CONTEMPORARY LABOUR LAW
your monthly online journal & library
Volume 25 No. 5 December 2015

Sexual harassment and the Labour Appeal Court :

Defining power relationships in the workplace

by P.A.K. Le Roux

The recent decision of the Labour Appeal Court (LAC) in *Campbell Scientific Africa (Pty) Ltd v Simmers and others* (Unreported CA 14/2014 23/10/2014) is an important decision; it analyses the nature of sexual harassment and places it within the broader context of our equality law.

The basic facts in this case were clear. A Mr Simmers, a Miss M and a Mr Le Roux were working on a project in Botswana. Simmers and le Roux worked for Campbell Scientific Africa (Pty) Ltd (CSA) and M worked for another company. Both companies were involved in the project.

On the final night of their stay in a lodge in Botswana the three of them had dinner in the restaurant of the lodge where they were staying. After dinner, whilst le Roux was settling the bill, Simmers and M left the restaurant. Whilst the two of them were on their own Simmers made proposals of a sexual nature to M. She rejected these proposals. Precisely what was said was subject to some dispute.

M later reported this incident to the management of CSA and Simmers was subjected to disciplinary proceedings for his conduct. He was found guilty and dismissed. He referred an unfair dismissal dispute to the CCMA.

The CCMA found that he had been fairly dismissed. Simmers lodged an application in the Labour Court to have the award reviewed and set aside.

The Labour Court decision

The Labour Court described the incident that took place outside the

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Published by
Gavin Brown & Associates
INDUSTRIAL RELATIONS

Box 31380 Tokai 7966
Tel: +27 21 788 5560
ISSN-1995-218X
e-mail: cll@workplace.co.za
www.workplace.co.za

restaurant as follows –

- Simmers asked M whether 'she wanted a lover tonight' .
- M rejected this proposal and stated that she had a boyfriend.
- Simmers then stated that if she changed her mind she should come to his room.
- M did not accept this invitation and Simmers did not pursue the matter further.

During the course of the decision the Court considered the following two issues of relevance to this contribution, namely, did Simmers' conduct constitute sexual harassment, and if this was the case, was dismissal an appropriate sanction?

As to the first question, the Court came to the conclusion that the conduct did not constitute sexual harassment. The evidence at the arbitration did not show that Simmers' conduct 'crossed the line where sexual attention becomes sexual harassment.' This was because, when M rejected his suggestion and indicated that his conduct was unwelcome, he did not pursue the matter. After referring to the Code of Good Practice on the Handling of Sexual Harassment Cases the Court stated the following –

'[27] The Code makes it clear that a person may indicate that sexual conduct is unwelcome by walking away. That is what M. did in this case. Simmers did not pursue her. Verbal conduct includes sexual advances – but it must be unwelcome, and the alleged perpetrator should have known that or the recipient of the advance should have made it clear.

[28] In this case, it is common cause that Simmers did not persist in his overtures once told that it was unwelcome. The words he used were certainly inappropriate, albeit uttered "more in hope than expectation", as Mr Ackermann remarked. But I agree with him that it did not cross the line from a single incident of an unreciprocated sexual advance to sexual harassment.

[29] It is true that a single incident of unwelcome sexual conduct can constitute sexual harassment. But it is trite that such an incident must be serious. It should constitute an impairment of the complainant's dignity, taking into account her circumstances and the respective positions of the parties in the workplace. This nearly always involves an infringement of bodily integrity such as touching, groping, or some other form of sexual assault; or quid pro quo harassment. In this case, it is common cause that the Commissioner dealt with a single incident. He found so. Once M. made it plain to Simmers that it was not welcome, he backed off. ('Footnotes omitted)

The Court also made the following points -

- Simmers' conduct constituted 'sexual attention' and was crude and inappropriate; but inappropriate conduct does not automatically constitute sexual harassment.
- Simmers' conduct could only have become sexual harassment if he had persisted in it or if it was a single serious transgression. His conduct in this case had not been serious.
- There was no 'workplace power differential'; the parties were not co-employees and the conduct took place after work.
- Simmers' advance was an 'inappropriate sexual one' but did not 'cross the line' to constitute sexual harassment. It did not lead to a hostile work environment. M left for Australia shortly thereafter and it was unlikely that they would ever work together again.

Also of importance was the Court's view regarding the evidence given by M during the arbitration that she had been incredibly nervous, that she felt insulted and that she had put

le Roux's cell phone number into her cell phone in case Simmers approached her during the night. It pointed out that these sentiments had not been expressed by her in emails sent to CSA prior to the disciplinary hearing. The Court found that the commissioner had erred in not taking into account this discrepancy when considering the issues.

The Court then went on to consider whether, even if it was correct that Simmer's conduct constituted sexual harassment, dismissal was an appropriate sanction. Taking into account the factors described above, the Court came to the conclusion that it was not. It set aside the award and substituted it with an order to the effect that Simmers' dismissal was unfair and that he should be reinstated but that this be coupled with a final written warning valid for twelve months. See *Simmers v Campbell Scientific Africa (Pty) Ltd & others* [2014] 8 BLLR (LC).

The LAC decision.

The approach adopted by the Labour Court stands in stark contrast to that adopted by the LAC. At the heart of the LAC's analysis is its view regarding 'power relations within society'. Its analysis commences with the statement that our constitutional democracy is founded on the explicit values of human dignity and the achievement of substantive equality in a non-racial, non-sexist society governed by the rule of law. The 'transformative vision' of the Constitution is the hope that it will require society to change or 're-imagine' power relations within society so as to achieve substantive equality. At its core sexual harassment is an exercise of power by one person over another and this reflects the power relations within society in general and in a specific workplace in particular. Whilst the economic power of the harasser may underlie many instances of sexual harassment (most obviously in the case of 'quid-pro-quo' harassment where a superior demands or requires sexual favours from a subordinate in return for employment benefits) this need not be the case. In the case of the creation of a hostile working environment the harassment proceeds from the perceived societal power of men over women. This type of power abuse need not be exerted by a superior but is often exerted by a co-worker. The LAC also pointed out that this type of harassment creates an offensive and often intimidating work environment that -

> *'[21] .... undermines the dignity, privacy and integrity of the victim and creates a barrier to substantive equality in the workplace'.*

The LAC accepted that CSA had been entitled to discipline Simmers for misconduct because it related to, and impacted upon, his employment relationship with his employer. Simmers' conduct occurred within the context of a work-related social event – Simmers would not have been at the lodge in Botswana in the company of M if it had not been for his employment with his employer. The LAC went on to find that the Labour Court had erred in finding that Simmers' advances did not constitute sexual harassment, were not serious and did not impair the dignity of M. It also erred in finding that there was no disparity of power and in regarding it as relevant that Simmers and M were not co-employees and unlikely to work together.

The LAC argued that Simmers' advances were directed at a young woman close to 25 years his junior and that underlying these advances lay a power differential that fa-

voured Simmers due to his age and gender. M's dignity was impaired by the insecurity caused to her by the unwelcome advances made. The LAC's views are trenchantly expressed in the following excerpt -

'[33] The fact that Mr Simmers did not hold an employment position senior to that of Ms Markides or that they were not co-employees did not have the result that no disparity in power existed between the two. His conduct was as reprehensible as it would have been had it been meted out by a senior employee towards his junior in that it was founded on the pervasive power differential that exists in our society between men and women and, in the circumstances of this case, between older men and younger women. Far from not being serious Mr Simmers capitalised on Ms Markides' isolation in Botswana to make the unwelcome advances that he did. The fact that his conduct was not physical, that it occurred during the course of one incident and was not persisted with thereafter, did not negate the fact that it constituted sexual harassment and in this regard the Labour Court erred in treating the conduct as simply an unreciprocated sexual advance in which Mr Simmers was only "trying his luck". In its approach the Court overlooked that in electing to make the unwelcome sexual advances that he did, Mr Simmers' conduct violated Ms Markides' right to enjoy substantive equality in the workplace. It caused her to be singled out opportunistically by Mr Simmers to face his unwelcome sexual advances in circumstances in which she was entitled to expect and rely on the fact that within the context of her work this would not occur. In treating the conduct as sexual harassment, Ms Markides, and other women such as her, are assured of their entitlement to engage constructively and on an equal basis in the workplace without unwarranted interference upon their dignity and integrity. This is the protection which our Constitution affords.'

Strike interdicts:

Dealing with violence and unlawful demands

by P.A.K. Le Roux

Given the interesting and important issues it deals with, it is surprising that the decision of the Labour Court in *National Union of Food, Beverage, Wine, Spirits and Allied Workers & others v Universal Product Network* (Pty) Ltd; In re: *Universal Product Network (Pty) Ltd v National Union of Food, Beverage, Wine, Spirits and Allied Workers & others* (Unreported J2182/2015 9/11/2015) has not attracted more attention. The employer in this case is a subsidiary of the retail chain, Woolworths, and provides certain services to Woolworths.

On 15 June 2015 the National Union of Food, Beverage, Wine, Spirits and Allied Workers (the Union) addressed a letter to the employer containing a comprehensive list of demands relating to terms and conditions of employment.

On 25 July 2015 the union referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA) in which it alleged that the employer was refusing to negotiate with it on the matters enumerated in the letter

This dispute was settled and the parties agreed to meet on 24 and 25 August 2015 in order to negotiate on these issues. These negotiations failed to achieve agreement and the union referred another dispute to the CCMA on the issue of wages. On 6 October 2015 the union issued a notice of its intention to embark on a strike in support of its demands. The strike notice did not explicitly state in respect of which issues it was calling a strike. However, it did refer to the negotiations that had taken place and the dates on which they had taken place.

The strike commenced on 12 October 2015. A week later the employer sought and obtained a Labour Court order interdicting the employees from breaching agreed picketing rules and from committing other acts of misconduct.

During the course of the strike banners were displayed by the strikers criticising Woolworths' for doing business with Israeli companies. Palestinian flags were also waved. On 23 October 2015 a political party, the Economic Freedom Fighters (EFF), also involved itself in the strike. Officials and members of the EFF visited the employer's premises and demanded to negotiate with the employer's management. On the same date four members of the EFF addressed the strikers and stated that they should not give up hope or 'surrender' until their demands were met; they should intensify the strike by targeting trucks entering and leaving the premises. The EFF undertook to provide legal assistance and to publicise the strike.

On 26 October 2015 the employer's attorneys addressed a letter to the union's attorneys in which it stated the following -

The strike was unprotected because the strike notice did not state what the issues were in support of which the strike was called.

Quite apart from the alleged defective strike notice, the employees' actions were not in support of a demand relating to a matter of mutual interest – the action was in support of 'political and violent goals'. This was because the demand was that the employer cease trading with Israel and because the EFF had become a 'partner' in the strike. The letter contained the following statement which summarises the employer's views –

> *' ... It is apparent that our client now faces political demands and threats of violence including attacks on their stores (which are workplaces outside the ambit of this particular dispute). Accordingly your members' conduct no longer constitute a protected strike action the objective of the strike is now become one in pursuit of violence and political issues are not in settlement of legislative demands of mutual interest ...'*

This letter elicited a detailed response from the union's attorneys in which it was stated that –

- The strike was protected.
- The strike notice was not defective.
- The strike concerned demands relating to wages and conditions of employment.
- The union was not aligned to any political party and that its members were free to belong to any political party of their choice. The union believed that its members belonged to various political parties and that some did not belong to any political party.
- The fact that the EFF had demonstrated solidarity with the strikers and had added its voice of protest against the employer and Woolworths on other matters had

nothing to do with the union. The union has not aligned itself with the EFF's demands; individual members may have done so, but this was not sanctioned by the union and did not represent the union's demands in relation to the strike.

- The EFF's actions could not prevent the union and its members from exercising their constitutional right to strike and to picket peacefully. The union had communicated with the EFF and a copy of the letter to the employer would also be sent to the EFF.
- The strike was not in support of political or violent objectives. The union was unaware of any violence associated with the strike, although vague allegations to this effect had been bandied about by the employer and Woolworths. Insofar as this may have occurred the union condemned the violence and disassociated itself from this.
- The union had no knowledge of any threats of attacks on stores and condemned such threats.

The union also addressed a letter to the EFF in which it stated that, although it appreciated shows of solidarity from members of the community and other organisations, it was also concerned that the EFF and its members were encouraging the union's members to breach the Labour Court order and thus exposing them to a conviction for contempt of court. It pointed out that, as a result of the EFF's intervention, the employer had threatened to interdict the strike on the basis that it was in support of a political demand. It then went on to state that –

'We are obviously not able to prevent the EFF and its members from protesting in the manner they see fit and we are not able to prevent the EFF from raising other issues, and neither would the union wish to prevent the EFF from exercising its constitutional rights of free assembly, free speech and the right to peacefully protest. However, we reiterate that the union strike is about wages and conditions of employment and we wish to prevail upon the EFF and its members not to encourage members to breach the court order or any other law.

Although some of our members may be members of the EFF and others may be members of other political parties, we place on record that the union is not aligned to any political party. I trust that the EFF will not act in a manner that is detrimental to the union, its members and its protected and legitimate strike for increased wages and better conditions for its members. I also trust that the EFF will consider and heed the requests made herein.'

The employer than approached the Labour Court for a court order in terms of which the strike was declared unprotected. It also sought a declaration to the effect that the actions of the union members 'no longer constitute lawful strike action in pursuance of demand/demands of mutual interest' by virtue of the threats of violence made and by virtue of the political nature of the demands made. An acting judge granted an interim order subject to confirmation at a later date. The union then anticipated the return date and opposed the order being made final.

The matter was heard by van Niekerk J. In his judgment he dealt with four issues. The first was the practice of employers to seek interim orders interdicting strikes rather than to seek final orders. The second was the argument that the strike notice was invalid by reason of the fact that it did not set out the issues in respect of which the strike was

called. The third was the question whether the employees' actions were rendered unprotected by virtue of the violence that was said to have accompanied the strike. The fourth was whether the employees' actions were rendered unprotected as a result of the interventions of the EFF.

The strike notice

After referring to the earlier decision of the Labour Court in *SA Airways (Pty) Ltd v SA Transport & Allied Workers Union* (2010) 31 *ILJ* 1219 (LC) and the decision of the Constitutional Court in *SA Transport & Allied Workers Union & others v Moloto NO & another* (2012) 33 *ILJ* 2549 (CC) the Court stated that the strike notice must place the employer in the position reasonably to know which demands a union and its members intend to pursue through strike action and which demands it must meet in order to avoid a strike.

Despite the fact that the strike notice did not explicitly state the union's demands, the Court came to the conclusion that it was clear from interactions between the parties prior to the strike being called that the employer was fully aware of the nature and extent of the union's demands on the date that the strike notice was issued.

Strike violence

The Court's approach to this issue attempts to strike a balance. On the one hand the decision supports the view that violence and intimidation can render employee actions unprotected in the correct circumstances. It refers to the following often-quoted excerpt from the decision in *Tsogo Sun Casinos (Pty) Ltd t/a Montecasino v Future of SA Workers Union & others* (2012) 33 ILJ 998 (LC)

> *'[13] This court will always intervene to protect both the right to strike, and the right to peaceful picketing. This is an integral part of the court's mandate, conferred by the Constitution and LRA. But the exercise of the right to strike is sullied and ultimately eclipsed when those who purport to exercise it engage in acts of gratuitous violence in order to achieve their ends. When the tyranny of the mob displaces the peaceful exercise of economic pressure as the means to the end of the resolution of labour dispute, one must question whether a strike continues to serve its purpose and thus whether it continues to enjoy a protected status.'*

It also laments the fact that 'wanton and gratuitous violence' appear to inevitably accompany strike action. It characterises strike related violence as a scourge and a serious impediment to the peaceful right to strike and picket as well as a denial of the rights of those who elect to continue working. Interestingly, the Court also points out that these actions pose serious risks to 'investment and the other drivers of economic growth'

On the other hand the Court also sounds a note of caution – it points out that in dealing with strike violence the law has its limits. What is necessary is a more holistic approach and a greater understanding of the factors that contribute to mob violence, 'together with a pre-emptive process and measures that are supportive of good faith negotiation'. It also has the following to say -

> *'[38] While, as it has previously indicated, this court will in appropriate circumstances declare an initially protected strike unprotected on account of levels and degrees of violence which seriously undermine the fundamental values of our Constitution, this is not a conclusion that ought*

lightly to be reached. A conclusion to this effect itself denies the exercise of fundamental labour rights, and as the Constitutional Court pointed out in SATAWU, this court ought not to easily to adopt too intrusive an interpretation of the substantive limits on the exercise of the right to strike.'

But when will the threshold be crossed which will render a protected strike unprotected? Here the Court refers with approval to the approach suggested by Professor Alan Ryecroft in an article entitled 'What can be done about strike-related violence' published in the *International Journal of Comparative Labour law and Industrial Relations*.(2014) 30.2 at 199. He suggests that the test should be whether misconduct has taken place to such an extent that the strike no longer promotes functional collective-bargaining.

On the facts, however, the Court came to the conclusion that this threshold had not been crossed.

Political demands

Whilst the Court accepts that there may well be situations where a threshold is crossed and when industrial action in support of a mutual interest changes its purpose and becomes unprotected, it finds that, on the facts, this is not the case here. It is not uncommon, in South Africa and elsewhere, for community groups and even political parties to express solidarity with striking workers.

'[42] In my view, the facts do not support a contention that the industrial action currently undertaken is not directed at matters of mutual interest between an employer and employees. The evidence does not disclose that any 'political' demands have been made by the union. To the extent that the EFF has made demands of the applicant these are not demands made by the union, and indeed, the union has expressly disassociated itself from both the EFF's conduct and its demands. To the extent that the applicant remains aggrieved at the conduct of the EFF (which appears to be opportunistic at best), this is a matter that should be addressed with the EFF directly. In so far as the EFF has encouraged any of the individual respondents to breach the terms of the order granted on 19 October 2015, those respondents may in due course be required to answer for their actions. In so far as the EFF itself or its officials have made themselves guilty of criminal acts, the applicant has remedies against them.'

Interim relief

On a more practical level, the views expressed by the Court with regard to the granting of interim relief may also be of some importance. In practice most employers seeking to interdict a strike will request the Court to grant an interim order prohibiting the unprotected strike subject to the order being made final at a later date.

The Court expressed concerns about this approach. In its view this approach has often been adopted by employers because of the lesser threshold that employers have to meet. An employer seeking interim relief does not have to show that it has a clear right to relief but merely a prima facie right. In addition, when the question of whether the interim order should be confirmed and made final comes up for consideration on the return date, the matter has often become academic. An interim interdict, coupled with a return date some weeks in the future, will in most instances put an end to the strike on the employer's terms. Such an interdict 'interferes with the power dynamics at play' and its effect on the constitutional right to strike will

be profound. The Court should be wary of being drawn inappropriately into the power play and being used by one party to gain a strategic advantage at the expense of the other.

The Court expressed the view that it would be preferable for the parties to file a full set of papers, thus enabling the Court to treat the application for an interdict as one for final relief. Alternatively, where interim relief is appropriate, a return date should be set within a few days of the granting of the final order.

Comment

The Court has once again accepted the principle that violence during the course of a strike could render the employees' actions unprotected. That it decided, on the facts, not to grant a remedy should not obscure this view. The following warning issued by the Court in the final paragraph of the judgment is important.

> *'[45] Finally, this ruling should not be construed as legitimising or condoning those acts of strike-related misconduct that have occurred, or the political interference in the strike by either the EFF or the BDS. The ruling means no more than that on the facts placed before the court, the levels and degree of violence and interference by outside parties do not tilt the balance toward a finding that the protected strike called by the union should be declared unprotected. Of course, the applicant is not precluded from seeking similar relief should future circumstances warrant such an order.'*

Here an issue of terminology arises. The violence does not lead to a 'strike' being unprotected. It is submitted that it will, in most cases at least, be preferable to argue that the violence leads to the employee action no longer being regarded as a strike, and therefore no longer being capable of enjoying the protection granted to strikes by section 67 of the Labour Relations Act, 66 of 1995. This is because the form that the actions undertaken by or on behalf of the employees take is no longer a refusal to work or another action that falls within the definition of a strike. This is aptly described by Anton Myburgh SC in *CLL* Vol 23 No 1 at page 5

> *'What I mean by economic duress in this context is this. Where levels of violence get out of control, it is the violence that places pressure on an employer to increase its wage offer, not the pressure brought to bear by collective bargaining and strike action per se. In effect, the strike fuels the violence; the violence becomes the focal point of the strike; and the violence then transcends the strike. To bring the violence (and not the strike per se) to an end, the employer is placed under economic duress to conclude a wage agreement at a wage level that does not reflect the forces of supply and demand, but rather the force of violence.'*

Also of interest is that the Court explicitly accepts that concerted action in support of a political aim would no longer constitute a strike because it is no longer in pursuit of a mutual interest.

Finally, the comments of the Court dealing with the use of interim interdicts as a tactical measure should not be ignored.

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