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THE JUDICIARY · REPUBLIC OF SOUTH AFRICA ·

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case no: JS1030/17

In the matter between:

SOLIDARITY obo A OOSTHUIZEN	**Applicant**
and	
SOUTH AFRICAN POLICE SERVICE	**First Respondent**
THE MINISTER OF POLICE *NO*	**Second Respondent**
THE NATIONAL COMMISSIONER OF THE SOUTH AFRICAN POLICE SERVICE *NO*	**Third Respondent**
ADAM SEDISA TIKOE	**Fourth Respondent**
SEISO CHRISTOPHER MPHANA	**Fifth Respondent**

Heard: **2 June 2022**

Delivered: **10 January 2023**

(This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court's website and released to SAFLII. The date and time for hand-down is deemed to be 10 January 2022)

Summary: **Unfair discrimination – section 6(1) of EEA – section 60 – employer vicariously liable.**

JUDGMENT

NKUTHA-NKONTWANA, J

Introduction

[1] In this action, the applicant (Solidarity), acting on behalf of Colonel A Oosthuizen (Col. Oosthuizen), is challenging the conduct of the first to third respondents (SAPS, the Minister and the National Commissioner) in failing to deal with her grievances pertaining to the unfair discrimination that was perpetrated by the fourth and fifth respondents (Warrant Officers (WOs) Tikoe and Mphana). The first to third respondents are opposing the action and are collectively referred to as the respondents.

[2] The trial commenced on 19 April 2021 and became part heard on 21 April 2021. It resumed on 13 June 2022 and was still part heard on 17 June 2022. It sat for the last time on 12 to14 September 2022. The parties agreed to file written closing submissions. Solidarity filed its heads of argument on 29 September 2022, while the respondents filed their heads of argument on 27 September and their reply to Solidarity's heads of argument on 4 October 2022.

Background

[3] This matter pertains to the allegations of racial abuse suffered by Col. Oosthuizen at the instance of her direct subordinates, WOs Tikoe and Mphana, and the alleged failure by the respondents to protect and defend her dignity.

[4] Col. Oosthuizen has been in the employ of SAPS since 1990. At the time of the incident, she held the rank of Lieutenant Colonel (Lt. Col) and was the Commander of Human Resources Management (HRM) at the Klerksdorp Police Station (Klerksdorp).

[5] The genesis of this contestation is the incident that took place on 27 February 2017. WOs Tikoe and Mphana went to Col. Oosthuizen consequent to her corrective action against them. She testified that the two WOs were not happy with the fact that she had instructed WO Tikoe to complete a leave form upon realising that he had signed the Z8 form as if he was at work on 24 February

2017 when he was, in fact, absent. While on 24 March 2017, she had issued WO Mphana with a verbal warning in relation to absenteeism. There was an altercation during which the two WOs threatened and intimidated Col. Oosthuizen and accused her of calling them "kaffirs".

[6] Col. Oosthuizen reported the incident to Col. Mohulatsi, the Station Commander at Klerksdorp, who issued an instruction that the matter be investigated with a view to institute disciplinary action against the WOs. On 28 February 2017, Lt. Col. Weydeman was appointed to investigate WO Tikoe and Captain Du Plessis was appointed to investigate WO Mphana. Lt Col. Mohultasi requested that the two WOs be transferred pending the investigations but that was never effected.

[7] On 1 March 2017, WO Tikoe opened a case of *crimen injuria* against Col. Oosthuizen under case number 10/03/2017 alleging that on 27 February 2017 Col. Oosthuizen called him and WO Mphana "kaffirs". On the other hand, Col. Oosthuizen opened a case of intimidation against the two WOs under case number 13/3/2017.

[8] On 7 March 2017, the two WOs lodged a grievance against Col. Oosthuizen alleging that, on 27 February 2017, she called them "kaffirs" and she often called blacks "kaffirs". They demanded that Col. Oosthuizen be transferred pending investigation as they felt unsafe and intimidated by her presence at work.

[9] On 13 March 2017, Captain Du Plessis issued his investigation report wherein he found that the complaint against WO Mphana was serious and recommended that disciplinary action be taken against him. On 16 March 2017, Lt. Col. Weydeman also issued his investigation report wherein he found that the allegations against WO Tikoe were serious and that disciplinary action be taken against him.

[10] On 15 March 2017, Col. Oosthuizen was approached by Ms Sechele, an intern at the SAPS, who informed her that she overheard the WOs conspiring to falsely accuse her of calling them "kaffirs". Ms Sechele later gave a statement confirming what she heard and observed and the fact that the WOs had plotted

to falsely accuse Col. Oosthuizen of referring to them as "kaffirs". Col. Oosthuizen opened a criminal case of *crimen injuria*, criminal defamation and perjury against the two WOs under case number 400/3/2017.

[11] On 7 April 2017, Col. Oosthuizen lodged a grievance requesting that disciplinary proceedings be instituted against WOs Mphana and Tikoe for falsely accusing her of calling them "kaffirs". Instead of dealing with the grievance, on 16 May 2017, Col. Oosthuizen was transferred pending the finalization of the disciplinary investigation that was instituted against her. On 22 May 2017, Solidarity wrote to the SAPS wherein it questioned, *inter alia*, the transfer of Col. Oosthuizen, and demanded that the WOs be subjected to disciplinary action for falsely accusing Col. Oosthuizen.

[12] The criminal case *against* Col. Oosthuizen was not prosecuted. On 22 May 2017, the Chief Prosecutor was of the view that there were no reasonable prospects in the complaint lodged by WO Tikoe.

[13] On 25 May 2017, Captain Morris, who was appointed to investigate WOs Mphana and Tikoe per case number 400/03/2017 which pertained to, *inter alia*, the false accusation that Col. Oosthuizen called them "kaffirs", issued his report where he found as follows:

> 'I find that this is a serious matter. I could not find that any member had an argument with Me. Sechele that can explain that she had something to gain by getting the two warrant officers in trouble with the complainant. Me Sechele also made other allegations about the two members and about not wanting to sign a leave form. I further find that there is a Prima Face case against the said members i.t.o regulation 5(3)(a) and that they be charged accordingly.'

[14] Yet, the above recommendation was not implemented as the Provincial Commissioner and POPCRU, the two WOs' trade union, had agreed to suspend the disciplinary actions against the two WOs. Instead, Col. Oosthuizen was investigated by Col. Tlhoaele who, in turn, recommended that she be

charged for allegedly contravening Regulation 5(3)(n) or (t) and (u)[1] of the South African Police Service Discipline Regulations, 2016.

[15] On 23 June 2017, Brigadier Lekubu confirmed that the disciplinary hearing against WO Mphana was suspended pending the finalisation of his grievance against Col. Oosthuizen and that the transfers of WOs Mphana and Tikoe had been placed on hold.

[16] On 28 June 2017, Col. Oosthuizen registered a second grievance due to, *inter alia*, the failure of the SAPS to comply with their own internal policies and procedure and for suspending the disciplinary action of Mphana in order deal with the WOs grievance. Col Oosthuizen requested that the letter of Brigadier Lekubu be withdrawn and that disciplinary action be taken against WOs Mphana and Tikoe but to no avail.

[17] On 1 August 2017, Col. Oosthuizen referred the dispute to the CCMA and the matter was conciliated on 20 September 2017 and a certificate of non-resolution was issued.

[18] On or about 14 August 2017, Col. Oosthuizen received a notice that a decision was taken to charge her for using the word "kaffir". On 14 September 2017, she appeared before a disciplinary hearing chaired by Col. Raphata. She was acquitted on all charges and the chairperson opined that:

> 'There was [sic] contradictions on the testimony of the three witnesses of the Employer;
>
> There was testimony that WO Tikoe and Mphana colluded to falsely accuse Lt Col Oosthuizen;

[1] Regulation 5(3) of the provides that an employee will be guilty of misconduct if he or she:

'...

(n) unfairly discriminates against others on the basis of race, gender, disability, sexuality or other grounds prohibited by the Constitution;

...

(t) conducts himself or herself in an improper, disgraceful and unacceptable manner;

...

(u) contravenes any prescribed Code of Conduct of the Service or the Public Service, whichever may be applicable to him or her...'

> The two members showed during their testimony that they have a toxic relationship.'

[19] On 6 November 2017, WO Tikoe lodged another grievance, alleging once again that on 27 February 2017 Col Oosthuizen called them "kaffirs".

[20] After various correspondence between Solidarity and SAPS in relation to the manner it had been handling Col. Oosthuizen's grievances, on 19 March 2018, the WOs were ultimately charged. They appeared before the disciplinary hearing on allegations of prejudice against the administration, discipline or efficiency of the department, office or institution of the state; conducting themselves in an improper and disgraceful and unacceptable manner and intimidation or victimization of another employee.

[21] WO Mphana was found not guilty and the reason being that the employer representative and employee representative agreed that there are no statements that corroborated and proved that he committed misconduct as the statements before the chairperson were incorrect and constituted hearsay facts. On the other hand, WO Tikoe pleaded guilty and was given a sanction of a written warning and one day leave without pay.

[22] Col. Oosthuizen and Solidarity challenged the turn of events. Moreover, because Col. Oosthuizen was never called as a witness during the two WOs disciplinary enquiry despite being the complainant. They sent numerous correspondences which were directed to the SAPS, impugning its failure to take action against the two WOs for falsely accusing Col. Oosthuizen of calling them "kaffirs".

[23] It was brought to the attention of the Court that on 23 October 2020, WOs Tikoe and Mphana were found guilty in the Regional Court of the North West Regional Division, of, amongst others, assault, contravening section 9 of the Justice of the Peace and Commissioners of Oaths Act[2], obstructing the administration of justice and *crimine inuiria*.

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[2] Act 16 of 1963.

[24] They were consequently charged internally and appeared before the disciplinary hearing. They were found guilty of the following charges: [3]

> 'In terms of section 40 of the South African Police Service Act, 1995 (Act No 68 of 1995), read with the South African Police Service Discipline Regulations, 2016, you are hereby charged with misconduct, in that you allegedly contravened Regulation 5(3)(dd) of the said Regulations, at or near Klerksdorp on or about 3 June 2020 between 7:30 and 16:00, you were found guilty in Stilfontein Regional Court (case SRC 87/17) on the following criminal charges in Klerksdorp CAS 13/3/2017:
>
> > Charge 2- made a false statement(s) knowing it to be false in an affidavit to a commissioner of oath.
> >
> > Charge 4- injure and insult and impair the dignity of Annemarie Oosthuizen making her out as a racist.'

[25] Both WOs were subsequently dismissed.

Legal principles and application

[26] The point at issue in this matter is whether the respondents are vicariously liable in terms of section 60 of the Employment Equity Act[4] (EEA) for the racial harassment and bullying perpetrated by WOs Tikoe and Mphana against Col. Oosthuizen.

[27] Section 60 clearly provides:

> '(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.

[3] Bundle D p 5-8.
[4] Act 55 of 1998, as amended.

(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.'

[28] Section 6 of the EEA deals with the prohibition of unfair discrimination and subsection (1) thereof provides:

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

[29] Pertinently, subsection 6(3) provides:

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

[30] Section 11 of the EEA deals with the burden of proof and clearly states that an allegation of harassment must be tied to conduct based on a discriminatory ground; providing that:

'(1) If unfair discrimination is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination –

(a) did not take place as alleged; or

(b) is rational and not unfair, or is otherwise justifiable.

(2) If unfair discrimination is alleged on an arbitrary ground, the complainant must prove, on a balance of probabilities, that –

(a) the conduct complained of is not rational;

(b) the conduct complained of amounts to discrimination; and

(c) the discrimination is unfair.'

[31] In the present instance, the discriminatory conduct is tied to alleged harassment which is based on the ground of race. Accordingly, the respondent accepts that they bear the onus in terms of section 11(1).

[32] The issues for determination are as follows:

32.1. Whether the conduct of WOs Tikoe and Mphana in harassing and falsely accusing Col. Oosthuizen of racism by WO Tikoe and WO Mphana constitutes unfair discrimination; and

32.2. Whether the first to third respondents failed to act in accordance with section 60 and as such are vicariously liable for contravening the provisions of the EEA.

32.3. The relief in the event the first to third respondents are found to have contravened the provisions of the EEA.

Whether WOs Tikoe and Mphana unfairly discriminated against Col. Oosthuizen

[33] As aptly put by the apex Court in *Rustenburg Platinum Mine v SA Equity Workers Association on behalf of Bester and Others*[5], the "*impact of the legacy of apartheid and racial segregation that has left us with a racially charged present*". The use of racial slurs such as "kaffir" stubbornly persists in the workplace, uttered not only by those with the power to subjugate. Notably, there is an emerging trend of false claims of racial or sexual harassment by subordinates against their superiors in order to circumvent being disciplined.

[5] (2018) 39 ILJ 1503 (CC); 2018 (8) at para [48].

[34] In the present instance, it is Col. Oosthuizen's undisputed evidence that on 27 February 2017, WOs Tikoe and Mphana were ill-mannered and harassed her for taking disciplinary measures against them. In fact, WO Tikoe later admitted during his disciplinary enquiry that he did act in an ill-mannered manner. I will return to this point later when I deal with the conduct of SAPS after it became aware of the incident and the investigation reports that recommended that the WOs be disciplined.

[35] What transpired thereafter is really unfortunate. Instead of dealing with WOs Tikoe and Mphana's ill-discipline, SAPS entertained their grievance based on false allegations of racism against Col. Oosthuizen. She was transferred pending investigation and brought before a disciplinary hearing on a false accusation. The chairperson of the disciplinary enquiry found no reason not to accept Ms Sechele's statement that she overheard the WOs plotting to falsely accuse Col. Oosthuizen of using the word "kaffir". Hence she was exonerated. It is telling that, despite the chairperson's conclusion that the WOs evidence showed that they had a toxic relationship, the SAPS did not conduct further investigation into their conduct. It took a persistent complaint by Solidarity for SAPS to take disciplinary measures but failed to deal with the complaint of racial harassment.

[36] In the circumstances, it is absolutely clear that Col. Oosthuizen was racially harassed by WOs Tikoe and Mphana which was motivated by insubordination and animus. The respondents' submission that Solidarity failed to prove that there was discrimination is untenable as the racial harassment complained of is based on a listed ground in terms of section 6(1) of the EEA. Furthermore, it is not their case that the overtly offensive conduct of WOs Tikoe and Mphana was fair.

Whether the respondents failed to act in accordance with section 60 and as such are vicariously liable for contravening the provisions of the EEA

[37] In *SAMKA v Shoprite Checkers (Pty) Ltd and Others*[6] the Labour Appeal Court (LAC) endorsed the following requirements for the application of section 60 of EEA set out in *Mokoena and another v Garden Art (Pty) Ltd and another*[7]:

> '40.1 The conduct must be by an employee of the employer.
>
> 40.2 The conduct must constitute unfair discrimination.
>
> 40.3 The conduct must take place while at work.
>
> 40.4 The alleged conduct must immediately be brought to the attention of the employer.
>
> 40.5 The employer must be aware of the conduct.
>
> 40.6 There must be a failure by the employer to consult all relevant parties, or to take the necessary steps to eliminate the conduct or otherwise to comply with the EEA, and
>
> 40.7 The employer must show that it did all that was reasonably practicable to ensure that the employee would not act in contravention of the EEA.'

[38] It is worth mentioning that these requirements were recently codified in terms of the Code of Good Practice on the Prevention and Elimination of Harassment[8] which came into effect on 18 March 2022. Instructively, clause 10.3 provides that:

> 'Failure to take adequate steps to eliminate harassment once an allegation of harassment by an employee has been submitted within a reasonable time, will render the employer vicariously liable for the conduct of the employee in terms of section 60 of the EEA. This is the case even if the harassment consists of a single incident.'

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[6] (2020) 41 (ILJ) 1945 (LAC) at para [12].
[7] [2008] 5 BLLR 428 (LC) at para [40].
[8] GNR.1890 of 18 March 2022.

[39] In the present instance, it is common cause that the SAPS was made aware of actionable harassment perpetrated by WOs Tikoe and Mphana as soon as it took place. Even though initially swift steps were taken to investigate the insubordinate conduct, the investigation reports by Col. Weydeman and Captain Du Plessis, that had recommended that disciplinary measures be taken against WOs Tikoe and Mphana, were abandoned. While Captain Morris's investigation report, which found that there was a *prima facia* case of racial harassment against the two WOs, was never implemented.

[40] Despite the respondents' insistence that SAPS took all the necessary steps to address the racial harassment that was perpetrated by WOs Tikoe and Mphana, that contention is not backed up by evidence. Two of its witnesses, Col. Gause, the initiator, and Brigadier Tlotleng, the chairperson, in the disciplinary hearing of WOs Tikoe and Mphana conceded that the two WOs were never charged for making false allegations of racism and discrimination. In fact, no witnesses were called, in particular, Col. Oosthuizen, the complainant. Col. Gause testified that the ultimate charges were decided on the basis of the statements that had been made available to him. He was not aware of the investigation reports by Col. Weydeman and the two Captains, Du Plessis and Morris.

[41] On the other hand, Brigadier Sibeko, the Provincial Head: Personnel Management for the North West Province, the respondents' main witness, conceded during her cross-examination that Col. Gause was not given all of the investigation reports. It was her view that Captain Morris' report was not informative and hence she decided to extract some of the informative statements from the reports of Col. Weydeman and Captain Du Plessis. There was no explanation proffered for the conduct of Brigadier Sibeko other than a flimsy proposition by the respondents' counsel that she had the discretion to do so. Regrettably, she abused that discretion in order to suppress the critical evidence and in turn manipulate the outcome of the disciplinary hearing against WOs Tikoe and Mphana.

[42] It is also strange that the respondents persist with their stance that Ms Sechele's statement was suspicious or influenced by Col. Oosthuizen despite

the fact the allegation that she called the two WOs "kaffirs" was never proven. To my mind, that clearly shows that SAPS dismally failed to investigate the racial confrontation and take necessary steps to eliminate it. Conversely, what transpired is that SAPS did everything in its power to protect the perpetrators of racial harassment.

[43] The racial harassment perpetrated by the two WOs was not just a single incident in a spare of the moment. It was premeditated machination to get rid of Col. Oosthuizen. She testified that the two WOs organised a demonstration by their fellow union members during her disciplinary enquiry, they laid a case against her with the Equity Court and she was transferred pending her disciplinary enquiry while they remained untouched. Brigadier Sibeko conceded during her cross-examination that had the two WOs gotten away with their false allegations, Col Oosthuizen would have been dismissed.

[44] After a careful analysis of the respondents' version of defence, it is apparent that they are oblivious to their statuary duties in terms of section 60 of the EEA. There is no evidence that the respondents were able to produce to show:

44.1. Firstly, that SAPS consulted all relevant parties. Solidarity was the one that was imploring SAPS to take action. Worse still, Col. Oosthuizen was unjustly criticised for lodging grievances while the racial harassment persisted;

44.2. Secondly, that they took the necessary steps to eliminate racial harassment within SAPS or to comply with the EEA. Instead, they acted in a partial manner by protecting the perpetrators at the expense of the victim; and

44.3. Thirdly, they did all that was reasonably practicable to ensure that WOs Tikoe and Mphana would not racially harass Col. Oosthuizen or act in contravention of the EEA. Tellingly, they incorrigibly persisted during trial to vilify Col. Oosthuizen for vindicating her right to dignity and equality.

[45] In my view, for the employer to escape being held vicariously liable for the actionable discriminatory conduct of its employees, it must show (i) that it took

reasonable precaution to prevent and promptly correct the inimical behaviour, and (ii) that the employee unreasonably failed to take advantage of the employer's preventive or corrective opportunities.[9] To achieve that, the employer would be expected to transcend the confines of superficial compliance and deal with historical ethos and systems that may have created a toxic environment which is susceptible to racial harassment.[10]

Remedy

[46] Section 50 (2) of the EEA provides inter alia that:

> 'If the Labour court decides that an employee has been unfairly discriminated against, the court may make any appropriate order that is just and equitable in circumstances, including –
>
> (a) payment of compensation by the employer to that employee;
>
> (b) payment of damages by the employer to that employee;
>
> (c) an order directing the employer to take steps to prevent the same unfair discrimination...'

[47] In *SA Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others*,[11] the Constitutional Court cautioned the courts of its constitutional imperative responsibility to root out racism. It was stated that:

> '[12] The Constitution is the conscience of the nation. And the courts are its guardians or custodians. On their shoulders rests the very important responsibility of holding our constitutional democracy together and giving hope to all our people that their constitutional aspirations will be realised. To this end, when there is litigation about racial supremacy related issues, it behoves our courts to embrace that judgement call as dispassionately as the judicial affirmation or oath of office enjoins them

[9] See: *Biggar v City of Johannesburg (Emergency Management Services)* [2017] 8 BLLR 783 (LC) at para [47].
[10] See: N Naylor '*Villains and (s)heroes in the quest for truth and justice in sexual harassment cases*' 2020 Acta Juridica, p. 27 – 62.
[11] (2017) 38 ILJ 97 (CC) at paras [12] – [14].

to and unflinchingly bring an impartial mind to bear on those issues, as in all other cases.

[13] Judicial Officers must be very careful not to get sentimentally connected to any of the issues being reviewed. No overt or subtle sympathetic or emotional alignments are to stealthily or unconsciously find their way into their approach to the issues, however much the parties might seek to appeal to their emotions. To be caught up in that web, as a judicial officer, amounts to a dismal failure in the execution of one's constitutional duties and the worst betrayal of the obligation to do the right thing, in line with the affirmation or oath of office.

[14] Bekker CJ, Mohamed CJ and Zondo JP observed in essence that racist conduct requires a very firm and unapologetic response from the courts, particularly the highest courts. Courts cannot therefore afford to shirk their constitutional obligation or spurn the opportunities they have to contribute meaningfully towards the eradication of racism and its tendencies. To achieve that goal would depend on whether they view the use of words like kaffir as an extremely hurtful expression of hatred and the lowest form of contempt for African people or whether the outrage it triggers is trivialised as an exaggeration of an otherwise less vicious or vitriolic verbal attack.' (Own emphasis)

[48] Col. Oosthuizen seeks compensation equivalent to six months' salary for the humiliation and insult she suffered at the hands of the two WOs which was compounded by SAPS's partisan and insular nature of its response. Furthermore, instead of owning up to its flaws, it baldly denied that Col. Oosthuizen was racially harassed and vilified her.[12] As aptly observed by the Constitutional Court in *McGregor v Public Health and Social Development Sectoral Bargaining Council and* Others[13], the sanction in cases of harassment (albeit sexual harassment) serves as a deterrent and should unequivocally send a stern warning to employees who perpetrated harassment that they do so at their peril.

[12] *McGregor v Public Health and Social Development Sectoral Bargaining Council and Others* 2021 (5) SA 425 (CC) at paras [43] - [45].
[13] Id.

[49] I agree that Col. Oosthuizen is entitled to payment of compensation in the form of a *solatium* for the racial harassment which negatively impacted on her dignity. Moreover, some compensation is justified in the light of SAPS's biased approach in manipulating the WOs disciplinary hearing and the outcome.

[50] In *Minister for Justice and Constitutional Development and another v Tshishonga,*[14] dealing with compensation, the Labour Appeal Court stated that:

> [20] For all the reasons set out in this judgment, a significant award is justified. While the principles developed in the cases dealing with a solatium are important, the actual amount to be awarded is a discretionary act of the court; there is no tariff to which recourse can be made.
>
> [21] To the extent that precedent is of assistance, *in Mogale and Others v Seima* 2008 (5) SA 637 (SCA) at para 18, it was noted that courts have not been generous in their awards of solatia. In *Mogale*, a newspaper, with a readership of possibly more than 900,000, carried a report that plaintiff gave his girlfriend a 'hot klap' for having taken notice of other men. The newspaper tendered an apology which was not accepted. The Supreme Court of Appeal reduced the award from R70,000 to R12,000.
>
> [22] In this case, a far more significant sum should be awarded as compensation for the indignity suffered, the extent of the publication of the attack on respondent (publication being on national television) and the persistent, egregious nature of the attacks upon respondent which has been triggered because he had acted in the national interest. In my view, an amount of R100,000 is thus justified, that is apart from the R 177,000 in respect of costs incurred in respondent's defence.'

[51] In addition, Col. Oosthuizen seeks a written apology from SAPS for the indignity and ordeal she had been subjected to. I see no reason why SAPS should not own up to its mistakes and apologise to Col. Oosthuizen.[15]

Conclusion

[14] (2009) 30 ILJ 1799 (LAC) at paras [20] - [22].
[15] See: *Atkins v Datacentrix (Pty) Ltd* (2010) 31 ILJ 1130 (LC)

[52] In all the circumstances, I am satisfied that for a period of about a year, Col. Oosthuizen was disparaged and humiliated by the racial harassment that was perpetrated by the two WOs with impunity. SAPS is therefore vicariously liable for the actionable racial harassment. In my view, the compensation equivalent to R300 000 is just and equitable. Moreover, SAPS shall tender a written apology to Col. Oosthuizen for the indignity she had suffered.

Costs

[53] Section 162 of the Labour Relations Act[16] confers this Court with a discretion to make orders as to costs, based on the requirements of the law and fairness. In the present instance, awarding costs in favour of Solidarity is justifiable given the history of this matter and the outcome I have arrived at above.

[54] In the circumstances, I make the following order:

Order

1. The first to third respondents are directed to pay Col. Oosthuizen R300 000 in compensation.
2. SAPS shall tender a written apology to Col. Oosthuizen for the indignity she had suffered within a week from the date of this order.
3. The first to third respondents are to pay Solidarity's costs.

P Nkutha-Nkontwana
Judge of the Labour Court of South Africa

[16] Act 66 of 1995, as amended.

Appearances:

Applicants:	Advocate D.J. Groenewald
Instructed by:	Serfontein, Viljoen & Swart Attorneys obo Solidarity
Respondent:	Advocate S Mbhalati
Instructed by:	Leepile Attorneys