



IN THE LABOUR COURT OF SOUTH AFRICA, GQEBERHA

Reportable

CASE NO: P 03/19

In the matter between:

SOLIDARITY obo CAPTAIN B

Applicant

and

SOUTH AFRICAN POLICE SERVICE

First Respondent

THE MINISTER OF POLICE N.O.

Second Respondent

THE NATIONAL COMMISSIONER OF

THE SOUTH AFRICAN POLICE SERVICE N.O.

Third Respondent

Heard: 14 – 15 March 2022 & 25 May 2022

Delivered: This judgment was handed down electronically by circulation to the Applicant's and the Respondents' Legal Representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing - down is deemed to be 14h00 on 22 September 2021.

JUDGMENT

LALLIE, J

- [1] Sexual harassment has no place in the South African working environment. The legislature continuously makes the message clearer and louder by passing legislation designed to eradicate sexual harassment from the workplace. Section 6 of the Employment Equity Act¹ which will be referred to as the EEA in this judgment, outlaws unfair discrimination based on gender and sex. Sexual harassment is defined as follows in the Amended Code of Good Practice on Sexual Harassment “...a form of unfair discrimination and is prohibited on the grounds of sex and/or gender and/or sexual orientation”. Sexual harassment is used, in most cases, by employers and employees entrusted with some level of authority to oppress, exploit and dominate those with less or no authority at all. In this case, like in most cases, the victim of sexual harassment is a woman and the perpetrator is a man. Like all employees, women go to work to sell their skills and labour and to practice their professions to earn an income not for the sexual pleasure of their employers or other employees, irrespective of the positions they hold.
- [2] Section 60 of the EEA enjoins employers, on receiving complaints of sexual harassment, to take the necessary steps to eliminate the reprehensible conduct. An employer who fails to fulfil the obligation is deemed to have committed sexual harassment and may be ordered to compensate the victim whose complaint has not received the required attention. Solidarity, the applicant trade union, acting on behalf of its member, Mrs B, a Captain in the South African Police Service (SAPS) instituted these proceedings seeking, mainly, relief based the first respondent’s alleged failure to take the necessary steps contemplated in section 60 (2) of the EEA. Solidarity argued that the first respondent is vicariously liable for acts of sexual harassment which were committed by one of its employees and liable to pay Capt B compensation. The proceedings are opposed by the respondents on the basis that the individual applicant failed to report the sexual harassment immediately as required in section 60 (1) of the EEA. They further submitted that the first respondent

¹ Act 55 of 1998

fulfilled its obligations envisaged in section 60 (2) of the EEA after receiving Capt B's sexual harassment grievance.

- [3] The parties decided not to lead oral evidence but to deal with the issues raised by the applicant by way of a stated case. They submitted a joint bundle containing documentary evidence. The applicant's initial complaint to the first respondent involved a number of employees and a number of acts of misconduct. However, in the proceedings at hand only allegations of sexual harassment against one employee are to be dealt with. An effort will be made to exclude facts relating to the other employees whose conduct falls outside the purview of this matter. I deemed it prudent to protect the identity of some employees mentioned in the stated case. The following extracts of the stated case with the necessary adaptation provide the relevant background for the adjudication of this matter:

“STATED CASE:

5. The applicant is employed as a member of the South African Police Services (the SAPS) and holds the rank of Captain.
6. Lt Col Ortell, a member of the SAPS, was the applicant's immediate supervisor during 2013 to 2015.
7. During 2013 and 2014, Lt Col Ortell made unwelcome sexual advances and/or utterances to the applicant.
8. On 11 February 2015 the applicant verbally informed Lt Col Pitt of her intention to lodge a collective grievance together with other complainants of sexual harassment by Lt Col Ortell.
9. On 24 February 2015, the applicant was charged with contravening SAPS Disciplinary Regulations 20 I, S and K which included *inter alia* the contravention of the dress code and for sexual harassment of a member of the SAPS, Lt Col Pitt. The applicant was found guilty and a sanction of a fine was imposed on 29 January 2016.
10. The applicant appealed against the sanction. (See A1, pp23 – 37)
11. The appeal was dismissed but the applicant did not receive feedback of the outcome of her appeal until the 16 March 2022. (See A1, pp320 – 325)

12. On 3 March 2015 the applicant approached the Station Commander, Brigadier Le Bok about the sexual harassment. She advised Brigadier Le Bok of her intention to lodge a sexual harassment grievance together with Cap A and that they had made an appointment to see a prosecutor. (See A1, p 76)
13. On 11 June 2015, the applicant lodged her first formal grievance of sexual harassment against Lt Col Ortell ... (See A1, p 1 – 22)
14. On 12 August 2015, SAPS made a decision that the three SAPS members complained of in her grievance (Lt Col Ortell, ...) not have any interaction with the applicant. (A1, p 46)
15. On or about 7 October 2015 the applicant was informed to report to Col Nomdoe directly. While this investigation process was running the applicant was informed by Brigadier Le Bok that she should no longer report to Lt Col Ortell. Lt Col Ortell was not transferred at this point.
16. On 19 August 2015, the SAPS provincial office appointed Brigadier Leonie Bentley to investigate the applicant's grievance of the alleged sexual harassment by LC Ortell, (See A1, pp 47 – 48)
17. Brigadier Bentley investigated the matter and submitted a report dated 23 February 2016. (See A1, p 49 – 79). Brig Bentley investigated the matter by interviewing the following witnesses who stated under oath as follows:
 - 17.1 Ms B stated that while she could not recall the date, she remembers the day the applicant asked her if she saw what happened and she replied no. The applicant then reported to her that Lt Col Ortell touched her breasts with his thumb and made her feel uncomfortable. (See A1, p 49 at para 2 and p 57 at para 5).
 - 17.2 W/O Riaan van der Nest confirmed that it was his birthday and that the applicant had given him a hug. (See A1, p 49 at para 3 and p 60 at para 2)
 - 17.3 ...
 - 17.4 Cap A reported that during May 2015, the applicant entered her office and reported that she took the wrong medication and felt drowsy. However, she could remember Lt Col Ortell brushed passed her with his hand touching her breast. The applicant felt uncomfortable and pushed him out of her office and/or told him to leave her office. Cap A further reported that she got the impression that the applicant was uncomfortable as she was

drowsy and he took advantage of her. She further (See A1, p 50 at para 5 and p 70)

18. Brig Bentley referred to the report of Mr Keith-Bandath in terms of the recommendations she was making as the investigating officer. (See A1, p 50 at para 6.7). The recommendations read as follows:
 - 18.1 ...
 - 18.2 The recommendations against Ortell were that: the allegations dating back to 2013 must be substantiated and if successfully substantiated Lt Col Ortell must be charged in terms of the provisions of Regulation 20 of the SAPS Disciplinary Regulations; ..., that the further allegations by the applicant be substantiated and if successfully done that Lt Col Ortell should be charged in terms of Regulation 20 of the SAPS Disciplinary Regulations;
 - 18.3 ...
 - 18.4 In conclusion the recommendation was that the dates and times of the alleged occurrences are extremely vague and unsubstantiated and might become a challenge in respect of the proper construction of the charge sheet. Due to the lapse of time it would be unrealistic "*to now consider suspension of or alternative placement of the officers.*" See A1 pp74 – 79
19. On 20 June 2016, the provincial sexual harassment officer, Captain van Rensburg, recommended *inter alia*, that a further Independent Investigator be appointed by the SAPS Head Office before disciplinary steps could be taken against LC Ortell. (See Bundle A1 pp 81 – 82).
20. On consideration of this recommendation, the SAPS recommended Brigadier Bentley was to continue with the investigation. (See A1, p 83)
21. On 8 June 2017, there was a letter from the SAPS National Office to Colonel Sebane calling for a report on the progress made in respect of the sexual harassment claim lodged by the applicant. (See A1, pp 85 – 88)
22. On 14 June 2017, the Deputy Provincial Commissioner respondent to this query. The response included *inter alia* that:
 - 22.1 Brigadier Bentley was appointed to investigate and she submitted her report to the Legal Services at Province.

22.2 A Provincial Sexual Harassment Task Team headed by Col Sabane was appointed to investigate the matter. See: A1 pp 89 – 90

23. In June 2017 the Sexual Harassment Task Team of the Province – Colonel Sabane, Col Dembula and Lt Col Jevu from the provincial office – were appointed to investigate the matter. This was after the applicant raised her complaints about unfairness and victimisation to the Provincial and National Office of the SAPS.

24. On 22 June 2017, Colonel Sebane, Colonel Dembula and Lieutenant Colonel Javu, after making the requisite arrangements telephonically with the applicant, held interviews with the following witnesses: the applicant, Ms D, Captain A, Sergeant E, Warrant Officer F, Captain G, Captain H over a period of two days. (See A1, pp 93 – 97)

25. The witnesses reported as follows:

25.1 The applicant reported that: her first encounter with Lt Col Ortell was when she was working in the Human Resource Environment. She always felt that Lt Col Ortell was in her private space and as a result she tried to avoid him at all costs; in 2014 she was placed under his direct supervision; another incident was when the applicant was standing behind, Ms D when Lt Col Ortell came over behind them and put his arm around applicant's shoulder with his finger on her breast; she went to his office and told him to stop his unwelcome sexual acts; Lt Col Ortell then started victimising her by taking away responsibilities which would normally fall on her in terms of seniority; she decided to inform Lt Col Pitt about Lt Col Ortell's acts of sexual harassment against her and other ladies and a result she is going to collect statements to lodge a collective grievance against him.

25.2 Ms D recalled two incidents. The first one was reported to her by the applicant as to what happened in Ms D's office while she was typing. She confirmed seeing Lt Col Ortel touching the applicant but she could not see which part of the body he touched. The second incident is where W/O van der Nest greeted and hugged the applicant in her office and Lt Col Ortell asked the applicant why did she hug W/O van der Nest and not him. He further said: *"let me sommer lift you up"* advancing towards her. She noticed that the applicant did not like it.

- 25.3 Cap A reported that when the applicant informed her about sexual harassment of Lt Col Ortell, she realised that they were both victims of sexual harassment by the same officer and she gave the applicant a brief statement to use if she opened a case against Lt Col Ortell. The impact on her was traumatic and she had to seek medical assistance from a specialised psychologist. The emails from Head Office about sexual harassment encouraged her to try and establish a support group for the victims of the sexual harassment.
- 25.4 W/O F gave evidence on behalf of his wife.
- 25.5 Cap H reported that ...
- 25.6 Sgt E testified that See A1, pp 93 – 96
26. The recommendations of the provincial team were as follows:
- 26.1 Lt Col Ortell be transferred to the neighbouring cluster;
- 26.2 Investigations for the purposes of instituting disciplinary action against Lt Col Ortell be instituted by behavioural management;
- 26.3 All the alleged victims of sexual harassment be referred to Employment Health Wellness (EHW) for counselling and support;
- 26.4 Work relationship programme and team building exercise by EHW conducted to enhance colleague relations and team work in the work place; and
- 26.5 Awareness campaigns by the teams from the province to management. See A1, pp 96 – 97
27. The recommendations were approved on 28 August 2017 by the Deputy Commissioner: HRM. (See A1, p 97)
28. On 7 September 2017 the applicant informed SAPS National Office of her grievance against the SAPS members and the outcome of the disciplinary hearing against her and request the intervention by Head Office. (See A, pp 98 – 111)
29. Lt Col Ortell was transferred in September 2017.
30. On 2 October 2017, the report by Col Sebane (detailed above) was submitted to the Province.

31. On 6 Nov 2017 the SAPS appointed Brig Mavuka to continue with the investigation replacing Brigadier Bentley.
32. On 5 Feb 2018, Brig Mavuka's reports were filed in respect of the investigations of the charges by the applicant against (See A1, pp 122 – 124)
33. Brig Mavuka's reported in respect of Lt Col Ortell was that there was a *prima facie* case of misconduct. (See A1, p 122, para 3).
34. Brig Mavuka further reported that in her opinion the SAPS did not have grounds to suggest disciplinary steps against Lt Col Ortell. (See A1, p122, para 4).
35. Brig Mavuka further reported that due to the lapse of time and extreme vagueness of the evidence it would be a challenge to formulate charges. (See A1, pp 122 – 123, paras 4.1 to 4.11)
36. On 20 July 2018 the applicant received a letter from Brig Kunene that the officers will not be prosecuted. (Applicant's bundle p 91 – 92)
37. The applicant's second grievance dated August 2018 was launched.
38. In September 2018, Lt Col Ortell returned to Mount Road Station.
39. On 10 September 2018 the applicant was instructed to be transferred. The applicant submitted representations objecting to her transfer.
40. On 18 September 2018 the applicant addressed a letter to Head: HRM regarding her transfer and Lt Col Ortell's return to Mt Road.
41. On 20 September 2018 the applicant addressed a letter to the Honourable Speaker regarding her dispute.
42. On 4 October 2018 the applicant addresses a letter to cluster commander regarding her dispute.
43. On 23 October 2018 the applicant addressed a letter to Police Ministry regarding her dispute.
44. The applicant did not receive feedback in terms of the abovementioned letters.
45. The applicant lodged a dispute with the CCMA in terms of section 60 of the EEA. The dispute was conciliated and referred to this Honourable Court for adjudication".

- [4] What has to be determined in this matter is whether the individual applicant acted, immediately, in bringing to the first respondent's attention the sexual harassment she was subjected to. If she did, it must be established whether the first respondent, the South African Police Service (SAPS) took the necessary steps envisaged in section 60 (2) of the EEA upon receiving the report. If the steps were not taken, a decision whether that omission was in breach of section 60 (3) of the EEA must be taken. In the event of a finding being made against SAPS, the parties agreed that reasonable compensation would be in the amount of R50 000. 00. The applicant also sought an order directing SAPS to take disciplinary action against LT Col Ortell for perpetrating acts of sexual harassment against the individual applicant.
- [5] It was argued on behalf of the respondents that an order that Lt Col Ortell be charged by SAPS is incompetent as it would amount to double jeopardy. The applicant did not disclose the legal basis for the relief it sought. There has to be a legal basis for each order this court issues. The order the applicant sought falls outside her main claim for compensation based on the first respondent's failure to take the necessary action after receiving her complaint of sexual harassment. As the applicant failed to disclose the legal basis of the relief, I accept the argument on behalf of the respondents that the order may not be granted.
- [6] Section 60 of the EEA provides as follows:
- “(1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.
- (2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.

- (3) If the employer fails to take the necessary steps referred to in subsection 2, and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.
- (4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act”.

[7] The respondents conceded that during 2013 and 2014, Lt Col Ortell made unwelcome sexual advances and/or utterances to Capt B. The conduct constitutes sexual harassment in terms of clause 5 (e) of the first respondent’s sexual harassment policy and the EEA. The perpetrator’s conduct of denying the individual applicant the opportunity to perform duties which should have been allocated to her by virtue of her seniority after objecting to his sexual advances formed part of the sexual harassment. The fact that Lt Col Ortell subjected Capt B to sexual harassment is therefore common cause. In denying that SAPS contravened the provisions of section 60 of the EEA the respondents submitted that the applicant failed to bring the sexual harassment immediately to the employers attention. The respondents relied on *National Union of Metal Workers of South Africa and Another v Passenger Rail Agency of South Africa*² where the court found that a delay of 2 to 3 years in reporting acts of sexual harassment was fatal to the applicant’s claim. The reason was that the employee had failed to bring her sexual harassment to the employer’s attention immediately as contemplated in section 60 (1) of the EEA. They also relied on *Liberty Group Limited v M. M*³ where the word “*immediately*” was given a “*sensible meaning*”. The court found a limited delay of 2 months acceptable in that case.

[8] The word “*immediately*” in section 60 (1) of the EEA can properly be interpreted when read against the following provisions of section 2 (a) of the same Act:

“The purpose of this Act is to achieve equity in the workplace by –

² [2022] 1 BLLR 90 (LC)

³ An unreported decision of the Labour Appeal Court under case number JA 105/2015 handed down on 7 March 2017

(a) promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination;”

In determining whether the applicant complied with the provisions of section 60 (1) of the EEA by reporting the sexual harassment to her employer immediately I have taken into account the following *dictum in Liberty Group Limited (supra)*:

“[51] Although the appellant contends that the conduct was not reported immediately, as required by s 60(1), with a delay of some weeks having elapsed between the sexual harassment and the report to Mr Haines, I am satisfied that the requirement that conduct be reported “immediately” must be given a sensible meaning.⁴ This is done through considering the provision within its context and in a manner, which ensures an interpretation that does not lead to a glaring absurdity, even where the interpretation given may involve a departure from the plain meaning of the words, used.

[52] The stated purpose of the EEA is to provide for employment equity through inter alia eliminating unfair discrimination in employment, ensuring the implementation of employment equity to redress the effects of discrimination and achieving a broadly representative workforce. The requirement that conduct in contravention of the Act be brought to the attention of the employer “immediately” seeks to place the employer in a position to act in the manner required of it in terms of s 60.

[53] A determination as to whether a report has been made in accordance with s 60(1) requires an assessment of the facts unique to each matter. I am satisfied that the respondent’s report of the conduct, while not made immediately, was nevertheless made within sufficient time and that an unduly technical approach to the timing of the report is not warranted on the facts of this case. A glaring absurdity would arise, one which does not accord with the purpose of the EEA, were the report to be found to have failed to comply with s 60(1) simply by virtue of the limited delay which arose between the conduct complained of and the report to the employer. “

[10] The court in *Liberty Group Limited* gave the word “*immediately*” the purposive interpretation it requires. The unfair discrimination was perpetrated during 2013 and 2014. In terms of the agreed facts, on 11 February 2015, the individual

⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) at para 25.

applicant told Lt Col Pitt of her intention to lodge a collective grievance with other victims of Lt Col Ortell. On 3 March 2015 the individual applicant advised the station commander of the Mount Road Police Station where she, the applicant, perpetrator, and his victims worked, of her intention to lodge a sexual harassment grievance with another female captain and that they had made an appointment to see a prosecutor. The first applicant ultimately lodged her first formal sexual harassment grievance against Lt Col Ortell on 11 June 2015. She was the only complainant in that grievance.

[9] In the letter addressed by Lieutenant General Kwena, the Divisional Commissioner Human Resource Utilization to the Eastern Cape Provincial Commissioner on 8 June 2017 that triggered the flurry of activity which saw the first respondent take a decision on the individual applicant's complaint the following is stated:

"1. The Section: Labour Practice received an email from Captain B of Mount Road Police Station in Port Elizabeth requesting for assistance with regards to progress in relation to a grievance she lodged at her station in 2014.

2. Captain B reported a case of sexual harassment against Lt Colonel Ortell at the beginning of 2014; the matter was also reported to Captain Whitebooi who is an officer appointed to handle sexual harassment matter at the Station and that Captain did not want to get involved".

[11] In affording the term '*immediately*' a sensible and purposive meaning I have considered that the perpetrator and the victim of the sexual harassment were, at the time the events took place police officers stationed at the same police station. Lt Col Ortell was Capt B's immediate supervisor. The former was therefore in a position of power. It is common cause that there were other female police officers who were victims of Lt Col Ortell's sexual harassment at the time he was preying on the individual applicant. They decided to file a collective grievance with the applicant. They, however, did not execute their decision. Even a fellow captain renege on the decision to file a joint grievance with the applicant. It is when the provincial management of the first respondent

started investigating the individual applicant's complaint that other victims of the same perpetrator opened up. One of them went as far as requesting that her case be determined separately. The most plausible inference that can be drawn from the individual applicant's reluctance to report the sexual harassment is that a real barrier prevented her.

[12] The legislature deliberately refrained from placing a fixed period within which sexual harassment has to be reported. In its nature, sexual harassment violates the victim's dignity and as it is a form of bullying it is used to intimidate the less powerful. The debilitating effect of sexual harassment can be gleaned from the 31 July 2017 recommendations of the Provincial Sexual Harassment Task Team which were, *inter alia*, that all the alleged victims of Lt Col Ortell's sexual harassment be referred to Employment Health Wellness for counselling and support. In order to promote fair treatment in employment through the elimination of unfair discrimination, the word "*immediately*" cannot be given an interpretation that will prevent junior employees making allegations of sexual harassment from being heard. Barriers to the reporting of sexual harassment must be recognized including the power relationship between the victim and the perpetrator. Employers should not be allowed to hide behind those barriers to defeat the very purpose of the EEA.

[13] It was argued on behalf of the respondents that the individual applicant's delay is inexcusable because she only lodged her grievance after she had been found guilty of sexual harassment against Lt Col Pitt and sanctioned. The respondents sought to rely on the individual applicant's comment that with all the conflict she felt even more determined to report Lt Col Ortell. The comment is extracted from a 15 page letter the applicant addressed to the second respondent dated 7 September 2017 seeking his intervention as she was of the view that her grievance was not receiving the attention it deserved. In the letter, the individual applicant gives a detailed account of the bullying and indignity she was subjected to at her workplace. She concludes the letter in the following words "*I wrote this report with the utmost respect but am pleading to your office to save us*". The respondents' attempt to rely on the single comment which was

used out of context is opportunistic and impermissible. A reading of the full text of the letter does not support the respondents' version.

- [14] The respondents' argument that the applicant reported the sexual harassment as an after thought which she had after being disciplined for committing sexual harassment cannot be sustained. It overlooks the common cause facts that when the individual applicant was charged on 24 February 2015 she had on 11 February 2015 already told Lt Col Pitt of her intention to lodge the collective grievance against Lt Col Ortell. She had already filed her grievance on 11 June 2015 when she was found guilty of contravening the dress code and sexual harassment and a fine imposed against her on 29 January 2016. The haste at which Lt Col Pitt reported the applicant's contravention of the dress code and sexual harassment against him cannot be used as a barometer of the speed at which the applicant was required to lodge her report. Each case is decided on its merits. The circumstance in which the 2 reports of sexual harassment arose are materially different. The most significant difference being the position of authority Lt Col Pitt held. The individual applicant submitted that she lodged an appeal after receiving the outcome of her disciplinary enquiry but received its outcome only after these proceedings had been instituted.
- [15] The respondents sought to rely on clause 8.2.1 of the policy on sexual harassment which requires complainants to report sexual harassment immediately. Clause 2 of the same policy provides that the policy should be read with a number of statutes governing the employment relationship including the Constitution of the Republic of South Africa, 1996 and the Labour Relations Act⁵ (the LRA). The manner in which the Labour Appeal Court interpreted "*immediately*" has already been dealt with earlier in this judgment. It applies equally to "*immediately*" in clause 8.2.1 of the policy. For the reasons already given, the individual applicant complied with the first respondent's policy on sexual harassment.

⁵ Act 66 of 1995 as amended.

- [16] The individual applicant's report was disregarded at her workplace. The withdrawal of other victims from lodging a collective grievance left her without the protection of safety in numbers. I find it sensible in the circumstances of this case to accept that the individual applicant brought her sexual harassment to the first respondent's attention immediately. Finding otherwise would, in the circumstances of this case result in an absurdity. The requirement of having acts of sexual harassment reported to the employer immediately was not intended to protect employers from the consequences of their refusal or failure to eliminate sexual harassment at the workplace. The respondents' defence that the individual applicant did not bring the sexual harassment immediately to her employer cannot succeed.
- [17] The next question that needs to be answered is whether SAPS complied with the provisions of section 60 (2) of the EEA by taking the necessary steps to eliminate the sexual harassment. The applicant alleged that SAPS failed to take the necessary steps to eliminate the sexual harassment she was subjected to. The applicant brought her sexual harassment to the attention of SAPS by lodging a grievance on 11 June 2015. Almost a month later, on 7 July 2015 the Provincial Sexual Harassment Officer, Capt Janse van Rensburg made a recommendation that officers referred to in the applicant's complaint including Lt Col Ortell "*be temporarily transferred prior to the investigation and up to conclusion of the departmental process as to eliminate possible intimidation and victimization*". On 9 July 2015 only 2 days after the recommendation was made, Brigadier Kunene issued a further recommendation that "*the officers be instructed not to interact with this officer whilst investigation is pending and a decision to transfer or not to transfer them be taken after the investigation is concluded*".
- [18] The investigation into the applicant's grievance continued. Lt Col Ortell was not transferred and on 5 October 2015, the Deputy Provincial Commissioner, Major General Dlani directed that Capt B should no longer report to Lt Col Ortell directly but to Col Nomdoe. In a report issued on 22 February 2016, it is stated that the dates and time of the alleged occurrences were vague and

unsubstantiated for purposes of drawing charge sheets and that owing to the time that had elapsed it would be unrealistic to consider suspension or alternative placement of officers. After writing letters complaining about not receiving progress reports on her grievance, the applicant addressed a letter to the second respondent on 7 September 2017, and sought his intervention. During the same month the Sexual Harassment Team which had been put together to investigate the applicant's complaint completed its investigation and Lt Col Ortell was removed from Mount Road Police Station in September 2017.

[19] In November 2017 Brigadier Mavuka was appointed to investigate the applicant's grievance further. In a report dated 5 February 2018, Brigadier Mavuka made a finding that there was a *prima facie* case of misconduct against Lt Col Ortell. She, however, expressed the view that SAPS had no grounds to suggest that disciplinary action be taken against him owing to the time that had elapsed and the extreme vagueness of evidence. The applicant was not favoured with a copy of Brigadier Mavuka's report. She was informed by Brigadier Kunene in a letter dated 20 July 2018, that there were no grounds to prosecute or take disciplinary action against Lt Col Ortell. In September 2018 Lt Col Ortell returned to Mount Road Police Station and the applicant received instructions that she would be transferred from the same police station. She refused, made representations and later initiated the present litigation.

[20] Other than consulting relevant parties by investigating the complaint of sexual harassment the first respondent removed the perpetrator from the same workplace as the individual applicant for a year almost 2 years after the grievance was lodged. The time SAPS took to investigate the applicant's complaint was unreasonably long. In reaching the decision I have taken into account that the sexual harassment complaint against Lt Col Ortell was but one of the complaints that were investigated which involved other perpetrators of other acts of misconduct. The extent of the complaint did not justify the time taken to investigate it. Meaningful steps were taken in the investigation after the Eastern Cape Provincial Commissioner was required, in a letter dated 8 June 2017, by Lieutenant General Kwena to provide a report on the individual

applicant's complainant. The respondents cannot be allowed to benefit from their inordinate delay in completing the investigation. They may not use the unreasonable delay to justify their failure to take the necessary steps to eliminate the sexual harassment the individual applicant was subjected to.

[21] The respondents also sought to rely on the extreme vagueness of the evidence at their disposal. They alleged that it was not corroborated and insufficient. The adequacy of the evidence obtained had to be determined by the purpose it had to serve. The first respondent conducted the investigation with the view of determining whether Lt Col Ortell had committed acts of sexual harassment so that it could comply with its obligation of taking steps to eliminate the conduct. The first respondent's policy on sexual harassment defines in clear terms conduct which constitutes sexual harassment. The individual applicant gave a detailed account of the relevant acts of sexual harassment and the information gathered from the initial investigation supported her grievance.

[22] The explanation that no action could be taken against Lt Col Ortell because the evidence against him was uncorroborated is unreasonable when viewed against the nature of sexual harassment. Sexual harassment is generally perpetrated in private out of sight of potential witnesses. The first respondent obtained a statement from an employee who saw Lt Col Ortell touch the individual applicant's breast. The concessions made by the respondents which formed part of the stated case do not support the conclusion that there was insufficient evidence against Lt Col Ortell. The parties were in agreement that he committed acts of sexual harassment against the individual applicant. The concession is partly based on a number of reports and recommendations generated during the investigation of the applicant's complaint. There was, at all material times, sufficient evidence for steps to be taken to eliminate the sexual harassment. In light of the information that was unearthed during the investigation and the decision the first respondent took not to take action against Lt Col Ortell, SAPS was remiss in its duty to eliminate sexual harassment.

- [23] The attack directed at the applicant for not commencing this litigation earlier cannot assist the respondents. The time of the commencement of this litigation has no impact on the first respondent's obligations in terms of section 60 of the EEA.
- [24] Section 60 (2) of the EEA enjoins employers to take the necessary steps to eliminate sexual harassment. The legislature made its intention clear and unambiguous by using the word 'eliminate'. It was deliberately placing a duty on employers to remove sexual harassment from the workplace completely. SAPS, through Capt Y attempted to comply with the provisions of section 60 (2) of the EEA by recommending that Lt Col Ortell be removed from Mount Road Police Station while the individual applicant's complaint against him was being investigated. Her report did not yield the intended result because her recommendation was never elevated to a decision. Instead Brigadier Kunene took a conflicting decision which Provincial Commissioner Dlani endorsed. It is common cause that SAPS consulted all the relevant parties.
- [25] Other than investigating the individual applicant's complaint, removing the perpetrator from the work place for a year and making recommendations no action was taken by the first respondent to eliminate the sexual harassment. While the respondents conceded that acts of sexual harassment were perpetrated by Lt Col Ortell against the individual applicant, they failed to demonstrate the steps SAPS took to eliminate the sexual harassment. The first respondent therefore acted in breach of section 60 (2) of the EEA and is deemed to have contravened the provisions of the EEA which outlaw sexual harassment.
- [26] Section 50 (2) (a) of the EEA empowers the Labour Court to grant compensation to employees who have been unfairly discriminated against by their employers. The parties were in agreement that in the event of SAPS being found to have unfairly discriminated against the applicant in breach of the EEA

it would be just and equitable in the circumstance of this case to grant the applicant compensation in the amount of R50 000, 00. I could find no reason to detract from the agreement.

[27] The applicant's trade union and the first respondent have a continuing relationship. They agreed that granting a costs order in the circumstances would not be appropriate.

[28] In the premises, the following order is made:

Order:

1. The first respondent committed unfair discrimination against the individual applicant in breach of section 60 of the Employment Equity Act 55 of 1998.
2. The first respondent is ordered to pay the individual applicant compensation in the amount of R50 000. 00.
3. There is no order as to costs.

Z. Lallie

Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:

Mrs M Erasmus – Solidarity Official

For the First Respondent:

Adv. A Rawjee

Instructed by

The State Attorney – Gqeberha

LABOUR COURT