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**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case Number: EC08/2018

In the matter between:

Zandisile Makhenkana

Complainant

And

The City of Cape Town

Respondent

JUDGMENT DELIVERED ON 12 DECEMBER 2018

BAARTMAN, J

[1] The complainant approached this court for relief after he was dismissed for alleged sexual harassment of a co-worker. The complainant seeks an order that video footage of the incident, if it exists, be made available to him. I deal with the relief in detail below.

- [2] On 14 April 2014, a colleague, Ms B (**B**), accused the complainant of sexual harassment as follows:

‘At approximately 16h15, the Complainant groped [B] at Maitland train station by touching her thigh and buttocks under her dress and uttering the words: “Kudala ndifun ukuba lapha”, which is literally translated as “I have long wanted to be here”.’

- [3] On 16 May 2014, the employer (**the respondent**) charged the complainant with misconduct – breaching its policy on sexual harassment. The disciplinary hearing commenced on 20 May. The complainant, who was represented by a union colleague, denied the charges. His defence was as follows:

‘The applicant summarises his version of events [as follows]:

“Just as I was about to pass the complainant, the wind blew up her dress and I held it and pulled the dress down with the intention to cover her exposed body. She angrily reacted by saying that I must leave her alone. I sensed her anger and apologised and told her that I simply wanted to cover her and then continued on my way.”

- [4] On 11 June 2014, the complainant was found guilty and dismissed. On 12 June 2014, he lodged an internal appeal that was dismissed on 23 July 2014. The complainant, aggrieved by the above outcomes, referred the matter to the Local Government Bargaining Council. Arbitration proceedings, under the auspices of the Bargaining Council, commenced on 29 September 2014. On 9 December 2014, the arbitrator issued an award in which he confirmed the alleged misconduct and found the sanction to be substantively and procedurally fair.
- [5] Undeterred, the complainant approached the Labour Court with an application to review the award. On 11 October 2017, that court dismissed the application as follows:

'I can find no basis on which the relief sought by the applicant can be granted. It is not for this court to interfere with the Arbitrator's finding on credibility...

In any event, the version proffered by the applicant at the arbitration was inherently improbable and his only witness contradicted applicant's version in various respects. Suffice to say that the complainant put on the same dress that she had worn on the day in question at the arbitration, to illustrate that it was not the type of dress that could be blown up by the wind and certainly not above her armpits as alleged by the applicant. It was a snugly fitting denim dress.'

- [6] On 9 April 2018, the complainant turned to the South African Human Rights Commission (**SAHRC**). The following appears from the SAHRC correspondence, dated 21 September 2018:

In terms of your complaint you alleged the following:

- (1) That you were unfairly dismissed based on false charges of sexual harassment laid by a colleague;*
- (2) That the matter was heard by the CCMA and you were not satisfied with the outcome;*
- (3) That you were not satisfied that your employer failed to view possible CCTV footage of the incident as it happened on a train station, which you regard as evidence to prove your innocence;(my emphasis)*
- (4) That you took the decision of the CCMA on Review before the Labour Court;*
- (5) That your application was unsuccessful.*
- (6) That you were represented by an Attorney in the aforementioned proceedings.'*

[7] On 17 September 2018, the complainant informed the SAHRC that he would pursue his quest for a just outcome in this court. Pursuant thereto, the SAHRC closed its file.

[8] In these proceedings, the complainant has articulated the relief sought as follows:

'I want the court to help me get that footage from PRASA premises in Maitland train station to clear my name and expose the truth. The City of Cape Town never investigated these allegations against me. They infringed my rights to a fair trial and they did not bring that evidence against my evidence I presented on that day.'

Discussion

[9] It is apparent from the above that this is a labour dispute. In terms of section 49 of the Employment Equity Act, 1998 (**EEA**) read with section 157(1) of the Labour Relations Act 66 of 1995 (**LRA**), the Labour Court has exclusive jurisdiction in the dispute between the parties. The complainant had exhausted his remedies in terms of the LRA.

[10] The complainant now seeks relief in terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (**PEPUDA**). However, section 5(3) of PEPUDA provides that its provisions do 'not apply to any person to whom and to the extent to which the Employment Equity Act, 1998 (Act No. 55 of 1998) applies.'

[11] In addition, I have considered that the complainant has not produced *prima facie* evidence that he was discriminated against. Nevertheless, due to the litigation history, I have carefully considered the record and am persuaded that the respondent did not discriminate against the complainant. It follows that the provisions of PEPUDA do not find application in this matter.

- [12] Nevertheless, again due to the litigation history, I have considered whether to refer this matter to another forum¹. In addition, to the factors specified in section 20(4) a–e of PEPUDA, I have considered that in previous litigation, the complainant, despite legal representation, did not seek to lead the evidence he now seeks to introduce. To date – 4 years after the event – the complainant is unable to say whether the footage exists. The respondent had instructed counsel in this matter. I have considered that the costs are for the tax payer's account.
- [13] Litigation must come to an end – there should be finality to legal disputes. In the circumstances of this matter, it is not in the interest of justice that another forum revisits this matter. The complainant has had ample opportunity to engage the merits of this matter. There is no indication that he sought to introduce/obtain the video footage in earlier proceedings. His attempt to obtain video footage, which might not exist, through this court is an afterthought and an abuse of the process. I am persuaded that it would be a futile exercise to refer this matter to another forum.
- [14] In addition, the video footage, if it exists, is in the possession of the Passenger Rail Agency of South Africa, which is not a party to these proceedings. Therefore, no order can be made against it. However, the complainant should not see this remark as an invitation to proceed with his exhausting and costly litigation. The respondent, as

¹ Section 20(4) of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000: *'The presiding officer, before making a decision to refer a matter as contemplated in subsection (3), must take all relevant circumstances into account, including the following:*

(a) The personal circumstances of the parties and particularly the complainant;
(b) The physical accessibility of any contemplated alternative forum;
(c) the needs and wishes of parties and particularly the complainant;
(d) The nature of the intended proceedings and whether the outcome of the proceedings- could facilitate the development of judicial precedent and jurisprudence in this area of law;
(e) The views of the appropriate functionary at any contemplated alternative forum.'

indicated above, has incurred costs in the process. The complainant should consider that he risks costs orders against him should he proceed.

[15] I, for the reasons stated above, make the following order:

- (a) The complainant's claim is dismissed;
- (b) No order as to costs.

BAARTMAN J