

IN THE HIGH COURT OF SOUTH AFRICA
(NORTH GAUTENG. PRETORIA)

Case No: A 189/2011

Date 2 June 2014

In the matter between:

Sahara Computers (Pty) LTD

Appellant

and

GG M[...]

Respondent

JUDGMENT

MAUMELA J

[1] This is an appeal with leave of the court *a quo* to the full bench of this division. It is against a judgment from this division which went against the Appellant. The said judgment was reported under the citation M[...] v Sahara Computers (Pty) LTD (2010) 31 ILJ 2827 (GNP). Before the court *a quo*, the Respondent instituted an action against the Appellant alleging that she suffered mental anguish, psychological trauma, and the impairment of her dignity.

[2] For mental anguish, the Respondent claimed damages in the amount of R 150 000-00. She also claimed R 50 000-00 in consideration for “psychological and trauma counselling”. The Appellant defended the action without success. In the end, the court *a quo* ordered Appellant to pay to the Respondent an amount of R 60 000-00, and to pay the respective costs. It is against that judgment that Appellant lodged this appeal.

[3] Briefly stated, the facts of the case are as follows: Appellant is a company that is involved in computer distribution and service. The Respondent was an employee in the said company; so was a male person called Mthethwa. The Respondent alleged that Mthethwa, her fellow employee in the Appellant, grew and persisted in the tendency to harass her.

[4] To sustain her claim, the Respondent cited instances listed hereunder, where Mthethwa harassed her sexually, and which she contended to have reported to the Appellant. She disclosed to the Appellant that the offending acts were taking place at the workplace. According to her, the Appellant was either reluctant to act, in order to create a safe workplace environment for her benefit, or failed to take “reasonable steps” to avoid her suffering any further acts of harassment in the hands of Mthethwa.

Before the court *a quo*, the Respondent did not seek for the Appellant to be held to be vicariously liable for

Mthethwa's acts. She alleged that the above omission on the part of the Appellant was both unlawful and negligent.

[5] This court is to consider whether or not the court *a quo* was correct in finding that:

- (a). The Respondent, who was the Plaintiff before it was sexually harassed.
- (b). The Appellant who was the Defendant negligently breached its duty to protect the Respondent, as one of its employees, against sexual harassment in the workplace.
- (c). The Respondent did prove that she suffered from a recognised psychiatric injury.

[6] The Respondent told the court *a quo* that she started serving as an employee of the Appellant on the 13th November 2006. Five months after she had come on board as the Appellant's employee, a fellow employee called Mthethwa questioned how she had managed to get onto the employ of the Respondent without "passing through him". Mthethwa told her that everybody that comes on board as the Appellant's employee has to "pass through him". She said that Mthethwa demanded sex from her.

[7] She told a colleague, one Sam Maboke about Mthethwa's conduct. Maboke is the one who introduced her to the Appellant. He told her to ignore Mthethwa, but in the same breath he told her that Mthethwa is "well connected". In the meantime, Mthethwa persisted with his constant demands for sexual favours from her, much as he continued to pester her.

[8] She said that one morning, as she sat on a chair, Mthethwa crept from behind her and put his arms around her. He then tried to touch her private parts. This happened in full view of one Karin de Beer and one Luntu, who are co-workers. Ms. de Beer advised the Respondent to report the incident to her manager, Mr. Eugene Steenekamp. Steenekamp pleaded helplessness stating that Mthethwa stood "well connected".

[9] She stated further that Steenekamp warned her that she stands at risk of losing her job if she persisted with her complaint against Mthethwa. Steenekamp also promised her protection in the sense of ensuring that Mthethwa does not touch her again. Evidence does not show how Steenekamp intended to deliver on his promise of protection for the benefit of the Respondent. Moreover, Mthethwa relentlessly persisted with his offending acts; often taking advantage whenever Steenekamp would not be around.

[10] On another day, unaware that Steenekamp is around, Mthethwa endeavoured to join her company in a store room. He soon retreated as soon as he became aware of Steenekamp's presence. Before retreating, Mthethwa told Respondent in Setswana that he would "get her".

Knowing that Steenekamp had pleaded helplessness before, she did not report this incident to Steenekamp, but she told Maboke, who again advised her to ignore Mthethwa.

[11] Whenever he came into contact with her; Mthethwa incessantly threatened to "get her one day". On another occasion, in the presence of bystanders, Mthethwa attempted to pour water over her private parts. In response to her audible protests, Mthethwa held out his cellphone and dared her to call his supervisors, telling her that they too are helpless about it.

[12] In December 2007, the Respondent stayed away from an 'office Christmas party', partly because she had a heavy workload, and partly due because she felt apprehensive knowing that Mthethwa would also be in attendance. On the following Monday, Mthethwa told her to get a fan from one Willie. It turned out that he was only playing tricks on her and he ended up telling her that she has go to his, (Mthethwa's) home where she must have sex with him in return for a fan. She decided not to pursue the issue of the fan.

[13] In February 2008, as she joined colleagues in a meeting, Mthethwa poked fun at her as she walked into the venue of the meeting saying: “here comes lady fan!”. She did not take particular offence. Later Mthethwa apologised for calling her “Lady fan”. She accepted the apology, much as she thought that Mthethwa would no longer harass her.

[14] With the hatchet in her thinking thus buried, on a day in January or February 2008, she, one Plaatjies and one Mandisi accepted a lift home offered by Mthethwa. It was to be the first and the last ride ever that she accepted from him. As she alighted from the car, Mthethwa leaned over and touched her buttocks. She swore at him and left. Back at the workplace she approached the Human Resource section and lodged a written complaint against Mthethwa.

[15] On the 28th February 2008, Respondent lodged a written complaint against Mthethwa. She cited Mthethwa’s incessant harassment, mentioning most of the incidences. But she omitted the incident when he tried to touch her as she sat on a chair. Mthethwa was charged with misconduct. A hearing was conducted on the 6th March 2008. According to the Respondent, Mthethwa was convicted of ‘sexual harassment’, but that is not common cause.

[16] According to the Appellant, at the hearing Mthethwa admitted to having been rude or harsh to the Respondent. However the disciplinary committee found that most of the allegations made against Mthethwa were not corroborated. The sanction written against Mthethwa was a “final written warning”. The Respondent expected Mthethwa to be dismissed and as such she was dissatisfied with the outcome of the disciplinary hearing. She attempted to lodge an appeal.

[17] Thereafter Mthethwa began frowning whenever he would meet her. She felt threatened by this behavior. She lodged a number of complaints to the HR department in pursuance of her appeal. A trail of emails, shows that Steenekamp held a meeting with the HR department on the 16th of April 2008 where her appeal was discussed. However, nothing concrete seems to have come out of the discussion. In May 2009, the Respondent resigned as an employee of the Appellant. She cited “personal reasons”. She stated that the reason is that the Appellant is not protecting her against Mthethwa. After resigning, she remained unemployed for a while. She also furthered her studies. She has since secured another employment.

[18] Under cross examination before the court a quo, it was revealed that the Respondent got married in 2009. She stated that she experienced sexual problems in the marriage due to the sexual harassment she suffered at the hands of Mthethwa. Plaatjies who is a cousin to the Respondent corroborated her on the instance when Mthethwa attempted to pour water over Respondent’s private parts and when he touched her buttocks as she alighted from a vehicle. He also confirmed that a lady called Mandisi, and not a male called Mandisa drove with them in the vehicle. He denied that there was a fifth person with them.

[19] A Mr. J.S. Mostert, who is a counselling psychologist interviewed the Respondent on the 19th August 2010. Based on the interview and psychometric tests, he prepared a written report, He tendered expert evidence and confirmed the contents of his report. His clinical impression of the Respondent was that she is anxious, timid and she appeared somewhat shy. She also lacked confidence, much as she showed flattened emotions. She lacked strength and vigor.

[20] Dr. Mostert stated that his findings are consistent with his findings on the SCL-90-R, which is a ‘symptoms checklist’ which made for one of the two psychometric tests conducted. Mostert also confirmed the Wechsler Adult intelligence scale-test. On that scale-test, in most categories the Respondent scored “high average” and “average” on some. Mostert opined that in the interview, the Respondent came across as “severely traumatized”. He said that the incident had an impact on her “social academic, occupational and interpersonal functioning”. Her capacity for attention and concentration was adversely affected. She exhibited significantly high psychological distress levels.

[21] In Dr. Mostert's view, the Respondent is in need of psychotherapy and psychiatric services. He testified that the Respondent is fairly depressed due to both the harassment itself and the fact that the matter dragged over a long period of time, preventing her from getting closure. Under cross examination, Dr. Mostert did state that the Respondent did not suffer from *Post-Traumatic Stress Disorder*.

[22] One Ms. Mandisa Makinana testified for the Appellant. She testified about the day when she, the Respondent, and one Plaatjies accepted a lift from Mthethwa. She said that Mandisi was not present. She disputed that Mthethwa touched the Respondent's buttocks. Mthethwa also testified, stating that he did work for the Respondent as a production manager. Due to a work related project. He got to know the Respondent. He admitted the "Lady Fan" taunt, calling it a joke, but he denied other allegations. He said that on occasion he would give the Respondent a lift home. He denied that anything untoward ever happened on the day he gave, the Appellant, Mandisa and Plaatjie a lift home. He confirmed that a complaint by the Respondent resulted in the disciplinary enquiry pursuant to which he was handed a written warning. He admitted further that after the disciplinary hearing, the HR department banished him from setting foot at the section where the Respondent was deployed. He said that he complied with the said banishment.

[23] The court *a quo* found that the Respondent was indeed subjected to harassment by Mthethwa, who was her fellow employee at the Appellant. The court found further that in reporting the incident of harassment to Mr. Steenekamp, the Respondent effectively brought the incidents of harassment to the attention of the Respondent. The court *a quo* correctly held that the Appellant had a legal duty to protect the Respondent in her capacity as one of its employees against sexual harassment at the workplace; (See *Media 24 Ltd and Another v Grobler*¹).

[24] The court *a quo* correctly held that the Appellant negligently breached its duties to protect the Respondent. It found that the written warning against Mthethwa had some effect in terms of stopping Mthethwa from harassing the Respondent further. In the view of the court *a quo*, Steenekamp should have immediately referred the Respondent's complaint to the HR department. The court also found that it was within the Appellant's means to create a safe working environment. It found that the Appellant acted unreasonably in failing to create that working environment in favour of the Respondent.

[25] Our law requires the Respondent to prove that she suffered a 途ecognized psychiatric injury • (herkenbare psigiese letsel) as a result of harassment at the hands of Mthethwa. See *Barnard v SANTAM Bpk*²; *Media 24 Ltd and Another*³, at paragraph 56 and onwards; and *Bester v Commercial Union Versekerings maatskapy Van SA Bpk*⁴. Based on the evidence before it; the court *a quo* concluded that the Respondent did satisfy this requirement.

[26] The Respondent contended before the court *a quo* that the sexual harassment she suffered in the hands of Mthethwa resulted in her suffering "*mental anguish, psychological trauma and impairment to her dignity*" However, she did not allege before the court *a quo* that the Appellant acted with intent, (*actio iniuriandi*), in failing to come to her rescue from the offending conduct on the part of Mthethwa. Instead, the Respondent relied on her claim against the Appellant on the *actio legis Aquiliae* and on an action for pain and suffering. She stated that her bodily integrity was unlawfully and negligently infringed as a result of Mthethwa's acts.

[27] The Respondent also proved before the court *a quo* that she requires psychotherapy and psychiatric medication. She alleged a breach of its duty on the part of the Appellant in failing to create a safe working environment for her benefit. According to her, that the failure resulted in her being sexually harassed by a fellow employee at the workplace. Hence, the court *a quo* ordered the Appellant to pay an amount of R60 000-00 plus costs.

[28] The Appellant did not dispute the sexual harassment allegedly committed by Mthethwa, together with the fact that the Respondent was in its employ at the applicable period. In fact, instituting disciplinary

proceedings against Mthethwa, and imposing a sanction on him based on the written complaint lodged by the Respondent is indication that Appellant does not dispute the allegations.

[29] I find that the Appellant delayed overly in taking action to prevent Mthethwa from continuing with his unacceptable behavior. After the Respondent reported Mthethwa's conduct, it took Steenekamp forever to do anything meaningful. He was too preoccupied with stepping too carefully, knowing that Mthethwa is well connected within the Appellant. Even in taking steps, the Appellant merely instituted disciplinary proceedings, issued a final written notice, and left the rest to fate as to what then happens between the Respondent and Mthethwa. That is why Mthethwa still found space to perpetrate his offensive conduct further.

[30] It was argued on behalf of the Appellant that the Respondent's claim cannot succeed because Dr. Mostert did not find that the Respondent suffered Post-Traumatic-Stress-Disorder. It has to be borne in mind that Dr. Mostert nonetheless recommended treatment for the Respondent.

That treatment shall come at a cost. Based on considerations made in a similar regard in the case of Allied v Road Accident Fund and on writings in Corbett & Honey⁵, the *court a quo* determined that R60 000 - 00 is an appropriate amount to be paid by the Appellant for the benefit of the Respondent. I find no fault with the findings of the *court a quo*.

[31] In the circumstances I am of the view that the judgement and the corresponding order, made by the trial court is correct.

In the result I make the following order:

1. The appeal is dismissed with costs.

T A MAUMELA

JUDGE OF THE HIGH COURT

I agree:

D DOSIO

ACTING JUDGE OF THE HIGH COURT

L M MOLOPA - SETHOSA J

JUDGE OF THE HIGH COURT

I agree and it is so ordered

2 **1999 (1) SA 202 (AD), at 216 E to F**

3 Supra

4 **1973 (1) SA 769 (AD), at 779 H**

5 **"The Quantum of Damages in bodily and fatal injuries".**