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REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case No: JS172/2012

In the matter between:

DR AUGUSTA MARIA MAPHUTI LEPHOLLETSE

Applicant

~~and~~And

DEPARTMENT OF EDUCATION: NORTH WEST

PROVINCE

First Respondent

Dr ABE M. SEAKAMELA; N.O.

Second Respondent

Heard: 2 March 2015

Delivered: 3 March 2015

Summary: Application for absolution from the instance at the end of the Applicant's case; Applicant's claim founded on s 60 of the Employment Equity Act; The necessary requirements to hold an employer liable not satisfied; Application for absolution from the instance granted with no order as to costs

JUDGMENT

VOYI, AJ

- [1] This is a matter in which the Applicant seeks to hold the First Respondent, in particular, liable for compensation and damages under s 60 of the Employment Equity Act.¹
- [2] The Applicant's case is that she was subjected to sexual harassment by an employee of the First Respondent and the latter failed to act or take corrective action against the employee concerned.
- [3] The Applicant testified in support of her case and did not call any witnesses. At the close of the Applicant's case, the Respondents launched an application for absolution from the instance.
- [4] It is trite that this court has the power to grant such an application.² In support of the application, the Respondents made reference to the established test for absolution from the instance.³
- [5] This is now my ruling in relation to the Respondents application for absolution from the instance.
- [6] In dealing with the application, it is necessary to refer to the relevant provisions of the EEA pertaining to the Applicant's claim. Under s. 6, the EEA provides as follows:

'(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.

¹ Act No. 55 of 1998 ("the EEA")

² See *Sihlali v South African Broadcasting Corporation Ltd* (2010) 31 ILJ 1477 (LC) at para 4

³ By referring to *inter alia* : *Claude Neon Lights (Pty) Ltd v Daniel* 1976 (4) SA 403 (A); *Gordon Lloyd Page & Associates v Rivera and Another* 2001 (1) SA 88 (SCA); and *Minister of Safety and Security v Madisha and Others* (2009) 30 ILJ 591 (LC)

(2) ...

(3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).

(4) ...

(5) ...'

[7] Of importance to the Applicant's cause of action against the Respondents is s 60 of the EEA, the provisions of which read as follows:

'(1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.

(2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.

(3) If the employer fails to take the necessary steps referred to in subsection (2), and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.

(4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.'

[8] The necessary requirements to be met in order for an employer to be held liable under s 60 of the EEA were articulated by this court in *Mokoena and Another v Garden Art (Pty) Ltd and Another*.⁴ These requirements emanate from the provisions of s 60 itself.

⁴ (2008) 29 ILJ 1196 (LC) at para 40

- [9] In the first place, a contravention of the provisions of the EEA must be brought to the attention of the employer *immediately*. In *Ntsabo v Real Security CC*,⁵ it was held that this requirement would be regarded as having been complied with when the contravention has been brought to the attention of the employer ‘within a reasonable time in the circumstances.’
- [10] Once the conduct alleged to be constituting a contravention of the EEA has been brought to the attention of the employer, the latter is obliged ‘...to consult all relevant parties and [to] take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.’
- [11] It seems to me that an employer would be required to comply with the second part of this requirement once it has been established that there has, indeed, been a contravention of the relevant provision of the EEA. It cannot be expected of an employer to eliminate that which has not been found to exist in the first place.
- [12] The statutory liability under s 60 of the EEA arises only where the employer fails to take the necessary steps referred to in ss 2, and ‘...it is proved that the employee has contravened the relevant provision,...’.
- [13] If an employer fails to ‘...to consult all relevant parties and [to] take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act...’ and it is proved that there was a contravention of the EEA, the deeming provisions under s 60 come into play.
- [14] Having outlined the aforesaid requirements in order for an employer to be held liable, I now turn to the case made out by the Applicant before this court. It was the Applicant’s testimony that only two incidents of sexual harassment were brought to the attention of the First Respondent. The first that was reported allegedly occurred in January 2008 wherein one [Mr M.....]atlaweng, an employee of the First Respondent, conveyed to the Applicant that he would like to visit her in her place of residence.

⁵ (2003) 4 ILJ 2341 (LC) p. 2374D-F

- [15] When the Applicant enquired as to the purpose of the visit, it is alleged [Mr M.....]atlaweng indicated that it was to drink tea. On the face of it, such a request from a colleague does not strike one as having any sexual harassment connotations to it. The Applicant testified, however, that [Mr M.....]atlaweng also stated that she was not living with a man, hence the request to visit her.
- [16] I am, therefore, satisfied that this incident would constitute an act of sexual harassment in a broader sense. However, the incident was only reported to the employer over a year after it had occurred. According to the Applicant, she verbally reported the incidents of sexual harassment to the employer's officials for the first time in February 2009.
- [17] The reporting of the incident was clearly not done *immediately* as required by ss 60(1) of the EEA. Even on a more liberal interpretation of the term *immediately*, the incident of January 2008 was evidently not brought to the attention of the employer within a reasonable time.
- [18] The Applicant is a well-educated individual who holds a PHD qualification. She testified that she was fully aware of the First Respondent's protocol when it comes to the lodging of grievances, in particular.
- [19] The second incident of sexual harassment that was reported to the First Respondent allegedly occurred on 6 December 2008,⁶ while the Applicant was at her place of residence. In relation to this incident, the Applicant testified that she received an 'sms' from [Mr M.....]atlaweng in which it was written '*Porno Images Collection with a nice viewer*'.
- [20] The Applicant testified that she confronted [Mr M.....]atlaweng regarding this 'sms' the next working day they met. In confronting him, the Applicant testified that she asked if he was a 'porno' subscriber and [Mr M.....]atlaweng answered in the affirmative.

⁶ It was pointed out to the Applicant during cross-examination that the 6th of December 2008 was on a Saturday. This was not disputed by the Applicant and I also took judicial notice of this fact.

- [21] There was no clear evidence from the Applicant to the effect that she asked [Mr M.....]atlaweng as to why he had sent her the 'sms' in question. In my view, the Applicant's evidence was simply unsatisfactory in relation to the incident of the 'sms'.
- [22] Even after having confronted the alleged perpetrator of sexual harassment, the Applicant did not immediately report the incident to her employer. According to her evidence, she only did so verbally in February 2009.
- [23] If one considers the Applicant's present stance that she considered the alleged 'sms' to be a serious act of sexual harassment, it cannot be said that she reported the incident to the employer within a reasonable time.
- [24] I am equally not persuaded that the Applicant has '*...proved that [Mr M.....]atlaweng has contravened the relevant provision...*' of the EEA. The alleged 'sms' was not produced as evidence. No explanation was tendered in this regard.
- [25] Only an affidavit purportedly deposed to by the Applicant was tendered in evidence. This affidavit was not signed by the Applicant and it simply recorded the following:
- 'I've seen the message that was send by [Mr M....]atlaweng on the 06-12-2008 to Mrs [L.....]ephelletse that was written porno images collection with nice viewer, but it could not avail the other text below (the 2nd paragraph)'
- [26] There was equally no evidence as to the mobile number from which the 'sms' was received and that such number belonged to [Mr M.....]atlaweng. It is, accordingly, my finding that the Applicant has failed to prove that there was a contravention of any of the provisions of the EEA by an employee of the First Respondent, namely [Mr M.....]atlaweng.
- [27] The Applicant reported the incidents of *inter alia* sexual harassment to the First Respondent in writing on 23 September 2009.

- [28] On the Applicant's own evidence, the First Respondent scheduled various meetings with the relevant parties in November 2009 and after the incidents of sexual harassment were brought to its attention in writing.
- [29] In these meetings, the Applicant and [Mr M.....]atlaweng were interacted with. In the bundle of documents presented by the parties, there is even a letter that was written by [Mr M.....]atlaweng in response to the allegations levelled against him. There was clearly an engagement with the relevant parties concerning the allegations of sexual harassment.
- [30] Following the meetings convened, the Applicant states that she was informed by one [Mrs Y.....]ssel (a senior employee of the First Respondent who was in charge of the formal process to look into the Applicant's grievance) that a decision had been taken not to pursue the matter any further due to lack of evidence.
- [31] It is clear to me that the First Respondent did consult with all the relevant parties after the incidents of sexual harassment were brought to its attention in writing by the Applicant. According to the Applicant, the First Respondent did not pursue the matter any further due to lack of evidence.
- [32] The Applicant also testified that the formal meetings aimed at getting to the bottom of the sexual harassment complaints were instead used as a platform to raise irrelevant issues which had nothing to do with her complaint.
- [33] To me, it was incumbent on the Applicant to, at least, demonstrate that the decision not to pursue the matter any further due to lack of evidence and, consequently, the employer's failure to '*... take the necessary steps to eliminate the alleged conduct ...*' was erroneous or misplaced. This is in view of the fact that it does not follow that simply because a complaint that the provisions of the EEA have been contravened the employer must automatically find that indeed there was such contravention.
- [34] The employer apparently based its decision not to pursue the grievance any further on lack of evidence. The Applicant made no attempt to place before this court the evidence which she had put before the First Respondent

concerning the contravention of the provisions of the EEA. Just as the employer found that there was no evidence of the alleged contravention, so is the position this court finds itself in.

[35] It reiterate that it was necessary for the Applicant to prove that [Mr M.....]atlaweng had contravened the relevant provision of the EEA. In this matter, it was incumbent on the Applicant to make out a *prima facie* case that she was sexually harassed by [Mr M.....]atlaweng. The Applicant has failed in this regard, with the result that the application for absolution from the instance stands to be granted.

[36] The Respondents did not ask for costs against the Applicant should the application be successful. I accordingly grant none.

[37] In the circumstances make the following order:

- (i) The Respondents' application for absolution from the instance is granted.
- (ii) There is no order as to costs.

Voyi

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant: Mr WP Scholtz (Attorney) of Scholtz Attorneys

For the Respondents: Advocate M G Hitge

Instructed by: Office of the State Attorney (Mafikeng)

LABOUR COURT