



MASERUMULE

Corporate Employment Law

THE PEEPING TOM

Determining Misconduct – The Role of Objective Assessment: Credibility and Inconsistencies

Sexual harassment is a form of unfair discrimination based on the grounds of sex, gender and/or sexual orientation. It has been characterised by the Labour Appeal Court as “the most heinous misconduct that plagues a workplace”. In the matter of *Association of Mineworkers obo Bakang v Tshipi Ntle Manganese Mining (Pty) Ltd*¹ (the “Company”) the Labour Court was tasked with reviewing the fairness of Mr Bakang’s (Bakang) dismissal.

Bakang, represented by the Association of Mineworkers and Construction (AMCU) was employed by Tshipi Ntle Manganese Mining (Pty) Ltd from 2027 until his dismissal after a disciplinary hearing where he faced one count of misconduct. The charge read: - Sexual Harassment, non-verbal conduct such as unwelcome gestures and indecent exposure towards a member of an opposite sex in that on 5 November 2019 at approximately 04h45 you peeped through the lady’s bathroom window whilst the lady was getting dressed and you consequently entered the lady’s bathroom without authority.

The complainant had reported for duty on a night in November 2019. In the early hours of the following morning, the complainant and her supervisor went to the ladies’ changing room to bath or shower before knocking off. After showering, the complainant went in front of the mirror to apply lotion. Whilst busy applying lotion and half naked in her underwear, she could see through the mirror that the window behind her was slowly opening, and a person was looking at her.

At this time, the supervisor was inside the toilet. The complainant called for the supervisor three times. At this stage, Bakang entered the changing room where the complainant was still half naked and the supervisor had come out of the toilet. It was the Complainant’s version that Bakang came inside the changing room very relaxed and looked at her with his hand on his cheek, she had also uttered to Bakang to get

out of the room and that she will report the matter. Bakang later tried to call the complainant multiple times and sent her a WhatsApp message apologizing. Bakang was found guilty of the charge and dismissed.

Bakang challenged the fairness of his dismissal and referred an unfair dismissal dispute to the CCMA. The CCMA ruled that the dismissal of Bakang was procedurally and substantively fair, finding that Bakang was not a credible witness. Disenchanted by the CCMA’s award, Bakang took the matter on review to the Labour Court. The grounds for the review application included allegations that the Commissioner committed misconduct and gross irregularity in the conduct of the arbitration proceedings, as well as inexcusable errors of law and that the Commissioner failed to properly evaluate witness credibility and inconsistencies, leading to an unfair ruling.

At the Labour Court, Maphage testified on behalf of the Company that she received a WhatsApp message from the complainant on 5 November 2019 explaining what he had done. Maphage reported the matter to the IR Specialist and confirmed that Bakang admitted to being in the vicinity of the changing room at the time of the incident. The supervisor testified and confirmed that she heard an argument between the complainant and someone outside the change room, whom she recognised as Bakang by his voice. She testified that the window of the changing room was slightly open, and when they exited the changing room, Bakang was standing outside.

It was Bakang’s version that during the early hours of the 5th of November 2019, he went past the changing room and as he walked past the window, he heard someone inside the changing room screaming. He then rushed to the door of the changing room to give assistance. When he arrived at the door the complainant told him that she wanted to see who the person was so that she could report. Bakang testified further that

¹ (JR1045/21) [2025] ZALCJHB 30

he did not see the complainant inside the changing room, nor did he see the supervisor. He also denied that he looked through the window because of the height of the window, stating that it was only possible when he climbed on something. It was also Bakang's testimony that it was not possible to open the window of the changing room from outside unless the window is slightly open. Finally, according to Bakang, the windows of the changing room are always closed because it is where people shower and change.

In a statement that was read at the CCMA proceedings, Bakang claimed that the complainant called him. Bakang also said that he was passing in front of the changing room and heard a person screaming. Furthermore, he claimed not to have spoken to the complainant whilst he was standing outside the door of the changing room. According to the supervisor, there was an argument between the complainant and Bakang which she heard whilst she was inside the toilet. The supervisor also recognised Bakang by his voice and when they emerged from the changing room, Bakang was still standing outside. Bakang admitted to being near the changing room at the time of the incident and trying to call the complainant afterward, including sending a message asking for forgiveness.

Bakang had the following challenges:-

- His statement and oral evidence were contradictory;
- His stance showed that he had been back to the scene of the incident and made up a case in defence.
- He was in denial and showed no remorse.
- He tried repeatedly to contact the complainant after the incident.

The Labour Court held that the Commissioner's finding that Bakang was not a credible witness cannot be faulted. This was clear from his testimony during cross-examination. Bakang was properly found guilty of sexual harassment, and accordingly his review application was dismissed.

Key Takeaways: Objective Assessment & Burden of Proof on a Balance of Probabilities

- Labour Disputes Rely on the Balance of Probabilities – Unlike criminal proceedings, where proof must be beyond a reasonable doubt, labour disputes require decision-makers to

assess which version of events is more probable based on the evidence presented.

- Objective Assessment of Credibility is Key – The Commissioner and the Labour Court objectively evaluated the consistency, logic, and reliability of witness testimony. The complainant's version was found more probable due to consistency, independent corroboration, and the context of the incident.
- Inconsistencies Weaken Credibility – Bakang's contradictory statements (initially saying the complainant called him, then later denying it) significantly undermined his credibility, making his version less probable than the complainant's.
- Assessing Witnesses Requires a Holistic View – The court considered not just what was said, but how it aligned with objective factors like physical settings, conduct after the incident, and logical consistency.

This case reinforces that objective assessments, thorough documentation, and a focus on probabilities are crucial for upholding fair workplace discipline.

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