

COMPLIANCE

# Moonstone Compliance Employment Law Webinar 2022

5 October 2022

Presented by **Joani van Vuuren** and  
**Andrea de Jongh**

# Agenda

Time	Topic	Presenter
10:00 - 10:05	<b>Opening and Welcome</b>	Andrea de Jongh
10:05 – 11:20	<b>The Harassment Code</b>	Joani van Vuuren
11:20 – 12:30	<b>The Restraint of Trade Agreements and Debarment</b>	Andrea de Jongh
	<b>Closing</b>	Andrea de Jongh



# Harassment Code

THE HARASSMENT CODE & EMPLOYER LIABILITY IN TERMS OF SECTION 60 OF THE EMPLOYMENT EQUITY ACT

Joani van Vuuren

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# PRESENTER



**Joani Van Vuuren**

Senior Associate

# SESSION STRUCTURE

01

## LEGISLATIVE FRAMEWORK

Employment Equity Act and the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace

02

## HARASSMENT IN THE WORKPLACE

Harassment policies and the expanded concept of harassment, considering the elements and new forms of harassment

03

## INVESTIGATING HARASSMENT

Employer obligations to investigate allegations of harassment, breaking down the aspects of investigation

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# Legislative framework

# Legislative framework



## Employment Equity Act: Section 60

- Allegation that employee contravenes the EEA at work
- The alleged conduct must **immediately** be brought to the employer's attention

Section 60(1)

Section 60(2)

- If an employer fails to take **necessary steps** and it is proved that employee contravened the EEA – employer is deemed to also have contravened the EEA

Section 60(3)

Section 60(4)

- Employer **must** consult all relevant parties and **must** take the necessary steps to eliminate the alleged conduct and comply with the provisions of the Act
- Employer not liable if it is able to prove that it did all that was **reasonably practicable** to ensure that the employee would not act in contravention of the EEA





## Overview of employers obligations in terms of the Code

### Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace

- Proactive and remedial steps to prevent all forms of harassment in the workplace
- Assess risk of harassment employees may be exposed to while performing their duties as far as reasonably practicable
- Ensure employees are free to raise complaints and do not feel that grievances are ignored or trivialised or fear reprisals
- Ensure customers, suppliers, job applicants are not subjected to harassment by employees
- Attempt to ensure employees are not subjected to harassment by clients, customers, or suppliers
- Implement policies and procedures stating employer's position regarding the prevention, elimination and management of harassment in the workplace
- Implement awareness training initiatives to educate employees at all levels about harassment to reinforce and maintain compliance through ongoing awareness programmes

# Vicarious liability in terms of the Code

- Allegation of harassment brought to the employer's attention employer must:



- Failure to take adequate steps to eliminate harassment as set out above renders employer vicariously liable for the conduct of the employee in terms of section 60 of the EEA, even if the harassment consists of a single incident



# Harassment policies

A vertical image on the left side of the slide shows several white paper cutouts of human figures holding hands, set against a green background. The figures are arranged in a line, with the one in the foreground being the most prominent.

# Harassment policies

## SECTION 60(2) OF EEA

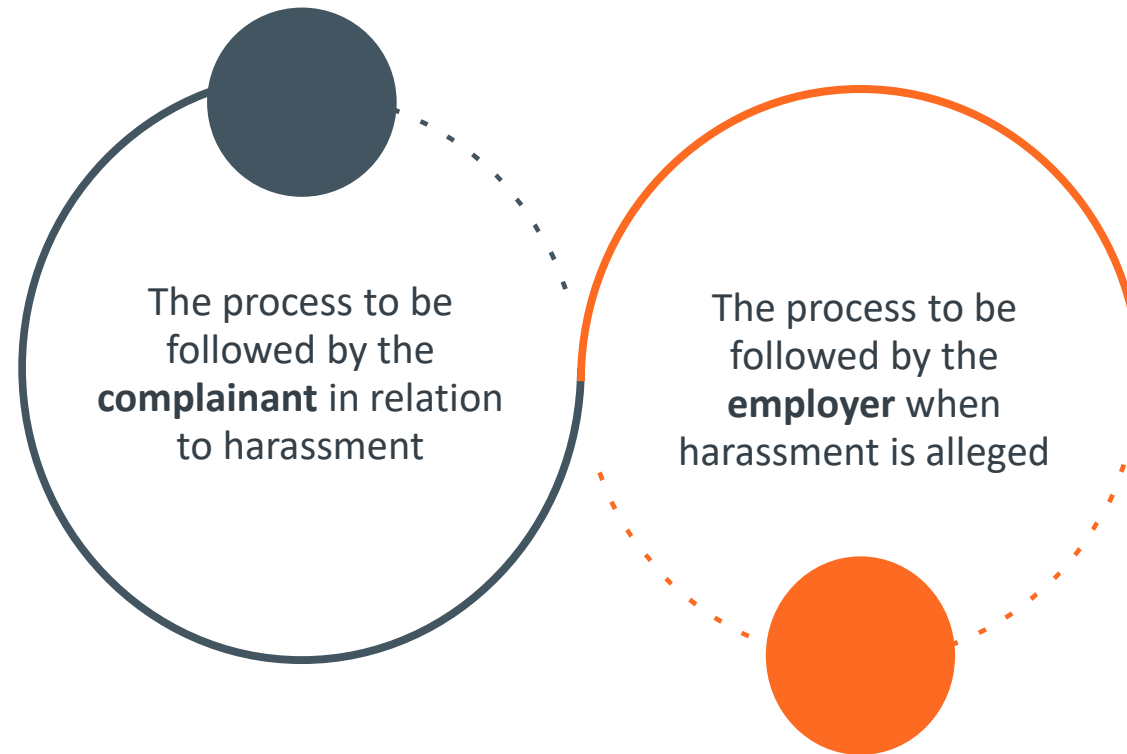
- Employers should **adopt harassment policies** and **communicate** the contents of the policy to show that the employer discharged its obligations

## THE CODE

- Harassment policy should include explicit statements that:
  - harassment, including actual violence, will not be tolerated
  - harassment on prohibited grounds is unfair discrimination which infringes complainant's rights and is a barrier to equality in the workplace
  - harassment on prohibited ground will not be permitted, tolerated or condoned
  - grievances about harassment will be investigated and handled in a confidential manner
  - complainants have right to follow the procedure in the policy and appropriate action must be taken by the employer, and
  - it is a disciplinary offence to victimise or retaliate against an employee who in good faith lodges a grievance about harassment, whether in respect of themselves or another employee.

# Harassment policies

- Procedures to be set out in the policy include:



- Availability of counselling, treatment, care and support programmes should be outlined in the policy



# Elements of harassment

## Unwanted conduct

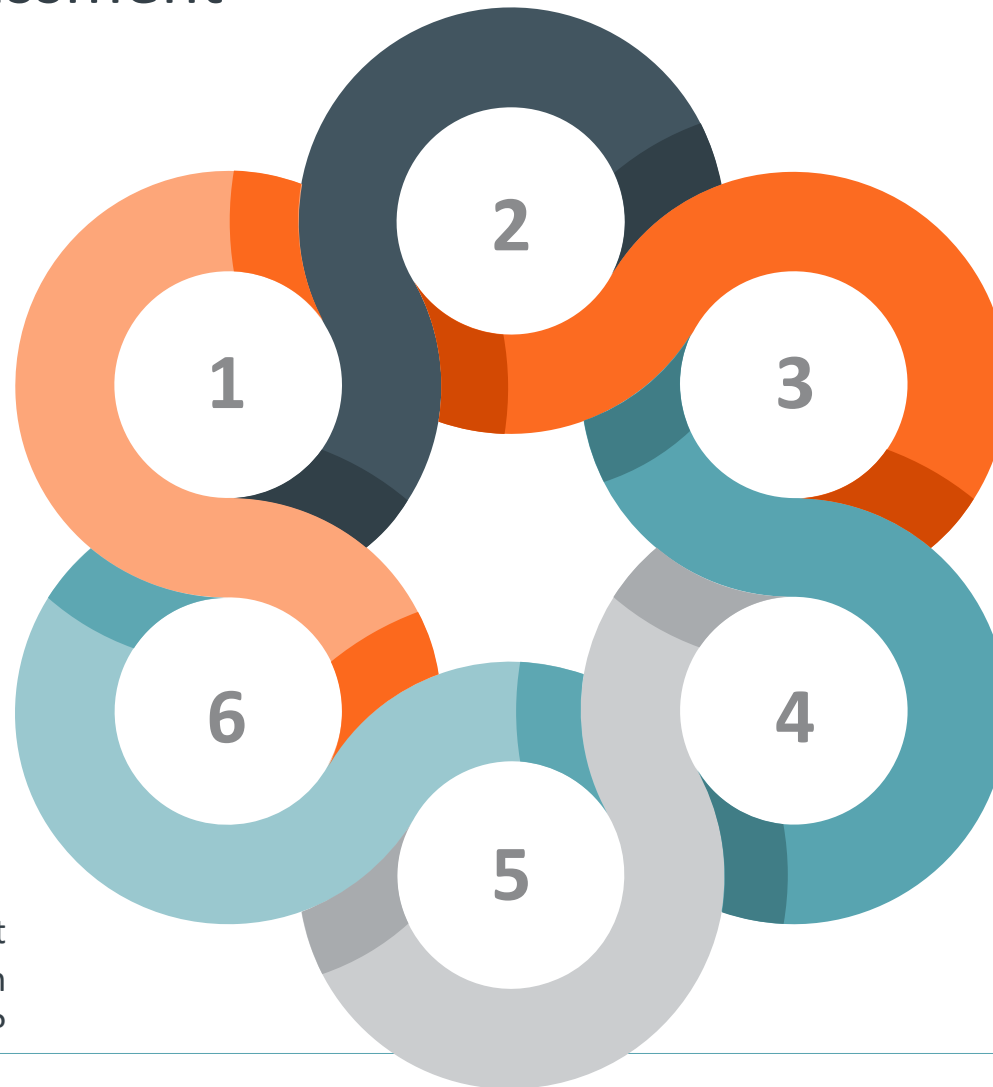
**Impairs dignity**, creates a hostile or intimidating working environment, calculated or induces submission by actual or threatened adverse consequences, and related to a **prohibited ground**

## Single or repeated incidents

Conduct can be **ongoing**, or a **single instance** can amount to harassment

## Victim's perception

Is the complainant's perception consistent with views of a **reasonable person** in complainant's situation?



## Communicated

Employee can **verbally** or **non-verbally** communicate conduct is **unwelcome** in a **direct** or **indirect** manner

## Perpetrator's knowledge

Even if the victim does not communicate, conduct still amounts to harassment if the perpetrator **knew or should have known** that the conduct is generally considered to be unacceptable

## Impact & intention

Harassment assessed on the impact on the complainant, the intention or state of mind of the perpetrator is **not** necessary to establish harassment

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# Important factors to establish harassment

Context of the harassment

Circumstances of the complainant

Impact on the complainant

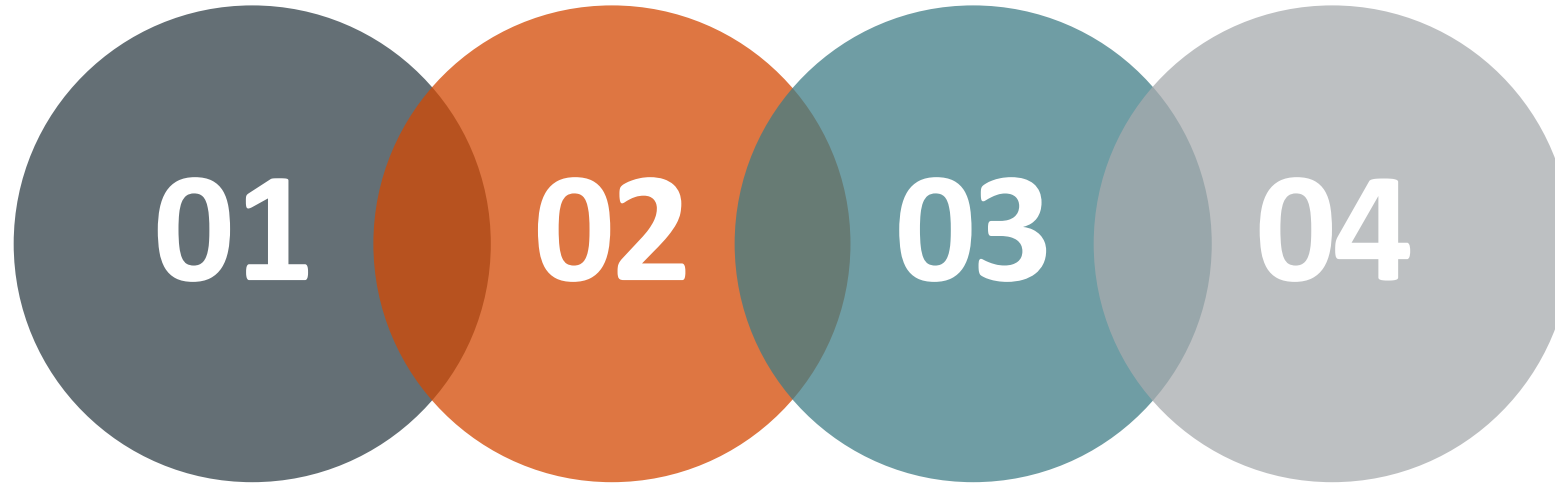
Respective positions of perpetrator and complainant





# Types of harassment

# Sexual Harassment



- Unwanted conduct or unacceptable conduct of a sexual nature based on sex, gender or sexual orientation
- Communicate verbally or non-verbally that conduct is unwanted
- Previous consensual participation does not mean it continues to be acceptable
- Communication that conduct is unwanted is not necessary if perpetrator ought to have known it could be regarded as unwanted

# Racial, Ethnic or Social Origin Harassment

- Racial harassment is where a person is subjected to physical, verbal or non-verbal conduct or any other conduct based on race which undermines their dignity or which creates an intimidating, hostile working environment for the recipient
- Racist language: is it reasonably capable of conveying a racist meaning to the reasonable hearer?

## The Test

- Assess objectively, the reaction of a normal or reasonable person in keeping with the values underlying the Constitutional Order
- Assess on a balance of probabilities that conduct was related to race, ethnic or social origin or a characteristic associated, or assumed to be associated with such a group
- Explicit racial conduct is assumed to be unwanted conduct

Verbal or non-verbal conduct

Remarks, abusive language or name-calling

Offensive behaviour

Gestures

Cartoons and memes

Innuendos





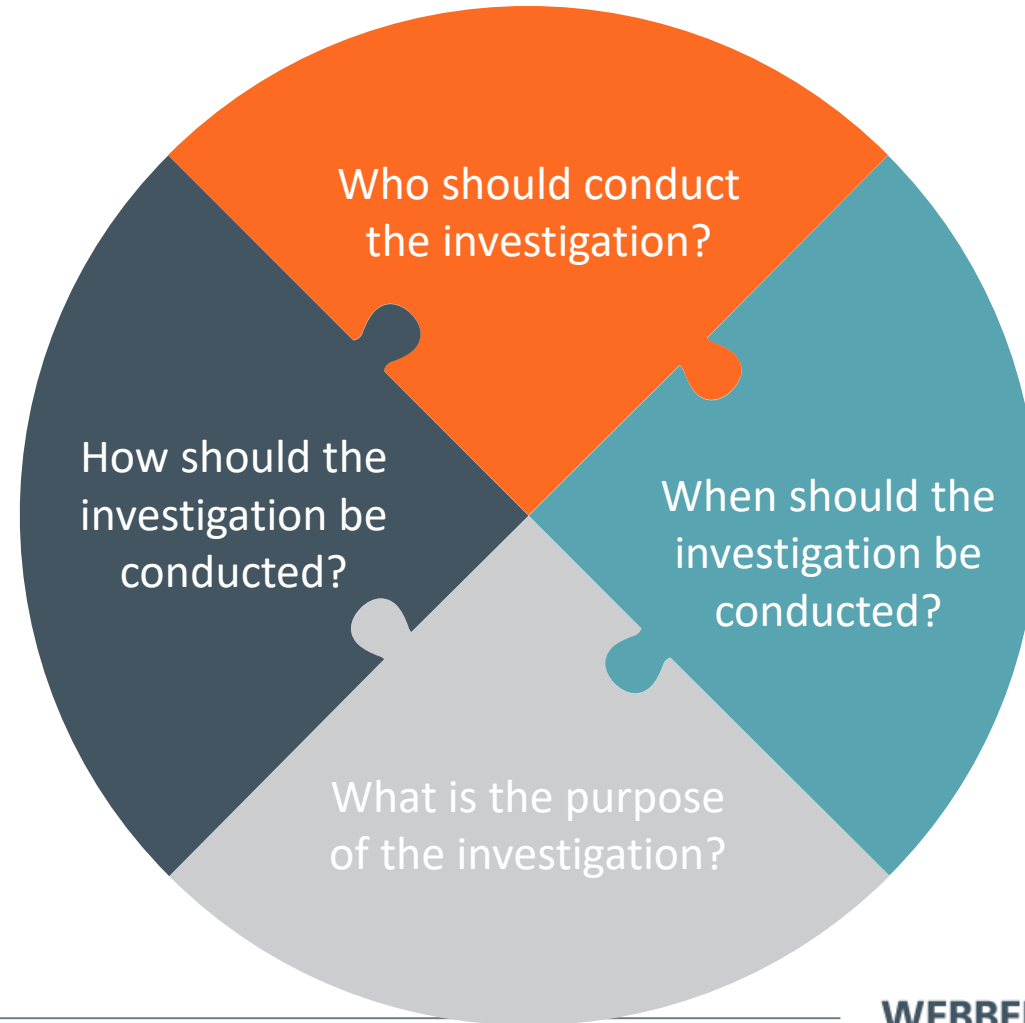
# Investigating claims of harassment



### In terms of Code:

- Employers are obliged to investigate allegations of harassment when an employee reports an alleged incident of harassment or lays a complaint, which has been brought to its attention
- Employers must advise the complainant of the **informal** or **formal** procedures available to deal with the harassment

## Employer obligations to investigate







The Code does not prescribe who should carry out investigations into harassment

## Who should investigate

### Best practice tips on choosing an investigator

- Senior manager
  - More senior than the complainant and alleged perpetrator
- Person with the ability to conduct an unbiased and fair investigation, applying an objective mind
- Someone who has read and understands the Code
- Familiar with the harassment policy and other relevant policies of the employer
- Could be an attorney, preferably not the attorney advising the business on what steps to take after the investigation
- If a third party, someone who is capable of conducting investigations of this nature
- Must write an outcome report



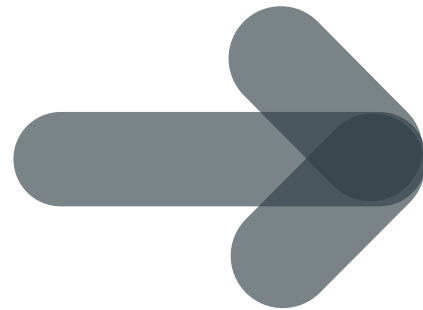
There is no specific time period referred to in the Code.

However, the sequence of steps to be taken by the employer in terms of the Code indicates that the investigation should be conducted as soon as possible.

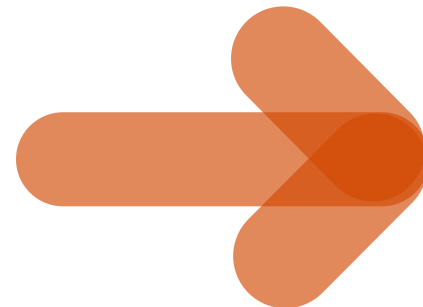
## When to investigate

- No undue delay between receiving a complaint and commencing an investigation
- Dependent on the circumstances of how/when the complaint is received and the circumstances of the complainant
- If time periods are set out in employer policies, such time periods must be adhered to

### Length of the investigation:



should be sufficient to obtain all the evidence and provide an outcome report



Investigations should not be protracted



Conducting an investigation assists employers **discharge their obligations** in terms of section 60 of the EEA and ultimately **avoid vicarious liability**

## The purpose of an investigation

- **Determine** whether there is **substance** to an allegation of harassment that requires further steps to be taken
- Collect and collate **evidence** about the complaint
- **Outcome** of the investigation used to advise the complainant about the informal and formal **procedures** set out in the Code or contained in the employer's policy

Not the purpose to come to a final conclusion as the evidence needs to be tested

Fair procedure is a  
fundamental tenet of  
workplace procedures



## How to conduct an investigation

- Complainant and alleged perpetrator to be treated even-handedly and appropriately
- Investigation must be fairly conducted in an unbiased way
- Interview the complainant
  - Ask **open** questions, not specific questions
  - Listen to the complainant's story
  - Record the complainant's version
  - Interview should not take the form of an interrogation/cross-examination
- Interview the alleged perpetrator
  - Right to respond to the allegations
  - Right to be provided with all information in order to respond to the allegations
  - Interview not take form of interrogation/cross-examination
- Investigation to be conducted in a **confidential manner**: ensure identities of persons involved are kept confidential

# How to conduct an investigation

- Interview relevant witnesses & review relevant documents
  - Need not be every witness or document suggested by complainant or alleged perpetrator
  - Only those with information that may impact on the findings that confirm or undermine the allegations
- Do an *in loco* inspection, if needed
- The fact that there are no direct witnesses does not mean a *prima facie* view cannot be formed
- Investigator prepares a report, recommendation, outcome to employer
- Standard to be applied is on a **balance of probabilities**

*Shoprite Checkers (Pty) Ltd v JL & Others*  
*[2021] JOL 52662 (LC)*

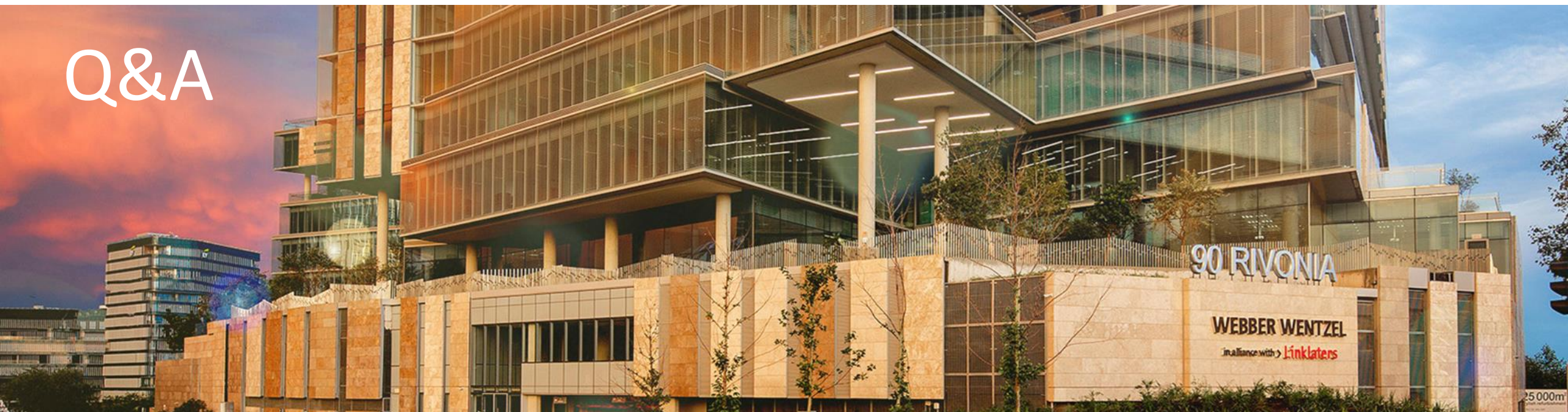


**JL, a salesclerk, and KB, her manager are working late one evening:**

- JL claimed KB slapped her on her left buttock and giggled
- KB went home after working late, JL spoke to another salesclerk, S, and told her what happened
- JL raised a grievance the next day to VDS, the Regional General Manager, claiming KB slapped her on her private parts in the office
- VDS appoints De Villiers, Regional Personnel Manager, to investigate
- De Villiers interviews JL and KB and other potential witnesses
- De Villiers' preliminary investigation concludes no witness to confirm JL's allegations
- KB underwent a polygraph test which showed no deception when he denied that he had touched JL's "private parts"

- No clear evidence proving KB guilty
- Based on polygraph, JL must prove she is not making a false allegation against KB
- The employer suspends JL
- JL was asked to do a polygraph, and the polygraph showed her responses were deceptive
- JL called to a disciplinary hearing for making false allegation – resigned by giving notice and claimed constructive dismissal

# Q&A



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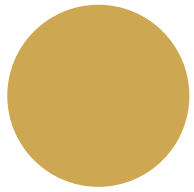
COMPLIANCE

# **Moonstone Compliance Employment Law Webinar 2022**

Restraint of Trade Agreements and  
Debarment in terms of FAIS or FSRA –  
Practical considerations

**Andrea de Jongh**

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# CONTEXT

- Debunking the myths of a Restraint of Trade Agreement.
- Understanding the relevance of COVID-19
- Understanding how and when Item 8(1) of the Code of Good Practice regarding Dismissal as per Schedule 8 of the Labour Relations Act (as amended) becomes relevant.
- When to debar in terms of FAIS vs FSRA.
- Understanding the Substantive- and Procedural Fairness Requirements of a Debarment.



# LEARNINGS FOR TODAY

- Why is a Restraint of Trade Agreement necessary?
- When are Restraint of Trade Agreements relevant?
- When to rather consider Confidentiality/Non-Disclosure Agreements.
- Are Restraint of Trade Agreements enforceable?
- Types of restrictive covenants.
- Components of a Restraint of Trade Agreement.
- When to debar ito FAIS vs FSRA.
- Substantive Fairness Requirements of a Debarment ito FAIS.
- Procedural Fairness Requirements of a Debarment ito FAIS.
- Substantive Fairness Requirements of a Debarment ito FSRA.
- Procedural Fairness Requirements of a Debarment ito FSRA.





# LEGISLATIVE FRAMEWORK

- Item 8(1) of the Code of Good Practice regarding Dismissal as per Schedule 8 of the Labour Relations Act (as amended)
- The process under section 14 of the Financial Advisory and Intermediary Services Act, 2002 (FAIS Act) (FAIS debarment)
- The process envisaged by section 153 of the Financial Sector Regulation Act, 2017 (FSR) (FSR debarment).
- **Guidance Note 1 of 2019** on the debarment process in terms of section 14 of the FAIS Act



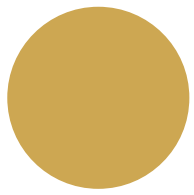
# WHY?

- Not all employment disputes justifying dismissal, amounts to a ground and a reason for debarment
- Results in wasteful expenditure (time and money)



# THREE ELEMENTS OF CONTRACT TO ENFORCE IT AGAINST A 3<sup>RD</sup> PARTY

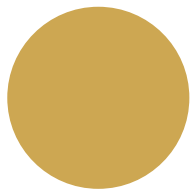
- Offer
- Acceptance
- Consideration (ie, offer of employment at very favourable terms/promotion/restraint bonus in exchange for agreeing to the terms of a restraint of trade clause/non-disclosure agreement)



# QUESTIONS TO CONSIDER

Before thinking about restraining an employee, ask yourself:

1. How long will the restraint of trade last?
2. Does it cover a geographical area in which you do not operate?
3. In what capacity does the restraineed work for the competitor?
4. Is it in the same as when employed by you?
5. Does it cover information that your competitors already have access to?
6. Does it cover information that your competitors can access without the assistance of the restraineed?
7. Can the information you want to protect be protected by way of a confidentiality agreement?
8. Are your client lists readily available to your competitors?
9. Do your clients utilize your services exclusively?
10. Was the client a pre-existing client of the restraineed before you employed him?
10. Is the product you sell unique to your business?
11. Is there potential for it to be sold by a competitor if the restraineed terminates his employment with you?
12. Did the restraineed develop or improve the product for you?
13. Do you seek to protect the product or the reproduction thereof?
14. Do you seek to protect the restraineed's skill?
15. Are you compensating the restraineed for the period of the restraint?
16. Can you restrain an employee's relative (spouse/partner) from working for the competition?
17. What damage will you suffer should the restraineed work for the competitor?
18. Have you taken over a business as a going concern ito s 197? Were the transferred employees subjected to a restraint of trade agreement? Does the restraint of trade agreement form part of the goodwill of the business that was transferred?



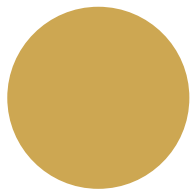
# REGARDING ENFORCEABILITY

## It all turns on reasonableness

In *Basson v Chilwan and others*<sup>25</sup> Nienaber JA identified four questions that should be asked when considering the reasonableness of a restraint:

- (a) Does the one party have an interest that deserves protection after termination of the agreement?
- (b) If so, is that interest threatened by the other party?
- (c) In that case, does such interest weigh qualitatively and quantitatively against the interest of the other party not to be economically inactive and unproductive?
- (d) Is there an aspect of public policy having nothing to do with the relationship between the parties that requires that the restraint be maintained or rejected?

Where the interest of the party sought to be restrained weighs more than the interest to be protected the restraint is unreasonable and consequently unenforceable. The enquiry which is undertaken at the time of enforcement covers a wide field and includes the nature, extent and duration of the restraint and factors peculiar to the parties and their respective bargaining powers and interests.<sup>26</sup>



# DEPARTMENT ITO FAIS FSRA

## Board Notice 194 of 2017

Fit and proper requirements are set out in section 4(1) of BN 194. This section reads:

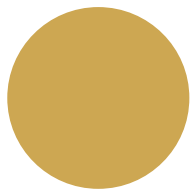
**The fit and proper requirements for each of the categories of FSPs, key individuals and representatives are-**

- (a) personal character qualities of honesty and integrity, as set out in Chapter 2;
- (b) good standing, as set out in Chapter 2;
- (c) competence, as set out in Chapter 3;
- (d) continuous professional development, as set out in Chapter 4;
- (e) operational ability, as set out in Chapter 5; and
- (f) financial soundness, as set out in Chapter 6.

**Representatives and Key Individuals of a juristic representative are obliged to comply with the following fit and proper requirements:**

- (a) personal character qualities of honesty and integrity;
- (b) good standing;
- (c) competence; and
- (d) continuous professional development.

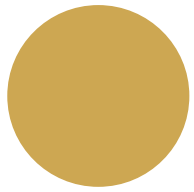




# DEBARMENT ITO FAIS & FSRA

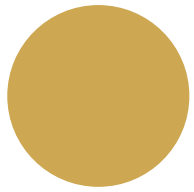
## The grounds and reasons for debarment

- Paragraph 3.2 in the [FSCA FAIS Guidance Note 1 of 2019](#), distinguishes between grounds and reasons. Grounds refer to the factors as set out in section 14(1) of the FAIS Act, while reasons refer to the facts that inform the aforementioned factors. For example:
  - ✓ **A ground for debarment:**
    - A representative may no longer meet fit and proper requirements, more specifically, the continuous professional development requirement.
  - ✓ **The reason for the ground:**
    - In terms of section 33(1)(b) of the Determination of Fit and Proper Requirements for Financial Service Providers (Board Notice 194 of 2017), the Representative is required to maintain a minimum of 12 hours of CPD activities per CPD cycle as the representative is appointed to render financial services in more than one subclass of business within a single class of business.
    - Should the Representative only have concluded 5 hours in the CPD cycle and have failed to submit a reason for the reduction of required hours, the representative will not have met the requirements in section 33(1)(b) and subsequently section 13(2)(a) of the *FAIS Act*.



# DEBARMENT ITO FAIS & FSRA

1. Attached hereto the following documents (section 14(3)(a)(ii)):
  - Your debarment policy; and
  - Your debarment procedure.
2. Confirm that the Representative has the right to make a written submission in response to this Notice in terms of section 14(3)(a)(iii) of the FAIS Act. Specify the date by when they should submit their written submission and to whom and the method of submission.
3. Confirm that section 14 of the FAIS Act does not require an oral hearing to be held in respect of debarment. Confirm if you are of the view that this matter is interrelated with the Representative's employment relationship with you and will therefore be combined with the disciplinary hearing to be held.
4. Highlight that that the Representative's failure to make a submission on or before the date set out in in the Notification, will not prevent you from considering the matter/s and taking a decision regarding debarment in absence of the Representative's response.
5. Inform the Representative that should him/her, in anticipation of the conclusion of these proceedings, attempt to avoid debarment by resigning from your employment with you or terminating his/her mandate with you, you still retain our power to debar him/her.

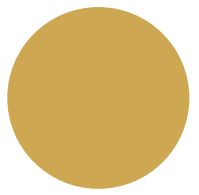


# DEBARMENT DECISION

## Notification of decisions

1. Section 14(3)(c) of the FAIS Act sets out what must be done once a decision is made in terms of section 14(3)(b). Sections 14(3)(c) provides:
2. The FSP must immediately notify the person in writing of-
  - (i) the financial services provider's decision;
  - (ii) the persons' rights in terms of Chapter 15 of the Financial Sector Regulation Act; and
  - (iii) any formal requirements in respect of proceedings for the reconsideration of the decision by the Tribunal.

Take note that the FSP and representative/key individual of a juristic representative may not decide to ignore or undo a debarment decision once it has been taken. A decision may and can only be overturned by a competent court or in terms of such processes as may be specified in legislation as a decision made by the FSP amounts to administrative action.



# DEBARMENT DECISION

## Flowchart discussion

Associated Portfolio Solutions (Pty) Ltd & Another v Basson & Others (554/2019)  
[2020] ZASCA 64 (12 June 2020)

# Closing and Questions

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Andrea de Jongh

# Thank you for your time in viewing this presentation

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**Andrea de Jongh**

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