IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JS373/06

In the matter between:

SUZAN MOKOENA	1st Applicant
LERATO MOKHETHI	2nd Applicant

and

GARDEN ART (PTY) LTD	1st Respondent
SAM MTUMO MOHLABANE	2nd Respondent

JUDGMENT

FRANCIS J

Introduction

1. This is a claim for damages by the two applicants, Suzan Mokoena and Lerato Mokheti, against the first respondent - the Garden Art (Pty) Ltd after they were allegedly sexually harassed by their supervisor, Sam Mtumo Mohlabane, the second respondent. No damages are sought against the second respondent.

2. The applicants contend that the first respondent's failure to take proper steps to prevent, to eliminate or prohibit sexism and "genderism" being perpetrated at the workplace by certain of its employees (including the second respondent) constitutes direct and unfair discrimination against the applicants.

3. The claim was opposed by the respondents on the basis that when the complaints were brought to it, it investigated the matter and no evidence of sexual harassment could be proven.

The evidence led

4. The first applicant is a married woman since 1988 with two children. She commenced employment with the first respondent in February 1997 as a cleaner. She is still employed by the first respondent. She knows the second respondent who is employed as a supervisor by the first respondent. In 2005 nine women worked under the second respondent's supervision and more than 10 males. As a supervisor he was responsible for employing them. He allocates work to them for the day and issues them with pay slips and their salaries.

5. The first applicant testified that on 16 August 2005 she went to work in the morning. She entered the premises through the gate and went to her change room to change. While she was undressing, she heard foot steps. She heard the second respondent asking where Elizabeth was. He asked whether Elizabeth or Julia had arrived and she responded that they did not. He walked into the door of the change room without knocking. At that point in time she was wearing panties and a T shirt. He was not aware that there was another female employee, Jane in the change room who had arrived before her. He stopped and stared at her. She asked him what he wanted. Jane met him in the door and he then returned to his office and did not say anything. There are two change rooms at the first respondent, one for males and another for females. Males are not allowed into females change rooms and females are also not allowed into males change rooms. A male supervisor is not allowed to enter the females change rooms to look for female employees. She felt degraded as a woman with the action that he had taken. It was degrading for him to see her in such a state because they are not related.

6. The first applicant testified that on the same day on 16 August 2005 she called both the males and females employees to a meeting where they discussed their supervisor's behaviour, i.e. him going to the women's change rooms. She told them that they had to call the second respondent. He came and was asked why he was acting in that

manner and he proceeded with an apology. The workers were very angry. They did not accept his apology and told him to report himself to the manager Rudolph Grove who was in charge of the first respondent about how he acted and did in the females' change room. After he had apologised, he went back to his office. He did as he was told and shortly after that a meeting was called on 23 November 2005. She reported the incident to her husband who told her that it would be best for her if she left the employment because in the future the second respondent might do something worse. She told him that he did not pay her but the first respondent did. She told her husband that the first respondent would have to see what action they had to take since the second respondent had come to the ladies change room.

7. The first applicant testified that she only reported the incident on 23 November 2005 to Grove because she wanted to see if the second respondent would continue with his behaviour or would stop. Grove called them to his office. They told him about their grievance and told him what the second respondent did in the change room. Her grievance is at page A12 that she signed. A meeting was then held on 24 November 2005. The meeting was attended to by her, the second applicant, Grove, the second respondent, Julia, Thomas a colleague and Grove's wife. The grievance that they had against the second respondent was discussed so that he could be reprimanded for having entered the ladies change room. Grove said that they were pinning it on the second respondent and that it was not sexual harassment. The second respondent also said that they were pinning it on him. He denied that he went to the change room. Grove did not tell them that he was going to issue him with a warning. Grove was very angry when the second respondent said that there was no sexual harassment. He

was not angry with the second respondent. The first applicant said that the second respondent likes women very much and cannot let a skirt walk pass him. After Grove did nothing against the second respondent, she felt that he condoned his behaviour. She wants this court to charge the first respondent. She admitted that she took leave in August. She was not there on 15 August and came back on 22 August 2005. They do not work on a Saturday.

8. The first applicant was cross examined extensively. I do not deem it necessary to repeat all of her evidence during cross examination. She agreed that the work schedule at page A66 for the fortnight starting on 21 August 2005 contains the hours of work, the days of the week and that it shows that she was present on the 8, 9, and 10 August 2005 but was absent on 11 and 12 August 2005. She also agreed that the work schedule indicates that she was replaced by one Jan for the period 15 August to 20 August 2005. She also agreed that it shows that on Tuesday 16 August 2005 that Jan worked 9.5 hours. It was put to her that she could not dispute that there was no record on it that she worked on 16 August 2005. She said that she was at work on 16 August but not at work on 17 August to 22 August 2005. It was put to her that her salary was calculated according to this document and that she was not paid for 16 August and she was mistaken when she said that she was at work. She insisted that she was on work on 16 August but not from 17 August to 22 August 2005. She was asked whether she was paid for 16 August 2005. She said that she was present and only came back on 22 August 2005. She was asked again if she were paid for 16 August 2005. She said that she got paid fortnightly and did not check to see if she were paid. It was put to her that the second respondent would deny that he entered the

ladies change room and did not enter it on 16 August 2005 or on any other date. She said that she believed that she was not the first one that he had did it to but had done it to others. The incident took place on 16 August 2005. Jane was present when this happened. She confirmed that it is recorded at page 15 that she was asked whether there were any witnesses present. She admitted that she had said that Jane was in the room with her. It was put to her that she did not call Jane to testify on her behalf. She said that at the time Jane was no longer employed there and was not her colleague. It was put to her that it was because she had waited for three months. She had no answer to it. She admitted that page A12 contains her signature and Juliet had taken the statement as she was speaking. She read it before she signed it and agreed with the contents thereof.

9. It was put to the first applicant that at page 32 in paragraph (c) of her statement of claim there is reference made to *"there were sexual innuendos, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults, graphic comments about a person's body made by the second respondent to the applicants and their fellow female employees; or in their presence"* and that she had not testified about it. She agreed that she only testified about the incident where the second respondent had walked into the change room. It was put to her that at page A12 she did not mention the sexual jokes and hints etc. She agreed that it was not mentioned. The space on the document was limited and she mentioned only the one incident. It was pointed out to her that in her CCMA referral she had not referred to any other incidents. She said that she was not asked to write about her daily encounters. It was put to her that the second respondent would testify that it did not

happen. She said that it was something that he did usually. It was put to her that he would testify about one incident when he went to look for Julia in the change room. He stood outside the main passage when he called Julia's name and the first applicant peeped out of the change room and said that Julia was not there. She was fully dressed. She said that she did not agree with his version. He had walked into the change room, opened the door and had asked if Julia was there and found that she was undressing.

10. The first applicant admitted that when she returned from maternity leave she was put into a different position to the one that she had occupied. It was put to her that she was angry that she could not do the same job and than made up a case against the second respondent. She said that when he refused to reinstate her in the original post and he gave her another job that was not hers. It was put to her that because of this she made a serious story about the second respondent. She said that she told the employees about what had happened. The question was repeated to her. She denied it. It was put to her that she testified that she laid a grievance because she wanted him to be reprimanded. She agreed. It was put to her that whether her story was true or not true, he was reprimanded. She said that he was not. It was put to her that page A20 is a warning form for the second respondent and it could not be proved beyond reasonable doubt. Nevertheless, it was an invasion of privacy and he was warned to stay away from the ladies change room. Steps were clearly taken against him and that he had been reprimanded. She said that after all this happened, Grove did not come back to tell them that the second respondent was reprimanded. It was put to her that she did not express her unhappiness with Grove. She said that Grove was aware of

the second respondent's behaviour as they always complained to him about his behaviour. She was asked whether she took further steps with Grove after he had not reported to her. She replied that he did not return to them to inform them and to apologise about his behaviour. It was put to her that there was no meeting before the grievance hearing where the second respondent was called in to apologise. She said that he apologised to the employees and he was told to go to Grove. It was put to her that he would deny that it happened. She was asked whether she had witnesses and said that the employees were present. It was put to her that the second respondent would testify that he found the scenario of the grievance and the trial awkward and that they had in general had a good relationship with him. She said that the relationship was good but they no longer have a good relationship.

11. During reexamination the first applicant said that she was not happy that he entered the change room on 16 August 1995. She was asked what she felt when he looked at her. She said that she did not feel that she was a woman when he looked at her while she was naked. She did not feel welcome but degraded. It was put to her that there is the allegation that because the second respondent had refused to reinstate her in the same job after her maternity leave she made this case against him and was asked if it were true. She said it was no reason and she did it because he went into their change room. It was put to her that she had said that Grove was aware of his bad behaviour and that he went to the change room to kiss his girlfriend and was asked to tell the court about it. She said that this happened on a daily basis. He would go to the ladies change room to see his girlfriend, Maria Mokoena even if they were there. She was asked to go to page A32 paragraph (1) and was asked whether before 16 August

2005 there was any incident that took place relating to her. She said that they argued and she had asked him why he had shouted at her since he knew that she went to the doctor and was not feeling well. She told him that he was aware that she was not well and that he had to wait for the doctor's certificate to see how long she was not well. The doctor's letter came. She was given one week off and than got a letter to come back to work and she asked him why he had a problem and treated her differently and they argued. He told Grove that she did not treat him well. She went to Grove and told him that he did not treat her equally like the other female employees. She thought that he wanted her to have a relationship with him. She was asked whether he had ever proposed to her. She said that there was an instant when he had approached her, grabbed her by the chin and kissed her. She asked him why he did that and he said that he wanted her to see if there was anything on him. She objected when he kissed her.

12. I allowed the respondents counsel to cross examine the first applicant further on some aspects introduced in reexamination. She confirmed that she had said that he did not treat her like the others. It was put to her that she did not deal with it in her grievance. She agreed that she did not refer to it in her CCMA referral and that she was mentioning it in court for the first time. She agreed that a kiss was a personal gesture to her and as a married woman she would not allow anyone to kiss her. She agreed that she did not refer the kissing incident to management. It was put to her that she did not report it since it was another part of her imagination. She said that she had no answer to it. It was put to her that Grove and the second respondent would testify that if a worker was absent the practice was to bring a doctor's letter. She said that she had explained on the telephone that the doctor had given her off and that she had said that she would bring the sick note. It was put to her that it was the general practice to bring a doctor's certificate upon returning to work. She said that she brought it and agreed that the rule applied to all employees. What had made her angry was that he had shouted at her on the telephone and had asked why she did not come to work.

13. The second applicant, Lerato Mokheti is a married woman who is 23 years old. She is pregnant with her first child. She was employed by the first respondent on 22 August 2005 and left employment on 9 December 2005. The second respondent was

her supervisor. On Friday 30 September 2005 she was about to knock off. She went to collect her wages from the second respondent's office. Upon her arrival, he grabbed her buttocks and breasts and smiled. She removed his hands off her, took her money, signed for it and left. She did not report this to management. She thought that because he was her supervisor that if she reported it, she would be dismissed. She thought that the incident would not happen again. It happened again on Monday morning on 21 November 2005. She went to work and the second respondent called her to his office. He touched her and wanted to kiss her. She removed his hands off her and went to the ladies change room but he followed her. She was changing from clothes her into overalls. After she had taken off her clothes and when she was naked, he came in and told her that she must not tell the people about what had happened. She did not answer him and he left. She put her overalls on and did the work that she had to do for the day. She did not feel well as he was her supervisor and he was somebody that she had looked up to and had thought that he would protect her and yet he had touched her. She felt that she had come to work to play with her body. She reported this to the employees on 22 November 2005 at a meeting and told them what had happened. They were angry since she was not the first person that it had happened too. It was decided that the second respondent should be called. He was in his office. He came, apologised and asked for forgiveness. The workers told him to report it to Grove in his office. He reported it late on 22 November 2005. On 23 November 2005 they were called to Grove's office. They gave written statements. A hearing took place on 24 November 2005. Grove asked whether there were any witnesses when the second respondent had called her to his office. She said that there were none since she was the first tea lady who had arrived. He then asked if there

were any witnesses about the change room incident and she said that there were none. He said that he could not take it further as there were no eye witnesses. The matter ended there according to the second applicant. She does not know whether the first respondent was issued with a warning. Grove did not tell her that he would give him a warning. She felt hurt when he told her that he could not take it further since she saw that the owner of the company was not doing anything about it and it meant that the sexual harassment would continue. On 28 November 2005 she was given notification that her last working day would be 9 December 2005. If she were called to work for them again, she would not do so. She was afraid that she would be touched on her buttocks and breasts and if she reported it nothing would happen. She would also be threatened that she would lose her job. She wants the first respondent to pay her R100 000.00 for it to be a lessen that if such an incident happened it must be taken seriously. Grove during the grievance hearing did not ask her what had happened before.

14. During cross examination the second applicant said that the incident of 21 November 2005 was not the first one. The second respondent had touched her on her buttock and breast and was smiling. She did not report it to management because she could be dismissed. She reported the incident of 21 November 2005. She was asked why she did not mention the serious allegation of the touching of her private parts. She said that they were given a document to complete. She could not fit it all in the document and only included the incident of 21 November 2005. She was asked why she did not think to ask for another page to mention the other incident. She said that they were under many pressure and were given only 30 minutes. She agreed that she

had in her CCMA referral only referred to the incident of 21 November 2005. It was put to her that in her statement of claim there was no reference made that he had touched her on a previous occasion. She said that she had transmitted a statement to the union. She confirmed that Grove had said that because there were no eye witnesses he could not take the matter any further. The grievance hearing did not take place on 23 November that was the day when they completed the statements. The document is at page A14 and has her signature. The comments written by management are that *"due to the statement of Sam he admits of touching her, but not in an offensive matter. There is not enough evidence to proof harassment and I cannot find the accused guilty with what was given to me."* It was put to her that the touching was not in an offensive manner. She said that he touched her not as if he were not playing. He followed her to the change room where she was naked. It was put to her that page A17 is a record of the grievance hearing and the questions that were put. It related to her complaints. She agreed. It was put to her that there was a hearing and management had taken steps against the second respondent and was asked whether she agreed. She did not agree. It was put to her that page A20 was the warning form issued to the second respondent. She said she did not know and it was the first time that she saw it. She was asked whether she had asked management to see it. She said that they never referred to it and she did not ask for it since the grievance was discussed. She was referred to the management brief dated 24 November 2005 that reads as follows: *"Entering the opposite gender's change rooms are strictly prohibited. This will not be tolerated and will lead to a final written warning. Should any incident occur, IMMEDIATELY report this to Management on the same day"*. It was put to her that this was put up throughout and she agreed but

said that nobody explained this to them. It was put to her that it was brought to her attention. She said that she had no knowledge and it was not explained to them. She was asked if she read it and agreed but said not in depth. It was put to her that the second respondent would testify that on the morning of 21 November 2005 he met her at the entrance at the gates of the factory and put his arm around her shoulders. She said that it was not at the entrance and that he had grabbed her by the cheeks and wanted to kiss her. It was put to her that he would deny that he wanted to kiss her and she said that she disagreed with it. It was put to her that she had brought the complaints to make money. She said it was not true and the reason that she made the grievance was to end it and for him to stop touching other women. They should work in a free environment. It was put to her that the first respondent had not received any other complaints. She said that she did not know since she was no longer working there. On 21 November 2005 he was pulling her towards the table and grabbed her by the cheeks. He tried to grab and kiss her. She removed his hands off and left.

15. The first witness called by the respondents was Rudolph Grove. He testified that he is the manager of the first respondent. There are 23 employees and at the time of the incident there were 20. He has been a manager for about 7 to 8 years. When he was employed, the second respondent was already employed as a supervisor. They have a professional relationship. When there are labour disputes they try to resolve them informally before they take disciplinary action. This was a serious matter and he dealt with it immediately as a disciplinary action. Page A12 is the grievance procedure form of the first applicant that he received on 23 November 2005. He dealt with it formally. After he had received the grievance on 24 November 2005, they held a

disciplinary procedure against the second respondent after the grievance procedure. They were called together and a shop steward was present. The two complainants gave evidence on their own. They could not prove beyond a reasonable doubt that the second respondent did what they said he did because they could not call witnesses. They were given an opportunity to call witnesses. He found the second respondent guilty of invasion of privacy and said that there would be a written warning the following day on 25 November 2005. He wrote on page A12 that the grievance was made too long after the alleged incident. The second respondent was warned to stay away from the change rooms. He was found not guilty of sexual harassment. What was proved was invasion of privacy. A written warning would be given. He could not be found guilty of sexual harassment that was a serious offence so he was given a warning so that it would not happen again. He does not believe that the incident of the first applicant happened. Page A14 is the grievance procedure form of the second applicant. She was given an opportunity to call witnesses and did not. She testified on her own and could not prove beyond a reasonable doubt that he was guilty. He did not know that the test is restricted only to criminal law that should have been a civil law test that is on a balance of probabilities. He would not have come to a different finding if he had applied the civil law test. It was the one person's word against the other and there were no witnesses. He had before it not received any complaint of this nature and there were no complaints before this against the second respondent.

16. Grove testified that the second applicant gave him a statement about the second respondent. The second respondent said that they met at the gate and he had put his arms around her. She moved away from him and went their separate ways. He found

her later at work and she told him that she had a headache and he asked her why. She said it was because of the incident of the morning that stressed her and asked for a pain tablet. He told her to collect it at his office but she did not do so. The second respondent admitted that he had touched her but not in an offensive manner. Grove said that he did not find him guilty of sexual harassment. He had touched her around the shoulder. He asked him why he did it and he replied that he did it in a playful manner. Grove understands sexual harassment to be continuous harassing of someone in a sexual manner. It is touching against their will but not necessarily touching. The written warning that he gave the second respondent is at page A20. He was very emotional about it and had no comments. On 25 November 2005 Grove sent out a management brief to all employees to stay out of the change rooms of the opposite sexes to prevent a similar incident from happening in the future again. Page A66 is a wage sheet. They prepare wages from it. It is clear from it that the first applicant was at work during the first week of the fortnight but was absent in the second week. At the time of the incident the first applicant was not at work and had been replaced by another worker. According to this record, she was not at work. The first applicant is still employed by the first respondent. She is not a cleaner and takes milt from the pots. Jan was working for the first respondent. The first applicant had said that she was preparing for a funeral for her mother-in-law and was on unpaid leave. At the time there were no documents and employees would tell them and they would not keep any records. She then gets replaced for that period.

17. Grove testified further that the first applicant used to clean milt. At that time they had used a different product and she then transported pots from one department to the

other. She had a medical problem in removing heavy things and was then transferred. The second applicant is no longer employed by the first respondent. She was employed in terms of a short time contract. The nature of the first respondent's business is seasonal. From time to time the first respondent employs people to help for a short period. Page A11 is a notice of the termination of the second applicant's continuous employment on 9 December 2005. The first respondent normally closes over the December period from 15 to 15 January and the termination had nothing to do with her complaint. He had asked those who were present at the hearing whether they were happy with the procedure and findings and they said that they were not happy and wanted to see the second respondent being dismissed. Grove said that on the evidence before him he could not dismiss him. The second respondent could have taken the matter as an unfair dismissal. The applicants did not say that they were unhappy. They referred the matter to the CCMA and wanted R100 000 each. The second respondent has worked for the first respondent for a long time, has a clean record and is competent. They have a professional relationship and they still work well together. Thomas Seema was the shop steward and was present throughout. Everybody is treated the same even in relation to gender and sex. There are currently nine women at the first respondent.

18. During cross examination Grove agreed that as an employer the first respondent had to ensure the reasonable care of safety of the employees. The employer must take reasonable steps to prevent sexual harassment at the workplace. Sexual harassment whether of the same sex or different sexes is a serious matter and requires the attention of the employer. Sexual harassment violates the body integrity of a person.

It can also affect the smooth running of a business. He did not know when the second respondent was employed but was employed by the director Dawid van der Merwe. As a supervisor he gave planning of the department and did daily productions. He would supervise the painting, people who are cleaning pots and those who transport pots from one department to another. There were 13 employees under his supervision. Seven of the nine females were under his supervision. Two women worked on their own. As a supervisor the second respondent must look after the safety of employees and this duty was also extended to him. It was put to Grove that in the second respondent's position as supervisor he had power over the workers. He said that it was not necessarily but he is an overseer. He must give them production for the day and see that they do it. He is their supervisor and they his subordinates and has authority over them. He assumed that the workers looked up to the supervisor as someone that they trusted and would protect them against sexual harassment. From page A66 it is clear that the first applicant was present at work for three days during that fortnight. She was absent on Thursday the 11 August 2005 to Friday the 19 August 1995 and started on Monday the 22 August 2005. It was put to him that in his affidavit that appears at page A63 and A65 he had said that she was absent from work from 15 August to 20 August 2005 yet in court he said it was from 11 August to 19 August 2005 and was asked to explain the contradiction. He said that he did not consider the previous week and did not have the relevant information that he had in court. He had only looked back at the week that she was absent and did not look back a further week. The first applicant had said that the incident happened on August 2005 and in his affidavit he said that it could not have happened as she was absent from work from 15 to 20 August 2005. In his affidavit he said that she was

absent from 15 August to 19 August and at the time of the affidavit he had looked at the week and not the previous week. The affidavit stated that she was absent for five days and in court he said that she was absent for seven days. He did not agree that the first applicant was absent from 17 August to 22 August 2005. He agreed that it was put to the first applicant that she had a vendetta due to returning from maternity leave and had been put in another position. This is what led to her motive. The second applicant's motive was that she was greedy.

19. It was pointed out to Grove that at page A64 paragraph it was stated that there was a personal vendetta within the workplace between the applicants and the second respondent. The applicants, along with other employees, did not accept the second respondent as their supervisor and for this reason plotted against the second respondent in order for him to be dismissed. Their claim formed part of the plot and the applicants before this court are *mala fides* and are untruthful in their versions of events and the applications have no merit. He agreed with this. He was asked which version had to be accepted. He said the version at page A64 overlaps with what was put to the applicants. Greed was only an addition. He did not know why this version was not put to the applicants when they testified. He agreed that on 23 November 2005 he had received two sexual harassment grievances at midday. The grievance hearing was held in the morning of 24 November 2005. He was asked where Julia's statement was since she and Elizabeth are mentioned at page A12. He said that she was asked to give a statement and did not give it. He was asked about Jane' statement. He said that Jane was no longer employed and had left the employment shortly after the incident. He did not take steps to try to trace her but had asked those

present at the hearing. He did not record this. He took this incident seriously at the workplace and had asked those present about Jane but did not know why he took no steps to trace her. He agreed that he did not investigate the matter thoroughly. It was for the applicants to prove the matter. He assumed that no witnesses would be called. He did not think of getting Jane's address. He has no training on labour and human resource matters. He spoke to people and the information that he received was quite good. He did not know of the Code that deals with sexual harassment at the workplace. He dealt with the grievance quickly because he wanted to sort the problem out as soon as possible. He agreed that big problems require big investigations. He did not ask the applicants if there were previous instances and did not contact other employees to find out if they were victims of sexual harassment. It was put to him that he did not properly investigate the matter. He said that from what he was hearing in court he would agree. There was no evidence that the second respondent had entered the change room. It should not happen. The applicants had testified about it but there were no witnesses. It was put to him the fact that he warned him from entering the change room must mean that he accepted that he had entered it. He said that he did not accept that he had entered the change room but warned him. He was asked to explain where it is stated in paragraph 16 of his affidavit at page A62 that the second respondent had said that he entered the change room on 16 August 2005. He said that it was wrong and should be replaced with his supplementary affidavit. This was a mistake and he tried to rectify it. He discovered that it was a mistake on 7 November 2007 since he did not read it before. His counsel called him and asked him if it were correct and he said no. In his supplementary affidavit he has said that he did not carefully read his previous affidavit before signing

it. He admitted that he took the oath and confirmed that he knew and understood the contents of the affidavit. They were under pressure to get it through and did not read it carefully. It was put to him that he was changing the minutes of the disciplinary hearing. He said that he was not changing it. He was asked what he had found the second respondent guilty of and said that it was an invasion of privacy. For a male to enter a ladies change room is an invasion of privacy. He however did not believe that he was guilty. He, Grove, was the chairperson of the enquiry. The second respondent was innocent but he found him guilty of invasion of privacy. He was asked why if he entered the female change room it was not sexual harassment. He said that if he went in and was told to leave and it happened only once it was not sexual. In reexamination he said that the founding affidavit was drafted by a lady who was in Pretoria and she helped him to do it. The second respondent did not lead evidence at the hearing. He had asked him for his version at the grievance hearing. There was a disciplinary hearing on 24 November 2005 and he was charged with sexual harassment and the charge was part of the grievance procedure. When he had asked him for his version, he said that he had nothing to tell.

20. The second respondent, Sam Mtumo Mohlabane, testified that he is a supervisor with the first respondent. He is employed for ten years and it was the first time that he was involved in a disciplinary hearing. He knows Rudolph Grove from work. He is his manager and he has no relationship with him outside his work. The first applicant's statement that she made at the grievance hearing which appears at page A12 was read to him. He disagreed with it since according to his knowledge she was not at work on 16 August 2005. He was asked whether he was in the change room. He said that

what he recalled was that he went towards the change room. He did not get to the change room and stood at the passage and called out for Julia. She was a domestic worker. The first applicant came out. She did not come out of the change room. Half her body was out and after she said that Julia was not present he then left and went back to his office. He could not recall when this was. He only saw the upper part of her body and she was wearing something. He did not recall what she was wearing but it was a top or a shirt. The first applicant had worked with him not for the first time. The first time she was a painter cleaning pots. The second time she was a pot transporter. When she came from maternity leave plus minus two years ago her position had been closed. Someone had occupied her position as she was off for a long time. He had tried to explain to her that she was not dismissed but had been changed from that position to another. She agreed to take that position.

21. The second respondent said that he did not agree with the contents of the second applicant's statement that she gave at the grievance hearing which appears at page A14. The date is correct but he disputes its contents. There are two gates at the first respondent. He had come from the warehouse side and met her when she was coming from the other side. They met at the centre gate. She greeted him and he greeted her back. He tried to put his arm around her neck and she pulled herself backwards. He then went to his office and did not notice that she felt bad about it. She went to the change room and did not come to his office to sign the book. He remained in the office. When he went out, she was doing black painting in the pot and asked for head ache tablets. He then asked her since when did she use tablets without medication. She said that she had a headache which was caused by what he did that morning. He

told her that it was not bad and that he was playing with her. He said that playing with women was wrong for a supervisor. He told her to come to his office and get the tablet but she did not come for it. He did not go back to find out why she did not come to collect the tablet. The employees had a meeting at lunch time and he was called to the meeting. They told him that they had a grievance against him. He told them to report it to management. This was on 22 November 2005. He only apologised to the second applicant because of her reaction and had said that she had a headache about what he did earlier. It was wrong because according to company rules, people who work with people should not make them feel bad. Playing with women is breaking the rules. The grievance procedure was followed. At the grievance hearing, Julia was present as a witness and the applicants, Thomas the shop steward, he and the manager. He was asked for his response and he answered both of them. He was found guilty of invasion of privacy. He agreed. It was painful to him and he did not believe what had happened to him. When he read the charges against him, he started crying. After the hearing and in their presence he asked the first applicant what he did to find himself in that situation. Her answer was that since she was working milt it was not good. She was not happy about the new position that she was given. After that response, he left it as he had been found guilty. The first applicant is still employed. He is her supervisor and they are on good terms. The second applicant was on a fixed term contract terminated on 9 December 2005. He disputed what is contained at page A62 at paragraph 16 since he did not enter the ladies change room. He had confirmed the affidavit made by Grove. He stood at the passage but did not enter the change room. He cannot explain why he signed the affidavit and did not have an opportunity to read it.

22. During cross examination the second respondent agreed that workers at the first respondent have the right to be free from violence at the work place, the right to dignity and right to substantive equality. He has four children. His first child is with his first wife and the other three with the woman with whom he is staying. He does not have a girlfriend at the workplace and has no girlfriends. Maria Mokoena is a friend and not his girlfriend. Elizabeth Malindi is not his girlfriend and is also not a friend. The first applicant was not at work on 16 August 2005. In August 2005 she was paid for 28 hours since she attended a funeral. She was off for five days. She had said that she would not come to work from the Monday. She was absent from Thursday and Friday that was 11 and 12 August 2005. They do not work on Saturdays and was then off from 15 to 19 August 2005. She was absent for seven days. He could not remember well. It was put to him that in the affidavit it was stated that she was absent from 15 to 20 August 2005. He said that he had no knowledge but according to the time sheet she was absent from 11 August 2005 onwards. It was put to him that the first applicant said that she took leave from 17 to 22 August 2005. He said that he had made the time sheet. She had a funeral either of her mother-in-law or father-in-law. She had asked to take time off. He told her that it was good that she had given sufficient notice. He had to replace her due to the change. She was absent from 11 August 2005 and page A63 was wrong. She is always open to him. After her maternity leave she had worked for about two weeks and told him that she was not enjoying it since she had a problem with her back. He told her that she should talk to a Cindy and that she should bring a letter to him to move her. She was carrying heavy things. After he received the letter from her he

spoke with Grove. She was moved and she is enjoying it. His first child is 23 years old. He did not know that the second applicant was also 23 years old. He is 40 years. He was employed by the first respondent in 1996 and had started as a supervisor. During August to November 2005 there were about 23 employees. There were 11 females under his control. He was asked whether as a supervisor he employed workers. He said that he did not employ them but if there was a shortage of staff the first respondent would ask him to get more staff. He would recruit the employees and once it was confirmed they would be employed. He would take their identity documents, addresses, records and their telephone numbers and place it in the files. He knows Jane whom he had found at the first respondent. He saw her file when he worked with it and thought that her telephone number was in the file. He confirmed that during the grievance hearing Grove had asked him to give his version. He gave it to him. He told him that he did not understand what was going on with the allegations and that he did not agree with it. He told Grove that he did not enter the change room. He had playfully put his arm around the second applicant's neck. It was put to him that Grove had said that he had nothing to tell. He had told them that nothing happened and told everybody his version. He was asked how he had touched the second applicant. He said that he did not touch her but only wanted to cover her and she pulled her self away. He agreed that he said that he touched her around the shoulders. He had put his right hand around her neck and she pushed herself back. He was asked why he did that. He said at the school he used to play with the girls. He did not have any bad intentions in mind. They were not in love.

23. The second respondent agreed that the second applicant was employed on 22 August

2005. He was asked whether by 21 November 2005 she had been his friend and he said no. He was asked how he could play with someone who was not his friend. He said that it was unprofessional. He had no intention to touch her. He did not touch her buttocks or attempted to kiss her. There was no motive. He learnt the hard way. He could give no reason that he did that. He does not do this on a regular basis and does not know what had happened. He denied that he wanted to feel her sexually. He was asked whether when he told Grove that he touched her around the shoulder he had asked him why he did that. He said yes and that he had apologised. It was put to him that Grove had said that he did not ask him why. He said that was his testimony. The two versions were different but he told him what had happened. He received a final written warning and had no other warning at his workplace. Those present at the meeting were told that he would get a verbal warning and he then received a written warning. When he received the written warning, he felt very small and ashamed. He did not want his record to affect him. Sexual harassment according to him is when somebody does something to you that you do not want, for example, kissing a girl who does not want to be kissed. If he touches a person's buttock and breast that is against the person's will, it is harassment. A further example is if he touches somebody's neck and the other person does not like it. They were asked questions by Grove at the hearing. The applicants said that they were not happy the way the grievance was handled. The first applicant spoke about someone who was fired for theft. She said that he should be fired with immediate effect and he was not fired. He said that he could not recall if the incident that he testified about was in August/October 2005 but it was in 2005. He had signed his affidavit without having read it and thought that his evidence was clear. There is a contradiction in the

affidavit and his testimony and did not agree that he had entered the change room. He did not accept the warning but it was for invasion of privacy. It was for entering the change room that he did not do.

24. The second respondent was asked what he wanted from Julia. He said that she was their domestic worker in the office and he needed some documents. He arrived 30 minutes earlier. She cleans and he looked for papers and thought that she had misplaced them. He met her when she arrived at a later stage on the same day. He had looked for her before she had arrived. She is the first lady to arrive and got there at 6h50. He needed to ask her whether she had the documents. She cleans in the afternoon and he did not see the documents in the morning. He found her when she came to his office because she starts there. He asked her but did not remember what documents they were. He was asked whether he made a statement about the allegations made by the first applicant. He said that he did not remember. He was asked whether he made a written statement about the second applicant's allegations. He said that it was the main thing and the first applicant supported the second applicant. The first applicant's incident happened about three months earlier. It was put to him that his version was false and it was pointed out to him that in terms of page A13 he was found not guilty of sexual harassment but of invasion of privacy. He admitted that he was found guilty of invasion of privacy but maintained that he did not enter the change room. The second applicant had said that she had a headache due to him having touched her. He was asked that if he had touched her in a playful manner how she got a headache. He said that she explained her reaction. She did not expect a supervisor to do that. Doing it was unprofessional of him. She was maybe

afraid of what she thought he might do to her. It was put to him that she had a headache because he sexually touched her and he said no. It was put to him that the first applicant testified that she felt degraded as a woman about what had happened on that day and was asked whether it did not show that he touched her sexually. He said that he had asked her why she was part of this as it happened three months ago. The second applicant told the first applicant and she became part of it. It was put to him that the second applicant testified that he called her to his office. He disagreed and said that he told her later to come and have a tablet. It was put to him that she had said that he grabbed her and wanted to kiss her. He said he did not know that. The incident was at the gate. He heard about this in court for the first time and it was now added. It was put to him that he followed her to the change room and she was naked. He disagreed and said that it was his word against hers. It was put to him that she thought that he would protect her and he said that she said so. He admitted that they were angry. He did not hear that they said that it was not the first sexual harassment incident. It was put to him that he asked for forgiveness and he said that he did not apologise. It was put to him that they told him that they did not accept it and that he should report it to the manager. He said he told them that they had to wait for Grove. When Grove came, he told him that the workers wanted to see him. He burst into tears after the first applicant had raised her issue and did not expect to sit in a grievance hearing. He did not touch her buttocks. He was asked when the first applicant had opened her case. He said he had asked her in the presence of the others and the tears started flowing. She said that it was the way he treated her when she came back from maternity leave. He said that it was so long ago. He told her that she had put a spear under the blanket to stab him. He had suggested to her that she go to

the doctor that she did. He was asked whether she had opened a case due to a vendetta. He said that he did not understand why she did that. She was still at the first respondent and is capable of anything. He was asked if he still did not know why she did that. He said that he would still want to know because he did not try to fall in love with her. It was put to him that his counsel had said that it was a personal vendetta of moving and he agreed but did not understand it. It was put to him that she denied that it was a personal vendetta. He said that he could not believe it and she is still there for him and him for her.

25. The second respondent was asked why the second applicant opened a case against him. He said that he knew that her contract would end in five days time. They were told that they were employed on a month to month basis. He was asked whether she had opened a case against him because her contract was ending. He said that there was a rumour that he was the only child of his parents who died within one week of each other. His parents were well known and they thought that he was going to inherit much money. Her motive was because of her contract that was ending. He was asked what she was going to achieve. He said that she could have a case and get R100 000.00. He agreed that at the time of the grievance the R100 000.00 was not in the picture. However after she left, the first respondent received papers indicating that she wanted R100 000.00. He thought that it was greed. He agreed that it was the respondents' case that the applicants along with the employees did not accept him as their supervisor and that there was a personal vendetta. He said this was true and it was a different motive to the others. He did not know why this version was not put to the applicants and did not have time to read the papers. He agreed that from August

2005 to November 2005 he was on duty the full day. He was acting in the course and scope of the first respondent. He was running the affairs of the first respondent and had control over the employees. The employees were in the care of the first respondent and were vulnerable. He was entrusted by the first respondent to look after them. He was employed to discharge the first respondent's responsibilities to the workers. He did not agree that he took advantage of his position as a supervisor and abused it. He did not agree that the sexual harassment was committed by him when they had trust in him. He did not agree that he invaded their privacy and that he did not challenge the warning given to him.

The parties submissions

26. The applicants contended that their claim is founded on sections 5 and 6 of the Employment Equity Act 55 of 1998 (the EEA) which prevents discrimination against employees *inter alia* on the grounds of gender and sex. This must be read with section 9 of the Constitution that provides for substantive equality for all workers, human dignity and integrity of persons. Section 5 of the EEA provides that every employer shall take steps to eliminate unfair discrimination. Reference was made to section 6(3) of the EEA and harassment is listed in section 6(1) which refers to gender and sex. The applicants' cause of action is set out at page 10 paragraphs 3(1) and 3(2).

27. The applicants contended that in direct or indirect contravention of section 9 of the Constitution and section 6 of the EEA, the respondents are guilty of sexual harassment of the applicants and of having created a hostile work environment harassment based primarily on their sex and gender. The first respondent did not

consult the applicants' and/or their union and did not take the necessary steps to eliminate the second respondent's said conduct and comply with the provisions of section 6 of the EEA.

28. The second respondent's conduct in this matter, constituted sexual harassment against female employees on the grounds of their sex and gender. The first respondent's failure to take proper steps to prevent, to eliminate or prohibit sexism and "genderism" being perpetrated at the workplace by certain of its employees (including the second respondent) constitutes direct and unfair discrimination against the applicants.

29. The applicants contended that the first incident was reported to management on 16 August 2005 after the second respondent was told by the employees to report himself. The first respondent failure to take proper steps to prevent, to eliminate or prohibit sexism and "genderism" being perpetrated at the workplace by certain of its employees including the second respondent constitutes direct and unfair discrimination against the applicants.

30. The applicants contended further that the second applicant immediately after she was harassed on 21 November 2005 reported the conduct on 22 November 2005 to the general meeting of her fellow workers. She used her fellow workers meeting and got help from her fellow workers who instantly summoned the second respondent to their meeting held on the following day of the incident. They directed the

second respondent to explain or report himself to his superior, Grove, the manager of the first respondent. On 23 November 2005 the applicants used the first respondent's grievance procedure to formally inform the first respondent in writing about the sexual harassment of 16 August 2005 and 21 November 2005 respectively.

31. The applicant contended further that the first respondent is vicariously liable because its manager, Grove, to whom the sexual harassment was reported failed to take the following steps (or the following reasonable steps) to prevent, to eliminate or to prohibit sexual harassment in its workplace:

31.1 In violation of the Code of Good Practice on the Handling of Sexual Harassment Cases, 1998, the first respondent has breached its positive duty to implement sexual harassment policy - including effective communication to employees, the creation of procedures to deal with sexual harassment and taking disciplinary action against employees who do not comply. If the employer fails to meet these requirements it would simply not be able to argue that it should escape liability for the acts of employees because it did not know about the harassment or waited to do something until the problem was brought to its attention.

31.2 During his cross-examination Grove correctly conceded that he did not investigate the sexual harassment cases. Grove's failure to investigate the sexual harassment cases resulted in him not taking any step to deal with serious incidents of sexual harassment that took place before 16 August 2005 in the case of the first applicant and before 21 November 2005 in the case of the second applicant. Grove's attitude was that it was upon the victims of sexual harassment to trace Jane to prove their sexual harassment case against their superior. This attitude created and maintained the climate which is prohibited by item 5 of the Code of Good Practice: Handling of Sexual Harassment Cases, 1998 in the workplace in which the victims of sexual harassment would fear reprisals or feel that their grievances were ignored or trivialised.

31.3 The applicants' evidence that they were disadvantaged and that they felt that their grievances were ignored or trivialized. Despite the instances of sexual harassment that occurred within the workplace brought to his attention, the first respondent's manager took no action to require the second respondent and other workers to refrain from committing acts of sexual harassment. What the manager did is that on 24 November 2005 he issued management brief saying that *"entering the opposite gender's change rooms are strictly prohibited. This will not be tolerated and will lead to a final written warning. Should any incident occur, immediately report this to Management on the same day*". Instead of informing the second respondent and other workers that serious incidents of sexual harassment or continued harassment after warning are dismissable offences, on 24 November 2005 the first respondent's manager merely made the following comments on the record of the grievance proceedings regarding the first applicant's grievance: *"The grievance was made too long after the alleged incident. Sam was warned to stay away from the change rooms, if he were guilty. The accused is found not guilty of sexual harassment. What was proved was invasion of privacy. Findings of grievance. I find that the evidence was not enough to prove sexual harassment. At most it was invasion of privacy and the accused will be punished accordingly. Although the complaint was sexual harassment it could not be proven beyond reasonable doubt, at most invasion of privacy could be concluded from the facts. Employee is warned to stay away from ladies' change room"*. Regarding the second applicant's grievance: *"Due to the statement of Sam he admits of touching her, but not in an offensive*

manner. There is not enough evidence to prove harassment and I cannot find the accused guilty with what was given to me."

31.4 During his testimony Grove correctly admitted that he did not take appropriate steps against the second respondent. Grove testified that he found the second respondent guilty of invasion of privacy because the facts indicated that he had entered ladies' change room. It was submitted that the manager's mere finding of the harasser of being guilty of invasion of privacy and the manager's mere statement that a written warning would be issued (or a first written warning for invasion of privacy was given), clearly shows that the manager to whom the sexual harassment was reported failed to take steps (or reasonable steps) against the harasser. Both applicants testified that during the grievance proceedings the first respondent's manager did nothing against the harasser or did not do everything that could be expected of a reasonable employer. The first applicant testified that the first respondent was angry towards the victims and lenient and friendly towards the second respondent. During the proceeding before the Court the first respondent's manager and the harasser rubbed salt into the wound by making self-conflicting and defamatory allegations as the real motives why the applicants had lodged sexual harassment cases against their supervisor.

32. The respondents contended that the claim for damages is founded on two legs. Firstly the alleged incidents of sexual harassment and the secondly the procedure followed by the first respondent in response to claims he received in respect of sexual harassment.

33. The first incident relied upon is the incident described by the first applicant of 16 August 2005 when the second respondent entered the ladies' change room and saw the first applicant who was at that stage in the process of dressing and not fully clothed. There were a number of difficulties with the first applicant's version regarding what happened on the day in question. Firstly it is disputed that she was at work on 16 August 2005. According to the wage book she was absent and Jan was working in her place. The correctness of the source document namely the wage book was never questioned, although the applicant's representative pointed out that there are certain discrepancies between the information contained in the affidavit by Grove. Despite the discrepancies between the information in the affidavit and the information in the wage book, the two versions have it in common that the first applicant was not at work on the 16th of August 2005. The incident was only reported three months after it occurred and the first applicant could not explain the delay. According to the first applicant it was not the first time something like the situation she alleged happened. She made the allegation that other employees were aware of similar events, yet nobody was called to support her evidence. According to the statement of claim the second respondent was making unwelcome remarks about her body. This allegation was not included in the grievance proceedings or in the CCMA referral. This allegation was further not repeated in her testimony. The first applicant averred that the second respondent in general made "sexual jokes, remarks and hints". This allegation was not included in the grievance proceedings or in the CCMA referral. Her explanation that the referral form was too small is not satisfactory at all. The first applicant did not tell the court what the "sexual jokes, remarks and hints" entailed. In terms of the grievance form, the first applicant was only wearing panties when the

second respondent walked into the change room. In court, she testified that she was wearing panties and a T-shirt. According to the first applicant, Jane was with her in the change room and she met the second respondent at the door after the incident. From this version, it is unclear whether the second respondent was standing outside the door or whether he was actually inside the ladies' change room as the first applicant would want this court to belief. The second respondent gave an account of events on a different date, placing him outside the change room and in the passage. There is no reason why the second respondent's version cannot be accepted.

34. The second incident relied upon is the incident described by the second applicant who alleged that the second respondent attempted to kiss her in his office and when she refused followed her to the ladies' change room. It was contended that the second applicant's testimony left one with a number of questions. She testified that the second respondent on a previous occasion touched her breast and buttocks. She admitted that she did not report the incident as she was afraid that she would lose her job. Yet, on the 23rd of November 2005 she reported an incident alleging that the second respondent tried to kiss her in his office. The grievance form does not mention the alleged previous harassment nor does the CCMA referral refer to any other incident other than the alleged incident on the 21st of November 2005. She could not explain why the alleged previous incident was not included in the statement of case. Again, the second respondent gave a probable account of what happened in the 21st of November 2005 admitting that he had put his hand around the second applicant's shoulders.

35. Both applicants testified that nothing was done to address their complaints. In cross examination they had to concede that it is not entirely true that nothing was done and that a grievance hearing was held. They however complained that nothing happened to the second respondent, even when they were confronted with the written warning addressed to the second respondent. The validity of the document was not placed in question. When questioned by the court, Grove, the first respondent's manager, conceded that he could have dealt differently with the applicant's grievances. He admitted that he is not aware of the Code of Good Practice: Handling of Sexual Harassment.

36. The respondents contended further that it is not clear from the EEA or any other authority whether it would *per se* constitute sexual harassment if a male would enter the change rooms reserved for use by females and vice versa. The incident is in any event denied by the second respondent and the first applicant's testimony is left in doubt due to the discrepancies in her evidence. It was contended that the alleged incident of the 21st of November 2005, on the second respondent's version, does not constitute sexual harassment. According to the second respondent her put his arm around the second applicant's shoulders. She moved away from his embrace and he left it at that. This behaviour was not persisted in when the second respondent made it clear that she found the behaviour to be offensive. The second respondent did not realise that the behaviour would be interpreted as sexual attention and regretted the incident as he realised that he acted in an unprofessional manner. He denied having any other intention with his action than to play with the second applicant. The other incidents alleged by the applicants should be disregarded *in toto*. The incidents were

not reported and were not mentioned in the pleadings. The alleged incidents were most likely fabricated to lend colour to the applicants testimony.

37. It was further contended that although Grove admitted that the first respondent could have dealt with the grievance proceedings in a different way, the first respondent consulted all relevant parties and took the following steps to eliminate the alleged conduct as is required by the EEA - the first respondent issued the second respondent with a written warning (despite being in doubt); and posted a notice on the walls of the premises specifically prohibiting males from entering the change rooms of females and vice versa. Although the applicants were disappointed with the outcome of the proceedings followed, they failed to file a further grievance and/or lodge an appeal to express their dissatisfaction. There is no evidence before this Court to suggest that the steps taken by the first respondent (albeit not in accordance with the guidelines provided by the Code of Good Practice on Handling Sexual Harassment) were inadequate to protect complainants from the sexual harassment complained of. Neither the first nor the second applicant complained of having been sexually harassed by the second respondent or any other employee of the first respondent after the grievance proceedings. There was therefore no case where the first respondent negligently failed to protect its employees from the harm caused by sexual harassment.

38. The respondents contended that save for testifying that the applicants' dignitas were infringed by the second respondent's actions, no further evidence was submitted to this Court in respect of the harm suffered by the applicants. Should this Court finds

that the actions complained of did occur and did amount to sexual harassment and that the first respondent did negligently fail to protect the employees from sexual harassment, the applicants should not succeed with the *quantum* of their claim. The amount claimed from the first respondent is grossly excessive in comparison with the amount of R50 000.00 awarded to the applicant in respect of *contumelia* in *Ntsabo v Real Security CC* (2003) 12 LC.12.1. In that case the applicant was held up with a fire arm, and sexually assaulted after which she had to receive psychiatric counselling. Seeing in the light of the nature of the alleged harassment, the fact that the applicants were not subject to the harassment over a long period of time and the fact that the applicants did not aver sustaining psychological harm, it was submitted that the applicants should not be awarded more than R5 000.00 each in respect of the *contumelia*.

Analysis of the evidence and arguments raised

39. The applicants are seeking damages against the second respondent only. The claim is founded in terms of the EEA. This is not a delictual claim founded under the common law. In their statement of claim they are seeking to hold the first respondent liable on the basis that it failed to take proper steps to prevent, to eliminate or prohibit sexism and "genderism" being perpetrated at the workplace by certain of its employees including the second respondent that constitutes direct and unfair discrimination against the applicants. This must be read with the provisions of section 60 of the EEA. Section 60 of the EEA deals with the liability of the first respondent as an employer and provides as follows:

"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 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 act in contravention of this Act."

40. The first respondent as an employer will be held liable if the following requirements are met:

40.1 the conduct must be by an employee of the employer;

40.2 the conduct must constitute unfair discrimination (i.e. it must constitute sexual harassment);
40.3 the conduct must take place while at work;
40.4 the alleged conduct must immediately be brought to the attention of the employer;
40.5 the employer must be aware of the conduct;
40.6 there must be a failure by the employer to consult all relevant parties, or to take the necessary steps to eliminate the conduct or otherwise to comply with the EEA; and
40.7 the employer must show that it took all that was reasonable practicable to ensure that the employee would not act in contravention of the EEA.

41. It is common cause that the second respondent is an employee of the first respondent and that the alleged conduct took place while he and the applicants were at work. The crux of the dispute as I see it is the following:

41.1 Whether the conduct of the second respondent can be construed to be sexual harassment;

41.2 Whether the sexual harassment was immediately brought to the attention of the first respondent;
41.3 Whether the first respondent was aware of the sexual harassment;
41.4 Whether the first respondent failed to consult all relevant parties or to take the necessary steps to eliminate the sexual harassment

41.5 Whether the first respondent showed that it took all that was reasonable practicable to ensure that the second respondent would not act in contravention of the EEA.

42. It seems to me that where the employer was aware about the sexual harassment and it was brought to its immediate attention and failed to take steps to eliminate it and a further act of sexual harassment took place, the employer cannot escape liability in terms of section 60 of the EEA. Where there is one incident of sexual harassment, which is brought to the attention of the employer immediately after the incident, an employer will not be held liable in terms of section 60 of the EEA. The aggrieved employee may then have to consider a different basis to hold the employer liable either in terms of common law etc. I do not know how an employer would be able to take reasonable steps to ensure that the employee would not act in contravention of the EEA in the second example that I have given. It would therefore appear to me that section 60 of the EEA really applies where it has been brought to the attention of the employer that sexual harassment has taken place and as a result of the employer's inaction, further sexual harassment takes place, which renders the employer liable.

43. For the applicants to succeed they must prove that the second respondent's conduct amounts to sexual harassment, that it knew about it, failed to take proper steps to prevent or eliminate or prohibit the sexism and "genderism" and it is this failure that makes it liable.

44. I need to say from the onset that there is no evidence before me that other employees of the first respondent perpetrated sexism or "genderism" in the workplace. The complaints are directed specifically to the second respondent who is a supervisor at

the first respondent.

Is the conduct complained about sexual harassment?

45. Sexual harassment in the working environment is a form of unfair discrimination and is prohibited on the grounds of sex and/or gender and/or sexual orientation. Sexual harassment is defined in item 5 of the Code of Good Practice 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:

45.1 Whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;

45.2 Whether the sexual conduct was unwelcome;
45.3 The nature and extent of the sexual conduct; and
45.4 The impact of the sexual conduct of the employee.

46. The unwelcome conduct must be of a sexual nature, and include physical, verbal or non-verbal conduct. Physical conduct of a sexual nature includes all unwelcome physical contact, ranging from touching to sexual assault and rape, as well as strip search by or in the presence of the opposite sex. Verbal conduct includes unwelcome innuendos, suggestions, hints, sexual advances, comments body made in the presence or to them, inappropriate enquiries about a person's sex life, whistling of a sexual nature and the sending by electronic means or otherwise of sexually explicit text. Non verbal conduct includes unwelcome gestures, indecent exposure and the display or sending by electronic means or otherwise of sexually explicit pictures or objects.

47. Sexual attention becomes sexual harassment if the behaviour is persisted in, although

a single incident of harassment may constitute sexual harassment; the recipient has made it clear that the behaviour is considered offensive and the perpetrator should have known that the behaviour would be regarded as unacceptable.

48. Evidence was led before me about three incidents that allegedly took place on 16 August 2005 between the first applicant and the second respondent; the incident of 30 September 2005 between the second applicant and second respondent; the incident of 21 November 2005 between the second applicant and the second respondent and the incident when he followed her into the change room while she was naked and told her not tell anyone about the earlier incident.

49. This brings me to the first incident that on the first applicant's version took place on 16 August 2005. The first applicant was clearly wrong about when the said incident took place. It could not have taken place on 16 August 2005 since it is clear to me that she was not at work on the day in question. She had been replaced by one Jan and was given permission to make arrangements for a funeral. This was supported by page A66 that is a record that was not seriously challenged. It is so that the second respondent had admitted in the affidavit that the incident took place on 16 August 2005 but later when they examined the records discovered that the first applicant was not at work on the day in question. They then sought to withdraw the admission. What is clear from his evidence in court however is that both he and the first applicant testified about an incident that took place. He could not recall when exactly the incident took place.

50. It is not entirely clear from the evidence what really happened on the day in question. Neither the first applicant nor the second respondent made a good impression on me when they testified. I found them both to be extremely poor witnesses. The first applicant's version is that she was in the change room in her panties and T-shirt when the second respondent came into the change room. He did not know that there was another lady in the change room and when he saw her he then left. She reported the incident on the same day to the employees who were angry and summoned the second respondent to a meeting. He apologised and was told to report himself to the manager. Shortly after that they met with Grove. At the grievance hearing the first applicant stated that she was in the change room when the second respondent came and asked her if Julia was there and she said no and then he asked her if Elizabeth was there and she said no. He pushed the door and found her standing in her panties. Jane was there too. He did not see that Jane was in the change room and than left. The second respondent's version given at the grievance hearing is that he had entered the ladies change room on that day as he was looking for another employee, but that he had left immediately after that. He denied that he continued watching the first applicant undress or that he had made any other unwelcome gestures or suggestions. In court he testified that what he recalled was that he went towards the change room. He did not arrive at the change room and stood at the passage and called out for Julia. She was a domestic worker. The first applicant came out. She did not come out of the change room. Half of her body was out and after she said that Julia was not present he then left and went back to his office. He could not recall when this was. He was standing in the passage. He only saw the upper part of her body and she was wearing something. He did not recall what she was wearing but it was a top or a shirt.

The second respondent was asked what he wanted from Julia. He said that she was their domestic worker in the office and he needed some documents which he thought she had misplaced. He had arrived 30 minutes earlier. Her found her later and did not remember what documents they were.

51. I fail to understand why the first applicant persisted that the incident took place on 16 August 2005 when she was clearly not at work. I fail to understand why she persisted that she informed the employees about the incident on 16 August 2005 when she was not there. I fail to understand why she did not call any witnesses who were present when the second respondent had apologised about the first incident. She could not explain why her version in court was different to what she had said at the grievance hearing. She bears the onus to prove that she was sexually harassed by second respondent in the manner that she says she was. I had earlier pointed out that she did not create a good impression on me when she testified. It is clear to me that the incident was only raised after the second applicant had complained to the rest of the employees on 22 November 2005. The second respondent's version in court is different to what he said in his affidavit. The fact is that he admitted that he entered the change room but left after he discovered that the person that he was looking for was not there. He denied that the applicant was naked. Jane who was a crucial witness was not called by any of the parties. She is untruthful. She testified about other incidents that was not pleaded in her case. In examination in chief she only testified about the incident of 16 August 2005. She attempted to introduce new evidence in reexamination that dealt with an instance when he had approached her and grabbed her by the chin and kissed her. She asked him why he did that and he

said that he wanted her to examine if there was anything on him. She objected when he kissed her. She was a member of a union and did not bring it to their attention. She had only on 22 November 2005 after the allegations of the second applicant surfaced that she mentioned her experience.

52. The first applicant has failed to discharge the onus relating to the first incident. She has failed to prove on a balance of probabilities that she was sexually harassed by the second applicant. The first applicant was not naked when the second respondent asked about the person for whom he was looking.

53. This brings me to the incidents involving the second applicant. The second applicant testified about three incidents of sexual harassment that allegedly took place. The first incident according to her was on 30 September 2005. 30 September 2005 was a Friday and she was about to knock off. She was on her way to collect her wages at the supervisor's office. Upon her arrival he grabbed her buttocks and breasts and was just smiling. She removed his hands off her, took her money, signed for it and left. She did not report this to management. Because he was her supervisor she thought that if she reported it she would be dismissed. She thought that the incident would not happen again. It happened again on 21 November 2005 that was a Monday morning. She reported for duty and he called her to her office. He touched her and wanted to kiss her. She removed his hands off her and went to the ladies change room but he followed her. She was changing from the clothes that she was wearing into overalls. After she had taken off her clothes and when she was naked he came in and told her that she must not tell the people about what had happened. She did not answer him

and he left. She put her overalls on and did the work that she had to do for the day. She did not fell well as he was her supervisor and he was somebody that she had looked up to and had thought that he would protect her. He had touched her. She did not fell well. She felt like that she had come to work to play with her body. She reported this to the employees on 22 November 2005. There was a meeting with all the employees and she told them what had happened. They were angry since she was not the first person that it had happened too. It was decided that he should be called as he was in his office. He came and apologised and asked for forgiveness. As the workers were angry, he was told to report it to Grove in his office. He reported it late on 22 November 2005. The second respondent denied that the incident of 30 September 2005 took place. He said that he heard about it in court for the first time when the second applicant testified. His version of the incident of 21 November 2005 is that he had met the second applicant at the gate. He wanted to put his arm around her neck and she pushed it away and left. He met her later that day and she told him that she had a headache caused by the earlier incident. His explanation for putting his arm around her neck is that at school he was used to playing with girls. At the time of the incident he was 40 years old and the second applicant 23 years old. He was her supervisor and admitted that he had acted in an unprofessional manner.

54. The second applicant impressed me as a good witness. I watched her closely when she testified under oath. She did not contradict herself in any major respects. She did not deviate from her testimony that she gave in chief. She appears to have been let down The same cannot be said about the second respondent. He struck me as a very evasive person. He had initially testified in Sotho and later changed to English. I

found him to be an extremely poor witness. However, in the applicants statement of claim there is no reference made to the incident of 30 November 2005. They were assisted by a seasoned union official. There is also no reference made to this incident in the grievance that she had given. The explanation that she gave is that the form that she was given was small and did not have sufficient space to write everything on it. The second applicant was assisted by a colleague and a shop steward.

55. The second applicant was upset about the incident of 21 November 2005. So much so that she has a headache and had asked the second respondent to give her some pain tablets. Her version of what happened on 21 November 2005 is more probable than that of the second applicant. This was the second time that the incident had happened. She did not accept that of the second respondent who was her supervisor. He did it again. Why would she get a headache if he had innocently put his arm around her neck? Why would she report this to the workforce and have the second respondent summoned to a meeting when this was innocently done? I accept her version of what happened on 21 November 2005. She was not a little girl with whom the second respondent was used to play with at school.

56. I am satisfied that the second applicant has proven on a balance of probabilities that the conduct of the second respondent on 21 November 2005 amounts to sexual harassment. She has failed to prove on a balance of probabilities that she was sexually harassed by the second applicant on 30 September 2005 for the reasons set out above.

Was the sexual harassment brought immediately to the attention of the employer?

57. I have already found that the first applicant's incident did not amount to sexual harassment and that her claim should fail. I have found that the second applicant had failed to prove that the incident of 30 September 2005 took place. The only incident that took place was that of 21 November 2005. The next question is whether this incident was reported immediately to the first respondent. It is clear from the facts that the second applicant reported this incident to the rest of the employees on 22 November 2005. The second respondent was called to a meeting on the same day. He tendered an apology and was told to report the incident to Grove, the manager. He did so later that day. On 23 November 2005 a meeting took place with all the parties concerned. I am therefore satisfied that this incident was reported immediately to the first respondent.

Was the employer aware of the sexual harassment?

58. It is clear from the facts before me that the first respondent only became aware of the allegations of sexual harassment on 22 November 2005. I had already found that the incident of 16 August 2005 is not sexual harassment and that it was only reported to the first respondent on 22 November 2005 as opposed to 16 August 2005.

Did the employer fail to consult all relevant parties or to take the necessary steps to eliminate the conduct or otherwise to comply with the EEA?

59. It is clear from the evidence that a grievance meeting was held on 23 November 2005. The applicants were present, their shop steward, Grove the manager, his wife, the second respondent and one Julia a fellow employee. The applicants were requested to

complete the grievance form and to give written statements about the incident. The second respondent was requested to give his version about the incidents. He was found guilty of invasion of privacy and was warned to stay away from the ladies change room. In respect of the charges levelled against him by the second respondent the employer found that this was not proven beyond a reasonable doubt. It had found that there were no witnesses present. A notice was placed on the notice board about the change room. The second respondent was given a written warning. There was no suggestion made to the first respondent that it failed to consult with all the relevant parties concerned. The evidence proves to the contrary. It met with the applicants and their shop steward. A grievance hearing was held. The second respondent was found guilty of invasion of privacy. He was issued with a written warning. The first respondent found that it could not be proved that the sexual harassment took place.

60. I am satisfied that the first respondent consulted with the employees concerned, and it took steps to prevent the second respondent's conduct from taking place. No further such conduct took place after 21 November 2005.

Did the employer show that it took all that was reasonably practicable to ensure that the employee would not act in contravention of the EEA?

61. The applicants reported the alleged sexual harassment incidents for the first time to the first respondent on 22 November 2005. The first respondent did not know of the incident that took place on 30 September 2005 since no reference was made to it in the grievance form. The applicants' explanation that the document on which they wrote was insufficient to refer to the other incidents, does not hold much water. They

were assisted by a colleague and there was a shop steward. They could have approached their union for assistance. There is more importantly no reference made to the incident of 30 September 2005 in their statement of claim. No valid explanation could be given why there was no reference made to it in the statement of claim.

62. The first respondent cannot be criticised for not having investigated the 30 September 2005 incident involving the second applicant when it was not referred to in the grievance. The investigation conducted by the first respondent can be criticised in certain respects. This much was conceded by Grove, the first respondent's manager. He was faced with two versions about what had happened. He pointed out that there was a shop steward present at the grievance hearing. A colleague of the applicants had assisted them in making the statements. No witnesses were called nor were their statements obtained. The applicants have also not called any witnesses in court. In the second applicant's case there were no witnesses involved.

63. The court should guard against adopting an arm chair critic position. We should take into account that the first respondent is not a large business. It has no human resources department and Grove consulted about what he had to do in the circumstances. When the incident was brought to his attention he met with the applicants and allowed them to give written statements. The next day a grievance hearing was held and the second respondent's version was sought. He had admitted that he had put his arm around the second respondent's neck and that she had objected. He was issued with a written warning for invasion of the privacy for having

entered the ladies change room. He found that no sexual harassment had taken place. No other incidents took place after 24 November 2005. The second respondent has subsequently to this incident not contravened the EEA. The first respondent has taken reasonably practicable steps to ensure that the second respondent will not act in contravention to the EEA.

64. As stated in paragraph 39 above, the applicants are seeking damages against the first respondent only. The claim is founded in terms of the EEA. This is not a delictual claim founded under the common law. The position would have been different had the first applicant and the second applicant reported the first incident of 16 August 2005 and of 30 September 2005 to the first respondent. The claim would have succeeded in that the first respondent did not take steps to prevent the harassment from having taken place after they were alerted about it. In this case they only did so on 22 November 2005 and an immediate investigation was conducted albeit that it was not thorough.

65. The application stands to be dismissed.

66. I do not believe that this is a matter where costs should follow the result. An appropriate order is not to make any order as to costs.

67. In the circumstances I make the following order:

67.1 The application is dismissed.

67.2 There is no order as to costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANTS	:	MALULEKE UNION OFFICIAL
FOR THE RESPONDENTS	:	E LIEBENBERG INSTRUCTED JOHANNES DE BEER INCORPORATION
DATE OF HEARING	:	9, 10 AND 12 NOVEMBER 2007
DATE OF JUDGMENT	:	3 DECEMBER 2007