REPUBLIC OF SOUTH AFRICA

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

Case number: 301/04
Reportable

In the matter between:

MEDIA 24 LIMITED **FIRST APPELLANT**

GASANT SAMUELS **SECOND APPELLANT**

and

SONJA GROBLER **RESPONDENT**

CORAM: FARLAM, NAVSA, CONRADIE, HEHER et VAN HEERDEN JJA

HEARD: 9 MAY 2005

DELIVERED: 1 JUNE 2005

SUMMARY: Delict – liability of employer for sexual harassment of female employee by trainee manager – negligent breach by employer of legal duty to maintain working environment in which employees not subject to sexual harassment - question as to whether employer vicariously liable left open – high court's jurisdiction not excluded by s 157 of Labour Relations Act 66 of 1995 – psychological injury in fact resulting from conduct of trainee manager away from workplace after series of acts of harassment in workplace – high court's jurisdiction not excluded by s 35(1) of Compensation for Occupational Injuries and Diseases Act 130 of 1993

JUDGMENT

FARLAM JA

INTRODUCTION

[1] This is an appeal from a judgment of Nel J, sitting in the Cape High Court, in which the first and second appellants were held jointly and severally liable to pay the respondent a total amount of R776 814. This was the figure at which the trial court quantified the damages which she had suffered as a result of sexual harassment to which it held she had been subjected over a period of approximately five months by the second appellant and for which it held that the first appellant was vicariously liable.

[2] The judgment of the court *a quo* has been reported : see *Grobler v Naspers Bpk* 2004 (4) SA 220 (C).

PLEADINGS

[3] At the time when the alleged sexual harassment took place the respondent was a 33 year old secretary employed by Nasionale Tydskrifte Ltd (to which I shall refer in what follows as 'Tydskrifte'), a wholly owned subsidiary of the first appellant. The second appellant was at that time a trainee manager employed by the first appellant. In response to the respondent's averment in her particulars of claim that she was employed by the first appellant, the latter ultimately pleaded that she was in fact employed by Tydskrifte, which had disposed of its undertaking and whose only remaining employee was the respondent. It went on to aver that it

had accepted liability for any obligations Tydskrifte might have towards the respondent.

[4] The first appellant thus figured in the case in two capacities. In its first capacity, as the employer of the second appellant, it was alleged to be vicariously liable for his actions in subjecting the respondent to sexual harassment. In its second capacity, as the party which had accepted liability for the obligations of Tydskrifte, it faced allegations that Tydskrifte, as the respondent's employer, was under a legal duty to its employees, in particular to the respondent, to create and maintain a working environment in which the dignity of its employees would be respected and, amongst other things, to take all reasonable steps to prevent its employees from being sexually harassed by other employees in their working environment.

[5] The respondent alleged further in paragraph 14 of her particulars of claim that this duty had been breached because there had been a wrongful and negligent failure to prevent the second appellant from sexually harassing her. In this regard it was alleged that the first appellant [in the circumstances, regard being had to the way in which the case was conducted, this allegation must be taken to refer to Tydskrifte], or its management:

’14.1 failed to come to the assistance of the [respondent] notwithstanding her requests;

14.2 failed to act against the [second appellant] notwithstanding the fact that it was common knowledge at [Tydskrifte’s] premises that the [second appellant] was sexually harassing the [respondent];

14.3 failed to deal with allegations of sexual harassment against the [second appellant] seriously and expeditiously;

14.4 permitted the [second appellant] wide latitude in his conduct towards his subordinates, in particular, the [respondent];

14.5 failed to act against the [second defendant] notwithstanding the fact that [he] had previously sexually harassed female employees of [the first appellant and Tydskrifte] during his employment with the [first appellant] and notwithstanding the fact that this was known to the management of [Tydskrifte];

14.6 failed to create a climate in the workplace in which the victims of sexual harassment, in particular the [respondent], would not feel that their grievances were being ignored;

14.7 failed to take all or any reasonable steps to preserve and protect the bodily integrity, psychological well-being, mental tranquillity and dignity of [Tydskrifte’s] employees, in particular that of the [respondent]; and

14.8 failed to prevent the [second appellant’s] sexual harassment of the [respondent] when such could and should have been prevented.’

[6] According to the particulars of claim, the persons comprising the management of the first appellant [which again must be taken to be a reference to Tydskrifte] referred to in paragraph 14 were acting in the course of their employment and the scope of their duties as employees.

[7] The respondent also stated that, as a result of the alleged sexual harassment, she suffered severe shock, anger, anguish, fear and anxiety; was humiliated, degraded and disturbed in her mental tranquillity and emotional integrity, and suffered severe psychological and psychiatric trauma,[1] manifesting as post-traumatic stress syndrome.

[8] In its plea the first appellant denied that, in sexually harassing the respondent as alleged, the second appellant had been acting in the course and scope of his employment. It pleaded further that neither it nor Tydskrifte had any knowledge of the correctness of the respondent's allegations of sexual harassment and that it made no admissions in respect thereof. With regard to one specific allegation of harassment, which related to an incident which took place near a flat owned by the respondent (described in

[1] From a linguistic and medical point of view, it is more accurate to speak simply of *psychological trauma*, for which both *psychological* and *psychiatric treatment* may be required. However, as the respondent's pleadings refer in terms to 'psychological and psychiatric trauma', I shall utilise this description or a variant thereof where appropriate.

the evidence as ‘the flat incident’), the first appellant pleaded as follows:

> ‘7.3.1 It did not take place at the [respondent’s] workplace;
>
> 7.3.2 It did not take place on premises controlled by the [first appellant] or … Tydskrifte …;
>
> 7.3.3 It did not take place at a time when either the [respondent] or the [second appellant] were performing their services in terms of either of their contracts of employment;
>
> 7.3.4 The event did not take place within the course and scope of the employment of either the [respondent] or the [second appellant];
>
> 7.3.5 The event did not arise out of the [respondent’s] employment or that of the [second appellant];
>
> 7.3.6 Neither the [first appellant] nor … Tydskrifte … is accordingly liable for any of the consequences of the alleged incident.’

[9] The first appellant denied being vicariously liable for any sexual harassment for which the second appellant might be liable. As regards the allegation that Tydskrifte or members of its management team had breached a legal duty towards the respondent, it denied that Tydskrifte owed its employees, including the respondent, a general (delictual) duty of care consisting of the obligations on which the respondent relied. It conceded that an employer has moral obligations towards its employees to take all reasonably practicable steps to protect their integrity, dignity and

privacy in their working environment but denied that 'it has any such legal obligations justiciable' by the high court. In amplification of this averment it pleaded that an employer's obligations in this regard arose from the provisions of the Labour Relations Act 66 of 1995 (item 2(1)(a) of Schedule 7) at the time of the claim and now arise from the provisions of s 6 of the Employment Equity Act 55 of 1998, both read with the *Code of Good Practice on the Handling of Sexual Harassment Cases'* published under s 203 of Act 66 of 1995 and that conduct offending against the relevant provisions of both Acts is justiciable only by the Labour Court. In any event, so it was pleaded, Tydskrifte had fully complied with any such obligations.

[10] The first appellant also denied that the respondent suffered from post-traumatic stress disorder as a result of the second appellant's alleged sexual harassment. It did not, however, deny that she suffered severe psychological and psychiatric trauma, its denial on this part of the case being confined to the respondent's allegation that the psychological and psychiatric trauma she suffered manifested as post-traumatic stress syndrome.

[11] In addition to pleading the jurisdictional defence set out in para [9], the first appellant also pleaded that the respondent's action was one contemplated by s 35(1) of the Compensation for

Occupational Injuries and Diseases Act 130 of 1993 and that, by virtue of the provisions of this section, the respondent had no claim against Tydskrifte other than in terms of the said Act. The present action, not being an action in terms of that Act, should thus be dismissed.

[12] The second appellant denied that he had been guilty of sexual harassment of the respondent. In particular he denied the incidents particularised in subparagraph 4.10 and 4.12 to 4.14 of her particulars of claim. These incidents, together with that referred to in sub-paragraph 4.11, were extensively covered in the evidence in the trial court and are dealt with in detail in the trial court's judgment. They were variously described as 'the lift incident' (paragraph 4.10), 'the Landbousaal incident' (paragraph 4.11), 'the coffee jar incident' (paragraph 4.12), 'the fingerbiting incident (paragraph 4.13) and 'the flat incident" (paragraph 4.14).

[13] In respect of the Landbousaal incident, he admitted kissing the respondent in the room in question but averred that she had consented to being kissed and had, as it was put, 'been a willing participant and had returned [his] kiss'. He alleged that there had been what was called 'a relationship' between the respondent and himself. He admitted touching her on occasion, engaging her in conversations of an intimate nature, with her willing participation,

and asking her to go out with him. He pleaded no knowledge of her allegations that she suffered psychological and psychiatric trauma and patrimonial loss in consequence thereof, putting the respondent to the proof thereof.

JUDGMENT OF COURT *A QUO*

[14] The learned judge in the trial court rejected the second appellant's version that there had been a romantic relationship between him and the respondent. He also found that the incidents set forth in sub-paragraphs 4.10 to 4.14 had taken place, save that he was unable to find that, during the so-called 'flat incident', the respondent was threatened by the second appellant with a firearm. The judge accordingly found that the second appellant had sexually harassed the respondent.

[15] He found that what he called the respondent's 'chronic emotional problems' were the result of the sexual harassment to which she was subjected by the second appellant and which she could not have escaped - despite her efforts to do so - without the possible loss of her job. He accordingly held the second appellant responsible for the respondent's condition. He refrained from making a specific finding that her condition could be classified as post-traumatic stress disorder, pointing out that the question to be considered was whether the second appellant was responsible for

the respondent's condition and not how her condition would be classified by the American Psychiatric Association (the publishers of the fourth edition of the *Diagnostic and Statistical Manual of Mental Disorders (DSM IV)*, to which all the psychologists and psychiatrists who testified had referred).

[16] He then proceeded to hold the first appellant, as the employer of the second appellant, vicariously liable for his actions. He came to this conclusion after a comprehensive discussion of the common law as to vicarious liability and recent developments thereof in the United States of America, Canada, the United Kingdom, Australia and New Zealand. He expressed the view that policy considerations justified the conclusion that the first appellant should be held vicariously liable for the sexual harassment of the respondent by the second appellant but that, if the existing rules relating to vicarious liability in our law are not flexible enough or do not make adequate provision for changed circumstances in order to deal with the problem of sexual harassment in the workplace then, he said, the Constitution obliges the courts to develop the common law accordingly.

[17] The trial judge also held that the two jurisdictional defences raised by the first appellant were without merit. His reasons for this conclusion are set out fully in the reported judgment and

accordingly need not be repeated here. So too, in view of the fact that the judgment of the court *a quo* has been reported, it is not necessary to set out in detail all the allegations and counter allegations dealt with therein.

ACADEMIC AND PROFESSIONAL COMMENTARIES ON THE JUDGMENT

[18] The judgment of the trial court, as was to be expected, aroused considerable attention on the part of academic commentators on the law of delict and industrial law[2].

[19] We are grateful to counsel for the respondent, Mr *Melunsky,* who conducted the respondent's case with considerable ability in both the trial court and this court, for making available to us copies of most of the articles in which this case was discussed.

SUBMISSIONS ON BEHALF OF THE FIRST APPELLANT

[20] Mr *Burger,* who appeared with Mr *Duminy* and Mr *Stelzner* for the first appellant, contended that the trial judge had erred in rejecting the evidence of the witness Leon Africa, who testified on behalf of the second appellant at the trial and said that, before the

[2]It was discussed in a number of articles published and to be published in the *South African Mercantile Law Journal,* the *Tydskrif vir die Suid Afrikaanse Reg,* the *Industrial Law Journal, Contemporary Labour Law* and *Employment Law.* (See the two articles by J Neethling and JM Potgieter published in (2004) 16 *SA Merc LJ* 488 and to be published in 2005 (3) *TSAR;* the articles by Alan Rycroft and Devina Perumal, Rochelle le Roux and Benita Whitcher published in (2004) 25 *ILJ* at 1153, 1897 and 1907 respectively, the article by Karin Calitz to be published in 2005 (2) *TSAR* 215, the article by Carl Mischke published in (2004) 14 *Contemporary Labour Law* 5 and the article by John Grogan published in (2004) 20 (4) *Employment Law 3.*

flat incident, the second appellant and the respondent acted like children, one minute having arguments and teasing each other, the next chatting to each, laughing and smiling. He said that it looked to him as if they were having an affair. On one occasion he came into the office he shared with the second appellant and found them kissing. On another occasion the respondent told him she had often kissed the second appellant. He also testified that he saw a letter apparently written by the respondent to the second appellant, which read 'Ek het jou lief' and was signed with a drawing of a sun, followed by the letters 'ja', this combination standing for 'Sonja', the respondent's first name.

[21] Mr *Burger* pointed out that the trial judge gave a very cursory summary of this witness's evidence and later, when considering it, contented himself with remarking that, in so far as Africa's evidence excused the second appellant's conduct, it was in conflict with the evidence of Vanessa Binneman, Nicolene Johnson and the other corroborating evidence to which he had referred and that it was accordingly not accepted. Mr *Burger* submitted that Africa's evidence should have been considered on its merits and not simply rejected because it conflicted with that of other witnesses. He submitted that in the circumstances the trial judge had materially misdirected himself in this regard and that Africa's

evidence was of great importance on a key issue in the case as far as it relates to the first appellant, *viz* whether any harassment had taken place before the flat incident. As this incident took place away from the workplace, the second appellant having ostensibly gone to inspect the respondent's flat with a view to buying it, it was not possible, counsel contended, to hold the first appellant vicariously liable for the second appellant's conduct on this occasion (even if the extended test for vicarious liability set out in the trial court's judgment were to be upheld). According to counsel, Africa had been a good witness and his evidence as to the nature of the relationship between the second appellant and the respondent, at least prior to the flat incident, should have been accepted.

[22] In support of his contentions in this regard, Mr *Burger* drew attention to a passage in the respondent's evidence where she referred to the period of about three weeks which preceded the flat incident. During this period, which followed on the second appellant's writing a letter to her in which, on her version, he solemnly swore not to touch her again or treat her badly or force his attentions on her, she was, she said, very happy at work. She worked well and she got on well with the other people there. She was experiencing no problems with the second appellant and she

could relax. Mr *Burger* submitted that even if the respondent had up to that point been sexually harassed by the second appellant and had not merely been involved in a flirtatious relationship with him, it could be accepted that, if the flat incident had not occurred, there would have been no question of the respondent's suffering from a post-traumatic stress disorder. As far as the flat incident was concerned he submitted that it alone, regard being had to the three week period of quiet which preceded it, is the only possible stressful event which could have precipitated a post-traumatic stress disorder affecting the respondent.

[23] He contended further that the first appellant could only be liable to the respondent on the facts of this case if she could establish that the harassment to which she had been subjected had resulted in a recognised psychiatric injury ('erkende psigiatriese letsel') (see *Barnard v Santam Bpk* 1999 (1) SA 202 (SCA) at 216E-F). He pointed out that the trial court had refrained from upholding the respondent's contention that she was suffering from a post-traumatic stress disorder and submitted that, as she had specifically pleaded that she had suffered 'severe psychological and psychiatric trauma, manifesting as post-traumatic stress-syndrome', she had failed to establish that her condition was of such a nature as to qualify for an order for

damages within the ambit of the rule as laid down in *Barnard's* case, *supra.*

[24] Mr *Burger* also argued that the court *a quo* had erred in holding that the essentials for the successful invocation of the principles of vicarious liability were present in this case. Such harassment as was proved to have taken place had not been committed within the course and scope of the second appellant's employment. Furthermore, there was no empirical evidence to establish that the first appellant had created or increased a risk of sexual harassment within the employment relationship. In any event, the first appellant should not be held to be vicariously liable for sexual harassment of one employee by another merely on the basis that the first appellant had created or increased a risk of sexual harassment within the employment relationship. The expansion of the common law as regards vicarious liability was in this case not justified on constitutional grounds. According to counsel, South African cases provide no authority for the trial court's finding of vicarious liability; the Canadian and English decisions were decided in different factual contexts, and the American authority was of doubtful value in our legal system.

[25] As regards the respondent's alternative cause of action against Tydskrifte, namely that Tydskrifte had breached a legal

duty *it* owed to the respondent by wrongfully and negligently failing to prevent the second appellant from sexually harassing her, Mr *Burger* submitted that the respondent had to prove that it could reasonably have been expected of Tydskrifte to take positive steps to prevent the injury to her and that Tydskrifte failed to take such steps. What could reasonably have been expected from Tydskrifte was determined by the factual circumstances and the legal convictions of the community as assessed by the court. Pointing out that a legal duty is something more than a moral, ethical or social duty, counsel contended - with reference to what was said by the Constitutional Court in *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC) para [43] at 957 - that the question to be answered was whether Tydskrifte ought reasonably and practically to have prevented harm to the respondent: put differently, was it reasonable to expect of Tydskrifte to have taken positive measures to prevent the harm? In his submission, no basis had been laid for any conclusion that the legal convictions of the community required the legal duty alleged to be imposed. Such duties as Tydskrifte had regarding the prevention of harm to the respondent flowing from sexual harassment arose from the contract of employment between it and her, supplemented in some respects by applicable legislation, such as the Labour Relations

Act 66 of 1995, the Occupational Health and Safety Act 85 of 1993, the Compensation for Occupational Injuries and Diseases Act 130 of 1993, the Basic Conditions of Employment Act 75 of 1997 and the Employment Equity Act 55 of 1998.

[26] Counsel submitted in this regard that there is an important difference in principle between an employer's relationship with his employees, on one hand, and that with the community in general, on the other. Any duty which an employer may have to prevent sexual harassment of its employees cannot be separated from the employment relationship, which is contractual both as to its origin and its nature, with statutory inclusions and additions. In the present case Tydskrifte had no legal duty *qua* employer towards its employee, the respondent, which did not arise from a contract of employment or applicable legislation. Instead of relying on a (delictual) legal duty, the respondent should have relied on a provision in her employment contract, whether express or implied, which she clearly had not done. That, he contended, constituted a complete defence to the respondent's claim against the first appellant in so far as it was being sued as the party which had accepted an obligation to assume any liability that Tydskrifte had towards the respondent in this regard. In support of this submission he relied on the decision of this court in *Lillicrap*

Wassenaar and Partners v Pilkington Brothers (SA) Ltd 1985 (1) SA 475 (A) at 499H-I.

[27] Even if there were a general legal duty on the part of Tydskrifte which could be enforced in a delictual action, this duty, so counsel submitted, had been discharged: in 1997 already, a sexual harassment policy had been accepted and applied throughout the whole Naspers group of which Tydskrifte formed a part; this policy had been distributed and made known throughout the whole group; a copy thereof had speedily been made available to the respondent as soon as she asked for it; a grievance procedure, supplementary to the procedures which were applicable at all levels in the group in terms of the sexual harassment policy, had been accepted enabling employees to direct and follow up their grievances to a variety of people within and outside Tydskrifte, and the disciplinary procedure had been set in motion expeditiously against the second appellant as soon as the respondent had laid a formal charge against him. Mr *Burger* submitted that the evidence thus showed not only that Tydskrifte had exercised reasonable care to prevent and correct promptly any sexually harassing behaviour but also that any legal duty to which it was subject had been complied with.

[28] He pointed out that the respondent, who was at all relevant times aware of the disciplinary policy and code and the grievance procedure of her employer, had refrained from taking formal steps of any kind against the second appellant until after the flat incident: that is to say after being subjected, on her version, to approximately six months of harassment. Her failure in this regard was, he submitted, unreasonable, alternatively she had herself to accept responsibility for the fact that steps were only taken against the second appellant after the flat incident.

[29] As regards the first jurisdictional defence raised by the first appellant, as set out in para 9 above, counsel referred to the *Code of Good Practice on the Handling of Sexual Harassment Cases* promulgated in terms of s 203(2) of Act 66 of 1995, read with s 203(3) in terms of which any such code must be taken into account in interpreting and applying the Act, and submitted that the elimination of sexual harassment in the workplace was recognised as a labour matter involving the application of Act 66 of 1995 in so far as concerns the relationship between employer and employee. He also pointed out that sexual harassment cases are presently dealt with under Chapter II of the Employment Equity Act 55 of 1998. Section 10 of that Act, which is part of Chapter II, provides that disputes concerning alleged unfair discrimination (of which

harassment is a form (see s 6 (3)) must be referred for conciliation and, failing resolution, to the Labour Court and, further, that the relevant provisions of Parts C and D of Chapter VII of the Labour Relations Act (which include s 157), with the changes required by the context, apply to such disputes.

[30] Dealing with the trial court's second reason for rejecting this jurisdictional defence (a reason which applies also in respect of the second jurisdictional defence), namely that the respondent's employer was Tydskrifte and not the first appellant, Mr *Burger* submitted that in this regard the trial court overlooked the fact that, from a practical point of view, the respondent and the second appellant were both working in the same organisation.

[31] He then turned to the second jurisdictional defence (as set out in para [11] above), namely that the High Court was precluded from hearing the respondent's action because of the provisions of s 35(1) of the Compensation for Occupational Injuries and Diseases Act 130 of 1993, which reads as follows:

'(1) No action shall lie by an employee … for the recovery of damages in respect of any occupational injury or disease resulting in the disablement … of such employee against such employee's employer, and no liability for compensation on the part of such employer shall

arise save under the provisions of this Act in respect of such disablement …'

[32] The trial court's first reason for rejecting this defence was based on a finding that the Act required a particular incident constituting an 'accident' to have taken place before compensation would be payable thereunder and that it made no provision for the consequences of prolonged harassment. Counsel submitted that this was incorrect because the Act was not confined to providing claims for compensation for injuries sustained as a result of accidents but also for occupational diseases, many of which can be contracted as a result of prolonged exposure to what he called work-related hazards (arbeidsgevare). In this regard he referred to s 65(1) of the Act, which as far as is material, reads as follows:

'(1) Subject to the provisions of this Chapter, an employee shall be entitled to the compensation provided for and prescribed in this Act if it is proved to the satisfaction of the Director-General –

(a) that the employee has contracted a disease mentioned in the first column of Schedule 3 and that such disease has arisen out of and in the course of his or her employment;

or

(b) that the employee has contracted a disease other than a disease contemplated in paragraph *(a)* and that such disease has arisen out of and in the course of his or her employment.'

In terms of s 66 it is presumed, unless the contrary is proved, that if an employee who has contracted an occupational disease listed in the first column of Schedule 3 was employed in any work mentioned in the second column of the Schedule, the disease so contracted arose out of and in the course of his employment. Thus, to give an example, a hearing impairment suffered by an employee engaged in work involving exposure to excessive noise will be presumed to have arisen out of and in the course of the employment of the employee concerned.

[33] Post-traumatic stress syndrome is not a disease listed in Schedule 3, but, by virtue of the provisions of s 65(1)*(b)* of the Act, if the respondent contracted it in circumstances arising 'out of or in the course of her employment', she would be entitled to compensation under the Act and would not be able to institute a civil action against Tydskrifte.

[34] Mr *Burger* accordingly submitted that, if the respondent's condition is correctly to be diagnosed as post-traumatic stress syndrome and she contracted it in her workplace as a result of exposure to sexual harassment by the second appellant, she would be entitled to compensation under s 65 of the Act and would be precluded from instituting a common law action for damages against Tydskrifte.

SUBMISSIONS ON BEHALF OF THE SECOND APPELLANT

[35] Mr *Heunis,* who appeared on behalf of the second appellant, submitted that the trial court erred in finding that it had been proved that the second appellant had sexually harassed the respondent. He associated himself with Mr *Burger's* submission that the trial judge had been guilty of a misdirection in the summary manner in which he had rejected the evidence of the witness Africa. He contended that Africa had been a good witness who corroborated the second appellant on the pivotal factual issue in the case, namely whether the second appellant had sexually harassed the respondent or was involved in a consensual flirtatious romantic relationship with her. He conceded that the second appellant had not been a satisfactory witness but said that the same applied to the respondent who had given untruthful and dishonest evidence on various points. As both of the two principal role players were unsatisfactory, the evidence of Africa became particularly important. On his evidence (the important aspects of which have been summarised in para [20] above), there was no question of harassment: the respondent was clearly involved in a consensual relationship with the second appellant. He submitted further that she was a single witness in respect of many of the incidents relied on.

[36] Furthermore, there was a pattern discernible in her conduct in that she had had an office affair previously with the main person for whom she performed secretarial duties, namely Barend van As (at that time the production manager of Tydskrifte). This affair had terminated some months before her relationship with the second appellant began. He also argued that the trial court had erred in finding that the flat incident had caused the respondent to lay a charge against the second appellant. He referred in this regard to the evidence given by Anchen Pienaar, a social worker employed at the time by the Naspers group, who testified that the respondent had told her that, before she decided to go to Ulrich Stander (the labour law consultant employed by Naspers) to report what had happened, there had been a telephone call on either the Thursday or the Friday following on the flat incident as a result of which she had had to tell her husband of what had allegedly happened at work. This, and not the flat incident, he suggested, had precipitated her report to Stander.

[37] Mr *Heunis* submitted that it was significant that, after the so-called Landbousaal incident, the respondent burst into tears only when Nicolene Johnson commented on lipstick marks on the second appellant's collar in the respondent's presence, not when she first came back to her workstation after being in the Landbou

room. This was not consistent with the allegation of sexual harassment. The scratchmarks on the second appellant's back, which Nicolene Johnson saw, were not necessarily corroborative of the respondent's story.

[38] He contended that the two female witnesses called to corroborate the respondent by telling of a pattern of similar conduct on the part of the second appellant in the past had not succeeded in proving such similar conduct. Thus, for example, Elsabe van den Berg, who had worked with the second appellant at the premises of Nasionale Boekdrukkery in Goodwood/Parow in 1996, testified that the second respondent had sexually harassed her, essentially by making crude suggestions to her and using sexually offensive language. In addition, Lieza Blom had conceded in cross-examination that it was possible that she had been unduly sensitive regarding proposals and suggestions put to her by the second appellant (as a result of previous experiences she had had at Naspers).

[39] As far as the evidence of Nicolene Johnson was concerned, important aspects in her evidence did not appear from her original written statement or her evidence at the disciplinary enquiry. Mr *Heunis* submitted that her evidence had to be approached with great caution as it was clear that she harboured a grudge against

the first appellant because she thought that she had been retrenched as a result of testifying at the disciplinary proceedings against the second appellant, despite the fact that she had been promised that the company would look after her and that she would not lose her job.

SUBMISSIONS ON BEHALF OF THE RESPONDENT

[40] Mr *Melunsky* submitted that the trial court had correctly found that the second appellant had sexually harassed the respondent and that she suffered severe psychological sequelae as a result. It was not necessary for the court to find that the respondent suffered from post-traumatic stress disorder in order to impose liability on the appellants: the name to be given to her condition was immaterial for the purposes of a finding that the appellants were liable.

[41] **T**he trial court correctly found, so he contended, that the first appellant was vicariously liable for the acts of sexual harassment found to have been committed by the second appellant. In the alternative he contended that it had been shown that Tydskrifte was under a legal obligation to ensure safe working conditions at its workplace. That obligation included a duty to protect the respondent from sexual harassment. Various persons who were on the managerial staff of Tydskrifte were aware of this sexual

harassment. In breach of their duty to prevent a recurrence thereof, they negligently remained passive and permitted the harassment to continue.

[42] According to counsel, the trial court had correctly rejected the jurisdictional defences raised by the first appellant.

DISCUSSION:

WAS THE RESPONDENT SEXUALLY HARASSED BY THE SECOND APPELLANT?

[43] It is convenient to deal first with the issue as to whether the respondent succeeded in proving that she was sexually harassed by the second appellant.

[44] In what follows I am prepared to assume, without deciding, that the trial judge may well have misdirected himself in regard to the manner in which he approached the evidence of the witness Africa. I shall accordingly consider whether this court can be satisfied on the record of the evidence led that the second appellant was indeed guilty of sexual harassment of the respondent.

[45] I do not think that the evidence of Leon Africa can be accepted. On two important aspects, his evidence, if accepted, would corroborate that of the second appellant and undermine that of the respondent on the crucial question as to whether they had a

romantic relationship or whether he was guilty of sexually harassing her. The first item of his evidence to which I refer is his statement that on one occasion he entered the office which he shared with the second appellant, the door of which was half open, and found the second appellant and the respondent embracing and kissing one another. The second item was his statement that he saw a note with the words ‘Ek het jou lief’, apparently signed by the respondent with a drawing of the sun followed by the letters ‘ja’. This note, which the second appellant kept in a drawer he shared with the witness, was written on a 9cmx9cm yellow sticker.

[46] The difficulty with both these items of evidence is that they are directly in conflict with the evidence of the second appellant. As far as the kissing incident is concerned, the second appellant said that he and the respondent always closed the door of the office before they kissed. As regards the alleged note, the second appellant said it was written on a paper serviette. The conflicts between the second appellant and Africa on these and other issues are of such a nature as to satisfy me that Africa’s evidence must be rejected.

[47] As will be seen from what follows I do not rely on the evidence of Elsabe van der Berg and Lieza Blom that the second appellant was also guilty of sexually harassing them. I am

prepared to assume that Mr *Heunis's* submission that it would not be appropriate to do so may well be correct. I have also not relied on the evidence of Nicolene Johnson. Here also I am prepared to assume that Mr *Heunis's* argument in regard to her evidence should be accepted.

[48] It is true that, in respect of the specific incidents referred to, we are largely dependent on the testimony of the two main protagonists, both of whom were in certain respects unsatisfactory witnesses. It seems to me, however, that there are certain aspects of the evidence, which the second appellant either admits or cannot deny, which indicate unmistakeably where the truth lies. They enable us, as it were, to ascertain in which direction the current is flowing and thus to determine, in my view, with a fair degree of accuracy whether or not there was sexual harassment.

[49] The first aspect to which I refer relates to the respondent's assertion that, after the first incident of harassment relied on (the lift incident), he threatened her with a newspaper article about her husband's previous criminal trial. He admitted obtaining the report in question from the Internet and satisfying himself that the respondent, whom he initially did not believe on the point, had been telling him the truth. His evidence that he then downloaded the report from the Internet, held onto it for some time and then

suddenly one day handed it to the respondent in an envelope does not make any sense and is inherently improbable unless, as the respondent says, he was using the report to ‘blackmail’ her into silence about his harassment of her.

[50] It is also significant that the respondent asked Jerome Kalan, a trainee manager in the personnel department, for the Naspers sexual harassment policy at an early stage, ie immediately after the alleged lift incident. This was not denied at the enquiry and Kalan was not called by the second appellant at the trial. In my opinion it can safely be accepted that the respondent did indeed call for the policy at that stage. This was conduct which clearly rebuts any suggestion that her allegations of harassment were a recent fabrication made shortly before the enquiry and is inconsistent with any suggestion that she was not already being harassed at that early stage.

[51] The next aspect to which I wish to refer is the so-called finger biting incident. The second appellant initially said that what happened on this occasion was that he put a sweet in the respondent’s mouth whereupon she bit his finger ‘more in a joking sense’, resulting in what he described as ‘a little gash’, ‘a laughable incident’ which was insignificant and not serious. Later on he conceded that the bite had been down to the bone and was

not ‘just a little gash’. It was something quite serious. When pressed further and confronted with what he had said at the disciplinary enquiry, he conceded the finger biting did not take place as a joke but in the context of an argument but claimed that he could not remember what had happened. His evidence on this issue also points strongly in the direction of harassment rather than flirtation.

[52] Another aspect which, in my view, provided a clear indication as to where the truth lies in this case is the incident in the Landbou room. On the second appellant’s version all that happened in the Landbou room was that he hugged and kissed the respondent with her consent. During the embrace, he said initially, she could have scratched his back. Later he conceded he had indeed been scratched and later still, that it had been an open wound. It had merely happened ‘as part of the kissing’, not as part of a passionate embrace. In my opinion the fact that he cannot deny that he was scratched on the back by her in the Landbou room is a fairly strong indication that her version of the incident is to be believed instead of his. His admission relating to the scratch wounds certainly corroborates her on the point because it is evidence which renders her version more probable and his less probable. I also can understand her initial reluctance to talk about

it and her subsequent embarrassment when it appeared that there was lipstick on his collar. I accordingly do not agree with Mr *Heunis's* argument on this point.

[53] In my view the admissions the second appellant made in regard to the flat incident indicate that, on this aspect of the case as well, the respondent is to be believed that he harassed her on this occasion also. The trial judge was unable to find that the respondent was threatened with a firearm on this occasion. The second appellant admitted that his primary purpose in going to see the flat was not with a view to purchase it but to spend time with the respondent. (In this regard I am satisfied that it is overwhelmingly probable that *her* reason in going there was to show him the flat with a view to his possibly buying it.) His further statement that they had reached the end of their relationship and that he suggested that he make a hotel booking so that they could again spend time together and discuss matters but not to have sexual intercourse is overwhelmingly improbable. Under cross-examination by counsel for the first appellant he said:

'… the hotel issue doesn't necessarily mean that it would have been a sexual relationship, because that never occurred to any one of the parties … That was never, never, ever discussed between the two of us.'

She testified, however, that when he said that all he wanted was one night with her, she said she could not go with him that night because she was menstruating. He then said that he would make a reservation for the place where he would meet her and give it to her. Her statement that she mentioned the fact that she was menstruating as the reason why she could not go with him that night (a statement not challenged in cross-examination) indicates clearly that she got the impression that he was after a sexual encounter. His acceptance of her reason for not coming with him that night and his action in making a hotel reservation for a night, some twelve days thereafter, indicates that her impression as to what he actually wanted was correct.

[54] He conceded that when he got into the respondent's utility vehicle after having been shown the exterior of the flat, she was shivering and tense and that, after he had asked her why this was so, he said that he was not going to do anything to her. This indicates that he himself thought that the reason for her emotional state was fear that he intended doing something to her. He concedes he had brought his firearm with him, that it was in its holster strapped to his right hip, which would have been the side nearest to her as he sat next to her in the passenger's seat. We know that she saw his firearm.

[55] All this evidence established in my view that she thought (a) that he wanted intercourse with her and (b) that he had brought a firearm with him so as to overcome her resistance if she refused. It is true that her further evidence that he drew the firearm from the holster and handed it to her saying ‘well shoot yourself’ cannot be accepted in the absence of corroboration. This notwithstanding, enough of the detail as to what happened that evening emerge from his own evidence and that part of her evidence that was not denied to enable one to find on the probabilities that he indicated to her that he wanted sexual intercourse; that she temporised by pleading that she was having a period; that he agreed to a postponement of their night together, and that she believed that, if she did not agree, he might use his firearm to achieve his purpose. In the circumstances I am satisfied that what the respondent experienced during the so-called flat incident amounted to sexual harassment and was substantially more serious than anything that had preceded it.

DID THE RESPONDENT SUFFER A RECOGNISED PSYCHIATRIC INJURY?

[56] It was common cause the parties that the respondent manifested severe psychiatric harm just after the disciplinary enquiry. All the professional witnesses agreed that she was not

malingering and that she was suffering from a recognised psychiatric disorder. The issue debated between the experts was whether the disorder was correctly diagnosed as post-traumatic stress disorder. All the experts accepted the diagnostic features of this disorder as set out in *DSM-IV* at p 424, as follows:

‘The essential feature of Posttraumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one’s physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate (Criterion A1). The person’s response to the event must involve intense fear, helplessness, or horror (or in children, the response must involve disorganized or agitated behaviour) (Criterion A2). The characteristic symptoms resulting from the exposure to the extreme trauma include persistent reexperiencing of the traumatic event (Criterion B), persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (Criterion C), and persistent symptoms of increased arousal (Criterion D). The full symptom picture must be present for more than 1 month (Criterion E), and the disturbance must cause clinically significant distress or impairment in social, occupational, or other important areas of functioning (Criterion F).’

[57] It was common cause that Criterion A2 and Criteria B to F were present in the respondent's case. The area of debate related to whether Criterion A1 was present.

[58] Professor Emsley, professor of psychiatry at the University of Stellenbosch and the chairperson of the SA Society of Psychiatrists' task team for disability assessment, originally diagnosed the respondent's condition as post-traumatic stress disorder. However, he subsequently revised his opinion when it was put to him that the respondent's statement to him that a gun was held to her head and an attempt made to rape her was neither consistent with her statement before the disciplinary enquiry, nor with her evidence at the enquiry and during the trial. He regarded incident - she had described it to him - as what he called an 'extreme stressor', which complied with Criterion A1. If, however, that specific traumatic event had not occurred, the most likely diagnosis would in his opinion have been an adjustment disorder.

[59] In my view the traumatic incident which I have found did occur *was* sufficiently severe, on the probabilities, to have complied with Criterion A1. In this regard it is important to bear in mind the distinction between the scientific and the judicial measures of proof highlighted by the House of Lords in *Dingley v The Chief Constable, Strathclyde Police* 2000 SC (HL) 77 at 89D-

E (cited with approval by this court in *Michael v Linksfield Park Clinic (Pty) Ltd* 2001 (3) SA 1188 (SCA) para [40] at 1201E-H). And to be fair to Professor Emsley, I did not understand him to testify otherwise.

[60] On this part of the case I agree with Mr *Burger's* submission that, but for the flat incident, the respondent would not have sustained post-traumatic stress disorder or any other psychiatric injury qualifying for legal redress within the rule as expounded by this court in *Barnard v Santam Bpk, supra.* In my view the respondent's own evidence, as summarised in para [22] above, provides substantial support for such a finding. It may be that the flat incident constituted the proverbial 'last straw' that broke the camel's back but, be that as it may, in my view what ultimately caused the respondent's injury and therefore her damages in this case was the sexual harassment which took place during the flat incident.

[61] It follows from what I have said so far that the second appellant's appeal must be dismissed with costs.

THE LIABILITY OF THE FIRST APPELLANT

[62] The next question to be considered is whether the first appellant should have been held liable, jointly and severally with

the second appellant, to compensate the respondent for the damage she suffered as a result of the harassment.

VICARIOUS LIABILITY

[63] In view of the fact that I am satisfied that the respondent succeeded in establishing the second cause of action on which she relied against Tydskrifte, it is unnecessary for me to deal with Mr *Burger's* submissions that Nel J's finding of vicarious liability against the first appellant was inappropriate.

BREACH OF LEGAL DUTY

[64] The respondent's second cause of action, it will be recalled, was a negligent breach by Tydskrifte of a legal duty to its employees to create and maintain a working environment in which, amongst other things, its employees were not sexually harassed by other employees in their working environment.

[65] It is well settled that an employer owes a common law duty to its employees to take reasonable care for their safety (see, eg, *Van Deventer v Workman's Compensation Commissioner* 1962 (4) SA 28 (T) at 31B-C and *Vigario v Afrox Ltd* 1996 (3) SA 450 (W) at 463F-I). This duty cannot in my view be confined to an obligation to take reasonable steps to protect them from *physical* harm caused by what may be called *physical* hazards. It must also in appropriate circumstances include a duty to protect them from

psychological harm caused, for example, by sexual harassment by co-employees.

[66] The test to be applied in this regard was laid down by this court in *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A-B, where Rumpff CJ said:

'Dit skyn of dié stadium van ontwikkeling bereik is waarin 'n late as onregmatige gedrag beskou word ook wanneer die omstandighede van die geval van so 'n aard is dat die late nie alleen morele verontwaardiging ontlok nie maar ook dat die regsoortuiging van die gemeenskap verlang dat die late as onregmatig beskou behoort te word en dat die gelede skade vergoed behoort te word deur die persoon wat nagelaat het om daadwerklik op te tree. Om te bepaal of daar onregmatigheid is, gaan dit, in 'n gegewe geval van late, dus nie oor die gebruiklike "nalatigheid" van die *bonus paterfamilias* nie, maar oor die vraag of, na aanleiding van al die feite, daar 'n regsplig was om redelik op te tree.'

[67] In determining the legal convictions of the community in regard to sexual harassment in the workplace it is appropriate to have regard to what was said on the topic by De Kock M in *J v M Ltd* (1989) 10 ILJ 755 (IC) at 757G-758D:

'Unwanted sexual advances in the employment sphere are not a rare occurrence. It appears from the article referred to above [Mowatt 'Sexual Harassment – New Remedy for an Old Wrong' (1986) 7 *ILJ* 637] that studies in America and England have shown that close to 50% of working women have received such advances, that is, sexual harassment in the wider view. It

also appears that a survey of 100 women in Johannesburg suggests that some 63% had received unwelcome sexual advances from a male in the office. There is no evidence that the percentage is in fact that high but common experience shows that sexual harassment is by no means uncommon.

Sexual harassment, whether it be between members of the opposite sex or of the same sex is, despite the fact that it is often a subject for uncouth jokes, a serious matter which does require attention from employers. Sexual harassment, depending on the form it takes, will violate that right to integrity of body and personality which belongs to every person and which is protected in our legal system both criminally and civilly. An employer undoubtedly has a duty to ensure that its employees are not subjected to this form of violation within the work-place. The victims of harassment find it embarrassing and humiliating. It creates an intimidating, hostile and offensive work environment. Work performance may suffer and career commitment may be lowered. It is indeed not uncommon for employees to resign rather than subject themselves to further sexual harassment. The psychological effect on sensitive and immature employees, both male and female, can be severe, substantially affecting the emotional and psychological well-being of the person involved. Inferiors who are subjected to sexual harassment by their superiors in the employment hierarchy are placed in an invidious position. How should they cope with the situation? It is difficult enough for a young girl to deal with advances from a man who is old enough to be her father. When she has to do so in an atmosphere where rejection of advances may lead to dismissal, lost

promotions, inadequate pay rises, etc – what is referred to as tangible benefits in American Law – her position is unenviable.

Fear of the consequences of complaining to higher authority whether the complaint is made by the victim or a friend, often compels the victim to suffer in silence. That sexual harassment of an employee in an inferior position is despicable is only fully realized when one has to comfort a young girl crying her heart out in a quiet corner.'

[68] It is clear in my opinion that the legal convictions of the community require an employer to take reasonable steps to prevent sexual harassment of its employees in the workplace and to be obliged to compensate the victim for harm caused thereby should it negligently fail to do so. I do not think that the fact that the legislature has enacted legislation providing a statutory remedy for unfair labour practices involving sexual harassment justifies a holding that, absent the statutory remedy (which presumably was intended to be quicker, cheaper and more convenient than the common law remedy), the common law is defective in failing to provide a remedy in a situation which cries out for one.

[69] Nor do I think that the argument based on the fact that there was a contractual relationship between the respondent and Tydskrifte can alter the position. There are many instances where the courts have recognised that there can be a concurrence of delictual and contractual actions arising from the same set of facts:

see, eg, *Van Wyk v Lewis* 1924 AD 438 and *Lillicrap, Wassenaar and Partners v Pilkington Brothers (SA) Pty Ltd* 1985 (1) SA 475 (A) at 496D-I.

[70] I also am of the view that the first appellant's attempt to rely on the *Lillicrap* decision in this matter cannot avail it. In that case an exception was allowed to the respondent's delictual claim because the infringement of duty relied on was an infringement of the appellant's contractual duty to perform specific professional work with due diligence (see the judgment of EM Grosskopf AJA at 499D-E), it not being contended that the appellant would have been under a duty to the respondent to exercise diligence if no contract had been concluded (at 499A-B). (See also *FF Holtzhausen v Absa Bank,* an unreported judgment of this Court delivered on 17 September 2004.) In the present case I am satisfied that the duty allegedly breached in this case was not dependent upon any specific term of the contract of employment between Tydskrifte and the respondent, whether or not supplemented by legislative enactment.

[71] The next question to be considered is whether a negligent breach of that duty by Tydskrifte has been established. In this regard I agree with counsel for the first appellant that, on this part of the case, the respondent had to show a failure by Tydskrifte to

take reasonable and practicable steps to prevent the sexual harassment of its employees. I do not agree, however, that the respondent's alleged refusal to lay a charge or even make use of the grievance procedure against the second appellant precluded Tydskrifte from preventing her from being harassed. In my opinion Van As, to whom the respondent had at a very early stage complained of her harassment at the hands of the second appellant, could and should have told Werner Wager (the then chief manager of Tydskrifte) what the respondent had reported to him and that (according to Van As) she had refused to lay a charge or use the grievance procedure and had said that she would deny it if called upon to substantiate the allegations. The key point was that, despite the respondent's attitude in this regard, Van As had no reason *not* to believe that the second appellant was harassing her – on the contrary, according to the evidence - and should have realised (even if he actually did not) that her reluctance to take the matter further in no way cast doubt upon the genuineness of her complaints. In the circumstances his failure to deal with the matter when the respondent reported it to him was culpable. He was in a managerial position and Tydskrifte, his employer, was clearly vicariously liable for his failure to act in this regard.

[72] If Van As had acted earlier in the way I have suggested I am satisfied that Wager should (and on the probabilities would) at least have informed the second appellant that his conduct *vis-à-vis* the respondent had not gone unnoticed and have warned him that, if such conduct persisted, not only his ambition of rising to a senior managerial position in the company would come to nought but there was a very real danger of his being dismissed. I think it overwhelmingly probable, knowing what we do about the personality of the second appellant and his relationship with Wager, that such a warning would in all probability have done the trick and prevented the flat incident from taking place. I have already found that, if the flat incident had not taken place, the respondent would not have suffered the psychological injury on which her claim is based.

[73] In view of my conclusions in respect of the failure by Van As properly to react to the respondent's complaints and the consequences of such failure, it is not necessary to consider whether or not either Lydia Davids (the acting personnel manager of Tydskrifte at the relevant time) or Paul de Bruin (the information technology manager of Tydskrifte and the second appellant's immediate superior at that time) also acted negligently in failing to

take steps timeously to curb the second appellant's conduct vis-à-vis the respondent, as was argued before us by Mr *Melunsky.*

THE FIRST APPELLANT'S JURISDICTIONAL DEFENCES

[74] Because I have found that the respondent has proved a culpable breach of legal duty on the part of Tydskrifte, and have left open the question as to whether the first appellant is vicariously liable for the actions of the second appellant, it is not possible for me to dispose of the two jurisdictional defences on the ground, relied on in part by the trial judge, that the respondent's delictual claim against the first appellant is not excluded by s 157 of Act 66 of 1995 and s 35 of Act 130 of 1993 because she was employed not by the first appellant but by Tydskrifte, and that the first appellant was not able, as it were, to acquire a jurisdictional defence which was not available to Tydskrifte by accepting liability on Tydskrifte's behalf. I do not think, however, that either of the two jurisdictional defences was available to Tydskrifte in this case.

[75] The harassment which forms the subject of the respondent's cause of action occurred before the Employment Equity Act 55 of 1998 came into operation (on 9 August 1999). Sexual harassment in the workplace has since 17 July 1998 been dealt with in the abovementioned *Code of Good Practice on the Handling of Sexual Harassment Cases*, issued by the National Economic,

Development and Labour Council in terms of s 203(1) of Act 66 of 1995. As indicated above, s 203(3) provides that any person interpreting or applying Act 66 of 1995 has to take this code into account.

Item 7(6) of the code reads as follows:

'A victim of sexual assault has the right to press separate criminal and/or civil charges against an alleged perpetrator and the legal rights of the victim are in no way limited by this code.'

While the references to 'civil charges' and 'sexual assault' are not as clear as they might be, I think that one can safely assume that conduct of the kind proved to have been indulged in by the second appellant must be covered by the phrase 'sexual assault' and that by a 'civil charge' is meant a civil action for damages therefor. It is also unlikely that the framers of the code intended a civil claim for damages such as that brought by the respondent to form the subject of the internal procedures set out therein.

[76] As appears from the summary of this defence as pleaded by the first appellant (set out in paras [9] and [29] above), the first appellant relied upon items 2(1)*(a)* and 3 of Schedule 7 to Act 66 of 1995 - which items were then still part of the Schedule - for the contention that the present dispute fell within the exclusive jurisdiction of the Labour Court. Item 3 dealt with disputes about

unfair labour practices, so that a claim brought thereunder for harassment would be based on an allegation that the harassment constituted an unfair labour practice. But, as this court pointed out in *Fedlife Assurance Ltd v Wolfaardt* 2002 (1) SA 49 (SCA) para [27] at 261E-H, a dispute about the *unlawfulness* of an employer's conduct (in that case a dismissal) as opposed to its *unfairness* is not a 'matter' required to be adjudicated by the Labour Court as contemplated by s 157(1) and accordingly the High Court's jurisdiction is not excluded. By parity of reasoning, a delictual claim such as the present will also not be excluded.

[77] It remains for me to deal with the second jurisdictional defence as set out in paras [11] and [31] to [34] above, *viz* that based on s 35(1), read with s 65(1)*(b),* of Act 130 of 1993. In this case, it will be recalled, I have found that the psychological disorder from which the respondent has been suffering was ultimately contracted because of the harassment which occurred during the flat incident. That incident did not occur in the course of the respondent's employment but rather while she was engaged in her own private activity, namely trying to sell her flat to the second appellant. It may well be that employees who contract psychiatric disorders as a result of acts of sexual harassment to which they are subjected in the course of their employment can claim

compensation under s 65 but those are not the facts in this case and I need express no opinion thereon. I am satisfied that the second jurisdictional defence is also without merit.

CONCLUSION AND ORDER

[78] It follows from what I have said that the appeals of both appellants must fail.

[79] The following order is made:

The appeals of both appellants are dismissed with costs.

……
IG FARLAM
JUDGE OF APPEAL

CONCURRING
NAVSA JA
CONRADIE JA
HEHER JA
VAN HEERDEN JA