25/11/2010

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

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES/NO.
(2) OF INTEREST TO OTHER JUDGES: YES/NO.
(3) REVISED.
25/11/2010
DATE SIGNATURE

Case No: 21881/09
Date heard: 12/11/2010
Date of judgment: 25/11/2010

In the matter between:

G.G. Mokone PLAINTIFF

and

Sahara Computers (Pty) Ltd DEFENDANT

JUDGMENT

DU PLESSIS J:

From 2006 to 2009 the defendant employed the plaintiff as a clerk in one of its departments. The plaintiff alleges that, while so employed a manager from another department, one Sello Mtethwa, sexually harassed her. The plaintiff now claims damages in an amount of R150 000 for "mental anguish, psychological trauma and the impairment of her dignity". She also claims R50 000 damages for "psychological and trauma counselling".

It is the essence of the plaintiff's case, as pleaded in the particulars of claim, that the defendant was "under the ever present obligation to provide a safe working environment ..." including one where the plaintiff would not be subjected to sexual abuse and harassment. The plaintiff further alleges that she reported Mtethwa's harassing conduct to the defendant but that "the defendant was reluctant to act" against him and/or was reluctant to "take reasonable steps to avoid further sexual harassment".

The particulars of claim are not a model of clarity. It is evident, however, that the plaintiff does not seek to hold the defendant vicariously liable for Mtethwa's actions, or for the actions of anyone else. Although neither unlawfulness nor negligence is pertinently alleged, the case was conducted on the footing that the plaintiff is seeking to hold the defendant liable for an unlawful and negligent ("unreasonable") omission to create a safe work environment wherein she would not be sexually harassed. The plaintiff is, as I have pointed out, seeking damages for "mental anguish, psychological trauma and impairment to her dignity". As a general proposition, personality rights are in our law protected by way of the *actio iniuriarum* that requires culpability in the form intent (*animus iniuriandi*) on the part of the alleged wrongdoer. The plaintiff does not allege that the defendant acted with intent and the *actio iniuriarum* is not at issue. But by way of the *actio legis Aquiliae* and by way of what has become known as the action for pain and suffering, our law affords redress for and protection

against the negligent infliction of bodily injuries. As I shall point out later in more detail, a person's body in this sense encompasses both its physical and psychological components. Where a plaintiff's bodily integrity has unlawfully and negligently been infringed, she can claim both patrimonial loss[1] and also compensation ("genoegdoening") for pain, suffering and shock[2] resulting from the injury. (See the discussion in **Neethling, Potgieter, Visser: Deliktereg** (4th ed. p. 19 and 20; See also **Van der Merwe en Olivier: Die Onrgematige Daad in SA** (6th edition) p. 241, 242 and at p. 328, 329.) I have embarked upon this, perhaps unnecessary, discussion in order to make it plain that, despite shortcomings in her particulars of claim, the plaintiff's claim is one for unlawful and negligent infringement of her bodily integrity. To the extent that she claims for impairment of her dignity, the particulars of claim do not sustain such a claim. I shall regard the claim for "mental anguish, psychological trauma" as one for shock, pain and suffering and the claim for "psychological and trauma counselling" as one for future medical expenses consequent upon a bodily injury. I should add that I am satisfied that the defendant will not be prejudiced by this lenient interpretation of the particulars of the plaintiff's claim. The case was conducted on the basis that this is a claim based on the unlawful, negligent infringement of the plaintiff's psychological integrity.

I turn to the evidence.

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[1] With the *actio legis Aquliae*.
[2] With the action for pain and suffering. There are more heads under which compensation could be granted but only those mentioned are now relevant.

The plaintiff testified that she started working for the defendant on 13 November 2006 as a "RMA clerk". About four to five months later Mtethwa, who was a manager in another department, asked her how she had come to work there without "passing through him". Everybody, he said, has to pass through him. He also told her that he wanted to have sexual intercourse with her. She told a colleague, one Sam Maboke about Mtethwa's conduct. Mr Maboke, whom she knew and who had introduced her to the defendant, told the plaintiff to ignore Mtethwa as he was "well connected". Mtethwa continued to come to the department and repeatedly told the plaintiff that he wanted to have sexual intercourse with her. One morning, while she was sitting on her chair, he came from behind, put his arms over her and tried to touch her private part. Two colleagues, Karin de Beer and one Luntu saw it. Ms De Beer told the plaintiff to report Mtethwa's conduct to her manager, Eugene Stenekamp. The plaintiff did so, but Stenekamp told her that he could do nothing as Mtethwa was well connected. He added that a complaint would rather lead to her dismissal than to that of Mtethwa. Stenekamp, however, also told the plaintiff that he would look after her within the department and that he would ensure that Mtethwa did not touch her there.

Mtethwa continued his visits to the department when Stenekamp was not there and told the plaintiff that sexual harassment is for whites only and does not apply to him. One day, while she was in the store room with Stenekamp, Mtethwa, unaware of Stenekamp's presence, entered the store room. When he realised that Stenekamp was there, Mtethwa left the store room. Leaving, he told

the plaintiff in seTswana that he would get her and that she would yet have sex with him. The plaintiff did not report this incident to Stenekamp as, so she said, he had previously said that there was nothing he could do. The plaintiff again related the incident to Maboke who repeated his advice that she should ignore Mtethwa.

Whenever they met, Mtethwa told the plaintiff that he was yet going to have sex with her. At some stage, it is not clear when, Mtethwa tried to pour water onto the plaintiff's private part. When she complained to bystanders, Mtethwa held out his telephone and told her to call his superiors who, he said, would do nothing.

In December 2007 the plaintiff did not attend the office Christmas party and did not receive the present (a fan) that those who did attend received. The plaintiff said that she did not attend the party as she had to work but also because she knew that Mtethwa would be present. On the Monday Mtethwa asked the plaintiff whether she had received a fan. When she said no, he told her to go to one Willie who was the person dealing therewith. He added that if Willie would not give her a fan, she could come to his house, have sex with him and he would give her a fan. The plaintiff tried to get a fan but could not. She said that she did not take the fan-incident further.

In February 2008 the employees had a meeting. When Mtethwa saw the plaintiff he said: "Here comes Lady Fan". The plaintiff did not say that this form of address had any improper implication. She did, however, say to Mtethwa that if she reported him, he would say that he has connections. Mtethwa apologised for calling the plaintiff "Lady Fan".

During about January or February 2008 Mtethwa gave the plaintiff, one Piet Plaatjies and one Mandisi a lift home in his car. The plaintiff said that she was prepared to drive with Mtethwa as he had apologised for calling her "Lady Fan" and she thought that his harassment had stopped. As she got out of the car, Mtethwa leaned over and touched her buttock. The plaintiff swore at him and left. Back at work after this incident, the plaintiff went to the defendant's human resources department ("HR") and complained about Mtethwa's conduct. She was told to put the complaint in writing which she did. As for driving with Mtethwa, the plaintiff said that was the last time she drove with him.

On 28 February 2008 the plaintiff made a written complaint to HR. In the complaint (exhibit D9) she mentions Mtethwa's continuous harassment and relates most of the incidents that she mentioned in her evidence. She made no reference, however, to the incident when he tried to touch her while she was on the chair.

In terms of its disciplinary code the defendant charged Mtethwa with sexual harassment. A disciplinary hearing was held on 6 March 2008. A

handwritten copy of the minutes of the disciplinary hearing as well as a typed "record of the proceedings and the verdict" were handed in as exhibits. It is clear from neither document whether Mtethwa was found guilty of sexual harassment: He admitted that he had been "harsh/rude" towards the plaintiff but the disciplinary committee also found that much of the plaintiff's complaints could not be corroborated. In any event, Mtethwa was issued with a final written warning.

The plaintiff was dissatisfied with the outcome of the disciplinary hearing: She said that although she did not want Mtethwa dismissed, she thought that at least a suspension was appropriate. She attempted to lodge an appeal. After that, whenever he saw her, Mtethwa assumed a threatening attitude by, so her evidence was translated, "frowning" at her. This prompted the plaintiff repeatedly to contact HR so as to pursue her intended appeal. She did not, however, get a satisfactory response. The plaintiff made reference to e-mail correspondence that she had with HR. From that and from her evidence it appears that although HR evinced sympathy for her cause, she subjectively did not think they were doing enough to pursue her appeal. What does appear from the exhibits, however, is that Mr Stenekamp had a meeting with HR representatives on 16 April 2008. At this meeting the plaintiff's intended appeal was discussed. Although the minutes of this meeting that were presented to the court are barely legible, the do show that the plaintiff's intended appeal was discussed at a relatively senior level.

In cross examination the plaintiff confirmed that, after the disciplinary hearing in March 2008, Mtethwa did not again sexually harass her.

In May 2009 the plaintiff resigned, stating in her letter of resignation that it was "for personal reasons". She said that she left because she felt that the defendant was not protecting her. She was unemployed for some time after her resignation during which time she studied. She has since obtained new employment at a higher salary.

In the course of cross examination it was established that the plaintiff got married in the course of 2009. She said that, due to the harassment, she experienced sexual problems in her marital relationship.

The plaintiff's cousin, Mr Piet Plaatjies, testified that he was present when Mtethwa tried to pour water over the plaintiff. He drove with Mtethwa and the plaintiff on the day Mtethwa touched her buttock as she gout out of the car. On that occasion, he said, one Mandisi drove with them but there was no fifth person in the car. Like the plaintiff, he said that a lady by the name of Mandisa (as opposed to the man Mandisi) was not present.

Mr JS Mostert, a counselling psychologist interviewed the plaintiff on 19 August 2010. Based on the interview and psychometric tests, he prepared a written psychological report. Mr Mostert gave evidence as an expert and in so doing confirmed the contents of his report. His clinical impression of the plaintiff

was that she was anxious, timid and appeared somewhat shy. She lacked confidence. She appeared to have flattened emotions, lacking strength and vigour. This clinical observation, according to Mostert's report, was consistent with his findings on the SCL-90-R, a symptoms checklist which was one of the two psychometric tests that he performed. Mostert also performed the Wechsler Adult Intelligence Scale-test. On it the plaintiff scored "high average" in most categories and "average" in some. Integrating the test results and his interview with the plaintiff, Mostert expressed the opinion that she was "severely traumatised" and that the "incident .... had an impact on her social, academic, occupational and interpersonal functioning". She seems to have "some difficulty with attention and concentration ability". She shows significantly high psychological distress levels. In Mostert's view the plaintiff is in need of psychotherapy and psychiatric services. Mostert testified that the plaintiff was fairly depressed. That condition was probably due, in the first place, to the harassment. The depression was probably also due thereto that the case was dragging on and that the plaintiff could not get closure. In cross examination he said that she did not suffer from Post Traumatic Stress Disorder.

For the defendant Ms Mandisa Makinana testified that she once travelled with Mtethwa, Plaatjies and the plaintiff to Olifantsfontein. Mandisi was not present. Mtethwa did not on that occasion touch the plaintiff's buttock.

Mr Mtethwa testified that at the relevant time he worked for the defendant as a production manager. He came to know the plaintiff when he did a project

requiring of him to go to the department where she worked. Apart from the "Lady Fan"-incident, he denied the plaintiff's allegations. Calling the plaintiff "Lady Fan" was a joke, Mtethwa said. Mtethwa admitted that he occasionally gave the plaintiff a lift on his way home. On the last occasion he had four passengers: the plaintiff, Mandisi, Mandisa and Plaatjies. Mtethwa denied that anything untoward happened.

Mtethwa confirmed that he received a written warning after the disciplinary hearing. He added that some time thereafter HR told him not to go the plaintiff's department. With that instruction, Mtethwa said, he complied.

The first question is whether the plaintiff has established on a preponderance of probabilities that Mtethwa sexually harassed her.

The respective versions of the plaintiff and Mtethwa are mutually destructive. In weighing up the two versions, I bear in mind that an innocent person in Mtethwa's position will find it difficult convincingly to convey that nothing untoward happened. In the nature of things, the two were alone on many occasions of alleged harassment. In my view it is manifest that something happened that emotionally upset the plaintiff. It is also manifest that that something involved Mtethwa. Mtethwa's evidence that only the "Lady Fan" incident happened between them is improbable. In isolation that incident was quite innocent. Despite that, the plaintiff reacted rather strongly to it. Mtethwa's apology also tends to show that that could not have been an isolated incident. I

am satisfied that Mtethwa did something that seriously upset the plaintiff. On the evidence that something can only be the sexual harassment that the plaintiff testified to. I am fortified in this conclusion by the fact that Mtethwa admitted during the disciplinary hearing that he had treated the plaintiff rudely.

Plaatjies was not a very impressive witness but I have to bear in mind that he testified through an interpreter whose command of English, in my view, was not very good. But something prompted the plaintiff soon after the last lift she had taken with Mtethwa to lodge a written complaint of sexual harassment. On the evidence only the incident when Mtethwa touched her buttock could have prompted the complaint. Accordingly, Plaatjies's (and the plaintiff's) evidence of the car incident is supported by subsequent events. Ms Makinana's evidence that she saw nothing is not helpful: Her evidence differs from that of Mtethwa in that she denied that Mandisi was present while Mtethwa admitted that he was. The one explanation for the difference between Makinana and Mtethwa could be that she was talking about a different occasion in which event her evidence would be of no assistance. The other, and in my view more likely, explanation is that she and Mtethwa were falsely exploiting the similarity between her name and that of Mandisi. I conclude that the car incident probably happened. Although the car incident did not happen in the workplace, it prompted the plaintiff's written complaint. Having regard to the evidence as a whole, I conclude that the car incident was the last in a series of incidents that cumulatively led the plaintiff to complain.

In summary, it is held that the plaintiff has succeeded in proving that Mtethwa sexually harassed her.

The defendant had a legal duty to protect the plaintiff, as one of its employees, against sexual harassment at the workplace (See **Media 24 Ltd and Another v Grobler 2005 (6) 328 (SCA)**, paragraph 64 and onwards). The question now is whether the defendant had negligently breached that duty. It is not in issue that the defendant had a disciplinary code in place in terms whereof sexual harassment constitutes a dismissible offence. On analysis, the plaintiff made only two complaints to people within the defendant's organisation who had some authority to act.

I start with the second of the two complaints. Within days after the plaintiff had complained to HR, Mtethwa was charged under the disciplinary code. Although he was not dismissed, the written warning had some effect because the sexual harassment stopped. After the disciplinary hearing Mtethwa started to intimidate the plaintiff but that is not the case that the defendant was called upon to meet. It follows, in my view, that after the complaint to HR the defendant acted reasonably as far as the sexual harassment is concerned.

The first complaint was made to Stenekamp. He protected the plaintiff within the confines of his department, but the sexual harassment elsewhere on the defendant's premises continued and culminated in the car incident. (The latter incident did not occur within the defendant's premises but it is unnecessary

to consider whether, had that been the only incident, the defendant would in law have had a duty to prevent it.) Having regard to what happened after the disciplinary hearing, it is probable that if Stenekamp had reported the complaint to HR, the harassment would have stopped earlier.

In my view Stenekamp should have relayed the plaintiff's complaint to HR but it is not the plaintiff's case that the defendant is liable for Stenekamp's negligence. It is, however, her case that the defendant failed to create a safe environment wherein she would not be sexually harassed. In my view the fact that her complaint to her manager did not adequately address the sexual harassment, grounds an inference that the defendant's management and disciplinary structures were insufficient to do so. Put differently, the defendant should have had management and disciplinary structures that would immediately and effectively have dealt with the plaintiff's complaint. For instance, Stenekamp should have been obliged immediately to have referred the complaint to HR. There is no doubt that it reasonably was within the defendant's means to create the necessary structures. In my view the defendant acted unreasonably when it failed to do so.

Moreover, by reporting to Stenekamp, her manager, the plaintiff brought the sexual harassment under the defendant's attention. Failing to act to protect the plaintiff in the circumstances was unreasonable.

I conclude that the plaintiff has succeeded in proving negligence on the part of the defendant.

I have pointed out that the plaintiff's claim is one for shock, pain and suffering due to a bodily injury. It follows that she had to prove that she has suffered a recognised psychiatric injury ("herkenbare psigiese letsel". See **Barnard v SANTAM Bpk 1999 (1) SA 202 (AD)** at 216E to F; **Media 24 Ltd and Another v Grobler** (*supra*) at para. 56 and onwards; (**Bester v Commercial Union Versekeringsmaatskapy van SA Bpk 1973 (1) SA 769 (AD)** at 779H;)

This aspect of the case troubled me. The plaintiff relied heavily on the evidence of Mostert. He is a counselling psychologist and diagnosing a psychiatric injury does not fall squarely within his field of expertise. For his submission that the plaintiff did not prove that the harassment caused a recognised psychiatric injury, Mr Beaton for the defendant relied on Mostert's concession that she does not suffer from a Post Traumatic Stress Disorder. It will be quite unfair on the one hand to disregard Mostert's evidence when determining whether the plaintiff has suffered a recognised psychiatric injury and on the other hand to rely on his evidence that she does not suffer from Post Traumatic Stress Disorder. When evaluating Mostert's evidence it must be borne in mind that, while he might not be able to give a psychiatric injury a name, he is sufficiently qualified to express an opinion as to whether the plaintiff has suffered an injury that requires psychiatric treatment. In this regard Mr Bircholtz for the plaintiff pointed out, correctly in my view, that Mostert's evidence shows that the

plaintiff is in need of psychotherapy and of psychiatric medication. It follows that the plaintiff has suffered an injury that needs to be addressed by way of psychiatric treatment. That the plaintiff suffers from such an injury, albeit that Mostert could not name it, is borne out by her own evidence as to how the harassment has affected her personal life and by Mostert's findings as to her cognitive, social and marital functioning. I might add that in the final analysis it is the function of the court to determine whether a recognised psychiatric injury has been sustained. The evidence of an appropriately qualified expert is preferable in that regard. If the court, however, finds on the evidence that there is a psychiatric injury, the failure to name it does not necessarily lead thereto that the plaintiff must fail.

On a conspectus of all the evidence I am satisfied that the plaintiff has suffered a recognised psychiatric injury as a result of the harassment.

As regards the quantum of damages to be awarded, the plaintiff did not prove the probable costs of the treatment that Mostert recommended. It is manifest, however, that she will need treatment. In the circumstances some allowance for such expenses must be made in the award of general damages for pain, suffering and shock. In **Allie v Road Accident Fund (Corbett & Honey: The Quantum of Damages in Bodily and Fatal Injury Cases**, Vol. V, K3-1) a composite sum of R80 000 was awarded as general damages for relatively minor physical injuries and for emotional shock sustained when the plaintiff saw his pregnant wife being flung out the car and when he also had to look on while she

bled to death. In the same publication (at K3-16) the case of **The Road Accident Fund v Draghoender** is reported. There a mother sustained shock when she saw her minor child having been killed in an accident in front of her home. The effect of the shock was in that case more severe than in this one. An amount of R80 000 was awarded. Taking into account that in this case compensation for future medical expenses must be included in the award for general damages, I have come to the conclusion that an amount of R60 000 will be appropriate.

As to costs, this case concerns the protection of an important right. It is of importance to both the parties and involves legal principles that are of general importance. In the circumstances I have come to the conclusion that, despite the sum to be awarded, costs on the high court scale should be awarded.

In the result the following order is made:

1. Judgment is granted in favour of the plaintiff in the sum of R60 000.
2. The defendant is ordered to pay the plaintiff's costs.

B.R. du Plessis

Judge of the High Court

On behalf of the Plaintiff:	Van den Berg & Meintjies Office 109B, First Floor Newlands Plaza Cnr Lois -& Dely roads Pretoria Adv. F.W. Birkholtz
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