

SOUTH AFRICA / JUDGMENT

PE v Dr Beyers Naude Local Municipality and Another (828/2011) [2021] ZAECHGC 35; [2021] 2 All SA 839 (ECG); (2021) 42 ILJ 1545 (ECG); 2022 (1) SA 560 (ECG) (13 April 2021) [2021] ZAECHGC 35

COURT

Eastern Cape High Court, Grahamstown

BEFORE

Kroon AJ

CASE / FILE NUMBER

828/2011

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IN

THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION,

GRAHAMSTOWN

REPORTABLE

Case

No.: 828/2011

In

the matter between: P[...]–A[...]
E[...]
Plaintiff
and
DR BEYERS NAUDE LOCAL
MUNICIPALITY
First
Defendant
XOLA
VINCENT JACK
Second
Defendant

JUDGMENT

KROON AJ:

1. On 31 March 2016 this Court found the Defendants jointly and severally liable to pay the Plaintiff such damages as she may be able to prove she has suffered in consequence of the sexual assault upon her on 16 November 2009 at the offices of the erstwhile Ikwezi Local Municipality in Jansenville[1]. I am required to adjudicate on the issue of quantum[2].
2. The American poet Robert Frost concluded his narrative poem The Road Not Taken[3] with the lines:

“... Two roads diverged in a wood, and I—

I took the one less traveled by,

And that has made all the difference.”

3. This is a story of a litigant embarking on a road rarely travelled by employees who have suffered a wrong at the hands of their employers and the path so chosen would ultimately prove to have far-reaching consequences for both employee and employer. After her employer had made her employment intolerable compelling her to resign, rather than pursue the conventional remedy of claiming an unfair constructive dismissal as provided for in the Labour Relations Act No. 66 of 1995 (“the LRA”)[4], the Plaintiff elected to prosecute a claim sourced in the common law and to contend that she had been the victim of a civil wrong, i.e. a delict[5].
4. The Plaintiff thus challenged the lawfulness not the fairness of the conduct of her employer. It was put to the Plaintiff in accusatory vein during cross examination at the trial on liability that perhaps she should have pursued a constructive

dismissal claim in the forum of the Commission for Conciliation, Mediation and Arbitration (“the CCMA”)[6]. It was however the prerogative of the Plaintiff to have formulated the claim in the manner she did and as she deemed fit.[7] The Plaintiff’s election to approach the High Court has been consequential for at least two reasons.

5. Firstly, there has been a considerable delay in the finalisation of the matter owing, inter alia, to the separation of the issues of liability and quantum in terms of Rule 33(4) (a procedure not permissible in statutory arbitrations

conducted in terms of the LRA) as well as a belated application for leave to appeal against the judgment on liability. This judgment is, as a result, being handed down more than a decade after the event. Had the Plaintiff referred an unfair dismissal dispute, the compensation to which she would have been entitled would have been capped[8] and given that the LRA has, as one of its imperatives the expeditious and effective resolution of disputes[9], any dispute so referred would have been expected to have been finalised with expedition[10].

6. Secondly, when it comes to the calculation of quantum, this Court is not concerned with compensation limited by a statutory cap; rather quantum is to be ascertained applying the trite principle that a plaintiff is entitled to such damages as he or she may prove[11]. In *Jones v KPMG Aiken & Peat Management Services (Pty) Ltd*[12] Myburgh J, with reference to the repealed Labour Relations Act No. 28 of 1956, distinguished between the two types of relief:

“Jones contended that he was entitled to be compensated for his loss from the date of dismissal (31 August 1992) until date of retirement at age 65 (4 December 1998). In doing so he confused a claim for future loss of earnings in delict and a claim for compensation in terms of section 46(9) of the LRA.

In the former, the defendant must make good the difference between the value of the plaintiff’s estate after the commission of the delict and the value it would have had if the delict had not been committed. The capacity to earn money is considered to be part of a person’s estate and the loss for impairment of that capacity constitutes a loss, if such loss diminishes the estate. The Court must calculate, on the one hand, the present monetary value of all that the plaintiff would have brought into his estate had he not been injured, and, on the other hand, the total present monetary value of all that the plaintiff would be able to bring into his estate whilst incapacitated by his injuries.....

By contrast, in a contract of employment the employer is entitled to terminate the employment relationship for valid reason having

followed fair procedure; there is no “job for life”. One of the valid reasons for terminating the employment relationship is a bona fide reduction in workforce. An employee’s claim for compensation under section 46(9) is not, therefore, for the loss of income from the date of retrenchment until the date of retirement.”[13]

7. Prior to her resignation, the Plaintiff had been employed by the Ikwezi Local Municipality (“Ikwezi”) and she issued summons against that municipality. After judgment was delivered on liability, the Member of the Executive Council for Cooperative Governance and Local

Government, Eastern Cape Province (“the MEC”), acting in terms of sections 12, 14 and 17 of the Local Government Municipal Structures Act, no 117 of 1998, disestablished by way of provincial notice 146 of 2016 (“the Notice”), with effect from 3 August 2016, the Baviaans, Camdeboo and Ikwezi Local Municipalities and established in their place the Dr Beyers Naude Local Municipality (the First Defendant). The First Defendant is thus the successor in law to Ikwezi and as such the liabilities of Ikwezi were transferred to the First Defendant.

8. For the sake of convenience, and given that the First Defendant has stepped into the shoes of Ikwezi, both Ikwezi and the First Defendant will, unless otherwise specified, be referred to as (“the Municipality”). The Plaintiff, P[...]-A[...] E[...], will be referred to as (“E[...]”) and the Second Defendant, Xola Vincent Jack, as (“Jack”).

OVERVIEW

9. E[...] was employed at the Jansenville offices of the Municipality. Jack was her immediate superior. Although Jack was stationed in Klipplaat (approximately 20 kilometers from Jansenville) the two were often required to work together and Jack spent much of his time at Jansenville. On E[...]’s evidence she had enjoyed a good working relationship with Jack.
10. On 16 November 2009 E[...] was sexually assaulted by Jack. Shortly before the assault, there was some tension in the working relationship when E[...] refused to perform a task requested of her by Jack because she was of the view that the instruction fell outside of her job description. There was also an incident where Jack had conveyed to E[...] that if they did something together nobody would know. E[...] was uncertain as to what Jack had intended by this comment but stated that whatever his intentions were, she was of the view that they were not good.
11. This Court described the assault in what I will refer to as the first judgment in the following terms:

“[11] On Monday morning, 16 November, plaintiff was alone in her office when second defendant entered. After greeting her he walked directly to where she was sitting at her desk. As she looked up he bent down with his head over hers and, putting his mouth over hers, attempted to force his tongue into her mouth. She clenched her teeth and tried unsuccessfully to push him away. After a minute or so he desisted, leaving her with a mouthful of his saliva. She immediately wiped the saliva off her mouth. He then also tried to wipe her mouth with his hand but she knocked it away. He then mumbled something which she could not hear and then told her to make copies of certain items from a council agenda. Before leaving her office he told her that he was going to get a cold sore the next day because he had kissed her.”

12. The assault, and the manner in which it was subsequently addressed internally by the Municipality, culminated in Erasmus resigning from the Municipality with effect from November 2010. Importantly so, it was found in the first judgment that E[...] had been compelled to resign, the Court concluding that “... [E(...)] has been forced to resign because of her Post Traumatic Stress Disorder [occasioned by the assault]”.^[14]

13. At the time that E[...] resigned in 2010 she was a vibrant 23 year old woman occupying the post of Registry and Archives Clerk within the Municipality to which she had been permanently appointed with effect from 1 January 2010. Much water has since flowed under the bridge and it became apparent that the course of the life of the deeply traumatised 34 year old woman who testified at the trial on quantum in late July 2020 had been much changed as a result of the assault.
14. As to the evidence which was adduced at the trial on quantum, in support of her case Erasmus gave evidence again and called two expert witnesses, a psychiatrist, Dr van der Merwe, and an industrial psychologist, Dr H J Van Daalen. The Municipality called Prof C S Young, a clinical psychologist and Dr P Whitehead, an industrial psychologist, as expert witnesses. It also called Mr H

Hendricks ("Hendricks"), the Chief Operations Officer of the First Defendant.

15. Given the issues which arise and in particular the issue as to whether E[...] should forfeit her claim for future loss of earnings because of a refusal to accept an offer made in terms of Rule 34 to be reabsorbed by the Municipality ("the Offer"), it is necessary to set out how the Municipality conducted itself towards Erasmus after the assault both prior to and post her resignation.
16. As part of the Offer which was made on 10 July 2020, the Municipality tendered employment to E[...] on the following terms:

"The first defendant hereby makes an offer of the following position of employment with the first defendant, in lieu of an offer of damages in regard to future loss of income, and in order to assist the plaintiff in mitigating her damages:

1. The first defendant offers the plaintiff reinstatement to a position commensurate with the plaintiff's position of employment when she left her employment with the first defendant in November 2010 (that being the position of Administrative Assistant, Finance and Archives Clerk), within the current organisational structure, at Jansenville, effective from date of acceptance of this offer, with full applicable benefits and remuneration, and subject to all relevant statutory deductions.
2. Should the plaintiff accept this offer of employment, the first defendant will immediately transfer/move Mr Xola Jack to one of the satellite offices of the Dr. Beyers Naude Municipality, and instruct Mr Jack that he may not have any contact with the plaintiff (including telephonic, by way of email or otherwise) in carrying out his duties in the course and scope of his employment with the first defendant. Mr Jack will furthermore not be permitted to enter the Jansenville offices of the first defendant during the plaintiff's period of employment. Any failure by Mr Jack to adhere to these conditions will be viewed by the first defendant as serious misconduct.

3. Should the plaintiff accept this offer of employment, the first defendant undertakes to reimburse the plaintiff (to the extent that the relevant medical aid scheme does not cover such costs) for any required psychological counselling and/or psychological/psychiatrically related medication/medical treatment, for a period of one year after acceptance of this offer of employment, and in order to assist the plaintiff in re-integrating into her employment position with the first defendant.”
17. Although inelegantly worded I am prepared to accept that the Offer was in substance an offer of retrospective reinstatement and its aim was to place E[...] into the position she would have been had she not resigned from her employment with the Municipality.
18. In evaluating the Offer and the decision by E[...] to decline it, it is inevitable that some of the ground covered in the first judgment will have to be traversed again but this time through a different lens, that is not with a view to considering the question of liability but rather the question as to whether the Municipality had discharged the onus^[15] of proving that it was unreasonable for E[....] to have refused the Offer.

HOW DID THE MUNICIPALITY CONDUCT ITSELF TOWARDS E[...] AFTER THE ASSAULT AND PRIOR TO HER RESIGNATION?

19. The circumstances leading up to the resignation of E[...] subsequent to the assault are outlined in the first judgment. It is however helpful, for the purposes of the current enquiry, to amplify that chronology both with reference to evidence given at the trial on liability as well as evidence led at the trial on quantum.
20. According to the Municipal Manager at the time, one Mnyimba, the assault had come as a shock to the Municipality because the Municipality was a close-knit organisation akin to “a family” and it had not encountered an event of that kind before. There was no evidence that the Municipality had in place a sexual harassment policy as required by law^[16] at the time that the assault occurred which meant that the Municipality had no direction or clarity as to the rights of an employee who has reported an incident of sexual harassment and what assistance was available to her. There were also no procedures in place either in respect of the alleged victim or the alleged perpetrator and no disciplinary sanctions were stipulated to be imposed in the event that an employee was to be found guilty of sexual harassment.
21. By its own admission, the Municipality relied heavily on the advice of its legal advisor as to how to address the incident. As will appear from what is set out below, it was ill-equipped to manage the situation.
22. After the assault it would seem that a degree of panic set in and a distraught E[...] was placed on what was termed “special leave” for 2 days whilst the Municipality pondered as to what procedure should be followed in dealing with Jack who remained in the workplace. E[...] was informed that she was required to be back at work by Friday of the same week. Although she was clearly traumatized by what had happened to her she was, extraordinarily so, instructed to communicate with Jack and to inform him that she would be absent from work for 2 days.

She performed this task by sending him an SMS message. Whilst she was on this special leave Jack telephoned her enquiring, in reproachful vein, as to why she was not at work. She responded by informing him that she was sick and Jack in turn responded by stating that she did not sound sick. She offered to furnish him with a sick certificate. He also asked her where the key to her office was. After the conversation Erasmus trembled and burst into tears.

23. Thus the woman, whose personhood and dignity had only two days earlier been so egregiously violated by her male superior who was unable to control his base sexual urges, found herself in the humiliating and degrading position where she had to account to her assailant and where her assailant was seeking to reinforce his control over her by cynically interrogating the reasons for her absence in what I regard as a show of toxic masculinity exacerbated by the power imbalance between the two.
24. On 19 November 2009 a letter, in the name of Mnyimba, was transmitted to Jack affording him an opportunity to make representations as to why he should not be suspended in the light of the allegations which had been made against him by E[...]. On 23 November 2009 Jack replied in a letter offering no basis as to why he should not be suspended other than to baldly deny the allegation, in his words “... with the contempt it deserve (sic).” The Municipality, again apparently on legal advice, took a decision not to suspend Jack. No satisfactory reasons were furnished for this decision. When questioned about it, the refrain from the Municipality was that Jack also had rights and it did not want to infringe those rights or to create an impression of bias towards E[...].
25. Looking at the matter objectively and giving proper consideration to the gravity of the allegation made by E[...] as well as the circumstance that Jack was her superior and the Corporate Services Manager, it is difficult to understand the decision of the

Municipality not to suspend Jack. Leaving aside the circumstance that there was an obligation on the Municipality to take steps to protect E[...], a suspension at that stage would after all have been no more than a precautionary measure so as to allow an investigation to take place and not a pronouncement of guilt[17]. There is a perverse irony where the victim is instructed, albeit for a short time, to leave the workplace whilst the perpetrator remained in his position.

26. The Municipality elected instead to transmit, on 1 December 2009, a letter to Jack in terms of which he was instructed, pending the finalization of an investigation into the allegations, to remain at the Klipplaat office and not to have any contact with E[...]. When E[...] testified at the trial on liability it was put to her that the effect of the letter was to “banish” Jack to Klipplaat. It is however clear from the evidence that this is not what happened. The Municipality was not able to ensure that Jack did not have contact with E[...] prior to the holding of the disciplinary hearing. Jack would arrive at the Jansenville offices, often unannounced, and E[...] would either find herself in the presence of Jack or in earshot of him. Her reaction on these occasions and when she became aware that Jack was in the vicinity, was to lock her door.

27. Although E[...] complained about the conduct of Jack and the circumstance that he had breached the instruction to remain at Klipplaat, the Municipality did not reconsider his suspension nor did it take disciplinary action against him for what was, on the face of it, insubordination which was gross in that it was persistent and wilful. This conduct of Jack may well also have amounted to victimization and retaliation.
28. More than three months lapsed before Jack was charged on 19 February 2010 with “gross misconduct” in terms of which it was alleged that he had “... forced himself upon a female subordinate [E(...)] and attempted to kiss [her] against her will”. In the first judgment it was astutely observed that the description of the misconduct of Jack as an attempt to “kiss” E[...] was an unjust mischaracterisation, the Court commenting as follows:
- “... It is necessary to point out that the presiding officer misdirected himself in stating that the second defendant had “attempted to kiss” the plaintiff. The evidence was that he bent over her and attempted to force his tongue into her mouth, only being thwarted because she clenched her teeth together. “Kiss” is defined in the Concise Oxford English Dictionary as “a touch or caress with the lips as a sign of love, affection or greeting”, something very far removed from the sexual assault perpetrated upon plaintiff by second defendant.”[18]*
29. The disciplinary proceedings did not seem to have been a priority for the Municipality and the hearing was eventually held on 11 May 2010, half a year after the assault. Although Jack had strenuously denied guilt in his letter he, without explanation, did not testify. He took a spurious technical point about the date of the assault. Unsurprisingly, he was found guilty of the charge which was preferred against him. The Presiding Officer found, correctly so, that “... the relationship between employer and employee is irretrievably broken down due to the seriousness of the allegations”. That however is where any commendation for the Presiding Officer’s decision ends.
30. The Presiding Officer then proceeded to mention, in his finding, something about the need to uplift the skills of employees, inexplicably utilizing this concern as a basis for not imposing a sanction of dismissal. The Presiding Officer found that a suitable sanction would be for Jack to be suspended without pay for a two week period. To crown it all, the Presiding Officer recorded that the only reason why he did not give Jack a final written warning (as opposed to the short period of suspension without pay) was that Jack was already on a final written warning for theft, and in this context the evidence was that Jack had stolen a tank from the Municipality.
31. The decision by the Presiding Officer not to impose a sanction of dismissal was mindboggling given the character of the offence, the circumstance that Jack, the Corporate Services Manager, had abused his position of authority by assaulting a female subordinate who was in a particularly vulnerable position in that she was a temporary employee at the time that the assault occurred. Furthermore Jack did not demonstrate any remorse, remaining defiant to the end. Where an employee has been found guilty of gross misconduct and fails to take the first step towards rehabilitation by acknowledging his wrongdoing,

there can be little scope for corrective or progressive discipline.

32. The Municipality, as an Organ of State, was not only entitled, but in fact obliged given the obligations on it in terms of Section 195 of the Constitution, to have challenged the disciplinary finding which, on the face of it, was indefensible. It was obliged to have done so, inter alia, as part of its duty to maintain the integrity of its organization, to ensure proper discipline therein and to remedy the injustice suffered by E[...]. In *Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal*[19] the Court described the duty as follows:

“Public functionaries, as the arms of the state, are further vested with the responsibility, in terms of section 7(2) of the Constitution, to “respect, protect, promote and fulfil the rights in the Bill of Rights.” As bearers of this duty, and in performing their functions in the public interest, public functionaries must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it. This is the responsibility carried by those in the public sector as part of the privilege of serving the citizenry

who invest their trust and taxes in the public administration.”[20]

(own underlining)

33. This duty is to be interpreted in the context of the special overarching obligation on Organs of State to uphold the rule of law. It was observed in *Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd*[21]:

“This Court has repeatedly stated that the state or an organ of state is subject to a higher duty to respect the law. As Cameron J put it in Kirland:

“[T]here is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution’s primary agent. It must do right, and it must do it properly.”[22]

34. As pointed out in the first judgment, a review application could have been brought in terms of Section 158(1)(h) of the LRA, a municipality

falling within the definition of “State”[23] for the purposes of that Section. As the disciplinary code, which was contained in a collective agreement, proscribed any interference with the sanction, the holding of a second disciplinary hearing would not have been permissible.[24] Any such challenge to the disciplinary sanction was required to have been brought in the form of a so called rule of law review application and on the strength of the doctrine of legality given

that it has authoritatively been held that it is not permissible, at least for the moment[25], in a State self-review to rely on the Promotion of Administrative Justice Act 3 of 2000 (“PAJA”)[26], contrary to what was accepted in *Hendricks v Overstrand Municipality and Another* (2015) 36 ILJ 163 (LAC) as referred to in the first judgment[27].

35. The Municipality did not however challenge the decision of the Presiding Officer. The explanation furnished for this failure by Mnyimba was that when he enquired from the legal advisor as to whether the sanction imposed by the Presiding Officer was susceptible to challenge:

“... he was advised that it could not and that once the two week suspension had been served second defendant would in effect resume his employment with a clean slate.”[28]

36. The understanding of Mnyimba was summarised in the first judgment as follows:

“[31] ... [Mnyimba] stated that when second defendant had served his suspension he told plaintiff that with the best will in the world there was nothing that he could do to prevent second defendant returning to work or to prevent second defendant from coming into contact with her in the course of his duties.”

37. Had the Municipality launched an application to challenge the decision of the Presiding Officer and had it placed Jack on suspension, it may well be that the sorry state of affairs which ensued may not have materialized. To the observations made in the first judgment about the correctness of the legal advice received by the Municipality, I would add that the advice was not only wrong insofar as it was that the Municipality could not challenge the decision of the Presiding Officer, but it was also wrong in that it was to the effect that there was nothing further the Municipality could do to protect E[...] after the incident and Jack was at liberty to resume his duties with “... a clean slate”. The author of the legal advice was seriously mistaken on this count. The assault committed by Jack was not the type of conduct which could have been extinguished or wished away. As Sachs J observed in a matter concerning an application to stay a criminal prosecution:

“As the popular saying goes “Molato ga o bole” (Setswana) or “ical’aliboli” (isiZulu) – there are some crimes that do not go away.”[29]

38. The Municipality had a duty not only to show courtesy and respect to E[...] [30] but further to provide her with a safe working environment. It was obliged to have taken steps to protect E[...] from the person who had assaulted her and who remained in the workplace. In a recent decision handed down by the Labour Appeal Court [31] it was held that employers:

“... have a duty to provide a safe and healthy work environment for their employees and students, including protection from senior employees of predatory disposition.”[32]

39. It would have been different if the Presiding Officer had found that the version of E[...] was untrue. But that is not what happened here. The Presiding Officer found that a male superior had committed a sexual assault on one of his female subordinates and that he had falsely denied committing that assault. The stance adopted by the Municipality that, in those circumstances, there were no measures which it could implement to protect E[...] was most unfortunate and regrettable. The Municipality stated that it had empathized with E[...] and that it could not understand the ruling of the Presiding Officer but that its hands were tied. Whilst I accept that the Municipality acted on the strength of legal advice (I note that this

advice appears to have been informally given and no second opinion was sought), this does not change the circumstance that its approach of washing its hands of the matter, à la Pontius Pilate, fell woefully short of what was required of an employer in the circumstances. The Municipality abdicated its responsibilities to protect Erasmus and adopted a supine approach of bovine resignation.

40. After the decision was handed down, although there was no provision for it in the disciplinary code, E[...] nonetheless, out of desperation, lodged an appeal against the decision because she was of the view that the sanction was shockingly lenient. The Municipality did not revert to her regarding her appeal and it also did not discuss the disciplinary finding with her.
41. E[...] was thereafter left to fend for herself. The Municipality took no steps to support or empower her. She was offered no counselling or any other assistance. There was no communication to E[...]’s co-employees affirming support for her and condemning the conduct of Jack and no communication recording that conduct of the nature was unacceptable and in future would attract the sanction of dismissal. Rather, if anything, the message was that victims of sexual assault who were brave enough to come forward would not receive redress. The unrepentant perpetrator, Jack, was allowed to roam free in the workplace with unfettered access to E[...]. Although she no longer reported to Jack, he still exercised a degree of control over her. E[...] stated that on one occasion when she applied for leave after the assault, the Municipality took the stance that it was Jack who had the authority to approve her leave. She also said that Jack requested a meeting with her but she refused to accede to this request.
42. In the aftermath of the incident E[...] explained that she felt stigmatized and experienced what is commonly known as victim shaming. By way of an illustration she mentioned how, on one occasion, some of her colleagues informed her that they would not be attending the Christmas party because E[...]’s presence would create a “bad vibe”. She perceived her colleagues as viewing her, not Jack, as the wrongdoer. She transferred, either fully or partially, the responsibility and culpability for what had happened onto herself. She felt marginalized and humiliated by scrutiny and gossip.
43. It is not in dispute that E[...] thereafter endeavoured valiantly to grin and endure the situation in which she then found herself. She was however not able to cope. She was often off sick for substantial periods as she continued to suffer emotionally and mentally as a result of the assault. There was no evidence of any enquiries made or concerns expressed by the Municipality about her absences and as to her welfare. She experienced feelings of betrayal, isolation and powerlessness. Bereft of any support from her employer, like many sexual assault victims she developed Post Traumatic Stress Disorder (“PTSD”).

44. The conduct of the Municipality was truly an illustration of how not to manage a sexual assault in the workplace. The failure by the Municipality to take steps to protect E[...] had catastrophic consequences for her emotional and psychological well-being and her employment became unendurable. The first judgment summarises the position as follows:

"[24] Plaintiff stated that after the disciplinary enquiry and the criminal trial had been disposed of, second defendant remained in the service of first defendant and she would still meet him in the offices and corridors at first defendant's premises. She reported these meetings to Mr. Bomvane who advised her that now that the disciplinary proceedings and criminal case had been finalised[33] there was nothing that they could do to keep him away from her. He told they did not know what to do (sic). In the meantime plaintiff, who was suffering from Post Traumatic Stress Disorder, had sought the assistance of a psychiatrist who prescribed certain medication for her. Plaintiff stated that the medication assisted to a degree but that every time she saw second defendant she began trembling and crying. She could not sleep and she suffered from nightmares. Eventually, during October 2010, plaintiff could no longer cope with her work situation and she tendered her resignation, her last week of work being the first week of November 2010."

45. As was poignantly observed in the first judgment[34]:

"...The awful irony was that Jack continued in his employment as the Corporate Services Manager whilst E[...] was forced to resign."

HOW DID THE MUNICIPALITY CONDUCT ITSELF TOWARDS E[...] AFTER HER RESIGNATION?

46. On 16 March 2011 E[...]s issued summons against both the Municipality and Jack.

47. E[...] claimed damages in the following amounts:

47.1. Past medical, psychiatric and related expenses: R31 005.02.

47.2. Future psychological, medical, hospital and related expenses:

R338 770.06.

47.3. Past loss of income: R1 323 700.00.

47.4. Future loss of income: R5 236 100.00.

47.5. General damages: R600 000.00.

47.6. Contumelia: R600 000.00.

48. Accordingly E[...] claimed damages totaling an amount of R8 129 575.02.[35]

49. Jack did not defend the claim.

50. In its defence the Municipality did not, for obvious reasons, dispute the sexual assault, but it did strenuously contend that it was in no way to blame for the injuries suffered by E[...]. As appears from the following exchange, E[...] took a different view:

“I want to put it to you Mrs E[...] that Ikwezi Municipality acted here in your best possible interests, within the frame (sic) of the law that it did what it could. Let me rephrase that it did what it was obliged to do and it could do no more in the circumstances. --- Ek het nie so gevoel nie.”

51. In response to the evidence of E[...] that, after the assault, she continued to meet Jack in the corridors and on at least one occasion in an office, it was put to her that “... the business of the Municipality had to go on ...” and that “Mr Jack had a job to do”. E[...] could have been forgiven for gaining the impression that the Municipality had, albeit unwittingly, effectively colluded with Jack, not necessarily with a view to protecting him but rather with the aim of protecting the reputation of the Municipality and shielding it from liability. In *Ntsabo v Real Security CC* the Court held that the employer had effectively supported the harasser by not sanctioning him[36].
52. The stance adopted by the Municipality at the trial demonstrated a disturbing lack of appreciation of its legal obligation to have

provided E[...] with a safe working environment. The Municipality appears to have been under the erroneous impression that conducting a disciplinary hearing amounted to taking steps to eradicate sexual harassment and cheerfully assumed that because it had conducted a disciplinary hearing this was sufficient in the circumstances[37].

53. On a human level, the defence which was put up by the Municipality was devoid of introspection, humility or compassion. If there was going to be any hope of a redemptive way forward and a restoration of the relationship between E[...] and the Municipality, what was required was not the drawing of battle lines and the presentation of legal arguments to avoid liability but rather a genuine and sincere apology, a statement of acknowledgment of wrongdoing and culpability for the role the Municipality had played in the harm suffered by E[...]. There was however no acknowledgement of organisational failure and no indication that the Municipality had reformed. The Municipality had not conducted an investigation into the workplace culture and its structures so as to ascertain as to how it came about that the assault occurred and as to what steps it, as an organisation, could take in the future to prevent a recurrence. There was no evidence that, since the assault, the Municipality had learned lessons or had even taken the trouble to put in place a sexual harassment policy. There was no acknowledgement that the advice the Municipality had received and acted on was severely misplaced and that, in accepting that advice, it had lengthened and intensified the trauma suffered by E[...]. In short there was no, as it were, corporate repentance. The Municipality was quick to defend the litigation and slow to listen to E[...].
54. The litigation strategy adopted by the Municipality had the result that E[...] was compelled to testify. Mercifully, although Jack was present prior to the start of proceedings, he left before they commenced.[38] Had he participated in the proceedings this would have provided him with a further opportunity to have exerted control and power over her. The Court nonetheless became a source of distress and re-traumatization when E[...] was required to relive both mentally and emotionally her assault and to re-experience the horror of the

incident and the events which led to her resignation[39]. E[...] was required to offer up for public scrutiny intimate details of her personal life.

55. On 31 March 2016 the Court first judgment was delivered, the executive part of which reads:

“[82] Accordingly the following order will issue:

1. It is declared that the first and second defendants are jointly and severally liable for such damages as the plaintiff may prove she has suffered in consequence of the sexual assault upon her on 16 November

2009 at the offices of first defendant in Jansenville.

2. Defendants are ordered jointly and severally to pay the costs of the action on the merits, the one paying the other to be absolved.”[40]

56. As mentioned above, on 3 August 2016 and four months after the handing down of judgment, Ikwezi was disestablished and the First Defendant was established.

57. On 3 September 2018, E[...] was informed that the trial on quantum would be proceeding on 28 February

2019. It is not in dispute that the spectre of the trial brought with it a whirlwind of emotions and a degeneration of her mental and emotional condition. Four days after receiving notice of the trial and on 7 September 2018 she suffered an anxiety attack and was taken to hospital. On 20 September 2018 she took 24 Panado tablets and was again taken to hospital although no treatment was considered necessary. In December 2018 she took a small overdose of her psychiatric medication (Ritrovil) but again no treatment was required. The trial was thereafter postponed (see below). On an undisclosed date in 2019, and on hearing about the Offer, E[...] ingested poison but immediately spat it out causing her not to be able to eat for a week. On 21 January 2020 she cut her wrists with a broken bottle. The injuries suffered as a result thereof were not however serious and she did not require medical attention.

58. In his report dated 11 February 2019 Prof Young recorded that:

“[38] While Mrs E[...] did not meet the diagnostic threshold for PTSD on 4 September 2017, she does appear to meet it now. The worsening of her mental state is probably a result of the impending court date, which she is dreading. Indeed, in my experience, it is not unusual for psychologically traumatized plaintiffs to report an increase in symptoms in the lead up to a court hearing, as they are typically expected to describe their experiences in preparation and during the trial and often meet the people implicated in their distress.

And

[40] Finally, the persistent experience of clinically-significant symptomology and functional impairment is likely to erode her morale as well as her social support. I would expect that there would be some improvement to her mental state at the conclusion of the protracted legal proceedings.”

59. Considerable preparation for trial on quantum was done by the legal representatives of E[...] which included the filing of various expert reports by medical practitioners, psychologists and an actuary. The trial on quantum was however to be substantially delayed at the instance of the Municipality and on the basis that the Municipality sought to belatedly bring an application for leave to appeal more than a year after the handing down of the first judgment. Having allowed the trial to run on the merits of the question of liability, it was now to be the contention of the Municipality that the relief claimed was not competent in the first place because E[...] was obliged to have pursued her remedies in terms of the Compensation for Occupational and Diseases Act No 130 of 1993 (“COIDA”).

60. The application for leave to appeal was formulated in the following terms:

“1. That the applicant/first defendant’s failure timeously to file a notice of application for leave to appeal in this matter be condoned.

2. That the applicant/first defendant be granted leave to appeal the whole of the judgment of His Lordship Mr. Justice Pickering, delivered on 31 March 2016, the grounds of which are as follows:

2.1 The applicant/first defendant will make application, on appeal, for leave to amend the applicant/first defendant’s plea to incorporate a special plea in terms of section 35 of the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (‘COIDA’).

Take further notice that:

3. Should the relief sought in paragraph 2.1 above be granted, the applicant/first defendant will apply for leave to amend the applicant/first defendant’s plea, on appeal, to incorporate the special plea in terms of section 35 of COIDA.

4. The applicant/first defendant will apply to lead further evidence (should it be necessary), on appeal, to demonstrate the existence of, and/or the first respondent/plaintiff’s entitlement to, a claim

in terms of COIDA.

5. Once any necessary evidence has been led, the applicant/first defendant will present argument on appeal, requesting that the special plea be upheld, and the decision of His Lordship Mr. Justice Pickering in regard to the first respondent/plaintiff’s claim on the merits be set aside, and the first respondent/plaintiff’s

claim on the merits dismissed with costs.”

61. Section 35 of COIDA provides as follows:

“35 Substitution of compensation for other legal remedies

- (1) No action shall lie by an employee or any dependent of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee’s employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.”
62. The Court refused the application for leave to appeal on the basis that sexual harassment did not fall within the ambit of an incident which constituted an accident arising out of and in the course of employment. The Court referred to Member of the Executive Council for the Department of Health, Free State Province v EJN[41] where it was held that it would be sending an unacceptable message to employees, especially woman, that they are precluded from suing their employers for a failure to protect them in the context of sexual violence[42]. The approach adopted by the Court in refusing the application for leave to appeal on 14 February 2020 has recently found support from the Supreme Court of Appeal. [43]
63. The Court, in dismissing the application for leave to appeal, found that the Municipality had acted disingenuously in seeking to blame E[...] for not having drawn to its attention to the provisions of COIDA. In line with the oft mentioned sentiment that sooner or later litigation must come to an end[44] and having referred to the remarks of Van Wyk J in Jutta & Co Ltd v Legal and Financial Publishing Co (Pty) Ltd[45] where the Learned Judge stated that “[t]here is such a thing as the tyranny of litigation, and a Court of law should not allow a party to drag out proceedings unduly” the Court, deeply concerned about the delays which had been occurred to date, expressed itself as follows:

“[29] In my view in the circumstances of this matter plaintiff will suffer undue and manifest prejudice should the present application be granted. The incident occurred well over 10 years ago. Plaintiff issued her summons timeously eight years ago and first defendant filed its plea on 15 July 2011 without raising the COIDA point. A further eight years elapsed in the course of which a full trial on the merits took place. Plaintiff testified at that trial, which was no doubt a traumatic experience for her...

- [30] Applicant now wishes in effect to wipe the slate clean and to render all that has occurred in the interim pro non scripto and to turn the clock back to 15 July 2011 when first defendant’s plea was filed.
- [31] In my view to allow applicant to do so in these circumstances with all the resultant trauma for plaintiff would be unconscionable and would be a classic example of the tyranny of litigation. Plaintiff has waited 10 years for justice and to obtain redress for the previous wrong perpetrated upon her. No further delays can be countenanced. ”

THE OFFER

The stance of E[...] to the Offer

64. E[...] rejected the Offer. It was her stance that she should not be expected to return to the Municipality after the way it had treated her. She maintained that she had a genuine fear that she would not be able to cope were she to return to the Municipality. The thrust of her evidence is apparent from the following passage:

“... die ervaring wat ek daar gekry het, behalwe die insident self maar die gedagtes en die ‘memories’ van wat daar was en hoe ek behandel was, ek kan nie terug gaan nie, nie daar die, al is the gebou leeg ook ek kan nie ingaan en net normal wees nie, so om elke slag, dat my ou kollegas moet sien hoe ek lyk as ek soontoe gaan, is ook nie vir my iets om op trots to wees nie”.

65. E[...] stated that she had, together with her husband, attempted to visit the municipal buildings even if it was just to purchase electricity. She also mentioned that at times she would approach a man on the street who resembled Jack to see if she could get over her fear of him. These endeavours had not however yielded any fruit and she remained convinced that she was not able to return to the Municipality.
66. Leaving aside, for the moment, the circumstance that her tormenter, Jack, still held a position of power in the Municipality and would in all probably do so for the next twenty years[46], E[...] stated that, to her knowledge, a number of other persons still worked at the Municipality who she perceived to have either aligned themselves with Jack or to have taken a dislike of her after the incident. She identified a co-employee who had apparently become upset about E[...] shutting her door whenever Jack used to come past her offices. She also referred to Jack’s girlfriend who still worked at the Municipality. Dr Whitehead conceded that her fears in this regard were not necessarily unfounded.
67. It was not in dispute that, after her resignation, on the occasions when E[...] happened, per chance, to see Jack in town or even someone who resembled him, she would experience feelings of panic and anxiety. She however further made it clear that whether Jack was still employed by the Municipality would make little difference:

“Ek weet nie regtig of hy alleen die rol gaan speel vir my om terug to gaan nie, wat van die gebou, wat van die mense, die situasie, die geskiedenis, so ek weet nie eers dit alleen, dit gaan nie alleen ‘n verskil maak volgens my nie.”

68. All the expert witnesses were in agreement that after the assault E[...] had showed remarkable courage in trying to break through her feelings of fear, shame and powerlessness. Both Dr Van der Merwe and Prof Young regarded her as a “miracle” given her positive attitude which was reflected in her attempts to actively look for work. It was not at any stage suggested that E[...] was feigning her apprehension about returning to the Municipality.

The effect of the assault on E[...]

69. The assault has changed the path of E[...]’s life. She has become withdrawn. She says that she has developed a generalized fear of being alone with men. She finds it difficult to socialize and suffers from feelings of isolation and the perception

that she is being judged by others. Her marriage has suffered to the extent that, owing to the change in her personality and the

disturbance of her emotional balance, her husband has contemplated seeking a divorce.

70. Before the assault E[...] had been a lively person who had excelled in the workplace which she had viewed as her second home and had had a very good relationship with the 20 colleagues or so with whom she had worked. As was recorded in the first

judgment:

“[Mnyimba] stated that he was on excellent terms with the Plaintiff and described her as ‘a remarkable woman, a bubbly woman, a lovely woman, that would be anything you asked her to do. She was one of the stars within the Municipality’.”[47]

71. After the assault, E[...] has become a different person and for her the world is now a daunting place wherein she often feels overwhelmed and must, at times, fight against the desire for oblivion. Her self-confidence and self-esteem have been shattered and her independence acutely compromised. She has been stripped of her natural joy. It seems she must henceforth move timidly through life, always guarded.

The nature of the offence of sexual assault

72. A judgment of this nature would not be complete without something being said about the harm suffered by victims of sexual assault. A sexual assault on a woman is a horrendous act and constitutes a heinous violation of a woman’s dignity, privacy and bodily integrity. It damages her reputation. It denies her intrinsic worth, her equality. It dehumanises her. It makes her into an object.
73. The scourge of workplace sexual harassment is more often than not gender-specific. A sexual assault by a male superior on a female subordinate is a deplorable abuse of power and is a terrifying vehicle utilized by the superior to sexualize his control over the victim in a show of pernicious patriarchal dominance.
74. What the evidence in this matter has confirmed is that sexual assault is a crime of a different kind given the devastation it leaves in its wake. The damage suffered is internal and unseen. Victims of sexual assault carry their sorrow with them. There are memories that will not decay. Theirs is the pain of which the Athenian dramatist Aeschylus spoke, “... pain which cannot forget ...”.[48]

Was E[...] obliged to consider the Offer?

75. Bearing in mind the special character of an offence of sexual assault, in my view there is something very wrong when an employer expects, as the Municipality evidently does, that a woman scarred by a sexual assault should return to, nay make a new home in, the very place of torment where the wound was inflicted and from whence she fled. This is more so where the employer has, through protracted litigation, made her wait so long for justice, thereby adding to her suffering.
76. The position is akin to a situation where an employee claims a constructive dismissal in terms of the LRA on the basis that her

employment has been made intolerable and the employer then, acknowledging the intolerability of the employee's employment,

still requires that employee, outrageously so, to mitigate her losses by returning to the intolerable environment. There is a jarring inconsistency and a complete failure of logic in such an approach. For obvious reasons reinstatement is invariably not pursued as a remedy where an employee claims constructive dismissal nor would it, save in few exceptional circumstances, be a competent one. At common law, contracts governing relationships are, for good reason, generally terminable on notice as parties are not usually compelled to work together in perpetuity. In labour law there is the trite principle that where an employment relationship, which is based on trust and confidence, has broken

down, as the current relationship clearly has, a Court will not order reinstatement pursuant to an unfair dismissal claim.[49] These principles must surely find application to the circumstances which obtain in this matter.

The stance of the Municipality in respect of the Offer

77. In motivating why the Offer was reasonable and why it should have been accepted by E[...], it was further contended on behalf of the Municipality that the Offer would, in the long term, be in the best interests of E[...]. Much was made by the witnesses called on behalf of the Municipality of the notion that E[...] should not spurn an opportunity to "reclaim her life". It was argued that taking up employment with the Municipality would be beneficial to E[...] as was evidenced by the fact that, after her assault, and whilst working for another employer, Best Buys, her condition had improved.
78. There may well be merit in the general proposition that engaging in (suitable) productive work and being socially useful is beneficial to one's self-esteem and one's sense of self-worth[50]. Indeed, the evidence before me demonstrated that E[...] wanted to work and had actively been looking for work. The submission made on behalf of the Municipality that E[...] should reclaim her life however loses sight of the fact that it is not the place of the Municipality, having caused the distress which it has to E[...], to then seek, 10 years after the event, to dictate to her, or even to have a say in, how that life should be reclaimed. If E[...] was of the mind to take up the Offer then good and well. That would be her prerogative. But if it is her choice not to return into the arms of an employer who has treated her so badly

then, in my view, it is not for this Court to second-guess that decision.

79. The Municipality went further and sought to persuade the Court that the Offer was made out of concern for the well-being of E[...]:

“MS MOLONY: Can you tell the Court why you have made this offer to Mrs E[...]?

MR HENDRICKS: My Lordship, we think that – first of all, we think it is in the best interest of both parties and we think that we are new management. We don’t know Mrs E[...] personally. What we know about her is what we’ve read and – in the documents of the court and we just think that it’s human, it’s – we care – we care. We think at her age, ja, she can build a good pension still the years ahead of her.”

80. I am constrained to record that, in my judgment, the sentiments expressed by Hendricks are contrived. The objective facts demonstrate that the Municipality took no responsibility for its conduct and denied liability at the trial. At no stage did it apologize for the tremendous suffering it had caused E[...]. The “new management” did not take an approach different to that taken by Ikwezi. It exhausted every avenue open to it to avoid having to compensate E[...] for the wrong which she had suffered at its hands. When all attempts to escape liability failed it then made the Offer a decade after litigating against E[...]. I am driven to the conclusion that the Offer, which was dressed up as a gesture of compassion so as to afford E[...] an opportunity to get back on her feet, was in truth a self-serving and calculated litigation tactic. It was par excellence an exercise in damage control to avoid liability in respect of E[...]'s claim for future loss of earnings.

81. The following exchange does nothing to dispel the conclusion which I have reached in this regard:

“MR LOUW: Thank you, M’Lord. Did you have any idea that the plaintiff and her husband may be suffering financially?

MR HENDRICKS: My Lordship, I have never attempted to make contact or to ask anyone about how they doing or what their circumstances are, because I don’t think that would’ve been the right thing and relevant. So my focus was really on the court case...”.

82. When Dr Van der Merwe testified it was raised with him, on behalf of the Municipality, that if resuming employment with the Municipality did not work out, E[...] could always apply for what was termed “boarding”[51]. Hendricks thereafter testified that “boarding” would be “... all but guaranteed because it is like insurance ...”. Leaving aside the circumstance that no evidence was placed before the Court regarding the requirements of a successful application for ill-health retirement, this line of thinking is problematic for another reason. In *The Minister of Correctional Services v Arbitrator W Blundin NO*, *The General Public Service Sectoral Bargaining Council and HL Vos*[52] the question arose as to whether it was competent for an employee, who had been unfairly dismissed, to seek reinstatement with the aim of thereafter making application to be granted ill-health retirement. The Court answered this question as follows:

“[41] I do not accept Vos’ contention that reinstatement was correct and appropriate in the circumstances, so that he could apply for ill-health retirement, and that if he is not reinstated, he would not be able to apply for ill-health retirement benefits. This contention, with respect, is illogical.

[42] An order of reinstatement cannot be granted just to afford an employee an opportunity to apply for certain benefits, which would ultimately see him in any event exiting the workplace permanently. An order of reinstatement is a remedy that may ordinarily be granted if the employee’s dismissal was found to be substantively unfair. Reinstatement as a remedy will depend on the fact of each case. It also does not seem logical, and appropriate, to grant reinstatement where the employee himself, as in Vos’s case, cannot perform his job and no longer wants to work for the Department.”[53]

83. It would not be farfetched to infer that the reason why ill-health retirement was even brought up by the Municipality was because it viewed this avenue as another mechanism to be employed, albeit indirectly, to avoid liability for the future loss of earnings suffered by E[...], the relevant pension fund, in the event of ill-health retirement being granted to E[...], being the entity ultimately responsible for absorbing the costs associated with the future loss of earnings suffered by her.
84. There is a body of jurisprudence in labour law which governs the situation where, pursuant to an unfair dismissal, an employee refuses an offer of reinstatement made by the employer so as to undo the fairness and the employer, in response, then contends that as a result of the refusal to accept the Offer, the employee should be deprived of compensation for the unfair dismissal. In my view, guidance, to a degree, may be sought from this body of case law. I say to a degree because the lis before the Court does not concern an unfair or even an unlawful dismissal claim but rather an orthodox delictual claim. The Labour

Court authorities endorse the principle that an employee’s right to compensation in terms of the LRA[54] is not absolute and that a Court may exercise a discretion not to award compensation where the employer has already provided the

employee with substantially the same kind of redress sought or where the employer’s ability and willingness to make that redress is frustrated by the conduct of the employee[55]. Employers have a so-called “right to seek to right the wrong” and the Courts will not reward obstinacy or opportunism. *Hedley v Papergraphics Limited*[56] dealt with a situation where the employer contended that an offer of reinstatement made by it was unreasonably refused by the employee.

The Court disagreed holding as follows:

“[157] In my view, the respondent simply failed to reassure the applicant that he will now be treated in a bona fide and fair manner. In my view, the accusation of lack of bona fides (the applicant’s view) was justified

...

[162] I am very firmly of the view that the terms of the retrenchment offer must be scrutinised in order to establish whether the offer of reinstatement will, indeed, cure or remedy the defects in the dismissal. I am also very firmly of the view that, if it can be shown on an objective basis that an employer was mala fide when it dismissed or retrenched the employee and that, as a result, the trust relationship had broken down, there can, in fairness to the employee, not be a blanket obligation to accept an offer of reinstatement ...

[163] As a general rule, an employer should first establish its bona fides in regard to an offer of reinstatement, that is, it must not be an attempt merely at damage control ... See further in this regard the judgment of the Labour Court in the matter of *Du Toit v SASKO (Pty)(Ltd)* (1999) 20 ILJ 1253 (LC) where the fact that the employer had not genuinely wished to redress the employee's position lead the Court to grant compensation to an employee who had declined an offer of reinstatement.

...

[165] Furthermore, if the dismissal preceding an offer of reinstatement was also substantively unfair, I am of the view that there generally is no obligation on the employee to accept such offer. In fact, in the *Mabola* judgment (quoted above at paragraph [158]) as well as in other judgments where employees refused to accept offers of reinstatement and the courts refused to grant them compensation because they had refused, the offer of reinstatement was made to cure or remedy procedural defects, and not the substantive unfairness[57] of the dismissal (see, inter alia, *Burger v Alert Engine Parts (Pty) Ltd*

[1999] 1 BLLR 18 (LC) at 25C-H; *Fletcher v Elna Sewing Machines Centres (Pty) Ltd* [2007] ZALC 72; [2000] 3 BLLR 280 (LC); *La Vita v Boymans Clothiers (Pty) Ltd* [2000] 10 BLLR 1179 (LC) at 1189E-J)”

85. It is clear from what I have stated above that, hypothetically speaking, had E[...] pursued an unfair dismissal dispute then she would have been entitled to have refused the Offer on the basis that the employment relationship has broken down, her dismissal would have been substantively unfair and the fact that the Offer was a thinly veiled attempt at damage control. For these reasons, it is my view that E[...] was entitled to have rejected the Offer out of hand and it is unnecessary to have recourse to the evidence of the expert witnesses in answering the question as to whether her decision to decline the Offer was reasonable. Insofar

as I may be wrong in coming to this conclusion, I elaborate further below on the reasonableness of the rejection of the Offer by E[...] having regard to the testimony of the expert witnesses.

86. As to whether E[...] would be able to successfully reintegrate into the organisation of the Municipality, such a question of necessity involves a degree of speculation. Dr van der Merwe was extremely pessimistic about a successful reintegration opining, in effect, that such a venture would all but be doomed from the outset. Dr van Daalen also had strong reservations about whether

an attempt at reintegration was the right route to follow emphasising that the Municipality was not “a rehabilitation centre”. Dr Whitehead stated that he would defer to the opinion of Prof. Young who was more optimistic about a successful reintegration providing that the exercise was managed properly and that the requisite psychotherapy treatment was properly administered.

87. I am prepared to decide the reasonableness of the refusal of the Offer on the evidence of the Municipality and in particular on the evidence of Prof Young who expressed himself as follows:

“MR YOUNG: I think M'Lord, it comes down to how it is managed, there is I suppose the potential for harm and there is the potential for immense psychological benefit and certainly all that I can offer the court as a psychologist is that I think there is great psychological potential to this. But she would need to have an opportunity to treat her PTSD and of course that her reintegration, or return to work would need to be done in such a way that accommodates her initially and she would need to be assured that she is not going to encounter Mr Jack at the workplace. I do not see why that cannot be done, but I acknowledge that if it is not done properly it could be bad for her.”

88. It is clear from the evidence of Prof Young that, notwithstanding his “cautious optimism” (his words), he did acknowledge that there were tangible risks attaching to what would be a complex and drawn out exercise. He also expressed the view that a course in psychotherapy should be administered prior to Erasmus resuming duties, something for which there was no provision in the Offer which envisaged Erasmus reporting for duty from day one.
89. There is of course also the risk, acknowledged by Hendricks, that Jack may disobey the instruction to stay away from E[...] and that is why this eventuality had to be catered for in the Offer. The statement that the Municipality would view such disobedience by Jack “in a serious light” can hardly be reassuring in the eyes of E[...] given the Municipality’s prior inability to police the instruction issued to Jack to refrain from making contact with her and its unflattering attempts at disciplining Jack[58]. It was also suggested by the Municipality that E[...] could occupy a municipal office in a town other than Jansenville but there can be no reason why there should be an obligation on E[...] to be further inconvenienced so as to accommodate the presence of Jack.
90. There is one further difficulty with the Offer when it comes to Jack, which cannot go unmentioned. It is that the Offer seeks to place a legal obligation on Jack to “relocate” or “move” (it does not say where). Jack is not a party to the agreement and accordingly it would not be enforceable against him[59]. In response to questions raised by the Court Hendricks stated that, if I understood him correctly, he had subsequent to the concerns raised by the Court and sometime in August 2020 informally spoken to Jack about the Offer and Jack had indicated that he was prepared to relocate but that any relocation would have to take into account a health condition which he had. In my view, at its highest, this discussion amounts to no more than an agreement to agree, a pactum de non petendo, which would not be enforceable because of the uncertainty accompanying it. Whether Jack would ultimately

agree to uproot

himself and to transfer to a different town when the time came given the inconvenience and additional expenses associated therewith is a matter deep within the territory of speculation.

91. Counsel for E[...] referred to *Van Almelo v Shield Insurance Co Limited*[60] where the plaintiff had sued the defendant in respect of personal injuries. The issue in that matter was whether the plaintiff, who was also employed by a municipality, namely the then Cape Town City Council, was obliged to have mitigated his losses by taking up an offer with a commercial firm. It was the case of that plaintiff that he had refused to take up the Offer of employment with the commercial firm because that opportunity did not afford him the requisite job security. The Court held that it should not be astute to find that the plaintiff's attitude in refusing to take up a job was unreasonable and that it could not "... say that Defendant has proved that Plaintiff's fears in this regard are unreasonable"[61]. I am similarly of the view that the Municipality in this matter has failed to discharge the onus on it of demonstrating that the refusal by E[...] to accept the Offer was unreasonable.

LAWFULNESS OF THE OFFER

Introduction

92. Leaving aside whether it was reasonable for E[...] to have declined the Offer, and having said all of the above I am, in addition, of the considered view that the Offer is, in any event, unlawful. I issued a directive to the parties requesting counsel to address me on whether the Offer did not amount to an impermissible circumvention of the recruitment procedures applicable within the Municipality.
93. Counsel were referred to *Khanyile v Minister of Education & Culture, KwaZulu-Natal & Another*[62] where it was found that an appointment which was made contrary to the applicable statutory prescripts was unlawful, Levinsohn J holding as follows:

"...Having purported to appoint him as such the relevant authorities were obliged to follow the procedure set forth in the law. To do otherwise would result in a most chaotic and inequitable dispensation in the public service.

For these reasons I am of the view that advertising of the particular post was a necessary requirement before an appointment could be made. One is reminded that the Regulations make it clear that the purpose of advertising is to reach the entire pool of potential applicants for a particular post more especially persons that were historically disadvantaged. The purported appointment of the applicant to a senior management service post in the public service was flawed in at least three major respects. Firstly, as indicated, the post was not advertised, secondly, the proper selection procedures were not adhered to, and thirdly no contract of service or performance agreement was concluded. I therefore hold that the purported appointment by the first respondent was not a valid appointment in terms of the relevant sections of the Public Service Act read with the Regulations thereto. It is therefore of no force and effect.”[63]

Statutory and Policy Framework applicable to the Municipality

94. Section 195 of the Constitution provides that:

“(1) Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

- (a) A high standard of professional ethics must be promoted and maintained.
- (f) Public administration must be accountable.
- (h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.”

(own underlining)

95. The Systems Act provides in terms of section 67, titled “Human Resource Development”, that:

“(1) A municipality, in accordance with applicable law and subject to any applicable collective agreement, must develop and adopt appropriate systems and procedures, consistent with any uniform standards prescribed in terms of section 72 (1) (c), to ensure fair, efficient, effective and transparent personnel administration, including—

- (a) the recruitment, selection and appointment of persons as staff members;

“(e) the promotion and demotion of staff;

- (2) Systems and procedures adopted in terms of subsection (1), to the extent that they deal with matters falling

under applicable labour legislation and affecting the rights and interests of staff members, must be consistent with such legislation.”

96. Section 51 of the Systems Act with the heading “Organisation of administration” provides that a Municipality must, within its administrative and financial capacity, establish and organise its administration in a manner that would enable the Municipality to:

“...(m) provide an equitable, fair, open and non-discriminatory working environment”

97. The Municipality has sought to give effect to this legislation with a view to ensuring the fair and proper placement of municipal employees on the organogram created for the newly established First Defendant by implementing firstly a placement policy and secondly a relocation policy, both of which have been approved by the council of the Municipality. These policies, expressly authorised and required by legislation, would thus be clothed with a statutory vires.

98. The following primary objects may be distilled from the two policies interpreted against the Notice:

98.1. All efforts must be made to preserve the employment of the employees of the Municipality.

98.2. Posts within the staff establishment will first be advertised internally and internal candidates will be given preference.

98.3. Only in exceptional circumstances, namely where it is critical for service delivery and where specialised skills are required and there is no suitable internal candidate, will posts then be advertised externally and, in that event, external advertisements will be published so that members of the public can then apply for the vacant posts.

99. When it comes to the appointment of external job applicants, clause 11.4.5(c) of the placement policy provides that:

“Should there be no suitable applicants from within the corporate pool, then other applicants may be considered in accordance with normal selection / promotion criteria.”

100. In this context, clause 6.1 of the placement policy provides further that:

“... approval of external filling of vacancies should be obtained from the placement committee.”

101. Applying the ratio in *Khanyile*, and accepting that there may be a degree of flexibility allowed by the doctrine of substantial compliance, an appointment made in clear contravention of the policies would be ultra vires those policies and would undermine the legislation which requires that the recruitment, selection and appointment of persons as staff members should be “fair” and “transparent”[64] and would thus be invalid[65] because the Municipality, an Organ of State, has no authority to disregard its own policies when it sues it and to make an appointment which would be inconsistent with legislation. As was held in *Khumalo*:

“... Persons who do not meet the requirements for a post in the public sector ought not to be appointed.”[66]

102. Administrative power is not “self-generating”[67]. It is limited to the extent that it has been conferred by law. The Constitutional Court held in *Fedsure Life Assurance v Greater JHB TMC*[68] that:

“the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function

beyond that conferred upon them by law.”[69]

103. Any such appointment would probably also amount to an unfair labour practice as envisaged by Section 186 (2)(a) of the LRA. In *Ncane v R Lyster NO and others*[70] the Labour Appeal Court held as follows:

“But where an employer provides that certain rules apply as regards the decision to promote or to recommend a candidate for promotion, ... good labour relations requires an employer to be held to this. A failure to comply with the rules may result in substantive unfairness.”[71]

104. If the Municipality were to make an appointment which was either unlawful or unfair or both, it would be exposed to litigation in that an aggrieved external candidate may claim that the appointment was unlawful in terms of PAJA[72] or a disgruntled internal candidate may claim that the failure to appoint him or her constituted an unfair labour practice[73]. It would also be open to any person with locus standi to apply to have the agreement set aside[74]. At an industrial relations level, affording a particular member of the public preference when it comes to the filling of a vacancy has potential to cause discord and unhappiness in the workplace. This would be particularly so in the current scenario where the placement of employees has been protracted and accompanied by much uncertainty. It may be that an employee within the Municipality has had his eye on the post reserved for E[...] and may feel aggrieved that he did not have the right to apply for it. It may even be that an employee is dismissed for operational reasons when, had the vacancy not been reserved for E[...], he would have filled it.
105. The crisp question which thus arises is whether the reservation of a post on the organogram for E[...] for the purpose of settling the future loss of earnings part of her delictual claim would contravene the Municipality's recruitment policies and thus be unlawful.

When can an Organ of State Offer Employment to Settle a Claim

106. The submission on behalf of the Municipality was that the Municipality would not so much be making an appointment as it would be legitimately settling a claim which had been brought against it by E[...]. If I understood it correctly, the argument advanced was that once E[...] had been reinstated the placement of her into a post within the organogram would not be unlawful because she would in any event have been transferred into that post in terms of the applicable prescripts. Given that the placement policy only applies to existing employees of the disestablished Municipalities that were transferred to this Municipality, this contention amounts to circular reasoning and begs the question as to whether the reinstatement itself would be lawful.
107. An Organ of State, such as a Municipality, is permitted to reinstate a dismissed employee pursuant to a claim of unfair dismissal because such conduct would not amount to the conclusion of a fresh contract of employment. In *Nel v Oudtshoorn Municipality*[75] Nel, aggrieved by the fact that the Municipality had reinstated its Municipal Manager pursuant to an unfair dismissal dispute, contended that the new appointment was unlawful because the applicable recruitment and appointment procedures were not followed. The Court did not agree, reasoning that:

"[10] From the provisions of the LRA and the cases I have cited it is clear that by reinstating a dismissed employee the employer does not purport to conclude a fresh contract of employment. The employer merely restores the position to what it was before the dismissal. ..."

- [11] Indeed, it would be absurd to construe the settlement of a labour dispute on the terms on which this dispute was settled to constitute a fresh appointment. That construction would necessarily require the council to advertise the position, interview numerous hopeful applicants, and then decide who to appoint, which would make it impossible to settle a labour dispute on these terms, contrary to the concept of reinstatement which is the 'primary statutory remedy in unfair dismissal disputes'. [76]
- [12] In my view the resolution taken by the council did not constitute the appointment of a municipal manager as contemplated by the Act."
108. The lis before me is however distinguishable from that which was before the Court in *Nel v Oudtshoorn Municipality*. I do not have a labour dispute before me. E[...] does not claim to have been unfairly dismissed and, in any event, this Court would not have jurisdiction to pronounce that there has been an unfair dismissal. [77] An unfair dismissal dispute, if pursued, would fall to be determined by the South African Local Government Bargaining Council, alternatively adjudicated by the Labour Court in the case of an automatically unfair dismissal. E[...] did not seek relief in the form of reinstatement nor would a claim for reinstatement have been competent given the ambit and scope of her claim which, without wishing to belabour the point, is a conventional delictual claim for damages. It is of no moment that the claim has been brought against the backdrop of an employment relationship. In my view it must follow that, unlike in an unfair dismissal dispute, there can be no statutory authority upon which to base the Offer. Just as it would be impermissible for the Road Accident Fund to offer a job to a litigant who has suffered injuries pursuant to a motor vehicle accident and who has put in a claim for future loss of earnings with the aim of extinguishing that claim, so too would it be unlawful for the Municipality to offer E[...] a job with a view to non-suiting her in respect of her claim for future loss of earnings.
109. There is a further self-standing reason as to why the Offer would be unlawful. Reserving a public sector post for E[...] in these circumstances would amount to impermissible favouritism and conduct akin to nepotism. In *Fort v COEGA Development Corporation (Pty) Ltd and Others* [78] the Labour Appeal Court dealt with a scenario where an employee had been found guilty of having "manipulated the recruitment system in order to promote the appointment [of a particular job applicant]". [79] The Court, mindful of the circumstance that it was dealing with a public funded institution, confirmed that dismissal was the appropriate sanction to be imposed on the errant employee holding that:
- "... Nepotism has a damaging effect on the positive corporate culture and is a potential threat to the morale of other employees."*
110. Where the object of an agreement is, for reasons of expediency, to afford a job applicant preferential treatment in respect of a vacant post housed within an Organ of State where that job applicant would otherwise not have been entitled to such preference, the agreement would be repugnant to the rule of law and inconsistent with the Constitution which provides that persons should not be subjected to unfair labour practices [80] and which requires

Organs of State to be governed by democratic values and principles including the principles of good human resource management[81], accountability[82] and transparency[83]. An Organ of State is required to fill vacancies on its staff establishment according to its operational requirements and in terms of the applicable procedures and not for an ulterior purposes such as the settling of litigation. I am of the view that an agreement concluded pursuant to the Offer would accordingly not pass constitutional muster[84] and would be contrary to public policy and for these reasons it would be unenforceable.

111. This would in turn mean that if a party breached the agreement and the other party sought to make it an order of court, the Court may exercise its discretion against making it an order of court because it is trite that a Court will not readily give its imprimatur to an illegality.[85] If this Court were to give its blessing to the agreement it would, albeit indirectly, be sanctioning conduct which is inimical to the principle of legality and which undermines the Constitution and the legislation which requires the Municipality both to implement fair and transparent recruitment procedures when making appointments and to fill vacancies in a manner which would be conducive to good human resources management.

Conclusion

112. In summary then, it is my view that there are three self-standing reasons as to why E[...] was entitled to refuse to accept the Offer:

112.1. Firstly, there was no obligation in law on E[...] to even have considered the Offer given the circumstance that it was common cause that she had left the Municipality because it had made her employment intolerable;

112.2. Secondly, and in any event, it was not unreasonable for E[...] to have refused the Offer; and

112.3. Thirdly, and decisively so, the Offer was unlawful and for this reason alone the Court should refuse to endorse it.

QUANTUM

Agreement

113. The parties were able to reach agreement on a number of material aspects relating to quantum. The parties have settled the following parts of the claim:

113.1. Past psychiatric, medical and associated expenses at R31,005.02.

113.2. Future psychological, medical, hospital and related expenses at R30,000.00.

113.3. General damages (inclusive of contumelia) at R400,000.00.

114. On the strength of an Actuarial Report compiled by Munro Forensic Actuaries dated 3 August 2020, the parties are further in agreement with the following calculations when it comes to the past loss of earnings of Erasmus:

114.1. Had E[...] not been forced to resign from her employment with the Municipality, she would have earned the sum of R1,231,600.00. Er[...] has, in her injured state, earned the sum of R338,200.00.

114.2. E[...]’s total past loss of earnings is thus R893,400.00.

115. When it comes to the future loss of earnings the parties have agreed, again on the strength of the Actuarial Report, as follows:

115.1. The earnings which E[...] would have received in her uninjured state from the date of the trial until her retirement with the Municipality had she not resigned is R4,134,200.00.

115.2. The future earnings of E[...] in her injured state after her resignation would have amounted to either of R1,573,200.00 or R641,400.00 depending on which of the two scenarios apply (see below).

116. I am therefore required only to determine the applicable contingency deductions to be made in respect of the above amounts. In *Road Accident Fund v Guedes*[86] the Court referred with approval to *The Quantum Yearbook*, by R Koch under the heading “General contingencies”, where it states that when:

“... assessing damages for loss of earnings or support, it is usual for a deduction to be made for general contingencies for which no explicit allowance has been made in the actuarial calculation. The deduction is the prerogative of the Court ... ”.[87]

Past loss of earnings

117. The past loss of earnings in both E[...]’s injured and uninjured states are not in dispute. The issue to be determined is what contingency deduction would be appropriate in regard to E[...]’s past loss of income in her uninjured state. No contingency is to be applied to the past injured earnings as these are known.

118. It is customary, when calculating past loss of earnings, to apply a 5 % contingency deduction to the calculated past loss of earnings. If I understood them correctly, both counsel accepted that it would be appropriate that a contingency of 5% should apply and I can see no reason to deviate from what is considered to be the normal contingency deduction.

The two scenarios

119. Two scenarios were, on the strength of the Actuarial Report, placed before the Court insofar as the future loss of income/earning capacity of E[...] is concerned:

119.1. The first scenario (“scenario one”) envisages that E[...] will continue managing her small business (selling Avon products) until retirement age at 65; and

119.2. The second scenario (“scenario two”) envisages that in addition to managing her small business E[...] will earn further income comparable to the income she earned whilst employed at the shop Best Buys in Jansenville.

120. In making a decision as to which of the two scenarios applies, it is necessary to evaluate the expert evidence relating to the medical

condition of E[...]. In drawing the Court's attention to discrepancies in the evidence, counsel for the Municipality referred to *Road Accident Fund v Kerridge*[88] where the Court observed as follows:

"[50] The role of experts in matters such as these and the opinions they provide can only be as reliable as the facts on which they rely for this information. Too readily, our courts tend to accept the assumptions and figures provided by expert witnesses in personal injury matters without demur. The facts upon which the experts rely can only be determined by the judicial officer concerned. An expert cannot usurp the function of the judicial officer who is not permitted to abdicate this responsibility — the court should actively evaluate the evidence. Ideally, expert evidence should be independent and should be presented for the benefit of the court. It is not the function of an expert witness to advocate the client's cause and attempt to get the maximum payout, as most seem to believe..."

121. It was not in dispute that as a result of the assault E[...] suffered from PTSD as of 2010. There was thereafter a lengthy phase of gradual improvement whilst she was working for the shop, Best Buys. E[...] ceased taking psychiatric medication in 2012 and only resumed taking such medication after her relapse in 2018 after she heard about the upcoming trial. After this period of improvement and when Prof Young examined her in 2017, he concluded that she did not meet the diagnostic criteria for PTSD. This led to him diagnose her with adjustment disorder. Dr van der Merwe, on the other hand, was of the view that her status should correctly be termed "subthreshold PTSD" or "PTSD in remission". It is however not in dispute that there is no accepted medical category of "PTSD in remission". Prof Young's diagnosis was therefore correct in that it was consonant with the Diagnostic and Statistical Manual of Mental Disorders[89]. Both Dr van der Merwe and Prof Young were nonetheless in agreement that adjustment disorder, contrary to common perceptions, is itself a serious stress-related condition. Both experts were ad idem that E[...] met the criteria for PTSD as of 2019 and was currently unemployable.
122. In parts of his testimony Dr van der Merwe went as far as to express the opinion that E[...] will for her entire future for all intents be "unemployable" and he even described her as "disabled". He was very guarded about her prognosis primarily because she had suffered a relapse of PTSD 10 years after the event. He was of the view that E[...] had about a 20% chance of a recovery from her PTSD.
123. Prof Young on the other hand, who Dr van der Merwe acknowledged as being the more qualified expert in the field of psychotherapy, was of the opinion that after the trial had been finalized and if E[...] underwent a proper course of trauma-focussed psychotherapy her condition was likely to substantially improve. It was common cause that E[...] had not had a course of psychotherapy to treat her PTSD. The evidence of Prof Young was that were she to undergo such a course her prognosis would be optimistic. The course would comprise 18 sessions over a period of a year and essentially what the psychotherapy would entail would

be E[...] reliving the traumatic event in a contained and carefully managed environment. When asked as to what his prognosis was in percentage terms, Prof Young stated that he would invert the prognosis of Dr Van der Merwe and that the prospects of a full recovery were good providing, he emphasised, E[...] received the necessary medical treatment.

124. I am inclined to accept, with some qualifications described below, the evidence of Prof Young for the following reasons:

124.1. Firstly, it was conceded by Dr Van der Merwe that Prof Young was better qualified to express an opinion as to the beneficial effects of a proper course in psychotherapy and whether this would resolve E[...]’s PTSD. Dr Van der Merwe further acknowledged that his evidence on this issue was, to a degree, speculative. Dr Van der Merwe also acknowledged that psychotherapy would be more effective than medication in treating E[...]. There was no reliable evidence to support the notion postulated by Dr Van der Merwe that if the PTSD suffered had endured for a lengthy period of time was unlikely to then be successfully treated. I would add that Dr van Daalen also did not join issue with the proposition that E[...] would be able to sustain employment at the level of that which she enjoyed at Best Buys.

124.2. Secondly, the objective facts strongly suggest that E[...] would be able to sustain employment at the level envisaged by scenario

2. It is common cause that, after her resignation and after brief periods of employment, E[...] worked in the shop, Best Buys, as a cashier for some six years between 2012 and 2018. I accept that this was sheltered employment (see below). However the evidence given by E[...] as to the reasons as to why she left her employment with Best Buys was not in all respects satisfactory and I am not persuaded that her decision to resign was based on her dysfunctionality in the sense that the dominant cause for her resignation was for reasons relating to her medical condition as was intimated by Dr van der Merwe. It became apparent during the evidence of Dr van der Merwe, who stated that often persons suffering from PTSD resign from their employment impulsively, that he was under the erroneous impression that E[...] had only spent a short time at Best Buys and he had to be reminded that she had been there for some six years. As a matter of probability, E[...] left Best Buys voluntarily with a view to focusing her energies on selling Avon products, a venture which did not work out as well as she had hoped.

124.3. Thirdly, it was not in dispute that her condition had improved whilst in the employ of Best Buys and that the reason why E[...] was currently unable to work was, as set out above, because of the resumption of the trial which had caused her to undergo somewhat of a mental and psychological implosion. It was also correctly conceded by counsel for E[...] that after the finalization of the trial, which has been a proverbial albatross around her neck and was the cause of the increase in her symptoms, that with the benefit of appropriate psychological and psychiatric treatment there is, in the words of counsel in his heads of argument:

“... indeed a likelihood of fairly substantial improvement in the Plaintiff’s condition.”

125. I conclude therefore that it is likely that the experience of the finalization of the trial will be cathartic in nature and that over time E[...] will have the capacity to resume employment at the level she enjoyed at Best Buys subject to some qualifications which I identify below.
126. There is another reason why I would not be inclined to accept the evidence of Dr Van der Merwe insofar as he expressed the opinion that E[...] was “unemployable” or “disabled”. It is that there was no allegation in the particulars of claim to this effect, an omission raised with Dr van der Merwe by counsel on behalf of the Municipality. The particulars of claim record that, as a result of the assault, E[...] has been unable to find “geskikte” (suitable) employment in Jansenville, not that she was unemployable per se. In my view, and assessed in context, the reference to suitable employment is a reference to comparable employment. In the circumstances I have reservations as to whether the evidence of Dr Van der Merwe on this point, which I do not in any event accept, is admissible.

127. In *A v Blue Crane Route Municipality*[90] Plasket J (as he then was) observed that:

“[47] Section 2 of the Civil Proceedings Evidence Act 25 of 1965 provides that ‘[n]o evidence as to any fact, matter or thing which is irrelevant or immaterial and cannot conduce to prove or disprove any point or fact in issue shall be admissible’. Two of the important purposes of the pleadings in civil proceedings are to inform an opposing party of the case he or she has to meet and to define the issues. What evidence is relevant to a plaintiff’s claim – and hence admissible – is defined principally by the particulars of claim which contains a ‘statement of material facts relied upon by a plaintiff in support of his claim against a defendant, the conclusion of law that he is entitled to deduce from the facts stated therein and a prayer for appropriate relief’.[91]

- [48] In *Trope & others v South African Reserve Bank* the court held:

‘It is trite that a party has to plead – with sufficient clarity and particularity – the material facts upon which he relied for the conclusion of law he wishes the Court to draw from those facts. . . It is not sufficient, therefore, to plead a conclusion of law without pleading the material facts giving rise to it.’

Flowing from this principle that material facts must be pleaded, Jansen JA, in *Société Commerciale de Moteurs v Ackermann*,[92] held that ‘[e]vidence would not be admissible to prove facts not pleaded’.”[93]

128. E[...] did not seek to bring an amendment when the issue of the admissibility of the evidence was raised with Dr van der Merwe, and it seems to me then that the evolved case that E[...] was unemployable is not before me[94].

Contingency to be applied to the future loss of earnings of E[...] in her uninjured state

129. When it comes to the future loss of earnings in E[...]’s uninjured state, it was submitted on behalf of E[...] that a contingency deduction of 20% would be appropriate whilst it was submitted on behalf of the Municipality that a contingency deduction of 40 % should be applied.

130. In Kerridge the following observations were made regarding the application of contingencies in a claim for future loss of earning capacity:

"[40] Any claim for future loss of earning capacity requires a comparison of what a claimant would have earned had the accident not occurred, with what a claimant is likely to earn thereafter. The loss is the difference between the monetary value of the earning capacity immediately prior to the injury and immediately thereafter. This can never be a matter of exact mathematical calculation and is, of its nature, a highly speculative inquiry. All the court can do is make an estimate, which is often a very rough estimate, of the present value of the loss.

- [41] Courts have used actuarial calculations in an attempt to estimate the monetary value of the loss. These calculations are obviously dependent on the accuracy of the factual information provided by the various witnesses. In order to address life's unknown future hazards, an actuary will usually suggest that a court should determine the appropriate

contingency deduction. Often a claimant, as a result of the injury, has to engage in less lucrative employment. The nature of the risks associated with the two career paths may differ widely. It is therefore appropriate to make different contingency

deductions in respect of the pre-morbid and the post-morbid scenarios. The future loss will therefore be the shortfall between

the two, once the appropriate contingencies have been applied.

- [42] Contingencies are arbitrary and also highly subjective. It can be described no better than the oft-quoted passage in *Goodall v President Insurance Co Ltd* where the court said:

'In the assessment of a proper allowance for contingencies, arbitrary considerations must inevitably play a part, for the art or science of foretelling the future, so confidently practiced (sic) by ancient prophets and soothsayers, and by authors of a certain type of almanack, is not numbered among the qualifications for judicial office.'

- [43] It is for this reason that a trial court has a wide discretion when it comes to determining contingencies....

- [44] Some general rules have been established in regard to contingency deductions, one being the age of a claimant. The younger a claimant, the more time he or she has to fall prey to vicissitudes and imponderables of life [my emphasis]. These are impossible to enumerate but as regards future loss of earnings they include, inter alia, a downturn in the economy leading to reduction in salary, retrenchment, unemployment, ill health, death, and the myriad of events that may occur in one's everyday life. The longer the remaining working life of a claimant, the more likely the possibility of an unforeseen event impacting on the assumed trajectory of his or her remaining career. Bearing this in mind, courts have, in a pre-morbid scenario, generally awarded higher contingencies, the younger the age of the claimant ..."

131. In *Bane & Others v D'Ambrosi*[95], which includes a reference to *Southern Insurance Association v Bailey NO*[96], the Court reasoned as follows:

*“The respondent's contention that it was futile to attempt to quantify the effect which a difference in cost of living might have on a particular individual because of differences in the lifestyle of individuals and the imponderables associated with any attempt to predict the vagaries of economic parameters such as cost of living, price indices and the like, plainly found favour with the learned judge. The contention is, however, flawed in two respects. First, because the computation of compensation for the loss of earnings must focus on a plaintiff's earning capacity, what he does with his money after he has earned it can hardly be relevant. Put into blunt commercial terms, the computation is about turnover, not profit. Secondly, the fact is that the courts habitually have to grapple with problems of this nature where resort must be had to estimates and speculation in order to arrive at a figure which the court considers to be as fair as possible to both sides. This is clear from the well-known and much-quoted dictum by Nicholas JA in *Southern Insurance Association Ltd v Bailey NO*:*

'Any enquiry into damages for loss of earning capacity is of its nature speculative, because it involves a prediction as to the future, without the benefit of crystal balls, soothsayers, augurs or oracles. All that the Court can do is to make an estimate, which is often a very rough estimate, of the present value of the loss.

It has open to it two possible approaches.

One is for the Judge to make a round estimate of an amount which seems to him to be fair and reasonable. That is entirely a matter

of guesswork, a blind plunge into the unknown.

The other is to try to make an assessment, by way of mathematical calculations, on the basis of assumptions resting on the evidence.

The validity of this approach depends of course upon the soundness of the assumptions, and these may vary from the strongly probable to the speculative.

It is manifest that either approach involves guesswork to a greater or lesser extent. But the Court cannot for this reason adopt a non possumus attitude and make no award.'

This principle applies with equal force to the manner in which a judge is called upon to deal with any aspect of the assessment of the loss of earnings The object of the exercise is always to arrive at a fair award which compensates the plaintiff for his actual loss and does not 'punish' the defendant for his delict...”

132. The argument presented on behalf of the Municipality for a 40% contingency deduction is summarised as follows in its heads of argument:

“It is submitted that, given the plaintiff’s young age and the limited period of time which she spent in employment with the first defendant before resigning, along with issues raised relating to the job pool, possible transfer, and restructuring of the first defendant, a higher than usual contingency should be applied to the plaintiff’s future uninjured earnings. The plaintiff’s position as an archives clerk at Jansenville, had it been included in the new organogram in the uninjured scenario, also appears to have potentially been one which might no longer be required at a certain point.”

133. The immediate hurdle which confronts the Municipality in making the submission quoted above is that when it led evidence about the attractiveness of the Offer, the import of the evidence of Hendricks was that were E[...] to accept the Offer she would have a long and promising career with the Municipality. In response to questions from the Court Hendricks, albeit in the context of giving evidence with a view to promoting the Offer, recorded that there was no prospect of E[...] being made redundant before her retirement:

“COURT: So is there going to be enough work there until she had to retire, is that your evidence?”

MR HENDRICKS: Ja, yes-yes, My Lordship.”

134. To contend, in contrariety to the above, that in the event of the Court finding that the decision to refuse the Offer was reasonable then the Court should find that E[...]’s prospects of employment longevity with the Municipality were poor is inconsistent and unpersuasive.
135. Before dealing with the facts which pertain to E [...], and in order properly to evaluate the submission made by the Municipality, it is necessary to set out in more detail the applicable statutory and policy framework. After the amalgamation of the disestablished municipalities, the question arose as to how the staff were to be assimilated into a new organogram/staff establishment within the First Defendant. With this question in mind the MEC issued the Notice which provides as follows:

“8. Transfer of staff

- (1) A person who on the effective date is an employee of a disestablished municipality becomes an employee of the new municipality in accordance with the following rules:
 - (b) an employee referred to is transferred to the new municipality on terms and conditions no less favourable than those under which such employee served immediately before the effective date;
 - (e) the new municipality must appoint a person who became an employee of the municipality in terms of sub-paragraph (i), to a post on the establishment of the new municipality, ...
 - (f) nothing contained herein shall preclude a municipality from implementing a scheme to reorganize its staff subject to provisions of the Labour Relations Act.”
136. The Notice thus expressly provides that employees who hail from the disestablished municipalities are required to be appointed to posts within the First Defendant. When Hendricks gave evidence he expressed the view that the term “reorganize” (clause 8(f) of the

Notice) envisaged the possible dismissal of employee. I am not convinced that this is so. Such an interpretation would be inconsistent with clause 8(1)(e) which requires that all employees be placed. Furthermore the plain meaning of the term “reorganise” would not, in my view, include the reduction of staff. Rather, if anything, it would envisage the relocation of staff in order that they might be placed in different geographical areas and/or the retraining of staff so as to enable them to be placed in posts different to those which they previously occupied. Whilst I do not hold that retrenchments pursuant to the amalgamation are not permissible, I merely wish to emphasize that the Notice is formulated in such a way as to make it clear that the clear intention of the MEC was to preserve employment.

137. The object of preserving employment is reflected strongly in the provisions of the placement policy. The purposes of the placement policy were to:

“7.1 Ensure appropriate placement of all employees excluding Municipal Managers and Managers directly accountable to Municipal Managers in terms of Section 56 of the Municipal Systems Act, as amended, unless if such Manager is appointed on a permanent basis.

- 7.2. Guarantee employment security and job level but not necessarily job title and job content.”

138. Clause 11.4.1 provides that:

“Every attempt shall be made to place the employees that were transferred to the Municipality firstly into the post that will be created in the new structure. Employees who cannot be accommodated in the new structure during the placement process in a reasonable alternative position will be regarded as being displaced until such time as an alternative position can be identified.”

139. Clause 11.4.7 provides that:

“The Municipality as employer is committed to ensure a continuity of employment and every attempt would therefore be made to ensure that no retrenchment/redundancy will occur provided that the affected employees are willing to accept alternative positions that are offered. In this regard every effort will be made to ensure that such alternative offers are reasonable.”

140. The placement policy further provides that those persons who cannot immediately be accommodated will not be retrenched but will rather find themselves in a “corporate pool” for “redeployment, reskilling and/or training”. On a proper interpretation of the Notice it provides that retrenchments, if any, would be kept to an absolute minimum.

141. When Hendricks gave evidence on the question of retrenchment he suggested that Jack (not E[...]) who found himself in the pool may potentially one day be retrenched, although he provided no factual basis for this view other than to vaguely refer to “the budget”. One would have thought that, if anything, it would have been the number of vacancies within the organogram matched against the number of transferred employees who are yet to be placed which would determine the foreseeability of retrenchments. The organogram was not produced and there was no evidence about the number of persons in the pool at the level of either Jack or E[...] and the number of vacant posts again either at the level of Jack or E[...].

All that Hendricks could confidently state was that there had been no retrenchments to date and the Municipality was still in the process of advertising vacant posts for which application could be made by persons in the corporate pool.

142. Returning to the facts that concern E[...], the evidence of Hendricks was that E[...]'s post was still vacant. It must then follow, axiomatically, that had E[...] remained in the employ of the Municipality, she would have been placed in her post and would thus not have been vulnerable to retrenchment. This was expressly recorded by counsel for the Municipality in the following passage in her Heads of Argument:

“The Plaintiff would accordingly, as her position has been retained, and if she were reinstated, automatically be entitled to her original position in Jansenville.”[97]

143. That being so it must logically follow that E[...] would then have enjoyed a very high level of job security had she remained with the Municipality. As is evident from the paucity of cases contained in the law reports, Organs of State such as municipalities which exist to serve the populace and not to generate income rarely embark on retrenchment exercises. The reason for this is obvious. Their existence is not, like commercial entities, dependent on whether they are able to turn a profit. Accordingly the scope for retrenching municipal employees for financial reasons is very limited. Municipalities do not, as it were, go out of business[98]. They are publicly funded institutions whose perennial existence is guaranteed by the Constitution.[99] Generally speaking, if a person is permanently employed in a municipality that person comes as close as one can come to having a job for life. In the context of giving evidence about the benefits of the Offer, Dr Whitehead stated as follows:

“MR WHITEHEAD: Yes, this came towards the end of the, at a later stage in the process, my opinion on the job offer, it is quite a good offer M'Lord, in terms of what is being put on the table by the employer. And I think from an earning perspective, from an employee benefits perspective, everything, it is probably as good as you are going to get in Jansenville and better than most places. So yes, I think it is an excellent offer.”

144. Added to the above is the circumstance that E[...] was an above average performer. She was initially employed on a temporary contract of employment and her employment was thereafter made permanent, presumably because the Municipality was satisfied with her performance. Both Hendricks as well as Dr Whitehead conceded that E[...] may well have been promoted had she remained with the Municipality. This would be a positive contingency.
145. As was pointed out by Nicholas JA in Bailey, both favourable and adverse contingencies must be taken into account, the Court holding that:

“It is, however, erroneous to regard the fortunes of life as being always adverse: they may be favourable. In dealing with the question of contingencies, Windeyer J said in the Australian case of Bresatz v Przibilla (1062) [1962] HCA 54; 36 ALJR 212 (HCA) at 213:

‘It is a mistake to suppose that is necessarily involves a ‘scaling down’. What it involves depends, not on arithmetic, but on considering what the future may have held for the particular individual concerned ... (The) generalisation that there must be a ‘scaling down’ for contingencies seems mistaken. All ‘contingencies’ are not adverse and all ‘vicissitudes’ are not harmful. A particular plaintiff might have had prospects or chances of advancement and increasingly remunerative employment. Why count the buffets and ignore the rewards of fortune? Each case depends upon its own facts. In some it may seem that the chance of good fortune might have balance or even outweighed the risk of bad.’”[100]

146. Lastly I take note of the circumstance that, after the assault, E[...] did not immediately resign from her employment but persevered in horrific circumstances for almost a year. The fact that E[...] clung to her employment like a terrier is demonstrative of the fact that she was possessed of qualities of fortitude and tenacity. There was no acceptable reason advanced to suggest that E[...]’s employment with the Municipality would have been curtailed save that Dr Whitehead did say, somewhat speculatively, that her husband, who works for the South African Police Service in the nearby town of Wolwefontein, may conceivably have been transferred.
147. Having considered all of the above, and notwithstanding the relatively young age of E [...], I am not persuaded that there should be a deviation from the normal 15% contingency deduction.

Contingency to be applied to the future loss of earnings of E[...] in her injured state

148. When it comes to the contingency to be applied to the injured earnings of E[...] the parties were even further apart. It was submitted on behalf of E[...] that a high contingency deduction of 80 % should be applied whilst it was submitted on behalf of the Municipality that a low contingency deduction of 5 % should be applied.
149. A major difference between the opinions of the two experts, Dr Young and Dr Van der Merwe, was that Dr Van der Merwe was of the view that a minor event, such as an unkind word from an employer or a chance meeting of Jack, could trigger a PTSD relapse whereas Prof Young was of the view that it would have to be a major event, such as another sexual assault, to precipitate a PTSD relapse.

As mentioned earlier I am inclined to prefer the evidence of Prof Young in this regard. That being said, in my view it is very doubtful whether Erasmus will ever return to her pre-morbid earning potential. As was stated by Dr Van der Merwe, E[...] has never been “completely well” since the assault and even during her period of highest improvement she still suffered from adjustment disorder and would frequently report “mini-crises” to him given her inability to tolerate stressful situations. It seems that she will, for the indefinite future, be hampered by a mental fragility and will be considered a vulnerable job applicant. There may be a duty on her to disclose her medical condition to any prospective employer.

150. In motivating the contingency of 5%, it was submitted on behalf of the Municipality that the Court should afford proper weight to the circumstance that E[...] did not suffer a permanent physical injury and that her mental condition was eminently treatable and that the potential exists for E[...] to reapply for posts within the Municipality whether in Jansenville or further afield. Dr Van Daalen and Dr Whitehead, in their joint minute of 4 June 2019, acknowledged a 10% to 20% possibility of E[...]

one day, in the future, returning to employment in local government and earning as in the pre-morbid scenario. On a conspectus of all the evidence, I am however of the considered view that there is no appreciable prospect of E[...] resuming employment with the Municipality or a similar employer.

151. In contending for the contingency of 80% counsel for E[...] relied heavily on the evidence of Dr Van der Merwe which was to the effect that she was extremely limited in places where she may be able to obtain work owing to her low stress tolerance and that this, so it was submitted, made her “virtually unemployable in the open labour market”. For the reasons set out above, I am not inclined to accept that E[...] will forever be unemployable. It was further submitted on behalf of E[...] that if her condition improved substantially as postulated by Prof Young, this may take some time and it must also be borne in mind that Jansenville is a small town with little job opportunities.
152. Dr Van Daalen opined that Erasmus had a 40% to 50% chance of obtaining employment in her injured state whilst Dr Whitehead was of the view that there was a 70% to 80% chance of her obtaining employment in her injured state although he did, in the same breath, acknowledge that job opportunities in Jansenville were limited.
153. I accept the evidence of Prof Young that if E[...] is subjected to a proper course of psychotherapy then a PTSD relapse would only be occasioned by a serious event such as another sexual assault. That being said, I do however agree that allowance needs to be made for the circumstance that it may take E[...] some time to recover from her PTSD as well as the circumstance that there may be some setbacks in her psychological condition.
154. I also need to take into account that in order to sustain employment E[...] would need to secure employment with a sympathetic employer given that her psychiatric and psychological impairment has negatively affected her ability to tolerate stress with the result that any employer will have to be accommodating and sensitive to her condition. In this context I accept that the employment which E[...] enjoyed at Best Buys was, to a degree, sheltered employment in that, inter alia, E[...] knew the owner who was a person who she trusted and had known for many years and who she regarded as a protector. In my view E[...] will remain vulnerable and her position will be exacerbated by her post-morbid emotional condition. Because she is vulnerable she will not be an equal competitor in the open market. Even if she secures employment it may also be that if she is treated differently, and more sympathetically, by her employer this could cause disharmony in the workplace and may negatively affect her job security once having attained employment.

155. Taking all the above into account, I am of the view that there is a 45% chance of E[...] obtaining work in the open labour market at the level of the employment she enjoyed at Best Buys which in turn also supports the view which I take which is that a 55% contingency deduction is to be made to the future injured earnings.

CALCULATIONS

156. I was informed that a claim lodged in terms of COIDA is still pending before the Compensation Commissioner in respect of this matter and in this regard, if I understood it correctly, the claim was initially refused but the Municipality has instituted an appeal and the outcome of that appeal is yet unknown. Counsel for E[...] properly conceded that it would only be fair that if monies were paid to E[...] by the Compensation Commissioner then these should be paid over to the Defendants providing of course that there has been compliance with the Judgment.
157. An amount of R100,000.00 is required to be deducted from the amount of R400,000.00 agreed upon for general damages due to the payment made pursuant to the order of Bloem J on 2 June 2020.

Uninjured Injured Loss Past Loss of Earnings Gross R1,231,600 R 338,200 Contingency 5% R 61,580 0% R

Total Loss of Past Earnings R1,170,020 R 338,200 R831,820.00 Future Loss of Earnings Gross R4,134,200 R1,573,200 Contingency 15% R 620,130 55% R 865,260 Total loss of Future Earnings R3,514,070 R 707,940 R2,806,130.00 TOTAL R3,637,950.00

Past psychiatric, medical and associated expenses R31,005.02

Future psychological, medical, hospital and related expenses

R30,000.00

General damages taking into account the R100,000.00

paid in terms of the order of 2 June 2020

R300,000.00

TOTAL

R361,005.02

TOTAL DAMAGES AWARDED R3,998,955.02

COSTS

158. In this matter costs follow the event. I was informed by the Office of the Registrar that the costs of the transcription of the evidence amounted to R9 972.78. The Defendants are liable for these costs as well.
159. Finally, counsel for E[...] requested that she be declared a necessary witness. In *Ralane v Road Accident Fund*[101] I had occasion to consider a similar request and responded as follows:

“23. The draft order handed up for consideration by the Court contained a paragraph declaring the Plaintiff to be a necessary witness. I decline the invitation to make such an order as it would be superfluous and would amount to usurping the function of the Taxing Master[102]. In as much as it may be necessary, I would suggest to the Taxing Master that, when exercising her discretion, the Plaintiff qualifies

for, at least, the allowance as prescribed in terms of Section 37 of the Superior Courts Act 10 of 2013. I understand that the Plaintiff had to travel some distance to give evidence and he is obviously not a man of means[103].”

160. The sentiments expressed in the above quoted paragraph apply to E[...] mutatis mutandis.

THE FOLLOWING ORDER IS ISSUED:

1. The First and Second Defendants are jointly and severally liable, the one paying the other to be absolved, to pay the Plaintiff an amount of R3,998,955.02.
2. The First and Second Defendants are jointly and severally liable, the one paying the other to be absolved, to pay interest on the aforesaid amount at the legal rate from fourteen (14) days after the date of judgment to the date of payment.
3. The First and Second Defendants are jointly and severally liable, the one paying the other to be absolved, to pay the Plaintiff's taxed party and party costs, such costs to include the reasonable and necessary qualifying attendance fees and expenses of the following expert witnesses:
 - 3.1. Dr van der Merwe;
 - 3.2. Dr van Daalen;
 - 3.3. Actuary Willem Boshoff; and
 - 3.4. Actuary Eddie Theron[104].
4. The First and Second Defendants are jointly and severally liable, the one paying the other to be absolved, to pay interest on the taxed costs at the applicable legal rate from fourteen (14) days after date of allocatur to date of payment.
5. Subject to full compliance with this judgment then, in the event of the Plaintiff being paid compensation by the Compensation Commissioner in terms of the Compensation for Occupational Injuries and Diseases Act No 130 of 1993 as a result of the claim pursued in

respect of the assault which occurred on 16 November 2009 at the offices of the erstwhile Ikwezi Local Municipality in Jansenville, the Plaintiff shall forthwith pay to the Defendants, in shares proportionate to the monies received from each Defendant, any monies so received from the Compensation Commissioner save that such payment shall not exceed the amount of R3,998,955.02 together with interest, if any.

6. The First and Second Defendants are jointly and severally liable, the one paying the other to be absolved, to pay to the Registrar of this Court an amount of R9 972.78 in respect of the transcription and interest on this amount at the legal rate from fourteen

(14) days after the date of judgment to the date of payment.

P N KROON

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: Adv Louw instructed by Nolte Smit Attorneys

For First Defendant: Adv Molony instructed by V Dercksen & Partners

Dates Heard: 28 to 31 July 2020

2 and 3 August 2020

28 to 30 September 2020

11 December 2020

Date Delivered: 13 April 2021

[1] E v Ikhwezi Municipality and Another [2016] 2 All SA 869 (ECG) at [82].

[2] Pickering J, who gave

judgment

on liability, retired before the commencement of the trial on quantum.

[3] The first poem in the poetry collection Mountain Interval published in 1916 by Henry Holt.

[4] Section 186(1)(e) read with Section 191 of the LRA (Cf. Payten v Premier Chemical Industries [1999] 8 BALR 922 (CCMA)).

[5] The Plaintiff also elected not to pursue a claim of unfair discrimination in terms of Section 60(3) of the Employment Equity Act No. 55 of 1998 (“the EEA”) in terms of which both compensation and damages may have been claimed. Section 6(3) of the EEA provides that sexual harassment is a form of unfair discrimination.

[6]The reference to the CCMA was erroneous as any constructive dismissal dispute fell to be determined by the applicable Bargaining Council, namely the South African Local Government Bargaining Council, alternatively, and in the absence of consent, the Labour Court in the event of an automatically unfair dismissal being pursued in terms of Section 187(1)(f) of the LRA (Cf. Ntsabo v Real Security CC 2003 24 ILJ 2341 (LC))

[7] Baloyi v Public Protector and Others 2021

(2) BCLR 101 (CC) at paragraphs [37] to [41]. Cf. Archer v Public School-Pinelands High School and Others

(2020) 41 ILJ 610 (LAC) at paragraph[16].

[8] Section 194 of the LRA.

[9] Section 138(1) of the LRA requires that a Commissioner must determine a dispute “... fairly and quickly [and] with the minimum of legal formalities ...”.

[10] As to the advantages of arbitration over adjudication in labour disputes see Toyota SA Motors (Pty) Ltd v CCMA and Others

(2016) 37 ILJ 313 (CC) at paragraph [34].

[11] Black and others v Joseph 1931 AD 132 at 150.

[12] (1996) 17 ILJ 693 (LAC).

[13] 696H-J and 697A-B.

[14] At paragraph [37] as well as paragraph [24].

[15] Cf. Swart vs Provincial Insurance Co. Ltd 1963

(2) SA 630 at 633 C – E. Kemp t/a Centralmed v Rawlins [2009] 11 BLLR 1027 (LAC) at paragraph [67].

[16] Section 5 of the EEA requires an employer to take steps to eliminate unfair discrimination which would include putting in place a sexual harassment policy. The Code of Good Practice for the Handling of Sexual Harassment Cases at paragraph 7.1 requires employers to adopt a sexual harassment policy which takes cognisance of the provisions of the Code.

[17]Long v South African Breweries (Pty) Ltd and Others; Long v South African Breweries (Pty) Ltd and Others (2019) 40 ILJ 965 (CC) at [24].

[18] Paragraph

[36] of the first judgment.

[19]2014

(5) SA 579 (CC).

[20] At paragraph [36].

[21] 2019

(4) SA 331 (CC).

[22] At paragraph [60].

[23] City of Johannesburg Metropolitan Municipality v South African Municipal Workers Union and others [2017] 12 BLLR 1244 (LC) at paragraph [4]. cf Section 40(1) of the Constitution.

[24] A collective agreement has statutory force in terms of Section 23 of the LRA and a municipality is obliged to comply with collective

agreements in terms of Section 71(3) of the Municipal Systems Act 32 of 2000 (“the Systems Act”).

[25] See the comments in Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd 2019 (4) SA 331 (CC) at paragraphs [113] and [114].

[26] State Information Technology Agency SOC Limited v Gijima Holdings (Pty) Limited 2018 (2) SA 23 (CC)

[27] It is noted that the disciplinary code applicable at the time was subsequently declared in valid in The City of Cape Town v Independent Municipal and Allied Workers Union and Others

(2016) 37 ILJ 147 (LC)). Unless this decision was overturned on appeal had the Municipality been aware that the code was invalid

then it would also have had the remedy of “reviewing” the sanction providing that it furnished Jack with a further opportunity to make representations thereon (Cf. BMW (SA) (Pty) Ltd v Van der Walt

(2000) 21 ILJ 113 (LAC)).

[28] At paragraph [29] of the first judgment.

[29] Bothma v Els and Others 2010

(2) SA 622 (CC) at paragraph [76].

[30] R & C X-Press Freight v Munro (1998) 19 ILJ 540 (LAC) at paragraph [46].

[31] McGregor v Department of Health, Western Cape & Others (2021) 42 ILJ 514 (LAC).

[32] At paragraph [61]. This duty would including protecting an employee from psychological harm flowing from sexual harassment by co-employees. Cf. Media 24 Limited and Another v Grobler 2005 (6) SA 328 (SCA) at 349E-F and 350F – G.

[33] Jack was also prosecuted in the Magistrate’s Criminal Court as a result of charges which were laid by Erasmus and he pleaded guilty and was sentenced to a suspended term of imprisonment.

[34] At paragraph [37].

[35] I note en passant that if Erasmus had pursued an unfair dismissal claim in the Bargaining Council the maximum compensation to which she would have

been entitled would have been 12 months' remuneration which would have amounted to the sum of R72,000.00 taking into the account her salary at the date of her dismissal.

[36] 2003 24 ILJ 2341 (LC) at 2384F. See also the remarks of Cameron J (as he then was) in *Intertech Systems (Pty) Ltd v Sowter*

(1997) 18 ILJ 689 (LAC) at page 705 E – G where the Court noted how, in the case of a female victim of sexual harassment who had also been diagnosed with PTSD, the employer had become a “direct accessory to [the victim's] victimisation”

[37] As was observed in *V v Passenger Rail Agency of South Africa (PRASA) and Others* (P60/2018)

[2020] ZALCPE 6 (7 February 2020) at paragraph [15], the conduct of a disciplinary hearing does not, in and of itself, constitute the taking steps to eradicate sexual harassment. As to the obligations on an employer to root out sexual harassment and to protect and assist a victim of sexual harassment see generally the remarks of Nel AJ in *Piliso v Old Mutual Assurance Company (SA) Limited and Others* (2007) 28 ILJ 897 (LC) at paragraphs [77] to [82]

[38] Paragraph

[2] of the first judgment.

[39] Cf. *M v N* 1981 (1) SA 136 (Tk) at 138B-C. See the article “Retraumatized in Court” by Negar Katirai, an Associate Clinical Professor at the University of Arizona, as published in the *Arizona Law Review* [2020 – Volume 62: 81]

[40] At paragraph [82] of the first judgment.

[41]

[2015] 1 All SA 20 (SCA).

[42] At paragraph [33].

[43] *Churchill v Premier, Mpumalanga* (889/2019)

[2021] ZASCA 16 as handed down on 4 March 2021 at paragraphs

[34] and [36].

[44] Cf. *Minister of Justice v Ntuli*

[1997] ZACC 7; 1997 (6) BCLR 677 (CC) at paragraph [29].

[45] 1969

- (4) SA 443 (CPD) at 445 E-F. See also the remarks of Froneman J in *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* 2010 (5) BCLR 422 (CC) at paragraph [52] where he observed how, through the manner litigation is conducted, employers may make themselves guilty of cynically

“playing the system”.

- [46] Jack is 45 years of age and is set to retire at the age of 65.

- [47] At paragraph [25].

- [48] Edith Hamilton’s 1930 translation of a line from the play *Agamemnon* reads: “Even in our sleep, pain which cannot forget, falls drop by drop upon the heart until in our own despite, against our will, comes wisdom, through the awful grace of God.”

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“Even in our sleep, pain which cannot forget, falls drop by drop upon the heart until in our own despite, against our will, comes wisdom, through the awful grace of God.”

- [49] *South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others* 2017

- (1) SA 549 (CC).

- [50] Cf. *Minister of Home Affairs and Other v Watchenuka and Another* 2004 (4) SA 326 (SCA) at paragraph [27].

- [51] The correct term is ill-health retirement.

- [52] Case No. PR190/15 as handed down in the Port Elizabeth Labour Court on 8 December 2016.

- [53] Cf. *MEC of the Department of Education, Eastern Cape v Gqebe* [2009] 9 BLLR 896 (LAC) at paragraph [22].

- [54] Section 194(1)

- [55] *Johnson & Johnson (Pty) Ltd v CWIU* (1999) 20 ILJ 89 (LAC)

- [56] (2001) 22 ILJ 935 (LC)

- [57] *Mkhonto v Ford NO & Others* (2000) 21 ILJ 1312 (LAC). The principle that substantive unfairness cannot be cured is not however immutable. In this regard see *Rawlins* (supra) as affirmed by the Supreme Court of Appeal in *Rawlins v Dr DC Kemp t/a Centralmed*

- [2011] 1 All SA 281 (SCA).

- [58] I would note that the fact that Erasmus would have obtained a judgment against Jack on which she can execute would do nothing to improve the unsatisfactory situation which would arise were she to return to the Municipality.

- [59] Cf. *Kock & another v Department of Education, Culture & Sport of the Eastern Cape & others* [2001] 7 BLLR 756 (LC) where Nkabinde AJ (as she then was) held that an agreement between an employer and employee which prejudiced the rights of another employee could not stand because the other employee had not been heard.
- [60] 1980 (2) 412 (C).
- [61] At 413H.
- [62]
- (2006) 27 ILJ 769 (N)
- [63] At 778 A to D.
- [64] Section 67(1)(c) of the Systems Act.
- [65] See the remarks of Waglay JP in *The MEC, Department of Health, Eastern Cape v Saville Kops and 16 Others* (Case no. PA5/2014, Labour Appeal Court, Port Elizabeth) at paragraph [17].
- [66] At paragraph [62].
- [67] Hoexter: *Administrative Law in South Africa*, 2nd Edition, p30.
- [68]
- [1998] ZACC 17; 1999
- (1) SA 374 (CC) at paragraph[58]
- [69] In *Knoop v Gupta*
- [2021] 1 All SA 17 (SCA) at paragraph [34] it was recently confirmed that even a Court order will be void ab initio and a nullity if what “... has been ordered cannot be done under the enabling legislation, the order is a nullity and can be disregarded”.
- [70] [2017] 4 BLLR 350 (LAC)
- [71] At paragraph [26]. See also *Manana v Department of Labour and others* [2010] 6 BLLR 664 (LC) where the Court held, at paragraph [23] that: “In failing to comply with its policy the First Respondent committed an unfair labour practice ...”
- [72] *Mlokoti v Amathole District Municipality and Another* 2009 (6) SA 354 (ECD)
- [73] See *Ncane and Manana* (supra)
- [74] Cf. *Minister for Local Government, Environmental Affairs & Development Planning, Western Cape Provincial Government v Bitou Municipality & Others* (2019) 40 ILJ 2778 (LC)

[75]

(2013) 34 ILJ 1737 (SCA)

[76] Equity Aviation Services (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration [2008] ZACC 16; 2009

(1) SA 390 (CC) paragraph [36].

[77] Gcaba v Minister for Safety and Security and Others 2010

(1) SA 238 (CC)

[78] (PA8/16) [2017] ZALAC 50 (17 August 2017).

[79] At paragraph [93].

[80] Section 23.

[81] Section 195(1)(h).

[82] Section 195(1)(f).

[83] Section 195(1)(g).

[84] Cf. Corruption Watch NPC and Others v President of the Republic of South Africa and Others; Nxasana v Corruption Watch NPC and Others 2018 (10) BCLR 1179 (CC) at paragraph [29].

[85] Cf. Cool Ideas Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC) at paragraphs [55] and [57].

[86] 2006

(5) SA 583 (SCA).

[87] At paragraph [9]. This wording is replicated in The Quantum Yearbook by Robert J Koch 2021 at page 118.

[88] 2019

(2) SA 233 (SCA).

[89] The principal authority for psychiatric diagnoses.

[90](4784/2015)

[2017] ZAECGHC 86 (11 July 2017)

[91] Footnotes omitted.

[92] Société Commerciale de Moteurs v Ackermann 1981 (3) SA 422 (A) at 435C-D.

[93] At paragraphs [47] and [48].

[94] Cf. PL v YL 2013 (6) SA 28 (E) at 41 F - H.

[95] 2010 (2) SA 539 (SCA) at paragraph [12].

[96] 1984 (1) SA 98 (A) at 113G-114A.

[97] At paragraph [79].

[98] See Van Almelo (*supra*)

[99] See Chapter 7.

[100] At page 117 B to D.

[101] (3646/18) [2020] ZAECGHC 91 (25 August 2020)

[102] Transnet Ltd t/a Metrorail and Another v Witter [2008] ZASCA 95; 2008

(6) SA 549 (SCA) at paragraph [19]

[103] Cf. Daniels and Other v Minister of Police (50047/2012, 50055/2012, 50049/2012, 50050/2012) [2015] ZAGPPHC 317 (26 February 2015) at paragraphs [106] and [107]

[104] Messrs Boshoff and Theron did not testify but did jointly compile the Actuarial Report which formed the basis for the agreement reached by the parties in respect of quantum.

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