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THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JS 1071/18

In the matter between:

**NATIONAL UNION OF METAL WORKERS
OF SOUTH AFRICA (NUMSA)**

First Applicant

T[...] I L[...]

Second Applicant

and

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Respondent

Heard: 23-26 August 2021 and 15 September 2021

Delivered: 23 September 2021

Summary: A referral in terms of section 10 of the Employment Equity Act No. 55 of 1998 (EEA). Allegations of sexual harassment – Liability of an employer in terms of section 60 of the EEA. Reporting the allegations to the employer. Employer taking steps to eliminate the alleged conduct. Relief against a liable

employer not to be dealt with in order to succeed against an employer, an employee must allege and prove (a) that she was sexually harassed at the workplace; (b) that she brought the conduct of sexual harassment to the attention of the employer immediately; (c) that the employer failed to take steps to eliminate the conduct. Once that is shown, an employer is liable for the conduct of an offending employee. An employer escapes liability if it can prove that it took necessary steps to eliminate the conduct and that it did all that was reasonably practicable to ensure that the employee would not contravene the EEA. By adopting a sexual harassment policy, the respondent was seeking to ensure that its employees do not make themselves guilty of sexual harassment. Held: (1) The referral is dismissed. Held: (2) There is no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] There can be no doubt that sexual harassment is a heinous and horrendous conduct since it undermines the dignity of women and the values enshrined in our Constitution¹. This judgment should not be read to be countenancing and/or approving of the hideous conduct of sexual harassment at the workplace. At the workplace, it is practically impossible for an employer to, with certainty; ensure that employees do not contravene the laws of this country. Section 6 (3) of the Employment Equity Act² (EEA) provides that harassment of an employee is a form of discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1) of section 6. There can be no shadow of doubt that sexual

¹ The Constitution of the Republic of South Africa, 1996.

² No. 55 of 1998.

harassment is prohibited in terms of the EEA. An important question is how can an employer police the prohibition? Often times, acts of sexual harassment do not happen openly and they involve only the harasser and the harassed. The only practicable step to be taken by an employer to ensure that employees do not contravene the law is to adopt employment policies like a sexual harassment policy.

- [2] In this matter, the applicant, Ms T[...] L[...] (L[...]) was sexually harassed by two of her managers at Passenger Rail Agency of South Africa (PRASA). Such conduct by these two employees amount to an unfair discrimination. In terms of section 6 (1) of the EEA, no person may unfairly discriminate an employee on the grounds of sex and gender. L[...] is in full armour against unfair discrimination in terms of section 6 (1).
- [3] Having been subjected to an unfair discrimination, L[...] opted to refer a dispute in terms of section 10 of the EEA on 10 October 2017 and alleged victimization and equal pay discrimination. The dispute so referred was enrolled for conciliation on 15 November 2017. In the referral forms, L[...] alleged that the dispute arose on 29 May 2017. Conciliation failed to resolve the dispute referred. L[...] requested resolution of the dispute through arbitration. On 4 October 2018, Commissioner Masunungure issued a ruling declining to exercise jurisdiction over the dispute. In terms of section 10 (6) (a) and (b) of the EEA if all parties to the dispute consent to arbitration an arbitrator may arbitrate the dispute. Since there was no consent, Masunungure directed that the dispute be referred to this Court.
- [4] On 13 December 2018, L[...] referred the dispute to this Court in terms of rule 6 of the Labour Court Rules. The referral is opposed by PRASA. Ultimately, this matter was enrolled for trial before me.

Background facts and evidence

- [5] As indicated above, L[...] alleged that she has been sexually harassed by two of the senior employees of PRASA, who were her superiors. She was the only

witness in her own case. For the purpose of this judgment, it is unnecessary to traverse her entire testimony. She testified about difficulties she encountered when she commenced employment at PRASA. Of relevance is that during a work excursion she was subjected to acts of harassment by her superior, Mr Ramutloa. She testified about internal transfers that happened to her during the relevant period. She formed a view that because she was not acceding to the advances from the relevant managers she was being punished through unfair internal transfers and by not being appropriately remunerated even when she acted in higher positions. She related episodes of harassment by the two managers most of which were later documented. At a particular point she was charged with misconduct, found not guilty and she resigned, which resignation was later withdrawn on the advice of her trade union.

- [6] Of significance in this matter, on 4 October 2016 she, for the first time, lodged a formal grievance with one of her superiors. In that grievance she disclosed the ill-treatment she suffered since December 2013. To a large degree she complained about victimization. As resolution she suggested formal apologies from the relevant managers and retrospective remuneration as a personal assistant. On 25 January 2017 one Mr Van Eeden issued a report and suggested that allegations of sexual harassment be dealt with in terms of the Code of Good Practice. On 28 November 2016, L[...] lodged a formal grievance. In this grievance she narrated the sexual harassment incidents encountered with two managers; namely Mr Ramutloa and Mr Swartz. One Mr Makhura was tasked with the investigations of the allegations, but L[...] did not trust him. Ultimately, a legal firm Bowman and Gilfillan was tasked with the investigations. L[...] expressed dissatisfaction and refused to participate further because the investigation was only focused to one manager and not the other.
- [7] PRASA, after its failed bid to obtain an absolution from the instance tendered the testimony of two witnesses. Mr Nyaba testified about processes related to the internal transfers, all of which were more operational in nature, and the

acting opportunities. He was not made aware of the sexual harassment allegations by Mr Ramutloa. He was also not aware of the allegations against Mr Swartz. He confirmed that L[...] should have used the sexual harassment policy. The next witness was Advocate Le Roux. She interacted with L[...] in confidence and was not willing to share what L[...] told her. However, in cross-examination she was afforded that permission to disclose the confidential information. She testified that in relation to Mr Ramutloa, L[...] narrated allegations which matched sexual harassment. She gave L[...] options in line with the sexual harassment policy. In relation to Mr Swartz, L[...] only related some acts of improper conduct and nothing about sexual harassment. She testified that her first encounter with L[...] was in August 2015. She made extensive reference to the sexual harassment policy and its import. She emphasised that sharing information with colleagues does not amount to reporting to the employer. Even her confidential discussions with L[...] do not amount to reporting.

Submissions

- [8] It became apparent that this is a case, although referred under section 10, where L[...] is alleging that PRASA contravened the provisions of section 60 of the EEA. Ms Ramji, who appeared on behalf of L[...] submitted that when L[...] discussed the sexual harassment allegations with Connie Makgatholele and Daisy Daniels, she was bringing the alleged conduct to the attention of the employer and PRASA failed to take steps as compelled by section 60 (2) of the EEA. Thus, PRASA is liable for the discrimination perpetrated by those managers, so went the submission. In the alternative, she submitted that after L[...] formally lodged a grievance, PRASA failed to take steps hence her referral of the dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). She placed reliance on three judgments, one of which was a judgment of the Labour Appeal Court (LAC) and the others were Labour Court judgments. Those judgments, in her submission, supports a contention that a sexually harassed employee may for good and acceptable reasons not bring the conduct to the immediate attention of an employer.

Reporting the incidents to senior managers without following the policy is sufficient as the LAC found, so she submitted. She submitted that PRASA is liable to pay L[...] a just and equitable compensation. She sought an indulgence to make further submissions on the issue of the relief after this Court raised certain concerns. Both parties were afforded a further opportunity to address the Court on the formulated legal question. Given the view this Court takes at the end, the question has since become moot.

- [9] On the other hand, Mr Matyolo, who appeared on behalf of PRASA, argued that when the allegations were brought to PRASA's attention steps were taken as such the provisions of section 60 were not contravened. PRASA is not liable, he argued. He asked the Court to dismiss the claim of L[...].

Evaluation

- [10] This matter turns on the application of section 60 of the EEA. In my view, this section is a codification of the common law principle of vicarious liability. Vicarious liability occurs in an instance where the wrongful acts of an employee during the course and scope of employment are imputed on the employer. It is often referred to as strict liability. In the context of the EEA, the starting point is whether an unfair discrimination has been committed or not. Section 6 (1) of the EEA prohibits discrimination on any of the listed grounds. L[...]’s case is that she has been discriminated on the grounds of sex and gender. She alleged and testified that she has been sexually harassed by Ramutloa and Swartz. Her version of the harassment acts remains uncontested and unchallenged. Both Ramutloa and Swartz did not come forward to dispute the allegations. They are the only people who could have disputed those allegations. Without hesitation, this Court comes to an irresistible conclusion that L[...] was sexually harassed. In terms of the policy of PRASA on sexual harassment, sexual harassment means unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcomed and mutual.

- [11] On the uncontested testimony of L[...], she was subjected to sexual harassment. The unique nature of this matter is that both Ramutloa and Swartz have left the employ of PRASA. It is unclear to this Court whether they refused to testify in this Court in order to answer to the allegations made by L[...]. If they did, PRASA could have compelled them to testify through a *subpoena* process. The legal question that obtains is whether an unfair discrimination took place or not? Section 6 (3) provides that 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 section 6 (1). On the basis of these provisions, sexual harassment is a form of discrimination.
- [12] Section 11 of the EEA provides that if unfair discrimination is alleged on the listed grounds, the employer against whom the allegation is made must prove, on a balance of probabilities that such a discrimination either (i) did not take place as alleged; or (ii) is rational and not unfair, or is otherwise unjustified. On the strength of the allegations of L[...], the *onus* rested on PRASA to prove the above stated. It is important to unpack this *onus* aspect. Ordinarily, in sexual harassment allegations, the unfair discrimination is committed by an employee of the employer and not the employer. Thus, the allegations of unfair discrimination are made against the employee(s) as opposed to an employer. The only circumstances under which an employer is deemed to be a perpetrator is under section 60 of the EEA.
- [13] Therefore a pleader who alleges sexual harassment would allege it against an employee and not the employer. It is of course impossible for an employer as a legal *persona* to commit acts of sexual harassment. Only its agents – employees can do so.
- [14] Under common law, an employer owes a duty to protect its employees against harm whilst working for that employer³. Sexual harassment is a harm that an employee is protected from. If an employer breaches that legal duty, an employee has a delictual claim against an employer. Under such a claim, the *onus* rests on an employee to prove his or her case. Sight must not be lost

³ See *Media 24 Ltd & another v Grobler* [2005] 7 BLLR 649 (SCA).

that an employee also has a delictual claim against the other employee; in this case L[...] has a delictual claim against Ramutloa and Swartz⁴.

- [15] I therefore take a view that where the allegation of unfair discrimination is not made against the employer directly, the provisions of section 11 does not apply. Section 11, in my view, is reserved for instances where allegations of unfair discrimination are made against an employer. For an example pay discrimination or implementation of affirmative action measures in relation to appointments and/or promotions. As indicated in the introductory paragraphs of this judgment, acts of sexual harassment often happen not openly and at times in the presence of no other person. So if an employee does not bring the conduct to the attention of the employer and decides to bring a section 10 referral, how will an employer be in a position to raise a defence that the unfair discrimination did not happen, let alone that it is rational, fair or justifiable? In my view, an employer cannot be in the position to do so.
- [16] In my view, a claim predicated on section 60 is one that is civil in nature. It does not resort under section 10 of the EEA. Thus its *onus* position is governed by the principle outlined in *Pillay v Krishna and another*⁵ – s/he who alleges must prove. As I see it, in a section 60 claim, two aspects require proof; namely (a) contravention of the EEA; and (b) the employer's failures. In the context of section 60, the contravention must have happened through acts of agents – employees – hence the need to bring that contravention to the immediate attention of the employer. Contravention of the EEA may happen in many forms regard being had to the EEA as a whole. In an instance of sexual harassment, the contravention happens when one employee harasses another sexually. Since the employer may not be in a position to disprove the harassment allegation, the *onus* contemplated in section 11 must lie on the employee who committed the act of unfair discrimination and not the employer since allegations are not made against it.

⁴ See *PE v Dr Beyers Naude Local Municipality and another* (2021) 42 ILJ 1545 (ECG).

⁵ 1946 AD 946.

- [17] Therefore, the conclusion I reach is that section 11 finds no application in a section 60 claim. I also take a view that a section 60 claim may be brought without first complying with the dispute resolution procedure outlined in section 10 of the EEA. This conclusion finds support from the plain reading of section 60 (3). The section, in part, states: “*and it is proved that the employee has contravened the relevant provisions*”. It must naturally follow that the aggrieved party must prove the alleged contravention. Otherwise, who then must prove that the employee has contravened the relevant provisions? It cannot be the employer who must prove the contravention.
- [18] In order to escape liability, the employer must disprove failure. I do accept that an employer may also succeed in a section 60 claim if it disproves that the EEA was contravened. Of course, in order to disprove the failure, the aggrieved employee must have proven that there is a failure on the part of the employer. Therefore, the overall *onus* in a section 60 claim rests with the aggrieved employee – plaintiff/applicant.
- [19] One last aspect to be mentioned on the issue is that the contravention of the EEA may be proven in separate proceedings and presented in a section 60 claim as proof of contravention. Proper reading of section 10 of the EEA, suggests that L[...] could have referred a dispute to the CCMA against Ramutloa and Swartz as individual employees. Section 10 (2) refers to a party as opposed to an employee. However, if that party is an employee and alleges unfair discrimination on the grounds of sexual harassment, that employee as a party may refer a dispute to the CCMA for arbitration if certain conditions are met. Section 10 (8) makes the point I am making in this judgment to be beyond perspicuous, in that it refers to a person affected by an award and not an employer specifically.
- [20] Accordingly, if a party like L[...] achieve success at the CCMA to prove sexual harassment – which will be contravention of the EEA – such a party may use the CCMA proceedings to prove contravention of the EEA in a section 60 claim lodged in the Labour Court.

[21] Lest I be misunderstood, in a section 60 claim, a party suing may prove the contravention of the EEA *intra* section 60 proceedings, which proving does not require a section 10 referral first. That being said, on the evidence before me, L[...] has proven on the balance of probabilities that the two employees of PRASA have contravened the EEA. The next aspect is the failure and the deeming provisions. I now turn to it.

Failure and the deeming provisions – contravention of section 60 (2) and 60 (4)

[22] To my mind, the steps of a section 60 claim are the following:

- 22.1 Allege a contravention at workplace;
- 22.2 Report the contravention immediately;
- 22.3 Prove the alleged contravention;
- 22.4 Allege and prove failure to take the necessary steps;
- 22.5 Prove the necessary and preventative steps taken.

[23] An applicant who proves the first four above is entitled to a deeming order of liability. In order to escape liability, the respondent must prove the fifth. In *casu*, I take a view that L[...] proved one and three before me. There is a dispute that L[...] reported the contravention immediately or not.

[24] Before I zoom into the failure and the deeming provisions issue, it is necessary to dispose of this issue of '*immediate bringing to the attention of the employer*'. Key in reporting immediately is that once reported one of the obligations of an employer is to eliminate the conduct. The word '*eliminate*' is too strong a word. In some instances, in the ugly past of this country, it was used to mean ending life. Be that as it may, the dictionary meaning of the word is to get rid of; remove; or take out. The word '*elimination*' is also employed in section 5 of the EEA. In there, every employer, PRASA in this instance, is obligated to take steps to promote equal opportunities by eliminating unfair discrimination. With such statutory obligation to get rid of and remove unfair discrimination, it cannot be expected that an employee must not act with the necessary haste. There must have been a reason why

the legislature chose to employ the word '*immediately*'. If lethargy was anticipated the legislature could have simply stated that the alleged conduct must be brought to the attention of the employer and leave out the word '*immediate*'.

- [25] The dictionary meaning of the word immediate is happening without delay. As an adjective, it means instant, prompt, instantaneous, quick, on-the-spot or split-second. In the section, the word immediately is used as an adjective to modify the phrase '*brought to the attention*'. The Labour Appeal Court in *Liberty Group v M. M.*⁶ suggested that the word must be afforded what it termed a "*sensible meaning*". It continued to say that even a limited delay in reporting is acceptable. In my view, a delay is an antithesis of the word as literally defined. On the facts that obtained in *Liberty*, the alleged conduct happened in May 2009 and the reporting happened in August 2009. There was, in that case, a delay of about two months. The LAC referred to that as a limited delay.
- [26] In this matter, faced with the issue of delay, Ms Ramji submitted that L[...] brought the conduct to the attention of Daisy and Connie. On L[...]’s version the incidents involving Ramutloa happened around November 2013. On her version, she discussed with Connie Makgatholele the issue of the Metropolitan report which dealt with the difficult relationship between her and Ramutloa. Even in her later written grievance, she alludes to having told an unnamed colleague about the episode, who advised her to tell the CEO, but she refused because Ramutloa was allegedly a family member of the Group Chief Executive Officer. In her testimony before Court, she testified that she was scared to tell the CEO because she felt that her case was not that important. Contrary to the submission, L[...] did not bring to the attention of anybody senior the conduct of Ramutloa. The only time she did so was on 28 November 2016. This is three years later. This, in my view, cannot constitute a limited delay referred to in *Liberty*. The upshot of this delay is that for a

⁶ (JA 105/2015) dated 07 March 2017.

period of three years, PRASA was deprived of its statutory duty to eliminate unfair discrimination.

- [27] On L[...]’s version, she worked with Swartz from 1 July 2014 to 26 November 2014. That was a period of about three months. The incident of giving Swartz a hug happened, on her version, in July 2014. Some of the alleged incidents were not attached to any date. However, this Court is prepared to accept that they occurred between July 2014 and November 2014. L[...] only brought the conduct of Swartz to the attention of PRASA on 28 November 2016. This is about two years later. Again, in my view, this is not a limited delay. During her testimony she vaguely testified that she related the incidents of Swartz to Connie. All of that was not attached to any dates. Connie apparently resigned from PRASA but she was not called by L[...] to testify in support of the alleged reporting.
- [28] I must state that on the common cause version of Advocate Le Roux, she interacted with L[...] from August 2015. In the interactions she only related the incident of Ramutloa and not any allegation against Swartz. However, this happened almost a year after working with Swartz. Even if the Court were to accept that relating it to Advocate Le Roux constitutes bringing to the attention of the employer, this was after a long delay.
- [29] Ms Ramji also placed reliance on the case of *Rustenburg Platinum Mines Ltd v UASA obo Pietersen and others*⁷. This judgment is distinguishable. In the first place, it was a review of an arbitration award. The sentiments expressed in paragraph 51 of the judgment were not seeking to address the issue of immediate reporting as outlined in section 60 (1) of the EEA. Similarly the judgment of *SA Post Office Ltd v CCMA and others*⁸ was a review application and did not concern itself with the statutory requirement of immediate reporting. Instead the case cited by Mr Matyolo is on point and almost on all fours with the present matter. Accordingly this Court unequivocally endorse the sentiments expressed by Van Niekerk J in *Matambuye v MEC for*

⁷ (JR 641/2016) dated 27 February 2018.

⁸ (D407/10) dated 15 November 2011.

*Education and others*⁹, in particular the interpretation placed on section 60 (2) of the EEA.

- [30] The conclusion I reach is that the alleged conduct was not brought immediately to the attention of the employer within the contemplation of section 60 (1) of the EEA. Therefore, L[...] failed to show the second step alluded to above.
- [31] Allied to the issue of immediate bringing to the attention, arises the question to whose attention. Section 60 (1) is specific, it refers to an employer. The veritable question is, does bringing it to the attention of an employee of the employer, irrespective of the level of seniority, sufficient or not? The LAC in *Liberty* accepted that informing one Mr Haines, whose position is not clarified in the judgment, but appears to be a Human Resources employee, amounted to reporting within the meaning of the section.
- [32] As I see it, to my mind, the reporting must be to an employer through the mechanism in its adopted policy. One thinks of a situation where an employee simply confides in another employee, as L[...] did to Connie and Le Roux. In such a situation, it cannot, in my view, be said that the alleged conduct was brought to the attention of an employer. It must be remembered that the bringing to the attention of an employer serves a statutory purpose. That purpose is to enable an employer to eliminate the alleged conduct. What happens if a senior employee is told but decides to keep quiet or do nothing? Le Roux was uncontroverted when she testified that as wellness practitioners everything is shared to them in confidence and cannot be disclosed unless with the permission of the discloser. L[...] did not suggest that she permitted Connie and/or Le Roux to disclose the confidential information to anyone. In fact on L[...]’s own version, Connie advised her to formally report it.
- [33] It could be said that an employee, who keeps quiet, without being subjected to the confidentiality handcuffs, is guilty of some form of misconduct, however such does not translate into affording an employer the golden statutory

⁹ (JS840/2012) [2015] ZALCJHB 455 (2 November 2015).

opportunity to eliminate the alleged conduct. L[...] testified that she was not aware of the Sexual harassment policy. One wonders whether an employee of sufficient intelligence and a law graduate like L[...], would not have made enquiries about the existence of the policy. Nevertheless, in 2016, she noted in her grievance to Van Eeden that “*I will follow the formal grievance process for next level if not resolved within seven days*”. That begs the question as to who then made her aware of the formal grievance procedures at that time.

[34] PRASA's Sexual harassment policy was first approved on 1 December 2008. On the uncontested evidence, this policy is readily available on *intranet* and from the Human Resources Department. Reading from its purpose, it exists to assist the employer to provide a healthy and safe working environment. In terms of clause 7.2 of the policy, complaints of sexual harassment must be reported to a supervisor or manager and where the manager is the alleged transgressor, the next level of supervision. In this instance, the next level was the GCEO. L[...], despite being advised by a colleague, decided on her own not to report to the GCEO for reasons that are, in the Court's view, rather flimsy – family relations and an unimportant matter. In the *Liberty* matter, Mr Haines advised the complainant to consult the policy in order to establish whether what was related to him constituted sexual harassment. Indeed, the complainant consulted the policy and completed the grievance form and held it back after the harasser indicated to her that he was aware of what she was doing. She concluded that perhaps Haines must have disclosed to the harasser and she feared retaliation. I take a view that the facts in *Liberty* are extremely distinguishable from the facts of this case.

[35] I now turn to the failure issue. Before I do that, I find it appropriate to refer to what was stated in *Lapka v Chertof*¹⁰. The District Judge, Matthew Kennelly said:-

“To prevail on a claim of sexual harassment based on hostile work environment, an employee must establish that she was subjected to unwelcome sexual harassment based on her gender, the harassment

¹⁰ Case 05 C 668 USDC 30 October 2006.

unreasonably interfered with her work performance by creating an intimidating, hostile, or offensive work environment, and there is a basis to impose liability on her employer.

In cases like this one, in which the harassment by a co-worker is not claimed to have been anticipated or foreseeable by the employer, the employer's liability depends on what it did, or did not do, after the co-worker's conduct was brought to the employer's attention to prevent further harassment..."

[36] I find justification to approve the above sentiments in this judgment. In concluding the case, the erudite District judge stated the following:

"If an employer fails to take action to prevent further harassment or forces the victim to bear the costs of solving a problem she has reported, the employer may be held liable.

Lapka has identified nothing from which a jury reasonably could find that there was something DHS should have done, but did not do, to prevent further harassment..."

[37] The amended case of L[...] was that she spoke to colleagues and managers about the Ramutloa allegations, Connie advised her to formally report and Daniels told her to be careful of Ramutloa. These managers never advised her of the sexual harassment policy, she alleges as already testified to in chief. This Court wonders what Connie could have meant by formal report if she allegedly failed to advise L[...] about the existence of the policy. This amended case was brought in to suit her testimony already delivered in chief. This Court allowed the amendment. However, on her own version she never formally reported the Ramutloa incident. In her amended case, she never reported the Swartz issue for fear of retaliation.

[38] It is common cause that the only time she brought the issue to the attention of PRASA was in October/November 2016. In terms of clause 7.2.2 of the policy, PRASA is obligated to fully investigate through the Security and Investigations Department with the assistance of EAP functionaries. Generally, an investigation entails consulting all the relevant parties, including the victim. Mr

Francois Van Eeden, Head of PRASA Rail Security, promptly investigated the complaint. On 25 January 2017, in his report he recommended that the allegations made against Ramutloa and Swartz be investigated in terms of the Code of Good Practice on the Handling of Sexual Harassment cases. Mr Joseph Makhura of PRASA Corporate Security was approached by Van Eeden to investigate the matter. On 31 January 2018, he also issued a report. In his report, he highlighted that L[...] was reluctant to cooperate with the investigation because a law firm was to be involved. In L[...]’s testimony, she lost trust in Makhura because he attended a wedding of one of the perpetrators’ family. In his report, Makhura recommended that PRASA must apply the recommendations of Bowmans to resolve the dispute. On the uncontested evidence, L[...] refused to cooperate with the investigations by Bowmans. In her WhatsApp communication with an official from Bowmans she recorded the following:

“I request to be removed from this investigation because I feel like it is not a fair process re my grievance. I would never reduce allegations to writing if I could not substantiate/qualify my allegations...I refuse to be used and hope my request will be respected.

- [39] The above communication happened on 24 January 2018. The Bowman official indicated that if she was not willing to help she will not be pressured to do so. It is clear that PRASA took the necessary steps with a view to eliminate the conduct but L[...] thwarted the steps by flatly refusing to participate. Therefore, the logical conclusion to reach is that PRASA did not fail to take steps. It did, the fact that L[...] frustrated the process, as it were, does not suggest a failure. Consultation is a two way process. L[...] was certainly a relevant party. The obligation in section 60 (2) is to consult all relevant parties and thereafter take the necessary steps to eliminate the alleged conduct. The only person who could have assisted PRASA to eliminate the conduct alleged is L[...]. In any event, it is apparent that steps were taken to suspend Swartz. In his explanation why he should not be suspended he denied the allegations of sexual harassment made by L[...]. Nonetheless no admissible evidence was placed before this Court with regard to that denial.

[40] Therefore, the conclusion this Court reaches is that PRASA did not contravene section 60 (2). I now turn to the preventative measures contemplated in section 60 (4). There is no dispute that in December 2008, PRASA adopted a Policy seeking to ensure that its employees do not act in contravention of the EEA. In terms of clause 7.1, the following is apparent:

“7.1 Roles and Responsibilities

7.1.1 Management and employees are required to refrain from committing acts of sexual harassment;

7.1.2 Management and employees have a role to play in contributing towards creating and maintaining a working environment in which sexual harassment is unacceptable. They should ensure that their standards of conduct do not cause offence and they should discourage unacceptable behaviour.”

[41] With all that it is clear that PRASA took steps to ensure compliance with the EEA. As indicated earlier, an employer will have no control over the conduct of its employees. The only manner to affect control is to put in place policies like this one and to ensure that employees are made aware of them. On the evidence before me the policy is circulated at PRASA. Such evidence supports a conclusion that Ramutloa and Swartz must have been aware of the roles and responsibilities outlined above.

[42] The conclusion to reach is that PRASA has not contravened section 60 of the EEA. Having reached this conclusion, it is unnecessary to traverse the issue of the relief. Another opportunity will present itself for this Court to explore the legal issue of compensation as against damages in a section 60 claims.

[43] In the results, I make the following orders:

Order

1. The referral is dismissed.
2. There is no order as to costs.

G. N. Moshwana
Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms B Ramji of Cheadle Thompson & Haysom,
Braamfontein.

For the Respondent: Mr. X D Matyolo
Instructed by : Msikinya Attorneys and Associates, Johannesburg.