REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JS 266 / 2012

In the matter between:

I T M **Applicant**

and

LEGEND GOLF AND SAFARI RESORT OPERATIONS

(PTY) LTD **Respondent**

Heard: 21 August 2014

Delivered: 16 September 2014

Summary: Discrimination – sexual harassment (rape) by fellow employee – applicant raped by superior – conduct constituting harassment

Discrimination – liability of employer for conduct of employee – provisions of section 60 of the EEA – principles stated

Discrimination – liability of employer – employer doing all that reasonably could be done in the circumstances – applicant failing to establish liability of employer in terms of Section 60 of the EEA

Powers of the Court – EEA – Court should deal with in justices found to exist – matter referred to various bodies for further investigation / attention

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JUDGMENT

SNYMAN, AJ

Introduction

[1] From the outset in this matter, I feel compelled to state that this was a case where I believe the applicant had a proper cause to feel aggrieved and to feel that she has been denied justice, and legitimately considered that her basic human rights had been trampled upon. The unfortunate reality however is that all of this was not been at the hands of her employer, whom she wanted to hold accountable, and I will deal with this in this judgment. The applicant has good reason to try and hold someone to account for what happened to her and it makes sense to me that she would look at her employer. But it is not the employer that failed the applicant in this case, but the criminal justice system. I honestly believe that if the applicant received proper and fair justice in the course of the criminal proceedings she was subjected to, this case may very well not have come before this Court. I will later in this judgment elaborate on the reasons for the statements I have made in this introductory paragraph, and hopefully this judgment will come to the attention of the correct responsible functionary or human rights organization who would look into the matter further.

[2] The case that the applicant brought to this Court is one of discrimination founded on sexual harassment. The applicant filed a statement of case with the Court on 4 May 2012, in which she contended that she had been sexually harassed during the course of her employment at the respondent and as a result of this sexual harassment, she had thus been discriminated against.The applicant sought patrimonial and non patrimonial damages from the respondent, as well as 24 months' salary in compensation. The matter came before me on trial on 21

August 2014. In the pre-trial minute, the parties have agreed to separate merits and quantum, so I shall only deal with the merits of the applicant's case in this judgment.

The relevant background

[3] In the end, virtually all the evidence presented to me at trial was undisputed. I in any event found the applicant herself, in general, to be a credible witness, who answered all the questions put to her in cross examination frankly and honestly, and even made concessions that were destructive of her discrimination claim. The evidence I will now set out is the evidence to be accepted for the purposes of the determination of this matter, without contradiction.

[4] The business of the respondent is that of operating three lodges, being the Legend Golf lodge and Entabeni lodges, which were situate in the Limpopo province between Makopane and Naboomspruit, and thirdly the Zebra lodge which was situate near Pretoria. The Legend Golf Lodge and Entabeni lodges, although situate in the same general vicinity, were separate lodges, each with their own staff and own staff quarters.

[5] The applicant was employed as a chef at the respondent's Legend Golf lodge. The applicant commenced employment on 1 June 2010 and earned R5 000.00 per month. The applicant's direct superior was the executive chef at Legend Golf lodge, one William Mtshali ('Mtshali'). The applicant and Mtshali had earlier been involved in a personal relationship and in fact had shared accommodation at the lodge staff quarters. This relationship ended sometime in 2011, and from all accounts, acrimoniously so. After ending the relationship, the applicant stopped residing with Mtshali and in fact made her own accommodation arrangements outside the lodge.

[6] According to the applicant, she was not happy at work at the end of 2011, and on 9 December 2011 went to Mtshali to resign. At the time, Mtshali was in the

process of preparing the afternoon lunch and asked the applicant if he could deal with this later. Early that same afternoon, Mtshali called the applicant and asked her to accompany him to the 'boma', which was a place at the lodge where functions were held, to fetch some catering equipment. The applicant, Mtshali and two other employees went to the boma and collected some catering equipment. Mtshali then sent the two other employees away with the catering equipment and asked the applicant to accompany him to another site in the bush where functions are also held, called 'Rooikat', to get further equipment. Due to the distance to Rooikat, the applicant and Mtshali drove there in a vehicle.

[7] Once at Rooikat, and with no else present, Mtshali asked the applicant to sleep with him for one last time, since she now wanted to resign and leave. The applicant refused. Mtshali then dragged her into the toilets and raped her.

[8] What followed the rape of the applicant by Mtshali was a bizarre series of events. The applicant testified to this in detail, but I do not propose to set out all these details in this judgment. Suffice it to say, Mtshali clearly appreciated the wrong of what he had done, told the applicant he did not want to go to jail, and said he was going to kill her. He forced her back into the vehicle and drove her away. At some point, Mtshali stopped the vehicle and the applicant jumped out and tried to run away. Mtshali however caught up with her and severally assaulted her, using a rock, a lid of a pot, and then his fists. The applicant stated that in the course of this assault, she became unconscious, and when she came to, she found herself in the trunk of the vehicle which was then again moving.

[9] The applicant started screaming whilst in the trunk and Mtshali stopped. He said to the applicant he did not know what to do with her. He however ended up hitting her again with his fists and then proceeded to rape her again. Following this second rape, Mtshali then said he was going to take the applicant to a place in Rustenburg. The applicant pleaded with him to first take her home so she could clean herself, and he agreed.

[10] As stated above, the applicant did not reside in the staff accommodation at the lodge but rented a room on someone else's property outside the lodge. Mtshali took her there as she requested. The applicant then managed to escape from Mtshali into the main house on the property, and she was locked in the house by the residents. The applicant did not know what Mtshali did after that, but she called a friend to come and fetch her and when she was collected by the friend Mtshali was gone. The applicant was first taken to a police station, but due to her state, the police recommended she be taken to hospital immediately. She was then taken to the George Masebe Hospital, where she was treated and examined.

[11] The applicant submitted as evidence the medical report that was prepared when she was examined at the hospital. It makes for distressing reading. The applicant had deep scalp lacerations, a grossly swollen face, a torn right ear, and her hand was fractured. The applicant stated that the police also came to take a statement from her at this time, and a criminal charge was laid.

[12] Willem Koen ('Koen'), the only witness who testified for the respondent and its security manager, stated that the first the respondent knew of all of this was then the police arrived at the lodge on 10 December 2011 to arrest Mtshali. The police gave Koen a short appraisal of what happened, as reported to them by the applicant. Koen then visited the applicant in the hospital on the same day, and by all accounts, received some particulars from the applicant about what happened. Koen told the applicant the respondent would open a case. The applicant asked that her motor vehicle, which was still at the lodge, be brought to the hospital and the respondent agreed and did this.

[13] The applicant's family came to fetch her the following day and she was taken home to Rustenburg. The applicant was booked off by the doctor at the hospital as a result of her medical condition following the attack my Mtshali until the end of January 2012. The respondent accepted this and the applicant was off work,

fully paid, until the end of January 2012.

[14] According to the applicant, and when her sick leave was about to end, she went to the lodge and met with the HR manager, Philip Breet ("Breet'). She told Breet that she cannot return to work and work with Mtshali. This was understandable and accepted by the respondent. Breet proposed she work at the clubhouse, which was, despite still being part of the lodge premises, some distance away from the lodge itself. The applicant refused, stating it was still too close to Mtshali and she was scared that she would still come into contact with him. Breet said the respondent would try and find somewhere else for her to work, and the applicant did not go back to work at this time.

[15] In the interim, and during the applicant's sick leave, Koen (according to his testimony) was informed by the police not to interfere with their investigation and consequently, and at this stage, stated that the respondent should not take action against Mtshali. There was a criminal case pending in this regard as well. It was as a result decided by the respondent not to take disciplinary action against Mtshali, until the criminal proceedings were concluded. This situation was then specifically recorded in the investigation report by the respondent prepared by Koen at the time, which was part of the documentary evidence. In a nutshell, disciplinary proceedings against Mtshali were on hold until the criminal case was concluded. The applicant did confirm in her evidence that one 'Tyron' at the respondent did tell her that this was a police matter and that the respondent was waiting for the outcome of the case before proceeding further against Mtshali.

[16] The applicant, whilst on sick leave, also consulted a social worker at the Rustenburg Rehabilitation Centre. A report by this social worker, one Monica Dube ('Dube') formed part of the undisputed documentary evidence. What is however clear from the applicant's own evidence and the report referred to, is that Breet engaged Dube in consultations as well, on behalf of the applicant, as to how to come to the assistance of the applicant and deploy her to work

elsewhere so she need not encounter Mtshali. These consultations started during the applicant's sick leave, but were not concluded by the time she was due back at work at the end of January 2012. As a result, and whilst these consultations were ongoing, Breet placed the applicant on further fully paid leave until the end of February 2012.

[17] During the course of the February 2012 consultations with the applicant though her social worker, Breet suggested that the applicant be re-deployed to the Entabeni lodge. The applicant refused this, on the basis that although the Entabeni lodge was some distance away from the Legend Golf lodge and a separate lodge, both lodges used the same access road and the applicant may well, in her view, come across Mtshali. Again, the respondent took no issue with this contention of the applicant. The applicant was then the one who requested that she be transferred to Zebra Lodge near Pretoria.

[18] Whilst these consultations were ongoing and whilst the applicant was actually off work on paid leave in February 2012, she, on 22 February 2012, referred a discrimination (sexual harassment) dispute against the respondent to the CCMA, claiming 'maximum general damages'. Why it was even necessary for the applicant to do this at this stage is unclear. The applicant was also interviewed by a reporter, and on 22 February 2012, an article about her ordeal appeared in the Sowetan Newspaper. It was recorded in the article that the respondent had said that it was awaiting the verdict of the criminal court and would then proceed with disciplinary proceedings against Mtshali, which is confirmation of the approach adopted by the respondent above. Importantly, the respondent took no issue with the applicant as a result of her dispute referral to the CCMA at this time, or the newspaper article, and still sought to accommodate the applicant.

[19] As to accommodating the applicant further, the respondent had a vacancy for a chef at Zebra Lodge, but it was not at the applicant's salary of R5 000.00 per month, but only at R2 323.87 per month. This vacancy was offered to the

applicant but she refused to agree to this because of the reduction in salary. Following further consultation, the respondent then agreed on 23 February 2012 to transfer the applicant to Zebra lodge at her existing salary of R5 000.00. The respondent further agreed to pay for the applicant moving there and to provide her with accommodation. The applicant would start working at Zebra lodge on the expiry of her leave on 27 February 2012. The applicant confirmed in evidence that she accepted and agreed with this proposal, which agreement was concluded after the applicant's dispute referral to the CCMA.

[20] Added to all of the above, the applicant found out in January 2012 that she was pregnant. She transferred to Zebra lodge on 27 February 2012, being pregnant. After having worked at Zebra lodge for only about two months, the applicant then applied for early maternity leave from the respondent based on her emotional state. The applicant's maternity leave was approved and she went on maternity leave sometime end May 2012. The applicant never actually returned to work after maternity leave, and later resigned. The applicant could not recall exactly when she resigned but said it was either in December 2012 or early in 2013. The applicant stated that she resigned because she asked the respondent to transfer her back to Legend Golf lodge, but the respondent refused.

[21] In the interim, and in the latter half of 2012, the criminal trial of Mtshali took place. He was charged with two criminal counts, the first count being rape and the second count being attempted murder. The criminal trial took place at the Magistrates' Court in Mokerong. The applicant confirmed that she indeed testified in these criminal proceedings. On 6 August 2012, Mtshali was found guilty by the magistrate of both counts, being that of rape and attempted murder. The matter was then postponed for sentencing.

[22] With Mtshali now having been convicted, the respondent instituted disciplinary proceedings against Mtshali. According to Koen, and before the disciplinary hearing could take place, Mtshali resigned and left the employment of the

respondent.

[23] The final chapter in this whole unfortunate saga comes when Mtshali is sentenced on 4 December 2012. I am completely appalled by what was presented to me. The magistrate sentenced Mtshali, with regard to the rape count, to 5 years' imprisonment wholly suspended for 5 years on condition that he is not convicted of rape in this 5 year suspension period. On the count of attempted murder, the magistrate sentenced Mtshali to a fine of R2 000.00 or 12 months' imprisonment. I consider this to be an utter failure of justice insofar as it concerns the applicant. I feel compelled to say and do something about this, which I shall do later in this judgment.

Was the applicant discriminated against by the respondent?

[24] From the outset, Mr Ntsumela, who represented the applicant, confirmed that what happened to the applicant on 9 December 2011 at the hands of Mtshali was not the fault of the respondent. There is simply no way in which the respondent could have foreseen such an occurrence or taken steps or measures to prevent it, and such issues was not part of the applicant's case. This meant that any finding of discriminated against the applicant by the respondent could only be substantiated by what the respondent then did about the events which took place on 9 December 2012.

[25] Now it is true that Mtshali is an employee of the respondent and the direct superior of the applicant. It is equally true that the events of 9 December 2011 happened during working hours and at the workplace. There can be no doubt that the conduct of Mtshali constitutes sexual harassment of the worst kind, which is strictly prohibited. In terms of section 6(1) of the EEA[1]:

[1] Employment Equity Act 55 of 1998.

> 'No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.'

And where it then comes to harassment, section 6(3) provides that:

> 'Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).'

By definition therefore, sexual harassment would constitute discrimination as contemplated by section 6(1) of the EEA.[2]

[26] In clause 5 of the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace[3] ('the Code') issued in terms of the EEA, it is provided that conduct that constitutes sexual harassment includes: 'Physical conduct of a sexual nature includes all unwelcome physical contact, ranging from touching to sexual assault and rape ….'. The conduct, *in casu*, without a shadow of doubt, was unwanted. The respondent in any event never, in the trial in this matter, sought to challenge what had happened to the applicant or sought to detract from how serious and unacceptable it was. As such, I conclude that the applicant has discharged the onus that rested on her in order to prove the existence of discriminatory behaviour of such a kind so as to establish liability in terms of the EEA. But that is not the end of the enquiry.

[27] As it has in my view been clearly established that the applicant was indeed unfairly discriminated against as contemplated by the EEA, this Court has the following powers, in terms of section 50(2) of the EEA:

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[2] *Potgieter v National Commissioner of the SA Police Service and Another* (2009) 30 ILJ 1322 (LC) at para 43.
[3] GenN 1357 in GG 27865 of 4 August 2005 issued in terms of Section 54(1)(b) of the EEA.

'(2) If the Labour Court decides that an employee has been unfairly discriminated against, the Court may make any appropriate order that is just and equitable in the circumstances, including-

(a) payment of compensation by the employer to that employee;

(b) payment of damages by the employer to that employee;

(c) an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees; ….

(f) the publication of the Court's order.'

[28] As an individual person and the perpetrator of the conduct, Mtshali would be clearly liable in terms of either the common law or the EEA as a result of his discriminatory conduct as against the applicant. But does this make the respondent as the employer of Mtshali also liable towards the applicant as contemplated by section 50(2) of the EEA, just because of the manner in which Mtshali conducted himself? In this regard, the provisions of section 60 of the EEA are determinative, as this section deals specifically with the liability of an employer in the case of discriminatory conduct by its employees, and provides that an employer can only be held liable in terms of the EEA for the conduct of individual employee(s) as against one another, if the provisions of this section are complied with. Section 60 reads:

'(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.'

[29] Unpacking the provisions of section 60, and in order for an applicant to succeed with a compensation and/or damages claim against his or her employer in terms of section 50(2)(a) and (b) of the EEA, such applicant has the evidentiary burden to show the existence of the following:

29.1 It must be shown that discriminatory conduct as contemplated by chapter II of the EEA exists;

29.2 This conduct must have been committed by an employee of an employer, towards another employee of the same employer;[4]

29.3 This conduct must have been immediately been brought to the attention of the employer;

29.4 Despite this conduct having been brought to the attention of the employer, the employer must have failed to consult all the parties and then have failed to take necessary steps to eliminate and/or remedy the conduct

[4] See *Piliso v Old Mutual Life Assurance Co (SA) Ltd and Others* (2007) 28 ILJ 897 (LC) at para 15 where it was said: 'In the light of the fact that s 60 of the EEA clearly is intended to create statutory vicarious liability in respect of an employer where its own employee contravened a provision of the EEA, it is apparent that it was a prerequisite that the applicant herein should, as a minimum, have alleged that an employee of the first respondent had contravened a provision of the EEA . In addition, or as a minimum requirement, the applicant bore the onus to prove that such employee of the first respondent had contravened the provision of the EEA. Once these minimum requirements had been met, the deeming provision would kick in and the employer would be deemed to have contravened the particular provision of the EEA.' Reference is further made to para 22 of this judgment in this regard.

complained of; and

29.5 If applicable, the employer had not taken all reasonable practicable steps beforehand to ensure that its employees would not commit such kind of conduct.

[30] The Court in *Ehlers v Bohler Uddeholm Africa (Pty) Ltd*[5], with specific reference to a claim in terms of the EEA and the provisions of section 60, said the following:

> '…. to succeed in her claim for damages against the respondent in terms of the EEA, she will have to prove that she suffered discrimination at the workplace, she brought it to the attention of the respondent, the respondent knew about it and did not take any reasonable steps to prevent it from happening. …. Section 60 of the EEA deals with liability of employers. The respondent will only be liable if the applicant was able to prove that it brought the discriminatory conduct of the employee to the attention of the respondent and the respondent failed to take all the reasonably practicable steps to ensure that the employees would not act in contravention of the EEA ….'

[31] And in *Potgieter v National Commissioner of the SA Police Service and Another*[6] it was held:

> 'An employer will be held liable if it is shown in terms of s 60 of the EEA, that:
> (i) The sexual harassment conduct complained of was committed by another employee.
> (ii) It was sexual harassment constituting unfair discrimination.
> (iii) The sexual harassment took place at the workplace.
> (iv) The alleged sexual harassment was immediately brought to the attention of the employer.
> (v) The employer was aware of the incident of sexual harassment.

[5] (2010) 31 ILJ 2383 (LC) at para 49.
[6] (2009) 30 ILJ 1322 (LC) at para 46. See also *Mokoena and Another v Garden Art Ltd and Another* (2008) 29 ILJ 1196 (LC) at para 40; *Piliso v Old Mutual Life Assurance Co (SA) Ltd and Others* (supra) at para 23.

(vi) The employer failed to consult all relevant parties, or take necessary steps to eliminate the conduct or otherwise comply with the provisions of the EEA.

(vii) The employer failed to take all reasonable and practical measures to ensure that employees did not act in contravention of the EEA.'

[32] As appears from the facts as set out above, there is no doubt that unfair discriminatory conduct exists *in casu* and such conduct was committed by an employee of the respondent towards the applicant, which is also its employee. There is equally no doubt that this conduct was immediately brought to the attention of the respondent, in that the respondent became aware of the conduct on 10 December 2011 (the day after the incident) when Mtshali was arrested and Koen visited the applicant in hospital to gather information from her. In any event, the applicant gave a detailed written statement to Koen on 23 December 2011, which, considering the events, must be regarded to be 'immediate' for the purposes of section 60. Considering that such kind of events could not have been foreseen beforehand, the only remaining question is whether the employer consulted with the parties and took all necessary steps to remedy the situation.

[33] In answering this remaining question, and in short, the evidence showed the following, insofar as it concerned the conduct of the respondent once becoming aware of what had happened:

33.1 The respondent visited the applicant in hospital immediately when becoming aware of the incident and sought to establish from her what happened. The respondent also took a statement from Mtshali. When she was in a position to give one, the respondent took a statement from the applicant;

33.2 It is true that the respondent did not suspend or take disciplinary action against Mtshali at this time. The respondent explained that the reason for

this is that it was told by the police not to interfere in the pending criminal case, and that the respondent was first awaiting the outcome of the criminal case. The respondent recorded this in its disciplinary docket with regard to the incident, prepared at the time;

33.3 The respondent did inform the applicant that it was awaiting the outcome of the criminal case before dealing with Mtshali. The applicant never took issue with this explanation, other than specifically stating that she would not work with Mtshali;

33.4 The respondent never required the applicant to work with Mtshali. The applicant tin fact never worked with Mtshali again;

33.5 The applicant was on sick leave until the end of January 2012. When she due to return to work, the respondent consulted with her. The respondent accepted her requirement that she does not want to work with Mtshali. The alternative positions of working in the clubhouse and at the Entabeni lodge were discussed with her, both of which she refused and which refusal the respondent accepted;

33.6 Whilst the respondent was seeking to find the applicant another placement, the applicant was placed on a further months' paid leave for February 2012;

33.7 The respondent also consulted with the applicant's social worker on behalf of the applicant. It was in fact through the social worker that the applicant herself proposed that she wanted to be transferred to Zebra Lodge near Pretoria, which the respondent agreed to;

33.8 Although there was initially a hiccup concerning the applicant's salary at Zebra lodge, the respondent nonetheless agreed that she be transferred there and ultimately, after considering the applicant's representations, not

only kept her salary the same, but paid for her transfer and provided her with accommodation;

33.9 The applicant went to work for the first time after the incident and following her leave, at Zebra lodge, where she worked for two months before embarking on maternity leave. The applicant was never required to return to work at Legend Golf lodge, where Mtshali was still working;

33.10 Insofar as it concerns Mtshali himself, the respondent, and once he had been convicted, immediately took disciplinary action against him and he left of his own accord as result. On her own version, the applicant conceded that she knew that Mtshali had left because of this incident.

[34] Considering the above, it is clear that the respondent at all relevant times consulted with the applicant and her social worker. In these consultations, all alternative ways in which to accommodate the applicant so that she did not have to come into contact with Mtshali were explored. The applicant was the one who said she wanted to transfer to Zebra lodge. In the end, and at the end of February 2012, agreement was concluded between the applicant and the respondent to this effect, and this agreement was adhered to. Therefore, there is little room to doubt that the respondent indeed properly consulted the applicant so as to avoid liability accruing to it in terms of section 60 of the EEA.

[35] This then only leaves the issue of whether the respondent took all the necessary alternative measures to eliminate the discrimination. It is clear that indeed the respondent did take alternative measures. The question is whether these alternative measures were sufficient so as to satisfy the requirement in section 60. In answering the question, the enquiry centres round what can be considered to be reasonable and practicable conduct by an employer in the particular circumstances. As the Court said in *Mokoena and Another v Garden Art Ltd and*

Another[7], caution must be taken not to adopt an armchair critic approach, but an objective assessment must be made of all of the steps taken by the respondent as a whole, to ascertain if these steps were reasonable to the extent of avoiding liability accruing to the respondent in terms of section 60.

[36] I must confess that I found it difficult to comprehend what more the respondent could or should have done. I in fact specifically asked Mr Ntsumela, representing the applicant, as to what conduct (or lack of it) of the respondent it was that was the source of the applicant's complaints, and consequently claim. Following some debate, it seemed that the applicant's issues were: (1) the respondent did not take immediate disciplinary action against Mtshali; (2) the respondent did not keep the applicant appraised as to what was happening with regard to the continued employment of and proceedings against Mtshali; (3) the respondent forced the applicant to work with Mtshali again; (4) the respondent did not act with the necessary expedition and was ultimately only spurred into action due to the Sowetan article. But overall, and from the submissions of Mr Ntsumela, I got the distinct impression that as a general proposition, the view of the applicant was that someone had to pay for the suffering and trauma endured by the applicant, and this simply had to be the respondent.

[37] I will first deal with the issue of the respondent not taking immediate disciplinary action against Mtshali. Whilst the contention is indeed true, the fact is that the respondent explained why it did not do so, which explanation was not disputed. The explanation was that it was told by the police not to interfere with the investigation and further that it was awaiting the outcome of the criminal case. In my view, an employer should not be dictated to by the police as to how to conduct its internal disciplinary processes. As a general proposition also, an employer should not wait for the outcome of any criminal proceedings, which may take years, before itself dealing with an issue such as the events *in casu*. I,

[7] (2008) 29 ILJ 1196 (LC) at para 63.

personally, would have liked to see the respondent being more proactive in this instance, and actually act against with Mtshali a lot quicker and preferably immediately. The fact is that the respondent had a potential rapist and attempted murderer in its midst in the employment environment, still working with a number of other female employees at a remote lodge, and such a situation should simply not be allowed to languish until the criminal justice machinery finally grinds to a conclusion. But the above being said, and despite there thus being a better and more proper way to have dealt with Mtshali, the respondent's explanation why it acted as it did in this regard is not unreasonable. It is not unreasonable to give credence to what the police told the respondent to do, and for the respondent to wait for the outcome of the criminal case. Certainly, there was no *mala fides* on the part of the respondent in adopting this approach. In any event, and as I have said above, the applicant never took issue with this explanation at the time, of which she was aware. I therefore conclude that there is no merit in the complaint of the applicant about Mtshali not being immediately disciplined by the respondent, as being a proper basis for a discrimination claim.

[38] The next issue raised was that the applicant was not kept appraised by the respondent as to what was happening with regard to Mtshali and was not told that he was dismissed once this had happened. I accept the applicant's evidence that this was indeed the case. But the point is that nothing can turn on this. The applicant was told from the outset that the respondent was waiting for the criminal case to conclude and the applicant was well aware that the criminal case was continuing, as she even testified in this case. There therefore was, as a matter of common sense, nothing to report to the applicant about, until after the criminal case was completed. The evidence was that once Mtshali was convicted, the disciplinary proceedings immediately followed and he left in the face thereof. Even if the applicant was not told of this, such a failure cannot render the respondent liable in terms of the EEA. The crucial consideration actually is that the respondent did act against Mtshali and his employment

relationship with the respondent did terminate as a result of his conduct vis-a-vis the applicant. On her own version, and at the very least, the applicant was aware by the end of 2012 and whilst still employed by the respondent that this had happened. Therefore, and actually, there is no merit in this cause of complaint of the applicant.

[39] This then only leaves the issues of the respondent allegedly refusing to accommodate the applicant and forcing her to work with Mtshali. Now, if this was true, then certainly, and in my view, the respondent would accrue liability as contemplated by section 60 of the EEA. In fact, the applicant's attorneys were acutely aware of this, and this is really where the applicant's case was sought to have its foundations in, in terms of the pleadings. In the CCMA referral, the applicant records that despite the applicant raising a complaint with the respondent's head of security, the respondent did nothing. In the statement of claim, it is contended that the applicant, being overwhelmed by her experiences, asked to be transferred to Pretoria but the respondent did not consider the request. It is further contended in the statement of claim that she was then told she could be transferred but she had to accept a reduced salary, and she then relented to this. It is finally contended that in the interim, and until transferred, the applicant had to endure seeing Mtshali every day at work, which contention is repeated in the pre-trial minute. But unfortunately for the applicant, and as will be addressed hereunder, none of these contentions of the applicant in the pleadings are actually true.

[40] The truth is that following the incident on 9 December 2011, the applicant never saw Mtshali again at work. She never again worked with him, or even worked in his proximity. It is recorded in the pre-trial minute, as an agreed common cause fact, that the applicant was on paid leave from the date of the incident until 27 February 2012 when she was transferred to Zebra lodge. In giving evidence in chief, the applicant was led by her attorney to testify that she worked for some

days at the clubhouse during in this period, and as a result she had to endure seeing Mtshali at work. But under cross examination, and upon being confronted with the documentary evidence and the common cause fact as set out above, the applicant readily conceded that she never actually worked until she was transferred to Zebra lodge and did not work with or come close to Mtshali again at work. This concession, coupled with the common cause fact referred to, then must be the end of this part of the case of the applicant.

[41] Dealing then with the contention about the respondent not accommodating the applicant, this was equally not true. Again, the truth of the matter is that when the applicant was due to return to work at the end of her sick leave, she was not made to come back to work. She was placed on a further months' paid leave whilst attempts were being made to accommodate her. The respondent made two suggestions of its own, being the clubhouse position and the Entabeni position, both of which the applicant declined. The respondent accepted that the applicant declined these positions and did not pursue this further. It was the applicant that proposed the Zebra lodge transfer. The respondent agreed to this, but only had a position at lesser pay. When the applicant resisted accepting lesser pay, the respondent again acceded to her request, and kept her pay the same. Finally, her move to Zebra lodge was funded by the respondent as well. There is clearly no truth in what is recorded in the statement of claim with regard to the position at Zebra lodge and the circumstances regarding the applicant transferring there. The parties consulted, and arrived at an agreed resolution to the difficulties caused by the incident with Mtshali and him still working at the respondent. The applicant's own evidence simply did not support the case she pleaded.

[42] I wish to finally add that the respondent further accommodated the applicant after she transferred to Zebra lodge, in that it allowed the applicant, after she only worked there for some two months, to take early maternity leave. Added to this,

the applicant never even returned to work at Zebra lodge following maternity leave, and before resigning. When the applicant filed her statement of claim in the Labour Court, she was actually still employed by the respondent at Zebra lodge, albeit on maternity leave, and made no reference in the statement of claim of still wanting to leave employment or still being subjected to any further discriminatory treatment or conduct.

[43] In the judgment of *Potgieter*[8] the Court dealt with a similar claim to the claim of the applicant *in casu*. By way of comparison, the issues raised by such applicant in that matter were recorded by the Court as follows:[9]

> 'The complaint of the applicant is not, as I understand it, that the respondent did not consult with the affected parties or take the necessary steps, but that the liability of the respondent arose out of failure by the respondent to do the following: *(a)* the respondent delayed in dealing with the complaint; *(b)* her report or complaint was not kept confidential; *(c)* Mafodi was not removed from the workplace after the incident, …. *(e)* the sanction imposed on Mafodi was too lenient, and *(f)* she was not timeously referred for assistance.'

The comparisons to the matter *in casu* are apparent. The Court dealt with the causes of complaint as follows:[10]

> '…. What is very clear and was not disputed is that the relevant parties were consulted and statements taken from them, including the husband of the applicant. Even if it could be concluded that there was a delay in finalizing the disciplinary hearing it cannot, in my view, be said that the delay was in the circumstances unreasonable or that it was due to some ulterior motive on the part of the respondent.'

The Court concluded as follows in rejecting the case of the applicant in that

[8] *Potgieter v National Commissioner of the SA Police Service and Another* (*supra*).
[9] Id at para 49.
[10] Id at para 50.

matter:[11]

> 'The issue of the transfer is related to the issue of the failure to suspend or remove Mafodi after the incident. It may well have been prudent for Mafodi to have been suspended or removed from the workplace and transferred to another workplace, however there is no general rule that suspension or removal from the workplace is automatic in every sexual harassment complaint. In my view the nature and extent of the sexual harassment may indicate whether suspension or removal from the workplace of the perpetrator was a necessary step which the employer ought to have taken. ….
>
> It is clear that the applicant was immediately transferred to Meyerton as soon as she made the request.'

As stated above, and *in casu*, there certainly was no mala fides on the part of the respondent for not immediately dealing with Mtshali. It had a reasonable explanation for its approach. The respondent transferred the applicant as she requested. The respondent prevented any further contact between the applicant and Mtshali.

[44] I wish to next refer to the judgment in *Garden Art*[12], where the Court dealt with the issue of a once off incident of sexual harassment which was not repeated. Francis J (as he then was) held as follows with regard to the consequences of such a once off incident which is factually not perpetuated, on the liability of the employer in terms of the EEA, and said:[13]

> 'It seems to me that where the employer was aware of the sexual harassment and it was brought to its immediate attention and he failed to take steps to eliminate it and a further act of sexual harassment took place, the employer cannot escape liability in terms of s 60 of the EEA. Where there is one incident of

[11] Id at paras 53 – 54.
[12] *Mokoena and Another v Garden Art Ltd and Another* (supra).
[13] Id at para 42.

> sexual harassment, which is brought to the attention of the employer immediately after the incident, an employer will not be held liable in terms of s 60 of the EEA. The aggrieved employee may then have to consider a different basis to hold the employer liable either in terms of common law etc. I do not know how an employer would be able to take reasonable steps to ensure that the employee would not act in contravention of the EEA in the second example that I have given. It would therefore appear to me that s 60 of the EEA really applies where it has been brought to the attention of the employer that sexual harassment has taken place and as a result of the employer's inaction, further sexual harassment takes place, which renders the employer liable.'

Whilst I, with respect, consider that Francis J in the above *ratio* stated the proper enquiry too narrowly, and it being my view that an employer's inaction could still expose it to liability under the EEA even if further related incidents are not repeated, the point remains that whether or not it is a once off incident or repeated incidents is an important consideration in deciding the issue of the liability of an employer under the EEA. *In casu*, the issue was indeed a singular incident and as a result of this singular incident, the respondent then implemented measures to actually ensure it was not repeated vis-à-vis the applicant, by not requiring her to return to work with the perpetrator and then concluding an agreement with the applicant to transfer her to another site.

[45] In addition, and in *Garden Art*, the Court said the following, once again comparative to the facts *in casu*:[14]

> '…. When the incident was brought to his attention he met with the applicants and allowed them to give written statements. The next day a grievance hearing was held and the second respondent's version was sought. He had admitted that he had put his arm around the second respondent's neck and that she had objected. He was issued with a written warning for invasion of privacy for having entered the ladies' changeroom. He found that no sexual harassment had taken place.

[14] Id at para 63.

> No other incidents took place after 24 November 2005. The second respondent has subsequently to this incident not contravened the EEA. The first respondent has taken reasonably practicable steps to ensure that the second respondent will not act in contravention to the EEA.'

[46] Finally, and as a comparator to the contrary, so to speak, and to provide a complete picture, I refer to *Biggar v City of Johannesburg*[15] as an instance where the employer was found to have not taken the requisite reasonable steps. The Court held as follows:[16]

> 'It cannot be said the employer took no steps to try to address the racial hostility which manifested itself in the residential quarters at the station. On the applicant's own account, a warning was issued to two of his antagonists and initially senior staff did attend to matters when incidents occurred. However, the respondent did not follow through on any of these initiatives to try to achieve a lasting solution, and it is remarkable that no disciplinary action was ever instituted against the perpetrators of the racial abuse directed towards the applicant and his family. The only reasonable conclusion that can be drawn is that the employer was essentially reluctant to deal with the real issues and matters were allowed to fester unresolved. When the employer did take more forceful action by initiating disciplinary steps arising from the fracas in January 2007, it did so by selectively instituting an enquiry into the applicant's conduct alone. The employer's inconclusive and ad hoc responses to such a systematic pattern of racial harassment cannot be considered adequate in the circumstances. Also, its mysteriously one-sided approach to the incident in January 2007 was unjustifiable, especially when the proceedings were only held at a time when it should have been well aware of the trial magistrate's findings which portrayed the applicant's white accusers in an equally bad light.
>
> In short, the employer did not take all necessary steps to eliminate the racial abuse that was being perpetrated by some of its employees at its residential

[15] (2011) 32 ILJ 1665 (LC).
[16] Id at paras 19 – 20.

> premises and it cannot be said that it did everything that was reasonably practicable to prevent the continued harassment. ….'

I consider the facts *in casu* to sketch a scenario which is the opposite than that before the Court in *Biggar* above. The respondent, as employer, immediately dealt with the matter. It consulted with the applicant. It reached an agreement with the applicant to accommodate her and to prevent her from coming into contact with Mtshali. As soon as Mtshali was convicted, the respondent took steps which led to his termination of employment.

[47] In the end, the applicant has simply not made out a case rendering her employer, the respondent, liable in terms of section 60 of the EEA. The respondent did consult the applicant and took all reasonable steps to deal with and remedy the discriminatory conduct of Mtshali, as required by section 60. The applicant's claim does not lie against the respondent, but against Mtshali, either in terms of the EEA or the common law. The applicant's discrimination claim against the respondent however falls to be dismissed.

Further considerations

[48] As I have mentioned above, I am compelled to address what happened to the applicant in the course of the criminal proceedings in this matter. As stated, there was two criminal counts against Mtshali, the first being rape and the second attempted murder. The criminal trial came before the magistrates' court in Mokerong in Limpopo under case number MRC 51 / 12 on 6 August 2012 where Mtshali was found guilty on both these counts. Sentencing followed on 4 December 2012. The sentence handed down by the magistrates' court was in my view manifestly unacceptable and unconscionable, considering the nature of the wrong done to the applicant, and that which Mtshali had actually been convicted of. In effect, Mtshali received a R2 000.00 file for attempted murder and a five years' fully suspended sentence for a violent rape.

[49] I appreciate that as a Judge in the Labour Court sitting in a discrimination claim it is not my duty to pass judgment on criminal proceedings in the magistrates' court. But I cannot sit by and let this situation go unaddressed. The fact is that the Labour Court is '… a superior court that has authority, inherent powers and standing, in relation to matters under its jurisdiction, equal to that which a court of a Division of the High Court of South Africa has in relation to matters under its jurisdiction.'[17] In terms of Section 39(2) of the Constitution[18], any Court is tasked to give effect to the Bill of Rights, which includes the right to human dignity[19] and bodily and psychological integrity[20]. In *F v Minister of Safety and Security and Another (Institute for Security Studies, Institute for Accountability in Southern Africa Trust and Trustees of the Women's Legal Centre as Amici Curiae)*[21] the Court said that:

> 'Ms F has a constitutional right to freedom and security of the person, provided for in s 12(1) of the Constitution. She also has the constitutional right to have her inherent dignity respected and protected. This, and the right to freedom and security of the person, are implicated by the assault and rape which were perpetrated against her person.'

[50] I am of the view that the sentence imposed on Mtshali is an affront to the human dignity and bodily and psychological integrity of the applicant, considering what he did to her. As Nugent JA said in *S v Vilakazi*[22]:

> 'Rape is a repulsive crime. It was rightly described by counsel in this case as 'an invasion of the most private and intimate zone of a woman and strikes at the core of her personhood and dignity'. In *S v Chapman* this court called it a 'humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the

[17] See Section 151(2) of the LRA.
[18] Act 108 of 1996.
[19] Section 10 of the Constitution.
[20] Section 12(2) of the Constitution.
[21] (2012) 33 ILJ 93 (CC) at para 54.
[22] 2012 (6) SA 353 (SCA) at para 1.

victim' and went on to say that —

''(w)omen in this country . . . have a legitimate claim to walk peacefully on the streets, to enjoy their shopping and their entertainment, to go and come from work, and to enjoy the peace and tranquility of their homes without the fear, the apprehension and the insecurity which constantly diminishes the quality and enjoyment of their lives'.'

[51] Similar sentiments can be found in the judgment of *F*[23] where the Constitutional Court said:

'The abuse of women and girl-children is rife in this country. …. This was aptly articulated in *Carmichele*:

'"Sexual violence and the threat of sexual violence goes to the core of women's subordination in society. It is the single greatest threat to the self-determination of South African women." . . . South Africa also has a duty under international law to prohibit all gender-based discrimination that has the effect or purpose of impairing the enjoyment by women of fundamental rights and freedoms and to take reasonable and appropriate measures to prevent the violation of those rights. ….'

[52] Further, Section 51 of the Criminal Law Amendment Act[24] introduced a minimum sentencing regime, which specifically included the offense of rape. This Act prescribes a minimum sentence for rape of ten years' imprisonment even in the absence of specified aggravating circumstances. This Act demands the imposition of this prescribed minimum sentence unless a court is satisfied in a particular case that there are 'substantial and compelling circumstances' that justify the imposition of a lesser sentence. I can find no indication of any such 'substantial and compelling circumstances', especially to such an extent so as to

[23] *F v Minister of Safety and Security and Another (Institute for Security Studies, Institute for Accountability in Southern Africa Trust and Trustees of the Women's Legal Centre as Amici Curiae)* (*supra*) at para 37.
24 Act 105 of 1997.

completely mitigate against any imprisonment at all, which is what happened *in casu*. Worse still, one of the prescribed aggravating circumstances needed to be considered for a sentence in excess of this minimum sentence is that of being where the crime involved the infliction of grievous bodily harm[25]. In the current proceedings, Mtshali was actually convicted of attempting to murder the applicant which was part and parcel of him raping the applicant. She only survived because she escaped his clutches. Also, and as stated above the report of the injuries she suffered in the course of this attack was severe. In short, and for Mtshali to have been sentenced to a R2 000.00 fine and a five years' completely suspended sentence in these circumstances, is about as grave an injustice as I can think of.

[53] The above being said, what do I now do with regard to what I have been confronted with? The simple fact is that a grave injustice has been perpetrated. I cannot walk past it. An injustice that one walks past is an injustice that you condone and by condoning it the injustice becomes the norm.

[54] Even though I considered this whole issue in a wholly different capacity than criminal proceedings, I can do no better than refer to the following dictum from the judgment in *National Credit Regulator v Opperman and Others*[26] where the Court said '…. courts have a duty to interpret and apply the law. On the assumption of office, each judge must swear or affirm to administer justice in accordance with the Constitution and the law.' And in *Glenister v President of the Republic of South Africa and Others*[27] it was held that: 'In our constitutional democracy, the courts are the ultimate guardians of the Constitution. They not only have the right to intervene in order to prevent the violation of the Constitution, they also have the duty to do

[25] See Schedule 2 Part I read with s 51(1).
[26] 2013 (2) SA 1 (CC) at para 47.
[27] 2009 (1) SA 287 (CC) at para 33.

so.'[28] Specifically with regard to violence against women, as is the case *in casu*, I conclude in this regard by referring to the following dictum in *F*[29]: '…. Courts, too, are bound by the Bill of Rights. When they perform their functions, it is their duty to ensure that the fundamental rights of women and girl-children in particular are not made hollow by actual or threatened sexual violence. ….'.

[55] I am thus compelled to intervene and a make some determination to the effect that something be done about this injustice. There can be no denying that the applicant was visited with a grave injustice in the outcome of the criminal proceedings. I have little doubt that this was a significant motivating factor for her looking to her employer to get some justice and proceeding with this case. I also believe that what had happened to her was instrumental in the applicant ultimately deciding to leave her employment. I have stated that the applicant still has a legal remedy against Mtshali, which is up to her to pursue. However, it is equally up to the executive of the State to deal with this injustice. In *S v Dodo*[30] Ackermann J said:

> 'The executive and legislative branches of State have a very real interest in the severity of sentences. The Executive has a general obligation to ensure that law-abiding persons are protected, if needs be through the criminal laws, from persons who are bent on breaking the law. This obligation weighs particularly heavily in regard to crimes of violence against bodily integrity and increases with the severity of the crime.'

[56] I have considered the judgment in *Van Rooyen and Others v The State and Others (General Council of the Bar of South Africa Intervening)*[31] where the Court

[28] See also *Doctors for Life International v Speaker of the National Assembly and Others* 2006 (6) SA 416 (CC) at paras 68 – 69.
[29] Ibid at para 57.
[30] 2001 (3) SA 382 (CC) at para 24.
[31] 2002 (5) SA 246 (CC).

dealt with the Regulations for Judicial Officers in the Lower Courts[32]. In particular, regulation 25 provides that an accusation of misconduct against a magistrate may be made in terms of such regulations, and this must then be dealt with in terms of these regulations. The Court said:[33]

> 'In effect what the regulations contemplate is this. If a complaint is received about a particular magistrate, a preliminary investigation may be undertaken to determine whether or not a formal charge should be brought against that person. The Commission determines whether or not to call for this investigation, but may decide to embark upon an enquiry itself if it is satisfied that there is sufficient evidence to warrant that being done. Detailed provisions are then made as to the manner in which the investigation is to be conducted. ….
>
> What constitutes misconduct by a judicial officer cannot really be defined with any precision. It depends upon the nature of the conduct complained of, and the particular circumstances in which that conduct was committed. Regulation 25 defines the circumstances in which an accusation of misconduct can be made. If the regulation had simply provided that an accusation of misconduct should be the subject of a preliminary investigation in order to determine whether or not there are grounds for bringing a charge of misconduct against a magistrate, there could have been no objection to it. In defining circumstances in which an accusation can be brought, reg 25 draws attention to conduct which may give rise to a charge. Whether that conduct in fact justifies the charge will depend upon all the circumstances including the nature of the offence, or the respects in which the regulations have been breached or the Code of Conduct has been contravened. ….'

In line with the above, the conduct of the magistrate in sentencing Mtshali, in my view, could legitimately form the basis of a complaint of misconduct as contemplated by these regulations. I make no determination that this is indeed

[32] Promulgated in *Government Gazette* 15524 GN R361 of 11 March 1994.
[33] Id at paras 188 and 192.

the case. But I do say that this must certainly be investigated and dealt with as contemplated by the regulations.

[57] In terms of section 50(1) of the EEA, this Court in any event has the power to '…. make any appropriate order including- *(j)* dealing with any matter necessary or incidental to performing its functions in terms of this Act.' In dealing with the common-law right to claim damages for the negligent infliction of bodily harm, Kampepe J in *Mankayi v Anglogold Ashanti Ltd*[34] said:

> '…. The protection of the right to the security of the person may be claimed by any person and must be respected by public and private entities alike. ….
>
> In *Fose v Minister of Safety & Security*, this court recognized that 'appropriate relief' may entail any relief that is required to protect and enforce the Constitution ….'

And in the same judgment Froneman J said:[35]

> 'In terms of the provisions of s 39(2) of the Constitution, a court must, when interpreting any legislation, promote the spirit, purport and objects of the Bill of Rights. This constitutional injunction makes it impossible to interpret any legislation other than through the prism of the Bill of Rights. Statutory interpretation is thus inevitably a constitutional matter. It is a legal issue which necessarily involves the evaluation of social and policy choices reflected in legislation.'

I can see no reason why the same kind of reasoning cannot be applied in seeking a way to try and eliminate discrimination as one of the primary objectives of the EEA, as an 'appropriate order'. In line with such objective of the EEA, and in applying this objective through the 'prism' of those provisions of the Bill of Rights I have referred to, I believe that I have the power and the duty to direct

[34] (2011) 32 ILJ 545 (CC) at paras 15 – 16.
[35] Id at para 118.

that the issue of the sentence imposed on Mtshali by the magistrates court in Morokeng on 4 December 2012 be further investigated so as to determine the issue of possible misconduct on the part of the magistrate.

[58] I thus intend to make an order to the effect that this judgment be sent by the Registrar of this Court to the Magistrates' Commission, the National Prosecuting Authority, and finally the Director-General of the Department of Justice and Correctional Services for investigation of the conduct of the magistrate, and also to the Women's Legal Centre[36] to possibly assist the applicant going forward. I believe this to be an appropriate order to seek to remedy the injustice I have been confronted with in this case.

Costs

[59] The fact is that the applicant's discrimination claim against the respondent was not successful. The respondent has asked that I award costs against the applicant. Considering the injustice visited on the applicant (albeit not at the hands of the respondent) I am simply not willing to saddle the applicant with the further burden of a costs order. I can understand why she (albeit incorrectly) sought to hold her employer liable. The respondent also, and in my view properly so, did not seek in the course of the trial to challenge the applicant's evidence as to the ordeal she had to endure at the hands of Mtshali. I cannot find any *mala fides* on the part of the applicant in pursing this matter. Applying the broad discretion I have with regard to the issue of costs in terms of section 162 of the LRA, I consider it fair and appropriate not to make any costs order in the circumstances.

Order

[60] For all of the reasons as set out above, I make the following order:

[36] Who acted as amicus curia in the judgment of *F*.

1. The applicant's discrimination claim against the respondent is dismissed.

2. There is no order as to costs.

3. The registrar is directed to forward this judgment to the Magistrates Commission, the National Prosecuting Authority and to the Director-General: Department of Justice and Correctional Services so as to investigate the issue of the possible misconduct of the magistrate in Mokerong in sentencing William Mtshali on 4 December 2012.

4. The registrar is further directed to forward this judgment to the Women's Legal Centre for possible assistance to the applicant in further conducting this matter.

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Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant: Mr S K Ntsumela of S K Ntsumela Inc Attorneys

For the Respondent: Advocate R Raubenheimer

Instructed by Nel Van Der Merwe and Smalman Attorneys