

SOUTH AFRICA / JUDGMENT

G v Minister of Safety & Security and Another (D495/06) [2010] ZALCD 15 (18 June 2010)

[2010] ZALCD 15

COURT

Labour Court Durban

BEFORE

Pillay D

CASE / FILE NUMBER

D495/06

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IN

THE LABOUR COURT, DURBAN

REPUBLIC

OF SOUTH AFRICA

HELD

AT DURBAN

CASE

NO:D495/06

HEARD:

24-28 MAY 2010

DELIVERED:

18 JUNE 2010

In the matter between

G

APPLICANT

versus

THE

MINISTER OF SAFETY &

SECURITY

FIRST RESPONDENT

THE PROVINCIAL

COMMISSIONER OF THE SOUTH

AFRICAN

POLICE SERVICE KWAZULU-NATAL

SECOND RESPONDENT

JUDGMENT

18 JUNE 2010

PILLAY D, J

Introduction

1. This is a claim for sexual harassment arising from a sexual relationship between a married male, the alleged harasser, referred to as R, and a middle aged unmarried female, the alleged victim, referred to as the employee. Both are employees in the South African Police Service (SAPS). R is an Area Commissioner, which is a managerial position superior to the Administrative Clerk post of the employee.
2. Manifestly, the constituent elements of sexual harassment, namely hierarchy, power and sex are present. However, did R force the employee to have sex? If he did, he would have sexually harassed her. Would the Minister then be vicariously liable for compensation and expenses of R635 000 if it failed to act against R's misconduct? Irrespective of whether R sexually harassed the employee, does the SAPS have a duty to act against R?

The Parties

3. The employee is the applicant. The Minister of Safety and Security is the first respondent. The Provincial Commissioner of the South African Police Service KwaZulu-Natal is the second respondent. R is not a party to this litigation.

The Employee's Case

4. The employee's case is that R sexually harassed her over three years before she complained about it on 31 August 2005. The SAPS failed to investigate her complaint and took no disciplinary action against R.
5. As a result of her complaint, she was victimised. R and other members of the SAPS treated her badly. Her promotion to Lamontville and the treatment she received there evidenced her victimisation.
6. The SAPS offered her no assistance, advice or counselling for sexual harassment; nor did it take steps to eliminate sexual harassment.

She suffered psychological and emotional trauma as a result of the sexual harassment, which aggravated a pre-existing post-traumatic stress disorder (PTSD).[1]

The SAPS's Case

7. The relationship between the employee and R was consensual. As R did not sexually harass the employee, the SAPS was not vicariously liable. Even if R did harass the employee, the SAPS investigated her complaint and complied with all the requirements of the law and its policy on sexual harassment.

The Law

8. The employee relies on section 60(3) of the Employment Equity Act No. 55 of 1998 (EEA) to invoke the liability of the SAPS. Section 60 provides 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.”
9. This formulation of the test sets harassment (“conduct”) as a prerequisite for an employer to incur vicarious liability in terms of section 60(3). Therefore, the first step in this inquiry is to determine whether the R sexually harassed the employee.
 10. Section 60 provides for the liability of employers generally. Subsection (2) refers to “conduct” generally; it is not limited to harassment specifically; however, “contravention” in section 60 refers specifically to contraventions in terms of the EEA, not the LRA, not the common law, not any other law. Furthermore, subsection (4) imposes an obligation on employers to do everything “reasonably practicable” to ensure that the offending employee would not breach the EEA. Although neither party canvassed the provisions of subsection (4), it could be relevant when assessing the SAPS’s liability for R’s

conduct.

11. The EEA does not define “harassment” but treats it as discrimination.[2] It also does not define “sexual harassment”. The Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace also treats sexual harassment as discrimination.[3] It sets the test as “unwanted conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account certain factors”.[4] Conversely, behaviour that is desired, welcome, mutual or reciprocal is excluded from the definition.[5]

The Onus

12. Conceptually connected as harassment is to discrimination, it follows that the onus of proving harassment rests on the party who alleges s/he has been harassed, in this case employee. The employer, in this case, the SAPS, bears the burden of proving the fairness of the discrimination or, more practically in a harassment case, the treatment did not amount to harassment.[6] Furthermore, based on the standard that a litigant has to satisfy the court that s/he is entitled to succeed, [7] the employee has to prove the harassment because it is exclusively within her knowledge.

The Process

13. The employee closed her case. The SAPS applied for absolution from the instance on the basis that the employee has not discharged the onus of proving that R sexually harassed her or that the SAPS delayed or otherwise failed to take steps to eliminate harassment.
14. Absolution will not be granted, unless the employee clearly fails to discharge her onus. She must establish a prima facie case of harassment, to avoid absolution.[8]

The Employee's Evidence

15. On 20 October 1980 the employee joined the police force as a level 1 administrative clerk. Over the next 20 years she progressed to a level 6 clerk earning a salary of about R70 000 per annum. By the time she instituted this claim she was a level 7 Chief Administrative Clerk.
16. It was New Years' Eve, 1986. At the time R was a lieutenant. The employee went into his office to wish him before leaving. He put his left hand on her right breast and his tongue into her mouth. Feeling uncomfortable, shocked, horrified, but not devastated, the employee retreated to her office. She did not talk about the incident to anyone, fearing that her father, who was a major in the SAPS, would be angry if he found out. She was close to her father. Besides, she was not proud of

the incident. In the Indian community people did not talk to their parents about sex.

17. She secured a temporary transfer from the Chatsworth office, where this encounter occurred, to Sydenham Police Station where her father worked. After six months, she returned to Chatsworth.
18. Although she testified about the 1986 incident, she did not plead it, nor did she mention it in statements she subsequently made to the SAPS. She remembered and related it for the first time to her attorney in 2006 because she wanted her attorney to know everything.
19. After this incident she had contact with R when she was charged in March 2002 for making obscene telephone calls. She had entertained a certain Naidoo who misrepresented himself as a medical doctor and a widower, who was in search of a wife. It turned out that he was married with children. The employee discovered this, confronted him and informed his wife of the affair. The wife brought charges against the employee for crimen iniuria, allegedly for

making abusive telephone calls, which she withdrew. R was involved in the investigation of this complaint.

20. The next occasion was on 7 June 2002. The employee had had a bad day. Her Charge Office Commander “screamed” at her for having lunch instead of working in the charge office. Back home, her mother picked an argument with her. These two incidents set her off to confide in R and to seek his help to improve her work life.
21. By this stage, R had become Assistant Commissioner for 20 stations including Chatsworth. She did not think of asking her Station Commissioner for help as he had not assisted her before. As for her New Years’ Eve encounter with R, she put that behind her believing that, over time, he had matured. Besides, he was now the Assistant Commissioner, a position of power.
22. She telephoned R. On hearing of her troubles with the Charge Office Commander R reassured her that he would sort them out. He telephoned her several times that evening. Between these calls, she drove her friend, a Captain in the SAPS, to the Berea to celebrate the latter’s birthday.
23. R arranged to meet her at a fast food restaurant on the Berea. In the parking lot of the restaurant, she left the Captain in her car and joined R in his car. For about 5 to 10 minutes they chatted about nothing serious or memorable.
24. R called her the following Monday and told her that he liked chatting to her. The following week he called her to his office in Prospecton. When they met he reminded her of the New Year’s Eve incident and remarked that her father would have “finished” him if he had known about it. The employee did not respond.
25. After this meeting R asked the employee to have sex with him. In return, he offered to promote her. The employee saw it as a business proposal. She refused. He persisted. By the end of June 2002, “after so much persuasion” and the promise of making her life better, she succumbed.
26. They met at a shopping centre. He told her that he knew a very nice place he could take her to. He drove her in her car to a lodge. It was a “filthy dump.” He signed the register as “Naidoo” and paid R100. They had sex and left.
27. After this encounter, R gloated that the former Provincial Commissioner had taken a bet that whoever slept with the employee would get R1 million. This angered the employee so, that she reconsidered her pact to have sex with him in exchange for her promotion. But she relented. When he called her again in July 2002, they had another sexual encounter at the same lodge. Thereafter, R vulgarly denigrated her father. Again, she considered withdrawing from the pact. Still she persisted with it.

28. R allegedly started the blackmailing that caused her to stay in the relationship for the next three years. He threatened to tell her family that she slept with him. She alleged that she was vulnerable after her dad had passed away a year before on 14 July 2001. Consequently, she succumbed to the threat.
29. If her family found out about the relationship it would have been detrimental for her as her family held high moral and spiritual values. Her two younger sisters were also in the SAPS. The incidents would have embarrassed them. Aged 42, unmarried, she lived with her mother. She could therefore not risk her family's wrath and ostracism.
30. R knew that she would not tell anyone about the affair because she had not reported the 1986 New Year's Eve incident. He swore at her constantly, calling her a prostitute and its various vulgar synonyms. Once, at the Wild Coast Casino, he swore at her in the presence of many people. He had been on duty in Margate and had insisted that she join him there. On another occasion

at the Sun Coast Casino, he swore at her again in public. On both these occasions she slapped him.

31. Once, R had remarked that she wore diamonds whilst he had none. She bought him a ring. She lent him money, first, R1 000 to give as a gift to his relatives, second, R12 000 in 2003 for reasons he did not disclose, and third, R15 000 for fees of counsel who was defending him in another sexual harassment complaint. With regard to the last loan, she had to borrow the money herself, using his official cellphone to call the lender in Johannesburg.
32. The relationship impaired her health. She does not enjoy good health. On 23 March 2000 she volunteered to attend at the scene of a tragic incident at the Throb Night Club when 13 children died. Witnessing this incident induced PTSD which, according to the employee and psychiatrists engaged by both parties, continues to afflict her. She also suffers from diabetes and other ailments. Since the Throb incident she consults a psychiatrist. Currently, she consults Dr S Khalil Kader, who is also her witness in this action.
33. The relationship aggravated her PTSD. She became anxious and suicidal and had to be hospitalised. She booked off sick from 19 September 2003 to 3 May 2005. For 19 months she was on paid sick leave.
34. During her sick leave, she indulged in her weakness for gambling. On 29 October 2003, barely a month after she had booked off sick, she went to the Golden Horse Casino in Pietermaritzburg with R.
35. The relationship with R soured to the extent that on 7 March 2005 she wrote an anonymous letter to the Minister accusing R of various acts of misconduct, including gambling and "satisfying his lustful desires during office hours", leaving his state subsidised vehicle for his family's use, his extramarital affairs with his subordinates and abuse of the state's telephone and cellphone. Still, nowhere in the letter did she disclose that he harassed or abused her. Without a fax transmission slip there is also no objective proof that she faxed this letter to

the Minister.

36. On 13 April 2005, R blackmailed her again to visit him. In his office, they argued. R went to the adjoining office and returned with a pistol allegedly threatening to shoot her if she reported him to the SAPS. She screamed. He dropped the pistol. In the Minutes of the Pre-trial Conference, however, the parties recorded as a common cause fact that R had threatened to kill himself.[9]
37. Shocked, stressed, she was admitted to hospital on 15 April 2005. Her blood sugar level went so out of control that the doctors prescribed insulin for the first time to treat her pre-existing diabetes. She was discharged on 20 April 2005.
38. That evening at about 8 pm R telephoned her. Blending abuse with blackmail he persuaded her to come to his house as his wife was away. At his house, she found him drunk. She photographed him naked. On four occasions when she tried to leave he pulled her back from her car. It got late and at about midnight she decided to stay the night at his house.
39. On 26 April 2005 she attended a career session at Prospecton where R was stationed. R telephoned her and told her to meet him at his house. At 10 am that morning, during working hours, they had sex at his house.
40. Days later she drove her friend past R's house. She noticed a blue VW Golf in his yard. She drove into his yard. Leaving her friend in the car, she knocked on his door. He did not answer. She went to his bedroom window. The curtains were slightly ajar. She saw R in bed with another woman whom she did not know. She knocked on the window. They sprang out of bed. R hid the woman in his lounge and pushed the employee into his bedroom. The woman left. The employee's friend, who was waiting in the car, telephoned her to check if she was alright. The employee reported that R was assaulting her by pushing her around. She called her friend into the house.
41. The employee recalled then that R had boasted that he had slept with over 40 women and that he had given her Aids. Fearing the worst, she slapped him, before driving off with her friend to lunch at a shopping mall.
42. R continued to telephone her. She asked him to repay the loan of R12 000. He undertook to repay her on 29 April 2005 at his house. When she got there, he called the SAPS. An inspector who attended at his house asked her what the problem was. She did not respond. The inspector encouraged the employee to leave the scene, as the inspector feared that R might shoot her.

43. On 30 April 2005 R again abused and blackmailed her to get her to his office. There, he raped her. She cut her lip. She sent him short text messages (sms's) calling him "therapist" and threatening to report him for rape. She reported the rape to her friend and to her sister, both social workers. They advised her to report it to the SAPS. That advice, she claims, and not her finding him in bed with another woman, moved her to lodge a formal complaint of sexual harassment.
44. Despite threatening to report him, she claims that she could not do so because no action was taken against him when D, another female officer, had complained of sexual harassment against him. Besides, R was Assistant Commissioner and action against him was unlikely.
45. Before she had booked off sick in September 2003, the employee was stationed at Chatsworth whilst R was at Prospecton. About 26 April 2005, shortly before she was due to return from sick leave, Captain Veerasamy asked her to return to work in Prospecton to clear the backlog in the medical records office. Under cross-examination, she denied that she asked to work in Prospecton where R was stationed.
46. In May 2005 she telephoned Captain Pillay who was stationed in the Provincial Commissioner's office. She informed him that R was driving her insane. She asked him for an appointment with the Provincial Commissioner. He gave her an appointment. On the appointed day, she cancelled the appointment, purportedly because R threatened her.
47. She took 22 days vacation leave between May and June 2005.
48. R asked to meet her. She opted to meet him in his office in Prospecton. He refunded her the loan of R12 000.
49. On 15 August 2005 she wrote asking for an appointment with the Provincial Commissioner. She secured an appointment for 19 August 2005 at 14h30. At the meeting, she told the Provincial Commissioner "everything".
50. The Provincial Commissioner urged her to leave R alone and to get on with her life. She pleaded with him for help, saying that she came to him because he was the Provincial Commissioner and that she had made up her mind to make her statement of complaint. He asked her to call his secretary when she was ready to make her statement. The meeting ended at 15h15.
51. The employee called the Provincial Commissioner's secretary several times to arrange to make her statement. Eventually, she got an appointment with Assistant Commissioner Makhanya, the Head of Legal Services on 31 August 2005.
52. On 26 August 2005 Veerasamy informed her that she had been transferred "too close to the source." He was referring to the close proximity in which she worked with R after she had reported him to the Provincial Commissioner. He allegedly suggested that she be transferred to Chatsworth.

53. That day, Area Commissioner Zikhali directed the Station Commissioner and the Area Head of the Employee Assistance Service (EAS) to transfer the employee temporarily to Chatsworth to a low stress environment. Area Commissioner Zikhali recorded that the employee had no objection to this intervention and assistance.[10]
54. However, in court the employee contested the purpose of the transfer, saying that it was for her alleged poor performance. She disputed that her performance was poor as Superintendent Nel had rated her performance as 80%.[11]
55. However, from her letter to Veerasamy[12] it emerges that she asked him to transfer her from Prospecton; she regretted her request and urged him to transfer her back to the medical records section in Prospecton. The documentary evidence therefore does not corroborate the employee's evidence in court that she was transferred against her will. Veerasamy allegedly replied that he would have to ask R about her request to return to Prospecton. Furthermore, given her reluctance to transfer to Chatsworth, her complaint that the area officials did not comply promptly with Zikhali's directive is unfounded. The employee remained in Chatsworth until December 2005.
56. On 31 August 2005 she met Assistant Commissioner Makhanya who recorded her statement of complaint. Makhanya presented the employee with a typed statement, which the latter signed without reading.[13] This statement bears no reference to either the 1986 New Year's Eve incident or the rape in April earlier that very year.
57. Later that day, Veerasamy telephoned her to report that R had said that she was "f...ked." This sent her on a "guilt trip", whatever that meant, for reasons she did not explain. Veerasamy called again at about 7 pm and invited her out for a chat. He called her several times while she was getting dressed and urged her to "dress pretty." Veerasamy, accompanied by Captain Munsamy, picked the employee up from her home. When she got into the vehicle she realised that Veerasamy was drunk. He drove them to two illegal liquor sales outlets or "shebeens" in Westcliffe and bought alcohol.
58. Veerasamy drove to a shopping centre in Hillary. He dropped the employee and Munsamy off saying that he would pick up R and return for them. As it got late and Veerasamy had not returned, the employee called Veerasamy three times to check when he was returning to fetch them. Eventually, Veerasamy returned with R. She denied under cross-examination that she had asked Veerasamy to set up a meeting with R.
59. The employee got into the vehicle. R said she should not have made the statement to Makhanya. He insinuated that he might commit suicide. She told Veerasamy about the bet that R had with the former Deputy Provincial Commissioner and Veerasamy allegedly replied that she should be proud.
60. R said that he still loved her and cared for her. Veerasamy and Munsamy left R alone with the employee in the vehicle for a while. R asked to kiss her. Indignant, she declared that he would never be able to touch her for the rest of his life.

61. Veerasamy and Munsamy returned to the vehicle and they dropped her off at her home. After this incident, which was purportedly an attempt to intimidate or victimise the employee, she was adamant about pursuing her complaint.
62. At 8 am on 1 September 2005 Veerasamy telephoned the employee to inform her that R was suicidal and urged her to come to Prospecton with the internal postal delivery service. When she arrived at Prospecton and entered R's office, R left. Veerasamy smirked. The employee realised that R and Veerasamy had colluded to make a fool of her.
63. Makhanya called to inform her that Deputy Provincial Commissioner van Eck would be investigating her complaint. She telephoned van Eck's office several times before eventually getting an appointment. During the interview van Eck took no notes. He wanted details that the statement to Makhanya had omitted, such as the contact numbers and addresses of the employee's witnesses and the dates of various incidents.
64. In court, the employee contended that she had informed van Eck of the rape and the incident with the three officers on the evening of the very day she had complained to Makhanya. She also told him about an incident on 29 October 2003 when she and R went to a casino in Pietermaritzburg. She was on sick leave. R was on duty. R received a message from complainant D to call her. R used the employee's telephone to call D. Van Eck asked for the employee's cellphone prints. Yet van Eck included none of this information in her statement, she pointed out.
65. She met van Eck again in October in the lounge of his office. He asked her "sexual questions." As she spoke he crossed and uncrossed his legs in a way that made her uncomfortable. She gave him the dates she could recall. Again, he did not take notes.
66. On 24 November 2005 she met van Eck with prints of her cellphone account and the photograph of R naked. A week later,

she called van Eck's secretary to complain about the delay in taking her statement. The secretary reported that van Eck had mislaid the documents including the cellphone prints and photograph. The employee arranged to have her typed statement faxed to her.[14]
67. When she received the statement, she noticed that van Eck had missed the incident of the evening of 31 August 2005 with the three officers and the date 30 April 2005 was incorrect. Van Eck had also changed her statement to read as if she had requested the transfer to the medical records section of Prospecton, whereas Veerasamy had asked her to come there.
68. She was not satisfied with van Eck's handling of the matter. On 28 November 2005 she wrote to him to report that she was being pressured to withdraw the complaint against R, that she was being promoted to Lamontville instead of the medical office post, and that she was not being temporarily transferred to Chatsworth as per Zikhali's letter dated 26 August 2005. This treatment, she contended, was part of R's strategy to victimise her for reporting him. Furthermore, Van Eck had delayed investigating her sexual harassment complaint for more than three months.[15]

69. She telephoned the National Deputy Commissioner whom she had heard would be a good person to take up her complaint. After listening to the employee, the Deputy Commissioner responded that she sounded like a woman scorned.

70. Not having heard from van Eck she faxed a letter dated 12 December 2005 to the Minister reiterating her complaints

about the sexual harassment and victimisation.[16] On 20 and 29 December 2005 she wrote to the Minister again complaining about the lack of progress by van Eck.[17] On 30 December 2005 the Minister acknowledged receipt of her correspondence sent the previous day.[18]

71. On 31 January 2006 she was promoted to Chief Administrative Clerk level 7 and posted to Lamontville where conditions were so unhygienic that she developed cellulites. The conditions also aggravated her diabetes.[19] She went to the doctor seven times that week and was eventually hospitalised on 14 February 2006 for a week.

72. She complained to van Eck about the posting, alleging that she was being victimised because of her complaint. Van Eck told her that she would have to remain in Lamontville because she had applied to be posted there. About her sexual harassment complaint, he replied he “will” investigate. From that she deduced that he had not even started investigating her complaint.

73. She had no confidence in van Eck or anyone else from the Province investigating a complaint against R. Consequently, on 28 January 2006 she asked the Minister to appoint a person from outside the province to investigate her complaint.[20]

74. On 2 February 2006 the Divisional Commissioner responded that van Eck was still investigating her sexual harassment

complaint. As regards her promotion complaint, she had applied for promotion to Lamontville and the panellists had recommended her for the post. There was therefore no irregularity, wrote the Divisional Commissioner.[21]

75. This letter did not reassure her because van Eck had still not given her her statement of complaint to sign. She was on leave from 31 January 2006 to 3 February 2006 when van Eck telephoned her to ask her to point out the lodge to which R had taken her. She accompanied van Eck and his secretary to the lodge.

76. Eventually, she signed her statement on 7 February 2006.[22] After she had signed it, she realised that it was wrongly dated as “6th”. She drew this to van Eck’s attention. However, she did not notice that he had not rectified the other errors that she had

alerted him to previously. By the end of February 2006, she had engaged her current attorneys to expedite the investigation.

77. By letter dated 6 March 2007 the Provincial Commissioner replied that her transfer was not approved and would be reconsidered

if she were prepared to relinquish her promotion.[23] By letter dated 6 November 2007 the Station Commissioner, Captain Zulu, notified her that unless she reported for work within 10 days her salary would be stopped. Her salary was stopped in January 2008 and reinstated in March.

78. On 30 June 2008 the SAPS charged the employee for misconduct for making false allegations of sexual harassment against R, when they had a consenting relationship, and for alleging that he had submitted false petrol claims.[24]
79. Van Eck supported these charges with an affidavit in which he stated that the employee failed to provide him with particulars of possible witnesses, that he viewed the records of the lodge, that the names of the employee and R did not appear there, nor did any of the entries resemble R's handwriting, that R telephoned the employee on about a hundred occasions and that R did not submit a false travel claim.[25] The disciplinary hearing is suspended pending this litigation.
80. At Lamontville she continued to be victimised. For instance, she was checking the staff leave records and found irregularities which she reported. An African male unknown to her approached her in her car in the parking lot and swore at her. He had blood on his face. Precisely what the connection was between the irregularities and the man with blood on his face, she did not clarify.
81. Another incident occurred on 17 November 2006. Whilst Captain M I Zulu was talking to her, Inspector V E Hlophe came into her office and argued with her about certain photocopies that she had made. The employee recorded the incident in the SAPS10 OB book, noting that Inspector Hlophe, when speaking to a student, had referred to her as "a useless clerk" or "a nothing". This student had allegedly said that she did not like Indians. The employee asked that these incidents be investigated.
82. No investigation occurred because R was by then the Area Commissioner. He wanted to victimise her for her complaint against him. Following these incidents, she asked to be transferred.[26] Her request went unheeded until 24 July 2008 when she was eventually transferred to Malvern.
83. On 1 August 2008 she went to Malvern. V G Naidoo said that he had a problem with the Province sending her there because he could not accommodate her. Captain Kubair, the Support Services and Human Resources Commander, offered to accommodate the employee in logistics with Chief Administrative Clerk S Govender.
84. Whilst working at logistics V G Naidoo reprimanded her. She retorted that he should not treat her badly because she had a problem with R. Following this incident she booked off sick. Dr Kader had her admitted to hospital for nine days. She did not return to work.
85. On 30 April 2009 the Provincial Commissioner notified her that she had exhausted her sick leave of 36 days and that the SAPS had no obligation to continue to remunerate her if she did not tender her services. She had applied for ill health retirement in March 2007. Her application for medical boarding was on the basis of her diabetes, hypertension,

hypothyroidism, anaemia, thalassemia and her back and ankle injury endured in the workplace in 2001. That application was still pending. Kubair telephoned her in July and notified her that her application was rejected and that she should return to work. She resumed her duties on 24 July 2009, working under Kubair's supervision. She lodged an appeal against the rejection of her application for ill health retirement.

86. On 4 August 2009, Superintendent V G Naidoo called her into his office. Present were the chairperson of the Community Policing Forum, Mr M Pillay, the Detective Branch Commander Captain Ntshangase, Crime Prevention Commander Captain Govender and Kubair. They informed her that she was being transferred to the exhibits room. Although she did not respond to this instruction at the meeting, she subsequently refused to work in the exhibit office. In her view administrative duties should not be done in the exhibits office. Exhibits had gone missing and they had not been audited for seven years.
87. After the meeting, she booked off sick. Dr Kader gave her a certificate for 4 August 2009. On 6 to 15 August 2009 she was hospitalised. Since then she has not returned to work.
88. Her relationship with R impaired her relations with her family. On 9 June 2006 her mother told her to leave the house, failing which she would obtain "a legal document" from the High Court to evict her. She has also become estranged from her sisters and brother.
89. She became suicidal. In the first 20 years of her service she took only 85 days sick leave, however after the PTSD she took 120 days sick leave.
90. She could not explain how her compensation was computed. In fact, it was more important to her to tell her story.

Dr Kader's Evidence

91. Dr Kader, the only witness besides the employee, is a Specialist Psychiatrist who has Mb.Bs (Kashmir) and Med.Psych (Natal 1986) degrees. He is self employed and has consulting rooms at various hospitals in KwaZulu-Natal. He has approximately 22 years experience as a Specialist Psychiatrist.
92. He consulted with the employee for the first time on 18 March 2004 and has since provided her ongoing psychotherapy and cognitive behavioural therapy about once a month and sometimes more frequently.
93. He confirmed that she reported to him about being verbally and sexually harassed. He diagnosed her with PTSD as a result of her witnessing the Throb incident on 24 March 2000 and as a result of a fall at work on 5 February 2001.
94. In his opinion, the verbal and sexual harassment exacerbated her pre existing PTSD. He confirmed that he had her admitted to hospital on several occasions. Having seen the transcript of some of her vulgar and abusive sms's to R, he opined that her state of mind was consistent with someone who was being sexually harassed.

95. Dr Kader is an unreliable witness for two principal reasons: Firstly, he issued a medical certificate to the employee on the very first day of his consultation with her, stating the following:

“18.3.2004

The employer

re Ms K Govender.

The above is not fit for work from 12 September 2003 until medically boarded as she suffers injury on duty: back injury and PTSD.

Yours sincerely.”

96. He produced this certificate after a 20 to 40 minute consultation with the employee. He undertook no independent clinical tests to support his opinion. He issued the medical report, he confirmed, purely on the employee’s assertion that she was not fit for duty.
97. Medical certificates of this kind are more a hindrance than a help to both employers and employees. Considering that employees have to pay for such certificates, which misrepresent their own opinion as that of the doctor, the practice is unethical.
98. The second reason that his evidence is unreliable is that in his notes of 26 May 2004[27] he wrote “she still loves him but knows”. Although he deleted this entry from his notes, it was still readable. When asked to read this portion he hesitated for a while until counsel for the SAPS prodded him. He pretended that he could not read the deleted but decipherable portion.
99. He explained that the employee had told him that she loved R but had asked him to delete it. He was distracted when he wrote it down because he was trying to arrange for her to be admitted in hospital.
100. Dr Kader failed to assist the court, as expert witnesses are required to, with independent, unbiased and reliable evidence.
101. However, that the employee suffers PTSD is corroborated by the reports of the SAPS’s own experts. On this basis Dr Kader’s diagnosis that she suffers from PTSD is accepted.

Analysis

of Employee’s Evidence

102. In an application for absolution from the instance, courts are usually slow to make credibility findings because they have heard only one party’s evidence.[28] However, in this case, the court is able to make credibility findings on the employee’s own version, even though her evidence lacks credibility in many respects. Such findings count as much against her as they do against R.

103. Although much of the details of her evidence are irrelevant to determine whether she was sexually harassed, the court has recorded the employee's narrative to illustrate both her personality and the extent to which she is credible and also the milieu in which her complaint arose. Though the court does not have to determine the veracity of allegations such as whether R abused state resources, or Veerasamy drove whilst under the influence of alcohol, visited shebeens or cynically completed her for having a bet of R1m over her virtue, or whether the physical and interpersonal conditions at Lamontville were unhealthy, the SAPS might have an interest in diagnosing their veracity to launder negativity about its public image.
104. On her own version the employee fails to establish a prima facie case that R sexually harassed her for the following reasons:
105. For three years since June 2002 she consented to having sex with R for reward, namely a promotion and a better life, whatever that meant to her. She assumed that because R was on the ratification panel appointing and promoting staff, he was in a position to make her life better and promote her. She relied on and expected him to use his seniority in the SAPS to advance her career. Under cross-examination, she conceded that she consented to have sex with him of her own free will and that R did not force her
- to have sex with him. She did not want to have sex with him but did so for reward. Having sex with R in exchange for promotion or a better life is both prostitution and a corrupt practice.
106. After the first pleaded sexual encounter in June 2002, she did not withdraw from the pact even though she was upset when R told her that the Deputy Provincial Commissioner had taken a bet pay R1 million to anyone who had sex with her. She did not withdraw after the second encounter with him the following month in July even though he angered her by insulting her father.
107. Almost on a monthly basis she had sex with R at a filthy lodge, at his house and at other places. Sometimes she drove herself or he drove her car to the meeting place. She bought the condoms but sometimes had unprotected sex with him, even though he told her that he had had sex with over 40 women and that he had infected her with Aids. She voluntarily took risks with R. She must therefore have wanted to have sex with him.
108. After the 1986 incident, she did not report him to her father who was a Major in the SAPS at the time and R was a lowly lieutenant. For three years from the June 2002 encounter she did not report him to her sister, an employee of the SAPS, or friend, both of whom were social workers, or to another sister who was also an SAPS employee. She did not have him charged for rape. In fact, she
- lodged no formal complaint until well after April 2005 when she discovered him in bed with another woman.

109. R had a lot more to lose than she did if she reported him. He was a senior officer holding a managerial position, a husband, parent and grandparent. Notwithstanding its tardiness in making credibility findings in applications for absolution, on this issue, the employee's explanation for not reporting R rings hollow. If he blackmailed her that he would tell her family, and if they ostracised her, he would have been worse off than she was.
110. Furthermore, she contradicted this explanation for not reporting him by saying that he threatened to kill her. She adduced no credible evidence that he threatened to kill her. Her evidence that she feared him and therefore desisted from reporting him is unsustainable.
111. As for her promotion, she confirmed under cross-examination that she had been promoted automatically for the past 20 years until she had reached level 6, and that a promotion to level 7 was her first promotion that she had applied for and which was initially unsuccessful. Despite her dissatisfaction, she did not appeal against that decision.
112. Notwithstanding her ill health, she was no wilting wallflower. She is feisty and assertive. She slapped him on two occasions in public and once in private. She initiated contact with him to seek his help in June 2002. She initiated and maintained contact via more than 1000 sms messages to him. Her tone in the messages was as vulgar and abusive as she alleged he was.
113. At work, she uncovered and reported irregularities with leave claims without fear or hesitation. She challenged senior officers including Veerasamy and V G Naidoo whenever she disagreed with them. She lodged a complaint against senior officers in Lamontville.
114. Eventually, when she decided to proceed against R, she complained to the Provincial Commissioner, not her human resources head, who should have been her first port of call. She fearlessly complained about van Eck and other issues to the Provincial Commissioner in breach protocol and to the Minister.
115. In court, she cut the image of a confident, middle aged woman who was determined to go to great lengths to achieve her objectives. She volunteered intimacies about the affair to embarrass and denigrate R as much as possible, without realising that her bluster against him denuded her of dignity as much as it did him.
116. There is another side to the employee's personality. She conceded that she acted "erratically" and could not explain for instance, why she informed R's wife about finding him in bed with another woman. Ranting against R also unveiled her true feelings for him. Even though she asked Dr Kader to delete her statement to him that she still loved R, she could not obliterate the feelings she harboured for him. Notwithstanding her denial that she did not love him, Dr Kader's deleted note is more credible than her testimony.
117. Furthermore, she indulged R even when he did not blackmail her. H He requested and she bought him a ring, two pairs of shoes, a jacket and two T shirts.[29] She lent him money on at least three occasions. On the last occasion, she had to borrow the money from her friend. In court, when she testified about other women who associated with R, e.g. "Anita", her disapproval, if not jealousy, was evident from her disparaging tone. Most of all, on her

version, she voluntarily endured an abusive, immoral, unethical and secret relationship for three years, which no rational, dispassionate, sensible person will tolerate.

118. In the circumstances, the employee has failed to prove that R sexually harassed her. Having failed to cross the first threshold of her onus the SAPS incurs no vicarious liability.

Victimisation

119. Ms Allen for the employee submitted that the victimisation presented as a failure to investigate her sexual harassment complaint promptly, intimidation by officers for lodging a complaint and bad treatment. The failure to investigate and eliminate the harassment and victimisation invoked section 60(3) of the EEA, which holds an employer vicariously liable for the conduct of its employee if it

fails to eliminate offensive conduct. As the victimisation was a consequence of the employee pursuing her rights to lodge a grievance

and dispute it was also in contravention of section 5(2)(c)(vii) of the Labour Relations Act 66 of 1995 (LRA). The latter ground was neither pleaded nor agreed at the Pre-Trial Conference.

Consequently, the court does not have to determine it. However, the facts on which it is founded overlaps with the EEA ground. A determination of the EEA ground will therefore also indirectly dispose of the LRA ground.

120. As the employee failed to cross the first threshold of proving harassment, which is the conduct she alleged the SAPS should take steps to eliminate, she cannot hold the SAPS vicariously liable. Furthermore, she conceded that she had audience with very senior officials within the SAPS, notably Makhanya, the Head of Legal Services and the Deputy Provincial Commissioner, van Eck. She conceded that they did investigate her complaint. She was dissatisfied at the pace at which they conducted their investigations. However, when it was pointed out to her that her complaint was investigated within about two months after she reported it, she admitted that she was satisfied.
121. As regards any delay in the investigation, she contributed to it. She undertook to provide van Eck with the names and contact details of witnesses but had failed to do so. She did not revert to van Eck to explain why she was unable to provide him with information about her witnesses.
122. As regards victimisation by other officers at Lamontville and elsewhere, the employee fails to establish a connection strong enough to link her complaint to the treatment she received to put the SAPS to its defence in these proceedings. Assuming without deciding in her favour that other officers treated her badly, her complaint could have been a factor, but not the only or most reasonable factor that contributed to the way other officers related to her. Her illness, her protracted absences from work with pay, her refusal to work in the exhibits room, and not least, her personality, could have alienated her from her colleagues.

123. If she had reported the alleged rape, that would have amounted to a sexual harassment complaint, notwithstanding their prior consensual relationship. As she did not report it, she jeopardised her credibility and any prospects of holding the SAPS liable under section 60(3) of the EEA.
124. The employee therefore does not satisfy the requirements of section 60(3) of the EEA. Even though she does not clear the harassment and section 60(3) hurdles, and even though her evidence is unreliable in many respects, in some respects she establishes a prima facie case of misconduct against R. That case is the following:
- i) R entered into an adulterous relationship with the employee.
 - ii) He is a husband, a father and a grandfather.
 - iii) In the SAPS hierarchy, he was superior to the employee.
 - iv) He broke workplace rules.
 - v) He used state time and resources to pursue an illicit relationship.
 - vi) He might have used state time and resources to pursue other illicit relationships.
 - vii) He compromised his integrity to manage and earn the respect of his colleagues.
 - viii) He lacks honour and loyalty.
 - ix) He behaved unethically, immorally and disgracefully.
 - x) He broke the law several times.
 - xi) He was a party to prostitution and corruption.
 - xii) He had adulterous relationships simultaneously.
 - xiii) He committed adultery which, although not a crime, remains an unlawful breach of the contact of marriage.
 - xiv) He maintained a stressful relationship with a person who suffered from PTSD.
 - xv) He cannot be trusted with protecting or promoting the interests of women and other vulnerable people.
 - xvi) He compromised his responsibility for eliminating harassment and other forms of discrimination in the SAPS.
 - xvii) He put the SAPS at risk to the tune in excess of half a million rand through this litigation.
 - xviii) He contributed to the expenses the SAPS incurred and will not recover from the employee.
 - xix) If he committed some or all these transgressions, he would have brought the SAPS into disrepute.

125. Instead, for all of these allegations, the SAPS reprimanded him for treating the employee with disrespect.
126. For a senior police officer and an elder in the community, for a person who is expected to practice and uphold high moral and ethical standards, who must avoid harm to colleagues and members of the public, who must protect vulnerable groups, which include women and people with disabilities, who must be accountable and responsible for his actions, and most of all, who must obey the law, the penalty is but a slap on the wrist.
127. At various stages in her testimony the employee expressed reservations about whether any action would be taken against R if she complained against him. The reprimand justifies her apprehension. In fact, it gives credence to the popular perception and fear, that power is as much a weapon that sexual harassers use to harm their victims as it is a shield to protect them when they are caught. It is an explanation for the reluctance amongst victims to complain.
128. The stereotypical employer response that sexual harassment is the complaint of a woman scorned is another barrier to exposing unacceptable sexual behaviour in the workplace. It discriminates against women and dismisses their complaints as trivial, emotional and generally undeserving of serious consideration. Most of all, it reflects a mindset that bars scrutiny of the conduct of the alleged harasser.
129. Notably, the reprimand implies that the SAPS did regard his conduct as misconduct and disciplined him. Having fine policies, manuals and a complaints machinery to combat sexual harassment does not go far enough to combat the scourge of sexual harassment if the leadership of the SAPS remains reluctant to act decisively against its own by imposing effective, deterrent penalties.
130. The inadequacy of the penalty of a reprimand inspires the question that section 60(4) invites: Even though the SAPS is not liable to the employee in this case, can it say with any confidence that “it did all that was reasonably practicable to ensure that (R) would not act in contravention of this Act”?

Medical Boarding Appeal

131. As regards her prayer for an order directing the SAPS to determine her appeal against the refusal of her application for medical boarding within one month, the court agrees with the employee, but for different reasons, that the SAPS has vacillated for too long in finalising the status of this employee. She remains on full pay without tendering her services. In the public interest, and in the employee's interest, the SAPS should finalise her medical board application forthwith. However, the court is not in a position to grant an order in this regard because, even though it accepts that she suffers from PTSD, it is not satisfied that she is so unfit for duty that she cannot be reasonably accommodated in a stress free environment. For instance, she gambled

when she was on paid sick leave, an activity that hardly conduces to recovering from PTSD. She also remained in a stressful, adulterous

relationship. Furthermore, she relies on Dr Kader's opinion to support her application. As the court has found, Dr

Kader's opinion is unreliable.

Costs

132. The SAPS sought an order for costs against the employee on an attorney and client scale, on the basis that her claim is entirely frivolous and vexatious and that she has cost the SAPS, and indirectly the taxpayers a considerable amount, not only in the litigation but also in investigating her complaint.

133. The Court accepts both these submissions. However, in mitigation, it takes into account that the employee has laboured under the disability of post-traumatic stress disorder. Another factor is that she was not alone in behaving unethically and disgracefully. R was equally, if not more responsible given his seniority, for putting the SAPS at risk.

The Order

- a. The application for absolution is granted.
- b. The employee pays the respondents' costs.

PILLAY D, J

APPEARANCES

FOR APPLICANT : Adv L R NAIDOO

Instructed by : STATE ATTORNEY

FOR RESPONDENT : Adv K ALLEN

Instructed by : STEELE ATTORNEYS

- [1] Paragraph 37 of the pleadings; paragraph 4 of respondents' heads of argument
- [2] Section 6(3) of EEA: "Prohibition of Unfair Discrimination: Harassment of an employee is a form of unfair discrimination and is prohibited on any one or combination of grounds of unfair discrimination listed in sub section (1)"
- [3] Item 3: "Sexual Harassment as a form of unfair discrimination: Sexual harassment in the working environment is a form of unfair discrimination and is prohibited on the grounds of sex and/or gender and/or sexual orientation."

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- [4] Including “4.1whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation; 4.2whether the sexual conduct was unwelcome;4.3the nature and extent of the sexual conduct; and 4.4the impact of the sexual conduct on the employee.”
Item 4 of the 2005 Code (NoticeE 1357 OF 2005)
- [5] J L Pretorius, M L Klinck and C G Ngwenya, Employment Equity Law July 2009 paragraph 6.3.1.2 page 6-30
- [6] Section 11 of EEA: “Burden of proof: Whenever unfair discrimination* is alleged in terms of this Act, the employer against whom the allegation is made must establish that it is fair.”
- [7] LH Hoffmann and DT Zeffertt The South African Law of Evidence fourth edition p496
- [8] LH Hoffmann and DT Zeffertt The South African Law of Evidence fourth edition p508-9
- [9] Para 3.5 of Pre Trial Minute Page 56 of Pleadings
- [10] Bundle A141
- [11] Bundle A142
- [12] Bundle A145
- [13] Bundle A146 to A150
- [14] Bundle A174 – 177
- [15] Bundle A159 – A160
- [16] Bundle A171 – A172
- [17] Bundle A178
- [18] Bundle A179
- [19] Bundle A285 Report of Dr K P Parag, a specialist physician and nephrologist
- [20] Bundle A182
- [21]Bundle A184
- [22]Bundle A186 – A190
- [23] Bundle A294
- [24] Bundle A342
- [25] Bundle A343 – A344
- [26] Bundle A254 – A256
- [27] Bundle B443
- [28] LH Hoffmann and DT Zeffertt The South African Law of Evidence fourth edition p508-9

[29] Bundle C108

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