REPORTABLE

IN THE HIGH COURT OF SOUTH AFRICA
(EASTERN CAPE DIVISION, GRAHAMSTOWN)

Case no: 828/2011
Date heard: 6-7 Oct 2015
29 February 2016,
23 March 2016
Date delivered: 31 March 2016

In the matter between

PE	**Plaintiff**
vs	
IKWEZI MUNICIPALITY	**First Defendant**
XOLA VINCENT JACK	**Second Defendant**

JUDGMENT

PICKERING J:

[1] This is an action for damages in which the plaintiff, PE, an adult female of Jansenville, claims damages in the sum of R4 028 416,80 jointly and severally from the first defendant, Ikwezi Municipality, and the second defendant, Xola Vincent Jack, arising out of an alleged sexual assault committed upon her by the second defendant during the course of his duties with the first defendant at the offices of first defendant in Jansenville on Monday 16 November 2009.

[2] At the outset of the trial before me the issues of liability and quantum were separated in terms of Rule 33(4) and the trial proceeded on the merits only. Second defendant, who had never entered an appearance to defend the matter, was duly served with the notice of set down, and, so I was informed, was present at court before the start of the proceedings but left before they commenced.

[3] In her particulars of claim plaintiff alleged that second defendant acting in the course and scope of his employment with first defendant had unlawfully

molested and sexually assaulted her by attempting to insert his tongue into her mouth. She alleged further that approximately three weeks prior to this incident second defendant had addressed words to her bearing sexual connotations. She alleged that in consequence thereof she was severely traumatised.

[4] She alleged that to the knowledge of first defendant's municipal manager and chief financial officer, she was further traumatised thereafter whenever second defendant came into her presence and that, in the circumstances, first defendant had a legal duty to prevent such further trauma by preventing second defendant from coming into her presence but breached that duty.

[5] Plaintiff alleged further that in consequence of above allegations she suffered from Post Traumatic Stress Disorder and was eventually forced to resign her employment with first defendant, which she did during November 2010.

[6] In its plea first defendant denied that second defendant was acting in the course and scope of his employment with it when the incident occurred. Whilst admitting that it had a legal duty to protect plaintiff's rights and to prevent her from suffering further trauma it pleaded that it took all reasonable steps to do so by, *inter alia,* confining second defendant to its Klipplaat office with instructions not to contact plaintiff who was at its Jansenville office and by instituting disciplinary proceedings against him.

[7] Plaintiff testified that she was born on 1 July 1986. After matriculating in 2004 she was employed as a cashier before commencing employment with first defendant in Jansenville as an Assistant Archives Clerk, being eventually promoted to the position of Archives Clerk.

[8] Her immediate superior once she started work with first defendant was one Wilmare Franse. Franse was in due course promoted and second defendant, who was first defendant's Corporate Services Manager, became

her immediate superior. At that time first defendant had offices both at Jansenville and at Klipplaat and second defendant was stationed at Klipplaat whilst plaintiff remained at the Jansenville offices. Second defendant's duties required, however, that he regularly visited the Jansenville offices.

[9] According to plaintiff she and second defendant worked very well together and, save for the odd incident, were good colleagues. Plaintiff's duties entailed that she and second defendant worked closely together, *inter alia* preparing Council agendas, on occasion late in the evening after hours when the rest of the staff had left.

[10] One evening plaintiff and second defendant were alone together in the Jansenville offices engaged in preparing a council agenda when second defendant said to her that they were alone and that if they did something nobody would know about it. According to plaintiff she did not know what he meant thereby but surmised that it was not something good. She therefore told second defendant that whatever it was that he was talking about she was not interested.

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

[12] Plaintiff stated that immediately thereafter she was distressed and anxious. She found the incident to be utterly revolting.

[13] She sat and thought about what to do and eventually decided to send an email to her previous superior, Wilmare Franse. Franse did not reply, apparently because she was not in possession of her laptop at that time. Because the mayor and the municipal manager had left for a meeting together with second defendant there was no one at the offices and she was obliged to remain there for the rest of the day. The following day she met the first defendant's legal advisor, Mr. Patel. She told him what had happened and he asked whether he could report the matter to the Acting Municipal Manager, Mr. Bomvane. She agreed that he should do so. The following day she was called in by Mr. Bomvane and the Acting Mayor, Ms. Wanda. At their request she typed out a statement. They told her that they were going to put her on "*special leave*" for the rest of the week until Friday. They also told her not to answer any call on her cellphone emanating from the Klipplaat municipal offices and that they were going to try to keep second defendant away from her until such time as the departmental enquiry into the matter had been finalised. Plaintiff was advised that in the meantime she should report to Mr. Bomvane.

[14] She was also told to send second defendant an *sms* advising him that she would not be in the office for the rest of the week. She duly did so. Shortly thereafter she received a call on her cellphone from the Jansenville office which she answered, only to discover that it was second defendant calling her from the office to ascertain why she was not at work. She told him that she was ill. Plaintiff stated that after this conversation she was trembling and burst into tears.

[15] On the Friday she returned to work. At some stage second defendant, accompanied by the Professional Assistant of the Municipal Manager, Ms. Malgas, entered in order to use the fax machine. She stated that at the mere sight of second defendant she again became anxious and trembling. She duly reported to Mr. Bomvane that she could not continue seeing second defendant virtually every day in the corridors of the office. The sight of him reduced her to tears. Mr. Bomvane told her that when the Municipal Manager, Mr. Mnyimba, returned to work he and Mr. Mnyimba would sit down

with her to decide how best to keep second defendant away from her. Despite this, plaintiff kept coming across second defendant in the offices in the course of her duties. She stated that she was so traumatised thereby that she would lock her office door if she heard his voice in the corridors. These unannounced visits occurred at least once a week.

[16] On every occasion that she reported this to Mr. Bomvane he said that they would try to keep second defendant away from her but that, as a manager, second defendant had to come to the Jansenville offices in the course of his duties. Plaintiff stated that the problem might have been resolved had she been advised in advance of every occasion that second defendant would be at the offices but she was only advised of his intended visit to the offices on approximately five occasions.

[17] It is common cause that on 19 November 2009 the Municipal Manager, Mr. Mnyimba, addressed a letter to second defendant with regard to the alleged gross misconduct. This letter (A1) reads as follows:

> "*This serves to inform you that serious allegations of misconduct have been levelled against you that potentially would warrant immediate disciplinary steps to be taken. The allegation levelled against you is that, on or around 16 November 2009, you allegedly committed a serious offence of sexual harassment, in that you allegedly forced yourself upon Ms. P R, (Rosie), in her office, whereby you allegedly kissed Ms. R against her will. This allegation is obviously very serious in nature, especially since you are Ms. R' direct supervisor.*
> *In this regard, you are hereby afforded an opportunity to make written representations, addressed to the writer hereof, as to why you should not be suspended from duty pending the outcome of any further investigation around the said allegations and or any envisaged disciplinary hearing.*"

[18] On 23 November 2009 the second defendant replied to this letter as follows:

"*This letter serves to acknowledge receipt of your letter dated 19 November 2009, with the aforementioned content and I wish to respond as follows:*

- *The allegation against me I regard them in a very serious manner and their directly impact on a person that is reporting to me directly.*
- *The allegations not clarified or not attended to, they remain a threat to our working relations in our daily operations of discharging our duties.*
- *My position is clear, that I am shock and surprise by these allegations and deny them with the contempt it deserve.* (sic)"

[19] On 1 December 2009 Mr. Mnyimba replied to second defendant's letter stating*, inter alia*, as follows:

"*After having taken all the relevant factors into account based on the allegations levelled against you, and based on the fact that your workstation is situated in Klipplaat, you are hereby informed and instructed as follows:*

1. *Under no circumstances are you to have any contact, work related or other, either direct or indirect, with the complainant in this matter, Ms. P, pending the finalisation of the current investigation into the allegations and the finalisation thereof;*
2. *Under no circumstances are you to visit and or present yourself at the Ikwezi Municipal administrative offices situated in Jansenville, for work purposes or other, pending the finalisation of the current investigation into the allegations and the finalisation thereof, except if given prior written permission to do so by the municipal manager;*
3. *Should you require any information and or documentation from the archives and or Ms. R in the execution of your duties, you are to request same only from your immediate supervisor, Mr. Nceba Bomvane, in writing.*

You need to understand that the employer sees the allegations levelled against you in a very serious light and is treating it as such."

[20] In due course a disciplinary hearing was convened during May 2010. This hearing was presided over by one C.V. Rhoode, an employee of the Camdeboo Municipality. Despite second respondent's professed "*shock and* surprise" at the allegations against him and his contemptuous denial thereof, he chose not to testify at the hearing. The relevant portions of the record of this hearing read as follows:

"4. *CHARGE*

The complaint against the employee was the following – 'gross misconduct in that on 16 November 2009 Mr. XV Jack allegedly forced himself upon a female subordinate employee, Ms. Pe R (E) and attempted to kiss the mentioned employee against her will. This amounts to misconduct in terms of the agreed SALGABC disciplinary code of conduct.

6.1 EMPLOYERS EVIDENCE

In essence, the evidence of the employer proved that the employee had forced himself upon a subordinate on 16 November 2009 and therefore contravened a serious misconduct. (sic)

6.2 EMPLOYEE'S EVIDENCE

The employee's representative never gave evidence of what actually happened on the specific day in question. However, they argued about the incorrect date on the charged sheet and also gave evidence of a protection order which also states another alleged date written under oath by Ms. P R." (sic)

7. ARGUMENT

The employers representative argued that Ikwezi Municipality have a sexual harassment policy in place and every personnel are aware of such policy. All personnel does know of the code of conduct. The employee's representative argued that Mr. Jack is not married, stay with his girlfriend, have kids and are a community leader. (sic)

[21] Under the heading "FINDING" the following is stated:

> "*In my opinion it is necessary to view and decide the charge. There is no dispute that Mr. XV Jack has forced himself upon a female sub-ordinate employee on the day of 16 November 2009. The only question is why have Mr. Jack not provide any evidence during this whole process to proof his innocence. Based on the evidence presented to me, I think it is appropriate to find him guilty as charged.*" (sic)

[22] Under the heading "*SANCTION"* the presiding officer, having stated that "*the relationship between employer [*by which he obviously meant second defendant] *and employee is irretrievably broken down due to the seriousness of the allegations*" proceeded to state that "*I have carefully considered all the arguments and have concluded that dismissal is not an appropriate sanction in this case.*" The presiding officer also stated that "*although the employer does have committed a serious misconduct during May 2009, I think that this Council needs to uplift the skills of their employee's by introducing a skills development plan.*" (sic) He proceeded to say that "*with his kind of record of misconduct, Mr. XV Jack needs to be made aware that his general behaviour is unacceptable and needs serious correction. I therefore, think that a further written warning would not be appropriate in this circumstances, but suspension from work for two weeks without payment, including benefits, from 01 June 2010 is my sanction.*"

[23] In the meantime plaintiff laid a criminal charge of "*sexual assault*" against second defendant. It is common cause that he pleaded guilty as charged and was sentenced to a suspended term of imprisonment. I should mention that second defendant's previous "*serious misconduct*" referred to by the presiding officer related to the theft by him of Municipal property.

[24] Plaintiff stated that after the disciplinary enquiry and the criminal trial had been disposed of, second defendant remained in the service of first defendant and she would still meet him in the offices and corridors at first

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

[25] Mr. Mnyimba, presently the Municipal Manager at Mnqushwa Local Municipality in Peddie, testified on behalf of first defendant. He stated that he served as Municipal Manager of Ikwezi Municipal from 2008 to December 2011. He stated that he was on excellent terms with plaintiff and described her as "*a remarkable woman, a bubbly woman, a lovely woman, that would do anything you asked her to do. She was one of the stars within the municipality.*"

[26] He was advised of the incident between plaintiff and second defendant in a phone call from Mr. Patel. He stated that his reaction was one of shock because the Ikwezi Municipality was a very small municipality where the relationship between the staff was almost akin to that of a close family. He had a sense of disbelief that such a thing could have happened.

[27] He stated that Mr. Patel told him that plaintiff was in a state of shock, "*shivering, crying and having anxiety attacks.*" He realised that it was of the utmost importance to protect plaintiff. Asked why, in that case, the letter confining second defendant to Klipplaat was only written on 1 December he stated that he had been advised by Mr. Patel that he had to follow due process before taking action. He stated further that in any event Mr. Bomvane had issued a verbal instruction on 17 November to the effect that

there should be no contact between plaintiff and second defendant. This was in order to protect plaintiff so that she "*did not become a victim twice.*"

[28] He confirmed that plaintiff had been promised that she would be informed beforehand if second defendant was coming to the Jansenville offices. As he put it "*he is coming today, you can lock your door, go into your office or even go home.*" The arrangement was that if second defendant was going to come to the office he would alert Mr. Bomvane who would then make the necessary arrangements in order for plaintiff to avoid contact with him. He could not dispute plaintiff's evidence that second defendant did visit the Jansenville offices without plaintiff having been warned prior thereto that he was coming but stated that it had never come to his attention that this had happened.

[29] He confirmed that on being advised of the incident he had immediately instituted disciplinary procedures against second defendant. He was extremely critical of the sanction imposed by Rhoode, to the extent that he had consulted with Mr. Patel in order to determine whether first defendant could appeal against its leniency. He was advised that it could not and that once the two week suspension had been served second defendant would in effect resume his employment with a clean slate.

[30] I interpose to state that the advice given by Mr. Patel to Mr. Mnyimba was incorrect. In Ntshangase v MEC for Finance: Kwa-Zulu Natal and Another (2009) 30 ILJ 2653 (SCA) it was held that the decision of the chairperson of a disciplinary enquiry constituted administrative action and that this being so, such action had to be lawful, reasonable and procedurally fair. In taking a decision the chairperson was acting *qua* employer and the decision was that of the employer. See also: Hendricks v Overstrand Municipality and Another [2014] 12 BLLR 1170 (LAC). If in these circumstances the decision prejudiced the employer, it had the right and was obliged to approach the Labour Court to review it where it failed to pass the test of rationality and reasonableness. Mr. Mnyimba, however, was obviously quite unaware of the fact that first defendant had such a remedy.

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

[32] The aforementioned Mr. Bomvane also testified on behalf of first defendant. He was, at the time of the incident the Director responsible for Finance and Administration as well as Corporate Services. He was also the Acting Municipal Manager.

[33] He testified that he was informed of the incident between plaintiff and second defendant by Mr. Patel whereafter plaintiff was called in to recount what had happened. She was in a "*bad psychological state*." Mr. Bomvane suggested that she take leave.

[34] He stated that he was in fact the author of the letters addressed to second defendant referred to above and had signed them on behalf of Mr. Mnyimba. He stated that this was a very sensitive matter and that in light of second defendant's protestations of innocence he had to be very careful not to create an impression of bias. It was decided to keep him in Klipplaat as a compromise. In this regard he stated that it became apparent that the requirement that second defendant receive his written permission to visit the Jansenville offices was unworkable because he himself was often out of office attending meetings or was on leave. It was accordingly arranged that second defendant could contact him by phone and that he would thereupon contact plaintiff and advise her accordingly.

[35] He conceded that it was in consequence of this new arrangement that matters went awry. Second defendant would sometimes call him whilst he was in a meeting and there might on occasions have been a delay in his contacting plaintiff or, as he conceded, there might even on occasion have been an "*oversight*" on his part in *"the heat of the moment*" to contact plaintiff. He could not dispute plaintiff's evidence that second defendant had arrived at

the Jansenville offices at least once a week without her having been advised thereof.

[36] As I have said above, second defendant, who had pleaded guilty in the magistrate's court to a charge of crimen injuria, chose not to enter an appearance to defend this matter and plaintiff's evidence that he had sexually molested her was therefore not disputed. It is necessary to point out that the presiding officer misdirected himself in stating that the second defendant had *"attempted to kiss*" the plaintiff. The evidence was that he bent over her and attempted to force his tongue into her mouth, only being thwarted because she clenched her teeth together. "*Kiss*" is defined in the Concise Oxford English Dictionary as "*a touch or caress with the lips as a sign of love, affection or greeting*", something very far removed from the sexual assault perpetrated upon plaintiff by second defendant.

> [37] In these circumstances it is a matter of very considerable surprise that the presiding officer did not consider dismissal as an appropriate sanction, especially in the light of second defendant's previous warning for the theft of municipal property. The relevance in this context of the presiding officer's comment that first defendant needed to uplift the skills of their employees by introducing a skills development plan is unfathomable. It may be that what he intended to convey was that first defendant should be pro-active in educating its employees with regard to its "*sexual harassment policy.*" Be that as it may, second defendant's conduct towards plaintiff was an intolerable, despicable and violent abuse of his position of authority over her and a two week suspension in no way reflected the gravity of his offence. There is, to my mind, no doubt whatsoever that Rhoode's award, measured against the charge on which second defendant had been convicted, together with his previous infraction, was grossly unreasonable and the conclusion is inescapable that Rhoode did not apply his mind properly to the issue of an appropriate sanction. Compare: Overstrand Municipality, *supra*. The awful irony is that, because of this, second defendant continues in his employment as

Corporate Services Manager whilst plaintiff has been forced to resign because of her Post Traumatic Stress Disorder.

[38] In the circumstances it is clear, subject to what I say hereunder, that second defendant is liable to pay to plaintiff such damages as she may in due course prove she has suffered in consequence of his actions. That leaves the issue of first defendant's liability, if any, to be determined.

[39] Plaintiff was an excellent witness and I have no hesitation in accepting her evidence as to the incident itself, its aftermath and the trauma experienced by her in consequence thereof. Mr. Mullins, who appeared for first defendant, did not contend otherwise.

[40] So too was Mr. Mnyimba an excellent witness. It is clear that he held plaintiff in the highest regard and was genuinely shocked and distressed by what had occurred. It is also clear that he took every step that he could, short of suspending second defendant, which he was advised was not an option, to attempt to protect plaintiff in the period preceding the disciplinary enquiry. He had delegated the responsibility for this to Mr. Bomvane.

[41] Mr. Bomvane himself was a good witness who also clearly had very high regard and affection for plaintiff whom he regarded, he said, as his sister. He candidly admitted that he had failed properly to implement the plan to protect plaintiff before the disciplinary enquiry by omitting on a number of occasions, either through "*an oversight*" or *"in the heat of the moment*" to advise her that second defendant would be attending to duties at the Jansenville office. It may be that although he clearly took the matter seriously he had underestimated the extent of the trauma suffered by plaintiff and the extent by which that trauma was exacerbated when she was unexpectedly confronted by the sight of second defendant in the office.

[42] In the light of Mr. Bomvane's evidence Mr. Mullins, conceded, correctly, that first defendant had indeed failed in its legal duty to protect plaintiff from

further trauma occasioned by any interaction with second defendant pending the disciplinary enquiry.

[43] He conceded therefore that to this limited extent first defendant would be liable to plaintiff for such damages as she might prove she had suffered in consequence of this breach of first defendant's legal duty to protect plaintiff.

[44] He submitted, however, that plaintiff had failed to discharge the onus upon her of proving that first defendant was vicariously liable for the wrong committed by second defendant during the course of his employment and that accordingly, save to the limited extent referred to above, first defendant was not jointly and severally liable with second defendant for plaintiff's damages.

[45] The issue of vicarious liability was dealt with exhaustively in K v Minister of Safety and Security 2005 (6) SA 419 (CC). In paragraph 22 O'Regan J commented as follows:

> "*If one looks at the principle of vicarious liability through the prism of s 39(2) of the Constitution, one realises that characterising the application of the common-law principles of vicarious liability as a matter of fact untrammelled by any considerations of law or normative principle cannot be correct. Such an approach appears to be seeking to sterilise the common-law test for vicarious liability and purge it of any normative or social or economic considerations. Given the clear policy basis of the rule as well as the fact that it is a rule developed and applied by the courts themselves, such an approach cannot be sustained under our new constitutional order. This is not to say that there are no circumstances where rules may be applied without consideration of their normative content or social impact. Such circumstances may exist. What is clear, however, is that as a matter of law and social regulation, the principles of vicarious liability are principles which are imbued with social policy and normative content. Their application will always be difficult and will require what may be troublesome lines to be drawn by courts applying them.*"

Section 39(2) of the Constitution provides:

> "*When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights.*"

[46] The learned Judge stated further, at paragraph 23 that "*the principles of vicarious liability and their application needs to be developed to accord more fully with the spirit, purport and objects of the Constitution.*"

[47] With reference to Minister of Police v Rabie 1986 (1) SA 117 (A), the learned Judge stated as follows at paragraph 32:

> "*The approach makes it clear that there are two questions to be asked. The first is whether the wrongful acts were done solely for the purposes of the employee. This question requires a subjective consideration of the employee's state of mind and is a purely factual question. Even if it is answered in the affirmative, however, the employer may nevertheless be liable vicariously if the second question, an objective one, is answered affirmatively. That question is whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee's acts for his own interests and the purposes and the business of the employer. This question does not raise purely factual questions, but mixed questions of fact and law. The questions of law it raises relate to what is 'sufficiently close' to give rise to vicarious liability. It is in answering this question that a court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights.*"

[48] After a review of the law of vicarious liability in other jurisdictions the learned Judge concluded at paragraph 44:

> "*From this comparative review, we can see that the test set in Rabie, with its focus both on the subjective state of mind of the employees and*

the objective question, whether the deviant conduct is nevertheless sufficiently connected to the employer's enterprise, is a test very similar to that employed in other jurisdictions. The objective element of the test which relates to the connection between the deviant conduct and the employment, approached with the spirit, purport and objects of the Constitution in mind, is sufficiently flexible to incorporate not only constitutional norms, but other norms as well. It requires a court when applying it to articulate its reasoning for its conclusions as to whether there is a sufficient connection between the wrongful conduct and the employment or not. Thus developed, by the explicit recognition of the normative content of the objective stage of the test, its application should not offend the Bill of Rights or be at odds with our constitutional order.

[49] As Mogoeng J (as he then was) said in F v Minister of Safety and Security and Others 2012 (1) SA 536 (CC) at paragraph 43:

"*The breath of fresh constitutional air that courts are enjoined by s 39(2) of the Constitution to infuse into our common law requires that the parameters of vicarious liability in deviation cases be developed to accord with the dictates of the Bill of Rights.*"

[50] In Minister of Defence v Von Benecke 2013 (2) SA 361 (SCA) the appellant was held vicariously liable for injuries sustained by the respondent when he was shot during an armed robbery with a stolen defence force issue R4 assault rifle. A defence force employee who was in charge of the safekeeping and storage of weapons and ammunition at the military base concerned had stolen and handed over R4 rifle parts and ammunition to a person not employed by the appellant. That person then used them together with a previously stolen rifle body to assemble the weapon used in the robbery.

[51] At paragraph 13 Heher JA stated with regard to these facts as follows:

"*That being so, it seems to me that the (pre-constitutional) standard test for vicarious liability – designed to achieve a balance between imputing liability without fault, which runs contrary to legal principle, and the need to make amends to an injured person, who might not otherwise be compensated (Minister of Law and Order v Ngobo 1992 (4) SA 822 (A) at 833G–H; K v Minister of Safety and Security 2005 (6) SA 419 (CC) [also reported at 2005 (9) BCLR 835 (CC) – Ed] at paragraph [21]) might not have provided a remedy in this case. Viewed from the subjective perspective of the employee Motaung he deliberately turned his back on his employment and its duties, pursuing instead his own interest and profit in stealing the components and ammunition for the rifle. Objectively considered, the theft and removal formed no part of his duties and there was no link between his own interests (as realised by the theft) and the business of his employer. In the standard terminology the conduct fell outside both the course and the scope of his employment; nor does the fact that Motaung was employed to safeguard the armoury provide the necessary connection – the submission of counsel being that the theft can be equated with a culpable neglect of his duties while in the course of carrying them out. There is, in my view, a clear distinction between a negligent performance of a task entrusted to an employee, for which the employer must usually bear responsibility, and conduct which is in itself a negation of or disassociation from the employee/employer relationship. The theft committed by Motaung falls into the second category. I can find no reason to distinguish it from the facts and principles summarised by Harms JA in Absa Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd 2001 (1) SA 371 (SCA) at 382I – 383C.*"

[52] The learned Judge stated further as follows at paragraph 14:

"*But, as O'Regan J made clear in K v Minister of Safety and Security at paragraphs [16] and [23] that cannot be the end of the matter in a deviation case, as this is: a court that finds that the standard test is not*

met is nevertheless bound to ask itself whether the rule does not require development and extension to accommodate the particular set of facts before it. In answering the question the normative values of the Constitution direct the policy that must influence the decision and they do so in relation to the objective element of the test, ie the closeness in relationship between the conduct of the employee and the business of the employer (ibid at paragraph [44]). It is no longer necessary, if the constitutional norms so dictate, to limit the proximity to those cases where the employee, although deviating from the course or scope of employment, is nevertheless acting in furtherance of the employer's business when the deviation occurs."

[53] After dealing with the nature of the employment relationship between the defence force and its employees the learned Judge concluded at paragraph 25:

"*It appears that there was, on the facts of the stated case, an intimate connection between Motaung's delict and his employment. First, he abstracted the equipment and ammunition while under a positive duty to preserve and care for the items in question; second, it is the most probable inference that the opportunity to make away with them arose from the opportunity provided by the scope of his duties without which he would have possessed neither access to them nor knowledge of the means to avoid such security controls as the defence force must have put in place.*"

[54] In this regard Pehlani v Minister of Police [2014] ZAWCHC146 is also of relevance. It dealt also with the issue of the vicarious liability of the Minister of Police on the basis of a stated case which was summarised by Rogers J as follows:

"*[3] The plaintiff and Petshwa were involved in an intimate relationship for several years until December 2010, when the plaintiff terminated it. Petshwa, who was at all material times a police reservist, made aggressive threats in an attempt to get the plaintiff to stay with her. On*

6 January 2011 she threw petrol over him and tried to set him alight. On 15 and 16 January 2011 she sent him several emails which were at once emotional and threatening. In one of these she said that, if he did not return to her, she would book out a firearm and kill him.

[4] On 18 January 2011 Petshwa booked herself on beat duty for the period 09h45-18h00. For this purpose she was attired in a SAPS uniform and issued with a SAPS firearm, 15 rounds of ammunition and the other paraphernalia of a police officer. Her beat area was confined to the Cape Town Parade. Petshwa volunteered for duty on this date with the intention of being placed in possession of the firearm and ammunition and of shooting the plaintiff.

[5] Shortly after noon the plaintiff, who worked in the city centre, went to the Mr Price retail store in Adderley Street. This was not within Petshwa's beat area. While he was in the shop Petshwa, who had followed him, approached him and fired about six shots at him with her SAPS firearm. The first shot struck him on his right thumb. He tried to disarm her, whereupon she shot at him again and he was struck in the abdomen. The plaintiff then managed to dispossess her."

[55] At paragraphs 29 and 30 the learned Judge stated as follows:

"[29] In certain circumstances the fact that a victim reposed trust in a police official will be an important circumstance in determining whether the latter's deviant conduct was 'sufficiently connected' with police business to justify the imposition of vicarious liability. Although the element of trust was mentioned in both K and F, it was not necessary in either case for the court to decide whether, if this element had been absent, vicarious liability would still have been warranted. In each case there were other circumstances in favour of vicarious liability. The element of trust may perhaps have been more critical to the outcome of F than K, given that in F the delinquent policeman was not on duty.

[30] The significance of trust, as a connecting factor between deviant conduct and SAPS business in cases such as F and K, seems to me to

be that it forges a causal link between the wrongdoer's position as a police official and the wrongful act. The factual finding in each case appears to have been that the complainant would not have got into the vehicle but for the trust which the complainant reposed in the police official. And if the complainant had not got into the vehicle, she would not or might not have been raped. It is unnecessary to decide whether, in cases such as F and K, vicarious liability depends on showing that the rape would probably not have occurred but for the fact that the complainant reposed trust in the delinquent police official. It may perhaps be sufficient that the complainant's trust facilitated the perpetration of the rape even though the wrongdoer would, in the absence of trust, probably have forced the complainant into his vehicle in any event."

[56] The learned Judge concluded at paragraph 34, that "*although trust of the kind contemplated in K and F (i.e. individual trust by the victim) is not a factor in the present case, trust in a broader sense cannot be discounted.*"

[57] There has been, in recent years, a growing realisation and appreciation of the prevalence and the devastating effects of sexual harassment in the workplace both in South Africa and in other jurisdictions. In Gaga v Anglo-Platinum Ltd & Others (2012) 33 ILJ 329 (LAC) the following was stated at paragraph 48:

"By and large employers are entitled (indeed obliged) to regard sexual harassment by an older superior on a younger subordinate as serious misconduct, normally justifying dismissal. In SA Broadcasting Corporation Ltd v Grogan NO & another, Steenkamp AJ (as he then was) observed that sexual harassment by older men in positions of power has become a scourge in the workplace. Its insidious presence is corrosive of a congenial work environment and productive work relations. Harassment by its nature will steadily undermine the supervisory authority vested in the superior, upon which the employer perforce must rely, and hence will diminish or even destroy the trust

requisite in the employment relationship; ultimately justifying the imposition of the sanction of dismissal."

[58] In Campbell Scientific Africa (Pty) Ltd v Simmers & Others (2016) 37 ILJ 116 (LAC) Savage AJA said:

"*[18] Our constitutional democracy is founded on the explicit values of human dignity and the achievement of equality in a non-racial, non-sexist society under the rule of law. Central to the transformative mission of our Constitution is the hope that it will have us re-imagine power relations within society so as to achieve substantive equality, more so for those who were disadvantaged by past unfair discrimination.*

[19] The treatment of harassment as a form of unfair discrimination in s 6(3) of the Employment Equity Act 55 of 1998 (EEA) recognises that such conduct poses a barrier to the achievement of substantive equality in the workplace. This is echoed in the 1998 Code of Good Practice on the Handling of Sexual Harassment Cases (the 1998 code), issued by NEDLAC under s 203(1) of the Labour Relations Act 66 of 1995 (LRA),and the subsequent 2005 Amended Code on the Handling of Sexual Harassment Cases in the Workplace (the amended code), issued by the Minister of Labour in terms of s 54(1)(b) of the EEA.

[20] At its core, sexual harassment is concerned with the exercise of power and in the main reflects the power relations that exist both in society generally and specifically within a particular workplace. While economic power may underlie many instances of harassment, a sexually hostile working environment is often 'less about the abuse of real economic power, and more about the perceived societal power of men over women. This type of power abuse often is exerted by a (typically male) co-worker and not necessarily a supervisor'.

[21] By its nature such harassment creates an offensive and very often intimidating work environment that undermines the dignity, privacy and integrity of the victim and creates a barrier to substantive

equality in the workplace. It is for this reason that this court has characterised it as 'the most heinous misconduct that plagues a workplace'."

[59] In F *supra* Mogoeng J stated as follows at paragraph 55 and 56:

"*55. Many men of our society, not unlike the policeman who raped Ms F, continue to force themselves on women and on girl-children. Often, with impunity, men forcibly violate women's bodies, privacy, dignity and self-worth, freedom, and the right to be treated with equal regard...*

56. The threat of sexual violence to women is indeed as pernicious as sexual violence itself. It is said to go to the very core of the subordination of women in society. It entrenches patriarchy as it imperils the freedom and self-determination of women."

[60] Grobler v Naspers Bpk en n Ander 2004 (4) SA 221 (C) appears to be the only South African case in which the issue of the vicarious liability of the employer for the actions of its employee in circumstances akin to the present was pertinently raised and decided by the Court. Nel J found that in the circumstances pertaining to the matter before him the first defendant therein was vicariously liable for the sexual harassment by second defendant of the plaintiff. The second defendant was a manager and the plaintiff a secretary. The English headnote of the case at 225F, which correctly reflects what was said in the judgment, reads as follows:

"*[T]he basic question was whether the unlawful act was sufficiently connected to the conduct authorised by the employer to justify the imposition of vicarious liability. In general the existence of a significant relationship between the creation or increase in the risk of the commission of the unlawful act and resultant wrong indicated a sufficient relationship for imposition of vicarious liability. Relevant factors were the opportunity presented to the harasser to abuse his*

authority, the ambit of his authority, and the vulnerability of a potential victim to the abuse thereof."

[61] Nel J held that taking into consideration all relevant factors, the working relationship between manager and secretary was clearly one that created or increased the inherent risk of sexual harassment and that in the circumstances it was fair to hold the first defendant vicariously liable for the sexual harassment of the plaintiff.

[62] In the course of his judgment Nel J referred to the Canadian case of Boothman v Canada [1993] 3 FC 381 (TD) where the following was stated:

"*I can see no difference in law between the case where a servant who, entrusted with the supervision of personnel, abuses that authority in the manner described in these reasons, and that of a servant entrusted with the care of goods who converts those goods for his or her own use. In both cases, the wrong is directly attributable and connected to the duty of responsibility conferred on the servant.*

In my view, when an employer places an employee in a special position of trust, he or she bears the responsibility of ensuring that the employee is capable of trust. That is the rationale which stands behind the vicarious liability of an employer.

Mr Stalingsky used the position of trust in which he was placed by his employer to cause harm to the plaintiff. In so doing, he was acting in the course of his employment and the defendant's liability was thereby engaged."

[63] In Boothman's case, *supra*, the plaintiff was severely harassed by a superior who had knowledge of her fragile mental state. The above dictum was approved in Clark v Canada [1994] 3 FC 323 (TD) where an employee suffered sexual harassment over a period of four years from her colleagues and supervisors.

[64] The Grobler case went on appeal to the Supreme Court of Appeal. The decision of the Supreme Court of Appeal is reported as Media 24 Ltd and Another v Grobler 2005 (6) SA 328 (SCA). In Media 24 Ltd, *supra,* Farlam JA summarised the reasoning of Nel J as follows at paragraph 16:

> *"He then proceeded to hold the first appellant, as the employer of the second appellant, vicariously liable for his actions. He came to this conclusion after a comprehensive discussion of the common law as to vicarious liability and recent developments thereof in the United States of America, Canada, the United Kingdom, Australia and New Zealand. He expressed the view that policy considerations justified the conclusion that the first appellant should be held vicariously liable for the sexual harassment of the respondent by the second appellant but that, if the existing rules relating to vicarious liability in our law are not flexible enough or do not make adequate provision for changed circumstances in order to deal with the problem of sexual harassment in the workplace, then, he said, the Constitution obliges the courts to develop the common law accordingly.* "

[65] At paragraph 63 the learned Judge concluded that it was not necessary to deal with the issue of vicarious liability as the plaintiff had in any event succeeded in establishing her alternative cause of action.

[66] In dealing with the alternative cause of action Farlam JA stated at paragraph 65:

> *"It is well settled that an employer owes a common-law duty to its employees to take reasonable care for their safety (see, for example, Van Deventer v Workman's Compensation Commissioner 1962 (4) SA 28 (T) at 31B - C and Vigario v Afrox Ltd 1996 (3) SA 450 (W) at 463 F-I). This duty cannot, in my view, be confined to an obligation to take reasonable steps to protect them from physical harm caused by what may be called physical hazards. It must also in appropriate*

circumstances include a duty to protect them from psychological harm caused, for example, by sexual harassment by co-employees."

[67] At paragraph 68 the learned Judge continued:

"*It is clear, in my opinion, that the legal convictions of the community require an employer to take reasonable steps to prevent sexual harassment of its employees in the workplace and to be obliged to compensate the victim for harm caused thereby should it negligently fail to do so. I do not think that the fact that the Legislature has enacted legislation providing a statutory remedy for unfair labour practices involving sexual harassment justifies a holding that, absent the statutory remedy (which presumably was intended to be quicker, cheaper and more convenient than the common-law remedy), the common law is defective in failing to provide a remedy in a situation which cries out for one.*"

[68] It is of interest that in the United States of America, in cases brought under Title VII of the Civil Rights Act, 1964, an employer's liability for workplace harassment depends on the status of the harasser. It is only if the harasser is a supervisor that the employer is strictly liable. In Vance v Ball State University 570 US, June 24, 2013, it was held by a majority of 5 to 4 that an employee is a "*supervisor*" for purposes of liability under Title VII, only if he or she is empowered by the employer to take "*tangible employment actions*" against the victim namely, to effect "*a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.*"

[69] The minority judgment, per Ginsberg J, held that the appropriate question was whether the employer has "*given the alleged harasser authority to take tangible employment actions or to control the conditions under which subordinates do their daily work. If the answer to either enquiry is yes,*

vicarious liability is in order, for the superior-subordinate working arrangement facilitating the harassment is of the employer's making." (My emphasis)

[70] It is against this background that I turn to consider the particular issue with which this case is concerned, namely whether the common law should be developed to hold an employer vicariously liable in circumstances where one of its employees is subjected to sexual harassment by another superior employee. I stress that this case is not concerned with the situation where the perpetrator of the sexual harassment is a co-worker and not a superior, where different considerations may apply.

[71] In determining this question I also have regard to what was stated by Ponnan JA in City of Cape Town v South African National Roads Authority Ltd 2015 (3) SA 386 (SCA) at paragraph 29, namely:

> "*In addition s 39(2) of the Constitution makes it plain that, when a court embarks upon a course of developing the common law, it is obliged to 'promote the spirit, purport and objects of the Bill of Rights'. This ensures that the common law will evolve, within the framework of the Constitution, consistent with the basic norms of the legal order that it establishes. The Constitutional Court has already cautioned against overzealous judicial reform. Thus, if the common law is to be developed, it must occur not only in a way that meets the s 39(2) objectives, but also in a way most appropriate for the development of the common law within its own paradigm. Faced with such a task, a court is obliged to undertake a two-stage enquiry. It should ask itself whether, given the objectives of s 39(2), the existing common law should be developed beyond existing precedent — if the answer to that question is a negative one, that should be the end of the enquiry. If not, the next enquiry should be how the development should occur and which court should embark on that exercise.*"

[72] There is no doubt that in molesting the plaintiff the second defendant was acting solely for his own purposes and was in pursuit of his own prurient

objectives. He was not furthering first defendant's purposes or obligations in any way. However, the incident occurred while second defendant was purportedly rendering service to first defendant and in the workplace.

[73] It is accordingly necessary to consider the objective element of the test which, as set out in K *supra* at paragraph 44, "*relates to the connection between the deviant conduct and the employment, approached with the spirit, purport and objects of the Constitution in mind.*" Mr. Mullins submitted that it was hard to conceive of conduct more removed from second defendant's duties and the business of first defendant than his sexual assault on plaintiff. He relied strongly in this regard on the case of Minister van Veiligheid v Phoebus Apollo Aviation BK 2002 (5) SA 475 (SCA) a matter in which it was held that the employer was not liable for the "*theftuous and fraudulent conduct*" of three dishonest policemen.

[74] In my view, however, that reliance is misplaced. The Phoebus Appollo case *supra* was decided prior to the decisions in K and F *supra* and, obviously, without regard to the principles expounded therein, in particular, relating to the spirit, purport and objects of the Bill of Rights. In my view it is not of assistance in the resolution of the present matter. I do not wish to burden this judgment further with a recital of the facts therein but I venture to suggest, with respect, that had the matter come before the Supreme Court of Appeal after K and F the outcome may well have been different.

[75] In this context it is important to bear in mind that the Bill of Rights affirms the right of all people to human dignity (section 10) and to security of their persons including the right to bodily and psychological integrity. (Section 12). Second defendant, by his gross actions, infringed plaintiff's rights in both respects. His actions created an offensive and intimidating work environment that undermined plaintiff's dignity, privacy and integrity. Compare Campbell Scientific *supra* at paragraph 21.

[76] Second defendant, as Corporate Services Manager, was in a position of authority over plaintiff and was her immediate superior. She trusted him

implicitly. She was obliged, by virtue of her position as archives clerk, not only to report to him but also to work with him closely, at times after hours when they were alone at the offices. It was because of the nature of their employment relationship that the opportunity presented itself to second defendant, in the course of carrying out his duties during his hours of work at his employer's facilities, to abuse his authority and to take advantage of the vulnerability of the plaintiff. Compare Grobler's case, *supra*.

[77] The first defendant placed the second defendant in the situation where he was able to act as he did. First defendant gave him the authority to control the conditions under which plaintiff, as his subordinate did her daily work. (Vance v Ball State University, *supra.*) This employment relationship facilitated his actions. In these circumstances I agree with respect, with what was said in Boothman's case, *supra*, namely, that when an employer places an employee in a special position of trust, the employer bears the responsibility of ensuring that the employee is capable of trust. That trust "*forged a causal link*" between second defendant's position as Corporate Services Manager and the wrongful act. Compare: Pehlani *supra*.

[78] As I have said above, there is a new understanding and appreciation of the prevalence of sexual harassment in the workplace and of its devastating effects on the victim. It has become, in effect, a systemic and recurring harm.

[79] In Bazley v Curry [1999] 2 SCR 534 the Canadian Supreme Court stated as follows at paragraph 33:

> "*Beyond the narrow band of employer conduct that attracts direct liability in negligence lies a vast area where imaginative and efficient administration and supervision can reduce the risk that the employer has introduced into the community. Holding the employer vicariously liable for the wrongs of the employee may encourage the employer to take such steps...*"

So too, in my view, in cases involving sexual harassment. Section 12 of Schedule 2 to the Local Government: Municipal Systems Act 32 of 2000 provides:

> "*A staff member of a municipality may not embark on any actions amounting to sexual harassment.*"

It is common cause that there is also in place a "*Code of Good Practice on Sexual Harassment*." There was certainly no evidence in this case that first defendant had provided any training to its employees in this regard.

[80] I bear in mind the caution reiterated by Ponnan JA against overzealous judicial reform but, in my view, having regard to the objectives of s 39(2) constitutional norms dictate that the common law be developed and extended to accommodate the present set of facts and that first defendant accordingly be held vicariously liable for the conduct of second defendant.

[81] There was some debate as to whether second defendant should be held liable in respect of the admittedly unlawful failure on the part of the first defendant to protect the plaintiff during the period leading up to the disciplinary enquiry and, in particular, whether such failure could be seen as a *novus actus interveniens* causing a break in the chain of causation thus allowing second defendant to escape liability in respect of some of the damages suffered by plaintiff. In my view, however, such failure did not constitute a true *novus actus interveniens*. It would have been reasonably foreseeable to second defendant that there would be occasions when he would meet plaintiff at the Jansenville offices and that plaintiff would be further traumatised thereby.

[82] Accordingly the following order will issue:

1. It is declared that the first and second defendants are jointly and severally liable for such damages as the plaintiff may prove she has

suffered in consequence of the sexual assault upon her on 16 November 2009 at the offices of first defendant in Jansenville.

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

_____
J.D. PICKERING
JUDGE OF THE HIGH COURT

Appearing on behalf of Plaintiff: Adv. S.S.W. Louw
Instructed by: Nolte Smit Attorneys

Appearing on behalf of First Defendant: Adv. N. Mullins
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