IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

CASE NO: - C32/2005

In the matter between

SIPOKAZI PILISO	Applicant
and	
OLD MUTUAL LIFE ASSURANCE COMPANY (S A) LIMITED	First Respondent
THEO VAN DER BERG	Second Respondent
ZAMA MJEKULA	Third Respondent
PHOKA TALI	Fourth Respondent

JUDGMENT

NEL AJ

[1] On 30 May 2004, the applicant, Ms Piliso, an administrator in the first respondent's document management systems department ("DMS"), found a note written in Afrikaans on a photograph of herself. The photograph was affixed to her workstation in the DMS department. The words written on the photograph were extremely crude and offensive. The

next day she found a similar second note on a photograph of hers, this time in English. A similar note was received by another female employee of the first respondent at more or less the same time.

[2] Ms Piliso felt scared, shocked, unsafe and insulted as a result of these two incidents. She, after receipt of the second note, immediately called her colleagues and the second respondent, Mr Theo van den Berg ("van den Berg") who was part of the first respondent's management. He promised and undertook to submit documents to the first respondent's top management and to convene a meeting with employees under his supervision. Not only did he not do so, alleges the applicant, but she is generally aggrieved by the manner in which the respondents dealt with these incidents of sexual harassment. I will deal fully with this later herein.

[3] Ms Piliso's complaint is in the main in terms of the Employment Equity Act 55 of 1998 (the 'EEA"). In the alternative she claims in delict on the basis that the first respondent failed in its duty to ensure that its workplace was safe. In the further alternative, Ms Piliso claims by virtue of the violation of her constitutional rights in the workplace.

RELEVANT PROVISIONS OF THE EEA

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[4] It was suggested that the legislative framework within which I am to decide this matter is to be found in Sections 2, 3, 5, 6, 50(2) and 60 of the EEA.

[5] Section 2 sets out the purpose of the legislation which is:

"To achieve equity in the workplace by –

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

b) (b) .... "

[6] Section 3 of the EEA deals with the way in which the Act is to be interpreted. It provides that:

"**3. Interpretation of this Act**

This Act must be interpreted –

(a) in compliance with the Constitution;

(b) so as to give effect to its purposes;

c) (c) taking into account any relevant code of good practice issued in terms of this Act or any other employment law;

(d) In compliance with the international law obligations of the Republic, in particular those contained in the International Labour Organisation Convention (No. 111) concerning Discrimination in Respect of Employment and Occupation."

[7] The EEA places a positive duty on an employer to ensure that its workplace is free from unfair discrimination. Section 5 of the EEA accordingly reads as follows:

"5. **Elimination of Unfair Discrimination**

Every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice."

And "employment practice" is defined in the EEA as including "the working environment and facilities". Commentators have noted that Section 5 of the EEA:

"... requires employers to take steps in advance, to be proactive in the elimination of unfair discrimination and not simply to sit back and wait to be informed before doing something. The absence of effort in anticipation of discrimination may well found liability."

(See Thomson and Benjamin, South African Labour Law, Volume 1 at CC1–25 to CC1-26).

[8] The EEA clearly prohibits sexual harassment of an employee in the workplace. Section 6 accordingly provides as follows:

"6. **Prohibition of Unfair Discrimination**

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

(2) ....

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

[9] Ms Rabkin-Naicker, who appeared on behalf of the applicant, submitted that, as the respondents admitted that sexual harassment of the applicant had taken place in the workplace, it was not necessary to consider what exactly constitutes sexual harassment.

[10] Section 60 of the EEA creates a form of statutory vicarious liability in respect of an employer whose employee sexually harasses a co-employee while at work. It provides as follows:

"**60. Liability of Employer**

1) (1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.

(2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.

3) (3) If the employer fails to take the necessary

steps referred to in subsection 2, and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.

4) (4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practical or to ensure that the employee would not act in contravention of this Act."

THE APPLICANT'S SECTION 60 OF THE EEA CLAIM.

[11] I do believe I will not do Ms Rabkin-Naicker's argument before me an injustice by summarising it as, in the main, contending that the first respondent is vicariously liable in terms of the prescripts of Section 60 of the EEA. In doing so, it was argued that Ms Piliso had complied with her obligation in terms of Section 60(1) in that the conduct constituting a contravention of a provision of the EEA was immediately brought to the attention of the employer. It was accordingly contended that the first respondent in particular failed to comply with its obligations prescribed by Section 60(2) of the EEA. Accordingly it was argued that the necessary steps required by Section 60(2) meant that an

employer must actively follow its procedures prescribed in such sexual harassment policy as it has. The first respondent's sexual harassment policy promised that complaints would be treated with respect and would be handled with seriousness and sensitivity and that appropriate action would be taken. It was contended that, in breach of this policy, the first respondent was dilatory in responding to Ms Piliso's report and that it failed to display the requisite standard of care towards its employee.

[12] The counter argument presented by Mr Madima, who appeared on behalf of the respondents, was to the effect that it was essential for the applicant to prove that an employee of the first respondent was responsible for this misconduct for it to attract vicarious liability under Section 60 of the EEA. He contended that the applicant had failed to establish this essential jurisdictional fact.

[13] It is clear that, for Section 60 of the EEA to find application, an applicant must, at the very least, allege that an employee, while at work, had contravened a provision of the EEA whilst at work. Once this has been alleged, the conduct needs to be brought to the attention of the employer and this must be done immediately.

[14] It was pointed out on behalf of the first respondent that Section 60(3) of the EEA provides that an employer will only be deemed to have contravened a relevant provision of the EEA if it was proven that an employee of that employer had contravened that provision of the EEA. It was submitted that the use of the definite “the employee” in subsection 60(3) indicated that a particular employee had to be identified, and that employee be proven had contravened the relevant provision of the EEA, before any liability could possibly attach to the employer under this section of the EEA.

[15] In light of the fact that Section 60 of the EEA clearly is intended to create statutory vicarious liability in respect of an employer where its own employee contravened a provision of the EEA, it is apparent that it was a prerequisite that the applicant herein should, as a minimum, have alleged that an employee of the first respondent had contravened a provision of the EEA. In addition, or as a minimum requirement, the applicant bore the onus to prove that such employee of the first respondent had contravened the provision of the EEA. Once these minimum requirements had been met, the deeming provision would kick in and would the employer be deemed to have contravened the particular provision of the EEA.

[16] I could nowhere find that Ms Piliso actually alleged that an employee of the first respondent, whilst at work, contravened a provision of the EEA. The applicant also did not adduce any direct evidence to the effect that it was an employee of the first respondent who had contravened the sexual harassment herein. If I understood the argument of Ms Rabkin-Naicker correctly, she contended that Section 60 did find application herein as the applicant had made the necessary allegations in the pleadings of her case. I must confess that I could not find, even by implication, the allegation being made by the applicant in her pleadings that it was an employee of the first respondent who had contravened a provision of the EEA. Even if I were to accept this allegation to have been implied, either at the time of the applicant having reported the incident to her employer, or in the pleadings, then I still need to be satisfied that the applicant has satisfied the onus of proving that an employee of the first respondent had contravened the relevant provision of the EEA.

[17] In this regard, the argument presented on behalf of the applicant was, I believe, two-fold. In the first instance it was suggested that I should, on a balance of probability, find that it was an employee of the first respondent who committed the sexual harassment. It was argued that I

should reject the so-called “contractors defence” put up by the first respondent. The evidence in this regard on behalf

of the applicant was that there was access control into the DMS department because it contained confidential client files. So the suggestion was obviously that it could only have been one of the first respondent's employees who could have entered the DMS department area at the time in question and perpetrated the sexual harassment.

[18] It was countered by the first respondent that, whilst there was control to enter the area, persons could at the time leave the area by simply pressing a button which appears to have allowed a party on the inside of the DMS area to leave it without having to use his or her access card and at the same time for another person to then enter the area without an access card.

[19] It was however submitted on behalf of the applicant that the first respondent was hoisted by its own petard when, in its efforts to present its so-called contractor's defence, its witnesses painted a picture of a complete lack of control into the DMS department area where the applicant was working. This evidence, so it was contended, merely gave substance to the applicant's allegation that the first respondent failed to provide a work environment that was safe for its employees, particularly safe from sexual

harassment.

[20] It was further suggested that the question whether an employee of the first respondent, or some other person, was responsible for the acts of sexual harassment had to be considered with due regard to the adequacy of the employer's actions to consult the relevant parties and to take the necessary steps to eliminate the alleged conduct. It was accordingly suggested that where an employer demonstrably failed to properly investigate the alleged conduct, as was alleged happened in the present matter, I should be loath to give any weight at all to the first respondent's allegation that the perpetrator may have been an independent contractor or outside visitor to the premises. This, it was suggested, was more especially the case where the first respondent, although able to, failed to investigate the possible involvement in these incidents in question by its contractors' staff. It was also submitted that, given the objects and purpose of the EEA, Section 60 thereof should not be read to allow an employer to avoid liability, when it demonstrably failed to make any reasonable effort whatsoever to investigate and to identify the perpetrator of sexual harassment.

[21] The applicant's main claim was therefore founded on the proposition that the first respondent failed to take the requisite steps contemplated in Section 60(2) of the EEA and that the deeming provision contained in Section 60(3) had been triggered. That being the case, so it was argued on behalf of the applicant, the first respondent did not meet the "reasonably practicable" standards set out in Section 60(4) of the EEA, to ensure that its employees would not act in contravention of the EEA.

[22] As I said, an applicant who wants to rely on the statutory vicarious liability provisions of Section 60 of the EEA bears the onus to satisfy a Court that it was an employee of that applicant's employer who, whilst at work, contravened a relevant provision of the EEA. It is not the employer who bears the onus to prove that it was not one of its employees who contravened a provision of the EEA. Similarly, I do not believe that, if an employee is unable to satisfy the onus to prove that it was an employee of his or her employer who had in fact contravened the relevant provision of the EEA, that it is then open to that applicant to say that, because of the failure by the employer to

properly investigate the matter, the Court should come to the assistance of that applicant party by concluding, on the probabilities, that it was an employee of that employer who perpetrated the contravention of the EEA.

[23] It is made very clear (in Section 6(3) of the EEA) that harassment of an employee is a form of unfair discrimination

When an employee of a particular employer has fallen foul of Section 6(3), and if the employer is not able to prove that it did all that was reasonably practical to ensure that the employee would not act in contravention of the EEA, then only will such employer be vicariously liable for the conduct of one of its employees.

[24] Even if I were to assume in favour of the applicant that she had, either at the time of the incidents, or in her pleadings, alleged that an employee, whilst at work, had contravened a provision of the EEA, the applicant did not adduce any evidence that it was an employee of the first respondent who had sexually harassed her. On the evidence adduced, I

am satisfied that it can not be ruled out that it was at the time of the incidents of sexual harassment possible for a person other than an employee of the first respondent to have entered the DMS department area and to have committed the acts of sexual harassment of the applicant. I am unable to agree that I can, on a balance of probabilities, on the evidence before me, find herein that an employee of the first respondent was responsible for the admitted acts of sexual harassment of the applicant. I am therefore also unable to agree that the deeming provision of Section 60 of the EEA was activated, or that the first respondent has been shown to be vicariously liable, under circumstances where the applicant has not satisfied the onus of proving, in the first place, that the contravention of the EEA was perpetrated by an employee of the first respondent. That being the case, I am accordingly of the view that the applicant has failed to establish an essential jurisdictional fact to succeed in her claim in terms of Section 60 of the EEA, namely that an employee of the first respondent had committed the sexual harassment of the applicant. I am obviously then unable to hold the first respondent vicariously liable in terms of Section 60 of the

EEA for such sexual harassment as the applicant did suffer at the hands of an unknown perpetrator, or to award her damages or compensation.

I accordingly turn to consider the applicant's alternative claims.

THE APPLICANT'S DELICTUAL CLAIM.

[25] Whilst it was contended on behalf of the respondents that any delictual claim arising out of an employer's alleged failure to provide a safe working environment should be determined by the Civil Courts, I am satisfied that this Court does have jurisdiction to deal with delictual claims arising from employment and from labour disputes.

[26] It is accepted and trite that an employer has a common law duty to take reasonable care for the safety of its employees and to provide its employees with a safe working environment. Employers are statutorily enjoined to pro-

actively prevent and/or eliminate discrimination and harassment, obviously including sexual harassment. The SCA has held that this duty of employers under the common law must logically also include the duty, under appropriate circumstances, to protect employees from the psychological harm which could possibly be caused by sexual harassment by co-employees. See Media 24 Ltd and Another v Grobler 2005 (6) SA 328 (SCA) at 349 E-F. The SCA in the Media 24 case (at 350 F-G) also held 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.

[27] Whilst it was common cause between the parties that the conduct complained of by Ms Piliso amounted to sexual harassment, and it was admitted by the respondents that the applicant did suffer harm as a result of the sexual harassment, the issue remained whether the first respondent, or any of the other individual respondents, or through them, the first respondent, were liable in law to pay

the damages and compensation claimed by the applicant for the harm she had suffered as a result of the sexual harassment.

[28] To attract vicarious liability at common law the plaintiff in essence had to prove that the perpetrator of the sexual harassment was an employee of the employer. The applicant would further have had to prove that the perpetrator committed the delict against her whilst acting within the course and scope of the perpetrator's employment.

[29] The applicant said she did not know who wrote the offending words on her photograph on the two occasions in question. The first respondent contended that it was not only its employees who had access to the area in question but also outsiders such as messengers from courier companies, post office personnel and cleaners. It was further testified on behalf of the first respondent that, once persons had gained access through the main entrance of its workplace, they would be able to gain access to the DMS area in question, as well as other areas inside the building

without access cards. Cleaners, for example, had access to the area in question at night prior to the incidents of sexual harassment. I am satisfied that the applicant has neither alleged nor has she succeeded to prove that the perpetrator of the sexual harassment is or was an employee of the first respondent. In light of the evidence on behalf of the first respondent, not successfully rebutted by the applicant, that it was possible for persons other than its employees to gain access to the area in question, I am unable, even on the probabilities, to find that the sexual harassment herein was perpetrated by an employee of the first respondent in the course and scope of his/her employ. In the result the applicant's delictual claim in terms of the common law must also fail.

THE APPLICANT'S CONSTITUTIONAL DAMAGES CLAIM.

[30] I turn to deal with the applicant's further alternative claim for constitutional damages. It was argued on the applicant's behalf that constitutional damages may be awarded as appropriate relief where no statutory remedies have been given, or no adequate common law remedies exist.

[31] According to the applicant's statement of case, her claim is based on the allegation that the first respondent, through its management personnel, including but not limited to the third and fourth respondents, failed and/or neglected to promote

equal opportunity in the workplace as it failed to eliminate unfair discrimination in its employment practices. Notwithstanding the aforesaid allegation, the fourth respondent did not feature in this case. Only the second and third respondents did. This is not relevant herein in light of the conclusion which I arrived at and the basis therefore. The first respondent is further accused of having failed and neglected to ensure that the applicant was working in a safe and secure environment and to have failed or neglected to investigate properly, or at all, the issues surrounding her harassment. The applicant alleged that the first respondent had trivialised the issue of sexual harassment in that it failed and/or neglected:

- • to provide assistance to the applicant by counselling her;
- • to provide certainty in procedures to be followed; and

- not to expose the applicant to further acts of harassment or intimidation.

[32] Before I consider these allegations further, I first turn to the issue of "constitutional damages". Conradie JA in Jayiya v M E C for Welfare, Eastern Cape, 2004 (2) SA 617, at 618A, had the following to say about it:

> "'Constitutional damages' in the sense discussed in *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) (1997 (7) BCLR 851) at 826 (SA) para [69] might be awarded as appropriate relief where no statutory remedies have been given or no adequate common-law remedies exist. Where the lawgiver has legislated statutory mechanisms for securing constitutional rights, and provided, of course, that they are constitutionally unobjectionable, they must be used. ..."

[33] As I have indicated, Section 60 of the EEA or a delictual remedy under the common law based on vicarious liability of the first respondent does not find application herein simply by reason of the fact that the applicant has not been able to show that it was an employee of the first respondent who had perpetrated the sexual harassment. I am also satisfied that the conduct complained of to which I have referred a moment ago in paragraph 31, can not be dealt with in terms of any of the provisions of the Labour

Relations Act 66 of 1995 (“the LRA”). None of the individual respondents stood accused of personally being liable to pay the applicant any damages or did the applicant make out a case that these individual respondents were personally liable towards the applicant.

[34] The reason for the applicant failing to prove a claim in essence related to her failure to satisfy the onus resting on her to prove that an employee of the first respondent perpetrated the sexual harassment which she suffered. The applicant did not strenuously, if at all, pursue any case that the respondents had failed any of their legal duties prior to the incidents of sexual harassment. Her pleadings essentially complain of the first respondent’s failures to properly respond and/or react to the incidents of sexual harassment to which the applicant had been subjected in the first respondent’s workplace. I am therefore called on to now consider the response by the first respondent to the admitted acts of sexual harassment perpetrated against its employee at its workplace under circumstances where the identity of the perpetrator is unknown. The first respondent admitted that the applicant had suffered harm as a result of

the sexual harassment, but denies that it is liable to pay the applicant any damages for such harm suffered. I am of the view that what the applicant complains of (as more particularly reflected in paragraph 31 hereof) does not attract a statutory remedy under the LRA. In a recent case before this court, incidentally also involving the first respondent, the matter involved racism in the workplace. (See SA Transport & Allied Workers Union on behalf of Finca v Old Mutual Life Assurance Company (SA) Ltd and another (2006) 27 ILJ 1204 (LC)). One of the first respondent's employees had made herself guilty of a patently racial slur which Revelas J did not hesitate to find constituted unfair discrimination against persons based on their race, ethnic and social origin as foreseen by Section 9(3) of the Constitution. At page 1209, para. [9], Revelas J states the following:

> "An employee who experiences this type of discrimination in the workplace, having the right to fair labour practices in terms of Section 23(1) of the Constitution, has the right to approach a competent Court in terms of Section 38 of the Constitution for appropriate relief. That would include the Labour Court."

In the same judgment (at page 1215, para [39] Revelas J said the following:

> "The delay and its cause were very unfair to Mr Finca. He was justifiably angry and hurt, he deserved far better treatment than he received, by way of addressing his problem. ..... In my view, the first respondent's failure to protect Mr Finca amounted to direct discrimination."

It is apparent that Mr Finca's complaint was also directed at what his employer had done, or failed to do, after the discrimination had been perpetrated against him by a fellow employee.

[35] What is clear from the EEA is that unfair discrimination is expressly prohibited on any one, or a combination of grounds listed in that Act. Sexual harassment is equally clearly regarded as a form of unfair discrimination. There is equally no doubt that employers are required to take steps in advance, and to be pro-active, in the elimination and prevention of unfair discrimination. It may not simply sit back and wait to be informed of it having happened before doing something. The absence of effort in anticipation of discrimination may well found liability.

(See Thomson and Benjamin, South African Labour Law, (supra) Volume 1 at CC 1-24 to CC1–27)

[36] Mr Madima's opening remark in this Court was, rather dramatically, to the effect that *"this is a case like no other"*. A number of witnesses with extensive experience in the employment field agreed that the extremely vulgar comments made, and the manner in which it was done, had never been experienced by them nor have they ever heard of this kind of conduct in the workplace. The relevance of this is that I am of the view that one can hardly find that the first respondent could or should have anticipated, or foreseen, this kind of conduct being perpetrated against one of its employees. This being the case, it can hardly be expected of the first respondent to have done anything more, or else, which may have prevented this most unfortunate incident. I am accordingly not persuaded at all that the first respondent (or for that matter any of the other respondents) have been shown to have failed to provide a safe working environment to the applicant in the sense that they had failed to take reasonable steps to prevent this

kind of conduct from occurring.

[37] This however still leaves me to finally consider the conduct of the first respondent complained of by the applicant and relating in essence to how it acted, or responded, after it had become aware of this most serious attack on the applicant's *dignitas* and person at her workplace. The applicant says that this incident, as well as the first respondent's reaction or response thereto, or its failure to do so, through its senior management level employees, left her to feel insulted, angry, humiliated, embarrassed and unsafe. The respondents did not seriously, if at all, take issue with the expert psychologist evidence as to what specific incidents had caused the applicant mental trauma. One cause of trauma, according to the psychologist, was the way in which the applicant experienced the first respondent's reaction or response to the incident.

[38] The undisputed evidence by the applicant was that, as a result of the incidents, her self confidence was low and she felt bad about herself. She had feelings of inadequacy and at home she was moody which she never was before. She

was unable to trust people around her, especially at work.

She even considered resigning from work which would have affected her family as she was the breadwinner. She had to go under psychological supervision and care as a result of shock and stress caused by the harassment.

[39] In this regard, it is however important to consider what I accept as the undisputed evidence of Ms Helena Thornton, a clinical psychologist, who testified on behalf of the applicant. She said that the first shock to the applicant, as much as one could artificially separate them, was the receipt of the sexual harassing notes on the applicant's photograph. To this the response from the applicant was one of humiliation, anxiety, fear and simply the shock of receiving these notes on her photograph.

[40] The second event, according to the psychologist, that caused psychological distress for the applicant, was that she did not know who it was (who had done these dastardly deeds) and that had the result that she did not know who to trust. The applicant had confirmed that, with about 70

people who worked in the same area as her, and with her not knowing whether it could be a fellow colleague, or whether it could be a manager who might have done this to her, it led to her even beginning to distrust the first respondent's management. This in turn led to a lot of withdrawal on the part of the applicant, for example not wanting to work late.

[41] Ms Thornton testified that a third area, which she could identify as a source of psychological distress for the applicant, was the response from her employer. The way she felt they were not listening to her, not taking her seriously, responding too slowly, not giving her feedback and especially being sent back to the DMS area which she had been seconded away from, when she felt that would be the worst thing that could happen to her. The applicant's responses to this third area of identified psychological distress were that she felt disappointed, angered and fearful. According to Ms Thornton, the applicant was very angry at the slow pace and the lack of feedback on the part of her employer. She further testified that the applicant experienced horror and anxiety, helplessness and fear

when she was told by her employer that she had to return to the DMS department where the abuse had happened. The applicant felt penalised because others had the chance to be promoted, but because she no longer wanted to work late, she felt she would not be seen to be working late and that may affect her prospects of promotion. The applicant felt that she was unheard and that her fears were not being taken seriously, having told people she was fearful to return, yet them insisting she must return. The applicant felt she was uncared for and isolated and she began to experience increasing paranoia, feeling that the reasons why she was not being heard, or things were not being taken seriously, was maybe because she was black, or that people were talking about her and that it was a racial thing.

[42] The respondents did not present any counter expert evidence to any of this evidence on behalf of the applicant. All that was attempted to be done was that in cross examination and argument it was suggested that the greater part of the psychologist's expert evidence was hearsay as she allegedly had relied on a report compiled shortly after the incident by a psychiatrist, Dr Fortuin. It

was accordingly suggested that Ms Thornton's evidence was hearsay. I do not agree. Ms Thornton's evidence was very clearly that it is a very standard practice for professionals like her to use another professional's report, but simply for purposes of comparison and to see whether she comes to the same conclusions. She testified that Dr Fortuin's report was very relevant and that 99% of all the work that is done in psychology, they always regard previous people's opinions, especially if they are mental health practitioners, but also keep an open mind and do not always agree. There are times that you find corroborating evidence to give the same diagnoses.

[43] In the absence of any contradicting expert evidence, I am satisfied to accept, and to rely on, Ms Thornton's evidence. What is most relevant of her evidence is that she testified that, on the applicant being seconded out of the area where the incident had taken place, her mental state improved. However, when she was told that she would have to return to her old workstation, where the sexual harassment had taken place, that was another trigger for her psychological trauma that was experienced by the applicant as the very

worst time. She felt sad, alone, abandoned, wanting to give up, threatening to resign and eventually sought psychiatric help by seeing Dr Fortuin. Once the applicant was permanently removed to a new department, she again became competent, relaxed and felt strong. When Ms Thornton saw the applicant, she had in essence recovered and only suffered some anxiety associated with talking about the incident. Ms Thornton concluded that the applicant had during 2004 suffered from adjustment disorder

and features of a generalised anxiety disorder and/or post traumatic stress disorder. She explained that an adjustment disorder is diagnosed when there is an identifiable stressor that causes significant psychological distress. She further testified that, if you remove the stressor, by taking the person away from what is causing the stress, the symptoms normally resolve within 6 months. The applicant's stress symptoms, according to Ms Thornton, peaked in November/December 2004, and it coincided with the time that the applicant thought she would have to return to her old department. Ms Thornton further concluded that the applicant, although she has

essentially recovered, remained vulnerable in that, if in the future an event occurs that reminds her of what had happened, she could come back to the post traumatic stress.

[44] According to the applicant, the first incident was not taken seriously by her at the time and she thought it was a joke. However, when the same incident occurred the next day, she was very scared. She did not know what was going on and she thought somebody was after her. She therefore reported the matter to her departmental head, Mr Theo van der Berg (the second respondent). He said he was going to take the matter to top management. When, after two weeks, nothing had happened, the applicant asked van den Berg what was going on and he advised her that top management had not come back to him. The applicant said that she then went to the Assistant Divisional Manager, Mr Zama Mjekula (the third respondent). Mr Mjekula knew about the matter and advised the applicant that he was going to call a meeting with his superior. He did however not revert to the applicant about this meeting he was going to call. The applicant said this meeting with Mr Mjekula

was about three weeks after the incident. That will place it round about the 21st of June 2004.

[45] In terms of the chronology of events, it is relevant to mention that in terms of evidence and documents adduced, the Group Forensic Services ("the GFS") of the first respondent opened a case relating to this incident on 21 June 2004. The reporter of the case is indicated to have been Zama Mjekula. The GFS consultant is indicated as Mark Manual. The applicant testified that Manual did not contact her but that she had seen him on 1 July 2004, which was when he took down an affidavit from her.

[46] The applicant then reported the matter to her union, the Organisation of Labour Affairs ("the union") in the person of Mr Michael Marawu, the Chairman of the union, who went to see the first respondent's management. A meeting was then organised with van den Berg, Mjekula and Manual. The applicant stated that at this meeting Manual said that he had done all he could to investigate the matter but that the only options were polygraph and handwriting tests. According to the applicant, the meeting between her and

the union, Forensics, the second and the third respondents, took place two weeks after the applicant signed her affidavit, which places it at approximately the middle of July 2004.

[47] The applicant confirmed that the incidents had left her very angry, she felt humiliated and was fearing for her life and could not work late. At home, she was always angry and could not sleep at night. She could not even wake up in the mornings and did not feel like going to work. Her 15 year old daughter who lives with her did not want to be with her all the time because she was always angry with her daughter. She did get medical assistance because Mr Mjekula suggested the wellbeing program of the first respondent. She attended a 45 minutes to an hour session. She was crying all the time and the therapist she was talking to suggested that she should speak to her union, but she had already done so. The reason why she waited to go and see a private psychiatrist was that she had been seconded to move to another department and was happy about this. The secondment took place in November 2004 and lasted for a month. She said she was not seconded

because of the incident. It was only a normal secondment. When she was told by Mr Mjekula that she would be going back to the DMS department, she felt angry and felt that these people did not care about what had happened to her. She said that when she had asked Mr Mjekula whether she could not be moved to another department, he had said that there was nothing they could do. This was on 8 December 2004. She had told Mr Mjekula that she could not go back to that department as she was scared and she was fearing for her life. After she had gone to see Dr Fortuin, she was put on medication and it did help. She had put in holiday leave from 17 December 2004 till 17 January 2005, but having seen Dr Fortuin, he changed that to sick leave because she was diagnosed by Dr Fortuin as not being well at that time. After her return in January 2005, the applicant went to see the first respondent's general manager, client services, a Ms van der Mescht. She told Ms van der Mescht what had happened to her at DMS but Ms van der Mescht did not know about it. The applicant advised her that she had in the meantime referred the matter to the CCMA. Ms van der Mescht advised the applicant that she would not be going back to that department. She was then

called by a manager of another department, a Mr Paul Rist. He advised her that he was going to give her a desk until he found a department she would be working with. He gave her a desk to sit at from 17 January until 13 February 2005. On 14 February 2005, she was moved to Money Collection, a new department of the first respondent's.

[48] The applicant stated that the first respondent's management did not call a meeting for the specific incident but that, at a general staff meeting, they mentioned the incident. This meeting was called about two months after the third incident (the two involving the applicant, and the similar one involving the other employee). In addition Mr Mjekula had sent out a communication to all the staff in the applicant's department telling them that something had happened in the department and that they were busy trying to find the culprit. This communication was sent out approximately two weeks after the general staff meeting. That would place it somewhere towards the middle of August 2004.

[49] On 29 October 2004, or thereabouts, the applicant referred

a dispute to the CCMA. The summary of facts of the dispute state that "employee received insulting and offensive communication within the working environment and the company failed to take reasonable/necessary steps." Under the heading "Describe the procedures followed" the applicant stated "managers informed about the matter and no action was taken in this regard".

[50] The GFS case which was, as I said earlier, opened on 21 June 2004, indicated that the finalisation date was 18 November 2004. In essence the report reflects that the GFS received the request on 21 June 2004 to investigate the matter. It simply further reflects that interviews were conducted with the applicant and Ms Hattingh, (the other employee who received very similar offensive material) and it concludes by indicating that the matter had been discussed with the management of DMS, who indicated that they would monitor the situation and that they were in the process to install cameras and access control in their area for better control purposes.

[51] Some e-mail activity took place between the GFS and Mr

van den Berg of the DMS department in the first few weeks of November 2004. It was suggested by Ms Rabkin-Naicker that this was spurred on by the applicant having referred her dispute, complaining about management's inactivity, by the end of October 2004.

[52] The applicant testified that she approached Mr Mjekula on 6 December 2004, after she had been told that she would be moving back to the DMS department. This led to the applicant, on 11 February 2005, thanking Mr Mjekula that at last he had come through for her in difficult circumstances.

[53] The applicant said that Mr Mjekula had only suggested that she goes to the employee wellness program ("the EWP") after the meeting between her and her union, the Forensic Consultant and Messrs Mjekula and van der Berg. The timing of this was placed somewhere in July 2004. The applicant said that the reason why she only went to the EWP once was that when she went back, her therapist was busy with another patient, so she had to wait outside for 15 minutes. That was why she decided to go and see her own doctor.

[54] The applicant also testified that she was told sometime in October 2004 that she would be moving in terms of a secondment. She specifically testified that it was only a secondment and that by the beginning of December 2004, she was told to go back to her old department. When it was suggested to her in cross-examination that she would not have been seconded without Mjekula's say-so, the applicant doubted this because she had to go and see a senior manager for her to eventually be moved. Under cross-examination, the applicant also repeated that, during her meeting with Mr Mjekula on 8 December 2004, about her moving to another department, that he had said to her that there was nothing he could do and that she would have to move back to the DMS department. The applicant persisted that the only reason why she found a permanent position in another department was because she had communicated with Ms van der Mescht. The applicant testified that she had told Mjekula that she would resign if she did not get moved. It was put to the applicant that Mr Mjekula would testify that it was not easy for him to find a place for her in another department as people did not just

move to departments without vacancies being available. The applicant did not agree with the proposition put to her by Mr Madima that Mr Mjekula negotiated with other departments to help and to remove her from the hostile environment. When it was put to the applicant that Mr Mjekula would testify that, because he cared, that is why the company changed the access cards and procedure of entry, and that that was why the CCTV cameras were installed, the applicant's response was that it only changed after she had left the DMS department between January and February 2005.

[55] Mr Madima, during cross-examination of the applicant, confirmed that it was Mr Mjekula who referred the incident to GFS and that it had happened around 21 June 2004.

[56] Mr Madima during cross-examination of the applicant specifically dealt with what he called the measures taken by the first respondent after the incident. In doing so, he essentially dealt with the proposition that Mr Mjekula had suggested to the applicant that she should go to the EWB.

The next action on the part of the first respondent which Mr Madima dealt with was Mr Mjekula's attempts at removing the applicant from DMS. Thirdly, the changing of the access cards and procedures of entry and the installation of CCTV cameras were proposed as the first respondent's reaction to the incidents of sexual harassment of the applicant. The applicant's response to this was that she confirmed that, in or about the middle of July 2004, some six weeks after the incident, Mr Mjekula did suggest that she should go to the EWP. As far as moving her to another department was concerned, the applicant remained adamant about two things. One was that Mr Mjekula had in December 2004, when she resisted her return to the DMS, indicated to her that there was nothing he could do. It was only after she had approached the general manager, client services, that she eventually was moved to another department by the middle of February 2005, according to the applicant. In respect of the changed access cards and the CCTV cameras, the applicant responded that this was only done in January or February 2005, after she had left the DMS department.

[57] Mr Madima, having completed his cross-examination of the applicant, and re-examination of the applicant having taken place, the Court adjourned. The next morning Mr Madima sought an indulgence to re-open cross-examination, which I allowed him to do. He then put it to the applicant that Mr Mjekula would come to testify that he in fact had talked to his colleagues and that he also had requested the applicant's CV so that he could hand it over to some of his colleagues so that they in turn could be able to determine whether the applicant would fit into any of their their departments. An e-mail was handed to the applicant in this regard which turned out to be an e-mail dated 19 January 2005. The applicant's response to this was that it only happened after she had spoken to the general manager, client services. Then it was put to the applicant that Mr Mjekula would testify that he had met informally on the issue in question with the applicant and Mr Marawu. The applicant responded that she could not remember this. Prompted by me whether, stating that she could not remember it, was it then possible that it did happen, the applicant stated that it did not happen. No version whatsoever was put to the applicant as to what was

allegedly discussed during these informal meetings which Mr Mjekula would testify he had had with the applicant and Mr Marawu.

[58] Mr Marawu, the Chairman of the union, testified on the applicant's behalf. He said that he received a call from the applicant in July 2004. The applicant told him about the experience that she had had and what had happened after that. She told him that she was sexually harassed by some colleague and was not getting the necessary assistance when she called on the first respondent's management in the DMS department. The applicant had advised him that she had notified everyone in the first respondent's management of the DMS department and that there was also a forensic consultant involved but that she was not being given the necessary feedback and reports by management. Mr Marawu then organised a meeting between the applicant and himself and Mr van den Berg, Mjekula and the Forensic Consultant, Mark Manual. At this meeting Manual explained that he did not want to do forensic testing because it would be futile because, if he were to tell the employees that there was going to be

polygraph and handwriting testing, the culprits who were suspected might have the right to withdraw from the process and then it would be a waste. Mr Marawu testified that when they wanted to find out why it could not be done, and whether the examination of handwriting also might allow people to reserve their right not to participate in the process, Manual eventually said that he would in his report tell everything that he had done and that which he could not do, and the reason therefor, and that he would give Mr Marawu and the applicant a full report about what had been done or not done by management so that they could see from that if there were any loopholes. Mr Marawu confirmed that he was aware that polygraph testing had been done by the first respondent in other cases. He was referred to a document in the papers from which it appeared that an Old Mutual Foundation Manager had requested polygraph examination for her department regarding numerous theft cases in that department. He further confirmed that they were advised during the meeting that the forensic department had no guidelines for investigating such misconduct as that which the applicant had been subjected to. Manual advised Mr Marawu that

there were turnstile reports that were drawn and he was also going to attach those to his report, which he had promised would be given to the union.

[59] Mr Marawu testified that he expected this report within a week after the meeting, but when he received nothing, he called Manual three times but he never received any report. He also never saw the turnstile reports and then the dispute was referred to the CCMA in October 2004. He expressed the view that the union felt that the applicant was not treated with sensitivity and due respect at the time and her case was not handled with seriousness. To Mr Marawu's knowledge none of the cleaners who work in the affected department were interviewed. He testified that he got the sense that serious measures were taken when it comes to other areas and certain cases and that the union would have liked to get the same sense of seriousness on the applicant's case at the time. He said that the expectation was that they would get a report that would explain to them what had happened and what was, and was not, explored, so that they could learn from that what management had, or had not, done.

[60] Mr Mjekula testified on behalf of the first respondent and obviously himself as the third respondent in this matter. He testified that he was appalled when he saw the defaced photograph of the applicant. He said it was completely unacceptable, and his immediate thoughts were that the harshest disciplinary sentence would have to be meted out against whoever wrote the particular note. He testified that he met the applicant after he had met the second respondent, Mr van der Berg. He in his evidence in chief indicated that this meeting with the applicant would not have been less than two weeks after the incident. This, incidentally corresponds with the timing given by the applicant of her meeting with Mr Mjekula. He said that during this discussion with the applicant, he was beginning to see the impact that the incident had had on her. He described it as a very sensitive conversation which they had and that the applicant during this conversation had broken down and that it was hurtful and painful to go through. He consoled the applicant and gave her advice to seek professional assistance in the form of the employer wellbeing program, where there were better qualified

professionals to handle such sensitive matters. He said that he qualified the incident, in the context of the workplace, as that it was something that had shocked the Old Mutual community of the people who were close to their area. It presented a grave challenge, so said Mr Mjekula, in terms of how they were going to handle it. Group forensics confessed to the fact that this was the first of its kind that they had to deal with. He saw the incident as a challenge for the entire company.

[61] During Mr Marawu's cross-examination, it was put to him by Mr Madima that Mr Mjekula would give evidence that he had met Mr Marawu informally and with the applicant on a number of occasions and discussed applicant's case. Mr Marawu denied this and stated that the only meeting he had with Mr Mjekula and the applicant was the one which also involved Messrs van der Berg and Manual and that after that, he, Mr Marawu, had to follow up from his side. In his evidence Mr Mjekula said that he had numerous conversations with Mr Marawu on the matter and in between with the applicant, also on the matter. It was put to him by Mr Madima, during his evidence in chief, that he

had his discussions with the applicant separately and he confirmed this. Mr Mjekula testified that he shared the matter with his immediate seniors. He mentioned them by name. He said that he sought assistance in terms of how they would best deal with the unfortunate incident and his colleagues offered their opinions and suggestions on the matter. He did, however, not tell this Court what those opinions and suggestions were. In addition, he said he had discussions with Mark Manual of GFS. He confirmed that, at the conclusion of the meeting between GFS, himself, Messrs van der Berg and Marawu and the applicant, Mr Marawu would have been waiting for a formal report from the GFS advising of what steps they had undertaken to deal with the unfortunate incident. He testified that there were no suggestions forthcoming from the union as to how they should deal with the matter. Mr Mjekula confirmed that what they did after the incident was to change the access to DMS and they installed CCTV cameras. They further conscientised employees through meetings called “Best for u Workshops”. He testified that, in these workshops, they discussed the fact that they had still not found the person who had committed this particular act and they discussed

the sensitivity around race relations. The installation costs for the cameras and the access control was in total around R90 000.

[62] As to what the first respondent had done to find the perpetrators, Mr Mjekula said that they first obtained the turnstile reports which were examined and looked into. When nothing could be found from that, they proceeded and notified GFS. He said that staff meetings were held, asking people to come forward with information so that they could get to finding out who the perpetrator was. They offered professional assistance to the applicant and he contended that he facilitated the applicant's move to the New Business Department. This represented everything the first respondent had done in response to this incident, according to Mr Mjekula.

[63] Mr Mjekula testified that the reason why handwriting experts were not used was that, at the time, they were undergoing massive change management and it was felt that, making the staff participate in a handwriting expert exercise might have resulted in some of the staff refusing

to participate. He regarded the decision not to proceed with handwriting experts to have been reasonable. The same applied to polygraph tests namely that some employees may refuse. When he was asked to deal specifically with the measures the first respondent took to protect the applicant after the incident, Mr Mjekula replied that after the incident, they seconded the applicant to the New Business Department. When that secondment had come to an end, due to the nature of the work in that area, the applicant had to come back to DMS, whilst on the other hand they had to continue searching for a suitable environment for her. He then proceeded to explain what the normal procedures were when an employee moved from one department to another. He testified that they had broken the rules in respect of the applicant in order to accommodate her. He said that, shocked and challenged as the company was at that point, they did all they possibly could to find out who the perpetrator was and also in supporting the applicant.

[64] Asked whether there was anybody in the first respondent's top management who had been specifically charged with

reporting back to the applicant, Mr Mjekula said it was the DMS management that was supposed to give feedback to the applicant. He testified that in one of the informal conversations he and the applicant had, she had raised the issue of the frequency of feedback with him personally. He had asked of her what the timing expectation was from her side and further said that he explained that the reason why feedback did not come on a day to day or weekly basis was because the matter was being investigated and that, in the absence of any outcome from the investigation, then there was no feedback to give. Unsurprisingly, this evidence elicited a recordal by Ms Rabkin-Naicker that the applicant was not given the opportunity to deal with this while she was being cross-examined as this proposition was never put to her. In response, Mr Madima contended that the version that was put to the applicant was that Mr Mjekula would come and testify that there were informal meetings. It is to be noted that this proposition, when put to her, was denied by the applicant. She clearly ought to have been confronted with the aforementioned allegations of Mr Mjekula. Mr Madima suggested that the version was put. When I confronted him with the proposition that the

contents of those meetings were not put to the applicant, he tried to contend that the version was put as a matter of fact. The record, however, reflects that the conversation about which Mr Mjekula testified, was never put to the applicant.

[65] Under cross-examination, Mr Mjekula confirmed that the first respondent only on the 1st day of the trial, through its legal representative, conceded that the conduct of writing the notes on the applicant's photograph, had constituted sexual harassment and that this was the first time that the first respondent's legal representatives had actually agreed that this no longer was in dispute between the parties. It is to be noted that until this admission was made at the commencement of the trial, the respondents had steadfastly denied that the conduct in question had amounted to sexual harassment of the applicant.

[66] Relating to the turnstile reports, Mr Mjekula conceded under cross-examination that somebody would have had to be inside DMS to have written the notes on the applicant's photograph. He confirmed that the turnstile reports were

not in the bundle of documents before the Court and that the applicant or her legal representatives had also never seen the turnstile reports. Approaching the matter on a hypothetical basis, Mr Mjekula conceded that the turnstile reports would have shown who had entered the DMS area over the period of time when the incident had taken place. He however qualified it by saying that, why the turnstile reports were inconclusive, was that at the time that would have been the case as, if the door was closed, the control access going in and out of the DMS area was not as strict as it became after the incident because the area was still under construction.

[67] Asked whether it would have been possible, if he or forensics had seriously considered whether a cleaner or a security guard might have been the suspect, that they could have asked those companies to provide them with the names of the people who were on duty on the relevant night, Mr Mjekula confirmed that this was possible, but not done. Mr Mjekula confirmed under cross-examination that the first of what he referred to as a formal meeting with the applicant, was when she had reported the matter to him.

Having confirmed this, Mr Mjekula qualified it by saying that this was not the first time he had spoken to the applicant. Mr Mjekula testified that the incident was brought to his attention on the same day that it had been reported to management. He then, under cross-examination, attempted to say that he went down to see the applicant within a week of the incident. He eventually conceded that, during his evidence in chief, he had testified that he had spoken to the applicant only after he had met with Theo van der Berg and that this had happened not less than two weeks after the incident. He then tried to suggest that the meeting which he was testifying about, which had taken place not less than two weeks after the incident, was the formal meeting where all the parties were involved. In the end he persisted with his version that within a week of the second incident being brought to his attention, he had walked downstairs to see exactly what that was about and to speak to the applicant.

[68] It was put to Mr Mjekula by Ms Rabkin-Naicker that, with reference to the Group Forensic Report, that anything

resembling action in this matter was only taken after the matter was referred to conciliation and that the report was prepared *ex post facto,* once the dispute had been declared, to which Mr Mjekula responded that, based on the dates, the proposition was correct. He further confirmed that the CCTV cameras and the access control system were only installed after 17 November 2004, being the date that forensics closed their file. In fact, he could not dispute that the cameras were only installed in 2005.

[69] Mr Mjekula agreed with a proposition put to him by Ms Rabkin-Naicker that the applicant's anguish may have abated if a person had been found who had done the deed. He also confirmed that he had reported the matter to forensics and that he was the one who had expressed the view that there was a threat to the personal safety of the applicant or others.

[70] A Ms Schenck, the Operations Manager for Group Forensic Services at the first respondent's Mutual Park premises in Cape Town, were called in conclusion of the respondents' case. She testified that, in respect of the measures taken

by GFS to track down the perpetrators, Manual interviewed the applicant and obtained an affidavit from her to find out who she may think the suspects who had written the note may be. Secondly, she testified, Manual visited the scene to find out who had access to the area and who could have placed the note where it was found and to establish whether there were any cameras installed in the area. She said that forensics also checked the access control to see who had been in the building at the time and that they had regular follow up meetings with the DMS management to provide them with feedback. She said that the case was treated as a priority one. She testified that, in respect of the two suspects who had been mentioned by the other employee as possibly having written the note to her, forensics obtained their Human Resources files to match their handwriting to the handwriting on the notes. She said that the handwriting was vastly different to those on the notes and that there was no other option but to not continue to interview them. She then said that they proceeded to give feedback to the DMS management and made recommendations for them to follow through to prevent this incident in the future. Ms Schenck, under

cross-examination, confirmed that the forensics report was a summary of the case. She confirmed that the investigation facts contained therein were that affidavits were obtained from the applicant and the other employee and that there was a discussion with DMS management.

That was the sum total of what was included in the report and a summary of the investigation. Asked why there was no official feedback to the union from GFS, Ms Schenck confirmed that there was no official report back but that she knew that Manual had various meetings with DMS management and had given them feedback on a regular basis of the findings and where GFS were on the matter. She suggested that GFS would have dealt with reporting back to the union if they had requested such a report back. Ms Schenck was not present at the meeting where Mr Marawu was promised the report by Manual and he was not called to testify. The fact that the report was promised but never deliver by GFS stands uncontested.

[71] In assessing the evidence adduced, I am in the first instance satisfied that the time frame of events as testified

to by the applicant can be accepted. That would mean that, in summary, Mr van der Berg was notified by the applicant the day the second incident happened. This would have been either on 31 May or 1 June 2004. When she had not heard from Management after two weeks, the applicant reported the matter to the next level of management, namely to Mr Mjekula. When she again had heard nothing, save for having to depose to an affidavit on 1 July 2004, she approached her union and a meeting took place, it would appear towards the middle of July 2004. Thereafter again there was no feedback, notwithstanding the fact that her union made a number of calls to GFS and notwithstanding the fact that the applicant and her union were promised a full report from GFS as to what had been done, or not done, and the reasons for their conduct during the investigation. The applicant confirmed that Mr Mjekula had suggested that she should attend the EWP which she did once and when she had to wait fifteen minutes the second time she wanted to attend this program, the applicant decided to go to her own doctor. The applicant was seconded to another department on 1 November 2004. This secondment was unrelated to the sexual harassment

incident. When she had to return to her own department, she on 6 December 2004 approached Mr Mjekula and saw him on 8 December 2004, in order to persuade him to move her to another department. He advised her that there was nothing he could do. She then went on leave from 17 December 2004 to 17 January 2005. During this time, because she had again reacted very negatively to the fact that she had to return to the same department where the incidents had happened, she consulted a psychiatrist, Dr Fortuin. He changed her holiday leave to sick leave. On her return in January 2005, she went to see the general manager, client services, Ms van der Mescht who, on hearing about the matter, immediately took the necessary steps which led to her initially simply being given a desk to sit at. She was eventually, on 15 February 2005, transferred to another department. Ms Thornton, the psychologist, testified that in essence three events traumatised the applicant. The first was the receipt of the sexual harassing notes on her photograph. The second event, which caused trauma, was the fact that the applicant did not know who it was who had perpetrated the sexual harassment and accordingly she did not know who to trust.

The third cause of psychological distress for the applicant was the response from her employer.

[72] For a number of reasons, I prefer the applicant's version relating to the issue whether she had had a number of meetings with Mr Mjekula. This proposition was not initially put to the applicant during cross-examination by Mr Madima. On resumption of the hearing the day after the applicant's cross examination had been concluded, having sought the indulgence to re-open cross-examination, all that Mr Madima put to the applicant was that Mr Mjekula would testify that a number of informal meetings had taken place. She denied this. No specific version as to what allegedly happened during these meetings was put to the applicant. Mr Mjekula's evidence as to when he had his first meeting with Ms Piliso was, to say the least, not satisfactory. In fact he patently contradicted himself in this regard.

[73] What do I therefore find did the first respondent, through its senior management employees, do after these horrendous incidents. The one undisputed action taken by the first

respondent, was that Mr Mjekula suggested to the applicant that she should attend the EWP. The applicant said that Mr Mjekula had only suggested that she should do so after the meeting between her and her union with the Forensic Consultant and Messrs Mjekula and van der Berg. The timing of this was according to the applicant placed somewhere in mid July 2004. I have no reason to doubt the applicant's evidence in this regard. As I accept the applicant's version regarding the meetings with Mr Mjekula, even if Mr Mjekula suggested the EWP earlier, the very earliest it could then have been made was when she saw Mr Mjekula when she had to approach him because Mr van der Berg had not provided her with feedback. That was two weeks after the incidents. Mr Mjekula's initial evidence was that he had first met the applicant not less than two weeks after the incidents.

[74] The next action the first respondent claimed it took was that Mr Mjekula was the person who allegedly ensured that the applicant be transferred out of her department. The applicant denied that this was so. In fact, her uncontested evidence was that her first transfer, only on 1 November

2004, was merely a secondment and not a response to the sexual harassment. The further evidence which I accept is that Mr Mjekula, in the first part of December 2004, indicated to the applicant that there was nothing he could do to transfer her out of the department where the incident had taken place. Why, if this was not what he said would the applicant have had to approach the senior general manager to have her transferred out of the DMS department. Only in the second half of January 2005, after she had seen the senior general manager, client services, was there an immediate and acceptable response to the applicant's anxiety and was she transferred to a holding position where she merely, it would seem, occupied a desk, and thereafter, on 15 February 2005, was she allocated a permanent transfer to another department. The e-mail note which the respondents handed in belatedly in support of the proposition that Mr Mjekula was the one who initiated the applicant's transfer, was dated 19 January 2005. I believe this was most probably in response to the general manager, client services, having initiated a transfer of the applicant in reaction to her appeal that it be done.

[75] The further action claimed on the part of the first respondent was that it changed the access control and installed CCTV cameras in the DMS department. This, on its own admission, only happened after 17 November 2004. On the applicant's uncontested evidence, it only happened after she had left the DMS department, which was in January or February 2005.

[76] I have been unpersuaded that any liability attached to the applicant by reason of its, or its employee's conduct, for which it may be vicariously liable and in respect of events, or the actions or inaction of any of the respondents, prior to the incident on 31st May and 1 June 2004. The question that I have to consider is whether the manner in which the applicant did respond to the incidents of sexual harassment in its workplace of one of its employees, and about which the applicant now complains, can objectively viewed be found to have been reasonable and sufficient. The question that then arises is, if I do find that the first respondent's conduct, through its senior employees, post the incident fall short of the standard the legal convictions

of the community may reasonably require and expect of an employer, is such conduct under these circumstances actionable and does it constitute just cause for the first respondent to be held liable to pay the applicant constitutional damages in the amount claimed, or at all?

[77] In considering this aspect, there is no doubt that employers are obliged to provide their employees with a safe working environment. It is equally clear that employers are obliged to take steps to eliminate unfair discrimination in any employment policy or practice. "Employment practice" is defined in Section 1 of the EEA as including "the working environment and facilities". There is no doubt that employers are required to take steps in advance, and to be pro-active, in the elimination and prevention of unfair discrimination. The question however is, if I were to find that the employer, objectively viewed, failed to act appropriately after its employee had been subjected to unfair discrimination, such as sexual harassment in her workplace, by an unknown perpetrator, and if I find that the employer failed to respond appropriately to support the employee and to protect her against and/or to minimise, as

best it can under the circumstances, the psychological trauma suffered by such affected employee, does such finding found a cause of action in terms of which the employer may be held liable for damages because of the harm suffered by the employee as a result of the unfair discrimination?

[78] I do not for a moment hesitate to conclude that, in the event of an employee having been traumatised in the workplace that, even if the employer, or the employee for that matter, is unable to identify the perpetrator, the legal convictions of the community will reasonably require and expect of an employer that, by way of example, in the first instance, there will be prompt reaction by the employer to commence a process of investigation which will leave no reasonable stone unturned to try and find the perpetrator.

[79] Secondly, I believe that immediate steps should be taken to provide the employee with the best possible support in the nature of counselling and consultation sessions to establish what, if any, the psychological impact of the incident was on the employee. In conjunction with such professional

help, and through direct personal communication, I believe the employer should, as best it can, try to establish what reasonably could or should be done in support of the employee. Clearly, the highest possible level of communication by the appropriate employer representative with the affected employee and his or her union, as the case may be, is required, most likely by its human resources personnel, if it has such. The worst thing that an employer can in my opinion under such circumstances do is to leave the employee in the dark as to what is being done to find the perpetrator. Equally bad is a situation where the affected employee does not know what, if anything, the employer is doing, or intends doing, to assist him/her to cope with the trauma of the incident. One can certainly also expect the employer to at least make enquiries as to what the employee is reasonably expecting the employer to do to minimise or eliminate the mental trauma possibly caused by such an incident. The employer needs to take all reasonable steps to ascertain what, if any, mental trauma the incident may have caused the employee. Communication between the employer and the employee of the highest possible frequency and of the most sensitive

nature is required.

[80] In the third place, I believe that it is necessary for an employer which has experienced a workplace incident such as the one herein to as soon as is possible take all reasonable steps to eliminate, or as a minimum to reduce, the possibility of such event re-occurring. What I have set out so far represents a minimum of what I believe can be described as the standard of fair labour practices an employee may expect on the part of an employer under circumstances where an employee has been traumatised through a workplace incident such as sexual harassment. This, as I have said, is irrespective of the question whether the trauma was caused by an employee or not. An employer is obliged to provide its employee's with a safe working environment and to take all reasonable steps to avoid unfair discrimination against its employees by any person who comes onto the workplace. That will include taking steps, as best and reasonably as it can, to prevent, avoid or minimise the possibility of employees suffering the kind of humiliating sexual harassment as the applicant herein was subjected to. I do however believe that it is

equally clearly required of employers, after an event such as unfair discrimination has been perpetrated in the workplace against one of its employees, even if the identity of the perpetrator is unknown, to meet its minimum fair labour practice obligations towards its employee along the lines I have suggested above. The conduct suggested being in my mind a fair exposition of what, very broadly speaking, would constitute the minimum fair labour practices on the part of an employer where an employee of it has been traumatised by improper conduct, such as sexual harassment, even by an unknown perpetrator, I am of the view that it follows that, if the employer failed to meet these minimum fair labour practices, if the employee cannot obtain relief through any statutory or common-law remedies, and his/her constitutional right to fair labour practices is found to have been violated, then such employee may approach this Court, in appropriate circumstances, for relief in terms of Sections 23(1) and 38 of the Constitution for appropriate relief.

[81] Measuring the first respondent's conduct against the yardstick I have earlier said herein is what I believe to be

the minimum fair labour practices an employer must comply with when its employee has been psychologically traumatised and harmed by a workplace incident such as sexual harassment, I am of the view that the first respondent herein failed to meet the minimum fair labour practices which could reasonably have been expected of it. The very essence of the applicant's complaint was the absence of proper communications from her employer with the traumatised employee herself after she had reported the incidents of sexual harassment. I find such absence of proper communication on the part of the first respondent to have taken place. How could it ever be regarded as acceptable, where an employee reports an incident of this magnitude, and of such a repugnant nature, for the employer not to revert to the employee at all, which I also find happened, forcing her to approach the next level of management, and to have to do so some two weeks after the horrific incident had taken place and reported to it?

[82] As I have said, it is at the earliest at this meeting, two weeks after the incident, that Mr Mjekula suggested to the applicant that she should attend the EWP. The applicant

insisted this happened in mid July 2004. Whether it happened two or six weeks later, in my view, it amounts to too little too late in respect of a serious and well-intended response from the employer. The applicant should have been counselled immediately the incident had been brought to the employer's attention. The employer had a duty to ensure, as best it could, that the employee receive such counselling. This delay in getting the applicant to be counselled is particularly serious where it is apparent that the first respondent has an in-house counselling program. As I have said earlier, I believe that the employee should immediately after the incident have been referred to professional counselling.

[83] The applicant should have been kept fully apprised of what steps exactly the employer were taking to try and find the perpetrator. I am not at all certain what exactly the DMS department itself did prior to it referring the matter to the GFS on 21 June 2004. Even accepting that the DMS department tried to investigate who the perpetrator may have been by perusing the turnstile reports, I believe, just as criminal conduct needs to be reported immediately to

the police for them to investigate, this incident should have immediately been reported to the first respondent's GFS. Whilst it was testified that this department had never had experience with such an incident, it is patently clear that this section had the wherewithal to investigate criminal misconduct. In any event, as I believe the conduct herein constitutes *crimen injuria*, the police ought to as well have been called in to assist. This was clearly not thought to be necessary by the first respondent. I believe that why nothing was fed back to the applicant is that the first respondent through its responsible senior employees did very little to seriously address this most serious incident of sexual harassment of one of its employees in its workplace. It until the commencement of this case not having admitted, or realised, that it was dealing with a case of sexual harassment, it very possibly caused the first respondent's senior employees not to deal with the matter with the degree of seriousness they clearly ought to have.

[84] Although this was not raised at all as the reason why the first respondent did not report back to the applicant what it was doing to find the perpetrator, in the event of such full

disclosure possibly undermining investigations, then I nevertheless believe that an employee should be told if that is the reason why regular communications as to what was being done did not take place. In the present matter we know that the DMS department only referred the incident to the first respondent's forensic services department three weeks after the incident. That was an inadequate response to a very serious incident. It is not dissimilar to a party first trying to determine who perpetrated a crime and then, if it cannot do so itself after three weeks, to then refer the matter to the police. Just as is required in respect of crimes being committed that it must immediately be reported to the investigating authorities, this serious incident ought to have been reported to both internal and external (the Police) investigators immediately and not three weeks later.

[85] I also find the reasons for not having involved handwriting experts or polygraph testing not very persuasive. Likewise the absence of using the turnstile reports to determine at least who exactly entered the DMS area over the periods in question, also appears to prove that the investigation was conducted rather superficially, or at least not with the

degree of earnestness it required. The manner in which the first respondent approached the two suspects who had been identified by the other employee who had suffered from the same sexual harassment also, I believe, leaves much to be desired.

[86] The union became involved, and a meeting was held between the applicant, her union and first respondent's managers, some six weeks after the incident. When full explanations were not tendered at this meeting about its investigations, GFS promised the union a full report. This report was never presented to the union. Such report as eventually saw the light of day reflects that all that was done by GFS was that they took affidavits from the two employees who were harassed, visited the area, checked the access controls and whether there were cameras and communicated with the DMS department about its progress. It did call for the personal records of the two identified suspects, but when it felt that the handwriting did not match, this was not pursued further at all. The overall impression I gained about the investigations was that it was done superficially and not at all with the degree and effort

of seriousness, which the misconduct of this nature required.

[87] Turning to the issue of placing the applicant in a different department, there should have been immediate consultation sessions with the applicant by her employer to find out from her what she may have wanted the employer to do. It is in the first instance quite apparent that the applicant was never approached and asked what she would want as a possible step to alleviate the clear psychological trauma she

was experiencing. It is evident that her secondment was incidental and not at all as a result of the incident and the trauma she was experiencing by being in the department itself. Even if I were to find that her secondment was effected as a result of the first respondent's alleged compassion, and wanting to remove her from the area where she experienced the trauma, it would again, I am afraid, be too little too late. This secondment only took place on 1 November 2004 – some five months after the event. I do however as a matter of fact find that this secondment was not at all in reaction, and related to the

incident. This is borne out by the fact that, when the applicant approached Mr Mjekula in the first week of December 2004, seeking from him a transfer to another department, his attitude was that there was nothing he could do. I am alive to the fact that the evidence adduced before me was to the effect that it is quite a cumbersome process for an employee to be moved from one department to another and that purportedly the first respondent had broken its own rules in order to accommodate the applicant. I am unpersuaded that this is in fact what the first respondent did, or at least timeously and as a response to the incidents. It is quite clear that, only on the general manager, client services having become involved, did she immediately realise the seriousness of the matter and did she, for the first time, in the second half of January 2005, act with the appropriate urgency that was required from the outset and did she not only immediately place the applicant at a temporary desk, but within a few weeks, managed to transfer the applicant permanently to another department.

[88] I turn lastly to the fourth step the first respondent claimed

as what it reasonably did in response to the applicant's plight. This was the installation of better access control and CCTV cameras in the DMS department. Here again, this happened only after the applicant had left the DMS department. Again, at least something sufficient was done, but unfortunately in my view again far too late. In this regard, the first respondent tried to impress on my mind the fact that it cost R90 000 to install the new access control and the CCTV cameras and that, as this expense was not budgeted for, that is why it took some time for things to happen. I am sorry to say but this is a feeble excuse. If the first respondent was genuinely serious with its response to what can only be regarded as the most repugnant form of sexual harassment to which the applicant was subjected, I am sure that it would immediately, and within weeks, if not days, have been able to find the necessary funding to take the steps which it eventually took some 7 – 8 months later.

[89] I do believe that the first respondent's conduct has breached the applicant's constitutional right to fair labour practices in terms of Section 23(1) of the Constitution. I am accordingly satisfied that the applicant's

right to fair labour practices in terms of Section 23(1) of the Constitution has been violated by the manner in which the first respondent responded and reacted to the incident of sexual harassment to which the applicant had been subjected in her workplace.

AN APPROPRIATE SANCTION.

[90] I turn to decide what an appropriate sanction herein should be. The applicant has claimed payment in the amount of R70 000 as constitutional damages. In support of this claim, I was referred by Ms Rabkin-Naicker to the fact that Section 50(1) of the EEA requires the Court to make an Order which is appropriate. It was suggested that, in the determination of appropriate relief, it requires the Court to consider the various interests, including the need to redress the wrong caused by the infringement, the deterrence of future violations, the dispensing of justice which is fair to all those who might be affected and the necessity of insuring that the order can be complied with.

[91] I am alert that awards by other Courts in comparable cases serve as no

more than a guideline. I am required to determine the appropriate amount
in the light of the evidence before me. I should not rigidly adopt or apply amounts which other Courts have considered appropriate. It was urged upon me to take into account that the applicant had suffered from adjustment disorder and features of a generalized anxiety disorder and/or
post-traumatic disorder as a result of the sexual harassment. In this regard I am reminded that the evidence was that the psychological trauma
caused to the applicant was essentially threefold. As I have indicated earlier herein, the trauma was caused first by the actual sexual harassment event and secondly psychological distress was caused by the
applicant not knowing who the perpetrator was. In respect therefore of the
first part of the psychological trauma, I remain of the view that the first respondent could not have anticipated the possibility of this kind of event and that it could therefore not reasonably have foreseen it and taken steps, as it did afterwards, to prevent or minimize its reoccurrence. In respect of the second part of the psychological distress, I do believe the first respondent could and should have taken more and better steps to

try

and find the perpetrator. In this regard I also believe that had the first respondent better communicated what it was doing to try and find the perpetrator, it may have reduced the psychological distress caused the applicant in this regard. It is really the third area of psychological

distress

which I believe the first respondent is to be blamed for fully and that is how the applicant experienced the response from her employer. The

fact

that she felt they were not listening to her, not taking her seriously, responding too slowly, not giving her feedback and being sent back to

her

department when she felt that would be the worst thing that could

happen. I was urged to further take into consideration, in

determining an

appropriate award, the failure of the first respondent's management to take the matter seriously and give the applicant adequate feedback and that this increased the trauma. I was asked to consider the fact that the psychological trauma impacted on the applicant both at work and at

home,

even detrimentally affecting her relationship with her young daughter.

The

first respondent's failure to remove the applicant from the environment was suggested prolonged her suffering. I was also reminded of the fact that the first respondent made it clear that it was not its case that the applicant did not suffer any harm. It was only the first respondent's case that, whatever harm might have been suffered by the applicant, the first respondent was not liable for. It was submitted that I should take account of the eleventh hour admissions by the respondents that the incidents did constitute sexual harassment and secondly that the respondents did not deny that the applicant had suffered harm. As the latter admission was made after the applicant had called her expert witness and the applicant had testified, I was urged to grant costs against the first respondent on a punitive scale and that the costs should include the qualifying fees of the applicant's expert witness. I would imagine that as it was not specifically prayed for in the relief sought, that under the further and/or alternative relief, I was urged to include in my order a directive that the first respondent should ensure that its management and staff are adequately educated as regards sexual harassment in its workplace. I have no doubt in my mind that as far as this last proposition is concerned, the very fact of me having found the first respondent's conduct wanting in respect of how

it responded to the incident of sexual harassment will be sufficient to encourage the first respondent to take heed thereof and to do the necessary to prevent a recurrence which may see it back in court under similar circumstances.

[92] In response to these arguments presented in support of what sanction I should impose, Mr Madima conceded that it has been held that the awarding of minimal awards for harassment and other forms of discrimination will trivialize or diminish respect for policy to which anti-discrimination legislation gives expression. He did at the same time indicate that, on the other hand, it has been said in court that "*Awards should not be so exorbitant or excessive that they induce a sense of shock, or lead to a situation where even litigants who have suffered minor consequences as a result of unfair discrimination reap financial benefits far in excess of what could, in the normal economic sense, be regarded as their loss*." He accordingly suggested that I would have to strike the mentioned balance in the event of a liability finding against the first respondent. In respect of costs, he submitted that it should follow the result. He however contended that the applicant had embarked on this matter fully aware that it was unwinable and that the first respondent had

to defend this matter out of principle and at great financial cost to itself when it would have been easier and more cost effective to settle and walk away. The first respondent had refused to be coerced into a settlement that could result in a plethora of similar actions against it. Hence the decision "*to fight it out*", so submitted Mr Madima.

[93[I have been referred to, and duly considered what my colleague, Oosthuizen AJ, considered in respect of appropriate relief in terms of Section 50(1) of the EEA in Christian v Colliers Properties (2005) 26 ILJ 234 (LC) from 240D and further. All of the cases I have been referred to deal with situations where the employer was the actual perpetrator of the unfair discrimination. I am dealing herein, as I have said, with the employer's failure to comply with what I regard to be the minimum fair labour practices after an unknown perpetrator had in its workplace committed a most serious act of sexual harassment in respect of one of its employees. I am of the view that an employer's responsibility to take pro-active steps to eliminate unfair discrimination in the workplace is no different to the employer's responsibility, after an event of unfair discrimination has taken place in its workplace. The way an employer responds is measured with the same yardstick as one would measure

its

pro-active obligations. In assessing the amount of damages I intend awarding, I have taken cognizance of the fact that I believe the first respondent is fully responsible for the third component of psychological distress caused to the applicant namely that caused by the first respondent's inaction after the sexual harassment incident. In respect of the applicant's psychological distress caused by her not knowing who

the

perpetrator was, I believe that the first respondent could have contributed more to lessening the psychological trauma caused by this incident by having done far more than what it did to investigate the matter in an

effort

to find out who the perpetrator was. It should have been seen and experienced by the applicant as far more interested and active in its pursuit of finding out who the perpetrator was. The award I make herein should also serve as a deterrent for future violations. I am mindful of the fact that the expert evidence by Ms Thornton was that the applicant has fully recovered from the traumatic experience, with the only possibility being that, should anything in the future happen that would remind her of this incident, there may be reoccurrence of the post-traumatic stress symptoms. Having taken all the factors mentioned herein as well as those particularly contained in the Colliers Properties case (supra) into

consideration, I believe that an amount of R45 000 ought to compensate the applicant for the trauma I believe she was caused by the failure of the first respondent to act in a manner which respected and protected the applicant's right to fair labour practices. At the same time I believe this amount would act as a deterrent to the first respondent as well as other employers to ensure that their conduct pre- and post possible acts of unfair discrimination perpetrated against their employees in the workplace meet with the required fair labour practice standards. Although the applicant is still in the employ of the first respondent, I do not believe that there is any reason why I should not let the costs follow the result. The fact that the applicant was not successful in her main and first alternative

claims is of no consequence in my opinion relating to the issue of costs. I do, however, not believe that there are any grounds for me to order punitive costs, as I was urged to do. I am however satisfied that the costs that I intend ordering should include the qualifying fees of the applicant's expert witness. I accordingly make the following order:

1) (1) The first respondent is found to have violated the applicant’s right to fair labour practices in terms of Section 23(1) of the Constitution.
2) (2) The first respondent is ordered to pay the applicant the

amount of R45 000 as constitutional damages.

(3) Interest on the said amount is to be paid from the date of judgment to the date of payment at the rate laid down in the Prescribed Rate of Interest Act.

(4) The first respondent is ordered to pay the applicant's costs of suit including the qualifying fees of the applicant's expert witness.

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DEON NEL
Acting Judge of the Labour Court

Date of hearing: 23 – 24 February 2005 and 11 – 12 May 2006

Date of Judgment: 5 December 2006

Appearances:

On behalf of the applicant: Advocate Hillary Rabkin-Naicker
Instructed by Rossouw Scholtz and Zondani Attorneys.

On behalf of the respondents: Advocate Takalani Madima
Instructed by Bowman Gilfillan Inc.