



REPUBLIC OF SOUTH AFRICA

Not reportable

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Case no: JS 840/2012

In the matter between:

KGAREBE STELLA MATAMBUYE

Plaintiff

and

MEC FOR EDUCATION

First Defendant

DEPT OF EDUCATION GAUTENG

Second Defendant

VUSUMUZI NTSHINGILA

Third Defendant

Heard: 29 and 30 October 2015

Judgment delivered: 2 November 2015

JUDGMENT

VAN NIEKERK J

Introduction

- [1] The plaintiff is employed as an educator at the Aurora Girls High School. She has referred a dispute to this court in terms of the Employment Equity Act (EEA), in which she claims damages and other relief as against the defendants. Her claim flows from acts of sexual harassment committed by the third respondent, a vice-principal at the school. During May 2015, the current proceedings were postponed, when the applicant withdrew her claim against the third respondent when she conceded that the EEA does not contemplate claims for damages against co-employees. When the proceedings resumed last week, the applicant persisted in her claim for damages in the sum of R 1 200 000 as against the second and third respondents. She relies on s 60 of the EEA, a provision that imposes a form of vicarious liability on employers who fail to discharge the obligations established by that section when a claim of harassment is lodged.
- [2] It is common cause that the applicant was sexually harassed by the third respondent at her workplace, that the harassment constituted an act of unfair discrimination, and that the applicant reported the act of harassment to the school principal. The only issue in dispute is whether the first and second respondents (to whom I shall refer collectively as 'the respondents') are liable to the applicant on account of any failure to discharge their obligations in terms of s 60. It was further agreed that the merits of the applicant's claim and quantum would be separated.

Factual background

- [3] It is common cause that the applicant was employed as an educator at the Aurora Girls High School on 1 June 1993, and that she remains so employed. It is also common cause that on 14 February 2012, and again on 16 February 2012, the third respondent sexually harassed the applicant by inappropriately hugging and touching her below the waistline, by uttering the words 'you are sexy' and by grabbing the applicant on her right buttock. It is not disputed that on Friday, 17 February 2012 the applicant reported these incidents to the school principal, Ms Maselwane, who requested her to reduce the complaint to writing. The applicant addressed a written complaint to the principal on Monday, 20 February 2012.
- [4] The applicant testified that she lodged the complaint, in writing, with Maselwane on 20 February 2012. She testified that nothing was done thereafter. The applicant says that she then escalated her complaint to the district office, where she similarly had no response. After receiving no response from either the principal or the district office, the applicant testified that she consulted her lawyers and then referred the matter to the CCMA on 13 August 2012. A conciliation meeting was convened on 14 September 2012, but the respondents did not attend. Prior to the conciliation meeting, the applicant testified that she had had no contact from the respondents. After the conciliation meeting, she referred the matter to this court.
- [5] It was put to the applicant during her evidence-in-chief that the respondents' witnesses would say that on 5 March 2012, she was interviewed by an official who had been appointed to investigate her complaint. The applicant firmly denied that she had been interviewed. This version was indeed put to the applicant during cross-examination, and she again denied that an official from the department (a Mr Mabuza) had visited the school to interview her. When a copy of the investigator's report was put to her, she denied having seen the document until it was shown to her by her attorney when a disciplinary hearing was

ultimately convened during March 2015. Under cross-examination, the applicant also testified that she had received a letter during September 2012 from Zakehlele Nawa, requesting her cooperation concerning the disciplinary enquiry initiated against the third respondent. She acknowledged that the letter was referred to her attorneys, who wrote a response to the Department. The letter reads as follows:

Kindly be informed that this matter has already been lodged at the Labour Court on 20/09/2012 and all issues relating to this matter will be dealt with at the Labour Court level. You are hereby advised to refrain from engaging with our client regarding this matter but instead to deal directly with our office as this would be calculated as undermining the court process.

The applicant testified that during the course of 2015, when the present proceedings were previously postponed, and after discussion with her lawyer, she agreed to cooperate with the respondents and to testify at the third respondent's disciplinary hearing. It is not disputed that the hearing took place and that the third respondent was found guilty and sanctioned.

- [6] A very different version was presented by the respondents' witnesses. Mr KG Mabuza, who at the relevant time was employed in the department's labour unit, testified that on 5 March 2012, and in response to a complaint of sexual harassment by the third respondent referred to the district office by the applicant on 29 February 2012, he attended at the school at which she was employed to conduct an interview with both the applicant and the school principal. He first conducted an interview with the principal. He had received a report from the principal on 1 March 2014 which had been compared with the terms of the complaint lodged by the applicant and it was on the basis of these two documents that the investigation commenced. After the principal had given him her version of events, Mabuza testified that he requested the principal to arrange for him to interview the applicant. This was done. The principal made available the office of one of the other deputy principals, in which Mabuza says that he conducted an interview with the applicant for an hour to 1 hour 15 minutes. After

the interviews, he returned to his office and compiled the report. He recommended that disciplinary proceedings be instituted against the third respondent and arrange to have charges drafted. The within submitted to the head of department for authorisation and the formal institution of disciplinary proceedings. Mabuza recalled that by the beginning of June 2012, the investigation had been completed and disciplinary proceedings through complaints. It was at this stage that Mabuza was engaged in a different post in different capacity. Mabuza recalled that between the time of his initial interview at the school on 5 March 2012 and the point at which he sought authorisation for the institution of formal proceedings against the third respondent, he had met with the applicant on four to five different occasions, at least one of them being a meeting at which her husband attended. Mabuza was asked whether he would recognise the applicant's husband and when requested to acknowledge whether he was present in court, Mabuza pointed out the applicant's instructing attorney.

- [7] Mabuza made specific reference to his written report. The report is dated 5 June 2012 and sets out the background to the complaint received by the district office on 29 February 2012. The report describes the action taken by the Department which included an interview on 5 March 2012 with the principal and the applicant as well as correspondence with the third respondent. The report concluded with the recommendation that charges of misconduct be brought against the third respondent.
- [8] The school principal, Ms Maselwane, testified that during February 2012, the applicant reported to her that she had been sexually harassed by the third respondent. Maselwane requested the applicant to provide a written report, which she did. Maselwane called the third respondent to her office and shedding the letter. He denied having harassed the applicant. Maselwane then called a meeting of both the applicant and the third respondent at which she intended to address the issue. The applicant failed to attend the meeting. After three days, and without any attempt by the applicant to engage with her either as to the report or a failure to attend the meeting, she compiled a report to the district

office. Before she could submit the report, the school was visited by district office officials in response to a complaint lodged at that level by the applicant.

- [9] I have no hesitation in accepting the evidence of the respondents' witnesses. Their evidence is internally consistent and consistent with the documentation referred to during the trial. While there may be a question raised about precisely when Maselwane compiled her report and when it was submitted to the district office, in my view, this is not a material issue. The fact remains that Maselwane took action immediately after receiving the applicant's report and confronted the third respondent with the terms of the complaint. I accept as more probable than not that Maselwane attempted to convene a meeting and that after it became clear to her that the matter was not going to be resolved at school level, she wrote a report to the district office.
- [10] In any event, the district office, when it received the applicant's complaint on 29 February 2012, acted without delay. The respondents' version that interviews were held at the school on 5 March 2012 is the subject of internally consistent evidence – Mabuza testified that at his request, the principal arranged a private interview with the applicant. The terms on which this occurred accord precisely with the principal's evidence, i.e., that she arranged for the interview to take place in the office of another vice-principal, that she called the applicant from her classroom to attend the interview and that a private interview took place between the applicant and Mabuza. This version of events is confirmed by the written report subsequently produced by Mabuza. Stacked against what amounts to a bare denial by the applicant that she was ever interviewed by Mabuza and her assertion that she was never called to a meeting with the principal and the third respondent, the probabilities in favour of the respondent's version are overwhelming. Of some significance too is the fact that Mabuza was able to point to the applicant's husband, whom he had testified had attended at least one of the meetings that followed the initial interviews on 5 March and during which he had furnished progress reports to the applicant.

- [11] Insofar as the demeanour of the witnesses is concerned, both Mabuza and Maselwane gave evidence clearly and confidently. Their recall of events was clear, and their evidence was not subject to serious challenge during the course of cross-examination. On the contrary, the applicant appeared to be a hesitant witness. To the extent that Mr Nkosi, who appeared for the applicant, sought to be dismissive of the obvious shortcomings in the applicant's evidence by appealing to the lengthy period between the date of the incident and the date of the hearing into consequence lapses in memory, this does not remedy the obvious improbability of the applicant's version, especially given the documentary evidence before the court and the pointing out of the applicant's husband.
- [12] I find therefore that contrary to the applicant's version that there was no contact between her and the department after she made a complaint to the principal and that the department had made no attempt to interview her, an investigation was initiated and conducted during which Mabuza held at least four meetings after the initial interview with the applicant on 5 March 2012, at which he reported progress in his investigations and the course of the disciplinary action that he had recommended.
- [13] The question that remains, of course, is whether on the respondents' version, they have discharged their obligations in terms of s 60 of the EEA.

Relevant legal principles

- [14] Sexual harassment is a form of unfair discrimination – see s 6(3) of the EEA. Section 60 of the EEA creates a form of vicarious liability by employers for acts committed by the employees that amount to a contravention of the EEA. Section 60 reads as follows:

60. Liability of employers.

- (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.

[15] Section 60 has been the subject of commentary in a number of judgments delivered by this court. In *Ehlers v Bohler Uddeholm Africa (Pty) Ltd* (2010) 31 ILJ 2383 (LC), the court said the following:

... to succeed in her claim for damages against the respondent in terms of the EEA, she will have to prove that she suffered discrimination at the workplace, she brought it to the attention of the respondent, the respondent knew about it and did not take any reasonable steps to prevent it from happening.... Section 60 of the EEA deals with liability of employers. The respondent will only be liable if the applicant was able to prove that it brought the discriminatory conduct to the attention of the respondent and the respondent failed to take all reasonably practicable steps to ensure that the employees would not act in contravention of the EEA...

[16] In relation particularly to sexual harassment, in *Potgieter v National Commissioner of the SA Police Service and another* (2009) 30 ILJ 1322 (LC) the court said the following:

An employer will be held liable if it is shown in terms of s 60 of the EEA, that:

- (i) the sexual harassment conduct complained of was committed by another employee.
- (ii) It was sexual harassment constituting unfair discrimination.
- (iii) The sexual harassment took place at the workplace.
- (iv) The alleged sexual harassment was immediately brought to the attention of the employer.
- (v) The employer was aware of the incident of sexual harassment.
- (vi) The employer failed to consult all relevant parties, or take the necessary steps to eliminate the conduct will otherwise comply with the provisions of the EEA.
- (vii) The employer failed to take all reasonable and practical measures to ensure that employees did not act in contravention of the EEA.

(See also *Moatshe v Legend the Golf and Safari Resort Operations (Pty) Ltd* [2014] 12 BLLR 1213 (LC).)

- [17] What precisely the nature and extent of an employer's obligations are obviously depends on the facts of each case but, for example, in *Mokoena & another v Garden Art (Pty) Ltd* [2008] 5 BLLR 428 (LC), the court held that where in response to a claim of sexual harassment the employer had issued a written warning and where no further incidents had occurred, the employer was not liable to the employee. Of some significance (if only because this judgment was heavily relied on by the applicant's representative) is the view expressed at paragraph 42 of the judgment, where the court stated where the employer is made aware of an act of sexual harassment but the employer fails to take steps to eliminate it and a further act of harassment takes place, the employer cannot escape liability in terms of section 60. The court went on to say however that where there is a single incident of sexual harassment which is brought to the attention of the employer immediately afterward, an employer will not be liable in terms of s 60. The court went so far as to say that an aggrieved employee may in these circumstances have to consider a different basis to hold the employer liable. In other words, s 60 applies only when an act of sexual harassment has

been brought to the attention of the employer and as a result of the employer's inaction, further acts of harassment occur.

- [18] In *Potgieter v National Commissioner of the SAPS & another* [2009] 2 BLLR 144 (LC), the court dismissed a claim for compensation and damages in circumstances where the perpetrator of an act of sexual harassment against the applicant had been subjected to a disciplinary hearing and fined. The court specifically rejected the contention that the employer was liable because it did not take further steps, including the removal of the perpetrator from the workplace and because the sanction imposed on him was too lenient.
- [19] In *Biggar v City of Johannesburg, Emergency Management Services* [2011] 6 BLLR 577 (LC), a case where there had been sustained racial harassment of the applicant and his family at the hands of co-employees in residential premises provided by the employer, the court held on the facts that the employer had failed to take all necessary steps to eliminate racial abuse that had been perpetrated by some of its employees and that it did not do everything that was reasonably practicable to prevent of the continued harassment.
- [20] The provisions of the Code to make certain recommendations regarding procedures to be followed when sexual harassment (the Code of Good Practice) assumes some significance in relation to employer liability in terms of s 60. In *Ntsabo v Real Security CC* [2004] 1 BLLR 58 (LC), this court made reference to both s 60 and the Code of Good Practice and made particular reference to the educative procedures which the employer is called upon to implement so as to avoid harassment. The court noted however, (at 95 G-H) that these recommendations are '*mere instructive guidelines not to be followed are not binding law*'. The court went on to hold that an employer party could not be penalised only for its failure to implement the Code's recommendations.

Analysis

- [21] If the approach adopted in *Mokoena & another v Garden Art (Pty) Ltd* (supra) were to be applied (i.e. that an employer cannot be liable to a victim of sexual

harassment in terms of s 60 except where the harassment is repeated after the lodging of an initial complaint and then only in circumstances where the employer failed to take reasonable steps to prevent further harassment), the present referral stands to be dismissed on that basis. The applicant was clearly the subject of a serious act of harassment, she reported it and after intervention by her employer and its agents, the act was not repeated.

- [22] If one were to accept (as I do) that the *Garden Art* approach represents an overly narrow reading of s 60 and that an employer may be liable to an employee in terms of that section even for an act of harassment that is the subject of an initial, single report, the principle that appears to emerge from the case law is one that represents a conflation of s 60 (2) and (4). In other words, the requirement that an employer take the necessary steps to eliminate any act of discrimination translates into a requirement that escape liability, the employer must be able to prove that it did all that was reasonably practicable to ensure that the employee would not in contravention of the act. Whether s 60 (2) refers to steps at the employer must necessarily take immediately following any report of any harassment and whether subsection (4) refers to reasonable steps that the employer must necessarily take in advance to eliminate and prevent acts of unfair discrimination, is not something I need decide. Am satisfied that for the purposes of s 60 (2) the respondents took all necessary steps following the applicant's complaint. The principal attempted to convene a meeting between the applicant and the third respondent; Mabuza initiated an investigation soon after the applicant lodged a complaint with the district office and completed the investigation and a reasonable time. The respondent might be criticised for some delay between Mabuza's report and his recommendation that formal disciplinary proceedings be initiated against the third respondent and the point at which steps were taken to initiate those proceedings. However, on the available evidence, it is clear to me that the reason that the disciplinary proceedings stalled was the applicant's lack of cooperation and in particular, her attorneys notice to the respondents that... It was not unreasonable for the respondents to read the letter

to put in place as Mabuza put it, 'a kind of interdict' pending the outcome of the proceedings initiated in this court.

- [23] The fact that disciplinary proceedings were held only in 2015 was the consequence directly of the applicant's belated agreement to cooperate in those proceedings. The case was one in which the applicant's evidence, as a single witness, was vitally necessary, given that the third respondent had chosen to deny all of the allegations made against him. In my view, the respondents cannot be blamed for the delay in sanctioning the third respondent for the serious misconduct that he committed and the circumstances, it cannot be said, given the evidence as a whole, that the respondents failed to take the necessary steps once the applicant had filed her complaint.
- [24] To the extent that Mr Nkosi appealed to the terms of the Code of Good Practice and in particular the applicant's failure to comply with the provisions of paragraph 11 (information and education), this cannot in itself be a factor that contributed to the act of harassment that occurred in the present instance or for which the respondents ought to be held liable. As Pillay AJ (as she was then) noted in *Ntsabo v Real Security CC* (supra), a breach of any of the provisions of the Code of Good Practice is not in itself a basis on which an employer attracts liability under the EEA. The nature and extent of any breach and any causal relationship that may exist between that breach and the act of harassment in issue is a matter to be determined on the facts of each case. In the present instance, the applicant has not led sufficient evidence to establish that any shortcomings by the respondent in relation to information about and education on the prevention of sexual harassment are of such a degree that the respondents ought to be held liable for the act of harassment perpetrated by the third respondent.
- [25] For all of the above reasons, in my view, the applicant's case lacks merit and the referral stands to be dismissed.
- [26] In relation to costs, this court has a broad discretion in terms of s 162 of the LRA to make orders for costs according to the requirements of the law and fairness.

Ordinarily, this court is disinclined to make orders for costs against individual applicants who pursue grievances against their employers in good faith. In the present instance, I have my doubts that this case falls into that category – it seems to me that the applicant chose to pursue her referral to this court and the prospect of a substantial award of damages in circumstances where she did not wish to compromise that claim by participating in disciplinary proceedings against the third respondent, even though these might ideally have commenced much sooner than they did. None of this was put to the applicant however, and on the evidence before me, she must be afforded the benefit of the doubt and a finding that although misguided, the institution of these proceedings was not malicious.

I make the following order:

1. The applicant's claim is dismissed.

ANDRÉ VAN NIEKERK

JUDGE OF THE LABOUR COURT

APPEARANCES

For the applicant: Adv. JSC Nkosi, instructed by LP Molohe Attorneys

For the first and second respondents: Adv. K Molemoeng, instructed by the State Attorney