IN THE LABOUR COUR OF SOUTH AFRICA

HELD AT CAPE TOWN

Case No: C259/2000

In the matter between:

BONGIWE NTSABO Applicant

And

REAL SECURITY CC Respondent

JUDGMENT

R. PILLAY, AJ

The Applicant, a female, also known as Beauty, was born in Cape Town in February 1970 and is the youngest of four siblings, being the only female. She had a good relationship with her father who is now deceased. She also has a good relationship with her mother who is a retired domestic worker as also with the rest of the close-knit Ntsabo family. She attended Fezeka High School where she completed standard nine in 1993. During her year of attempting matric, she was forced to drop out because of a lack of funds to continue and because she had become pregnant.

She described herself as a shy person who generally stayed at home and only occasionally went to see a film with her then boyfriend who is also a father of her only child. After six (6) years of job-seeking, she finally obtained a position as security guard with the Respondent on the 4th June 1999. It is not disputed that this position with the Respondent was secured for the Applicant through the assistance of her sister-in-law, who appeared to be the person upon whom the

continued contractual relationship between the hospital where she was employed as a nurse and the Respondent depended. The Applicant resigned from the employment with the Respondent on the 19th January 2000 at which time she was earning R1000.00 per month.

For most of the period that she was employed, she was stationed at the Khayelitsha Day Hospital, Cape Town. She was required to work a twelve hour shift. The Respondent arranged two twelve-hour shifts, one during the day the other during the night. There does not seem to have been any pattern in allocating these shifts to employees.

After resigning, the Applicant embarked on litigation, exhausting the prescribed mechanisms before ultimately reaching this court. In her statement of case, she alleged that from the beginning of December 1999, Mr Dlomo, her supervisor, regularly harassed her sexually and he eventually assaulted her. This included touching the Applicant's breasts, thighs, buttocks, genitals and ultimately simulating a sexual act on her resulting in ejaculating on her skirt. He also made certain unwanted sexual proposals to the Applicant.

The basis of her case is that she was harassed by Mr Dlomo, her superior, during the latter part of 1999. She alleged that as a result of his attentions, she became very uneasy in her work environment and culminated in him actually simulating sexual intercourse on her person during which he ejaculated on her dress.

She alleged that she had, prior to that, informed Mrs Fisher, a member of the Respondent and who also completed managerial duties therein.

She also alleged that the Respondent had also been informed of the unwanted attention of Mr Dlomo by her and through her brother, Mr Ntsabo who had also

laid a complainant to the Head Office about the alleged incident involving the simulated sexual intercourse.

She alleged further that nothing satisfactory if anything, was done about the matter and this compelled her to resign. (She alleged also that her original letter of resignation was torn up by Mrs Fisher and accepted a letter of resignation which the latter had dictated).

The Respondent's answer to the Applicant's statement of case is that the alleged harassment including the alleged simulated sexual intercourse did not take place at all and alternatively, if it is found to have occurred, then it was never reported to the Respondent.

Substantial evidence was lead at this hearing. By the nature of the allegations, it is not surprising that ultimately, the finding of whether the alleged event of simulated sexual intercourse occurred or not rests essentially on the credibility of the appellant and Mr Dlomo and indeed the acceptability or otherwise of the Applicants versions.

It must be pointed out however, and as will be seen on a reading of the record, that as the evidence proceeded, the nature of the allegations changed and rendered a substantial portion of the evidence irrelevant to what is necessary to be considered herein. I will therefore only refer to evidence and matters which are necessary for the purposes of this judgment.

The Applicant alleged that she reported the problem she had with Mr Dlomo to Mrs Fisher, who holds an interest in the Respondent concern and also holds a managerial position therein.

No steps were taken to stop Mr Dlomo, and as a result, the Applicant resigned from her position on the 19th January 2000.

The Applicant consequently seeks damages as follows:

1. (a) R45 000.00 : patrimonial damages in terms of section 6 (1) to 6 (3) of the Employment Equity Act (EEA) 55 of 1998 in respect of future medical costs as for psychological counseling;
   (b) R100 000.00 : non-patrimonial damages in respect of contumelia, humiliation, impairment of dignity and injuria - R50 000.00, for pain, suffering, emotional and psychological trauma, shock and impairment of normal amenities of life - R50 000.00.
2. In terms of section 187 (1) (f) alternatively section 186 (e) of the Labour Relations Act (LRA) 55 of 1995.

At the start of the hearing, I was informed that the alternative claim in terms of section 186 (e) was being abandoned.

The Applicant testified and stated that she was stationed at the main gate of the Khayelitsha Day Hospital Grounds where she had to search female visitors before they entered the Hospital grounds. She was one of the eight people who worked the shift. It was also Dlomo's function to patrol the premises and relieve those who had to take lunch breaks and so forth. She further testified that Dlomo used to carry a firearm when on duty.

She explained that there was a 'guard-room' near the main gate and in which firearms received for safe keeping from visitors were kept. At times, guards also had their lunch on it. It also contained a toilet access to which was through separate internal door. Entrance to the actual guard room was through a stable door. All the windows were covered with cardboard in order to prevent viewing into the guard room.

She explained that on or about the 2nd December 1999, Dlomo suggested to her that they engage in an intimate relationship. She refused this upon which, she stated, he threatened to tender a 'negative work performance' report about her. The next day, Dlomo touched her breasts, thighs, buttocks and genital area when they were in the guardroom and also pulled her skirt,. This was one of two incidents of "touching" in the guardroom in the early part of December 1999. He also touched her when she was on actual duty at the gate.

After the first incident in the guard room, on or about the 3rd December 1999, she reported the incident to a colleague, Christopher Nashwa while they were traveling home on the train. He advised her to inform Mrs Fisher of her predicament. She testified that she did so by telephone and Mrs Fisher undertook to solve the problem.

These activities did not seem to abate and consequently, she decided to sit down when she approached the main gate.

She testified that she regularly reported these incidents to her brother, Barnabus. He assured her that he had spoken to Mrs Fisher about the matter. In particular she complained to him on the 13th December 1999 and as a result he phoned the office of the Respondent in regard thereto. A copy of the telephone records reflecting this phone call is included at page 33 of bundle 'B' and submitted, as evidence, by agreement, by the Applicant.

On or about the 14th December 1999, Applicant was called to a meeting with Mrs Fisher. Mrs Nomathemba Socishe was also present in the office. Janice Johnson also attended the meeting though she arrived late. Mrs Fisher told the Applicant that Dlomo had complained about her bad work performance, that she was not wearing the prescribed uniform and that she was making tea for the other guards. She Responded to Mrs Fisher, referring to the 'reports' and Dlomo's

harassment of her. It is then that Mrs Fisher indicated that Dlomo was a good worker and did not drink or smoke.

She told me that she also mentioned the problem to one Victoria who was Dlomo's girlfriend at the time and who also worked for the Respondent but at a different site.

She also mentioned the matter to the shop steward, Restitution. He gave her the telephone number of the relevant union. It seems that despite promises to attend to the issue, the union did not.

She testified that on or about the 15th December 1999, she was in the guardroom having her lunch when Dlomo entered and closed the door. It was closed with a piece of wire. She thought he closed the door in order to put his firearm in the safe. He went to the toilet and when he came into the guardroom she had her back towards him. He put his firearm on the table near where she was seated and told her he would shoot he if she screamed. He grabbed her, held her breasts and simulated sexual intercourse on her person resulting in his ejaculating on her skirt. She felt his erect penis against her skirt and body. He threatened to shoot her if she told anyone about the incident.

She was so overcome by the incident that she could not continue working and sat outside the guardroom crying. She was embarrassed by the incident that she tied her jersey around the area of the resultant semen stain so that it was covered. She explained that she took the threats very seriously and therefore she did not scream for help during the attack. For the same reason she was unable to tell Christopher why she was sitting there and crying when he asked her why she was doing so later on that afternoon.

That evening, when she reached home, she told her mother what Dlomo had done and showed her mother the semen stain on her skirt. Her mother then contacted her brother who after arriving at the Applicant's mother's home, made telephonic contact with the offices of the Respondent about the incident.

Though she feared Mr Dlomo, she returned to work at the instance of her mother who told her that her brother would arrange a meeting with Mrs Fisher and Dlomo to 'sort the matter out'.

She expected Mrs Fisher to conduct an enquiry or convene a meeting in order to ensure that Dlomo stopped his offensive conduct.

On the 24th December 1999, Dlomo told her that she could not work with him and that she had to report at the Manenburg Site. She did this. Again on 1st January 2000, when she reported for duty, Dlomo told her that she could not work with him. According to the weekly roster, she was supposed to work at Khayelitsha where Dlomo was stationed.

On the 5th June 2000 she was transferred to the Mitchell's Plain Day Hospital where she continued to work. On the 16th January 2000, when she reported for duty early in the morning and according to the roster, she was told that she was on night duty. There was no explanation given to her for this change in the roster.

On the 17th January 2000, she went to the office and queried the change in the roster. Mrs Fisher then informed her that she was reassigned to night shift because there was no place at Mitchell's Plain for her during the day. The Applicant then responded that she had difficulty in accepting to working night shift as her problem with Dlomo had not been solved.

She testified that Mrs Fisher then told her that if that were the case, then she should resign. She then wrote a letter of resignation quoting the problem with Mr Dlomo as the reason for her resignation. She stated further that Mrs Fisher then tore the letter up and suggested that the reason for the resignation in the letter should indicate her mother's illness as the reason for her resignation. In return she would receive a good reference from the Respondent. She did so.

After her resignation, she went to collect her deposit for her uniform. She went with her brother. She stated that on this occasion an argument with the Fishers occurred during the course of which they were referred to as "kaffirs".

During her cross-examination, it was put to the Applicant that Dlomo never carried a firearm during December 1999. It was also put to her that other witnesses would support the proposition. She insisted that this was the case. It was also put to her that Victoria Nomkhonwana would say though she came to visit the Khayelitsha Day Hospital, the Applicant never told her of Mr Dlomo's behaviour towards her.

It was also put to her that Mr Dlomo had never touched her in any inappropriate manner. She vehemently confirmed that he did.

The evidence by the Applicant that firearms were as a rule kept in a safe in the guard room for safe keeping was also disputed. She again insisted that it was so.

It was also put to her that the door of the guardroom was never closed during the day. She confirmed that this was not so.

She denied that she had failed to inform Restitution of the difficulties she experienced with Dlomo. It is significant that it was put to her the Restitution would be called to testify about this.

She had no knowledge that complaints about her were being handled with her sister-in-law.

Applicant testified that after the illegal incident of the 15th December 1999, she became very distressed as a result and experienced fear of sleeping alone, developing an associated dislike for her own body. She slept with her mother for a period of approximately 2 months thereafter and at times contemplated killing herself because of the infringement of her privacy in that "Dlomo took and I never gave him".

She also started suffering from headaches and developed shaking and shrivering symptoms which resulted in her being admitted to Valkenberg Hospital (a psychiatric hospital) in July 2001, about 18 months after the focal event on the 15th December 1999. At the time she had extreme tendencies to kill herself.

She was weary of men in general and herself-respect began to deteriorate as a result. She also developed a feeling of being useless and in particular felt she had become unemployed precisely because of what Dlomo had done to her.

The failure of the Respondent to address the matter contributed to her condition because she thought that she was not believed and that her dignity and privacy were not accorded the respect it deserved.

She also developed difficulties with her mother and son as a result of the effect of her experience with Dlomo. She also suffered from irratic sleeping patterns inter-spread by nightmares.

She became socially withdrawn because of her resultant condition. She no longer attended church, terminated participation in the choir, her friendship with Yvonne, her earnst-while friend, deteriorated. She told me that these symptoms were not present prior to December 1999. She is also troubled by the fact that the father of her son terminated the intimate relationship they had when she told him what happened. The termination of the relationship with the father of her child related more to his suspicions that a relationship of some type did exist between the two rather than her condition.

Christopher Nashwa was called to testify on behalf of the Applicant. It is undisputed that on the 15th December 1999, he was stationed at the Khayelitsha Day Hospital during December 1999 and in particular, at the material times hereto. He was placed at the Trauma Unit of that Hospital. When he testified; he was still working for the Respondent but at the Conradie Day Hospital.

He told me that during December 1999, he witnessed Dlomo touching the Applicant in the guardroom, on two occasions. He explained that he saw him touch her upper body and breasts. He also confirmed that he saw her crying outside the guardroom during mid-December 1999.

He explained that the appellant complained to him about Dlomo on two separate occasions while they were travelling home by train. She first told him about Dlomo's proposal that they start a relationship which she refused. He testified that he had advised her to report the matter to the office (of the Respondent). He also explained that a time after he saw her crying outside the guardroom, she told him what had given to rise to her being so upset, in particular, what Dlomo had done to her that day.

He also confirmed that Dlomo released others who went on lunch and who at times left the premises when going on lunch. He furthermore confirmed that,

when going on lunch, guards left their firearms in the safe located in the guardroom which was "latched" by means of a piece of wire. He also stated that he was not armed with a firearm when stationed at the Trauma Unit, Khayelitsha Day Hospital.

He also testified that shortly before the commencement of the trial, he was called to the office by Mr Fisher, who also has an interest in the Respondent concern. He told me that Mr Fisher informed him of this claim(s) brought against the Respondent and that it was in connection with Dlomo's alleged conduct. He was asked what he knew about Dlomo and the Applicant and he responded that he could see that Dlomo was interested in the Applicant and that he had seen him touch her. He also told Mr Fisher that the Applicant had told him that Dlomo wanted to rape her.

He also stated that Mr Fisher told him not to sign a subpoena to attend court and that he should change his address or take a holiday in the Eastern Cape for which he (Mr Fisher) would supply the costs of doing so.

He emphatically denied that he was testifying in favour of the Applicant and thereby implicating Dlomo because he did not like the idea of being moved from trauma unit at Khayelitsha Day Hospital.

Barnabus Ntsabo, the Applicant's brother, also testified on behalf of the Applicant. He confirmed that the Applicant had complained to him about Dlomo's attention during December 1999. He said that initially he did not pay much attention to it because he thought she was capable of handling the matter herself.

On 13th December 1999, she again complained to him about Dlomo saying that she was unable to do her work properly as a result of what he was doing to her.

He said that he phoned the Respondent's offices requesting to speak to Mrs Fisher. He was connected to Janice to whom he explained the problem and requested that steps be taken to terminate the said problem and to pass the message on to Mrs Fisher.

He confirmed that he was summoned to his mother's home again on the evening of 15th December 1999 where he found the Applicant crying. His mother told him that the Applicant had told her of the incident with Dlomo earlier that day and that he had ejaculated on her skirt. He testified that the Applicant confirmed this with him and he saw her skirt soaking in the bath.

He told me that he immediately phoned Mrs Fisher about the incident. He was unable to say if he used his mother's cellular telephone or the land line. Mrs Fisher, he stated, promised to attend to the matter, urgently, as requested by Mr Ntsabo, but also pointed out that she was short staffed and needed a bit of time to do so.

In the Ntsabo family forum, called after the incident, it was decided that the Applicant should continue working for the Respondent because, being December, the family needed the money. Mr Ntsabo in any event felt that Mrs Fisher would solve the problem.

He told me that on the 1st January 2000, he again had reason to contact Mrs Fisher telephonically after Dlomo had told the Applicant, when she reported for work during her scheduled day shift, to leave. He testified that Mrs Fisher told him that the Applicant should report for night shift as Dlomo would not be working at that shift.

Upon enquiry as to the promised investigation into Dlomo's conduct towards the Applicant, he stated that Mrs Fisher again indicated that because of being short staffed, she had not as yet, got around to it.

He confirmed that he accompanied the Applicant to the Respondent's offices to collect her deposit for her uniform and that an altercation developed with the Fishers. However he did not hear either of them refer to him or the Applicant as "kaffirs" at any time during their visit.

Dr Daniels, a psychiatric, stationed at Groote Schuur Hospital confirmed that she had treated the Applicant in 2001 and that she had referred her to Valkenberg Hospital because of depression. She testified that she had also prescribed anti-depressants for anxiety and post traumatic stress disorder. She also confirmed that the Applicant had made a report to her about the alleged sexual harassment and described the effects that it had on her. Her symptoms were not inconsistent with what she stated had caused them.

The notes of Dr Parker, stationed at Valkenberg Hospital confirmed the symptoms of the appellant. The notes also confirm that her proposed treatment was terminated prematurely by the intervention of the Applicant's family. It confirmed that she conveyed this position to Mrs Mkhontwana, of the trauma center, in Cape Town and who was in contact with the family. It is not clear if the condition of the Applicant would have improved or not had her treatment not been terminated prematurely, though it was thought to be a good option. The proposed treatment, as I understand, involved electrical impulses to the person of the Applicant to which she had continually agreed to, provided that her family supported the idea.

Miss Nomfundo Walaza a qualified clinical psychologist and who had occasion to assess the condition of the Applicant. Her qualifications and experience were

clearly tabulated in her curriculum vitae and submitted together with her reports on her consultations with the Applicant. She has substantial experience in counseling. Her qualifications to assess the Applicant was not challenged and consequently I will not refer thereto. Her reports were submitted and are on pages 57 to 75 of Bundle 'A', being the main file.

Her evidence as to the condition of the Applicant and diagnosis of her condition, was questioned by Dr Bredenkamp who was called by the Respondent. I will however refer thereto presently. I am satisfied that Miss Walaza is suitably qualified to testify as an expert on the psychological effect of sexual violence.

Miss Walaza consulted with the Applicant on two separate occasions and over two distinct periods. The latter consultation was shortly prior to a report dated the 2nd August 2001. This report is clearly supplementary to the first report and a more up-to-date assessment of the Applicant's condition.

According to the earlier report, Miss Walaza expressed an opinion that the Applicant was a sensitive person who had apparently suffered substantial trauma and psychological damage as a result of a series of intrusive and threatening sexual harassment experiences which culminated in a violent sexual assault. She found that the conditions of the Applicant was consistent with sexual assault.

Miss Walaza based her findings on information tendered to her by the Applicant; her mother and brother, Applicant's friend, Yvonne Mqwalo and Yandiswa Mavela of the Local Rape Crisis Centre. It is not necessary to repeat the information upon which miss Walaza relied suffice to say it was consistent to what she testified in so far as it was relevant to Miss Walaza's enquiry.

Miss Walaza found that the Applicant's life had been affected by these experiences in several ways. She has lost a companion in her boyfriend as a

result, she has lost her trust in men, she had become depressed and more withdrawn and her relationship with her son and mother has also been strained.

The social support she had from relationships with friends and her boyfriend is no longer what it was and should be and she is not in a state which would encourage anyone to employ her. She has also lost some of her self-pride and her social intercourse had become worse whereas, prior to the effects of her aforesaid experiences, despite being a quiet and shy person, she functioned well with others and seemed generally a happy person. This situation is directly linked to her experiences with Dlomo. She is chronically anxious and has developed avoidance patterns involving situation which might be real or otherwise. This perpetuates the depressive mood which seems to be ever present.

The second report, dated 27 November 2001, was drafted when Miss Walaza conducted an interview with the Applicant again because the latter was admitted at Valkenberg Psychiatric Hospital where she underwent group therapy sessions and was monitored for the effects of her anti-depressant medication. It seems the purpose of the assessment was to establish to what extent, if at all, the treatment had helped and to assess her future needs.

Miss Walaza was able to find that there has been a definite improvement in the Applicant. Her capacity to communicate with family had improved especially in stressful situations, her depressive state has been reduced and there has been a reduction in angry outbursts, nightmares and suicidal thoughts. She has resumed church attendance (though she does not participate in the choir as she did before because her improvement has not extended that far). She has also started welcoming visits from Yvonne but still struggles to visit Yvonne because of her fear to venture out of the house. She has taken to attending the local gymnasium at the suggestion of the therapy facilitator. The exercise seems to

have helped. She has also, despite difficulty, taken up temporary work on two occasions, helping out domestic workers for a period of time on each occasion.

However, it seems that the Applicant is still within the window period of improving and treatment is crucial in ensuring a substantial improvement on a permanent basis. According to Miss Walaza, during the preparatory session for this hearing, (the Applicant would obviously have had to recollect the details of these experiences which underpin the application) the Applicant displayed many of her symptoms related to her condition. She had clearly improved. The Applicant however appeared to be extremely concerned that she might be propelled back into the level of depression she was in prior to treatment, should she go through exercises of recollecting the events.

Miss Walaza later testify that she did not employ all the accepted tests known to her fraternity because such tests are clearly applicable to the western world. Such psychological tests are based on standards as set by the western world without regard for those human beings who fall, primarily, out of that type of lifestyle.

It is common cause between these experts that these particular tests were verbal and involved the use of language, especially the English language. The answers have a particular impact in the context of the tests and the results depend on the answers. She explained that she deliberately did not conduct those tests on the Applicant because the social context of the Applicant was not condusive to an accurate result. If conducted it would have given misleading data and consequently the assessment would not be a true reflection of the Applicant's position.

Miss Walaza confirmed that symptoms of post-traumatic stress disorder was very common in sexual assault cases, as was the Applicant's fear for men. She

confirmed that the Applicant's condition was so serious that, without proper and careful treatment, including monitoring, she could deteriorate.

Miss Walaza testified that while there was an improvement in the Applicant's condition, further improvement thereon is required in order to consolidate the benefits gained already and to stabilize the effects of the treatment so that the Applicant could resume her normal life. In pursuance thereof, Miss Walaza has recommended weekly sessions for one hour of psychotherapy over a period of five years. She calculated the financial requirements at two hundred and twenty rand (R220.00) per hour per week for five years. This translates into an amount of fifty-two-thousand eight- hundred rand (R52 800.00) I will return to this aspect presently.

Miss Nokuzola Mkontwana also testified on behalf of the Applicant. She is a qualified social worker and graduated at the University of Western Cape in 1991. She held a position in the Department of Social Services till 1996 and was stationed at George. Thereafter she took up a position at the Trauma Center, Cape Town, in August 1996 where she holds the position of training co-ordinator. She is involved with counseling victims of general trauma. She had on occasions to deal with the Applicant on a professional level and in the course and scope of her work. She consulted with the Applicant on a few occasions, the first being the 14th December 2000. The purpose was to counsel her in respect of the trauma flowing from the alleged sexual harassment as reported to her by the Applicant. She confirmed that, according to the Applicant, she was harassed her at her workplace. She described the Applicant as at first being quite distressed, crying throughout the interview and displaying resultant suicidal tendencies.

The Applicant went as far as verbalizing how she would throw herself in front of an oncoming train or swallow battery acid or swallow crushed glass because she felt so worthless as a result of this experience.

She told me that the Applicant explained to her that she was so affected by the associated trauma that she was not patient with her mother and son and this type of moodiness and anger was affecting family life and her sleeping patterns which were aggravated by associated nightmares. At times she dreamt of two men trying to rape her one of which was Dlomo, trying to rape her.

She saw the Applicant over a period of eleven months but because of forgetfulness or lack of transport funds, the Applicant did not attend all scheduled sessions. In most of these interviews the distress was more pronounced than not. There has, however, been a brief improvement especially after she started attending, upon recommendation, a message therapist.

Miss Mkontwana also telephonically consulted with Dr Parker about the Applicant and, in consultation with her superior, later referred the Applicant to Dr Letitia Daniels. She explained that she did so because of the suicidal tendencies the Applicant displayed.

She testified that she found it necessary to refer her to Dr Daniels in order to monitor the medication because the negative side effects thereof did not make it easy to administer. She also confirmed that the family of the Applicant refused the opportunity of her receiving Electro-Convulsive Therapy (shock treatment). She also confirmed that the Applicant said to her that she did not feel that she belonged at the psychiatric hospital because of the 'stigma'. Despite advice to the contrary, the Applicant terminated her stay at the hospital.

She again consulted with the Applicant later and noticed a marked improvement in her condition. During that interview the Applicant mentioned that she had acquired temporary employment as a domestic worker. The appellant seemed to

be excited about working as she was then able to contribute towards the family needs.

She confirmed that the Applicant reported to her the experience she had at the Respondent's firm and that despite raising the matter with her employers, nothing was done about it and she consequently felt unsafe in an environment that she was offered, being night shift. She explained to Miss Mkhontwana that she needed to be with her sickly mother during the night.

Miss Mkontwana however conceded that the information she relied upon to help the Applicant and refer her for proper medical assistance was based on information provided by the Applicant save for her own observations of the Applicant.

Annelet Chantal Barnard testified on behalf of the Applicant. At the time of her testimony, she was employed by Cape Federal Building as a security officer. She was previously employed by the Respondent from which she resigned in 1996.

She stated that at some time prior to her resignation she wrote a letter of complaint to the Respondent and handed it to Mrs Fisher. She explained to Mrs Fisher what the import of the letter was after which Mrs Fisher destroyed the letter.

Vuyiswa Yvonne Mqalo explained that she has been a long time close friend of the Applicant. She stated that prior to 1999, she visited the Applicant regularly. In the year prior to the incident she estimated that she visited the Applicant about 4 times a month.

She described the Applicant as a happy person prior to her taking up a position with the Respondent though she was generally a shy person. She enjoyed work

and was easy talking. She confirmed that the Applicant went to church regularly, enjoyed baking and cooking.

After the Applicant started working for the Respondent, Miss Mqalo noticed a change in her. She had mentioned that there was a person at her work who wanted to start a relationship with her and this made her unhappy. The Applicant did not mention any details in regard thereto.

She explained that during the period she refers to, the Applicant was extremely upset and was always crying. She had lost some weight and became forgetful and sad. It became difficult to converse with the Applicant because, aside from being upset and crying, she was always angry and tended to scream. As a result of this situation, Miss Mqalo started to feel uncomfortable in her company and her visits consequently decreased.

According to Miss Mqalo, the Applicant wanted to work in order to contribute to the household requirements.

Yandiswa Mavela was also called to testify for the Applicant. She assists the Rape Crisis Center in Cape Town on a voluntary basis. She testified that she interviewed the Applicant a long time before she testified and referred to notes she had made of the interview.

However she stated that these notes were not contemporaneous notes but recorded after the interview with the Applicant who had already left for home by then. This is her general procedure and she could not say how accurate her notes were.

She also stated that she is not formally qualified to deal with such cases and merely does voluntary work at the center.

It was agreed between the parties that the Applicant consulted with her attorney for the first time on the 4th February 2000 after having first telephonically contacted her on the 1st February 2000.

The Applicant's case was then closed.

Marvin Dlomo was called to testify on behalf of the Respondent. He was first employed by the Respondent in 1996.

Within six months of employment as a guard, he was promoted to supervisor. He passed standard seven and then left school to go and work. He worked for another security firm immediately prior to being employed by the Respondent. He stated that he started working for the Respondent when he was asked by Janice who represented the Respondent, to come and work for the Respondent.

He stated that he first met the Applicant at the Macassar Day Hospital, when they were both placed there by the Respondent.

During November 1999, he was the supervisor at the Khayelitsha Day Hospital after being transferred from Macassar Day Hospital where he was stationed for two-and-a-half years. He was of the view that he was transferred to the Khayelitsha Day Hospital because Mr and Mrs Fisher valued his services. The Applicant had been stationed there shortly before his transfer. In any event they both generally worked there on the same shift.

According to Mr Dlomo the Applicant was very shy and failed to carry out her duties, even at Macassar Day Hospital. Though he showed her what to do on more than one occasion, she did not improve. He mentioned this to the Respondent's offices but requested that the matter be left to him to deal with.

In his capacity as supervisor, Mr Dlomo was referred to as a "runner" because he would have to supervise seven people placed at different points, and relieve each of them when necessary.

He told me that during 1999, when he worked at the Khayelitsha Day Hospital, only two firearms were issued to the site, one to the guard at the Trauma Unit and one to a guard at the main gate. He emphatically denied, in accordance with what was put to the Applicant, when she was cross-examined, that he carried a firearm while on duty because, as he put it, one was for the guard at the main gate and the other for the guard at the trauma unit. He said that this is why he was so certain that he did not carry a firearm. He stated further that firearms issued by the Respondent were never stored in the safe and when a guard to whom a firearm was issued left the premises, the firearm would be left with another guard.

According to Mr Dlomo, the Applicant did not search people at the main-gate but just folded her arms while standing or sitting there. She would only search people when she noticed Mr Dlomo watching her. He stated that he reported the matter to the office once a week for the three consecutive weeks. He said that he was aware that she was spoken to about her performance by someone from the office but her work did not improve.

He also testified that he had warned the Applicant that he would lay a complaint about the quality of her work. He told me that she did not respond to the warning.

He testified that he had requested that the Applicant be transferred to another site, though it is unclear when this occurred and what the Respondent's response to this was.

Mr Dlomo denied having harassed the Applicant, sexually or otherwise. He stated that he thought that she had fabricated these allegations of sexual harassment because, in his opinion, she held him responsible for being unemployed.

Mr Dlomo stated that the Respondent did not have any grievance procedure in place and he did not have any authority to issue written warnings. At the time, when he did complain about an employee, the office would respond to him when the issue had been taken up by it. Nor did the Respondent, as far as he knew, have code of practice or a policy relating to sexual harassment. Nor was sexual discrimination ever discussed with him by any representative of the Respondent.

He explained that he often spoke to the Applicant about her work performance and thought at some stage that her problems could be related to her inability to speak Afrikaans. However he did not think of an alternative placement to obviate this apparent problem.

He explained that he twice telephonically complained to either Janice or Anthea about the Applicant's poor work performance. On the second occasion, the Applicant was spoken to over the telephone. He however never enquired about what was done after his first complaint.

When he finally mentioned the Applicant's poor work performance per chance to Mrs Fisher, he did not suggest disciplinary measures in that regard nor did he suggest any solution to the problem. Neither did he, on any occasion, when he spoke to the Applicant about her poor work performance, warn her that her employment was at risk.

While he could not remember the occasion, he conceded that he might have instructed the Applicant to work at Manenburg and not to complete her duties at the Khayelitsha Day Hospital when she reported there on the 24 December 1999.

He stated that the first time he heard of the complaint against him was when he was told by Mr Fisher that the Applicant was suing the Respondent in respect of sexual harassment in that she alleged that Mr Dlomo had tried to rape her and that she had reported it to the Respondent which failed to do anything about it. Mr Fisher spoke to him about the allegation after he was shown the statement of case which was signed on 15 June 2000. He told me there was no formal enquiry into the matter at all and that he denied the allegations to Mr Fisher.

Later in his evidence, when confronted with documentary evidence of firearms, he conceded that he did in fact carry a firearm (more often than not) when he worked at the Khayelitsha Day Hospital.

In initially denying possession of a firearm during the material period, he explained that only two firearms were allocated to the site where he was stationed. He took the trouble of explaining that these firearms were allocated to the guard at the trauma unit and the guard stationed at the main gate. He further stated that only in 2001 was he allocated the 3rd firearm when that shift no longer had the use of a dog.

Upon production of the receipts in respect of firearm allocation for the period December 1999 and the beginning of 2000, he at first questioned the correctness of the records. After it was pointed out to him that he had signed for the receipt of the firearm on numerous occasions, did he conceed that he carried the firearm while on duty.

He finally conceded that he accepted the correctness of the records that he did carry a firearm during the period of December 1999. He stated "the reason why I can't disagree now is because the receipts are now in front of me. Now I can see I was carrying a firearm for more than once, or many times. If I disagree with the records in front of me then I would be lying. I can't disagree, because its in front of me and it's a lot. The two that was in the [occurrence] book I was trying to find the mistake that was made. I also couldn't find those. That is why I agree with the records".

He eventually conceded that he also carried a firearm at Khayelitsha Day Hospital on the 6th January 2000.

It is common cause that the original firearm allocation books contained carbon copies of receipts issued and upon which the signature of the respective recipients appeared. It is also common cause that the records for firearm allocation at the Khayelitsha Day Hospital for the period 21 November 1999 to 20 November 1999 were not available to be submitted as evidence.

From the available records, it is clear that Mr Dlomo was allocated a firearm and for which he signed, 18 times during the period 22 December 1999 to 25 January 2000. He could not explain his denial of being allocated a firearm at Khayelitsha Day Hospital.

In the circumstances, Mr Dlomo also admitted that it was possible that he did carry a firearm on the 15 December 1999.

He also admitted that he was aware that his possession of a firearm was going to be an important factor and that this aspect was discussed at length with him. He could not however explain why he did not correct counsel for the Respondent

when it was put to the Applicant that Mr Dlomo, as a rule, did not carry a firearm because he was a "runner".

He emphatically stated that Christopher Nashua did carry a firearm at the Trauma Unit and suggested that the latter's denial thereof was part of an elaborate fabrication by the Applicant and her witnesses.

Mr Dlomo also testified that the door of the guard room at Khayelitsha Day Hospital was never closed during the day and emphasized that it had to be open.

He also told me that the Respondent's employees, issued with firearms at Khayelitsha Day Hospital never locked the firearms in the safe.

He also stated that he was not empowered to issue warnings to persons under his control but this fell within the powers of those at the office. Therefore despite his reservation about her work ethics, he did not issue any warning to the Applicant.

Earlier in his evidence, he stated that he had requested her to be transferred to another site. However he later denied that he had done so.

He also told me at some stage in his evidence that the guards would sometimes bring their own firearms to work and would be paid in respect thereof. Later however, he denied any knowledge of others bringing their personal firearms to work.

The Respondent called Morris Aplein to testify that he did not see Mr Dlomo harassing the Applicant at any time. He testified that before the commencement of the hearing, he was asked by Mr Fisher, (in the presence of Mr Dlomo) if he had seen such harassment. He answered in the negative. This he said occurred

before the hearing commenced. He also conceded that he was dependant on the Respondent and his continued employment rested with the controlling members of the Respondent. He also confirmed that Dlomo, as a rule, did not carry a firearm during that period.

Ermeson Vinjwa testified that he was also employed by the Respondent and was stationed at the Khayelitsha Day Hospital during December 1999. He too was asked about the alleged harassment by Mr Fisher in the presence of Mr Dlomo and to which he answered that he did not. He confirmed this in court. He also conceded that he depended on the controlling members of the Respondent for his continued employment. He also testified that the Applicant's work rate was somewhat lagging, and that supervisors, as Mr Dlomo was at the time, had to keep records of verbal warnings. Significantly he conceded that the door of the guard room was sometimes closed when firearms were placed in the safe.

Cynthia Notchibi also testified on behalf of the Respondent. She told me that she was employed by the Respondent during December 1999 and was stationed at the Khayelitsha Day Hospital. However she said that she never worked with the Applicant on the same shift. She stated that she did not see Mr Dlomo harassing the Applicant on the 15 December 1999. She also stated that as a rule, when she reported for duty she did not go to the guardroom but straight to the maternity ward to complete her duties.

Marlene Kordan testified on behalf of the Respondent and was also employed by the Respondent during 1999. At some stage the Applicant worked under her supervision. She told me that she had complained to the office about the Applicant's work performance due to her reluctance to work at certain points and that she was not willing to work a minute more than her shift required.

Janice Johnson also testified on behalf of the Respondent. She was employed at the offices of the Respondent. She was employed at the offices of the Respondent and her duties included managing the administration in general and co-ordination of operations. She seems to have held a position at management level. At any rate it is clear that communication with the employees including the Respondent was done mostly if not totally through her. Certainly she was responsible for dealing with complaints and shift allocations. Complaints would be reported to her or Anthea and passed onto the Fishers.

She knew the Applicant's sister who had asked her to obtain a position for the Applicant.

She stated that she received complaints from Marlene that the Applicant did not work properly and just sat and day dreamed and was not prepared to wait for her reliever. She also told me that Magadja had also complained about the Applicant's work rate as did Mr Dlomo on two occasions.

In dealing with the complaints, she spoke to the Applicant in her office. This proved to be ineffective and she therefore spoke to Sister Ntsabo, the person who requested the work opportunity for the Applicant, in an attempt to get her to speak to the Applicant to improve her work rate. She also explained that the Applicant was transferred to the Khayelitsha Day Hospital because it was thought that she would be more suited to a more language friendly environment. Thereafter, when she received a second complaint from Mr Dlomo, she referred the matter to Mrs Fisher.

While all complaints were recorded in an occurance book, she negligently failed to note any of the complaints directed at the Applicant. She also explained this phenomena as the exception because the Applicant was the sister in-law of sister

Ntsabo, who, it seemed was crucial to the continuance of the Respondent's contract with Khayelitsha Day Hospital where sister Ntsabo is stationed.

In January 2000, she said that the Applicant handed in a letter of resignation for Mrs Fisher's attention. Janice then read it and put it on the desk of Mrs Fisher. She could not recall precisely what contents thereof was.

She testified that she recalled a telephonic conversation with the Applicant's brother, Mr Ntsabo. She conceded that it could have been on the 13 December 1999 though she could not recall any conversation with him regarding sexual harassment of the Applicant.

She also stated that she was in court, like some of the other witnesses called by the Respondent when the Applicant testified. She heard the proposition that Mr Dlomo did not carry a firearm during the relevant period because he was a runner. She stated that at the time she doubted the accuracy of the proposition and when she went back to the office, she checked the firearm records for that period.

Mrs Liza Fisher testified that she was never informed either by the Applicant or anyone else, about the alleged harassment.

She stated that, initially, she received complaints about the Applicant's poor work performance. She explained that at first it seemed that the Applicant had difficulty in understanding what was expected of her. Later these complaints were that she was insubordinate and did not do her work. She did not deal with these complaints but it was Janine who did.

However in December 1999, Janine told her that she did not know where to assign the Applicant in view of her "not producing". It was then that she suggested that a meeting with the Applicant be arranged.

A meeting was arranged during December 1999 and the Applicant attended it. Mrs Fisher explained that the meeting occurred in the presence of Nomathemba Socishe who was a business partner and with whom she was discussing business matters when the Applicant came to the office in response to the invitation to attend the said meeting.

She explained that it was the first time that she met Applicant on 14 December 1999. She dealt with the Applicant's poor work record and complaints in respect thereof. She stated that she told the Applicant that she would no longer benefit from a protected work environment and that she was putting her colleagues' lives at risk.

She also told me that the Applicant, upon being told that she would be required to work night shift, objected to being required to do so because she needed to tend to her sickly mother and referred to a number of personal problems which prevented her from working during the night. She was then referred to Anthea for a timetable which would indicate where she was required to report. She did not collect this.

She specifically denied that the Applicant told her that she was being sexually harassed by Mr Dlomo. She also denied that she had previously been spoken to over the telephone about the Applicant being sexually harassed by Mr Dlomo. That was the last time that she had direct contact with the Applicant.

She also denied that she had been given a letter of resignation by the Applicant. As far as she knew no such letter was given to anyone connected with the

Respondent concern. She only found out about the Applicant's resignation when Janine and Mr Fisher were discussing it. She became aware of such a letter thereafter.

She also denied having any conversation with Mr Ntsabo. She specifically denied speaking to him on the 1 January 200 because, as she explained, she is never at the office at that time as she was on leave and far off in the world at a time for celebration.

She told me that the first time she became aware of the allegations was when Mr Fisher mentioned it on his return from the hearing at the Commission for Conciliation, Mediation and Arbitration (CCMA).

She stated that had the allegations of harassment been mentioned to her by the Applicant, she would have suggested that the issue be reported to the South African Police Services.

She also stated that she discovered that Mr Dlomo in fact carried a firearm when her attention was drawn to the records. She further explained that the firearm records for the 15 December 1999 might have been lost either by being misplaced during the moving of offices or it could have been in one of the vehicles which was scrapped after being involved in a big collision shortly after the 15 December 1999. She also described the impact of the collision in detail explaining that the person who distributed the firearms and driving the said motor vehicle had to be extracted from the wreck with the help of modern equipment.

Nomathemba Socishe was called by the Respondent to support Mrs Fisher's version of the meeting between the Applicant and Mrs Fisher. She stated that she was busy discussing certain issues related to a business venture with Mrs

Fisher and in which both had a direct interest when the Applicant arrived. She conceded that she was dependant on Mrs Fisher and that she would have received her first cheque once they reached an agreement.

She told me that, although, she did not take much notice of what the Applicant and Mrs Fisher were saying at the time, she remembered that the Applicant had complained about being allocated night shift duty and that prevented her from tending to her sickly mother and that she would otherwise resign from her position.

She said that the Applicant did not complain about the attentions of Mr Dlomo nor did Mr Fisher raise with the Applicant her alleged poor work rate.

Victoria Nomkhonwana also testified on behalf of the Respondent. She testified that she never ever visited the Khayelitsha Day Hospital to see Mr Dlomo with whom she had an intimate relationship at the time.

When Mrs Fisher contacted her about the allegations directed at Mr Dlomo by the Applicant, Victoria immediately phoned him and accepted his denial of such allegations.

Mr Fisher also testified for the Respondent. He told me that he was not informed by the Applicant or anyone else, that the Applicant had made these allegations against Mr Dlomo until he found out at the first scheduled CCMA hearing.

He testified that he was not aware of the allegations before then because he first passed on all correspondence and documents regarding such like matters to his attorneys.

He stated that he was in court when the Applicant testified that she had been threatened with a firearm. He then gave instructions to his legal representative to deny that Mr Dlomo ever carried a firearm during the period referred to by the Applicant.

He testified that Christopher had admitted to him that he had not actually seen Mr Dlomo touching the Applicant. However upon being reminded that his legal representative had put to Christopher that he had seen Mr Dlomo "hugging Bongiwe", Mr Fisher agreed that those were his instructions and that it was in fact the truth.

He denied that he was holding back evidence and/or manipulating the impact of the evidence, and in particular that he was convening meetings to find out what the state of the case was in order to plot the next step of the defence.

By the nature of allegations such as rape and anything associated therewith, it is almost always impossible to refer to independent witnesses in regard to such cases. In assessing the position, it would be convenient to deal with the evidence as a whole. I think this approach would be the most practical in the circumstances because the evidence of the various witnesses for the Applicant on the one hand and those for the Respondent on the other, overlap on some crucial issues. Some aspects also seem to impact on both the case for the Applicant and that of the Respondent.

The Respondent denied that Mr Dlomo ever harassed the Applicant in any way and suggested that her allegations were a fabrication motivated by reports of her poor work performance which in turn led to her resignation and unemployment. His denial of the alleged harassment was based primarily on the evidence of Mr Dlomo himself.

Mr Dlomo was initially a confident witness tendering his evidence in a direct and clear manner. However, as his evidence continued, he became less confident and less impressive.

His explanations of certain issues became illogical at times while on other occasions he could not explain material contradictions in his evidence.

He contradicted himself on a number of occasions and on some occasions his evidence was nothing but untrue.

He initially, in accordance with what was put to the Applicant, confirmed that he did not carry a firearm during the period of December 1999. He maintained this stance for most of the time in which he testified until much sought after documents which clearly showed that he did in fact carry a firearm on many occasions during that period were finally produced. It must however be pointed out that no record relating to firearm allocation on the 15 December 1999 was produced. Nonetheless, it was clear that he did carry a firearm on a number of occasions during that period, both before and after the 15 December 1999. It is difficult to accept that he might have forgotten. It might have been understandable if he had carried a firearm once or twice or even sporadically during that period. The frequency of allocating a fire-arm to him, as indicated by the records, militates against accepting what he said in that regard. In the face of the records, he finally and reluctantly conceded that he could have been carrying a firearm on the 15 December 1999.

In attempting to convince me that he did not carry a firearm as alleged by the Applicant, he explained that the two firearms allocated to the site were carried by the person stationed at the Trauma Unit at the Hospital. This was put to Christopher Nashua who continuously denied it.

Initially Mr Dlomo supported the proposition as put to the Applicant, but in view of the records was constrained to conceed that the proposition was not true. Again, this aspect cannot be regarded as a "mistake" but clearly an attempt to discredit the Applicant's case in order to protect the Respondent and probably himself.

In attempting to discrediting the Applicant's case, he also stated that, as a rule, the door of the guardroom was never closed during the day. This evidence was countered, not only by the Applicant but also by Ermason, a witness called by the Respondent. Similarly, Ermason contradicted Mr Dlomo's evidence that the firearms allocated to the sites were never locked in the safe when the person to whom it was allocated went on lunch.

The elaborate version that the allegation against him probably stemmed from his complaint (s) of the Applicant's poor work performance loses, all its possible impact by his failure to record any alleged warnings he says she received from him. In trying to explain his failure to do so, he glibly stated that he did not have the power to do so. This is indeed improbable in view of his supervisory position. This was also proved to be untrue because Janice Johnson, Marlene Kordon, Mr Fisher and Mrs Fisher all confirmed that supervisors had the authority to issue warnings, written or otherwise, to subordinates.

He also contradicted himself by first stating that he had requested her to be transferred but later denied that he had made the request. To suit his version he told me that there was a shortage of firearms and that required employee guards to bring along their private firearms to use on duty and who were paid for such use. However later, when faced with the question of where such firearms would be stored, he alleged an inability to answer that because he had not "experienced a guard bringing his own firearm on the premises"

When required to deal with all these aspects, he became evasive and could not deal with questions he was expected to easily answer.

His evidence contains a number of improbabilities. For example, it is hardly likely that he could not have issued an official warning of any kind to the Applicant if her work performance became as bad as is now alleged.

His explanation that Christopher is siding with the Applicant against him because he had caused Christopher's transfer to the trauma unit is improbable. He implied that it was for disciplinary reasons. Yet no formal disciplinary action was taken against Christopher and no complaint was ever recorded against Christopher.

As can be seen from the record, his evidence deteriorated as it progressed. He easily told untruths and tended to change his version to suit the Respondent's case.

It is difficult to accept anything he testified to and consequently it cannot be relied upon at all. In the light of the aforegoing, his evidence is rejected.

It follows therefore, by the nature of the allegations and in view of the finding in regard to the evidence of Mr Dlomo, the impact of the evidence regarding the Applicant's poor work performance diminishes to such an extent that it draws into question the integrity of the case of the Respondent as a whole.

Morris Aplein was not a good witness. He seemed to be able to confirm only essential averments and denials made on behalf of the Respondent. In any event, his main contention was that he did not see Mr Dlomo harass the Applicant. It must be pointed out that, firstly the Applicant did not testify that Mr

Aplein witnessed anything related to such allegations. Secondly the fact that he did not see it happen does not mean that it did not occur.

His support for the denial that Mr Dlomo carried a firearm during the period of December 1999 falls to be rejected in the light of the otherwise overwhelming evidence to the contrary and brings into stark focus his credibility.

In the circumstances, his evidence cannot be relied upon at all and is rejected.

The evidence of Cynthia Notshibi does not seem to be relevant and consequently does not have any bearing on the considerations. She was not able to throw any light on any relevant issue in this case and her evidence on important issues is at variance with issues which are common cause. The nature of her evidence does not support that of the Respondent. In any event, she did not make a good impression and seemed to have a selective memory which coincidently favoured the Respondent. If her memory is to be relied upon, then there are other issues which she would be expected to be remember and not only those bits which favour the Respondent. In any event, in view of the ultimate findings in this application, her testimony does not impact on it to any significant degree.

The evidence of Emerson Vinjwa is similar to that of Morris Aplein. He was not impressive. He also seemed to have supported a version which was proved to be incorrect. In particular his evidence about Mr Dlomo's possession of a firearm on duty touches his evidence in a negative way. It seemed also that the instruction in regard thereto, to the Respondent's legal representative raises serious doubt as to the reliability of his evidence.

He contradicted himself on the question of giving instructions about Mr Dlomo's possession of a firearm on duty.

He mentioned a few other aspects about related matters such as the Applicant's alleged poor work performance, keeping records of warning and keeping firearms in the safe. These aspects were contrary to the version of Mr Dlomo.

In the circumstances, his evidence cannot be relied upon and falls to be rejected.

Victoria Nomkonwana very conveniently testified that the Applicant did not make a report about Mr Dlomo's attention to her. However she testified that this was so because she never visited the site in question for such a report to be made to her. Yet it was put to the Applicant that though Victoria did visit the site the matter was never raised with her. In view of this contradiction, which seems central to he evidence, her evidence cannot be relied on.

Marlene Kordon referred to different aspects of the Applicant's alleged bad work performance. Basically her complaints amounted to insubordination and a lack of loyalty in that she did not want to work at certain points and refused to attend to duties longer than her shift demanded. The nature of these allegations in regard to the Applicant's work performance does not impact on the general tenor of the defence sought to be tendered by the Respondent. It raises some doubt about what exactly the Respondent wanted to convey as a reason for the Applicant's allegations. Miss Kordon's evidence does not need any further consideration and, if anything, strains the Respondent's case.

The evidence of Janice Johnson falls somewhat into a different category. She impressed at times but yet her evidence contained important improbabilities which raises doubt as to her reliability.

If there were complaints about the Applicant's work performance, and she took steps to deal with it, then her failure to record these become questionable and consequently lends strength the Applicant's version. Her second explanation for

not doing so, flies, by its very nature, in the face of the first. It is irreconcilable that she would, on the one hand negligently fail to make the required notes about dealing with the matter but on the other hand, deliberately omit to do so because of the guarded relationship that existed between the Respondent and the Applicant's sister in-law.

She was also unable to give any reason for transferring the Applicant during January 2000 when she should have been able to do so.

Her contradictory version of the conversation she had with Mr Ntsabo raises serious improbabilities and consequently taints her evidence even further.

(i) She stated that conversation related to a complaint about the Applicant being placed on night duty. Her version was at variance with the records of shift allocation;

(ii) It is improbable that the complaint would have related to a supervisor placing the Applicant on night shift as it was common knowledge, that only Janine and Anthea were responsible for shift allocations;

(iii) She alleged that she discussed the allegations against Mr Dlomo with Mr Ntsabo during that telephonic call but yet, later stated that she refused to discuss the matter with him because he did not work for the Respondent.

The failure to enforce disciplinary procedures she explained, was the result of the special relationship the Respondent had with the Applicant's sister-in-law with whom the problems had in any event been discussed. Given the nature of the complaint of non-performance of duties and/or insubordination, the reason for not embarking on disciplinary procedures is flimsy in the light of the seriousness of the allegation and the fact that the Applicant's sister-in-law already had

knowledge (on the Respondent's version) of these complaints, as it was initially raised with her in an attempt to improve matters while still protecting the contract, with the hospital.

Her version of the nature of the complaints about the Applicant's work performance by Marlene was not supported by Marlene who gave a must less serious version of her dissatisfaction. Furthermore, the resultant action as testified to by Janice is not supported by Marlene.

She initially also attempted to bolster the Respondent's case by testifying in full support of the denial that Mr Dlomo carried a firearm. She finally and reluctantly conceded that Mr Dlomo did carry a firearm while on duty and that she knew of this as she and Anthea regularly checked those records.

She testified that after she heard the incorrect proposition regarding this aspect put to the Applicant, she went to check the relevant records (she contradicted herself also as to whether she was instructed to do so or not) and that they were available at any time. It is unclear from the evidence whether she drew the attention of Mr and/or Mrs Fisher to the truth of the matter.

It is noteworthy that Mrs Fisher testified that some of these records had disappeared. Yet Janice referred to these during the course of the hearing. Her allegation that she had a meeting with the Applicant regarding the complaint from Marlene, is clearly a version that did not feature in the preparation of the Respondent's case. It seems to me that this bit of evidence was manufactured as she testified because it was never put to the Applicant. On the contrary, it was put to the Applicant that the issue was not taken up with her at the time as an alternative method of resolution of the problem was being sought through her sister-in-law.

It was argued that it was probable that Janice was part of a connivance to withhold evidence from this hearing because she was in management of the Respondent. There is no evidence to support this contention and it will become clear hereunder that, on the probabilities, she was not.

In the light of the aforegoing factors, it is difficult to accept her evidence where it stands on its own. Those portions are rejected as unreliable. However her evidence is capable of supporting the evidence of other witnesses whose evidence is found to be reliable.

Dr Bredenkamp was a good witness. Her evidence was based on scientific tests and data. She is an experienced psychiatrist and was able to shed much light on the tests adopted and the perceived failures of not adopting others. Her qualifications were not questioned and consequently I accept that she is suitably qualified to comment on the tests. However, as will be apparent, the tests she referred to as not having been done on the Applicant were those which would in addition, have been done in the ordinary cause of assessing the Applicant. In the absence of these tests, she questioned the results of the assessment made by Miss Walaza.

Dr Bredenkamp did not suggest any alternative tests nor were any suggested to Miss Walaza. It is not clear whether Dr Bredenkamp was able to dispute what Miss Walaza has testified in that regard or whether she agreed therewith once it was pointed out to her.

In the environment in which she studied and presumably practices, it is understandable that she would adopt this stance.

Mr Fisher was an unimpressive witness. He was argumentative and tended to be aggressive when cross-examined. He clearly played a leading role in the defence of the Respondent and in which he has a substantial interest.

His evidence is punctured with improbabilities which further taint his evidence.

It is improbable that he would only have heard of the nature of the application and that it involved an allegation of sexual harassment which played an important role in the "dismissal" when he attended the meeting called by the CCMA. It is also improbable that upon receipt of the initial claim, he passed this on to his legal advisors without reading it. This begs the question as to how he knew that it required the attention of his legal advisors if he did not read the documents.

He contradicted himself in first saying that he conducted site inspection both during the day and night then denying that he had testified to this effect.

He denied that Christopher told him that he had seen Mr Dlomo touch the Applicant. However he conceded that this in fact occurred when it was pointed to him that this was what was put to Christopher by the Respondent's representative.

Initially he said that he paid little attention to Christopher's allegations of bribery but later stated that it upset him so much that he intended taking disciplinary action against Christopher.

He also tended to arrogantly fabricate evidence to suit the Respondent's case as he progressed but when faced with what already was on record or the Respondent's records e.g., the firearm records, he tended to change his evidence and make feable excuses as to why he had given incorrect evidence. He was

constrained to admit that he blamed others for his false evidence in attempting to explain the inconsistencies. When he could not resort to this, he simply refused to answer questions or said that he could not remember.

While he denied that he was kept informed of what was being said in court and that he called meetings to discuss the case with witnesses and prospective witnesses, it is clear that he did so. The Respondent's main witness, Mr Dlomo, confirmed this.

It is difficult to believe that a person who displayed such obvious belief in his power and control while testifying would not exercise this in his own environment. He gave the impression of a despot who would not allow anyone to dictate to him and that he expected his orders to be carried out without fail. It seems that he was feared at his place of business and if he required anything to be done by his employees, it would be done in his way. Consequently, it is clear that if he had asked for the firearm records, it would have been found and produced immediately. When he called a meeting during the course of the hearing, people attended it and gave him explanations of how the hearing was progressing and what was being said by the witnesses.

His absolute control over the Respondent and the employees makes it difficult to avoid the suggestion that he played a central role as to how the hearing was being conducted from the Respondent's perspective. It is probable that he tended to withhold evidence, such as records of firearm allocation. This corresponded very well with the proposition that Mr Dlomo did not carry a firearm at the material time. This was convenient because, the Applicant bearing the onus of proof, would not be able to prove independently that this was so. It was only when he had no option, that the records requested long before then, were allowed to be produced. His manipulation is further demonstrated by his altercation with Christopher alleging that he would have to come to court to give

his evidence. This is improbable because it would damage the Respondent's case and strengthen the Applicant's case. In that event the Respondent would seriously have to reconsider its position.

His denial that the meeting with witnesses and that Mr Dlomo was fabricating this portion of his evidence demonstrates Mr Fisher's readiness to blame others in order to escape liability. There is no evidence to suggest that Mr Dlomo would fabricate this. Mr Dlomo's outburst, in objecting to the presence of Delores in court, fortifies this as Mr Dlomo clearly saw her as the person who would report proceedings to Mr Fisher. Mr Dlomo could hardly be expected to adopt that kind of stance if such meetings were not being held.

In any event, in so far as Mr Fisher's evidence touches the merits, it must be rejected as false and unreliable. His conduct regarding this hearing, it must be said raises much discomfort and taints the Respondent's case enormously.

Mrs Fisher is very much in the same position. She was unimpressive, argumentative and tended to resort to a loss of memory when faced with awkward aspects of her evidence and the Respondent's case in general.

In attempting to render the allegation of Mr Ntsabo that he spoke to her on the 1st January 2000 false, she denied that she was available in the office of the Respondent when he says he spoke to her over the telephone. She continued to deny her presence in the office despite records to show that she was. When she was confronted with her signature verifying an entry clearly made at a time she said she was not at the office and when the call was made, she resorted to explaining that the entry must have been made prematurely. Her reason for saying that she was not at the office is that she was normally on holiday on the 1st January 2000. She was eventually constrained to concede that she was at

the office and could not say how long she was there. This being so, she was unable to deny that she was at the office when the relevant call was made.

She described, in detail an accident that allegedly occurred in December 1999 at the time of the alleged harassment of the Applicant. She did this to explain the missing firearm records which included those for the 15th December 1999. However she could not explain this when it was pointed out to her that the accident she referred to occurred in August 1999 and therefore could not have been the cause of the records going missing.

It became obvious during the course of the hearing that she listened to all of the evidence related to the Applicant's case and in particular the evidence of the Applicant herself. She was giving instructions as to the disputes in the case. In doing so, she allowed or caused propositions to be put to the Applicant and her witnesses which were false or aspects of which she could not have had knowledge (on her own version).

Included in this list of propositions, is her instruction that site inspectors attended the site at anytime to check firearms and therefore firearms were not locked in the safe. This was obviously to counter the evidence of the Applicant. She did not testify to this and was unable to explain why it was put to the Applicant or her witnesses. She furthermore allowed the denial that Mr Dlomo carried a firearm while on duty to be put to the Applicant when she ought to have known that he did and at best of her, she needed to investigate the position before allowing the proposition to be put to the witness.

She confirmed that her husband had told her that Christopher had told him that he had seen Mr Dlomo touch the Applicant yet she allowed it to be put to the Applicant that she had never been touched by Mr Dlomo. The disregard for such

information is clearly, as is the other aspects referred to, designed to protect the Respondent's interests and therefore her own interests and that of her husband.

The extent to which she went to protect the interests of the Respondent is also clearly demonstrated by the distancing of the Respondent from the concession made by Mr Dlomo that he did carry a firearm at the time whereas its case as moulded by Mr and Mrs Fisher relied on, at best for Respondent, on what must have been information provided for by Mr Dlomo. If one or both of them were the authors of that version, it makes the position all the worse. Indeed, the firearm records were available at the time she testified and yet maintained the original position in this regard. It could only have been to avoid capitulation and what was made a central issue by the Respondent itself.

She also testified that she could not remember if Christopher's allegations were raised with Mr Dlomo. In the light of the importance and nature of this kind of information, it is difficult to accept that she is unable to recall whether it was raised or not. It tends to confirm the suggestion that accepting Mr Dlomo's denial was the convenient option for the Respondent and its members.

Mrs Fisher's version of the complaints allegedly leveled at the Applicant differs materially from versions tendered by those who were supposed to have made the complaints. She also mentioned, clearly in order to substantiate the alleged poor work performance and very late in her evidence, that she had witnessed the poor performance personally. Issues such as the Applicant being rebellious, not wearing specified clothing while on duty, leaving her post and going to make tea and so jeopardizing peoples' lives were raised by her as being typical of the complaints leveled at the Applicant. These were hardly the complaints referred to by others who were to have made these allegations and not confirmed by them.

She confirmed that it was company policy to record warnings, whether written or verbal and that corrective training procedures had been put in place by the Respondent. In view thereof it is difficult to understand then why the Applicant was not put into a corrective training programme (at least), if indeed there were all these complaints about her bad work performance.

Her evidence that the corrective measures she intended to implement on the 14th December 1999 was to transfer the Applicant from Khayelitsha Day Hospital (where Mr Dlomo would remain) to work on night shift at the Bellville site. This would hardly address the problem complained of as she would, without training, continue to render poor work. Over and above that Mrs Fisher was unable to explain why this did not occur. She could further not satisfactorily explain why, contrary to her instructions, the Applicant was transferred to Mitchell's Plain Day Hospital on the 5th January 2000 save to say that it was an office slip-up.

When Mrs Fisher was confronted with her entry in the occurance book of Mitchell's Plein, she suggested that the entry itself was incorrect and that she might have signed it on her return fourteen days later. She again changed that to a scenario of having made the entry before the 1st January 2000. When it was pointed out that in either event, the entry would be incorrect, she was unable to explain the entry and finally conceded that the entry would have been made on the 1st January 2000.

Later in her evidence she again conceded that the said entry would not have been made on the 31st December 1999, nor on her return in the middle of January 2000.

In the light of the concession that she was in the office for an undetermined period on 1st January 2000, she was unable to deny that she could have had the conversation with Mr Ntsabo that evening.

Mrs Fisher was constrained to admit in the face of independent proof, that the motor vehicle accident she couples with the firearm records occurred in August 1999. It follows therefore that her explanation that the firearm records for December 1999 went missing during the said accident and could consequently not be produced could only be a convenient fabrication to suit the Respondent's case.

It might be well to point out that there is no explanation, whatsoever, as to why the these fire-arm records were not produced despite numerous requests for them.

As members of the Respondent, Mr and Mrs Fisher provided instructions to the Respondent's legal representatives. In particular, Mrs Fisher was present in court during the Applicant's evidence.

It is clear from this that she allowed certain incorrect propositions to be put to the Applicant and some of her witnesses. For example, that Mr Dlomo did not carry a firearm when on duty, that no firearms were put into a safe because the inspectors could randomly check the firearm during the course of the shift.

Mrs Fisher was also prepared to colour her evidence to suit the Respondent's case. A clear example of this was her almost spontaneous evidence that when the 'error' of the proposition that Mr Dlomo did not carry a firearm on duty became apparent through an admission by Mr Dlomo, it was corrected. This was not so and more significantly, it was clearly the position of the Respondent that it distanced itself from the admission by Mr Dlomo that he did in fact carry a firearm as evidenced by the records.

At times during her evidence Mrs Fisher was evasive and raised excuses for providing non-sensual answers to simple questions.

In the circumstances her evidence falls to be rejected as false and unreliable.

The case for the Applicant is a very simple one. Her case is that she had been constantly sexually pestered by Mr Dlomo until he simulated having sex with her the manner already described.

She reported the initial advances by Mr Dlomo to Mrs Fisher and the latter incident was telephonically reported to the Respondent (Mrs Fisher) through her elder brother. On these occasions, promises to deal with the matter were made. In the context of the evidence and telephonic calls, the promise to deal with the matter entailed stopping the broad offensive conduct of Mr Dlomo towards the Applicant.

The Applicant was a good witness. She was clear and direct in giving her evidence.

It was argued that the Applicant's case did not sufficiently establish, as the onus resting on her required, that the conduct of Mr Dlomo as alleged was committed without consent.

The Respondent's case was never that the dispute centered around consensus. It's occurrence was completely denied and the question is whether it in fact occurred or not.

Furthermore it was argued that even if it were found that the alleged harassment did occur, nothing could be done immediately to prevent further harassment.

The ethos of Labour Law of this country is clearly one which enhances respect and calls for the observing of the rights of persons referred to in the

Constitution. The conduct complained of falls within Chapter III of the Constitution and any prospect of infringing such right demands immediate attention. It was further argued that it is unreasonable to expect an employer to drop everything and suspend the alleged perpetrator upon such complaint. That was not the Applicant's case at all. All she required was for steps to be taken against Mr. Dlomo and in doing so, stop future incidents of harassment my Mr. Dlomo on her.

It was argued on behalf of the Respondent that the real reason for her resignation was that she was put on night shift. If it was intended to suggest that this was a step taken by the Respondent to avoid continued harassment of the Applicant by Mr Dlomo, she was clearly upset by the fact that it was her who was being inconvenienced and therefore penalised in an attempt to solve the problem.

She was criticized for not satisfactorily dealing with the matter through her Union; if at all. It is suggested that in the light of inaction by her Union, it can safely be found that she did not take up the matter with the Union. It follows therefore that such an argument would assert that the Union was not informed because the event(s) did not occur.

This argument is based on an assumption that the Unions operate within an atmosphere of utmost efficiency and with the required urgency. I may point out that a short spell in the Labour Courts of this country clearly demonstrates that apart from other possible reasons, the mere pressure of work and great numbers of cases to be dealt with do not allow Unions to act as promptly as even their officials would like to. Consequently, the lack of Unions' intervention does not indicate, to any extent, that the alleged harassment was not reported to the Union and therefore did not occur.

She was also criticized for becoming upset during her testimony and that she had to be brought into line on a few occasions. It is true that she did. It should however be seen in its proper context. The record will clearly demonstrate that the Applicant's discontent developed over a time during the approximately five days, she testified and was, in any event related to the resultant frustration of being told that events did not unfold the way she explained but in another way or not at all. It was indeed in this kind of atmosphere that she displayed the frustration she is criticized for. Again it is understandable and cannot be attributed to her being an untruthful witness as the criticism would tend to suggest.

Numerous aspects in the Applicant's evidence were referred to on behalf of the Respondent. It was argued that there were unsatisfactory aspects in the Applicant's testimony which detracts from the impact it was intended to make especially in the light of her being a single witness in respect of the incident in the gaud room between Mr Dlomo and her on 15th December 1999.

While there were aspects which might, in isolation, raise concern, they were not material to the focal issues. It cannot be expected that evidence in relation to these non-focal issues would be clear and void of criticism when examined with a fine toothcomb and seen in perspective, the actions of and what was important to a lay person in the position of the Applicant. e.g. Why she went to tell her family of the incident before informing her employer of the problem. Why she did not lay a complaint to the police and so forth. It must be remembered that these were factors which are not germaine to what Mr Dlomo actually did but rather related to what the Applicant did after.

It was clear from the evidence of the Applicant that she and her family were close-knit and conducted their lives, perhaps unlike other families, in a manner whereby the elders and males were consulted about issues affecting members of

the family. It seems that the elder males played an important role in such matters and therefore her failure to report the problems directly and immediately to the employer cannot negatively affect the Applicant's evidence and her case as a whole.

The fact of the matter is that her evidence of what occurred between Mr Dlomo and her on the one hand and subsequent dealings with the Respondent representatives was consistent, clear and to the point. Indeed there was no criticism leveled against her evidence in that regard.

It was further suggested on behalf of the Respondent that the Applicant's case is based on the fact that she held Mr Dlomo responsible for her having to resign and being unemployed. It was further submitted that in the light of his complaint(s) about her poor work performance which she believed to lead to her being unemployed, she fabricated the version of being harassed as she described.

The Applicant's bother, Themba Ntsabo was 'criticized' for being uncertain as to when he informed the Respondent of the problems his sister had. Similarly the Respondent referred to inconsistencies in his testimony. These were not elaborated on. On a reading of the record, it becomes understandable that there were no substantial details regarding the alleged unsatisfactory aspects of his evidence because there really were none.

Furthermore, certain material portions of his evidence such the (soiled skirt) of the Applicant, that he in fact spoke to Janice at the Respondent's head office prior to the 15th December 1999, were never disputed with him.

Mr Ntsabo was a good and generally impressive witness whose evidence contained expected minor shortcomings, given the lapse of time between his

testimony and the actual occurrences he testified about. He was otherwise clear and was certain of the material aspects of his testimony.

Significantly, it was not argued that he was fabricating his evidence but rather that his evidence should not being accepted because it fell short of the acceptable standards of evidence for lack of clarity. This submission cannot be sustained because it is based on the flimsy premise that Mr Ntsabo's memory failed him and his evidence as a whole is therefore suspect. It is clear that he was unable to recall dates and times because of the passage of time. Otherwise his evidence was to the point.

In the circumstances his evidence must be accepted as true and reliable. Similarly the evidence of Christopher Nashua was criticized for testifying on minor issues which did not accord with the Applicant. For example whether she was crying at the guard room after the incident of the 15th December 1999; whether the guard room was closed when firearms were put into the safe; when the Applicant actually told him of the incident of the 15th December 1999; whether he witnessed any harassment of the Applicant by Mr Dlomo and when he actually told Mr Fisher of the harassment.

All these issues can be explained. Firstly, it was never the Applicant's version that she sat outside the guard room on 15th December 1999, and actually cried for all the time after lunch till she left work that day. It is understandable that at the time he saw her, she might not actually have been crying. What is important though is that he saw her sitting there. It is significant that it was never contested that she sat where she said she did. Secondly, it was never the Applicant's case that the door to the guard room was always shut when firearms were put into the safe. She stated that this is what normally occurred according to the rules of the Respondent. Thirdly, the Applicant never testified that she knew or saw Mr Nashua witness any act of harassment on the Applicant by Mr

Dlomo. However it is not inconsistent with his testimony that he saw this. It does not mean that the Applicant was aware that Nashua saw it. Lastly, it was never the case of the Applicant that she relied on Mr Nashua to inform the Respondent of the harassment.

Consequently, he was not expected to report the matter to the Respondent's owners or officials of his own accord. It is perfectly acceptable that he would respond to these issues only when asked about them. Consequently, the Applicant's case cannot be tainted by these criticisms. His evidence is also accepted as true and reliable.

The combined reports and evidence of Drs Daniels and Parker were never disputed in so far as it pertained to the symptoms of the Applicant being consistent with what they were told was the cause thereof.

The evidence of Miss Walaza was challenged somewhat through the evidence of Dr Bredenkamp.

Dr Bredenkamp criticized the method employed by Miss Walaza in assessing the Applicant. It was common cause that the tests involved verbal examination and a lot of direct questions. It is obvious that the communication between the Applicant and the expert would have occurred on the basis as envisaged in the English language.

As Miss Walaza explained some of the tests are able to be conducted without the risk of an inaccurate assessment. But some can be tainted by result obtained from tests which do tend to give incorrect result because of its language or social incompetence. Dr Bredenkamp did not suggest any alternative tests or how to overcome the problem. What is more, her criticism was framed more on the basis that if the omitted tests were conducted, it would have guaranteed a less

risky result. That did not mean that the assessment of Miss Walaza was incorrect.

There is no doubt in my mind, absent the allowance necessary to be made in dealing with people from a different cultural background to those who are accustomed to western life, the conclusions drawn by Dr Bredenkamp fade as against those made by Miss Walaza because the former did not make the necessary allowances in dealing with the Applicant.

In the circumstance, I would prefer the findings of Miss Walaza to that of Dr Bredenkamp. It is clear from those findings that the symptoms were consistent with being a resultant condition to what the Applicant had explained.

In examining the evidence as a whole it is clear that the Applicant's evidence enjoys the support of other corroborative evidence.

Mr Ntsabo was not in the habit of communicating with the Respondent's office. Indeed, on the Respondent's version, he was told on one occasion, that he was not an employee and therefore could not raise issues. It is therefore puzzling as to why he would otherwise have made these phone calls, the existence of which is supported by documentary evidence of telephone records, submitted by agreement. It could only have been, as is the Applicant's case, to complain about the harassment and the culminating event of the 15th December 1999. If the Applicant's case is a fabrication as suggested by the Respondent, it would have had to be a plan to sue the Respondent, which was developed before the Applicant's resignation. It would be too far fetched to find that the telephone calls were made as part of this elaborate plan to sue the Respondent which would have been formed at that time, kept in incubation and dependent on the reaction to the telephone calls. This is so because the Applicant and her

'accomplices' could not have forseen that the Respondent would not react to any complaint lodged with it.

Furthermore, the evidence of Drs Daniels, Parker and Miss Walaza fortifies the Applicant's version because their findings are consistent with her allegations. No suggestion that she was feigning these symptoms were made to the Applicant. They clearly existed. She explains why they do exist. Mr Nashua would have had to be an accomplice to a plan to sue the Respondent on false evidence if the Applicant's case is based on fabrication. If this is so, it begs the question as to why he did not raise the issue with Mr Fisher before he was asked about the alleged harassment. It would have been expected that he would go out of his way and be proactive in raising the issue with Mr Fisher in order to enhance the Applicant's case.

That she had covered-up the soiled part of her skirt was never disputed. Nor was the evidence that the same skirt was soaking in the bath that very night before being washed.

It is improbable that she would have covered her skirt in such a way for no reason. Similarly it is improbable that she would have gone to soak the skirt which her mother would see if there was nothing wrong with it.

It is therefore difficult to find that it was not soiled and that she is being truthful in that regard.

It is also improbable that the Applicant would seek to settle a score with Mr Dlomo in such an elaborate way when she could easily have publically cried rape after she was questioned by Mrs Fisher about her bad work performance.

It seems to me that the Applicant only came to know that Mr Dlomo had raised her alleged work performance with the Respondent after she had told Mr Nashua and her brother of her problem with Mr Dlomo. If she has raised the alleged harassment in order to implicate Mr Dlomo falsely because he complained about her work performance, then mentioning such harassment to Mr Nashua is out of place in the whole scheme of this plot to falsely implicate him. The plan would then be even more sophisticated in such circumstances and dependant on the co-operation and manipulated by all of the witnesses who testified in respect of the merits on her behalf. The probabilities of this having been the case are at best, remote.

What is more, if this application was to settle a score with Mr Dlomo, then mentioning the harassment to Mr Nashua and her brother knowing fully well that her brother was going to raise it with the Respondent, does not make sense. It could not have been motivated by his complaint of bad work performance because his complaint had not as yet been raised with her. Consequently she did not know at that time that the complaint had been made. She would therefore not have the suggested motive to claim harassment.

In the circumstances, I am satisfied on the balance of probabilities that the Applicant's evidence is truthful and reliable. Her version that she was harassed as she described and the manner in which she drew the attention of the Respondent to the problem is accepted as true. So too is her evidence of how the representatives of the Respondent initially turned a blind eye to the plight claiming that Mr Dlomo is a good person suggesting that they do not believe her in that regard.

Her evidence as to what occurred at the meeting between Mrs Fisher and herself is also accepted.

It is common cause that no procedure to deal with the matter prior to resignation was ever embarked upon. It seems also that the Applicant would have been prepared to continue working despite her discomfort brought on by the said conduct if there were steps taken by the Respondent to protect her from such future conduct. This included continued shift work with Mr Dlomo as long as the Respondent ensured that the harassment was not repeated or continued. Though not the Respondent's case, if it were to be argued that Mr Dlomo was retained on that particular shift for operational reasons, and the only way to stop the offensive conduct was by separating the two, this should have at least been discussed and explained to the Applicant prior to implementing it. If these changes did not suit her, alternative arrangements could and should have been investigated with her. However this was not done and the ensuing discontent is understandable.

In summarizing the position, the Applicant was an employee of the Respondent who was sexually harassed by a co-employee holding a superior position and which culminated in the worst occurrence of sexual harassment she encountered on the 15th December 1999. She was so overcome by her experience that she just sat and cried outside the structure in which it occurred. Significantly she stayed at the site of her employment and only left at the scheduled time. She made a report to her mother when she arrived home and her brother was called in as seems to be a family practice in times of distress. He then informed the Respondent of what had happened and was promised that the matter will be dealt with. This response was premised by a complaint by the Applicant about Mr Dlomo to the officials of the Respondent and met with disbelief and a comment that Mr Dlomo was a good man without vices. The Applicant nonetheless relied on the promise made to her brother that the matter will be attended to. No disciplinary or mediation procedures were followed and ultimately she was placed on night shift at a different site to that of Dlomo. She again felt penalized and again complained through her brother. Again nothing

was done to deal with the problem. In the face of these omissions of the Respondent, she handed in a letter of resignation which was rejected by Mrs Fisher. The Applicant was then compelled to hand in a letter of resignation which suited Mrs Fisher who was acting on behalf of the Respondent. This seems to have enhanced the frustration caused to the Applicant by the Respondent's continued failure to attend to a worsening problem from the Applicant's perspective. The Applicant often referred to the failure to understand her position by officials of the Respondent.

The Respondent distanced itself from the concession made by Mr Dlomo in respect of whether he carried a firearm during the period of December 1999. Yet at the same time maintained that it relied on his evidence that the harassment as alleged by the Applicant did not occur. While this seemed to have been of equal focus in the defence(s) raised by the Respondent, though not directly abandoning it, reliance thereon clearly diminished with time. In the end the Respondent clearly relied more on the failure to be informed of the problem in order to avoid liability.

To the extent that the former is still relied upon by the Respondent, the evidence favours the Applicant's version.

Consequently it is found on a balance of probabilities that Mr Dlomo did harass the Applicant as she testified.

The Respondent's argument that it was never informed of the alleged sexual harassment raises two aspects. Firstly, it is argued that section 60 of the EEA demands that the victim of an infringement under that legislation requires that the entity sought to be held liable must be informed immediately of such infringement. However, the accepted facts are that the Respondent was informed thereof sometime during the evening of the 15th December 1999 or

soon thereafter. As referred to above, there is documentary proof that the office of the Respondent was controlled by telephone which carries the number registered to either the mother of the Applicant and with whom she resides or her brother who was called to his mother's home when the alleged incident was discussed.

The requirement that the reporting procedure be reported immediately cannot be construed to mean with minutes of the incident complained of. There are circumstances of which one is reminded in such considerations.

It is trite that such a requirement is regarded as being complied with when it has been done within a reasonable time in the circumstances. That it has been done in 'reasonable time" will of course differ from case to case and determined by the relevant circumstances which prevail. It must also be remembered that this requirement is underpinned by the notion of giving the recipient of the notice and opportunity to deal with the complaint without any prejudice. To expect her to have dropped everything in the condition she was in, is an unreasonable expectation.

Furthermore, the context of her family way of life coupled with her appreciation to maintain her employment makes it understandable that she first went home to make the report. As is borne out by her mother, the impact of her being unemployed on the family, seem to have an important factor in the family decision that she continue working.

After the incident of the 15th December 1999, she immediately went to sit outside in full view of others probably to avoid providing an opportunity of repetition of the incident.

It is important to note that one of the reasons for making a report to the Respondent was to ensure that it took preventative steps before the offence was repeated. In this case, there does not seem to have been an opportunity to repeat the offence in the circumstances.

It seems to me that the failure of the Applicant to inform the Respondent within minutes of the event on 15 December 1999 cannot be construed as an infringement or non-compliance of section 60 of the EEA. The insensitivity displayed by the Respondent's officials aggravated the situation. The Applicant clearly wanted to continue her much needed work and the remuneration she received not only provided finance but also gave her a sense of pride in contributing to the requirements of the home. This intention to keep her employment is also demonstrated by her staying on at work despite her devastating experience on the 15 December 1999 and what before that. It seems that she did not want to risk her employment. This attitude was fortified by her being patient and giving a reasonable time for measures to solve the problem to be implemented. She clearly did not want to dictate what should be done but would have been satisfied if he was disciplined and the threat posed by Mr Dlomo ceased so that she could carry on with her duties as expected.

Failing to attend to this problem within a reasonable time does give rise to legal consequences.

The conduct of the Respondent in face of the complaints must be considered in terms of the cumulative impact it had on the Applicant and her expectation that punitive and preventative measures would be implemented.

The failure of the Respondent to heed to the Applicant's pleas to make it possible for her to do her work properly and without such interference fell on deaf ears.

She consequently felt compelled to resign in the face of a continued threatening environment and in respect of which the Respondent did nothing.

Section 187(f) of the LRA reads as follows:

" automatically unfair dismissals…"

(1) …

(f) that the employers unfairly discriminated against the employee, directly or indirectly, on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility".

In terms of the LRA, this section would be applicable if her dismissal was related to discrimination. From an LRA perspective, I do not think that the Applicant's dismissal can be described as being based on discrimination. Indeed discrimination was not alleged as a basis for dissatisfaction and consequent resignation. Her case was framed on completely different principles. Consequently her claims in terms of sec 187(1)(f) of the LRA cannot succeed.

Section 186 (1) (e) of the LRA reads as follows:

Dismissal means that …

"(e) an *employee* terminated a contract of employment with or without notice because the employer made continued employment intolerable for the *employee*;"

In these circumstances, the employee must resign in consequence of the employer's conduct. If the employee would in any event have resigned he/she cannot claim constructive dismissal.

See: Brassey: Employment on Labour Law, Vol 3 at 6.16.

The conduct does not necessarily refer exclusively to proactive conduct by the employer. An omission to deal with an intolerable situation is just as much a situation envisaged in section 186 (1) (e) of the LRA.

The conduct of the employee must be so intolerable that the employee cannot fulfill what is the employees most important function, namely to work.

In Pretoria Society for the Care of the Retarded v Loots [1997] 18 ILJ 981 [LAC] a 985 A – B, Nicholson JA stated:

> "The enquiry then becomes whether the Appellant, without reasonable and proper cause, conducted itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. It is not necessary to show that the employer intended repudiation of the contract; the court's function is to look at the employer's conduct as a whole and determine whether it is such that its effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. I am of the view that the conduct of the parties has to be looked at as a whole and its cumulative impact assessed".

See also: CEPPWAWU and Another v Glass Aluminium 2000 CC [2002] 5 BLLR399 [LAC] at 404 G – 406 D

Conduct becomes intolerable only when the employee has exhausted the means he/she might reasonably be expected to employ to put a stop to it.

See: Kruger v CCMA and Another [2002] 11BLLR 1081 (LC)

The Applicant informed the Respondent of the initial sexual harassment on her by Mr Dlomo early in December 1999. By the time she resigned about six weeks

thereafter, matters had worsened and the incident of 15th December 1999 had occurred. Nothing was done by the Respondent to rectify the situation and to ensure that the risk to the Applicant was neutralized. That is all she wanted so that she could get on with her work. She did all that could reasonably be expected of her in an attempt to hold onto her employment and to avoid being sexually harassed. The attitude of the Respondent is clearly described by the Applicant when she testified that the Respondent did not understand. In my view, the brushing aside of the complainant had such an effect on the Applicant that not only were there patent effects but this was compounded by her feeling that her credibility and integrity was being undermined.

In the circumstances, it is clear that the inaction of the Respondent was unfair and lead to a situation that became an intolerable environment for the Applicant to continue employment. She was then compelled to terminate her contract of employment with the Respondent. The Respondent did or are at best, ought to have foreseen the development of hostile and intolerable working environment in the circumstances. The Respondent did not explain its approach and chose to deny that it was ever informed of the problem. It follows therefore by the nature of its defence, it did not prove that the dismissal was fair. Her action therefore falls within the situation as envisaged by section 186 (e) of the LRA.

That being the case, she is entitled to compensation in respect of her dismissal as contemplated in section 186 (1) (e). The extent of the compensation is to be determined as provided for by section 194 (1) of the LRA.

Taking into account the attitude of the Respondent, its attitude at the hearing and the extreme consequences on the Applicant as a result thereof, I think it would be fair to give maximum compensation allowed by section 194 (1) of the LRA.

Sexual harassment has only recently become a focal issue in South African legal terms. It is suggested that sexual harassment, especially by men on women, is by far the most prevalent.

Item 4 of the Code (the "Code"), published in terms of sec 203 of the LRA in Government Gazette 190449 GNR 1367 of 17 July 1998, specifies the following forms of conduct which may constitute harassment.

(a) Physical conduct,: varying from touching, sexual assault, etc.
(b) Verbal conduct, - including innuendoes, sexual advances, suggestions or hints, etc;
(c) Non-verbal conduct, - including gestures, indecent exposure, etc.

It is also important to examine the effect of such harassment. Some of the common instances which flow from sexual harassment include:-

(a) Quid Pro Quo Harassment, which occurs when a woman is forced into submission to sexual advances for fear of losing benefits from her employment itself. Normally this is related to a man who is in a position of power vis-à-vis the victim, in the relationship at work.
(b) Creation of a Hostile Work Environment which is commonly created by offensive sex jokes, innuendoes and propositions.
(c) Sexual favouritism which is similar to the Quid Pro Quo proposition.

Sexual harassment has often been claimed to be a form of sexual discrimination. The debate stills seems to be raging on. The debate involves mostly technical and academic argument with no clear persuasive direction.

It seems to me that legislation itself makes the distinction because it creates specific provisions which deal with both notions separately. This is simply because life's experiences affect persons differently and the law must attempt to provide for as many situations as possibly can be envisaged.

Section 60 of EEA deals with the Liability of employer. The relevant subsections read as follows:-

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

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

(3) If the employer fails to take the necessary steps referred to in subsection 2, and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.

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

In casu, the actions of Mr Dlomo would indeed constitute a contravention of the provisions of EEA. It was brought to the attention of the Respondent who did not attend to the issue as envisaged in subsection 60 (2) of the EEA for at least five to six weeks after being so informed and indeed turned a blind eye to the complaint. The Respondent is therefore deemed to have contravened the same provisions as envisaged in subsection 60(3) of the EEA.

The Code of Good Practice on the Handling of Sexual Harassment Cases (hereinafter referred to as "The Code of Good Practice"), which is produced in terms of section 54 of the EEA specifically defines Sexual Harassment. In

interpreting the provisions of EEA, the code is one of the instruments that must be referred to. This directive is clearly set out in section 3 of the EEA.

The Code of Good Practice defines Sexual Harassment as

"11 (1) unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.

(2) Sexual attention becomes harassment if:-

(a) the behaviour is persistent;

(b) the recipient has made it clear that the behaviour is considered offensive and/or;

(c) the perpetrator should have known that the behaviour is regarded as unacceptable."

Sec 6 (3) of the EEA clearly defines 'harassment' is defined as a form of Unfair Discrimination and is prohibited on any one of the listed grounds in section 6 (1) of the EEA, which reads as follows:-

"6. Prohibition of unfair discrimination.

(1) No person may unfairly discriminate, directly or indirectly, against an employee, in the employment policy or practice, on one or more ground, 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."

Hence the harassment experienced by the Applicant is, in terms of EEA, Sexual Harassment.

While this definition of the Code of Good Practice does not quite correspond with the interpretation of sexual harassment referred to in the EEA, it is clear that such definition is intended to fall within the spirit of the EEA. The actual EEA must however be followed in the event of a strain between the EEA and the code. In my view the two sources do not strain each other to any significant degree.

The conduct of Mr Dlomo falls squarely within the boundaries of the definition of both the code and the EEA even if the approach adopted in this regard is one in which strict and separate interpretations apply.

For the purpose of the EEA, failure of the Respondent to attend to the problem brings the whole issue within the bounds of discrimination. The nub of the complainant laid with the Respondent involved sexual harassment. Its failure to attend to the matter is by definition as envisaged by section 6 (3) read with section 6 (1) of the EEA, discrimination based on sexual harassment.

It might be prudent to mention that the code makes certain recommendation regarding procedures to be followed when sexual harassment had occurred. It also makes recommendations regarding educative procedures which the employer is called upon to embark upon in informing its employees of the impact of principles relating to the upkeep of notions such a dignity, sensitivity, gender rights, etc, and to avoid harassment itself.

It is common cause that the Respondent did not implement these recommendations. However they are mere instructive guidelines to be followed and not binding in law. Consequently the Respondent cannot be penalized for its failure to implement these recommendations.

See: Moropane v Gilbey's Distillors & Vinters (Pty) and Another 1997 (10) BLLR 1220 (LC)

However this does not mean that it will escape liability which flows from the conduct of Mr Dlomo.

Section 50 (2) of the EEA is an empowering provision. It empowers the Labour Court to award (a) compensation and (b) damages. The attentions on the Applicant by Mr Dlomo lasted from early December 1999 till about the 15th December 1999. The effects thereof were compounded by the approach to the problem adopted by the Respondent.

As a result of her experiences with Mr Dlomo, the Applicant underwent a character change. She developed fears of sleeping alone. She started having nightmares of being raped by a group of men which included Mr Dlomo. She was extremely angry at being so violated and consequently developed a dislike for her own physical being. This was probably related to "feeling dirty" after the incident of the 15th December 1999. She also experienced regular headaches and a loss of appetite. She stopped eating eggs because the albumen reminded her of semen with which her skirt was soiled.

The failure of the Respondent to attend to the complaints aggravated the situation. It seems to me that despite her initial condition, (as described above) dealing with the matter appropriately would have eased the situation and even have prevented the deterioration thereof.

However when matters became too intolerable, she consequently resigned from her position. Her condition became substantially worse. She then developed suicidal tendencies and acute psychological symptoms set in for which she had to be hospitalised.

She then became unusually intolerant of her another and child and her behaviour affected her social life adversely.

She held Mr Dlomo responsible for her status as an unemployed person and for having lost the affection for the father of her son.

It was argued that it was because she held Mr Dlomo responsible for her being unemployed that she instituted this claim. This is not so. She holds him responsible because she would still have been employed had it not been for his actions and the Respondents failure to act appropriately in the circumstances.

Secondly, it was also argued on behalf of the Respondent that her stress was brought on by the termination of her relationship with the father of her child. This is once again not the case. As she explained the man with whom she had this relatively long relationship terminated it because of what occurred. It is clear that she was depressed long before then and her complaints were lodged with the Respondent prior to the relationship with her erstwhile partner being terminated. She testified that he attributed the cause of Mr Dlomo's actions to her behaviour intimating that her behaviour encouraged such conduct. That is why he terminated the relationship. It could therefore hardly be argued that the said termination of her relationship with her erstwhile partner brought on the depression when in fact she reported the offensive conduct to him. If she was not depressed by then she could hardly be expected to seek comfort from him.

Indeed the termination of the relationship might well have aggravated the condition but this possibility does not detract from the primary cause of her condition.

It was further argued that her claim was based on the conduct of Mr Dlomo and the sequelae attendant thereon. Miss van Wyk argued that the post-traumatic stress is a condition that should be dealt with in terms section 16 of the Compensation for Occupational Injuries and Diseases, Act 130 of 1993 (hereinafter referred to as "the COIDA") and therefore the jurisdiction of this court is not properly founded.

The compensation envisaged in the EEA stems from a condition that is caused by a work related phenomenon. It is simply a scenario which is far too remote from the circumstances of this claim. The condition of the Applicant was clearly brought on by conduct which fell outside the boundaries of the duties, directly and indirectly, of both Mr Dlomo and the Applicant. The conduct of which the Applicant complained did not fall anywhere within the job description of Mr Dlomo nor that of the Applicant. Consequently the condition of the Applicant does not fall within the confines of the COIDA as it did not involve a condition listed in Schedule 3 thereof and neither did it arise from or in the course and scope of her employment (nor indeed his).

In the circumstances, the claim must therefore fall within the jurisdiction of this court.

The claim can be divided into four sections. Firstly, a claim in terms of section 186 read with sec 194 of the LRA. This involves a simple equation to establish the amount of compensation to be awarded to the Applicant. The dismissal is one which falls under section 186 (1)(e). The limits to the compensation which is to be awarded to the Applicant is therefore governed by section 194 (1) of the LRA. The circumstance peculiar to this case justifies, a maximum award. Consequently, the Applicant is entitled to R12 000,00 (twelve thousand rand) as and for compensation in respect to her unfair dismissal.

Secondly, she claims, in terms of the provisions of the EEA, for patrimonial damages in respect of future medical costs, which would take the form of psychotherapeutic treatment. It is estimated that she would require weekly sessions over a period of five years. It is further estimated that each session would cost R220, 00 (two hundred and twenty rand).

Aside from the bland estimation of five years, there is no concrete evidence to justify the period of five years. The uncertainty which the nature of this aspect entails make it difficult to formulate an idea as to how long the necessary treatment would last and what it would entail.

It was argued that the refusal to adhere to such treatment and her premature and self imposed termination of her hospitalization prolonged the condition which would otherwise have improved to some indeterminable extent.

While the type of treatment in this field, cannot be imposed on a patient, it is also necessary to bear in mind that insistance on any type of treatment could have an undesirable effect and perhaps aggravate the condition of the patient.

There was however a duty on the Applicant to mitigate her damages, her premature discharge and refusal to undergo shock treatment is tempered by the fear of being shocked the understandable revolt against the stigma attached to a person who is hospitalized at a hospital like Valkenburg Psychiatric Hospital. In my view such a duty diminishes in the light of the nature of the condition and the possible negative results upon the insistance of continued hospitalization and agreement to the shock treatment.

The case of Williams v Oosthuizen 1981 (4) 182 CPD involved the question whether the right of an injured party, entitled to future medical expenses

included the right to have those expenses quantified on a private hospital tariff as opposed to that of a public hospital. At para 185A Baker J stated that:-
" In this country, a plaintiff is obliged to investigate his damages and I am of the opinion that where he is able to choose between medical treatment at two institutions equally good, he is obliged to choose the less expensive in the case where the defendant has to pay for the treatment.'

I am in respectful agreement herewith. If extended, the rationale strengthens the notion that the Applicant carried the duty to mitigate her damages.

There is no evidence that the fees claimed for future medical attention is in respect of treatment at a private institution. Neither was this evidence challenged.

I recently requested both counsel to make submissions ion to aspects regarding the quantification of future medical costs. Firstly on whether, if I am not satisfied that the proposed five years period is reasonable, how I should establish the amount and secondly how the fact that the Applicant prematurely terminated her treatment would affect the quantum in respect hereof. Counsel seemed agreed that a five year period was far too long to establish with any reasonable certainty what the award for future medical costs should be. They also seemed agreed that the termination is a factor to be taken into account and would have the effect of reducing the claim.

In my view, the premature termination by the Applicant of her treatment and her refusal to adhere to the suggested shock treatment probably aggravated her condition and undoubtedly prolonged it. The result thereof is that it probably became more difficult to eventually treat the condition successfully. This situation cannot be placed on the shoulders of the Respondents because it was for the Applicant to have mitigated her damages. The treatment would probably have

helped her sooner, avoided a deterioration of her condition and prevented the prolonged existence thereof.

Counsel also accepted that it is difficult to compute the exact amount under this heading and agreed that it would be best to subject the claim of R45000 to the aforementioned factors and also to discount the amount accordingly.

See Coetzee v Guardian National Insurance Co Ltd 1993 (3) SA 388 WLD.

Section 50 of the EEA does not specifically provide for such an order. The EEA however falls within the exclusive jurisdiction of the Labour Court. The Labour Court of South Africa is founded on the provisions of the LRA. Consequently the powers accorded to the Labour Court by the LRA must have force over all other legislation with which the Labour Court deals, unless specifically excluded. Section 50 of the EEA is in my view, not exhaustive. In the event of a lacuna in this section, the powers of the Labour Court as created and envisaged by section 157 and 158 must then be of application. Consequently this Court has the jurisdiction to deal with this aspect. Taking all these factors into account, I think it just and equitable to award a lump sum of R20 000,00 (twenty thousand rand) in respect of future medical costs.

Section 60 (3) of the EEA finds support in section 6 (1) thereof. The use of the word "person" would seem to include fellow employees. Where the employer allows and condones, either directly or by inaction, conduct which is or leads to a violation of the EEA, as in this case, then the employer is vicariously liable for any damages flowing from such conduct.

In many foreign countries an annual plan of action is required to be submitted. [presumably to a state of authority]. The plan is expected to set out *inter alia*, what steps have been implemented by the proprietors, to prevent sexual

harassment at the workplace, e.g.: Sweden, Canada, etc. Sec 20 of the EEA broadly contains similar provisions.

The long grinding foreign debate about whether harassment altered the victim's condition of service or not, whether such conduct constituted discrimination, sexual harassment or merely an unfair labour practice has been put to test by sec 6 (3) of the EEA. It specifically provides that harassment of an employee is a form of unfair discrimination and is prohibited on any one or a combination of grounds of unfair discrimination listed in subsec 6(1).

Furthermore the Code of Good Practice envisages that employees will be warned of the undesirability of harassment, especially sexual harassment, and the procedures to be followed by victims in the event of such conduct. Everyone at the business, including the employer should be educated in that regard.

It is common cause that the Respondent did not implement a policy related to harassment in its operation let alone make plans in that regard.

Consequently a failure to have done this does not provide a veil behind which an employer can hide to avoid possible liability. The Respondent is clearly liable for damages which flow from the sexual harassment committed by Dlomo on the Applicant. Save to say that it is possible to have founded liability thereon, I do not think it necessary to deal with sec 5 and sec 6 of the EEA in the light of the facts of this case and the applicability of section 60.

Assessing the damages is complicated by the fact that M. Dlomo simulated sexual intercourse on the Applicant. It becomes difficult to assess damages because, while the experience might well have been very horrifying, rape would have been much worse. Nonetheless the sequelae are not much different from

those which one would expect in the case of actual rape. It is only slightly tempered by the fact that it was simulated.

As to the sequelae, the primary evidence was tendered by the applicant herself. This was supported by evidence of the various experts who treated and interviewed her. They all complement her evidence and corroborate her condition as she described.

There was no physical injuries sustained by the Applicant. Her damages are based on the pschycological sequelae of her experience. It is probable that her sequelae will not be permanent though she cannot be expected to completely forget the experience. Her real problem lies more with the effects of her torrid experience rather than only with the incident itself. The pschycological consequences of an attack are often more serious than the physical consequences because the human body has, in most cases, an extremely high degree of ability to repair itself. This is not the case with pschycological sequelae. By comparison, people with strong stoic characters are few and far between. The applicant suffered pschycological consequences. By all accounts they did not rank as the less serious type. Indeed it seems to have been extremely serious. It drove her to consider committing suicide.

The Applicant developed anti-social habits and became generally miserable. She cried for long periods of time, became intolerant to her mother and son and became anxious.

There are no decisions in South African Law from which any guide could be derived in assessing damages in this kind of matter.

In the circumstances I have sought assistance, in so far as it could be rendered from foreign law and South African Law involving the assessment of damages under delictual law.

It appears that the few decisions which seems to be of relevance relate to the pschycological effects of disfigurement caused in motor vehicle accidents most of which were based on negligence.

I am mindful that foreign decisions are based on the requirements of those countries that the value of currency differs from country to country. It is for those reasons that I did not attach too much weight to those decisions and merely utilized the logical considerations which could be gleaned from them.

Indeed no case law in this regard was referred to.

It is difficult to establish what amount of money as solace would compensate the Applicant for the indignity and attendant symptoms she undoubtedly suffered.

In Van Blerck v Marine & Trade In Co-Quantum of Damages – Corbett & Buchannon Vol II Page 145 Adderson J handed down judgment on the 7 May 1971. He awarded general damages for disfigurement and physical discomfort, pain and suffering in an amount of R9 000,00.

In 1980, in the case of MVN, -Quantum of Damages – Corbett & Buchannon, Vol II, a child was awarded R1 500,00 as a result of being raped. It does not seem that she suffered any long term effects as a result.

The Applicant must also have been embarrassed by the incident and even by the trauma which presented itself thereafter.

She will also experience embarrassment of having to attend psychiatric clinics in order to overcome the effects of her experience. This cannot be easy for her to do given that she was uncomfortable with attending Valkenburg Hospital in the past. The stigma she resisted in the past will no doubt also play a role in her preparing herself pschycologically to attend these sessions.

However, it must not be forgotten that she curtailed her treatment prematurely and the effects thereof must negatively affect the damages in the same way it did in respect of future medical costs.

The Applicant has claim under two heads for the consequence of her experience. (a) contumelia and (b) pain, suffering, emotional or psychological trauma, shock and loss of amenities of life.

Because the claims stem from the same incident, aside from the obvious dilemma of how to apportion the ultimate award, it is in my view convenient and safer to make one award in respect of these two headings. It seems to me equitable to do as I propose.

Allowance must also be made for the change in money value. Currency over the world and in particular South Africa is in such a state of flux that it is difficult to venture into forecasting money values. The so-called money experts have predicted different flows for the South African currency in the near future. They off course pass such comments from different interests vantage points. This does not help others in trying to deal with the future.

In the Motor- Vehicle- Assurance Handbook, para 10.22, authors Newdigate and Honey state:-

> " In determining the annual percentages to be used in this process of updating, it is communis opinio of the authors, which is shared by many

> colleagues whom they have consulted, a 5% annual increase to awards made up to and including 1972 and applying a flat rate of 10% increase from 1973 onwards is appropriate, but it must be stressed that this is only for the purpose of establishing a pattern. A lump sum is more appropriate in [certain] instances."

The frightfully distressing event of such sexual assault and the consequences thereof must be borne in mind. This must be seen in the light of her experience and the sequelae which flow from it together with frequent reminders thereof. Hopefully they will diminish with time.

I am also mindful that the prognosis do not seem negative at all. What must not be forgotten is the role the Respondent played. What can only be described as its deliberate effort to avoid dealing with the matter aggravated the situation. This must be balanced against the assumption of successful treatment. The effect hereof is that her condition will diminish or disappear while the attendant trauma will be less troublesome to her.

I have attempted to be fair to both parties. However the ever present feelings of repugnance at the conduct of Mr. Dlomo and the support he received from the Respondent over a relatively lengthy period leaves a bitter taste. In my view to add punitive measures in the form of financial compensation into the equation, would not be misplaced especially in the light of the effect it had on her rights with which I will refer to below.

The spirit of the EEA imposes a duty on all employers to protect its employees against offensive conduct. The failure to do so is a disregard for the law.

In this case it was not only a disregard for the law, but an unacceptable invasion of the applicant's privacy and a violation of her constitutional rights. I can only

imagine, as best I can what women must feel when tehir bodies are so violated by sexual attackers. I do not limit this only to sexual attackers but I think an attack motivated by sexual lust is worse.

Society has clearly rejected this type of behaviour and the law makers have recommended, through the EEA, measures to be adopted in educating everyone involved in employment to do to rid ourselves of this scourge.

The EEA makes provision for an order directing the Respondent to put into operation these recommendations. There is reason to believe that such an order might not be capable of being monitored. I have therefore decided not to make such an order but rather encourage the Respondent to take heed of the said recommendations and implement them. This would benefit all concerned.

In the case of Demosthenous v Paulos – Quantum of Damages, Corbett & Buchannon Vol II G3-1 OPD – 25 May 1989 an amount of R3 500,00 was awarded for psychological trauma as a result of disfigurement from an assault.

In the case of Page & Arther v Rondalia Assurance Corporation of South Africa Ltd and Another - Quantum of Damages, Corbett & Buchannon Vol II ECD, 21 March 1974, Addelson J awarded an amount of R9 500,00 in similar circumstances.

In present day terms, having regard to flexible money values as well as to the degree of pain and suffering she had endure, the extent of the contumelia and the fact that she seems to be on the road to recovery I would fix general damages in an amount of R50 000,00.

In the result, I make the following order:

(a) In terms of the Labour Relations Act, No 66 of 1995:-
    (i) The dismissal of the Applicant is declared unfair;
    (ii) the Respondent is ordered to pay the Applicant as and for compensation in respect of unfair dismissal an amount of R12 000,00.
(b) In terms of the Employment Equity Act, No 55 of 1998, the Respondent is ordered to pay damages to the Applicant:-
    (i) As and for future medical costs an amount of R20 000,00.
    (ii) As and for general damages including contumelia, an amount of R50 000,00.
(c) The Respondent is ordered to pay the costs of the application.

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R. Pillay AJ

(Judge of the Labour Court)

Date of judgment: 14 November 2003.

For the Applicant: Women's Legal Center

For the Respondent: Van der Spuy & Partners