

# Sexual harassment in the workplace: Lessons for Botswana from a South African Legal perspective

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Dissertation submitted in partial fulfillment of the requirements  
for the degree *Magister Legum* in Labour Law at the  
Potchefstroom Campus of the North-West University

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May 2014

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Mini-Dissertation submitted for the degree *Magister Legum* in Labour Law at the  
Potchefstroom Campus of the North-West University

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November 2013

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## **Abstract**

Equality of opportunity and treatment in the workplace forms one of the critical components of an individual's ability to obtain and remain in employment and occupation. In a world where qualifications, experience and individual merit can be easily by-passed owing to diverse workplace discriminations, the ability of employees to enjoy their right to work cannot be fully achieved if the workplace is marred with inequalities. Sexual harassment has been characterised as one of the workplace hazards that impinges on the achievement and enjoyment of the right to equality of opportunity and treatment in the workplace and defeats the right of employees to decent work.

Notwithstanding the acknowledgement of its existence and prevalence, sexual harassment is still treated as an unmentionable concept in Botswana in legal and academic circles. The labour legislative framework has been less emphatic when it comes to recognising and setting out the proper sanctions for sexual harassment in the workplace. At present, only public servants are assured of a legal remedy should they experience such harassment. The legal framework does not openly extend protection to employees in the private sector, leaving them uncertain of the proper forums to approach. There is not even the assurance that sexual harassment is prohibited and punishable at law. Since it is rarely discussed in academics and not prohibited outright, it is safe to assume that most incidents of sexual harassment are shrouded in secrecy owing to employees' lack of knowledge of their rights.

In contradistinction, South Africa presents a legal framework conscious of the reality of sexual harassment in the workplace. It employs the use of equal opportunity laws to give authority to a Code of Good Practice that outlaws sexual harassment. The South African Courts have also played a pro-active role in ensuring compliance with legislative provisions and developing common law principles on sexual harassment in the workplace. In addition, legislation that outlaws harassment in a general sense has been enacted to add to laws prohibiting sexual harassment.

Whereas the mere existence of laws is not an end in itself, it is submitted that sexual harassment laws may serve to deter this conduct, but most significantly, to inform

employees that their rights in the workplace are not limited to, amongst others, a guarantee from unfair dismissals and withholding of wages. The argument is that sexual harassment should be seen as a violation of employees' human rights, as opposed to a mere misconduct. With that realisation in mind, the need to progress from sole reliance on Codes of Good Practice to unequivocal and binding laws reflects the concern that the government of the day has for the protection of the human rights of employees and the consonance of national labour laws with the international standard.

This contribution presents an examination of the two legal frameworks in so far as sexual harassment in the workplace is concerned. The aim is to determine the shortcomings of Botswana's framework and outline lessons that may be learnt from the South African legal framework. The position of international law is also considered to ensure that the lessons to be learnt from South Africa are in consonance with the international standard.

**Keywords:**

Sexual harassment

Equality of opportunity and treatment

Human rights

## Opsomming

Gelyke geleentheid en behandeling in die werksplek is een van die kritiese komponente van 'n individu se vermoë om werk te kry en te behou. In 'n wêreld waar kwalifikasies, ondervinding en individuele verdienste maklik omseil kan word deur verskillende werksplekdiskriminasies, kan die werknemer nie sy reg om te werk ten volle geniet as die werksplek met ongelykhede besaai is nie. Seksuele teistering word beskou as een van die werksplekhindernisse wat inbreuk maak op 'n persoon se verwerwing en genieting van die reg tot gelyke geleentheid en behandeling in die werkplek, en as sodanig benadeel dit die werknemer se reg tot behoorlike werk.

Ongeag die erkenning van die bestaan en gereelde voorkoms van seksuele teistering, word dit in Botswana se regs- en akademiese kringe steeds beskou as 'n onuitspreekbare konsep. Die arbeidswetgewingsraamwerk is minder empaties wanneer dit kom by die erkenning en uitspel van behoorlike strafmaatreëls vir seksuele teistering in die werksplek. Huidiglik kan slegs staatsamptenare verseker wees van 'n geregtelike regstelling indien hulle teistering ervaar. Die wetlike raamwerk bied nie openlik enige beskerming aan werknemers binne die privaatsektor nie, wat hulle onseker laat oor die regte forums om te nader. Daar is nie eers soveel as die versekering dat seksuele teistering verbied word en geregtelik strafbaar is nie. Aangesien die onderwerp selde akademies bespreek word en nie prontuit verbied word nie, is dit veilig om aan te neem dat die meeste gevalle van seksuele teistering in geheimhouding gehul is omdat werknemers nie kundig is oor hulle regte nie.

In teenstelling daarmee bied Suid-Afrika 'n wetlike raamwerk wat bewustheid toon van die realiteit van seksuele teistering in die werkplek. Dit maak gebruik van gelyke geleentheid-wette om gesag te verleen aan 'n Gewensde Praktykskode wat seksuele teistering onwettig verklaar. Die Suid-Afrikaanse howe het ook 'n proaktiewe rol gespeel deur nakoming te verseker met die neerlê van wetlike bepalinge en die ontwikkeling van gemeenregtelike beginsels rakende seksuele teistering in die werkplek. Daarmee saam is wetgewing wat teistering in die algemeen onwettig verklaar saam met die wette wat seksuele teistering aanspreek bekragtig.

Alhoewel die blote bestaan van wette nie versekering bied nie, kan wette teen seksuele teistering tog dien om sulke optrede te keer. Meer betekenisvol is miskien die potensiaal van sulke wette om werknemers bewus te maak van die feit dat hulle regte in die werkplek nie beperk is tot 'n waarborg teen onregmatige afdanking of die weerhouding van lone nie. Die argument is dat seksuele teistering gesien moet word as 'n oortreding van die werknemer se menseregte, en nie net 'n oortreding nie. Met dit in gedagte, sal die vordering van volle steun op Gewensde Gedragskodes na ondubbelsinnige en bindende wette Botswana se besorgdheid oor die beskerming van die menseregte van werknemers toon en die nasionale arbeidswetgewing lig tot op die vlak van die internasionale standaard.

Hierdie bydrae bied 'n ondersoek van die twee wetlike raamwerke in soverre dit seksuele teistering in die werkplek aanspreek. Die doelwit is om die tekortkominge van die raamwerk van Botswana te bepaal en die lesse wat van Suid-Afrika se wetlike raamwerk geleer kan word uit te spel. Die posisie wat die internasionale reg inneem word ook oorweeg om seker te maak dat die lesse wat geleer kan word van Suid-Afrika strook met die internasionale standaard.

**Sleutelwoorde:**

Seksuele teistering

Gelyke geleentheid en behandeling

Menseregte



## List of abbreviations

BLR	Botswana Law Reports
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CC	Constitutional Court
EA	Employment Act
EEA	Employment Equity Act
IC	Industrial Court
ICESCR	International Covenant on Economic Socio and Cultural Rights
ILC	International Labour Conference
ILJ	Industrial Law Journal
ILO	International Labour Organisation
ILR	International Labour Review
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act
OHSA	Occupational Health and Safety Act
PHA	Protection from Harassment Act
PSA	Public Service Act
UDHR	Universal Declaration of Human Rights

## CHAPTER 1 INTRODUCTION

Sexual harassment in the workplace is a widely discussed and internationally recognized phenomenon. Previous studies have indicated that it is a significant problem in the workplace,<sup>1</sup> and is actually more common than is acknowledged.<sup>2</sup> As a result, sexual harassment is generally an issue that is known to exist, but its existence is usually ignored or given negligible audience. This may arise from laws that do not proscribe sexual harassment outright, thus leading to most sexual harassment incidents going unreported owing to victims' ignorance of their rights.

Sexual harassment in the workplace is mostly perpetrated by those in senior positions because their economic power *vis-à-vis* that of their juniors puts them in a position to do so.<sup>3</sup> In view of that, harassment may be perpetrated with the goal of influencing decisions taken in the workplace (such as the process of employment, training, promotion and dismissals) in exchange for sexual favours.<sup>4</sup> This has been classified as *quid pro quo* sexual harassment. Nevertheless, harassment of a sexual nature does not always involve the abuse of economic power, but may occur amongst work colleagues who are in similar positions, or even at times, may be directed at seniors.<sup>5</sup> This has been classified as hostile work environment harassment<sup>6</sup> since the harassing conduct creates an environment that is intimidating, offensive and oppressive, without necessarily influencing workplace decisions. Studies have also shown that men and women alike may fall victim to sexual harassment,<sup>7</sup> but that in most cases women are on the receiving end.<sup>8</sup>

At an international level, the International Labour Organisation (ILO) has submitted that the *Convention on Discrimination (Employment and Occupation)*<sup>9</sup> is sufficient to

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- 1 ILO: Equality at Work: The Continuing Challenge 2011 Report I (B) (executive summary XI).
  - 2 Husbands 1992 (131) *ILR* 537; Halfkenny 1995 (16) *ILJ* 6.
  - 3 Basson "Harassment in the Workplace" 228-257; Mackinnon *Sexual Harassment of Working Women* 217-218; Halfkenny 1995 (16) *ILJ* 4.
  - 4 Basson "Harassment in the Workplace" 228-257; ILO: CEACR Report III (Part 4B) 1996 par 39.
  - 5 Basson "Harassment in the Workplace" 228-257.
  - 6 Basson "Harassment in the Workplace" 228-257.
  - 7 Halfkenny 1995 (16) *ILJ* 4-5; ILO: Equality at Work: The Continuing Challenge 2011 Report I (B) par 106-107.
  - 8 Halfkenny 1995 (16) *ILJ* 5; ILO: Equality at Work: The Continuing Challenge 2011 Report I (B) par 106.
  - 9 Convention No. 111 of 1958.

prohibit sexual harassment in the workplace. While the Convention does not specifically prohibit sexual harassment but moves for the promotion of equality of opportunity and treatment in the workplace in general, the ILO Committee of Experts on the Application of Conventions and Recommendations<sup>10</sup> has classified sexual harassment as a form of sex discrimination in terms of the stipulations of the Convention.<sup>11</sup> The CEACR has conceded that sexual harassment is one of the manifestations of sex discrimination in that it "undermines equality at work by calling into question the integrity and dignity and well-being of workers."<sup>12</sup> As a result, to the ILO, sexual harassment is a violation of the right not to be discriminated against on the basis of sex, and thus an impediment to the realisation of equality of opportunity and treatment in the workplace.

Article 2 of the Convention calls on ratifying states to take steps to pursue national policies designed to promote equality of opportunity and treatment in respect of employment and occupation with a view to eliminate any form of discrimination. Seeing that sexual harassment is a form of sex discrimination in terms of the Convention, ratifying states are obliged to pursue national policies that will work towards eliminating sexual harassment in the workplace.

Contrary to a narrow view that it affects employees only, sexual harassment has been found to be detrimental not only to its victims, but also to employers. It has three consequences to the employer, namely the consequential absenteeism of the victims, award of damages to victims of the harassment and the loss of management time dedicated to the investigation and defence of claims of sexual harassment, as well as legal fees that arise from such cases.<sup>13</sup> This observation indicates that sexual harassment should not be viewed as a concern to employees only, but should also be of interest to employers.

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10 The Committee of Experts on the Application of Conventions and Recommendations is a specialised supervisory body of the ILO, which was set up in 1926 to examine government reports on ratified conventions. In its examination of the application of international labour standards by ILO members, the Committee makes two comments, viz, observations and direct requests. The Committee of Experts on the Application of Conventions and Recommendations will henceforth be referred to as the "CEACR" or the "Committee" interchangeably.

11 ILO: CEACR Report III (Part 4B) 1996 par 36; see also par 2.3.1.1 below.

12 ILO: ILO: CEACR Report III (Part 4B) 1996 par 40.

13 *Husbands* 1992 (131) *ILR* 540.

While it is recognised as a reality by international law, the labour legislative framework in Botswana barely proscribes sexual harassment. The *Employment Act* 29 of 1982, which regulates employment relationships in the private sector, is silent on sexual harassment. The *Public Service Act* 13 of 1998 is the only labour legislation that specifically prohibits sexual harassment, but its scope of application is limited only to public servants. Bearing in mind that employees in the private sector are barred from seeking remedy under the *Public Service Act*, the immediate question that arises is what legal protection and remedies are available to these employees in Botswana when they fall victim to sexual harassment.<sup>14</sup>

Whereas there is negligible legislation prohibiting sexual harassment in the workplace in Botswana, South Africa presents a dissimilar approach. The South African *Employment Equity Act* 55 of 1998 and the recent *Protection from Harassment Act* 17 of 2011 have included sexual harassment within their scope of operation, which extends across public and private sector employment.<sup>15</sup> Furthermore, sexual harassment has been viewed by the South African courts as an element that could jeopardise a safe working environment that every employee is entitled to. In fact, in the case of *Mokone v Sahara Computers (Pty) Ltd*,<sup>16</sup> the court held that the failure of an employer to address a report of sexual harassment or have appropriate measures in place to address sexual harassment constitutes a breach of that employer's duty to provide a safe working environment to his employee.

The South African High Court and Labour Courts have also continued to show a novel and progressive approach in dealing with cases of sexual harassment. The *Mokone-case*<sup>17</sup> demonstrates that there may be cases where an employer has a sexual harassment policy in place that seeks to address issues of sexual harassment, but does not use it effectively or even treats sexual harassment complaints with negligence. The South African High Court in this case demonstrated that the court may exercise its powers to award remedies to a victim of sexual harassment where the employer's management and disciplinary structures are insufficient to do so.

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14 See par 3.3.1 of this dissertation in this regard.

15 See par 4.5.1 and 4.5.3 in this regard.

16 2010 31 ILJ 2827, 2835.

17 2010 31 ILJ 2827, 2835

Sexual harassment is considered misconduct that warrants dismissal in terms of the South African labour legislation. In the case of *Motsamai v Everite Building Products Pty Ltd*,<sup>18</sup> the Commission for Conciliation, Mediation and Arbitration found that the appellant was guilty of misconduct, but that dismissal was too harsh a sanction for sexual harassment. The Labour Appeals Court endorsed the decision of the Labour Court in finding that the proper sanction for sexual harassment was a dismissal and that the dismissal of the appellant was both substantively and procedurally fair.<sup>19</sup>

Flowing from the observations made regarding international law and the South African legal framework, sexual harassment in the workplace is clearly a concern, the existence of which cannot be denied, and still remains an issue relevant for discussion. Having noted the distinct approach presented by the South African legal framework, this contribution examines the current legal framework with regards to sexual harassment in Botswana's private sector employment in juxtaposition with that of South Africa. The aim is identify the shortcomings of Botswana's framework and derive lessons that can be learnt from South Africa. South Africa has been chosen for the purposes of this study since the common law and statute law of Botswana are based on the receptions of South African law.<sup>20</sup> The Courts in Botswana are also more inclined to apply South African court decisions as persuasive authorities where there are no binding decisions in their jurisdiction.

The role that international labour law standards play in shaping and informing national laws are important in making a comparative analysis. It is instructive to consider the position of international law to identify whether the lessons taken from South Africa are also in consonance with international law.

Chapter 2 examines the standards set by international law. Chapter 3 thereafter considers the legal framework in Botswana, after which the position in South Africa is considered in chapter 4. Finally, chapter 5 draws conclusions by identifying the lessons that Botswana may learn from South Africa and makes recommendations for law reform.

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18 2011 2 BLLR 144 (LAC) 27.

19 2011 2 BLLR 144 (LAC) 25-26.

20 See generally Fombad and Quansah *The Botswana Legal System* 55-56.

## CHAPTER 2 INTERNATIONAL LAW PERSPECTIVES ON SEXUAL HARASSMENT

### 2.1 Introduction

The ILO sees sexual harassment in the workplace as a major concern, more particularly affecting women.<sup>21</sup> As a body set up to advance and protect the rights of workers in the workplace, the ILO has seen the need to adopt measures that set minimum standards for averting sexual harassment in the workplace, but most significantly, the ILO classified it as a violation of a human right.

This chapter discusses international law perspectives on sexual harassment with particular reference to the ILO *Convention on Discrimination (Employment and Occupation)*.<sup>22</sup> It also highlights the place of international law in national law in an endeavour to identify the extent to which Botswana and South Africa are bound by this Convention.

### 2.2 The role of international labour law

International law plays a vital role in the development of national law by setting down minimum standards for the formulation of national laws. The role and effect of international labour law in shaping national laws and policies is something to cognisance of. The ILO has posited that countries use international labour standards as a basis for the formulation and implementation of national labour laws and social policy to ensure that such laws and policies conform to internationally accepted standards.<sup>23</sup> International labour standards also provide guidance for developing national and local policies and improving various administrative structures, such as labour administration.<sup>24</sup>

The ILO is a specialised organisation of the United Nations which was set up in an endeavour to help set the minimum standards for working conditions through the

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21 ILO: Equality at Work: The Continuing Challenge 2011 Report I(B) par 106.

22 Convention No. 111 of 1958.

23 <http://www.ilo.org/global/standards/introduction-to-international-labour-standards/international-labour-standards-use/lang--en/index.htm>; Dingake *Collective Labour Law in Botswana* 29-30.

24 Dingake *Collective Labour Law in Botswana* 29-30.

adoption of conventions and recommendations.<sup>25</sup> It is the only tripartite organisation which allows for the cooperation of governments, employers and employees in decision making. Most importantly, ILO Conventions are drawn up by these parties with each party having the right to vote on a particular convention independently.<sup>26</sup> Like other international law instruments, ILO conventions are binding on states that ratify them.<sup>27</sup> These conventions embody labour standards that prescribe the minimum acceptable conditions of work. In addition, recommendations by the ILO serve as guidelines to the interpretation and application of the conventions and are not binding.<sup>28</sup>

The ILO has 188 Conventions and 199 Recommendations to date, but its Governing Body<sup>29</sup> recognises that among these there is a class of rights and principles which are "fundamental" in the workplace. Respect for these fundamental rights and principles should be inherent to every workplace. Consequently, the Governing Body has set aside eight Conventions considered to embody "fundamental and basic" human rights and principles in the workplace. These principles are freedom of association and the effective recognition of the right to collective bargaining,<sup>30</sup> the elimination of all forms of forced labour,<sup>31</sup> abolition of child labour<sup>32</sup> and the elimination of discrimination in respect of employment and occupation.<sup>33</sup>

These labour rights were not initially seen as fundamental rights. According to Betten,<sup>34</sup> the fundamental treaties which embody these rights were prominently discussed in the immediate post-world war period, and since then have been elevated to the status of fundamental principles, such that they find audience not only in economic and social treaties, but also in treaties which include civil and

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25 Preamble of the ILO Constitution.

26 Article 4 and 7 ILO Constitution.

27 Article 19(5) ILO Constitution.

28 Article 19(6) ILO Constitution.

29 Established as the executive body of the ILO in terms of article 7 of the ILO Constitution.

30 *Freedom of Association and Protection of the Right to Organise Convention* No. 87 of 1948; *Right to Organise and Collective Bargaining Convention* No. 98 of 1949.

31 *Forced Labour Convention* No.29 of 1930; *Abolition of Forced Labour Convention* No. 105 of 1957.

32 *Minimum Age Convention* No. 138 of 1973; *Worst forms of Child Labour Convention* No. 182 of 1999.

33 *Discrimination (Employment and Occupation) Convention* No. 111 of 1958; *Equal Remuneration Convention* No. 100 of 1951.

34 Betten *International Labour Law* 65-66.

political rights. In light of this, these rights have crystallised into customary international labour law principles.

### 2.3 Sexual harassment and ILO standards

Equality of opportunity and treatment in the workplace is one of the ILO's quintessential subjects in the development of its policies and activities.<sup>35</sup> The continued need to achieve equality of opportunity and treatment in the workplace dates back as far as 1919 when the *ILO Constitution* of 1919<sup>36</sup> affirmed the need to preserve and promote opportunities for development and equitable economic treatment for all. The *Declaration of Philadelphia* adopted in 1944 also reiterates the aspiration of the ILO Constitution by stating that "all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in condition of freedom and dignity, of economic security and equal opportunity."<sup>37</sup> This is also demonstrated by the fact that equality of opportunity is one of the fundamental rights and principles set as aside by the ILO's Governing Body as essential to every workplace.<sup>38</sup>

There has always been the realisation that every human being, without distinction, possesses the right to pursue his or her material well-being and spiritual development, and such pursuance entails access to whatever employment and occupation that person is properly qualified for in a condition of freedom, dignity and equality of opportunity. Accordingly, the ILO has acknowledged that this right cannot be fully realised when workplaces are marred with inequalities.

The ILO has through these early developments demonstrated that inequalities exist in the workplace and that there is a need to eliminate them, seeing that the right to decent work of employees cannot be achieved in such conditions. In response to this, the ILO adopted the *Convention on Discrimination (Employment and Occupation)*.

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35 <http://www.ilo.org/global/standards/subjects-covered-by-international-labour-standards/equality-of-opportunity-and-treatment/lang-en/index.htm>.

36 See the Preamble of the Constitution (hereafter the ILO Constitution).

37 Article 2(a).

38 See par 2.2 above.



### **2.3.1 ILO Convention on Discrimination (Employment and Occupation)**

The ILO *Convention on Discrimination (Employment and Occupation)*<sup>39</sup> came into force on 15 June 1960 after being adopted by the International Labour Conference at its 42<sup>nd</sup> session held in Geneva on 25 June 1958. According to the CEACR, the adoption of this Convention and its Recommendation<sup>40</sup> echoes the ILO's commitment to eliminating discrimination in employment, irrespective of the grounds on which it is based and/or the form it takes.<sup>41</sup>

It ought to be noted that the right not to be subjected to discrimination is a fundamental human right protected under the *Universal Declaration of Human Rights*.<sup>42</sup> Consequently, Convention No. 111 was formulated based on the fact that all human beings, regardless of their race, creed or sex, have the right to pursue both their material well-being and spiritual development and with the realisation that discrimination constitutes a violation of human rights as enunciated by the UDHR.<sup>43</sup> The UDHR provides that everyone has the right to work, the right to freedom of choice of employment and to just and favourable conditions of work,<sup>44</sup> thus recognising that the right to work cannot be fully enjoyed if it is not accompanied by just and favourable conditions of work.

The right not to be discriminated against with respect to the workplace and decisions taken there is also found in other prominent United Nations documents. For example, articles 2(2) and 3 of the *International Covenant on Economic, Social and Cultural Rights* 1976<sup>45</sup> obliges ratifying states to ensure the equal enjoyment of the rights set out in the Covenant without distinctions based on, amongst others, sex. Subsequent to that, the rights of men and women to work<sup>46</sup> and to just and favourable conditions of work are protected.<sup>47</sup> Article 7(c) specifically provides for the right to equality of opportunity as an integral part of the right to just and favourable

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39 Hereafter Convention No. 111.

40 *Discrimination (Employment and Occupation) Recommendation* No. 111 of 1958.

41 ILO Committee of Experts Report par 7.

42 Article 7 (hereafter referred to as the UDHR).

43 Articles 2, 7 and 23.

44 Article 23(1).

45 Hereafter referred to as the ICESCR.

46 Article 6.

47 Article 7.

conditions of work. Flowing from these sentiments, the right not to be discriminated against in so far as the workplace is concerned has arguably crystallised into a rule of customary international law.

Convention No. 111 and its Recommendation are the ILO's key instruments that focus on the elimination of all forms of discrimination in the workplace. In terms of article 1(1)(a) of the Convention, discrimination includes any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin. The said distinction, exclusion or preference must have the effect of nullifying or impairing equality of opportunity. The CEACR has interpreted this definition as having three essential ingredients. Firstly, there must be some form of differential treatment which may take the form of a distinction, exclusion or preference which may arise not only due to an act, but also an omission. Secondly, the said differential treatment must arise out of any of the listed grounds. Finally, the differential treatment must have the effect of nullifying or impairing equality of opportunity or treatment.<sup>48</sup> It is also worth noting that the definition given in the Convention does not attempt to be exhaustive. By using the word "includes" the Convention gives expression to the fact that there may be other forms of differential treatment not listed by article 1. The CEACR has also defended the adoption of a broad definition by submitting that it covers all the situations that may affect equality of opportunity in the workplace.<sup>49</sup> Arguably, this submission readily supports the possibility of an argument that sexual harassment, whilst not listed, constitutes discriminatory conduct that nullifies equality of opportunity and treatment in the workplace. This is in view of the fact that the failure to respond to sexual advances may lead to the loss of a job opportunity or promotion, thus nullifying equality of opportunity and treatment in the workplace.

Whereas the definition of discrimination as enunciated by article 1(1)(a) is broad, article 1(2) permits differential treatment based on inherent requirements of the job. Article 1(3) defines the scope of "employment" and "occupation" within the Convention as referring to access to employment, vocational training and terms and conditions of employment.

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48 ILO: CEACR Report III (Part 4B) 1996 par 23.

49 ILO: CEACR Report III (Part 4B) 1996 par 19 and 23.

It has already been indicated that Convention No. 111 was formulated with a view to eliminate discrimination in the workplace notwithstanding the form it takes or the grounds on which it is based. Whereas it was argued above that the adoption of a broad definition by the CEACR readily supports an argument for sexual harassment, it is not easily discernible how the Convention prohibits harassment. It will therefore be instructive to decipher how the ILO has crafted its arguments in defending the application of the Convention to sexual harassment.<sup>50</sup>

### 2.3.1.1 *Sexual harassment as a ground of sex discrimination*

The CEACR has continuously submitted that sexual harassment can be addressed within the confines of Convention No. 111 as a form of discrimination on the basis of sex.<sup>51</sup> The CEACR has noted that distinctions based on sex are those which use biological characteristics and functions that differentiate women and men.<sup>52</sup> The Committee has stated that these distinctions may be explicit or implicit and directed at disadvantaging one sex or the other. Moreover, women continue to be predominantly affected by various acts of indirect discrimination.<sup>53</sup> Discrimination, according to the CEACR, should not be viewed as influenced by inferiority, but also as having its roots from other factors that are capable of limiting women's opportunities of obtaining and remaining in employment.<sup>54</sup>

It can be seen here that the Committee moves for the broad interpretation of sex discrimination as including indirect sex discrimination. Indirect discrimination consists of practices that appear neutral, but result in unequal treatment of a class of persons with certain characteristics. Hence, certain acts of indirect sex discrimination are not so obvious to the naked eye and may appear neutral, but arise as a consequence of belonging to a certain gender. Flowing from this argument the Committee has listed

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50 The only ILO instrument that expressly prohibits sexual harassment is the *Indigenous and Tribal People Convention* No. 169 of 1989 which provides at article 20(3)(d) that "The measures taken shall include measures to ensure that workers belonging to these peoples enjoy equal opportunities and equal treatment in employment for men and women, and protection from sexual harassment."

51 ILO: CEACR Report III (Part 4B) 1996 par 39.

52 ILO: CEACR Report III (Part 4B) 1996 par 35.

53 ILO: CEACR Report III (Part 4B) 1996 par 35.

54 ILO: CEACR Report III (Part 4B) 1996 par 36.

distinctions based on pregnancy and confinement,<sup>55</sup> civil and marital status<sup>56</sup> and sexual harassment<sup>57</sup> as examples of indirect sex discrimination. In defining sexual harassment, the CEACR has given a non-exhaustive list of acts that may constitute sexual harassment:

Sexual harassment or unsolicited sexual attention includes any insult or inappropriate remark, joke, insinuation and comment on a person's dress, physique, age, family situation etc; a condescending or paternalistic attitude with sexual implications undermining dignity; any unwelcome invitation or request, implicit or explicit, whether or not accompanied by threats; any lascivious look or other gesture associated with sexuality and any unnecessary physical contact such as touching, caresses, pinching or assault.<sup>58</sup>

The first detail to be picked up from this definition is that sexual harassment has been characterised as constituting unsolicited sexual attention. Thus, the attention in this particular instance must not be welcome on the part of the victim. This unsolicited sexual attention may include *inter alia* inappropriate remarks, jokes or comments about a person's dress or physique. Furthermore, it may take the form of conduct that patronises another person with sexual implications, thus undermining their dignity. Unwelcome invitations or requests, whether made expressly or implied, accompanied by threats or not, lascivious looks or gestures and unnecessary physical contact, which includes pinching, caressing and touching all fall under the auspices of sexual harassment.

The latter part of the definition suggests that in order to successfully prove sexual harassment, sexual invitations and/or requests must be unwelcome on the part of the victim, and if this can be successfully proven, it is irrelevant whether the requests or invitations were accompanied by threats or not. Moreover, any unnecessary physical contact such as touching, caressing and pinching constitutes sexual harassment.

In order for the above classes of conduct to constitute sexual harassment in the workplace, there must be proof that they were perpetrated with a motive to attain a

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55 ILO: CEACR Report III (Part 4B) 1996 par 37-38.

56 ILO: CEACR Report III (Part 4B) 1996 par 37-38.

57 ILO: CEACR Report III (Part 4B) 1996 par 39-40.

58 ILO: CEACR Report III (Part 4B) 1996 par 39.

particular result. The Committee has submitted that the conduct must be "justly perceived as a condition of employment or precondition for employment, or influence decisions taken in this field and or affect job performance."<sup>59</sup> As a result, the victim must allege that the harassment was a precondition to attain a job or to maintain it or that it affected her<sup>60</sup> job performance. That the alleged act of sexual harassment has to be accompanied by a motive or result draws back to the basis of classifying sexual harassment as a form of sex discrimination viz that it must limit an individual's opportunities of obtaining or remaining in employment. That is, the harassing conduct must actually put the victim's employment in jeopardy or inspire the belief that it does. This component also highlights that the ILO recognises *quid pro quo* and hostile environment sexual harassment as discussed in chapter 1.<sup>61</sup>

In 1974, MacKinnon<sup>62</sup> argued that sexual harassment is a form of sex discrimination primarily because it hinders women in getting, enjoying and keeping a job. She argued that women suffer workplace detriment because of their sex, thus their successes and/or enjoyment of the workplace depends on men.

### 2.3.1.2 *States' obligations under the Convention*

It has already been noted that Convention No. 111's primary aim is to promote equality of opportunity and treatment in employment by eliminating all forms of discrimination, of particular relevance to this discussion, sex discrimination, which includes within its auspices sexual harassment. Convention No. 111 is also one of the ILO's fundamental conventions and has to date been ratified by over 90% of ILO members.<sup>63</sup>

South Africa and Botswana are both members of the ILO and have each ratified this Convention.<sup>64</sup> In terms of article 2 of the Convention, members that ratify the

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59 ILO: CEACR Report III (Part 4B) 1996 par 39.

60 For purposes of this contribution, reference to one gender must be construed as equally applicable to the opposite gender.

61 See page 1.

62 MacKinnon *Sexual Harassment of Working Women* 74. MacKinnon's work is based on the early developments of sexual harassment laws in the United States of America, which is recognised as the founding state for these laws.

63 ILO: Equality at Work: The Continuing Challenge 2011 Report I(B) par 266.

64 Both countries ratified this Convention in 1997.

Convention undertake to declare and pursue a national policy that will work towards promoting equality of opportunity and treatment with a view to put an end to any form of discrimination. Such pursuance may be done by way of methods suitable to national conditions and practice. Paragraph 2 of Recommendation No. 111 highlights what may constitute methods appropriate to national conditions and practice. It provides that the national policy declared in terms of article 2 of the Convention should be applied by means of either legislative measures, collective agreements between representative employers and workers' organisations or in any other manner consistent with national conditions and practice.

Flowing from this, the Recommendation outlines the flexible nature of the Convention, thus giving leeway to governments and employers to adopt measures they find most appropriate in combating sexual harassment in the workplace. Legislation prohibiting and sanctioning sexual harassment may be formulated by Parliament, employers and trade unions may come up with collective agreements on how sexual harassment can be dealt with, or labour departments can formulate policies that succinctly address sexual harassment.

In terms of the Recommendation, the policy formulated by the ratifying member must draw attention to the fact that the promotion of equality of opportunity and treatment is a matter of public concern and that all persons without distinction should enjoy it in respect of the following factors.<sup>65</sup> There should be access to training and employment based on an individual's choice and on the basis of individual suitability for such training.<sup>66</sup> That is, an individual's access to employment or training should be based on individual choice and suitability. Secondly, advancement in employment or training must be in accordance with their individual character, experience, ability and diligence.<sup>67</sup> These factors must influence the criteria for decision making in the workplace, more particularly where such decisions involve workplace opportunities, for example, promotions or appointments. An employee should be permitted to prove him/herself based on his or her abilities, experiences and diligence in order to thrive

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65 Par 2(a) and (b).

66 Par 2(b)(ii).

67 Par 2(b)(iii).

in the workplace. The acceptance or decline of sexual favours must not be a precondition for one's chances of success in the workplace.

Thirdly, individuals are entitled to enjoy equality of opportunity and treatment in respect of security of tenure of employment, and such an employee may not lose their job on the basis of declining to honour unsolicited sexual attention.<sup>68</sup> According to the Recommendation, the policy should also require employers not to practice or tolerate discrimination in engaging or training any person for employment, in advancing or retaining such a person in employment or fixing employment terms and conditions of employment.<sup>69</sup>

In a nutshell, it flows from the above that the ILO recommends that a policy adopted by a member state (be it legislation prohibiting sexual harassment or national policies) should, whether expressly or implied, speak to the aforementioned considerations. Most notably, it should reflect that access to employment or training should be based on individual merit and so should retaining such employment or training. Employees should be allowed to succeed based on their capabilities as opposed success being dependent on whether or not they yield to acts of sexual harassment.

Whereas international law plays a significant role to the development of national law, it has to be kept in mind that its binding force differs from one country to the next.<sup>70</sup> This is primarily because the procedure for incorporating international law into national law is dependent on the system of incorporation adopted by a specific country. As a result, two systems of incorporation exist in relation to international law, namely monism and dualism. In a monist state international law and national law are seen to be interrelated parts of one legal system.<sup>71</sup> Consequently, the ratification of a treaty makes it binding law in the national legal system without the

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68 Par 2(b)(iv).

69 Par 2(d).

70 Dingake *Collective Labour Law in Botswana* 44-47; Tshosa "The Status and Role of International Law" 229-246.

71 Dingake *Collective Labour Law in Botswana* 44-47; Tshosa "The Status and Role of International Law" 229-246.

need for an active act of incorporation.<sup>72</sup> In a dualist state, international law and national law are treated as two separate bodies of laws. For international law to have a binding effect on national law there has to either be an act of incorporation of the relevant treaty in national law.<sup>73</sup> However, rules of international law that have crystallised into customary international law automatically become part of national law, notwithstanding the system of incorporation adopted by a country.<sup>74</sup>

Botswana and South Africa are both dualist states. What differentiates the two is that in Botswana there is no constitutional provision that identifies the position of international law in Botswana's national law. However, section 24 of the *Interpretation Act 24 of 1984*<sup>75</sup> of Botswana makes reference to the role of international law by providing that:

For the purposes of ensuring that which an enactment was made to correct and as an aid to the construction of an enactment a court may have regard to any relevant international treaty, agreement or convention and to any papers laid before the National Assembly in reference to the enactment or to its subject matter but not to the debates in the Assembly.

What section 24 basically does is to permit the courts of Botswana to apply international law when interpreting domestic legislation, especially legislation that is designed to incorporate a treaty. The wording of section 24 is permissive, thus the courts are not *per se* bound to apply international law. In contrast, the *Constitution of the Republic of South Africa 1996*<sup>76</sup> provides that courts, tribunals or forums must in interpreting the Bill of Rights, apply international law.<sup>77</sup> This provision does not purport to make international law part of South African law but rather puts an obligation on the courts, tribunals or forums to apply international law as and when the need arises.

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72 Dingake *Collective Labour Law in Botswana* 44-47; Tshosa "The Status and Role of International Law" 229-246.

73 Dingake *Collective Labour Law in Botswana* 44-47; Tshosa "The Status and Role of International Law" 229-246.

74 Dingake *Collective Labour Law in Botswana* 44-47; Tshosa "The Status and Role of International Law" 229-246.

75 The Act is also referred to as the General Provisions and Interpretations Act of 1984.

76 Act 108 of 1996.

77 S 39(1)(b).



Two contrasting decisions of the Court of Appeal of Botswana have to be considered. In the case of *Kenneth Good v Attorney General*,<sup>78</sup> the court held that the ratification of a treaty does not give it power of law in Botswana and its provisions do not form part of national law until they are passed into law by Parliament. For provisions of a treaty to be binding on Botswana they either have to be incorporated into national law by an Act of Parliament or have crystallised into rules of customary international law.<sup>79</sup> In a progressive judgement, the Court of Appeal in the case of *Unity Dow v Attorney General*<sup>80</sup> relied on a treaty Botswana has not ratified to interpret national law and reasoned that in interpreting national legislation, the court is entitled to look at international agreements entered into by Botswana before or after promulgation of such legislation to ensure that such legislation does not contravene Botswana's international obligations. The court held that this position must be followed irrespective of whether or not a particular convention has been incorporated into national law.<sup>81</sup> This decision demonstrates that whereas the courts are not bound to apply international law, international law will be applied where an interpretation of national law conflicts with Botswana's obligations in terms of international law. The weakness in section 24 of the *Interpretation Act*, which is also manifested in these two judgements, is that it is not clear as to when the courts will be bound to apply international law where such international law has not been incorporated into national law. It is at the courts' discretion to either apply international law or not.

Be that as it may, this position sheds light on the legal position with respect to the legal status of conventions in Botswana generally. The Industrial Court of Botswana, as established under section 15(1) of the *Trade Disputes Act*,<sup>82</sup> is a court of law and equity<sup>83</sup> and has repeatedly held that it will apply principles of international law whether or not they have been ratified by the Republic or been adopted into national law.<sup>84</sup> However, the discussion on the status of international law in Botswana's

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78 2005 2 BLR 337 (CA) 346.

79 See also Dingake *Collective Labour Law in Botswana* 44-47; Tshosa "The Status and Role of International Law" 229-246.

80 1992 BLR 119 (CA) 170.

81 1992 BLR 119 (CA) 170.

82 Act 15 of 2005.

83 See amongst others *Kanokang v T K Trading (Pty) Ltd* 1995 BLR 389 (IC) 395; *Moatswi v Fencing Centre (Pty) Ltd* 2002 1 BLR 262 (IC) 268.

84 *Moatswi v Fencing Centre (Pty) Ltd* 2002 1 BLR 262 (IC) 268.

national law remains relevant. Notwithstanding the specialised jurisdiction of the Industrial Court in labour disputes,<sup>85</sup> the Court of Appeal of Botswana in *Botswana Railways' Organisation v Setsogo and Others*<sup>86</sup> held that this position should not be interpreted as nullifying the general unlimited jurisdiction of the High Court of Botswana in all matters.<sup>87</sup> In view of this, not all labour disputes are settled in the Industrial Court, thus finding a direct application of international law instruments notwithstanding whether they have been incorporated or not.

It has to be noted at this juncture that whereas the application of international law differs from one jurisdiction to the other, the *ILO Declaration on Fundamental Principles and Rights at Work*<sup>88</sup> imposes positive obligations on member states. In article 1(a) of the Declaration, the International Labour Conference emphasises that in exercising their free-will to join the ILO, "members endorsed the principles and rights set out in its Constitution and in the Declaration of Philadelphia and have undertaken to work towards attaining the overall objectives of the ILO." The International Labour Conference also states that even if a country has not ratified the fundamental conventions, an obligation to "respect, promote and realise in good faith and in accordance with the Constitution the fundamental rights and principles" in the relevant conventions arises from the very fact of the country's membership.<sup>89</sup>

The CEACR has also submitted that when joining the ILO, member states indicate their unreserved subscription to sharing the common task of eliminating discrimination and promoting equality in the workplace.<sup>90</sup> As a result, the obligation to eliminate discrimination in employment arises even in the event that Convention No. 111 was not ratified. The fact that a country is a member of the ILO automatically implies an obligation to ensure that it takes steps towards promoting equality of opportunity and treatment in the workplace.

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85 S 15(1) and (2).

86 1996 BLR 763 (CA) 800-801.

87 In terms of section 95(1) of the *Constitution of the Republic of Botswana* LN 83 Of 1966, the High Court has "unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other jurisdiction and powers as may be conferred on it."

88 Adopted by the International Labour Conference at its 86th Session in Geneva on the 18<sup>th</sup> of June 1998.

89 Article 2.

90 ILO: CEACR Report III (Part 4B) 1996 par 7.

### **2.3.2 Convention on Occupational Health and Safety<sup>91</sup>**

The CEACR has submitted that harassment of a sexual nature calls into question the well-being of employees, thus prejudicing productivity in the workplace.<sup>92</sup> The ILO also views sexual harassment in the workplace as an occupational health and safety concern.<sup>93</sup> According to the ILO, employees continue to be faced with exposure to psychosocial risks due to confrontation with sexual harassment at work.<sup>94</sup> These views all point in one direction; that sexual harassment is not only a discriminatory practice but also jeopardises the health and safety of employees in the workplace.

In view of that, the ILO has classified the *Convention on Occupational Health and Safety* as moving ratifying members to formulate measures to eliminate sexual harassment in the workplace. The Convention<sup>95</sup> is a social security instrument that sets minimum standards for the creation of safe work environments. According to article 4, parties to the Convention are required to "formulate, implement and periodically review a coherent national policy on occupational safety, occupational health and the working environment". Employers and workers' organisation should be actively involved in this process.

The policy must be aimed at the "prevention of accidents and injury to health arising out of, linked with or occurring in the course of work, by minimising, so far as reasonably practicable, the causes of hazards in the working environment."<sup>96</sup> Health in terms of the Convention includes, but is not limited to "physical and mental elements affecting health which are directly related to safety and hygiene at work."<sup>97</sup> Accordingly, the psychological effects that come with exposure to sexual harassment enter into this definition, thus making the Convention relevant to addressing sexual harassment in the workplace.

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91 Convention No. 155 of 1981.

92 ILO: CEACR Report III (Part 4B) 1996 par 40.

93 McCann *Sexual harassment at work: National and International responses* 14.

94 McCann *Sexual harassment at work: National and International responses* 14.

95 Botswana has not ratified this Convention whilst South Africa ratified it in February 2003.

96 Article 4(2).

97 Article 3(e).

## **2.4 Conclusion**

Equality of opportunity and treatment plays an important role within the ILO and has been used to move for the elimination of all forms of discrimination in the workplace. Convention No. 111 is one of the fundamental conventions of the ILO and embodies a fundamental and basic human right not to be discriminated against in the workplace. The Convention has also received an overwhelming ratification status from the ILO membership, thus reinforcing the critical role of anti-discrimination and promotion of equality of opportunity and treatment in the workplace.

Sexual harassment in the workplace has been classified as constituting discrimination on the basis of sex under the Convention and as such constitutes a violation of workers' fundamental human right to anti-discrimination in pursuance of both their material well-being and spiritual development. Ratifying members are therefore obliged to pursue national policies that outlaw sexual harassment in the workplace. Notwithstanding that members of the ILO subscribe to different modes of incorporating international law into their national law, the ILO moves for cooperation in the elimination of sex discrimination in the workplace, whether a member state has ratified the relevant convention or not. More particularly, where Convention No. 111 is concerned, the moment a country joins the ILO it accedes to sharing the common task of eliminating discrimination and promoting equality of opportunity and treatment in the workplace.

Whereas it is mostly classified as a form of sex discrimination, the ILO has indicated that sexual harassment constitutes an occupational hazard which every employee must be guaranteed protection against. Because employers have a duty to provide a safe working environment, this augments the growing need to ensure that workplaces are free of sexual harassment.

Having set the background in so far as international labour standards on sexual harassment are concerned, the next phase examines how far Botswana has gone in complying with its obligations under Convention No.111 and how the legal framework proscribes sexual harassment in the workplace.

## CHAPTER 3 THE LEGAL FRAMEWORK IN BOTSWANA

### 3.1 Introduction

The preceding chapter indicated that the ILO has submitted that Convention No. 111<sup>98</sup> is sufficient for addressing sexual harassment in the workplace.<sup>99</sup> An important aspect was also highlighted from the submissions of the ILO; namely that sexual harassment falls within the auspices of sex discrimination as a form of indirect discrimination.<sup>100</sup> This chapter explores how far Botswana has gone to complying with its obligations to international law by looking at the legal framework for addressing sexual harassment in Botswana. It also seeks to explore how the Botswana courts will address cases of sexual harassment in the workplace.

### 3.2 Botswana's employment and labour legal system

Botswana became a member of the ILO in 1978. So far it has ratified most of the ILO's fundamental conventions, Convention No. 111 included. The Government of Botswana has also made considerable effort to ensure that its labour legislation reflects its international obligations.<sup>101</sup> According to Dingake,<sup>102</sup> the Government overhauled the labour legislative framework in 2004 to incorporate the ILO Conventions it had ratified into national law. It also has to be noted that the incorporation of ILO Conventions into national legislation by the government has not been a simple task. As Dingake<sup>103</sup> has observed, it took on average more than six years for legislation incorporating some of the ILO Conventions into national law to be formulated.

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98 *Convention on Discrimination (Employment and Occupation)* 111 of 1958.

99 See par 2.3.1.1.

100 Par 2.3.1.1.

101 For example, the fundamental concepts of freedom of association and collective bargaining are recognised and protected under the *Constitution of the Republic of Botswana* LN 83 of 1966 and various labour legislation such as the *Employment Act* 29 of 1982, *Public Service Act* 13 of 1998, *Trade Disputes Act* 15 of 2004 and *Trade Unions and Employers' Organisations Act* 23 of 1983.

102 Dingake *Collective Labour Law in Botswana* 25.

103 Dingake *Collective Labour Law in Botswana* 25.

Botswana subscribes to a system of labour and employment which Olivier<sup>104</sup> refers to as "a strict public and private law divide" where private service and public sector employment are regulated by two separate legal orders. Public service employment falls under the *Public Service Act* 13 of 1998, whereas private sector employment is covered by the *Employment Act* 29 of 1982.

In terms of dispute resolution mechanisms, the *Trade Disputes Act* 15 of 2004<sup>105</sup> establishes the Office of the Labour Commissioner, which heads and oversees the settlement of trade disputes by appointed mediators and arbitrators. Disputes are referred to the Commissioner for mediation or arbitration before being tried in a court of law. The Act also establishes the Industrial Court, which serves a specialist function of settling trade disputes and securing and maintaining good industrial relations in Botswana.<sup>106</sup>

### **3.3 The legislative framework**

Before embarking on discussing the legislative framework, it is important to keep in mind that article 2 of Convention No. 111 calls on ratifying states to pursue a national policy that will work towards promoting equality of opportunity in the workplace with an aim of eliminating any form of discrimination. It was also highlighted that the policy may be applied by means consistent with national conditions such as legislation, collective agreements and any other measures a member deems appropriate.<sup>107</sup>

#### **3.3.1 Employment Act**

The *Employment Act* 29 of 1982<sup>108</sup> is the chief legislation that regulates employment relationships in the private sector. It regulates almost all important elements that accrue to an employment relationship such as remuneration, various types of leave and dismissals. However, unlike the *Public Service Act* 13 of 1998,<sup>109</sup> there are no

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104 Olivier 2006 (2) *Speculum Juris* 217.

105 Hereafter the Trade Disputes Act.

106 S 15(1) and (2).

107 See par 2.3.1 and 2.3.1.2 above.

108 Hereafter the EA.

109 Hereafter the PSA.

express provisions in the EA that outlaw sexual harassment; neither does it make provision for a procedure to deal with incidents that include such conduct. In contradistinction, section 38(1) and (2) of the PSA provides:

Sexual harassment of one employee by another, or by a person in authority over another in the public service, shall constitute misconduct. For the purposes of this section, "sexual harassment" means any unwanted, unsolicited or repeated sexual advance, sexually derogatory statement or sexually discriminatory remark made by an employee to another, whether made in or outside the workplace, which is offensive, or objectionable to the recipient, which causes the recipient discomfort or humiliation, or which the recipient believes interferes with the performance of his or her job security or prospects, or creates a threatening or intimidating work environment.

This provision provides a comprehensive mechanism that seeks to address sexual harassment and takes it a step further by extending coverage to harassing conduct that may not necessarily take place in the workplace, so long as it occurs amongst work colleagues. The definition of sexual harassment mirrors that of the ILO.<sup>110</sup> It also recognises *quid pro quo* and hostile working environment harassment. Albeit the incorporation of the sentiments of the ILO, private sector employees cannot rely on this provision to extend the same protection to them since the PSA applies only to public service employment.

Section 23(d) of the EA only makes provision for a prohibition of termination of an employment contract based on discriminatory grounds such as gender and an employee's sexual orientation. It is not clear as to whether one can rely on this provision in a claim of sexual harassment. The most apparent claim that can be brought under section 23 would be that an employee was dismissed because she is a woman or because as a woman she was considered not fit to perform a certain task. However, in the case of *Moatswi and another v Fencing Centre (Pty) Ltd*,<sup>111</sup> the Industrial Court of Botswana acknowledged that discrimination should be seen as entailing acts of both direct and indirect discrimination. Also consider that the ILO has submitted that sex discrimination goes beyond the issue of inferiority, but is also fuelled by other considerations that limit women's opportunities to obtain or remain in employment.<sup>112</sup> Consequently, a far-reaching argument can be made under section

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110 ILO: CEACR Report III (Part 4B) 1996 par 39.

111 2002 1 BLR 262 (IC) 265-267.

112 ILO: CEACR Report III (Part 4B) 1996 par 36.

23 to the effect that an employee was dismissed because as a woman she stood susceptible to sexual harassment by her employer. Section 23(e) also makes a general provision which prohibits the termination of employment arising from "any other reason which does not affect the employee's ability to perform that employer's duties under the contract of employment." If an employee is dismissed due to her refusal to honour sexual advances from the employer, an argument may be made out of this provision to the effect that the dismissal was based solely on such refusal and not because the dismissed employee had become unable to perform her obligations under the contract of employment.

The scope of section 23 is very narrow since it is limited to instances of discrimination related to termination of employment. Not all acts of sexual harassment lead to a termination of employment by the employer. Sometimes harassment is perpetrated not by the employer *per se*, but by those in authority<sup>113</sup> or by work colleagues. On that note, it is argued that an employee who is subjected to sexual harassment may resort to a claim of constructive dismissal provided for under section 26(2) of the EA. The EA does not define constructive dismissal save for listing the grounds on which it may be utilised. In order to give clarity to the scope and extent of section 26(2), the Industrial Court of Botswana in the case of *Motlhanka v BCL Limited*<sup>114</sup> relied on South African authorities, a fact that merits discussion.

According to Grogan,<sup>115</sup> constructive dismissal was once not part of the common law of South Africa.<sup>116</sup> Constructive dismissal allows an employee to abandon her employment arising from a repudiation of the contract by the employer. Section 186(1)(e) of the *Labour Relations Act* 66 of 1995 gives employees the liberty to terminate their contracts of employment where the employer makes continued employment intolerable for them. In *Jooste v Transnet t/a South African Airways*,<sup>117</sup>

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113 For example, in instances of corporate companies where the employer is a juristic person and harassment occurs between a subordinate and a manager.

114 2010 2 BLR 10 (IC) 14-16 (hereafter the *Motlhanka*-case).

115 Grogan *Dismissal* 51.

116 Additionally, in *Jooste v Transnet t/a South African Airways* 1995 16 ILJ 629 (LAC) 636, the Labour Appeal Court highlighted that constructive dismissal was not part of the Labour Relations Act, nor any South African statute.

117 1995 16 ILJ 629 (LAC) 630F.



the LAC held that the onus rests with the employee to prove that she did not intend to terminate the employment relationship, but because of the intolerable conditions imposed by the employer, she had no option but to terminate her employment contract. In *Pretoria Society for the Retarded v Loots*,<sup>118</sup> the court held that:

The enquiry then becomes whether the appellant (employer) 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 any 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.

In view of the above, in order to succeed in proving a constructive dismissal, an employee must prove a relationship between her employer's conduct and the resignation. The conduct must be intolerable, unbearable or inhibit the employee from fulfilling her duties as an employee.

Similarly, constructive dismissal under the EA is treated as a remedy that entitles employees to terminate an employment contract without notice due to a breach of the contract by the employer. An employee thus has the right to terminate her employment contract if she is subjected to any of the grounds listed under section 26(2), one of which includes ill-treatment by her employer or her employer's representatives. Since the Act does not define nor give an indication of what would constitute ill-treatment by an employer or the employer's representatives, it can be argued that an employee who has been subjected to sexual harassment either by the employer or other employees may resort to terminating her contract of employment and proving ill-treatment as a ground for such termination. In the *Motlhanka*-case,<sup>119</sup> the court observed that the Act does not entitle employees to seek compensation where they have relied on section 26(2) to terminate a contract. For an employee to claim compensation for constructive dismissal, she has to prove that the dismissal was either wrongful or substantively unfair.<sup>120</sup> Consequently, where an employee relies on constructive dismissal arising from being sexually

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118 1997 18 ILJ 981 (LAC) 985 (hereafter the *Pretoria Society*-case).

119 2010 2 BLR 10 (IC) 15.

120 *Moremi v Westhynd Security (Pty) Ltd* 1998 BLR 287 (IC) 293-295.

harassed, she has to allege that due to the employer's sexual advances it was unbearable for her to continue being employed and as such, although the employer did not dismiss her directly, the unlawful conduct of such employer led her to resign. The guiding factor here would be that there is no obligation in terms of common law for an employee to comply with an unlawful or unreasonable instruction of an employer.<sup>121</sup>

Be that as it may, where sexual harassment is concerned reliance on constructive dismissal is of little assistance at least in two ways. Firstly, in the *Pretoria Society-case*<sup>122</sup> the court noted that when an employee terminates a contract of employment based on a constructive dismissal, she does so because she believes that the employer has no reasonable prospects of ceasing the conduct or pattern that makes the work environment unbearable. The court proceeded to note that if the employee is wrong in that assumption, then her resignation should be considered a voluntary resignation and therefore does not amount to a constructive dismissal. For example, where a sexual harassment complaint has been lodged by an employee against a colleague and the employer does not take reasonable steps to avert and discipline such conduct, it may be justifiable to claim that there was no indication that the employer would eliminate the conduct rendering the work environment unbearable, thus permitting a termination based on constructive dismissal. The employee has to prove that she did in fact bring the sexual harassment complaint to the attention of the employer, but that the employer failed to act.

The Industrial Court of Botswana in the *Mothanka-case*<sup>123</sup> somewhat endorses this position. An employee who had been continuously harassed by his employer's personnel terminated his employment contract and approached the court alleging a constructive dismissal and sought compensation for the dismissal. The court held that an employee who alleges harassment by an employer's representative must formally present that complaint to the employer so that it may be investigated in accordance with the employer's grievance procedures. According to the court, it is not enough to allege a constructive dismissal where grievance procedures have not

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121 *Moremi v Westhynd Security (Pty) Ltd* 1998 BLR 287 (IC) 293-295.

122 1997 18 ILJ 981 (LAC) 984E-F.

123 2010 2 BLR 10 (IC) 17.

been followed preceding the resignation.<sup>124</sup> Although this case involved harassment of a non-sexual nature, it follows that an employee should not be hasty to resort to constructive dismissal without exhausting the remedies made available by the employer. Complex situations arise where the employer has no stipulated grievance mechanisms such as a sexual harassment policy that gives guidance on how to handle such a complaint and indicates its proper sanction. If the employer chooses to retain and rehabilitate an employee found guilty of sexual harassment as opposed to dismissing him, the victim of the harassment may resign and claim a constructive dismissal since she finds working in the same environment with the perpetrator as unbearable.

The second limitation of relying on constructive dismissal is that an employee must exercise this right within a reasonable period after the ground conferring the right materialises.<sup>125</sup> A failure to do so, in terms of the Act, is considered to be a waiver of the right. Nevertheless, the Act does not give a guideline as to what a reasonable period entails, nor does it give guidelines as to how this should be determined. As a result, what is reasonable would depend on the facts and circumstances of each case. The implication of this provision is basically that a failure to act upon the right to terminate the contract as soon as sexually harassing conduct is identified results in a waiver of the right. Considering the sensitivity involved in sexual harassment matters, it can be argued as espoused that what constitutes a reasonable period would best be identified by the courts.

Despite an attempt to make an argument out of the provisions of sections 23 and 26 of the EA, these sections do not provide a comprehensive model that addresses the issue of sexual harassment in the workplace. It has to be kept in mind that the ILO views sexually harassing conduct in the workplace as having two facets. According to the ILO, sexual harassment can either be perpetrated as a condition for employment or a precondition of employment.<sup>126</sup> Moreover, in terms of article 1(3) of Convention No. 111, employment and occupation have been defined as including admittance to employment and relating to terms and conditions of employment. This

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124 2010 2 BLR 10 (IC) 17.

125 S 26(3).

126 ILO: CEACR Report III (Part 4B) 1996 par 39.

reflects the fact that sexual harassment does not affect existing employees only. Job applicants may also find themselves at the receiving end of this conduct. Consequently, a policy adopted by a member state should not only address incidents of sexual harassment experienced by employees, but also those that are more likely to occur in the process of employment. It arises from the arguments made out of sections 23 and 26 (both dealing with dismissals) that only incidents of sexual harassment pertaining to employees may be addressed. This leaves job applicants with no readily available remedy. Even in the case of employees, the reliance on sections 23 and 26 does not guarantee ample protection and speak to the procedure for handling sexual harassment complaints and its appropriate sanctions. That is, the provisions are general and not specifically tailored to curb and address sexual harassment in the workplace.

On that note the CEACR has expressed dissatisfaction with the general nature of the provisions of section 23 and submitted thus:

While noting the general prohibition of discrimination added to the Employment Act, the Committee recalls that where legal provisions are adopted to give effect to the principle of the Convention, they should specify at least all the grounds of discrimination set out in Article 1(1)(a) of the Convention and cover all aspects of employment and occupation, including training, recruitment and selection and all terms and conditions of employment.<sup>127</sup>

The key observation made by the CEACR is that section 23 is lacking in as far as it extends protection against discrimination to employees only, leaving out job applicants. According to the CEACR, if legislation intends to incorporate the Convention, it should do so in an unequivocal manner and cover all aspects that the Convention seeks to address.<sup>128</sup> The CEACR has also observed that the provisions of section 23(d) are general and should be amended to specifically enumerate the grounds of discrimination as set out in the Convention.<sup>129</sup>

In its observation, the CEACR noted from a submission by the government that the EA is being amended. Having noted the sexual harassment provisions reflected

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127 ILO: CEACR Report III (Part 1A) 2013 430.

128 ILO: CEACR Report III (Part 1A) 2013 430.

129 ILO: CEACR Report III (Part 1A) 2013 430.

under the PSA, the CEACR has requested the government to take the necessary steps to include provisions on sexual harassment as part of the EA.<sup>130</sup> The CEACR also expressed that it anticipates that the ongoing amendments to the EA will give the government an opportunity to include more comprehensive provisions that prohibit direct and indirect discrimination, covering all aspects of employment, occupation and training.<sup>131</sup>

These remarks confirm the ILO's observation that, notwithstanding the overwhelming statistics in the ratification of Convention No. 111, its incorporation and implementation in national law has been occurring at a staggering slow pace.<sup>132</sup> Additionally, the ILO has observed that legislations of many ratifying states continue to fail in embodying provisions that directly speak to sexual harassment.<sup>133</sup>

### **3.3.2 *The Constitution of the Republic Botswana***

Constitutions have continued to play a major role in the protection and development of labour rights and the labour discourse.<sup>134</sup> Modern constitutions specifically entrench labour rights and elevate them to the status of fundamental human rights.<sup>135</sup> Even in jurisdictions where labour rights are not constitutionally entrenched, the courts have played an important role in establishing the role that civil and political rights in the constitutions play in the protection of labour rights.<sup>136</sup> Hence, constitutions remain relevant in the protection and justiciability of labour rights and may be invoked to substantiate a claim in a court of law.

That the EA has no specific provision addressing sexual harassment does not imply that harassed employees are completely left without a remedy should they choose not to resort to constructive dismissal under the EA. Constitutional provisions may be invoked in a sexual harassment suit to allege infringement of fundamental human rights.

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130 ILO: CEACR Report III (Part 1B) 2012 484.

131 ILO: CEACR Report III (Part 1B) 2012 484.

132 ILO: Equality at Work: The Continuing Challenge 2011 Report I(B) par 227.

133 ILO: Equality at Work: The Continuing Challenge 2011 Report I(B) par 62.

134 See generally Beatty 1993 (14) *ILJ* 1-2.

135 Dingake *Collective Labour Law in Botswana* 14.

136 Dingake *Collective Labour Law in Botswana* 14.

The *Constitution of the Republic of Botswana* LN 83 of 1966<sup>137</sup> was adopted in 1966 when Botswana gained independence. According to Dingake,<sup>138</sup> the time at which the Constitution was adopted has an influence on the absence of specific protection of labour rights. Be that as it may, this does not imply that labour rights are not protected and endorsed by the Constitution. Notwithstanding that it does not specifically make reference to labour rights, generic rights in the Constitution have been interpreted as guaranteeing constitutional protection of labour rights.<sup>139</sup> In view of the absence of specific sexual harassment provisions under the EA, an employee may allege an infringement of one or more of the rights enshrined in the Constitution to augment her claim.

Of particular relevance to a sexual harassment suit, a litigant may allege an infringement of the right to equality and equal protection of the law and the right not to be subjected to inhuman and degrading treatment. Section 3(a) of the Constitution provides:

...every person in Botswana is entitled to the fundamental rights and freedoms of the individual, that is to say, the right, whatever his race, place of origin, political opinions, colour, creed or sex but subject to respect for the rights and freedoms of others and for the public interest... to life, liberty, security of the person and the protection of the law.

Section 3(a) guarantees every person the right to, amongst others, equal protection of the law. The right to equal protection of the law should be interpreted to go beyond provisions enshrined in various Acts of Parliament, to mean that everyone is entitled to equal treatment and also access to and justice before the courts of law. Convention No. 111 as a source of international law guarantees protection against discrimination in the workplace, and of particular relevance to this discussion, sexual harassment. Hence, a litigant may submit that the provisions of the Convention equally protect her against sexual harassment in the workplace.<sup>140</sup>

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137 Hereafter the Constitution of Botswana.

138 Dingake *Collective Labour Law in Botswana* 14.

139 Dingake *Collective Labour Law in Botswana* 26.

140 This submission is made with caution bearing in mind the decisions in *Kenneth Good v Attorney General* 2005 2 BLR 337 (CA) and *Unity Dow v Attorney General* 1992 BLR 119 (CA) where contrasting decisions were reached by the Court of Appeal regarding the role of unincorporated treaties in the law of Botswana. These two cases are discussed in Chapter 2 par 3.1.2.

In fact, the courts have established that there is a relationship between the right conferred by section 3(a) and section 15 which entitles every individual to protection against discrimination. In terms of section 15(2), everyone is guaranteed the right to protection from discriminatory conduct by any person acting by virtue of any written law. Section 15(3) provides that:

In this section, the expression "discriminatory" means affording different treatment to different persons, attributable wholly or mainly to their respective descriptions by race, tribe, place of origin, political opinions, colour, creed or sex whereby persons of one such description are subjected to disabilities or restrictions to which persons of another such description are not made subject or are accorded privileges or advantages which are not accorded to persons of another such description.

Flowing from this provision, every employee is entitled not to be subjected to any form of discrimination, chief amongst these, discrimination on the basis of their sex. Since the ILO has classified sexual harassment as a form of sex discrimination,<sup>141</sup> section 15 gives room for a litigant to motivate her argument by making a submission that sexual harassment constitutes discriminatory conduct based on her sex, and that such harassing conduct infringes on her constitutional right not to be discriminated against.

In addition to the above, section 7(1) of the Constitution entitles everyone to protection from being subjected to inhuman or degrading treatment. The court in *Diau v Botswana Building Society*<sup>142</sup> established the interrelatedness of this right to that of dignity and life. According to the court, the right not to be subjected to inhuman and degrading treatment shields the right of individuals to their dignity, which according to the court, is the anchor of the right to life.<sup>143</sup> If the right to dignity was to be taken away, the right to life would be devoid of its meaning. The court proceeded to hold that human dignity is what bestows on an individual their worth as a human being, and demands that they be treated with respect.<sup>144</sup> In light of the court's sentiments, it must be submitted that in a society that has the utmost respect for the fundamental human rights of its people, sexual harassment, irrespective of

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141 ILO: CEACR Report III (Part 4B) 1996 par 36.

142 2003 2 BLR 409 (IC) (hereafter the *Diau*-case).

143 2003 2 BLR 409 (IC) 433.

144 2003 2 BLR 409 (IC) 433.

the form it takes should be seen as infringing on the right of an individual to their dignity and bodily integrity. A respect for the right to dignity demands that an individual's right to privacy and right to freely make decisions concerning their bodies be equally respected.

### 3.3.2.1 *Application of the Constitution to private entities*

Unlike the *Constitution of the Republic of South Africa, 1996*, which employs a vertical and horizontal application,<sup>145</sup> the Constitution of Botswana is silent as to its application to private entities. Because constitutions are normally formulated to govern the rights of the individual in relation to the state,<sup>146</sup> it may appear that the conduct of private employers cannot be challenged as unconstitutional.

In the *Diau-case*,<sup>147</sup> the Industrial Court of Botswana had an opportunity to grapple with the question whether the conduct of private bodies can be brought under constitutional scrutiny. The court noted that the Constitution had no clause limiting its application to organs of state and recalled that its language must at all material times be given a broad and purposeful interpretation so as to give effect to its spirit.<sup>148</sup> The court proceeded to hold that in the absence of a clause limiting application of the Constitution to organs of state, there is no basis on which such a strict interpretation would rest. The court further expressed a progressive reasoning by observing that:

In today's world there are private organisations that wield so much power, relative to the individuals under them, that to exclude those entities from the scope of Bill of Rights would in effect amount to a blanket license for them to abuse human rights. This is particularly so in an employment relationship which more often than not is characterised by unequal bargaining power between employer and employee.<sup>149</sup>

Leaving private entities outside the scope of the Constitution would undoubtedly do more harm than good to the human rights of employees in the private sector. If the conduct of private employers cannot be placed under constitutional scrutiny, room is given for the violation of the human rights of employees and the fact that employees

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145 S 8(2) makes the conduct of private bodies subject to constitutional scrutiny.

146 *Diau-case* 2003 2 BLR 409 (IC) 452.

147 2003 2 BLR 409 (IC) 427.

148 2003 2 BLR 409 (IC) 427.

149 2003 2 BLR 409 (IC) 427-428.



would be barred from making a claim under the Constitution would exacerbate the situation. It also has to be taken into account that the private sector is a large employer. Hence leaving it out of the scope of application of the Constitution, more particularly where fundamental rights are concerned, would leave multitudes of employees without resort when their rights are being infringed upon by their employers.

The court thus concluded that private bodies are bound by the Constitution, but that the application of its provisions to these entities must be done with caution.<sup>150</sup> Whether or not a private body's conduct is subject to constitutional scrutiny has to depend on the nature of the conduct in question and the circumstances of each case.<sup>151</sup> Because one of the fundamental principles of the Constitution is to uphold respect for human dignity, and in view of the effect sexual harassment has on the dignity of the harassed,<sup>152</sup> it is not comprehensible why the court would be reluctant to apply provisions of the Constitution to a private body where sexual harassment is concerned. Taking into account the sensitive nature of issues related to sexual harassment and the human rights violated by this conduct, one would think that the courts would be quick to jealously guard and protect victims in the private sector who rely on provisions of the Constitution in sexual harassment suits.

### **3.3.3 Codes of Good Practice**

#### *3.3.3.1 Code of Good Practice: Sexual Harassment in the Workplace*

The *Code of Good Practice: Sexual Harassment in the Workplace*<sup>153</sup> was formulated under section 51(1) of the *Trade Disputes Act*,<sup>154</sup> which empowers the Minister of Labour and Home Affairs, in consultation with the Labour Advisory Board, to publish among other things, Codes of Good Practice that serve as guidance for employers, employees and their organisations. The Code is not contained within the *Trade*

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150 2003 2 BLR 409 (IC) 428.

151 2003 2 BLR 409 (IC) 428.

152 The ILO has also observed that sexual harassment puts to question the integrity of employees, thus negatively affecting their dignity. See par 2.3.1 and 2.3.1.1 above in this regard.

153 Hereafter referred to as the Code of Good Practice on Sexual Harassment.

154 The Government is included as an employer within the provisions of the Trade Disputes Act. As a result, absent section 38(1) and (2) of the PSA, the Code of Good Practice would arguably be applicable to addressing sexual harassment in public service employment.

*Disputes Act*, but exists as a separate document kept by the Office of the Commissioner of Labour, which has the responsibility of ensuring its accessibility to employers.

In terms of items 1.2 and 1.3, the object of the Code is to eliminate sexual harassment in the workplace and promote the development and implementation of policies and procedures with a view to achieve a workplace free of sexual harassment.<sup>155</sup> In order to do so, the Code requires every employer to devise a policy statement that incorporates and reflects the objects and provisions of the Code.<sup>156</sup> The employer is required to make available the policy to all employees, and display such policy in such a manner that non-employees who visit the workplace may peruse it.<sup>157</sup> The scope of application of the Code extends coverage to job applicants, contractors and clients.<sup>158</sup>

Item 3.1 of the Code defines sexual harassment in the following manner:

Sexual harassment is unwanted conduct of a sexual nature. The unwanted nature of the conduct distinguishes it from consensual behaviour.

Sexual harassment has been classified as a breach of a contract of employment and a delictual wrong entitling the harassed employee to resign and claim compensation for constructive dismissal, or to sue for damages for breach of contract or an invasion of privacy.<sup>159</sup> According to item 2.3, sexual harassment should be treated as a serious misconduct warranting a dismissal without notice in terms of section 26(1) of the EA. Thus an employer may either lawfully discipline or dismiss an employee found guilty of sexual harassment.<sup>160</sup>

The Code also gives an employee who has been sexually harassed an option to either press criminal charges or bring a delictual claim against the perpetrator,<sup>161</sup> notwithstanding that the employer has commenced with the normal disciplinary

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155 See generally item 1 of the Code.

156 Item 6.1.

157 Item 6.2.

158 Item 2.

159 Item 1.4.

160 Item 1.4.2.

161 Item 7.8.1.

procedures for the reported harassment.<sup>162</sup> Employers are encouraged to develop clear procedures for dealing with sexual harassment, which may be incorporated into existing grievance or disciplinary procedures.<sup>163</sup> Additionally, employers should create and maintain a working environment in which the dignity of each employee is respected. Victims of sexual harassment should not fear reprisals or that their grievances will be ignored or trivialised.<sup>164</sup>

Whereas the Code presents an overarching mechanism that mirrors the international standard as set out by the ILO,<sup>165</sup> its weaknesses somewhat outweigh the significance it would have in combating sexual harassment. If the argument is that the Code is sufficient to address sexual harassment in the private sector, the following has to be noted: the Code gives employers the liberty to devise sexual harassment policies, but fails to provide enforcement mechanisms to ensure that every employer without distinction has a working sexual harassment policy. It appears that employers have to formulate and implement such policies as a matter of "good practice and ethics" and not because there is a pressing need to eliminate sexual harassment. As there is no indication of how employers' progress regarding the formulation and implementation of the policies will be monitored, there is the likelihood that most private employers will not be bothered to engage in that exercise. Moreover, even if the government attempts to monitor the formulation and implementation of sexual harassment policies in the private sector, it would be more of a cumbersome exercise, bearing in mind the diversity of private sector employment.<sup>166</sup> The Code also lacks binding force and cannot be enforced as giving rise to legal obligations. The Code merely gives guidelines and thus may be brought into play not as law, but as giving weight to a demand on an employer to comply.

It was stated earlier that whereas the Code was formulated under the *Trade Disputes Act*, it exists as a separate document accessible from the office of the Commissioner of Labour. It is not clear as to how the office ensures that the Code is

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162 Item 7.8.2.

163 Item 7.

164 Item 5.

165 See par 2.3.1.1.

166 This submission is motivated by the fact that private sector employment comprises of many stakeholders amongst others, domestic employment, farming sector, corporate firms, retail markets, temporary employment services.

made available to all employers and employees as reasonably practicable as possible. There is likely to be a class of employers that are ignorant of the existence of the Code. Even though it has been in operation for eleven years now, the Code has played a negligible role in addressing sexual harassment in the workplace. In its 2012 report, the CEACR outlined that the government stated that a majority of private institutions were still lagging behind in putting in place sexual harassment policies,<sup>167</sup> albeit the fact that the Code has been in force for more than a decade. Perhaps this shows how unaware employers are of the existence of the Code, or their unwillingness to formulate sexual harassment policies owing to the absence of enforcement mechanisms. On that note, the CEACR has requested the government to furnish it with information pertaining to the measures employed to raise awareness of the Code amongst employers, employees and their organisations.<sup>168</sup>

The overall argument is that it would serve better if there were provisions on sexual harassment in the EA. This is because the EA will apply to all employers and employees in the private sector. Moreover, employees who fall victims to sexual harassment would readily recognize that a claim against sexual harassment is justiciable before the courts. The direct request by the CEACR that the government should include sexual harassment provisions in the EA<sup>169</sup> is not without a basis, because the government has not to date put forward any justifications as to why sexual harassment in the public service is outlawed by an Act of Parliament, whereas this is not the case for the private sector.

### 3.3.3.2 *Code of Good Practice: Employment Discrimination*

This Code of Good Practice is similar to the Code on Sexual Harassment in that they are both formulated under section 51(1) of the *Trade Disputes Act*. Similarly, it also serves as a guideline that requires employers to formulate policies prohibiting discrimination in the workplace. The object of the Code is to move for elimination of discrimination in the workplace while promoting equality of opportunity and treatment.<sup>170</sup> In terms of item 3.3, "harassment of an employee whether of a sexual

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167 ILO: CEACR Report III (Part 1B) 2012 484.

168 <http://www.ilo.org/dyn/normlex/en/f?p=1000:20010:0::NO::>.

169 <http://www.ilo.org/dyn/normlex/en/f?p=1000:20010:0::NO::>.

170 Item 1.1.

nature or otherwise constitutes a form of discrimination." This constitutes a recognition that sexual harassment is a form of sex discrimination as viewed by the ILO. The Code also mirrors the international standard that aims to eliminate discrimination in the workplace notwithstanding the form it takes and that moves for the attainment of equality of opportunity and treatment in the workplace.

However, limitations identified under the Code on Sexual Harassment are equally applicable to this Code, chief amongst them being that it cannot be applied as binding law. The CEACR has also noted the provisions of this Code and its relevance for addressing sexual harassment in the workplace, but has nevertheless requested the government to incorporate sexual harassment provisions in the EA.<sup>171</sup>

### **3.4 Conclusion**

In the sixteen years that Convention No. 111 has been in force for Botswana, a considerable effort has been made to incorporate it in national legislation as far as sexual harassment is concerned only with respect to the PSA. Employees in private sector employment have no similar protection rendered by the EA. While provisions in the EA pertaining to constructive dismissal may be invoked to circumvent the absence of specific provisions proscribing sexual harassment, the remedies they provide are not alive to the effects of sexual harassment and do not embrace the wide spectrum of sexual harassment.

That notwithstanding, an employee can always plead an infringement of one or more of her fundamental human rights entrenched in the Constitution in a sexual harassment suit. Though the scope of application of the Constitution to private employers depends on the rights being claimed, the nature of the infringing conduct involved in sexual harassment will without a doubt bring a private employer's conduct under constitutional scrutiny.

The Code of Good Practice on Sexual Harassment and the Code on Employment Discrimination have also played a negligible role in addressing sexual harassment in the workplace. The CEACR's reports and direct requests to the government show

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171 <http://www.ilo.org/dyn/normlex/en/f?p=1000:20010:0::NO:::>

the pressing need to adopt legislative measures to address sexual harassment in the private sector. Moreover, the government has not justified the *status quo* concerning the existence of sexual harassment laws in public sector employment and a patent silence in private sector employment laws.

The subsequent chapter investigates the extent to which South Africa complies with its obligations under Convention No. 111. The aim will be to identify the mechanisms employed by the legal framework to eliminate sexual harassment in the workplace and to consider how the courts have dealt with it over the years.

## CHAPTER 4 THE SOUTH AFRICAN LEGAL FRAMEWORK

### 4.1 Introduction

This chapter explores the extent to which South Africa fulfils its obligations to international law with regard to sexual harassment, seeing that it has equally ratified the ILO *Convention on Discrimination (Employment and Occupation)* 111 of 1958.<sup>172</sup> The aim is to find out how the South African legislative framework addresses sexual harassment in the workplace and how the courts have dealt with sexual harassment cases over the years. In view of the eminent shortcomings of the legislative framework in Botswana, the South African model is examined to outline the lessons Botswana can derive from this model to improve its own.

### 4.2 General observations on the South African labour law system

First and foremost, Olivier<sup>173</sup> notes that the general consensus is that South Africa has a progressive labour law legislative framework which has at its heart the protection of human rights. However, this was not achieved overnight. He further points out that the overhaul in the framework did not come about as part of a planned labour law reform, but rather owes its existence to certain considerations.<sup>174</sup> Chief amongst these is the findings of the Wiehahn Commission, which he feels played a significant role in remoulding the law. Additionally, comparative international law has been at the forefront and helped in achieving this legislative overhaul. Various ILO norms and standards have been adopted into national legislations and comparative experiences from progressive jurisdictions have also been used to turn the labour legislative framework into what it is today.<sup>175</sup>

Another noteworthy detail is that the South African labour legislative framework is less set on drawing a line of distinction between public and private employment. As a

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172 Convention No. 111.

173 Olivier 2006 (2) *Speculum Juris* 216.

174 Olivier 2006 (2) *Speculum Juris* 216.

175 Olivier 2006 (2) *Speculum Juris* 217.

result, the provisions and dispute resolution mechanisms set out in the Acts equally apply to both forms of employment.<sup>176</sup>

### **4.3 The evolution of sexual harassment laws in South Africa**

Olivier's sentiments show that to be what it is today, the South African labour legislative framework had to go through developmental stages. The same has to be equally true for sexual harassment laws. Moreover, because the purpose of this study is to lay down lessons for another jurisdiction, it is important to ponder and reflect on how sexual harassment laws in South Africa have developed over the years.

The need for laws proscribing sexual harassment in the workplace were first advocated for and recognised in the United States of America.<sup>177</sup> As a result, sexual harassment laws were foreign to many developing countries until the late 1990's. Like other developing countries, South Africa did not have laws that speak to sexual harassment in the workplace. This did not imply that sexual harassment was an unrecognised or non-existent concept. In fact, according to Halfkenny,<sup>178</sup> numerous studies reflect the reality and overwhelming statistics of sexual harassment in the workplace. Whereas the statistics were reflective of the prevalence of sexual harassment, Halfkenny<sup>179</sup> argued that they only revealed the reality of harassment in formal employment. Employees in the informal sector were also more likely to be affected by workplace harassment, but had fewer avenues for redress.<sup>180</sup>

#### **4.3.1 The common law**

By the year 1995, South Africa still had no specific laws prohibiting sexual harassment in the workplace.<sup>181</sup> Consequently, victims had to resort to other avenues for redress. Most importantly, the burden was on the courts to develop common law principles that would help in addressing workplace sexual harassment.

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176 Olivier 2006 (2) *Speculum Juris* 217. This is also subject to exceptions. For example, the application of administrative law principles to public sector employment is still maintained.

177 Halfkenny 1996 (17) *ILJ* 6.

178 Halfkenny 1996 (17) *ILJ* 214-215.

179 Halfkenny 1996 (17) *ILJ* 215.

180 Halfkenny 1996 (17) *ILJ* 215.

181 Halfkenny 1996 (17) *ILJ* 215.



The Industrial Court (as it then was) in the case of *J v M Ltd*<sup>182</sup> laid down a number of significant principles that warrant a discussion. The applicant in this case was employed by the respondent as an engineering manager and had authority over around three hundred and fifty employees of the respondent. During the course of his employment, the applicant was charged with and found guilty of sexual harassment by the respondent and dismissed. He approached the court to challenge the substantive fairness of his dismissal and sought an order for reinstatement. The court established that sexual harassment, whether between members of the same or opposite sex, is a matter not to be taken lightly which every employer should treat with the requisite seriousness.<sup>183</sup> According to the court, sexual harassment violates an individual's right to bodily integrity and personality and finds protection in the South African legal system both criminally and civilly.<sup>184</sup> Whereas the Industrial Court was readily available to deal with such matters, it did not bar employees from pressing criminal charges or bringing claims for damages in delict in criminal and civil courts.

The court in the *J v M*-case<sup>185</sup> proceeded to hold that sexual harassment creates an intimidating, hostile and offensive work environment, which in most occurrences leads the victim to resort to resigning or shrouding the harassing conduct in secrecy due to the fear of reprisals that may arise if they report the incident. The court further tapped lessons from the American and English jurisprudence; that sexual harassment is a form of sex discrimination and also a form of constructive dismissal in English law.<sup>186</sup> Since evidence of the sexual harassment was placed before the court, it was held after a consideration of these principles that the applicant's dismissal was substantively fair.

As a 1989 decision, the *J v M*-case was the very first case to report on sexual harassment and thus set precedent for how the courts would most likely deal with sexual harassment in the workplace. This was also before South Africa ratified Convention No. 111. Whereas there were no specific sexual harassment laws or any

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182 1989 10 ILJ 755 (IC) (hereafter the *J v M*-case).

183 1989 10 ILJ 755 (IC) 757.

184 1989 10 ILJ 755 (IC) 757.

185 1989 10 ILJ 755 (IC) 758.

186 1989 10 ILJ 755 (IC) 757-758.

international obligations at that time, the court was reluctant to take a conservative stance in its approach to sexual harassment matters. The court adopted principles from other jurisdictions and developed them to address the *status quo*.

### **4.3.2 Statute law**

#### *4.3.2.1 The Labour Relations Act*<sup>187</sup>

The LRA came into effect in November 1996 and has been the chief legislation regulating employment relationships. While it does not *per se* have a clause proscribing sexual harassment, the LRA has been used by litigants to approach the Industrial Court on matters of sexual harassment by making use of the unfair labour practices provision.<sup>188</sup> Section 185(b) of the LRA entitles every employee to protection against being subjected to unfair labour practices. In terms of section 186(2)(b) an unfair labour practice is:

Any unfair act or omission that arises between an employer and employee involving, amongst others, unfair conduct by the employer relating to the promotion, demotion, probation, or training of an employee or relating to the provision of benefits to an employee.

The right to fair labour practices also finds protection in terms of section 23(1) of the Bill of Rights under the *Constitution of the Republic of South Africa, 1996*.<sup>189</sup> The Constitutional Court (per Ngcobo J) in *National Education Health & Allied Workers Union v University of Cape Town & Others*<sup>190</sup> held that the concept of fair labour practices cannot be given a precise meaning. According to the Court, this is because what constitutes fairness depends on the circumstances of a particular case, and more often than not, involves a value judgement. The Court proceeded to hold that it is left to the Labour Court and Labour Appeal Court to define and give content to this principle in accordance with the international standard. Hence, in *Cobra Watertech v National Union of Metal Workers of South Africa*,<sup>191</sup> the Labour Appeal Court held

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187 Act 66 of 1995 (hereafter the LRA).

188 This provision was used by a litigant in *Lynne Martin-Hancock v Computer Horizons* Case No. NH 11/2/14268 (unreported), however, the court did not address the issues pertaining to sexual harassment but rather chose to dwell on her dismissal.

189 Act 108 of 1996 (hereafter the Constitution of South Africa).

190 2003 24 ILJ 95 (CC) 110.

191 1995 16 ILJ 607 (LAC) 611.

that the introduction of the fair labour practices concept directs the courts to ensure that the employment relationship is conducted fairly.

In essence, because the Act brings in an element of fairness, evidence must be placed before the court to prove the fairness or unfairness of the alleged conduct by the employer. Grogan<sup>192</sup> points out that relief from unfair labour practices is intended to ensure a restriction on abuse of power by employers in conferring or withholding favours and benefits, or imposing discipline in an unfair manner. In view of this, the concept of unfair labour practices is broad and may be employed in a claim for sexual harassment. When relying on section 185(b) of the LRA in a sexual harassment suit, a litigant may have to allege that she was denied a promotion or training or was demoted due to a refusal to honour an employer's sexual advances. Moreover, it has to be alleged and proven that the demands of the employer constituted an unfair conduct, which culminates into an abuse of power.<sup>193</sup> This argument also reflects the ILO's statement that the harassing conduct must influence decisions taken in the workplace.<sup>194</sup>

As noted in chapter 3, section 186(1)(e) of the LRA allows an employee to terminate her contract of employment and claim compensation for constructive dismissal where the employer makes continued employment intolerable.<sup>195</sup> Employees subjected to sexual harassment in South Africa have continuously resorted to this remedy in approaching the labour courts. In *Ntsabo v Real Security CC*<sup>196</sup> the applicant had been continuously exposed to sexually harassing conduct by her superior and made numerous complaints to the employer concerning this conduct. The employer however, failed to act upon these complaints and the applicant subsequently resigned and approached the court claiming a constructive dismissal. The court highlighted that in order to successfully claim a constructive dismissal, the applicant's resignation must be based on the employer's failure to resolve the

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192 Grogan *Employment Rights* 98.

193 A sexually harassed employee has to make this claim in the Labour Court or Labour Appeal Court. The right to fair labour practices finds protection under the Bill of Rights, but this does not give leeway for litigants to directly approach the Constitutional Court and rely on this right before exhausting remedies under the LRA. This is discussed in par 5 of this Chapter.

194 ILO: CEACR Report III (Part 4B) 1996 par 39.

195 See par 3.3.1 in this regard.

196 2003 24 ILJ 2341 (LC) (hereafter the *Ntsabo*-case).

situation in question and to make sure that the risk posed to the applicant was counteracted.<sup>197</sup> After considering the evidence placed before it, the court held that:

...in the circumstances, it is clear that the inaction of the respondent was unfair and led to a situation that became an intolerable environment for the applicant to continue employment. She was then compelled to terminate the contract.<sup>198</sup>

Hence, whenever an employee seeks to claim compensation for constructive dismissal arising from sexual harassment, there must have been no voluntary intention to resign. The conduct of the employer, which makes the environment intolerable, must form the basis for the resignation.

#### 4.3.2.2 *Occupational Health and Safety Act*<sup>199</sup>

Because South Africa has ratified the ILO *Convention on Occupational Health and Safety* No. 155 of 1981, academics in South Africa have argued that the provisions of the OHSA are relevant to addressing sexual harassment in the workplace as per the standard set by the ILO.<sup>200</sup> The Act places a duty on every employer to not only provide, but also maintain as far as reasonably practicable a safe working environment absent of the risk to the health of employees.<sup>201</sup> In terms of this Act, the word "healthy" has been defined as the absence of illness or injury attributable to occupational causes. The argument here would be that illness should be widely interpreted to include incidences of emotional traumas and negative psychological effects, such that the effects of sexual harassment may be embraced within its ambit. In terms of section 17(1) where an employer employs more than twenty employees, it has to elect health and safety representatives whose mandate is to investigate employees' complaints relating to their health and safety at work and to make representations on the complaints to the employer.

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197 2003 24 ILJ 2341 (LC) 2376.

198 2003 24 ILJ 2341 (LC) 2376.

199 Act 85 of 1993 (hereafter the OHSA).

200 See amongst others, HalfKenny 1996 (17) ILJ 224. See also par 2.3.2 above.

201 S 8(1).

#### **4.4 Why move from these statutory provisions to sexual harassment laws?**

Because sexual harassment has been classified as a form of sex discrimination,<sup>202</sup> the LRA and the OHS Act leave a gap since they do not address the problem from the equality of opportunity and treatment angle. As a result, the need to raise awareness on sexual harassment as a form of discriminatory conduct amongst employers and employees was left out.

Additionally, whereas employees may rely on constructive dismissal or unfair labour practices provisions under the LRA, the remedies that the courts will award therein are not specifically tailored for the humiliating nature of sexual harassment. That is, they do not give room for an award of damages for humiliation suffered or lost promotion opportunities.<sup>203</sup> Notwithstanding that an order of specific performance may be made, the contention is that it would be difficult for the victim to find herself having to work with the harasser. Halfkenny<sup>204</sup> has also argued that civil and criminal remedies did not generally compensate employees for emotional damage caused by sexual harassment. More powers were left to the courts to determine how to award damages, taking into consideration the nature of the conduct involved. Many a times, according to Halfkenny,<sup>205</sup> the courts would interpret the law in a manner that demeans the emotional damage suffered due to sexual harassment.

Seeing the loopholes left by these provisions, South Africa saw the need for legislation that addresses sexual harassment as discriminatory conduct and making provision for the award of equitable damages. This is still an exceptional feature in the South African legal framework.

#### **4.5 The post-1997 era: specific sexual harassment laws**

South Africa ratified Convention 111 in 1997. Perhaps this is one of the contributing factors to a lack of specific sexual harassment laws in the era preceding 1997. Victims of sexual harassment had to rely on other channels of the law in order to

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202 See par 2.3.1.1 above.

203 Halfkenny 1996 (17) *ILJ* 227.

204 Halfkenny 1996 (17) *ILJ* 227.

205 Halfkenny 1996 (17) *ILJ* 227.

pursue their claims before the courts. The courts, more particularly in the *M v J*-case,<sup>206</sup> borrowed sexual harassment principles from comparative experiences of progressive jurisdictions that would guide the courts in future. Be that as it may, a need was still identified for laws speaking to sexual harassment.

#### **4.5.1 Employment Equity Act<sup>207</sup>**

The EEA was enacted to specifically incorporate the provisions of Convention No. 111. Section 2 provides that the Act must be interpreted in conformity with the international law obligations of the Republic, more particularly those imposed under Convention 111. Moreover, one of the primary purposes of the Act is to "achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination."<sup>208</sup>

The model presented by the EEA is a direct mirror of the provisions of Convention No.111. It is recalled that article 1(1)(a) of the Convention provides that discrimination includes any distinction, exclusion or preference on the basis of, amongst others, race, colour, sex, religion, which has the effect of nullifying or impairing equality of opportunity.<sup>209</sup> The ILO has also highlighted that the grounds listed are not exhaustive and that members should consider themselves not restricted to give an extension in national legislation.<sup>210</sup> The Act adopts a more similar definition and extension of the grounds of discrimination by providing that:

No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.<sup>211</sup>

From the sentiments expressed at the international level by the ILO it can be argued that section 6(1) can suffice on its own in making an argument against sexual harassment, seeing that it specifically speaks to a prohibition of discrimination on the

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206 1989 10 ILJ 755 (IC).

207 Act 55 of 1998(hereafter the EEA).

208 S 2(a).

209 See par 2.3.1.

210 ILO: CEACR Report III (Part 4B) 1996 par 25.

211 S 6(1).

basis of sex.<sup>212</sup> Whereas the question whether sexual harassment is discriminatory remains moot,<sup>213</sup> the general view held by academics in South Africa<sup>214</sup> is in consonance with that expressed by the ILO<sup>215</sup> and that held by MacKinnon.<sup>216</sup> Notwithstanding the generality of section 6(1) of the EEA, section 6(3) additionally provides that harassment of an employee constitutes an unfair discrimination. Since the provision proscribes workplace harassment in a general sense, it can be argued that sexual harassment falls within the ambit of such harassment.<sup>217</sup>

Section 5 places a duty on every employer to take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. It would then arise as a direct consequence that such steps would include formulating and implementing working policies that set out the procedure to combat and address issues of sexual harassment. To ensure compliance with this requirement, section 60 introduces statutory vicarious liability<sup>218</sup> of the employer where an employee is found to have carried out sexually harassing conduct while at work. Section 60(1) provides:

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.

Therefore, should an employee be sexually harassed, she must lodge a complaint with the employer. The employer must give the report the necessary attention by taking appropriate steps to eliminate the offending conduct and ensuring that the provisions of the Act are complied with.<sup>219</sup> This would entail conducting an enquiry on whether sexual harassment has indeed taken place, carrying out the necessary disciplinary hearing and thereafter imposing the appropriate sanction to remedy the

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212 See par 2.3.1.1.

213 See generally the *Ntsabo-case* 2003 24 ILJ 2341(LC) 2377 where Pillay AJ opined that the debate on sexual harassment being a form of sex discrimination raises both academic and technical arguments and remarked that the arguments have "no clear persuasive direction."

214 See amongst others Halfkenny 1995 (16) ILJ 2; Cooper 2002 (23) ILJ 1-2.

215 ILO: CEACR Report III (Part 4B) 1996 par 35.

216 See par 2.3.1.1 above.

217 Grogan *Employment Rights* 232; Basson "Harassment in the Workplace" 228-257.

218 *Piliso v Old Mutual Life Assurance Co (SA) Ltd & Others* 2007 28 ILJ 897.

219 S 60(2).

wrong. If it can be proven that the employer failed to take these steps, the Act provides that the employer will be deemed to have also acted in contravention of the Act.<sup>220</sup> The Labour Court in the *Ntsabo*-case<sup>221</sup> highlighted that section 60 imputes liability to the employer because unfair discriminatory practices on the grounds listed under section 6(1) are not only limited to acts or omissions on the part of the employer. The Act takes cognisance of the reality that such practices may occur amongst employees themselves. As result, where the employer is made aware of conduct contravening the Act and it fails to act accordingly, it should be deemed to be a contravention of the Act on the part of the employer. As noted above, this provision motivates employers to promote the attainment of equality of opportunity and treatment in the workplace, thus the employer may only escape liability if it proves that it took all the reasonably practicable steps to ensure non-contravention of the Act by an employee.<sup>222</sup>

Another detail presented by the EEA is with regard to orders and awards that the court is empowered to make. The issue of award of damages in a sexual harassment suit is important because the offending conduct has always been deemed as impinging on the dignity of the victim<sup>223</sup> and as having psychological effects. As much as an employee could be awarded damages under the LRA preceding the enactment of the EEA, it could be argued that the damages were suited for unfair dismissal. They did not take cognisance of the emotional and psychological effects that sexual harassment had on the victim.

Section 50(2) of the EEA gives the court powers to make any "appropriate order that is just and equitable in the circumstances" and this may include payment of compensation<sup>224</sup> and damages<sup>225</sup> by the employer. That the court is given power to make an appropriate order that is just and equitable by taking into account the circumstances of a case gives the court room to ponder on the peculiar nature of sexual harassment and its effects on victims. It gives the court an opportunity not to

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220 S 60(3).

221 2003 24 ILJ 2341(LC) 2382. Section 6(1) of the Act makes use of the word "no person", which should be construed broadly, to include fellow employees.

222 S 60(4).

223 Cooper 2002 (23) ILJ 1-2; Halfkenny 1995 (16) ILJ 4.

224 S 50(2)(a).

225 S 50 (2)(b).



award damages only for unfair dismissal arising out of a constructive dismissal (if a victim pleads this in her case), but also to award patrimonial damages, *contumelia* inclusive. In the *Ntsabo*-case,<sup>226</sup> the court took its time to ponder on the realities presented by the effects of sexual harassment on the victim. As a result, the court was not reluctant to award the victim patrimonial damages, general damages and *contumelia* after having considered the psychological effects of the harassment on the victim, and the exacerbating effect of the company's failure to react to her complaints. Because the applicant had alleged constructive dismissal in terms of section 186(1)(e) of the LRA, the court additionally awarded her compensation for her unfair dismissal in terms of section 194(1) of the LRA.<sup>227</sup>

Flowing from this, the application of the EEA to sexual harassment cases does not bar employees from relying on dismissal provisions under the LRA. Where unfair dismissal arising out of sexual harassment has been proven, the court will make an order under both Acts bearing on the dismissal and the harassment. This approach bridges the gap that existed prior to the enactment of the EA as identified in paragraph 4.4 above.

#### **4.5.2 Code of Good Practice on Handling Sexual Harassment Cases<sup>228</sup>**

The *Code of Good Practice on Handling Sexual Harassment* was formulated as an annexure to the LRA, but has since 2005 been amended and annexed to the EEA. It sets out comprehensive guidelines on how to handle sexual harassment in the workplace. In terms of item 1, the Code was formulated to encourage and promote formulation of sexual harassment policies that will lead to the creation of workplaces free of sexual harassment. Item 4 provides that:

Sexual harassment is unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace...

According to the Code, amongst others employees, job applicants, clients and employers are listed as potential perpetrators and/or victims of sexual

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226 2003 24 ILJ 2341(LC) 2379-2385.

227 2003 24 ILJ 2341 (LC) 2380.

228 Published under GenN1357 in GG 27865 of 4 August 2005 (hereafter referred to as the Code or the Code of Good Practice on Handling Sexual Harassment).

harassment.<sup>229</sup> Albeit the extension of coverage to persons who are not employees under item 2(1), the Code provides that this provision should not be interpreted as giving an employer the authority to discipline such persons.

Item 5 gives a wide list of conduct that may be classified as forms of sexual harassment. Physical conduct of a sexual nature, which may comprise unwanted physical contact including touching, sexual assault and rape are considered forms of sexual harassment.<sup>230</sup> By bringing sexual assault and rape (which are commonly prosecuted as criminal offences) within the confines of the Code is an indication that harassed employees are not prohibited from pressing separate criminal charges. In addition, the fact that a harassed employee has pressed criminal charges should not bar an employer from disciplining an employee who is found guilty of sexual harassment. According to item 5.3.1.2, unwelcome suggestive messages, innuendos, hints, sexual advances and sending of sexually explicit text by electronic means or otherwise all constitute verbal forms of sexual harassment. In addition, non-verbal forms of sexual harassment are characterised by displays of sexually explicit pictures and objects or the sending of such through electronic and other means.<sup>231</sup>

*Quid pro quo* harassment is also recognised as a form of sexual harassment. In terms of item 5.2.3.2, this form of harassment occurs when an individual in a position of authority (this may be an owner, employer or supervisor) attempts to or actually influences decisions taken in the workplace, usually pertaining to the conferment of a benefit in exchange for sexual favours. The reward of only employees who respond positively to sexual advances by a person in authority while prejudicing deserving employees who do not succumb to such advances is considered sexual favouritism and constitutes a form of sexual harassment.<sup>232</sup> In this case, a reward refers to employment benefits such as promotions, salary increments and training.

Employers are encouraged to formulate sexual harassment policies which highlight that it is the right of every employee, job applicant or other person to be treated with

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229 Item 2.

230 Item 5.3.1.1.

231 Item 5.3.1.3.

232 Item 5.2.3.2.

dignity and that sexual harassment is prohibited, notwithstanding the form it takes. The policy should also highlight that a sexually harassed person has the right to report such conduct and that appropriate action will be taken against it.<sup>233</sup> It is the duty of the employer to implement the policy and educate employees on any matters relating to sexual harassment in the workplace.<sup>234</sup>

Bearing in mind the sensitive nature of sexual harassment and that it may be difficult for the harassed person to personally lodge a complaint with the employer, the Code allows for the appointment of a person outside the line of management to whom sexual harassment complaints may be made.<sup>235</sup> Alternatively, a victim must be informed of an option to take the informal procedure in dealing with the harasser.<sup>236</sup> This involves giving the harassed employee or an appropriate person an opportunity to talk to the harasser and explain that the harassing conduct is unwelcome, offending and interferes with the work of employees. The Code provides that a formal procedure may be followed either with or without first following the informal procedure. The employer's sexual harassment policy should specify the person to whom a complaint may be made and the time frame which allows the grievance to be dealt with expeditiously.<sup>237</sup> It should also provide that should the matter not be satisfactorily solved, the harassed employee may approach the CCMA in terms of item 8.7.3.4 of the Code.

Provision for additional paid sick leave is suggested under item 10.1 of the Code where an employee's normal sick leave entitlement has been exhausted in cases of serious sexual harassment where the employee requires trauma counselling in accordance with medical advice.

Whereas the Code precedes the EEA, it ought to be noted that emphasis cannot be placed on it alone since it is only instructive. However, this does not mean that it is not applicable. The court in the *Ntsabo*-case<sup>238</sup> held that in interpreting the provisions of the EEA, the Code is one of the instruments that must be referred to. This is

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233 Item 6.

234 Items 1.3 and 11.2.

235 Item 8.4.

236 Item 8.6.

237 Item 8.7.3.

238 2003 24 ILJ 2341(LC) 2378.

evident from section 3(c) of the EEA, which requires any relevant code of good practice to be taken into account when interpreting the Act. Whereas the employer cannot be penalised for a failure to follow the guidelines of the code, this does not mean that liability under the EEA is escaped. In essence, the EEA and the Code have to be read together. The Code should be seen as an extension of the provisions of the EEA in so far as sexual harassment is concerned.

The South African Code is not on the same plane with that of Botswana. It readily recognises sexual harassment as a violation of the rights of employees, a detail which is not expressly present in Botswana's Code.<sup>239</sup> Sexual harassment perpetrated through electronic means is also recognised under the South African Code, as discussed above. Provision of additional leave is not provided for under the Botswana Code, while in South Africa it may be implemented in appropriate circumstances. Most significantly, the South African Code is backed by the legislative power of the EEA, an element absent in Botswana. Consequently, the Code in South Africa is susceptible to practical application and enforcement. It also comes as an annexure to the EEA, thus making its accessibility to employers and employees easy. On the other hand, the Code for addressing sexual harassment in Botswana exists as a separate document kept by the Labour Commissioner's office with no indication of a mechanism monitoring its accessibility to employers and employees.

#### **4.5.3 Protection from Harassment Act<sup>240</sup>**

The PHA is a relatively new addition to laws that seek to address sexual harassment in South Africa. The Act is not restricted to sexual harassment *per se*, but seeks to address harassment in a broad sense. However, this discussion will focus on how relevant the Act is to sexual harassment in the workplace and applies its provisions only with reference to sexual harassment matters. First and foremost, it has to be noted that the Act was enacted against the background of the principles of the Constitution of South Africa. The preamble of the Act reads thus:

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239 See par 3.3.3.1 above for a discussion of Botswana's Code on Sexual Harassment.

240 Act No. 17 of 2011 (hereafter the PHA).

Since the Bill of Rights in the Constitution of the Republic of South Africa, 1996, enshrines the rights of all people in the Republic of South Africa, including the right to equality, the right to privacy, the right to dignity, the right to freedom and security of the person, which incorporates the right to be free from all forms of violence from either public or private sources...and in order to afford victims of harassment an effective remedy against such behaviour and introduce measures which seek to enable the relevant organs of state to give full effect to the provisions of this Act.

The Act reinforces and reaffirms the importance of the principles of the Constitution, that is, dignity, privacy, equality and freedom and security of the person, which are all affected when an act of sexual harassment is perpetrated. Harassment is defined as directly or indirectly engaging in conduct that the respondent knows or ought to know:

...causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues<sup>241</sup> or sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to, or brought to the attention of, the complainant or a related person<sup>242</sup> or amounts to sexual harassment of the complainant or a related person.<sup>243</sup>

The submission here is that whereas this definition is aimed at harassment of a general nature, the definitions at paragraph (ii) and (iii) may also be crafted to suit a sexual harassment matter. The respondent cannot be heard to say that he did not know or perceive his conduct as sexually harassing, knowledge of the nature of his conduct is imputed, so long as the complainant can prove that the conduct caused her harm, or inspired a belief that harm was about to be caused.

The Act acknowledges that sexual harassment may take place not only directly, but also through indirect means. For example, an act of sexual harassment would be direct if it is in the form of touching or caressing that is unwelcome,<sup>244</sup> while sending an email of a sexual nature to an employee may constitute an indirect act of sexual harassment. Consequently, the Act adopts a new dimension by providing that the

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241 S 1(1)(a)(ii).

242 S 1(1)(a)(iii).

243 S 1(b).

244 In other words, harassment focused on the particular individual.

unreasonable sending of parcels, electronic mail (e-mail) and letters will constitute harassment. In a sexual harassment suit, a complainant will have to prove that the parcels or letters sent were of a sexual nature. This provision also brings about a progressive view to sexual harassment in the workplace, that is, the place where the harassment occurs is irrelevant. This submission is made in view of the fact that incidents of sexual harassment may take place amongst work colleagues even outside the workplace. A parcel containing sexually harassing material may be sent to an employee's house by her supervisor and an email from a work colleague with sexually explicit content may be read at home. The common denominator is that whereas the harassment does not take place at work, it takes place between work colleagues and still remains sexual harassment.

The PHA also uses the word "harm" as a manifestation of harassment. Harm has been defined as "any mental, psychological, physical or economic harm."<sup>245</sup> It was identified earlier that sexual harassment has adverse psychological effects on its victims.<sup>246</sup> This definition is appropriate to prove the effects of sexual harassment as constituting "harm" within the context of the Act. Economic harm may be alleged by claiming that sexual harassment will cause one to lose their job, to resign or simply be denied promotions. The submission that sexual harassment has adverse effects on the victim's financial state also lends support from a postulation by Halfkenny<sup>247</sup> that economic harm is one of the probable consequences of sexual harassment for harassed employees.

In addition to defining harassment, the Act also specifically defines sexual harassment as:

Any unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome; unwelcome explicit or implicit behaviour, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant or a related person in circumstances, which a reasonable person having regard to all the circumstances would have anticipated that the complainant or related person would be offended, humiliated or intimidated; implied or expressed

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245 S 1(1).

246 See the *Ntsabo-* case 2003 24 ILJ 2341(LC) 2379-2385; Cooper 2002 (23) ILJ 5; Halfkenny 1995 (16) ILJ 214; see also par 4.4 of this paper.

247 Halfkenny 1995 (16) ILJ 4.

promise of reward for complying with a sexually oriented request; or implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually oriented request.<sup>248</sup>

This definition mirrors that of the Code of Good Practice on Handling Sexual Harassment<sup>249</sup> and that of the ILO.<sup>250</sup> Additionally, a reasonable person in the position of the respondent must be in a position to anticipate that such conduct would cause the alleged humiliation, intimidation and offence to the complainant.

The overall aim of the Act is to provide a speedy and effective remedy to sexually harassed employees through the issuance of protection orders against harassment. Section 2(1) gives a harassed employee a right to apply to the court<sup>251</sup> for such an order and an application may be brought outside ordinary court hours or an ordinary court day if the court has a reasonable belief that the employee is suffering or may suffer harm if the application is not dealt with swiftly.<sup>252</sup> The court is also empowered to deal with the application as soon as reasonably possible.<sup>253</sup> An interim protection order may be granted *ex parte* so long as there is *prima facie* evidence that there is harassing conduct on the part of the respondent<sup>254</sup> or that giving prior notice may defeat the purpose of the order.<sup>255</sup> In such a situation, a sexually harassed employee need not serve notice of court proceedings on the employer or colleague if the evidence before the court meets this standard.

In an era where there is advanced technology and electronic means of communication, the Act takes cognisance of the reality that sexual harassment may take place not only through direct physical contact, but may also be effected through electronic means. Consequently, where sexual harassment is perpetrated through electronic means, the communications service provider may be subpoenaed to furnish the court with relevant evidence pertaining to the information of the alleged

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248 S 1(1)(a-d).

249 See par 4.2 above.

250 See Chapter 2.

251 In terms of s 1(1), a court for the purposes of the Act means a magistrate court.

252 S 2(5).

253 S 3(1).

254 The Act refers to the parties to a harassment application as the "complainant" and the "respondent" respectively.

255 S 3(2).

harasser.<sup>256</sup> A final protection order obtained from the court is binding and a breach of its conditions may lead to a criminal charge and if found guilty, the respondent may be held liable to a fine or imprisonment.<sup>257</sup>

#### **4.6 The relevance of the Constitution and the Bill of Rights to sexual harassment in the workplace**

A discussion on sexual harassment should be deemed incomplete if no reference is made to the supreme law of South Africa. The Constitution and its Bill of Rights have played a significant role in informing and shaping the legislative framework of South Africa. Therefore, the existence of laws that explicitly proscribe sexual harassment in the workplace should not be seen as rendering the significance of constitutional provisions futile in addressing workplace harassment. In fact, the Constitution plays an important role in this regard seeing that it enshrines basic human rights which everyone is entitled to and that must be respected by both the state<sup>258</sup> and private parties.<sup>259</sup> In terms of section 2, it is the supreme law of the land from which all law and conduct must derive legitimacy. Thus any limitation to the right that an individual possesses by virtue of the Bill of Rights must pass the constitutionality test under section 36(1). This in itself explains the relevance of the constitutional framework in addressing sexual harassment in the workplace.

Several rights are relevant to and can be alleged in a sexual harassment suit, notwithstanding that relief is sought under the EEA or the PHA.<sup>260</sup> Section 9(1) guarantees everyone the right to equality before the law and equal protection and benefit of the law. Unfair discrimination by the state<sup>261</sup> and any other person<sup>262</sup> on the ground of sex, amongst others, is prohibited. The Bill further authorises the

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256 S 4

257 S 11(4)(a).

258 S 8(1).

259 S 8(2). This is subject to the nature of the right and duty it imposes.

260 Section 170 of the Constitution limits the powers of Magistrates' courts in constitutional matters, viz, they may not make a ruling on the constitutionality of any legislation or any conduct of the President. However, this does not mean that an individual making an application under the PHA to a magistrate court will be barred from alleging the breach of a constitutional right by the harassing conduct of the respondent.

261 S 9(3).

262 S 9(4).



enactment of national legislation that prevents and prohibits unfair discrimination.<sup>263</sup> Section 10 provides that dignity is an innate value and right that everyone is entitled to and that has to be respected. The right to freedom and security of the person is also relevant in that it guarantees protection against being subjected to treatment that is inhuman, cruel or degrading.<sup>264</sup> It also encompasses the right to bodily and psychological integrity which includes the right to security and control of their body.<sup>265</sup> As noted under paragraph 4.3.2.1 above, the right to fair labour practices as guaranteed under section 23(1) may also be employed in so far as it is protected under the LRA.

Albeit the comprehensive mechanism presented by the PHA, the EEA and the Code of Good Practice, these rights remain relevant and may be alleged to augment a claim against sexual harassment and make a representation to the effect that sexual harassment constitutes a violation of several human rights.<sup>266</sup> This representation must be made within a claim under the EEA within the Labour Court or the Labour Appeal Court.

That is to say, whereas these rights are constitutionally entrenched, the Constitution permits the promulgation of national legislation with the purpose of regulating these rights.<sup>267</sup> Consequently, because the EEA and LRA were enacted for this function, jurisprudence emanating from the Constitutional Court demonstrates that the Court takes cognisance of the framework developed to regulate these rights and encourages litigants to exhaust the remedies formulated therein. For example, because section 185(b) of the LRA entitles employees not to be subjected to unfair labour practices, an employee who alleges an unfair labour practice must do so within the confines of the LRA or the Constitution under the Labour Court or Labour Appeal Court. Such an employee cannot be seen to directly approach the Constitutional Court and allege an infringement of her right to fair labour practices under section 23(1) of the Constitution.

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263 S 9(4).

264 S 12(1)(e).

265 S 12(2).

266 The court in *Grobler v Naspers BPK* 2004 25 ILJ 439 (C) made reference to these rights in a sexual harassment judgement.

267 See for example s 9(4) on the promulgation of employment equity legislation.

In *Piliso v Old Mutual Life Assurance CO(SA) Ltd & Others*,<sup>268</sup> the applicant had on two consecutive occasions been subjected to sexually harassing conduct (in the form of notes containing sexually harassing messages) while at the workplace, but the identity of the harasser was unknown. The court held that the applicant could not rely on section 60 of the EEA that establishes vicarious liability on the employer, nor could a delictual claim under the common law based on vicarious liability of the employer be sustained, because the applicant could not prove that the harassing conduct was attributable to an employee of the first respondent (the employer).

This notwithstanding, the evidence that the employer failed to act to avert the recurrence of the incidents was overwhelming. The court observed that employers have a duty to provide a safe working environment for their employees and to take steps to eliminate unfair discriminatory conduct in the workplace. According to the court, this has to be interpreted to mean that the employer must act in advance and be proactive in averting and eliminating unfair discrimination. The court held that where an employee cannot obtain relief through statutory or common law remedies, but there is evidence that her right to fair labour practices has been violated, such an employee may approach the Labour Court and seek relief in terms of section 23(1) of the Constitution.

This case demonstrates that constitutional damages may be obtained by a harassed employee where relief cannot be sought under the EEA, the common law or in terms of protection from unfair labour practices under the LRA. Reliance may be placed on section 23(1) of the Constitution, but the proper forum to approach is the Labour Court, not the Constitutional Court. Employees are barred from directly approaching the Constitutional Court in matters where the Labour Court and Labour Appeal Court have jurisdiction. Litigants are encouraged to exhaust the dispute resolution mechanisms formulated under the LRA and EEA, notwithstanding the constitutional protection of their labour rights.<sup>269</sup>

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268 2007 28 ILJ 897 (LC) 907.

269 See amongst others *Gcaba v Minister for Safety & Security & Others* 2010 31 ILJ 296 (CC); *Chirwa v Transnet* 2008 3 BCLR 251 (CC); *Minister of Health & Another v New Clicks SA & Others* 2006 8 BCLR 872 (CC).

#### 4.7 Role of the courts

The enactment of sexual harassment laws should not be seen as an end in itself. Laws serve a better purpose if they are capable of interpretation and development by the courts. According to Aeberhard-Hodges,<sup>270</sup> the courts' interpretation of sexual harassment laws gives reality to sexual harassment as a prohibited practice in the workplace. Therefore, whereas Botswana may derive lessons from the legislative framework of South Africa, the role that the South African courts have played in interpreting the laws also has to be noted. As identified in chapter 1, the courts of Botswana are more inclined to apply South African court decisions should there be no binding authorities within their jurisdiction. It arises therefore that the lessons that may be learnt by Botswana are not restricted to the legislative framework. The decisions of the courts of South Africa may also inform the development of Botswana's jurisprudence in so far as sexual harassment is concerned.

Over and above interpreting sexual harassment laws, the courts of South Africa have always stepped in to protect the human rights of employees where there is evidence that harassment has been perpetrated. The overwhelming commitment of the courts to protect and uphold the human rights of employees in cases of sexual harassment is demonstrated as early as 1989 through the *M v J*-case<sup>271</sup> as discussed at paragraph 4.3.1 above. This role of the court has since not ended, as will be discussed below.

First and foremost, the courts have more often than not played a supervisory role in ensuring the proper application of the EEA and compliance with the Code of Good Practice on Handling Sexual Harassment. In the *Ntsabo*-case,<sup>272</sup> the court reaffirmed the importance of the Code by stating that whereas it is not binding law, an employer may not by virtue of this escape its obligations to promote a workplace free of unfair discriminatory practices under the EEA. The court in essence established that the Code must be referred to as an extension of provisions of unfair discrimination under the EEA. In *Gaga v Anglo Platinum Ltd & Others*<sup>273</sup> where it arose during an

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270 Aeberhard-Hodges 1996 (135) *ILR* 503.

271 1989 10 *ILJ* 755 (IC).

272 2003 24 *ILJ* 2341(LC) 2378.

273 2012 33 *ILJ* 329 (LAC)

employee's exit interview that she had been subjected to harassment by one of her seniors, the Commission for Conciliation, Mediation and Arbitration held that her claim had to be dismissed because all along she had failed to report the harassing conduct, thus indicating that she was never at any material time offended by it. On appeal, the Labour Appeal Court held that the Code of Good Practice does not require that sexually harassing conduct be offending for it to constitute sexual harassment.<sup>274</sup> According to the court, the incidence of repeated unwelcome remarks is enough to constitute sexual harassment within the requirements of the Code.

The courts have also held that the proper sanction for harassment is dismissal as it is a form of misconduct. In the *Gaga v Anglo Platinum*-case,<sup>275</sup> the court expressed utmost displeasure at harassment perpetrated by employees in senior positions over their juniors. The court had this to say:

By and large employers are obliged to regard sexual harassment as a serious misconduct normally warranting a dismissal... It is appropriate for this court and employers to send out an unequivocal message: senior managers who perpetrate sexual harassment do so at their own peril and should more often than not expect to face the harshest penalty.

However, whether or not a dismissal is appropriate will depend on the circumstances of each particular case. The court held that it is obliged to have regard for the nature and gravity of the infringing conduct and its impact on the victim. The relationship between the harasser and the victim and the position and responsibilities of the perpetrator must also be considered.<sup>276</sup>

One of the principles introduced into the South African legal system is the concept of vicarious liability of the employer for sexual harassment under the common law. The concept is a construct of the American and Canadian courts, but was received into this jurisdiction through *Grobler v Naspers Bpk*.<sup>277</sup> Arguments against vicarious liability of the employer in a sexual harassment matter as enunciated in *Grobler v*

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274 2012 33 ILJ 329 (LAC) 342.

275 2012 33 ILJ 329 (LAC) 346.

276 2012 33 ILJ 329 (LAC) 346.

277 2004 25 ILJ 439 (C). The judgement of the court is written in Afrikaans, the English commentary on the case can be accessed from Whitcher 2004 (25) ILJ 1907-1924.

*Naspers Bpk* where it was stated that when an employee sexually harasses the other, he cannot be said to be within the course and scope of his employment. It was argued with a plethora of South African authorities that such employee should be deemed to be on a frolic of his own and that it was never part of his job description to sexually harass a colleague. The court boldly departed from these precedents and submitted that the Constitution gives it inherent powers to develop the common law taking into account the interests of justice. The court proceeded to hold that South Africa, like other common law jurisdictions, was prepared to receive the vicarious liability rule with respect to sexual harassment on policy considerations in order to discharge their duty to protect the human rights of women in the workplace. When an employer is found vicariously liable, the court will order that the employee and employer are jointly and severally liable to pay damages to the victim.

#### **4.8 Conclusion**

The legal framework presented by South Africa presents a progressive approach to dealing with sexual harassment in the workplace and reflects an incorporation of the international standard. The framework demonstrates that sexual harassment is a reality that affects employees in the workplace, whether in public or private sector employment. Even before ratification of Convention No. 111, the courts were prepared to accept principles on sexual harassment from progressive jurisdictions to inform their own judgements. The importance of fundamental human rights enshrined in the Bill of Rights has also been reflected in South Africa's sexual harassment laws. The courts have also played a major role by being reluctant to adopt a conservative stance where sexual harassment is concerned and have thus stepped in to adopt principles that reaffirm the importance of giving sexual harassment the attention it deserves. It is also evident from the jurisprudence that the existence of specific sexual harassment laws has not done away with channels available for employees under the LRA. In fact, litigants have relied on constructive dismissal and unfair labour practices provisions alongside the provisions of the EEA and the Code of Good Practice on Handling Sexual Harassment. Whereas the PHA is yet to be tested in litigation, its provisions indicate that it may have far-reaching consequences for sexual harassment in the workplace.

The South African model thus leaves much to be learnt by Botswana in developing its legal framework to meet the international standard. Thus, in drawing final conclusions to this study, the following chapter reflects on the lessons that Botswana can learn from South Africa and makes recommendations for law reform.

## CHAPTER 5

### CONCLUSIONS AND RECOMMENDATIONS: LESSONS FOR BOTSWANA

In its sixty-seven years of promoting fair labour practices, the ILO has to be commended for bringing about a novel dimension to the manner sexual harassment in the workplace is viewed, *viz*, that it is a violation of a fundamental human right not to be discriminated against on the basis of sex.<sup>278</sup> A human rights approach is more likely to change the mindset that sexual harassment is a problem to be settled between the harasser and the harassed individual or that it is a matter that would rather not be discussed.

It is clear that sexual harassment in the workplace is neither a theoretical concept nor an issue to be left for academic discussion only. The recognition of this problem on the international and national plane demonstrates its reality and prevalence in the workplace and most significantly, the need to combat it.<sup>279</sup> Sexual harassment has been characterised as constituting a violation of the fundamental human right not to be discriminated against on the basis of sex, alongside other fundamental human rights like the right to dignity and freedom and security of the person. Flowing from these sentiments, giving it the necessary attention and audience is not overestimated.

The accepted characterisation and definition of sexual harassment is that it constitutes any unwelcome touching, remarks, jokes or subliminal messages of a sexual nature. The key feature here is that such conduct must be of a sexual nature and be unwelcome on the part of the victim. In international law, Convention No. 111 has been identified as the most relevant instrument for addressing sexual harassment in the workplace. Because the Convention is aimed at promoting equality of opportunity in the workplace by moving for the eradication of unfair discrimination of various sorts, it is not readily discernible as to how sexual harassment fits into this model.

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<sup>278</sup> Par 2.3.1.1.

<sup>279</sup> Par 2.3 and 4.3.

Whereas its relevance is not apparent, the ILO has submitted that the provisions of the Convention are sufficient to address harassment of a sexual nature in the workplace.<sup>280</sup> Therefore, sex discrimination within the Convention has been given an expansive interpretation so as to embrace acts of direct and indirect sex discrimination.<sup>281</sup> The ILO has asserted that sexual harassment is a form of sex discrimination because it involves the abuse of power by those in authority to influence workplace decisions.<sup>282</sup> Consequently, employees are not given an opportunity to thrive based on their capabilities and individual merit. Moreover, it calls into question the integrity and well-being of employees.

The ILO enjoins member states to move for the elimination of unfair discrimination in the workplace, notwithstanding their ratification status to Convention No. 111,<sup>283</sup> and therefore an accession to the Convention should be seen as imposing an even higher obligation. Seeing that it is a fundamental Convention of the ILO,<sup>284</sup> it is implicit that the principles embodied in it are those accepted as basic and essential to every workplace. As a result, ratification of the Convention should inspire the formulation of national laws that seek to promote equality of opportunity in the workplace as one of the founding principles<sup>285</sup> of the ILO, and more particularly relevant for this discussion, sexual harassment laws. However, the ILO has observed that notwithstanding the overwhelming statistics in the ratification of Convention No. 111, its incorporation and implementation in national law has been occurring at a staggering slow pace.<sup>286</sup> Additionally, the ILO has observed that the legislation of many ratifying states continue to fail in embodying provisions that directly speak to sexual harassment.<sup>287</sup>

Likewise, it should for that reason not be appalling to conclude that the ratification of Convention No. 111 has been of miniature inspiration in formulating and shaping sexual harassment laws in Botswana's private sector employment laws. The major

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280 Par 2.3.1.1.

281 Par 2.3.1.1.

282 Par 2.3.1.1.

283 Par 2.3.1.2.

284 Par 2.3.1.2.

285 Par 2.3.

286 Par 3.3.1.

287 Par 3.3.1.



problem with the legal framework in Botswana is that the *Employment Act* is silent on sexual harassment, whereas the *Public Service Act* has an express provision addressing this issue. It is not clear as to whether this expresses a view that sexual harassment in private sector employment is non-existent or an ancillary issue that does not warrant the existence of specific sexual harassment laws. However, flowing from observations made regarding international law and in South Africa, this line of argument cannot be correct.<sup>288</sup> Botswana is a signatory to the Convention and this gives rise to an expectation that legislation moving towards the elimination of discrimination will be adopted, in particular, legislation that outlaws sexual harassment.

In contradistinction, the *Employment Equity Act* of South Africa expresses that an act of ratification alone is not enough, but must be accompanied by an incorporation of international standards into national law so as to give effect to obligations incurred under the Convention.<sup>289</sup> The *Employment Equity Act* reflects a direct incorporation of the provisions of Convention No.111 and because its scope extends across public and private sector employment, all employees are covered. The Act does not only prohibit discrimination on the basis of sex, but goes a step further to classify harassment as a form of discrimination.

Given the loophole in the *Employment Act*, employees may rely on the channels of dismissal based on discriminatory grounds or constructive dismissal under sections 23 and 26. Nevertheless, the setback in these provisions is that they do not extend coverage to job applicants. The ILO has stated that sexual harassment in the workplace may be perpetrated in the process of attaining employment.<sup>290</sup> The demand of the ILO is that sexual harassment laws should extend protection to this class of individuals. Thus these provisions do not fully reflect the international standard. On the other hand, the *Employment Equity Act* extends coverage to job applicants, thereby incorporating the international standard.

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288 See generally the discussion in Chapters 2 & 4.

289 S 3(d).

290 Par 2.3.1.1.

Additionally, when relying on constructive dismissal to pursue a sexual harassment suit, an employee is only likely to be awarded compensation for the dismissal, save where she pursues a delictual claim against the harasser or employer. This approach turns a blind eye to the need to award damages for the emotional trauma caused by the harassment. Since the issue before the courts will require a discussion of constructive dismissal principles, there is little challenge on the court to dwell on employment equity and sexual harassment and its effects on employees. The lack of legislation providing for equitable damages does not give the court an opportunity to reflect on the realities of sexual harassment and its effects on employees. Compensation for dismissals is not true to the overwhelming effects of sexual harassment on employees, and more often than not, it would take a progressive court to not only dwell on the dismissal, but to divert attention to consider the issue of sexual harassment in the suit.

The South African framework sets an example in this regard since employees still have the opportunity to rely on the right not to be subjected to unfair labour practices and constructive dismissal, but equitable damages play an important role in the realisation of workplaces free of sexual harassment. The *Employment Equity Act* gives the court the power to award equitable damages,<sup>291</sup> and in the process the court is inevitably given the opportunity to reflect on the effects of sexual harassment. The courts have gone as far as awarding compensation for the dismissal and in addition awarded damages for patrimonial loss and *contumelia*.<sup>292</sup> Moreover, the *Employment Equity Act* helps in addressing sexual harassment as a form of discrimination in the workplace, an aspect which constructive dismissal provisions cannot achieve alone.<sup>293</sup>

Notwithstanding that Convention No. 111 is flexible in terms of policies that members may adopt to eradicate sexual harassment in the workplace, it has been demonstrated and also endorsed by the ILO that laws that speak to sexual harassment serve a much more valuable purpose in doing so.<sup>294</sup> Even if an argument was to be made that Botswana's *Code of Good Practice on Sexual*

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291 S 50(2).

292 Par 4.5.1 & 4.5.2.

293 S 6(3).

294 Par 3.3.1.

*Harassment* was sufficient on its own, the ILO has continuously recommended the adoption of sexual harassment provisions into the *Employment Act* or another piece of legislation specifically directed at the private sector.<sup>295</sup> As much as the need for such laws was identified under the public sector, there has been no argument motivated for their absence in the private sector. Reliance cannot be placed on the Code solely, seeing that it only sets out guidelines and lacks binding force.<sup>296</sup>

The Code also fails to provide an enforcement mechanism. Employees are not bound to formulate and implement sexual harassment policies, but they may only do so as a matter of good practice. The problem is further exacerbated by the lack of an Act that backs the implementation of the Code. In South Africa, the *Code of Good Practice on Handling Sexual Harassment* is backed by the *Employment Equity Act*. The courts have endorsed the significance of the Code and the role it plays in sexual harassment suits, albeit its lack of a binding force.<sup>297</sup> The Code has been used by the courts as an expansion of the provisions of the Act on sexual harassment. Because it is backed by legislation, the South African Code is susceptible to frequent application and enforcement before the courts. It also comes as an annexure to the *Employment Equity Act*, thereby making its accessibility to employers and employees simple.

Notwithstanding that litigants in Botswana may lay separate criminal charges or pursue a delictual claim, it has to be highlighted that this approach will likely develop these bodies of law, while the law on sexual harassment as related to employment and labour either remains non-existent or stagnant. The lack of laws on sexual harassment in the workplace contributes to a fear in employees to take action against harassers because they do not know that it is a violation of their human rights and the proper forum to which a complaint may be made. On the other hand, where there are specific laws, harassed employees are well informed and this encourages the laws to be tested and developed further before the courts.

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295 Par 3.3.1.

296 Items 1.6, 1.7 and 2.1.

297 Par 4.5.2 above.

Moreover, whereas the role of the *Constitution of the Republic of Botswana* would play an invaluable role in crafting arguments in sexual harassment suits, the reality that there are no specific sexual harassment laws means expensive and lengthy litigation because more often than not it entails creativity on the part of attorneys to craft arguments that would establish the offending and non-acceptable nature of sexual harassment.

Whereas the Industrial Court of Botswana is a court of equity, implying that it will go out of its way to apply and enforce the provisions of the Code, the Convention or even borrow decisions from the courts of South Africa and other jurisdictions, this cannot always be relied on. As part of a global village with respect for human rights, Botswana ought to see the need for specific sexual harassment laws that are endorsed under modern labour law.

Another lesson to be highlighted concerns the progressive model that the *Protection from Harassment Act*<sup>298</sup> brings about with regard to modern technology. With the current prevalence of technology in workplaces, it can be used to effect sexual harassment. As a result, there is a need to take cognisance that harassment does not only take place in the form of overt acts and only within the workplace. The Act has not yet been tested in litigation, but it may have legal effects on sexual harassment in the workplace, seeing that an interdict against the harasser may be obtained by an employee *ex parte*. By and large, the aim is to afford a speedy remedy against harassment and provide an overarching model for combating harassment of a general nature and sexual harassment.

In order to make legislation effective, it must be viable to interpretation and application by the courts. The courts must be given the power to develop both statutory and common law and in doing so must not shy away from stepping in to protect the human rights of workers. For example, the court's adoption of the vicarious liability principle into the South African common law in the *Grobler-case*<sup>299</sup> and the endorsement by the court in the *Gaga v Anglo Platinum-case*<sup>300</sup> of dismissal

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298 Ss 1(b) and 4 of the Act.

299 2004 25 ILJ 439 (C).

300 2012 33 ILJ 329 (LAC) 346.

as a proper sanction for sexual harassment set a precedent for the role the courts can play in putting the law into practice. This demonstrates the courts' role in acting as a mechanism to ensure the implementation of the South African *Code of Good Practice on Handling Sexual Harassment*. It also demonstrates that the courts should always play a pro-active role in developing the common law to protect the human rights of employees.

In conclusion, much still needs to be done as far as improving the legal framework of Botswana, more particularly in shaping the *Employment Act* so that it reflects the principles embodied in Convention No. 111 in so far as sexual harassment is concerned. Alternatively, employment equity legislation may be adopted to encompass all forms of discrimination in the workplace.

There is a need for the realisation that sexual harassment is a human rights issue and legislation giving it this status and imposing certain obligations on employers will instil in them keen interest to formulate and implement sexual harassment policies. It is therefore recommended that employment equity legislation that incorporates the provisions of Convention No.111 and specifically outlaws sexual harassment be adopted. Furthermore, this will back up the *Code of Good Practice on Sexual Harassment*, which extends protection to job applicants. Moreover, employment equity legislation will make provision for the awarding of equitable damages, thus restoring hope that in addition to other damages, a harassed employee will be compensated for the emotional effects of sexual harassment. The courts also need to play a pro-active role by borrowing principles from the South African courts to develop their own jurisprudence concerning sexual harassment in the workplace.

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