

SOUTH AFRICA / JUDGMENT

A.K v Right to Care NPC (JS597/21) [2023] ZALCJHB 182; (2023) 44 ILJ 2200 (LC) (5 June 2023)

[2023] ZALCJHB 182

COURT

Labour Court Johannesburg

BEFORE

Nkutha-Nkontwana

CASE / FILE NUMBER

JS597/21

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IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JS597/21

In the matter between

A.K Applicant and RIGHT TO CARE NPC Respondent

Heard: 8 May 2023

Delivered: 05 June 2023

Summary: Sexual harassment – employer’s vicarious liability in terms of section 60 of the EEA – failure to report sexual harassment to the employer immediately as required by section 60(1) of EEA would not nonsuit the applicant – a disciplinary action against the perpetrator constitutes an appropriate step to prevent re-occurrence of sexual harassment as required by section 60(2) of EEA.

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] In this action, the applicant is claiming compensation and damages in terms of section 60 of the Employment Equity Act[1] (EEA). In essence, her claim is premised on the allegation that the respondent is vicariously liable for the sexual harassment she had been subjected to while in its employ. The quantum sought in respect of each claim is R3.5 million in damages and R960 000.00, being compensation equivalent to 24 months' salary. The respondent has mounted a fervent defence.

Background

- [2] There is not much controversy when it comes to facts. The applicant was employed by the respondent, a non-profit making organisation, as a junior pharmacist, a position she took up on 6 January 2020. She was based in Bloemfontein and her responsibilities included supervising the Central Dispensing Unit and was responsible for despatching high-volume prescriptions to patients; overseeing patients' queries and deliveries; and management of staff.
- [3] On 17 December 2020, she reported a complaint of sexual harassment to the Human Resources (HR) Manager, Ms L N (Ms N), against Mr David Molele (Mr Molele) and Mr Thato Mathabathe (Mr Mathabathe) who were also in the employ of the respondent. On 6 January 2021, she filed a formal complaint against Mr Molele.
- [4] Consequent to the applicant's complaint, Mr Molele was charged and dismissed for sexual harassment.

Issues to be decided

[5] The issues to be decided in this matter are articulated in the pre-trial minute and are as follows:

- 5.1. Whether the respondent failed to consult the relevant parties and take the necessary steps to eliminate the alleged conduct of sexual harassment;
- 5.2. Whether the respondent failed to investigate, consult the applicant and prepare a report into allegations pertaining to sexual harassment;
- 5.3. Whether the respondent failed to protect the applicant and comply with section 60, subsections (1) and (2), of the EEA;
- 5.4. Whether the lie detector (polygraph) test that the applicant was subjected to constitutes a report pertaining to sexual harassment investigation; and
- 5.5. Whether the respondent acted reasonably and as expeditiously as possible following the initial grievance or complaint that was lodged by the applicant.

Summary of evidence

- [6] The applicant testified that the first incident of sexual harassment happened on 13 January 2020 when she met Mr Molele for the first time during her induction. Mr Molele complimented her for her good looks and later asked her about her favourite sex position. The next day, on 14 January 2020, Mr Molele approached her and fixed her bra that was slightly showing and commented that she should not have worn a bra as her breasts are perky.
- [7] The incident was reported to Ms T, her line supervisor. She also sent a text message to Mr Molele recording her discomfort with his conduct. Mr Molele apologised. The applicant testified that she was not surprised because she had already been warned by Ms T that Mr Molele and Mathabathe were known for abusing women.
- [8] The next incident of sexual harassment, according to the applicant, occurred on 14 October 2020. Mr Molele called her and proposed that they should start dating, a proposal she turned down at that instant. Still, Mr Molele was insisting on his proposal and sent a WhatsApp message to the effect. The applicant's response was still negative and informed Mr Molele that she did not want to date at work and preferred a professional relationship. Mr Molele replied by acknowledging the applicant's stance. The applicant conceded that this incident was never reported to the respondent.
- [9] On 10 December 2020, the applicant suggested that the respondent should conduct training on sexual harassment as part of the 16 days of activism against gender-based violence campaign. Mr Mathabathe, the Operations Manager, was of the view that training was not necessary but employees would be sensitised. However, the next day, Mr Mathabathe informed the applicant that there were people who had reported sexual harassment in the past and it backfired. The applicant stated that she took the statement as a threat even though Mr Mathabathe denied it.
- [10] On 17 December 2020, the applicant reported the sexual harassment incidents against both Mr Molele and Mr Mathabathe. On 6 January 2021, she lodged a formal grievance against Mr Molele and an informal complaint against Mr Mathabathe. She was later informed by Ms N that a grievance hearing would be convened. Instead, nothing happened. She then called HR and was informed that there were conflicting statements in relation to the sexual harassment allegations. She was then requested to undergo a polygraph test which she consented to. It is not in dispute that Mr Molele and Mathabathe were also requested to consent to a polygraph test. Mr Molele agreed and was tested. Mr Mathabathe refused and resigned with immediate effect.
- [11] On 5 March 2020, the applicant took a polygraph test. Subsequently, she requested the outcome of the polygraph test from HR but was told that she could not be given the report because it was part of the investigation. Displeased with that response, on 11 March 2020, the applicant referred a dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA). She did so because, in her view, she was not supported and was kept in the dark about the process that was undertaken by the respondent. Moreover, she was

anxious because of Mr Mathabathe's remark that there were employees who had reported sexual harassment and it backfired.

- [12] However, the main reason for approaching the CCMA was the fact that her request for the of the polygraph test results and the Sexual Harassment Policy was turned down. The polygraph test results and the Sexual Harassment Policy were provided to the applicant consequent to the CCMA referral. Even so, the applicant was adamant during her cross-examination that she could not have withdrawn the CCMA dispute because she was not satisfied with the manner her grievance was handled. She took issue with the fact that she was not kept informed about the actions taken by the respondent. Also, there was no grievance hearing convened and Mr Molele was not suspended pending his disciplinary enquiry. As a result, she believed that the respondent subjected other female colleagues to his conduct.
- [13] The applicant conceded that she was the main witness during the disciplinary hearing against Mr Molele which led to his dismissal. Equally, she was a witness during the arbitration at the CCMA wherein Mr Molele challenged his dismissal unsuccessfully. Yet, she insistently testified that her complaint was not handled sensitively and the respondent failed to provide a safe environment. Hence she is claiming the total quantum of 4.5 million.
- [14] The respondent led evidence of two witnesses, Ms T and Mr K N (Mr N), the respondent's Deputy Chief HR Officer.
- [15] Ms T denied that she had warned the applicant about Messrs Molele and Mathabathe and their notoriety with women. Ms T also denied that the applicant lodged a formal complaint with her. She was adamant that the applicant only told her that Mr Molele was 'pouncing' at her but was not ready to lodge a formal complaint. The applicant preferred to raise the issue with Mr Molele informally, which she did. She later showed Ms T a WhatsApp message she had sent to Mr Molele.
- [16] When she was teased on this issue, Ms T was resolute that there was nothing unbecoming in allowing the applicant to address Mr Molele informally as it was in line with the respondent's Sexual Harassment Policy. Furthermore, she testified that was not aware that in 2015 Mr Molele had pleaded guilty to a sexual harassment charge and was issued with a final written warning.
- [17] Mr N testified that he oversaw the investigation of the applicant's sexual harassment grievance which was undertaken as soon as HR received the formal grievance in January 2021. Even though Mr Molele was not suspended, he was prevented from visiting the Bloemfontein office where the applicant was based.

- [18] Statements were obtained from all the individuals that were implicated in the applicant's grievance. Mr Molele requested more time to file his statement of response to the allegations made by the applicant and was accordingly indulged. Upon receipt of the statements, it became apparent to the investigation team that there were denials. Hence they resorted to a polygraph test. The applicant passed the polygraph test; while Mr Molele failed.
- [19] In light of the evidence that was secured, the decision was made to proceed by way of a disciplinary hearing. Mr Molele was accordingly charged and dismissed for sexual harassment. His dismissal was successfully defended at the CCMA.
- [20] Mr N was unbedding in his evidence that the applicant was made aware of the process that the respondent was implementing, i.e. charging Mr Molele. There was constant feedback. Pertinently, on 26 March 2021, he had a telephonic discussion with the applicant where context on the process and feedback was given on the progress in preparation for the disciplinary hearing against Mr Molele was provided. The applicant understood and accepted the explanation.
- [21] The disciplinary enquiry sat on 9 April 2021. Under cross-examination, Mr N persisted with his testimony that he consulted with the applicant in preparation for Mr Molele's disciplinary hearing and she was shown the statements of the witnesses, including Mr Molele's statement. He further testified that he was not part of the investigation team when Mr Molele was charged for sexual harassment in 2015. Nonetheless, his investigation team managed to secure a dismissal, despite the views of the Managing Director during his evidence at the CCMA.
- [22] The highlight of Mr N's cross-examination turned on the respondent's failure to hold a grievance hearing and provide a written report to the applicant. He was once unbedding in his evidence that, given the seriousness of the allegations, the disciplinary hearing was preferred in line with the respondent's Sexual Harassment Policy.
- [23] Mr N denied that the polygraph test offended the dignity of the applicant. Instead, it assisted to deal with denials and, together with the other evidence that was available, it secured the conviction of Mr Molele.

Legal principles and application

- [24] I deal first with the issues on the pleadings. The applicant's case is pleaded in the conventional manner, to be precise, that the respondent breached its statutory duty in terms of sections 60(1) and

(2) of the EEA by:

24.1. failing to consult all the relevant parties and take the necessary steps to eliminate the alleged conduct of sexual harassment;

24.2. failing to conduct investigations, consult the applicant and prepare a report into the allegations pertaining to sexual harassment; and

24.3. subjected the applicant to a lie detector test as opposed to conducting a proper investigation and convening a grievance hearing.

[25] It is a well-accepted principle that parties are bound by their pleadings and other

issues

which are not defined in the pleadings do not have to be decided unless they were fully canvassed without objection in the

evidence.[2] The respondent correctly objected to the applicant's broadening of the issues during the course of the trial. There are no averments in the statement of claim that the respondent failed to take steps to prevent further sexual harassment after the applicant had reported same. Nor was it

contested that the respondent had a Sexual Harassment Policy in place when Mr Molele sexually harassed the applicant. Therefore, the applicant is indeed bound by her pleaded case.

[26] To the extent that sexual harassment is conceded, the enquiry turns on the respondent's liability in terms of section 60 of the EEA. Axiomatically, the onus is on the applicant, a fact acquiesced by the parties.

[27] Section 60 provides:

'(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.'

[28] In *Liberty Group Ltd v M*[3] (Liberty), the Labour Appeal Court (LAC) endorsed the requirements for employer liability in terms of section 60 where the discriminatory conduct complained of is one of sexual harassment outlined in *Potgieter v National Commissioner of the SA Police Service* and another[4] 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.

[29] Notably, section 60 creates a statutory vicarious liability for employers for a conduct of an employee, while at work, that contravenes any provision of the EEA. Therefore, the issues for determination are three. First, whether the alleged sexual harassment had been immediately reported to the respondent. Second, upon being notified of the discriminatory conduct, the next enquiry turns on whether the respondent took necessary steps to eliminate the alleged discriminatory conduct in consultation with the relevant parties. Third, to escape vicarious liability, the respondent must show that it did all reasonably possible to create an environment that is free from sexual harassment.

Immediate reporting of sexual harassment.

- [30] The respondent contends that section 60 is only triggered if an employee immediately brings the sexual harassment to the attention of the employer. However, the applicant failed to report the sexual harassment immediately as contemplated in section 60(1).
- [31] The applicant testified that she reported the first incident of sexual harassment to Ms T on 13 January 2020. However, Ms T seemed indifferent, a conduct that was consistent with her prior warning that Messrs Molele and Mathabathe were known for abusing women. This evidence was denied by Ms T who, in turn, testified that the applicant only informed her that Mr Molele was making a move on her and that the applicant had preferred to address her concern directly with Mr Molele, which she did.
- [32] I have no reason to reject Ms T's evidence as the applicant herself asserts in the statement of claim that on 10 December 2020, she suggested sexual harassment training which was turned down by Mr Mathabathe. On 17 December 2020, she reported the matter pertaining to sexual harassment to Ms N. Moreover, the second incident of sexual harassment occurred on 14 October 2020, almost 10 months after the first incident. Notwithstanding her strong resistance, she saw no need to promptly report this incident.
- [33] Whether the delay in reporting sexual harassment is in itself dispositive of the matter, as submitted by the respondent's counsel, is the next issue I deal with. In *Liberty*[5], the LAC observed that the requirement that conduct be reported "immediately" must be given a

sensible meaning; having regard to the purpose of the EEA and the general context of section 5 of the EEA which enjoins employers to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. As such, the requirement that the conduct in contravention of the EEA should be brought to the attention of the employer “immediately” is to be read as affording the employer an opportunity to swiftly deal with the offending conduct without being bogged down by technicalities.[6]

- [34] The Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace[7] (the Code), endorsing the approach in Liberty, provides that the “allegations of harassment which are made within an appropriate time, in the circumstances, must be investigated and appropriate steps must be taken to prevent a re-occurrence”.
- [35] It follows that when confronted with an allegation of sexual harassment, which is the most heinous misconduct that plagues a workplace[8], the context and merits of each case would have to be taken into consideration. I accept that the delay of 10 months in reporting the first incident is not insignificant. I, however, accept the applicant’s explanation that she thought Mr Molele would stop after she had confronted him and he apologised. The second incident was reported within two months from the date of the incident, which, in my view, is not unreasonable.
- [36] Therefore, the contention by the respondent is obviously untenable as the victims of sexual harassment cannot be nonsuited solely on the basis of the delay in reporting same.

Steps taken to eliminate the sexual harassment

- [37] As mentioned elsewhere in this judgment, the respondent charged and dismissed Mr Molele for sexual harassment. The applicant conceded under cross-examination that she was instrumental in the dismissal of Mr Molele as she was the respondent’s main witness during the disciplinary enquiry against Mr Molele and at the CCMA arbitration where Mr Molele unsuccessfully challenged his dismissal.
- [38] Instructively, the respondent’s Sexual Harassment Policy allows, inter alia, that a disciplinary action be taken against the alleged perpetrator in terms of the Disciplinary Code in order to ensure that the complaints of sexual harassment are taken seriously and sympathetically, and are dealt with promptly and confidentially. Despite the delay in reporting the incidents of sexual harassment, the respondent acted swiftly and determinedly to eliminate the offending conduct.
- [39] The crux of the applicant’s impugn, nonetheless, is that the respondent failed to investigate her grievance, produce a report and convene a grievance hearing. I struggle to understand the applicant’s obstinacy with this contention when the process undertaken by the respondent dealt with her complaint of sexual harassment expeditiously and resulted in the dismissal of Mr Molele.

- [40] Thus, in my view, the applicant's case should meet its demise on this ground alone. Nonetheless, I deem it expedient to deal with the other grounds for completeness' sake.

Failure to protect the applicant

- [41] The applicant testified that she was kept in the dark about the process that was undertaken by the respondent and felt that she was not being supported. Instead, she was subjected to a lie detector test and was refused the outcome thereof, hence she referred the matter to the CCMA.
- [42] The above criticism by the applicant is not warranted. On objective facts before me, it clearly took the respondent about three months to deal with her grievance. The formal grievance was lodged on 6 January 2021 and the disciplinary enquiry sat on 9 April 2021. That to me was prompt; especially, as testified by Mr N, the whole process took place during the COVID-19 national lock-down.
- [43] It is not the applicant's case that she had contact with Mr Molele after reporting the complaint of sexual harassment or that sexual harassment persisted. Conversely, Mr N's evidence that, even though Mr Molele was not suspended pending his disciplinary hearing, he was prohibited from visiting the Bloemfontein office where that applicant was based was not refuted.
- [44] The applicant's evidence that she was kept in the dark about the process that was undertaken by the respondent in dealing with her grievance was refuted. Mr N testified that the applicant was made aware of the process that the respondent was implementing, i.e. instituting disciplinary hearing against Mr Molele. There was constant feedback and pertinently on 26 March 2021, he had a telephonic discussion where a context was provided on the process and feedback on progress in preparation for the disciplinary hearing against Mr Molele. Moreover, the applicant conceded that she was a witness during Mr Molele's disciplinary enquiry.

Polygraph test

- [45] The use of polygraph test is indeed atypical in cases of this nature. However, it is also obvious from Mr Molele's statement in response to the applicant's grievance statement that he gave a detailed defence to each and every allegation. In my view, the respondent cannot be faulted for availing itself to the assistance of the polygraph test which, in my view, was applied fairly. The applicant passed the polygraph test but Mr Molele failed. That, according to Mr N was, inter alia, a factor that informed the process that was ultimately undertaken with great success.

Sexual harassment Policy

- [46] The applicant conceded that she was aware that the Sexual Harassment Policy was accessible through the respondent's intranet, even though she had challenges in accessing it. In any event, she was favoured with a copy of the Sexual Harassment Policy per her request when she referred a dispute to the CCMA.
- [47] The applicant made much of the fact that Mr Molele had been issued with a final written warning in 2015 for sexual harassment. Yet the respondent's Sexual Harassment Policy provides for a disciplinary sanction short of dismissal for minor offences.
- [48] As well, I don't agree with the submission by the applicant's counsel that such a sanction is contrary to the zero-tolerance stance against sexual harassment adopted by the respondent. Ordinarily, the appropriateness of the sanction is informed by the grossness of the transgression and progressive discipline tenet. I accept Mr N's evidence that Mr Molele's perverted conduct was swiftly weeded out as soon as it was brought to the attention of the respondent in accordance with the Sexual Harassment Policy.[9]

Conclusion

- [49] In all the circumstances, I am satisfied that the respondent did not contravene section 60 of the EEA. As such, the applicant's claim stands to be dismissed.

Costs

- [50] Turning to the issue of costs, the circumstances of this case dictate that no order as to costs should be made.

- [51] In the circumstances, I make the following order.

Order

1. The applicant's claim is dismissed.
2. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr M Marweshe of Marweshe Attorneys

For the Respondents: Advocate M Van As

Instructed by: Flaxmans Attorneys

- [1] Act 55 of 1998, as amended.
- [2] Trellidor (Pty) Ltd t/a Trellidor v National Union of Metalworkers of SA on behalf of Ndwalane and others

(2022) 43 ILJ 1331 (LAC) at para 38.

[3]

(2017) 38 ILJ 1318 (LAC) at para 38.

[4]

(2009) 30 ILJ 1322 (LC) at para 46.

[5] Liberty supra at paras 51 – 53.

[6] Id.

[7] GNR.1890 of 18 March 2022, clauses 10.1.2 and 10.1.3.

[8] See: McGregor v Public Health and Social Development Sectoral Bargaining Council and others 2021

(5) SA 425 (CC) at para 1.

[9] See: National Union of Metalworkers of SA and another v Passenger Rail Agency of SA

(2021) 42 ILJ 2637 (LC) at paras 35 and 41.

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