# EMPLOYMENT LAW
## ALERT

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INCORPORATING
**KIETI LAW LLP, KENYA**

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### What to do with that ever-complaining employee

It is not uncommon for an employer to have to contend with a disgruntled, agitated employee who regularly raises grievances and other forms of complaints relating to workplace issues or against managers or other colleagues. While employers are obligated to address grievances, at what point can they draw a line in the sand and say, "*no more*".

### The harshest penalty: Sexual harassment in the public sector

In the recent decision of the Labour Appeal Court in *Ekurhuleni Metropolitan Municipality v South African Local Government Bargaining Council and Others* (JA17/2021) [2022] ZALAC 3 (27 January 2022), the court examined the exercise of power and the unequal gender power relations that exist in society generally, and in workplaces in particular.

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# What to do with that ever-complaining employee

It is not uncommon for an employer to have to contend with a disgruntled, agitated employee who regularly raises grievances and other forms of complaints relating to workplace issues or against managers or other colleagues. While employers are obligated to address grievances, at what point can they draw a line in the sand and say, "*no more*". For most employers, this line is a mirage because businesses operate in a rights-based environment and employers fear claims from employees of unfair discrimination, victimisation or what is known in other markets as retaliation. Previously the fear faced by employers was that a complaint that a dismissal following the lodgement of a grievance would be declared automatically unfair. The facts in *CEPPWAWU obo Mokoena v Sasol Chemical Operations (Pty) Ltd* [2022] 2 BALR 105 (NBCCI) are interesting and worth consideration by employers in a similar position.

The employee was employed as a warehouse controller until his dismissal for incompatibility after using the employer's grievance procedures to lodge numerous complaints and for continually displaying aggression towards his immediate superior. The employee claimed that his complaint arose because of a disagreement with his performance rating. Some of the background circumstances are that:

- The employee continued to file grievances after a successful conciliation meeting in which he agreed to "*bury old wounds*". The grievance that he lodged was entertained and a finding was made that the claim was malicious and had no substance.
- The employee never filed an unfair labour practice dispute over any of his complaints.
- The employer had gone out of its way to assist the employee, however, he had continuously rejected advice from managers and coaches. Instead, the employee made counter claims of victimisation and raised issues that had previously been dealt with.
- The employee was moved from one department to another and was placed on secondment in an attempt to address his numerous concerns.
- The employee was offered assistance through ICAS, and a number of people were also assigned to assist and coach him.

## COMMISSIONER'S FINDINGS

The employee referred an unfair dismissal dispute to the Bargaining Council. The commissioner found that the employer went out of its way to assist the employee and despite this he continued to disrupt the harmony in the workplace. The employer described this as more than mere disharmony amongst colleagues and rather as a situation of sustained conflict and severe disharmony. The employee, through his numerous grievances, made the employment relationship intolerable. The employer convened an incompatibility enquiry against him and the employee was subsequently dismissed.

In his findings, the commissioner concluded that the employee had disrupted the harmony of the workplace and that this justified his dismissal. He had been counselled but refused to co-operate with remedial measures. When he refused to sign the minutes of the conciliatory meeting it was clear that he did not intend to change his behaviour at all, despite the employer's understanding that issues were resolved. The termination of his employment was the last resort as the employer had invested a lot of time in dealing with his grievances, which were unfounded and baseless. The Bargaining Council upheld the dismissal as substantively and procedurally fair.

While the *Sasol* matter does not give an employer the authority to overlook or fail to properly address grievances lodged by employees, the principles of the case now provides employers with a level of protection against employees who abuse grievance procedures and where employers would previously have

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been reluctant to take firm action against such employees for fear that such dismissals could result in legitimate claims. The avenue of an automatically unfair dismissal is also no longer available to an employee because of the 2020 decision of the Labour Appeal Court (LAC) in *DBT Technologies (Pty) Ltd v Garnevska* which held that an employee cannot claim an automatically unfair dismissal following the lodgement of an internal grievance.

The net effect is that an employer may now consider terminating such an employee on the basis of incompatibility. Interestingly, in the Sasol matter the employer had introduced incompatibility into its disciplinary processes. It may be prudent for employers to consider incompatibility as a subject in their internal policies.

So, the 2020 LAC decision, which reversed earlier authority on the protected status of internal grievances in the context of dismissals, has perhaps had a further unintended happy consequence for employers as they can now establish a threshold against ever-complaining, unhappy campers who take refuge in raising grievance after grievance in the workplace. Such disgruntled employees should beware that lodging grievances with no merit may ultimately result in a fair dismissal.

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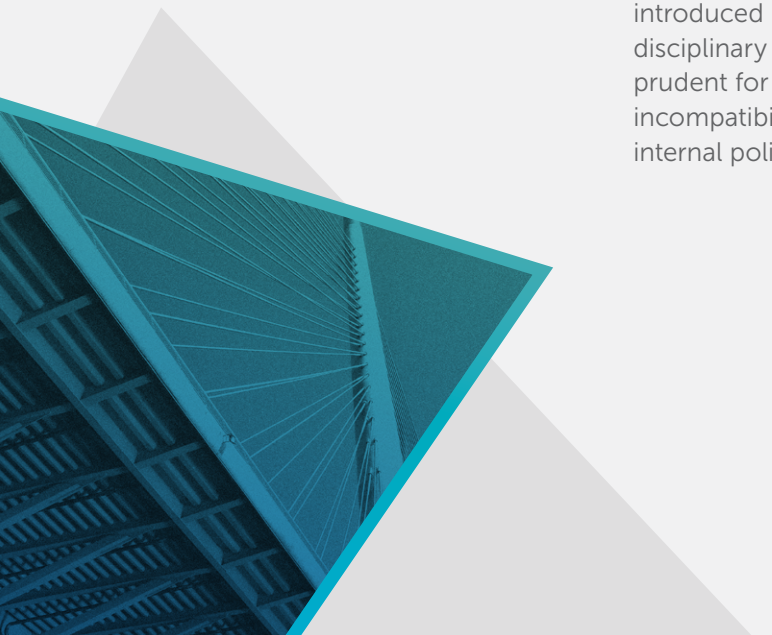

# The harshest penalty: Sexual harassment in the public sector

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The court reiterated that South Africa's constitutional democracy is founded on the explicit values of human dignity and the achievement of equality in a non-racial, non-sexist society which operates under the rule of law. Central to this vision, the court held, is the hope that our Constitution will have us re-imagine power relations in our society so as to achieve substantive equality, especially for those who have suffered or continue to suffer unfair discrimination.

## THE FACTS

The facts of this particular case turn on the conduct of a public official, Mr Mabetoa, who was employed at the Ekurhuleni Metropolitan Municipality's vehicle testing station, towards the complainant, a member of the public.

On 23 June 2015 the complainant went to the testing station to make a booking for her learner's licence, where Mabetoa attended to her. While taking her payment for the licence, he told the complainant that he would phone her and that she looked like she would "*taste nice in bed*", or words to that effect. The complainant was shocked. She left the testing station but did not report the incident.

On 31 August 2015 the complainant returned to the testing station to take her learner's licence test. Mabetoa was one of the officials tasked with signing certificates and taking fingerprints that day. When Mabetoa took the complainant's fingerprints, he rubbed her hand in a manner that made her very uncomfortable and told her that she looked like she was "*nice in bed*". He also offered to visit her now that he had her address. This was the final straw for the complainant who reported Mabetoa's conduct to his supervisor.

## DISMISSAL DISPUTE

Mabetoa was charged with sexual harassment, subjected to a disciplinary hearing and dismissed. Mabetoa referred an unfair dismissal dispute to the South African Local Government Bargaining Council. At the bargaining council, the arbitrator found that Mabetoa had probably committed the misconduct described by the complainant. He found, however, that the sanction of dismissal was too harsh considering Mabetoa's 10 years of clean service with the municipality. The arbitrator reinstated Mabetoa with a final written warning.

Unsurprisingly, the municipality brought an application to review the arbitrator's decision. On review in the Labour Court, the matter took a bizarre turn. The acting judge who heard the matter held that the arbitrator had committed a misdirection by finding that any misconduct had occurred at all. He reasoned that there was not sufficient evidence to establish Mabetoa's guilt. He found that the complainant's version did "*not make sense*". He was sceptical of her version as she had not reported Mabetoa after the first incident. She also failed to choose another official other than Mabetoa to do her fingerprints. He found it improbable that the complainant would have approached Mabetoa on the second occasion if he had

# The harshest penalty: Sexual harassment in the public sector

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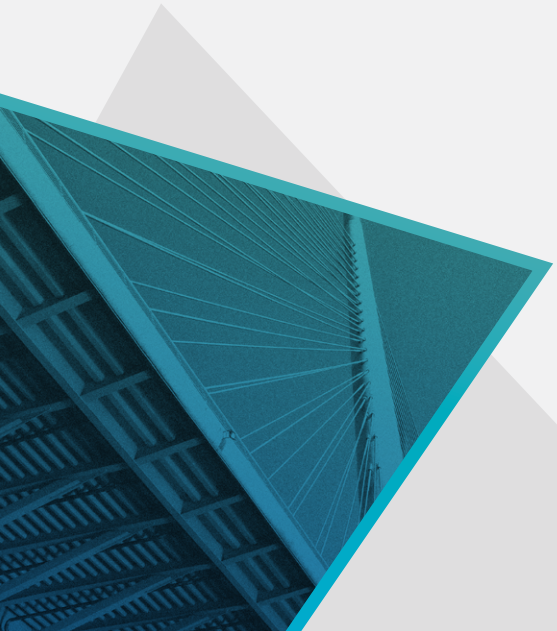

previously harassed her. Furthermore, there was nothing wrong with Mabetoa touching her hand as he would have had to do so as part of the fingerprinting process. The municipality's review application was dismissed with costs.

## LABOUR APPEAL COURT

This led to the appeal to the Labour Appeal Court. In its analysis of the evidence the court found, among other things, that the complainant's version was not challenged by Mabetoa in cross examination and should have been accepted. Furthermore, Mabetoa had admitted that he had used words to the effect of *"you will taste nice or look nice in bed"*. The court found that based on the material before the arbitrator, his finding that Mabetoa had committed the alleged misconduct was not unreasonable. Accordingly, the Labour Court had erred in this regard.

The court found that it would be remiss not to comment on the Labour Court's approach in this matter. It held that the Labour Court's approach was in conflict with the constitutional imperatives that have guided the courts' approach to the treatment of such matters. In undertaking its task in the manner that it did, the Labour Court contributed to the indignity endured by the complainant.

## SANCTION SERVES AN IMPORTANT PURPOSE

Turning to sanction, the arbitrator clearly recognised that Mabetoa's misconduct was serious. However, he found that it was too harsh, taking into account Mabetoa's long service and clean record. The court found that in considering an appropriate sanction the arbitrator was required to have regard to the full conspectus of the evidence before him. This included the nature and seriousness of the misconduct, the importance of the rule, the harm caused by the employee's conduct, his knowledge of and training about the rule, the reason the employer imposed a sanction of dismissal, the basis of the challenge to the dismissal, and the employee's disciplinary record and relevant mitigating factors.

The court referred to its own judgment in *Campbell Scientific Africa (Pty) Ltd v Simmers* [2015] ZALCCT 62; (2016) 37 ILJ 116 (LAC), where it stated that in the context of sexual harassment, sanction serves an important purpose in that it *"sends out an unequivocal message that employees who perpetrate sexual harassment do so at their peril and should more often than not expect to face the harshest penalty"*.

To make matters worse, Mabetoa was an official employed in the public sector who, in the course of the provision of public services to a member of the public, sexually harassed her. This constituted an abuse of a public position of authority. Furthermore, his harassment was committed more than once and directed at the same member of the public. This was a seriously aggravating factor.

# The harshest penalty: Sexual harassment in the public sector

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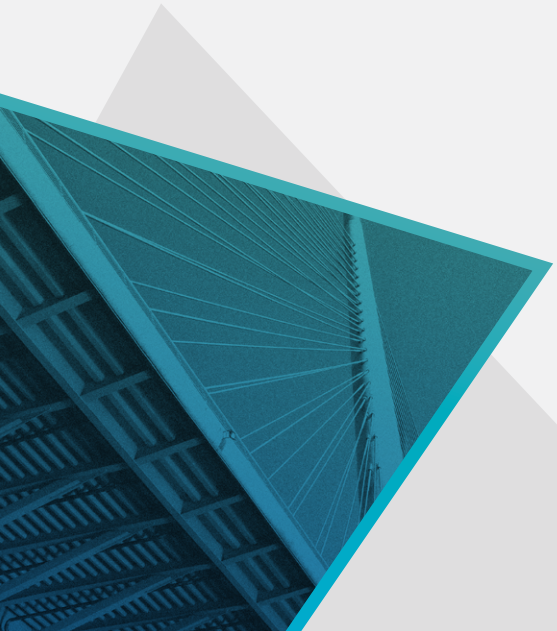
The court found that the arbitrator's decision on sanction was not one that a reasonable decision-maker would make. It reiterated that an arbitrator is not given the power to consider the issue of sanction afresh, but is required to determine whether the sanction imposed by the employer is fair. The award of the arbitrator was substituted with a finding that Mabetoa's dismissal was substantively fair.

Despite our Constitution's protection of fundamental values of human dignity and equality, South African society, broadly, has failed to properly re-imagine gender power relations and women, in particular, continue to suffer unfair discrimination. This is an important judgment. It clearly sets out our obligations in this regard and reiterates that sexual harassment will not be tolerated in the workplace. Perpetrators should expect to face the harshest penalty.

JOSE JORGE AND TARYN YORK



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