



Employer liability for sexual harassment committed against employees in the workplace


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LIST OF ABBREVIATIONS

EEA	The Employment Equity Act
ILO	International Labour Organisation
LRA	The Labour Relations Act
PHA	The Protection of Harassment Act
PELJ	Potchefstroom Electronic Law Journal
V&H	Violence and Harassment Convention

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CHAPTER 1 INTRODUCTION AND RESEARCH QUESTIONS

1.1 Title

Employer liability for sexual harassment committed against employees in the workplace

1.2 Keywords

Delict- A civil wrong whereby one person can claim compensation for the harm suffered

Discrimination-Unjust or prejudicial treatment of different categories of people

Harassment -Aggressive pressure or intimidation

Liability-Responsible in terms of law

Unlawfulness - Actions not allowed by law

1.3 Problem statement

1.3.1 *General*

Sexual harassment in the workplace is endemic. If the wrongdoer is a man or woman of straw, they cannot make good the victim's damage. Simply dismissing the guilty employee does not address the question of damages. Furthermore, it is necessary to strongly encourage employers to treat this matter seriously and with urgency.¹

There are two remedies against the employer being available to a victim:

1. In terms of the common law the victim can, based on delict, hold the employer vicariously liable;² and
2. In terms of Section 60 of the Employment Equity Act 55 of 1998, the victim can report the matter and, if the employer does not take the appropriate

¹ Zalesne 2002 *Havard Women's Law Journal* 207.

² Neethling *Law of Delict* 444.

action immediately, they may act against the employer on the basis of unfair discrimination.³

The requirements for these two remedies are different, although there is ample overlap. Both deal with the liability of an employer for sexual harassment. However, the ambit of the common law is wider as it deals with any delict committed by an employee. The EEA and the Amended Code of Good Practice on The Handling of Sexual Harassment Cases in The Workplace deals with sexual harassment only.⁴

It must be mentioned that the employer can be held vicariously liable for the delict of their employees but can also be directly liable on the basis of a failure to provide a safe working environment.⁵ This "direct" liability is not within the scope of this research.

The delict (of the wrongdoer), for purposes of the common law, will be adjudicated in terms of the requirements of common law. In principle, the employer and guilty employee are regarded as joint wrongdoers.⁶ The conduct of the guilty employee must be wrongful, and the court will evaluate the act complained of in terms of the *boni mores* to determine unlawfulness.⁷

The common law does not require fault on the part of the employer to be vicariously liable.⁸ Fault on the part of the offending employee is, however, required for the employer to be held liable in delict.⁹

The requirement for damage in the common law may refer to an infringement of bodily and psychological integrity as well as dignity and privacy.¹⁰ The common law also requires a causal link to be proven between the act and the damage caused. The ordinary rules regarding damages will apply when claiming damages.

³ Section 60 of The Employment Equity Act 55 of 1998(hereinafter referred to as the EEA).

⁴ Neethling *Law of Delict* 444.

⁵ Adams & Adams 2014 <https://www.polity.org.za/article/rape-an-accident-arising-out-of-and-in-the-course-of-employment-for-purposes-of-coida-not-quite>.

⁶ Neethling *Law of Delict* 447.

⁷ Neethling 2018 *Journal for Juridical Science* 151.

⁸ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para 24.

⁹ Neethling *Law of Delict* 445.

¹⁰ Freehills 2020 <https://thelawreviews.co.uk>.

The conduct, for the purposes of Section 60 of the EEA, will be adjudicated in terms of The Amended Code of Good Practice on The Handling of Sexual Harassment Cases in The Workplace, which refers to the "unwelcomed conduct".¹¹

Paragraph 5.3 of the Amended Code differentiates between the various conduct that constitutes sexual harassment. These are wide-ranging and include, as examples, physical contact, verbal conduct and non-verbal conduct. It also includes victimisation, *quid-pro-quo* harassment, and sexual favouritism. These may be much broader than what would be viewed as a delict.

In terms of the EEA Section 6(3), harassment is regarded as one of the grounds for unfair discrimination which the employer would need to eradicate. This is also seen in Section 3 of the Amended Code where sexual harassment is declared to be unfair discrimination.¹²

The Amended Code, however, requires an impairment of the victim's dignity, considering the circumstances of the employee and the respective positions of the employees involved.¹³

The court can award compensation and damages in terms of the EEA. It is not clear how this differs from common law damages, as "damages" are not defined in the EEA. According to Smit and Viviers, employer liability in terms of the EEA is aimed at penalising employers for not addressing workplace equity and not to remedy harm in the delictual sense.¹⁴

Without a doubt, the definition of sexual harassment in the Amended Code will influence the public's perception of what is acceptable and what is not acceptable conduct in the workplace. It will, furthermore, influence the public's expectations of the employer, as it places a burden on the employer to develop and maintain

¹¹ Section 4 GN 1357 of 4 August 2005 The Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (Herein after referred to as the Amended Code).

¹² Section 6(3) of The Employment Equity Act 55 of 1998.

¹³ Section 5.4 GN 1357 of 4 August 2005 The Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace.

¹⁴ Smith and Viviers 2016 *Journal of Business* Vol 1 6.

sexual harassment policies and procedures in the workplace. It also requires the employer to act expediently with confidentiality.¹⁵

1.3.2 Historical development

Women are more susceptible to sexual harassment because of their position on the employment scale.¹⁶ McKinnon states that sexual harassment is not due to sexual attraction of the male to the female gender, but rather "dominance eroticised".¹⁷ Sexual harassment, however, does not affect all women equally. Black women are most likely to be victims of sexual harassment due to their past position on the employment scale because of historic injustices.¹⁸

The Constitution of the Republic of South Africa, 1996, in section 9(3), prohibits discrimination against individuals on the basis of sex, gender and sexual orientation.¹⁹ Section 9(4) places a duty on government to enact legislation to prevent unfair discrimination.²⁰ This led to the promulgation of the Employment Equity Act 55 of 1998²¹ and, thereafter, the Employment Equity Amendment Act of 2013.²²

The era preceding 1997 did not have established sexual harassment laws. Victims of sexual harassment had to rely on common law for relief.²³

Prior to the Employment Equity Act 55 of 1998, cases of sexual discrimination were also adjudicated by the Industrial Court as "unfair labour practices".²⁴ In *G v K*, an employee was dismissed "to save the marriage" of the senior director, with whom

¹⁵ Nana *Sexual harassment in the workplace in South Africa: The unlimited vicarious liability of employers?* 260-261.

¹⁶ Mogapaesi 2019 *Commonwealth Law Bulletin* 431-453.

¹⁷ Mackinnon *Sexual Harassment of Working Women: A case of Sex Discrimination* (Yale University Press 1979) 312.

¹⁸ Zalesne 2001 *SAJHR* 503.

¹⁹ Section 9(3) The Constitution of the Republic of South Africa, 1996.

²⁰ Section 9(4) The Constitution of the Republic of South Africa, 1996.

²¹ The Employment Equity Act 55 of 1998.

²² The Employment Equity Amendment Act 47 of 2013.

²³ See Chapter 11 of Neethling *Law of Delict* for an exposition of the common law requirements for vicarious liability; See also Mogapaesi 2019 *Commonwealth Law Bulletin* 431-453.

²⁴ Du Toit 2007 *LDD* 20; See also *Pretorius v Britz* 1997 5 *BLLR* 679 (CCMA).

she had had an affair with, on the basis that she was a source of embarrassment for the employer.²⁵

In 1998, the EEA recognised harassment as a form of unfair discrimination but did not provide a clear definition of sexual harassment or guidance on addressing it.²⁶

In 1998, the first Code of Good Practice on the Handling of Sexual Harassment was published. This code was issued in terms of the LRA.²⁷ The Code endeavoured to create guidelines for employers to deal with sexual harassment. An important element in defining sexual harassment is the element of the act being "unwanted". The Code defined sexual harassment as "unwanted conduct of a sexual nature". This unwanted nature will differentiate between it being welcomed and reciprocated.²⁸

The Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace was published in 2005 in terms of the EEA.²⁹ It determines that sexual harassment is a form of unfair discrimination³⁰. The Amended Code also provides tests to establish if the conduct amounted to sexual harassment and guiding principles on the manner in which the employer would need to address the matter. It is clear that the Amended Code has very wide application and that a person may indicate that the conduct is unwanted verbally, by not responding or simply walking away.³¹

In *SA Metal Group (Pty) Ltd v CCMA*,³² the employee inappropriately teased the complainant. The CCMA commissioner found that this did not amount to sexual harassment as it did not contain explicit sexual connotations. The commissioner further held that the conduct was not sexual harassment as the complainant did

²⁵ Ndou 2020 *Obiter* 546.

²⁶ S 6 (3) of the EEA.

²⁷ Government Notice R1367 of 17 July 1998.

²⁸ S 3 in GN R1367 of 17 July 1998.

²⁹ GN 1357 of 4 August 2005 The Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace.

³⁰ S 4 General Notice 1357 of 4 August 2005 The Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace.

³¹ McGregor 2016 *THRHR* 324.

³² *SA Metal Group (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* (C350/13) [2014] ZALCCT 68 Para 12-14.

not inform the perpetrator that the conduct was unwelcomed. The Labour Court, however, found that the conduct did fall within the definition of sexual harassment.

The court went on to state that:

Although the complainant may present as ambivalent, or even momentarily flattered by the attention does not suffice as an excuse; particularly where at some stage in an ongoing situation she signals her discomfort. If not the initial behaviour, then, at the very least, the persistence therein is unacceptable.³³

Importantly, the Amended Code refers to Section 60(1) of the EEA that requires conduct that contravenes the EEA to be brought to the attention of the employer immediately. In the case of sexual harassment, 'immediately' is redefined to mean as soon as is reasonably possible.³⁴

1.3.3 Liability of the employer in terms of the EEA – Unfair discrimination

It is important that sexual harassment be reported as it constitutes serious misconduct and unfair discrimination.³⁵ A harassed person has their constitutional rights violated and is left feeling vulnerable. Sexual harassment further influences the productivity of the harassed employee due to the psychological impact and absenteeism.³⁶

The role of the employer is crucial in sexual harassment cases. The employer controls the work environment, therefore, sexual harassment cannot be combated unless the employer takes the appropriate steps.

Section 60 of the EEA deals with the liability of employers after the conduct has been reported to the employer. For the employer to be held liable, the conduct must be reported to the employer within a reasonable time. The employer is then required to consult with the relevant parties and to take steps to eliminate the wrongful conduct. The employer will have the defence that they did everything

³³ *SA Metal Group (Pty) Ltd v Commission for Conciliation Mediation And Arbitration and Others* (C350/13) [2014] ZALCCT 68 para 15.

³⁴ S 8.1 GN 1357 of 4 August 2005 The Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace.

³⁵ Du Plessis and Fouché *A Practical Guide to Labour Law* 117.

³⁶ McGregor 2016 *THRHR* 324.

reasonable and practicable to prevent the guilty employee from continuing the conduct.³⁷ The EEA punishes employers who fail to establish fairness in the workplace.³⁸ The Labour Court would have the jurisdiction to award compensation and damages.⁴¹

1.3.4 Liability of the employer for delict – Vicarious liability

Various legal systems, South Africa included, hold the employer vicariously liable for the wrongful acts (delicts) of their employees. In South Africa, this stems from the common law of delict.⁴²

An employer has a common law duty to provide a safe working environment.⁴³ The theory runs that the employer created the risk that the employee (that committed the delict) may not be trustworthy.⁴⁴ Du Toit elaborates and urges that this encourages employers to be more active in implementing rules to discourage sexual harassment.⁴⁵

The conduct would have to comply with the requirements of a delict, namely the act, wrongfulness, fault, causation and damage.⁴⁶ In addition, the aggrieved employee (plaintiff) would have to prove further requirements in order to claim damages from the employer. These are:

1. They need to have an established employment relationship.
2. The (other) employee must have committed a delict causing harm.

³⁷ Basson *et al* *The New Essential Labour Law Handbook* 242 - 243.

³⁸ S 60 of The Employment Equity Act 1998. See also Smith and Viviers 2016 *Journal of Business* Vol 1 6.

⁴¹ Section 50(1)(d) and (e) of the Employment Equity Act 1998. The jurisdiction on the CCMA is not discussed and the time periods in which claims must be lodged is also beyond the scope of this work.

⁴² Aeberhard-Hodges 1996 *International Labour Review* 516-525

⁴³ Basson *The New Essential Labour Law Handbook* 37.

⁴⁴ See also *Ess Kay Electronics Pty Ltd and Another v First National Bank of Southern Africa Ltd* 2001 (1) SA 1214 (SCA) which held that risk creation explains vicarious liability, but does not form the principle itself. In cases of sexual harassment, the court took a different tack and investigated whether risk creation in finding that the employee acted within his scope of employment.

⁴⁵ Du Toit *Enterprise responsibility for sexual harassment in the workplace: comparing Dutch and South African law* 139.

⁴⁶ Freehills 2019 www.lexology.com.

3. The conduct must have taken place during the course and scope of the (other) employee's duties.⁴⁷

For the employer to be held vicariously liable, the guilty employee must have acted within the course of their duties. This is the most difficult aspect of holding the employer liable for the delict of an employee, particularly where the employer was not aware of the conduct and did not approve of it. These are the so-called "deviation cases".⁴⁸

To determine if the employee had acted in the course and scope of their duty, it will be investigated if the employee had completely detached himself from his employment and his actions were to the sole benefit of his own interests.⁴⁹ In *Minister of Police v Rabie*, the court established a subjective and objective test to determine if the employee acted within the course and scope of their employment.⁵⁰

In *K v Minister of Safety and Security*, The Constitutional Court awarded damages to a young woman who had been raped by three policemen while on duty.⁵¹ The Court explained the test laid down in *Minister of Police v Rabie*. The test contains two questions. The first question is whether the actions committed by the employee were done for their sole benefit. This question is subjective and examines the employee's state of mind. The second question is objective and looks at the link between the employee's actions and the business of the employer.⁵²

Such a close connection has been found in other cases. In *Grobler v Naspers*, the employer was found vicariously liable for sexual harassment committed by an employee.⁵³

⁴⁷ Neethling *Law of Delict* 447.

⁴⁸ Basson *et al The New Essential Labour Law Handbook* 44.

⁴⁹ Sibisi 2016 <http://www.derebus.org.za>.

⁵⁰ Smith and Viviers 2016 *Journal of Business* Vol 1.

⁵¹ *K v Minister of Safety and Security* (CCT52/04) [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) ; [2005] 8 BLLR 749 (CC) para 3-7.

⁵² *Minister of Police v Rabie* (487/82) [1985] ZASCA 105; [1986] 1 All SA 361 (A) para 7-8.

In *Erasmus v Ikwezi Municipality*, the court dealt with 'a sufficiently close relationship'. This aspect was addressed as follows:

It was because of the nature of their employment relationship that the opportunity presented itself to second defendant, in the course of carrying out his duties during his hours of work at his employer's facilities, to abuse his authority and to take advantage of the vulnerability of the plaintiff... The first defendant placed the second defendant in the situation where he was able to act as he did. First defendant gave him the authority to control the conditions under which plaintiff, as his subordinate did her daily work... This employment relationship facilitated his actions. In these circumstances I agree with respect, with what was said in Boothman's case, supra, namely, that when an employer places an employee in a special position of trust, the employer bears the responsibility of ensuring that the employee is capable of trust. That trust "forged a causal link" between second defendant's position as Corporate Services Manager and the wrongful act.⁵⁴

In this case, the Eastern Cape High Court, sitting in Grahamstown, held the Ikwezi Municipality and a senior employee jointly and severally liable for delict. The senior employee harassed the plaintiff by attempting to insert his tongue into her mouth and addressing her with words with a sexual connotation.⁵⁵ The court held that he infringed upon the Plaintiff's right to dignity and security of the person (including bodily and psychological integrity). The employer breached its legal duty to protect the Plaintiff in circumstances where the employer placed the employee in control of the Plaintiff.⁵⁶

1.3.5 Research question

The question that this research paper will attempt to answer is: what are the overlaps and differences between the common law and statutory approaches on vicarious liability?

⁵³ *Grobler v Naspers Bpk en n Ander* 2004 4 SA 221 (C).

⁵⁴ *E v Ikhwezi Municipality and Another* (828/2011) [2016] ZAECGHC 20; [2016] 2 All SA 869 (ECG); [2016] 7 BLLR 723 (ECG); (2016) 37 (ILJ) 1799 (ECG); 2016 (5) SA 114 (ECG) para 76-77.

⁵⁵ *Erasmus v Ikhwezi Municipality and Another* 2016 2 All SA 869 (ECG) para 3.

⁵⁶ *Erasmus v Ikhwezi Municipality and Another* 2016 2 All SA 869 (ECG) para 75-76.

1.4 Research aims and objectives

This research will attempt to determine in what way the requirements of common law to hold an employer liable for sexual harassment overlaps with the requirements of Section 60 of the EEA.

Keeping in mind that no two cases are identical, a comparison between the approaches will be instructive.

1.5 Research Methods

This research paper draws from decisions of the South African courts, legislation, scholarly sources such as books and journal articles and other miscellaneous sources. A desktop, qualitative approach together with the comparative method will be used.

1.6 Framework

Chapter 1 includes the background and research questions.

Chapter 2 will define sexual harassment and analyse the development of sexual harassment law in South Africa.

Chapter 3 will discuss the employer's liability toward sexually harassed employees under common law. The chapter will further discuss the elements the sexually harassed employee would need to prove and the damages available to them.

Chapter 4 will discuss the employer's liability toward the sexually harassed employee in terms of Section 60 of the EEA, and analyse the consequences following the employer's failure to act.

Chapter 5 provides a summary and conclusion. The discrepancies between common law and legislation on vicarious liability will be analysed

1.7 Relevance for the Research Unit

This research falls under the research unit of: Law, justice, and sustainability and under the sub-category of vulnerable societies.

Sexual harassment is one of the numerous topics which relates to the vulnerability of

members of society, and is a problem encountered daily in the working environment. A sexually harassed employee usually faces embarrassment and often victimisation.

The current emphasis on gender-based violence has highlighted the plight of vulnerable employees, particularly women and minorities. It has been ignored for too long and cannot be swept under the carpet any longer.

1.8 Statement regarding ethics

This research is based on a qualitative methodology. No questionnaires or interviews will be conducted for this study.

CHAPTER 2: DEFINITION OF SEXUAL HARASSMENT AND RECOGNITION OF SEXUAL HARASSMENT LAWS

2.1 Introduction

The reports of sexual assaults in South Africa are astounding. In the years of 2015/2016, 142 sexual assault reports were made a day. These figures do not account for victims who do not report the sexual harassment.⁵⁷ Sexual harassment is not a new concept and has been prevalent in the workplace since the beginning of employment relationships. Despite this frequent event, many victims do not report the matter for the fear of being ostracised by the community.⁵⁸ It is imperative that sexual harassment be addressed and stopped in South Africa. Its impact is devastating, not only on the economy but it has an adverse effect on the victim as well.⁵⁹

The South African constitution entrenched the right in section 9 to each individual not to be discriminated against whether directly or indirectly, in terms of their, gender, race, material status, pregnancy, ethnic or social origins, colour, sexual preference, disability, age, beliefs, culture, language and birth.⁶⁰ Section 9(2) places a burden on the legislature to ensure these rights will not be infringed upon.⁶¹

This chapter will define the meaning of sexual harassment in various pieces of legislation. It will also identify cases that have an instrumental part in the development of sexual harassment laws in South Africa.

2.2 What Is Sexual Harassment

South Africa has attempted to reduce sexual harassment in the workplace from as far back as 1989. In *J v M Ltd* (1989) 10 ILJ 755 (IC), the court defined sexual harassment as unwanted sexual attention in the working environment. The court went on to further state that a single occurrence may constitute sexual harassment.⁶²

⁵⁷ Kubanja 2020 *Obiter* 89.

⁵⁸ Chicktay 2010 *Journal of African Law* 283.

⁵⁹ Chicktay 2010 *Journal of African Law* 284.

⁶⁰ S 9 of The Constitution of South Africa 1996.

⁶¹ S 9(2) of The Constitution of South Africa 1996.

⁶² *J v M Ltd* (1989) 10 ILJ 755 (IC) 757E–G (hereafter the *J v M* case); *Reddy v University of Natal* (1998) 19 ILJ 49 (LAC) para 8.

The 1998 Code of Good Practice on Handling Sexual Harassment Cases in The Workplace, first attempted to define sexual harassment and stipulated that sexual harassment contained an element of unwanted sexual conduct. It provided a guideline on how to address sexual harassment.⁶³

Many questions surrounding sexual harassment arose, and the Amended Code of Good Practice of Handling Sexual Harassment Cases in the Workplace (hereinafter referred to as the Amended Code) was created and attempted to resolve these questions. It defined sexual harassment and conduct that constitutes sexual harassment as "unwelcome behaviour of a sexual nature that infringes on the rights of the victim".⁶⁴

Item 5.3 of the Amended Code differentiates between the various acts that constitute sexual harassment. The following are examples of conduct recognised in the Code as sexual harassment:

Physical conduct – Paragraph 5.3.1.1:

This conduct includes behaviour that consists of an undesirable physical element. It includes all contact of a physical nature including; touching, rape, sexual assault and strip searches performed by the opposite sex or in the presence of the opposite sex are included. The list is not exhaustive.

Verbal conduct – Paragraph 5.3.1.2

This conduct comprises of unwelcomed hints, suggestions, comments, advances and jokes of a sexual nature. Insults and graphic comments relating to a person's body made to them or in their presence, inappropriate enquiries made about a person's sex life, catcalling and any sexually inferred communication via electronic means.

Non-verbal conduct – Paragraph 5.3.1.3

⁶³ Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace in GN R1367 of 17 July 1998.

⁶⁴ The Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace GN 1357 of 4 August 2005(hereinafter referred to as the Amended Code); Van Niekerk *et al*, *Law@work* 303.

Non-verbal conduct comprises of unwelcomed gestures, indecent exposure and the display or sending of sexually inferred images via electronic means.

Item 5.3.2 deals with victimization, *quid pro quo* harassment and sexual favouritism as follows:

Victimisation

Victimisation is intimidation or unfair treatment due to a failure to comply with advances of a sexual nature.

Quid pro quo harassment

Quid pro quo harassment happens when an employee is being pressurised to conform to sexual advances in the fear that their employment may be affected negatively or positively. This pressure is exerted by a superior or a co-employee.

Sexual favouritism

Favouritism could be included, where only persons who reciprocate the sexual advances from a person receive rewards from them.⁶⁵

It is pertinent to note that the conduct the Amended Code wishes to discourage must be "unwelcomed". This may have an impact on consent as a possible ground of justification.⁶⁶

The conduct of sexual harassment has been extensively defined. However, the legal system fails to address two issues when dealing with sexual harassment. The first issue that is excluded, is behaviour which may not seem to be sexual, but its inference or implementation is sexually oppressive. The second issue is that not all sexual conduct is regarded as sexual harassment. Sexual interaction between employees which is mutual and does not constitute sexual harassment is accepted. For conduct to constitute sexual harassment, it would need to be unacceptable. Unacceptability may

⁶⁵ Item 5 The Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace GN 1357 of 4 August 2005.

⁶⁶ Botes 2015 *ILJ7*.

differ from person to person and, therefore, it is imperative that a test for sexual harassment be established.⁶⁷

When sexual harassment is not of a physical nature, it may be hard to determine if the harassment occurred. The determination of sexual harassment cases may differ from person to person. What a super sensitive employee may consider as sexual harassment, another employee may not. McGregor mentions that there are three tests to decide on these matters.⁶⁸

The first test is the subjective test. It focuses on the victim and takes into consideration the feelings and perceptions of the victim. Sexual harassment, according to this test, may be established easily. Critics state that this test may result in unnecessary legal suits by sensitive employees who consider every minor conduct or environment as sexual harassment. It also imputes liability on the perpetrator without fault.⁶⁹

The second test is the objective test. It takes into consideration the perspective of the "reasonable man" and relies on the norms and values of society which are influenced mainly by males. This test has been criticized because it will not take into consideration the feelings of a woman.⁷⁰

The third test, the reasonable victim test, was then established. This test includes objective and subjective elements. It considers the victim, the circumstances surrounding the event and the blameworthiness of the offender.⁷¹

In the *J v M* case and *Jerry v Putco*, the Industrial Court directly addressed sexual harassment. The court did not mention which approach was used to ascertain if the conduct amounted to sexual harassment.⁷² According to Louw, the court approached the matter subjectively. The court considered the victim as opposed to the perpetrator and investigated the effect of the conduct on the victim. Dan Caster is of the view that the courts used a more objective approach where they considered the effect of the

⁶⁷ Basson 2007 *STELL LR* 425.

⁶⁸ McGregor 2016 *THRHR* 326-328.

⁶⁹ Basson *et al The New Essential Labour Law Handbook* 242.

⁷⁰ Van Niekerk *et al Law@work* 128-129.

⁷¹ Basson *et al The New Essential Labour Law Handbook* 242.

⁷² Judges And Gender Legal Column 1992 *Agenda; Empowering Women for Gender Equity* 81.

conduct on the victim as well as the circumstances that surrounded the conduct.⁷³

The Amended Code sets out guidelines to determine sexual harassment.⁷⁴ Item 4 of the Amended Code states that the factors that need be considered are: if the harassment has taken place based on any of the prohibited grounds, if the conduct was not welcomed, the nature and extent of the conduct and the impact the conduct has on the victim.⁷⁵ Item 5 of the Amended Code sets out a detailed meaning of the elements in item 4.⁷⁶ This does not differ significantly from the 1998 Code. However, item 5(4) refers to the impact of the conduct. This means that the impairment of the victim's dignity will need to be investigated together with the position of the victim and the perpetrator. This provision contains two important parts. The first is the shift from the fault of the perpetrator to the impact of the perpetrator's conduct on the victim. The element of fault has been excluded. The second part is leaning towards a more subjective view rather than an objective view. This is done via the item clearly mentioning that the conduct is based on the impairment of dignity and the circumstances of the victim.⁷⁷

2.3 Recognition and development of sexual harassment laws in South Africa

2.3.1 The Code of Good Practice 1998

The National Economic Development and Labour Council published the first code which made the first attempt to define sexual harassment. The purpose of the code was to eradicate sexual harassment in the workplace and encourage the creation of policies and procedures to address the issues.⁷⁸ Item 3 of the 1998 code states that sexual conduct that has been repeated or has been rejected by the victim and the perpetrator is aware that his actions are not acceptable is tantamount to sexual harassment.⁷⁹ Each factor need not be present for conduct to constitute sexual harassment. Conduct

⁷³ Nel 1993 *DeJure* 255.

⁷⁴ Naylor 2010 *Women's Legal Centre* 6.

⁷⁵ Item 4 of the Amended Code.

⁷⁶ Naylor 2010 *Women's Legal Centre* 10.

⁷⁷ Zalesne 2001 *SAJHR* 513-515.

⁷⁸ Botes 2015 *ILJ*1724.

⁷⁹ Item 3 of Government Notice R1367 of 17 July 1998 Code of Good Practice on the Handling of Sexual Harassment Cases.

may still constitute sexual harassment if either of the factors are present. ⁸⁰Item 4 recognizes the different forms in which sexual harassment may present itself. It may be verbal, nonverbal, physical, quid pro quo or sexual favouritism.⁸¹

2.3.2 *The Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace 2005*

The 1998 code has been superseded by the Amended Code of Good Practice 2005. The Amended Code applies to employees and non-employees. Sexual harassment in the code has been defined and contains an element of the conduct being unwelcomed and of a sexual nature. The code encourages the implementation of sexual harassment policies and procedures to prevent sexual harassment in the workplace.⁸²

2.3.3 *The Constitution of the Republic of South Africa 1996*

South Africa is based on a constitutional dispensation. The South African Constitution is based on human dignity, equality and the rule of law amongst others. Unfair discrimination is prohibited in The Constitution. The Constitution recognises fair labour practices for each employee, however, it does not specifically address the working environment of employees. In section 24 it mentions that each individual has the right to an environment that is not detrimental to one's welfare. Sexual harassment has not been explicitly mentioned in The Constitution, however, certain rights enshrined in the Bill of Rights promote values that are based on human dignity equality and freedom.⁸³

2.3.4 *The Labour Relations Act 66 of 1996*

The Labour Relations Act makes provisions for employees to resign and claim constructive dismissal if the employer has not dealt with their claims for sexual harassment. It further provides for automatically unfair dismissals as a result of an employee being dismissed for reporting sexual harassment.⁸⁴ Rycroft states that dismissals may occur in two ways in sexual harassment cases. This is when an

⁸⁰ Zaesne 2002 *Havard Womens Law Journal* 162.

⁸¹ Item 4 of Government Notice R1367 of 17 July 1998 Code of Good Practice on the Handling of Sexual Harassment Cases.

⁸² Botes 2015 *ILJ*1727-1729.

⁸³ Du toit *Law, Democracy And Development* 4-5.

⁸⁴ Kubanja 2020 *Obiter* 97.

employee is dismissed for misconduct, or an employee resigns because of the employer who failed to address the situation, even though the employee had brought it to the employer's attention.⁸⁵ In *Ntsabo v Real Security CC*, an employee was forced to resign due to the employer not addressing the sexual harassment claim. This made the working environment intolerable. The court found that the employer had not made an attempt to eliminate the sexual harassment and it was, in fact, constructive dismissal. The employer was liable to pay the employee compensation.⁸⁶

2.3.5 *The Protection from Harassment Act 2011*

This Act sets out the definition of harassment and the procedures for a victim to submit a complaint. It further mentions the powers of the judiciary to enforce The Act. The Act gives a broad definition to the term harassment. Harassment may be carried out via direct means or indirect means. It may also be carried out by influencing a situation which results in harassment.⁸⁷

2.3.6 *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000*

This act aims to address harassment. It differs from the EEA, in that it does not classify harassment as unfair discrimination. Victims who do not fall within the employee definition in the Labour Relations Act cannot proceed against the employer for discrimination committed by an employee, as there is no provision in the Act addressing discrimination. These victims will have a remedy in terms of our common laws.⁸⁸

2.3.7 *The Occupational Health and Safety Act 85 of 1993*

The Act places a legal duty on the employer to eliminate all elements that may be hazardous or be detrimental to employees. Employers are to ensure the working environment is free from violence and sexual harassment⁸⁹

⁸⁵ Mukheibir and Ristow 2006 *Obiter* 254 .

⁸⁶ Calitz 2018 *PELJ* 3; *Ntsabo v Real Security CC* 2003 24 *ILJ* 2341 (LC).

⁸⁷ Protection From Harassment Act 17 of 2011.

⁸⁸ Landman and Ndou 2013 *Contemporary Labour Law* 89.

⁸⁹ Kubanja 2020 *Obiter* 98.

2.3.8 *The Employment Equity Amendment Act 20 of 2003*

The Employment Equity Act (hereinafter referred to as the EEA) recognizes sexual harassment as unfair discrimination. It has a discriminatory nature to it, as it imposes on a person's rights in the workplace. It is a violation of the victim's dignity. Sexual harassment in the EEA is regarded as a form of discrimination based on the grounds of sex/gender.⁹⁰ Section 51, together with Section 60, protects the victims from discrimination by the employer for exercising their rights in terms of this Act. These provisions are inserted to protect the victim from disciplinary measures that some employers may wish to carry out against them for reporting the harassment. This is illustrated in the case of *Christian V Colliers Properties*, where the victim was dismissed for objecting to sexual advances made towards her. The court found that the dismissal is automatically unfair based on sexual discrimination.⁹¹

The EEA does not define sexual harassment. This aspect is dealt with in the Code of Good Conduct. The EEA places a burden on the employer to develop policies and procedures to eliminate sexual harassment in the workplace⁹²

2.4 Case law

2.4.1 *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (CA 14/2014) [2015] ZALCCT62

In this case, a group who were employed by Campbell South Africa had gone to Botswana to perform a job. They all stayed together at the same accommodation. One night after dinner, the perpetrator had asked the victim, who was part of the Campbell Group but employed as an external contractor, to come to his room. The perpetrator had asked the victim if she wanted a lover for the night. He mentioned that he was lonely. The victim conveyed to him that she was not interested as she had a boyfriend. The perpetrator reiterated that if she felt lonely at night, she could call him. The victim reported the matter the next morning to the colleague who was with them at the accommodation. This was a one-time incident and did not continue. The Labour Court needed to establish if the statement "do you want a lover tonight?" and "come to my

⁹⁰ Gule ISSN 66.

³⁵ Kubanja 2020 *Obiter* 95; *Christian v Colliers Properties* (C323/2004) [2005] ZALC 56.

⁹² Mukheibir and Ristow 2006 *Obiter* 255.

room" satisfied the requirements of sexual harassment, or was it just sexual attention? The court decided that the conduct was not conducive to sexual harassment as it happened only once, it was not in the workplace, and the parties were not co-employees. The matter was taken on review by the LAC. The LAC, relying on The Constitution and both the 1998 and amended code of good practice on handling sexual harassment cases, held that the conduct was unwelcomed and the dignity of the victim was impaired. There was also an imbalance of power between the perpetrator and victim when looking at the age difference as the victim was 25 years junior to the perpetrator. The court found that the single incident did amount to sexual harassment.⁹³

2.4.2 *Rustenburg Platinum Mines Limited v UASA obo Pietersen and Others* (JR641/2016) [2018] ZALCJHB 72; (2018) 39 ILJ 1330 (LC)

In this matter, the perpetrator had made many propositions to the victim to have sexual relations with him which were rejected by the victim. The victim had reported the matter to the employer, who then followed procedure and dismissed the perpetrator. At CCMA, the commissioner declared the dismissal as unfair as the perpetrator was making a declaration of love to the victim, and it did not constitute sexual harassment. The matter was taken to the Labour Court where the court had rejected the commissioner's decision. The court stated that the workplace was not a place for people to find love and mentioned that the commission's decision was "patriarchal and misogynistic" in the extreme. The court stated that sexual harassment will not be viewed with a stance of victim blaming.⁹⁴

2.4.3 *UASA obo Zulu v Transnet pipelines* 2008 ILJ 1803

The perpetrator had regularly sexually harassed his co-employee, who was of the same culture. The victim has consistently rejected the verbal harassment and made it clear that his conduct is not welcomed. The victim reported the matter and, ultimately, he was dismissed. The argument by the perpetrator was that his actions were accepted

⁹³ *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (CA 14/2014) [2015] ZALCCT 62 para 3-36.

⁹⁴ *Rustenburg Platinum Mines Limited v UASA obo Pietersen and Others* (JR641/2016) [2018] ZALCJHB 72; (2018) 39 ILJ 1330 (LC) (27 February 2018) Para 4-53.

culturally, and the victim was aware of the Zulu culture. The commissioner mentioned that this conduct was not accepted in civil society and constituted sexual harassment, which will not be accepted.⁹⁵

2.4.4 *University of Venda v Maluleke and Others* (2017) 38 ILJ 1376 (LC)

In this case, the complainants, who were students, were sexually harassed by the applicant, who was a lecturer. The lecturer had made numerous proposals for sexual favours in return for additional marks. The CCMA commissioner did not find that the conduct constituted sexual harassment, as the students did not expressly mention the conduct was unwelcomed. The Labour Court had set aside the decision of the commissioner and stated it was grossly irregular and could not constitute a reasonable decision. The court added that this type of conduct is festering in the employment sector and needs to be eradicated.⁹⁶

2.5 Conclusion

This chapter discusses the definition of sexual harassment and various pieces of legislation and codes that have been developed to recognize and eliminate sexual harassment in the workplace. Sexual harassment is viewed in a serious light, and the courts state that it is the most heinous misconduct that is present in the workplace. It impairs on a victim's dignity, self-worth and integrity. Sexual harassment has not disappeared in the post-constitutional era, however, we now have fundamental rights that are protected by The Constitution.⁹⁷

⁹⁵ Mcgregor 2015 *Journal of Contemporary Roman-Dutch Law* 122-125.

⁹⁶ *University of Venda v Maluleke and Others* (2017) 38 ILJ 1376 (LC) para 23-110.

⁹⁷ *McGregor v Public Health and Social Development Sectoral Bargaining Council and Others* (CCT 270/20) [2021] ZACC 14; (2021) 42 ILJ 1643 (CC); [2021] 9 BLLR 861 (CC); 2021 (5) SA 425 (CC); 2021 (10) BCLR 1131 (CC) (17 June 2021) para 1.

CHAPTER THREE: COMMON LAW LIABILITY OF EMPLOYERS TOWARDS SEXUALLY HARASSED EMPLOYEES

3.1 Introduction

In recent years, sexual harassment in the workplace has increased drastically. South African courts endeavoured to protect employees from this sexual harassment by holding the employer liable when employees are sexually harassed at work.⁹⁸

This chapter contains a discussion on the common law liability of employers towards sexually harassed employees in South Africa. The first section of the chapter defines employer liability under common law. The second section of the chapter provides the elements that an employee has to prove in claims of workplace sexual harassment. The last section of the chapter indicates the remedies available to sexually harassed employees.

3.2 Employer Liability under common law

Common law liability means the joint case law arising out of preceding court verdicts on workplace damage.⁹⁹ The term means the accumulation of earlier legal proceedings that bodies use for decision-making on cases that are similar in facts.¹⁰⁰ Liability in South Africa arises out of the common law of delict, which primarily engages with the situations in which a person, the employee herein, can initiate compensation claims for the damage they have suffered.¹⁰¹ In general terms, delict is blameworthy and wrongful behaviour that results in injury to another person. Unlike Roman-Dutch law that forms the foundation of the South African legal system, South Africa's law of delict focuses on three (3) pillars: a) the *actio iniuriarum*, b) the *actio legis Aquiliae* and c) the action for suffering and pain.

⁹⁸ Smith and Viviers 2016 *Journal of Business* 42.

⁹⁹ Van der Walt and Midgley 1999 *JS Afr. L.* 188.

¹⁰⁰ Levmore 2019 *University of Chicago Law Review* 1137-1156.

¹⁰¹ Buthelezi 2022 *Obiter* 630. See also *R K and Others v Minister of Basic Education and Others* 2020 (2) SA para 42.

The inquiry of delict is, therefore, an exercise of loss-allocation.¹⁰²

In terms of employment, South Africa's common law of delict provides that it's the duty of the employer to provide their employees with a healthy and safe working environment.¹⁰³ Providing a healthy and safe work environment involves the obligation to care for employee safety, undertake reasonable measures to form and preserve a workplace environment wherein, amongst other things, the workers are not harassed by any other person in that work setting.¹⁰⁴

South Africa's High Court has recently indicated in *Erasmus v Beyers Naude Municipality* that the duty to provide a healthy and safe workplace environment is not limited to the employer protecting their personnel from only physical injuries but also from other claims like psychological harm, discrimination and sexual harassment.¹⁰⁵ A community's ethical principles require employers to undertake reasonable measures of preventing employee sexual harassment at the workplace as well as to compensate the victims for any damage caused if an employer fails negligently to offer healthy and safe workplace settings.¹⁰⁶ Therefore, the employer's duty of care against sexual harassment within a workplace arises out of five (5) legal possibilities, including a) vicarious liability, b) automatic unfair dismissal, c) unfair work practices, d) failure to produce a safe workplace environment and e) violation of the Employment Equity Act.¹⁰⁷

Vicarious liability means the presence of a substantial connection between the increase or creation in the risk of omission or commission of an unlawful action with resultant wrong indicating sufficient relationship for the imposition of vicarious liability.¹⁰⁸ Courts in South Africa are aligning employers' vicarious liability and their

¹⁰² *Ahmed Ltd and Another v Grobler* [2005] ZASCA para 65.

¹⁰² *Public Servants Association of South Africa obo AG v Department of Agriculture, Land Reform and Rural Development* [2021]2019 THRHR 136.

¹⁰³ *Media 24 Ltd and Another v Grobler* [2005] ZASCA para 65.

¹⁰⁴ *Public Servants Association of South Africa obo AG v Department of Agriculture, Land Reform and Rural Development* [2021]

¹⁰⁵ *Erasmus v Beyers Naude Municipality* (828/2011) [2021] ZAECGHC para 32 .

¹⁰⁶ *Media 24 Limited and Another v Grobler* 2005 (6) SA 328 (SCA) para 349E-F, 350F – G.

¹⁰⁷ Kubjana 2020 *Obiter* 93-97.

¹⁰⁸ Johnson and Ramokoka 2022 <https://www.mondaq.com/southafrica/discrimination-disability-sexual-harassment/1236748/employers-you-may-be-held-vicariously-liable-if-your-employees-commit-sexual-harassment-at-work> .

constitutional obligations towards guaranteed protection of employees' human rights. According to the court, in *CS and Another v Swanepoel and Others*, the employers' vicarious liability extends to presenting harassers with a chance to abuse their authority as well as the vulnerability of likely victims to abuse their authority.¹⁰⁹ The High Court held the Western Cape Education Department directly liable for failure to discharge the duty of safeguarding the child from Mr Swanepoel's sexual assault.¹¹⁰

From the above, employers must consider the business nature, determine to whom the duty of care is owed and take all measures reasonable to safeguard their employees against sexual harassment.¹¹¹ An employer's liability for sexual harassment of their employee amounts to vicarious liability. Any liability for sexual harassment by co-employees is liability arising out of the employer's negligent failure to act against the harassment.¹¹²

3.3 The elements for employer liability

The Court, in *Amathole District Municipality v CCMA Others*, offers the latest common law principles on sexual harassment in the workplace by an employer.¹¹³ The *onus* in sexual harassment claims rests on the employee to prove their case. The credibility of the provided proof regarding the supposed sexual harassment is not taken lightly and is proved on a balance of probabilities.¹¹⁴ The test for employer liability in intentional misconduct by employees is both objective and subjective. The test is subjective if the employment occasioned the sexual harassment undertaken in the employees' scope of employment. The test is objective if there is an adequately close connection between sexual harassment and the business. In *Oudehoutkloof Boerdery (Pty) Ltd and Others v Venter*, the court indicated that South African courts employ the objects, spirit and purport of

¹⁰⁹ *CS and Another v Swanepoel and Others* [2022] 7 BLLR para 94.

¹¹⁰ *CS and Another v Swanepoel and Others* [2022] 7 BLLR para 97.

¹¹¹ *CS and Another v Swanepoel and Others* [2022] 7 BLLR para 96.

¹¹² Mukheibir and Ristow 2006 *Obiter* 227.

¹¹³ *Amathole District Municipality v Commission for Conciliation, Mediation and Arbitration and Others* [2023] 2 BLLR para 60.

¹¹⁴ *National Union of Metal Workers of South Africa (NUMSA) and Another v Passenger Rail Agency of South Africa* [2022] 1 BLLR 90 para 22.

the 1996 Constitution when applying the common law test for an employer's liability differently to every case and its facts.¹¹⁵

According to The Constitutional Court of South Africa, in *AK v Minister of Police*, courts will seek to resolve two (2) questions when determining the employer's liability under common law for sexual harassment at the workplace. That is 1) if the sexual harassment was done exclusively for the employee's purposes; that is, the employee acted in course of their employment; and 2) if there is a close connection between the employee's private actions and employer's business or purposes.¹¹⁶ Therefore, an employee has to establish that a) an employer-employee relation existed between the employee and employer; b) the existence of the delict elements (harm, conduct, causation and fault); and c) that the sexual harassment occurred within the employee's course of employment.¹¹⁷

3.3.1 Scope and Course of Employment

The most argumentative common law requirement in sexual harassment cases is the employee acting in the course of employment. The standard test in South Africa emanates from the principal-agent principle. The test that South African courts have set is:

"If the employee acted subjectively in a way promoting their personal interests, while their acts objectively and simultaneously dissociated them from the usual scope of duties."¹¹⁸

The actions are referred to as "frolic and detour". Under common law, an employer is liable if the sexual harassment is connected closely to the employee's authorized engagements even where such an employee committed expressly the forbidden harassment.¹¹⁹ South Africa's Supreme Court has held that an action is within the employee's employment scope if a) the action is the kind the employee is hired to undertake (b) the act occurs significantly within the official space and time limits

¹¹⁵ *Oudehoutkloof Boerdery and Others v Venter* (1649/2018) [2021] ZAECGHC 85 para 15.

¹¹⁶ *AK v Minister of Police* (CCT 94/20) 2023 (2) SA 321 (CC) para 70.

¹¹⁷ *Minister of Police v K*(403/2019) 2020 (2) SACR 1 (SCA) para 50-69. See also *Amathole District Municipality v Commission for Conciliation, Mediation and Arbitration and Others* (PA9/2018) (2023) 44 ILJ 109 (LAC) para 60.

¹¹⁸ *AK v Minister of Police* (CCT 94/20) [2022] ZACC 14 para 60.

¹¹⁹ Hornbeck 2020 *Buffalo Law Review* 975.

of the workplace c) the action is partially or fully actuated by the employee's drive to serve their employer and d) if there was the use of un-expectable and intentional force by the employee.¹²⁰

Conduct of employees does not form part of their employment scope if such conduct is, in kind, different from authorized conduct, far past the authorized space or time limitations, or unactuated by the drive to serve the employer.¹²¹ Under common law, an employer is not liable for sexual harassment by an employee if the employee abandoned absolutely their duties.¹²²

3.3.2 Employer-employee connection

The court, in *Stallion Security (Pty) Limited v Van Staden*, held that there must be a legal agreement between employer and employee. This can be either written or oral. The agreement needs to define the terms and conditions of employment.¹²³ In law, the legal relationship between the parties may be extracted from, inter alia, the construction of the contract which has or might have been concluded. When trying to discover the true relationship between the parties, the court must take into consideration the realities of the relationship and not regard itself as bound by what the parties have chosen to label it. In the *Midway Two Engineering & Construction Services v Transnet BPK case*, the court developed a multi-faceted assessment of employer-employee connections.¹²⁴ According to the test, courts take into account all factors relevant when considering the absence or presence of employment relations, including the extent of employer control, as well as policy contemplations underlying the vicarious liability concept.¹²⁵

3.3.3 Employee committed the delict

South Africa's common law of delict remains inherently flexible in order to represent

¹²⁰ *Minister of Police v K* (403/2019) 2020 (2) SACR 1 (SCA) para 57.

¹²¹ Mukheibir and Van As 2020 <https://www.litnet.co.za/delictual-liability-of-local-authorities-for-failure-to-maintain-infrastructure/> .

¹²² *Costa Da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy* (486/01) [2003] ZASCA 7 para 7.

¹²³ *Stallion Security (Pty) Limited v Van Staden* (526/2018) 2020 (1) SA 64 (SCA) para 28.

¹²⁴ *Midway Two Engineering & Construction Services v Transnet BPK* 1998 (3) SA 17 (SCA) para 22E, 23G-I.

¹²⁵ *Smit v Workmen's Compensation* 1979 (1) SA 51 (AD) para 62E-63B.

social policy. Delict requires four key elements to exist if an employee is to be held liable for sexual harassment by an employee, including harm, causation, conduct (wrongfulness) and fault.¹²⁶ While the conduct and harm elements are fact-based investigations, causation prevails as partly normative and factual. Fault and wrongfulness are completely normative (value-based) since they communicate an extensive social policy outlook.¹²⁷ The court, in *Dempsey v Ncube and Others*, indicates that for an employee to be held liable under the common law of delict, the harm (injury) which the plaintiff suffers has to be a making (caused) of the wrongful actions of the defendant (or their agent) and with culpability (fault). Fault means the blameworthiness in the conduct of the employer (or agent) to result in injury to the persons.¹²⁸

The law of delict recognises two forms of fault, that is, *dolus* (intention) and *culpa* (negligence).¹²⁹ In negligence, the employer is blamed for the conduct or attitude of imprudence, carelessness or thoughtlessness because, in giving inadequate courtesy to the actions, they were unable to observe the legally obliged standard of care. Being blameworthy comprises the capacity to be legally accountable and culpable. South Africa's criterion to establish carelessness and negligence is *bonus paterfamilias* (an objective standard of a reasonable being).¹³⁰

Wrongfulness infers the presence of a sufficiently close association between the employer and the misconduct of the employee. In *VM and Another v Member of the Executive Council for Education, Eastern Cape Provincial Government and Others*, the court stated that employee negligence founds itself in constructive actions, which result in physical damage to the other individual or their property. The wrongfulness of the employer's negligent conduct prevails as an omission to prevent and stop sexual harassment is a legal responsibility.¹³¹ The judge, in *Hawekwa Youth Camp & Another v Byrne*, held that the court's imposition of the

¹²⁶ Buthelezi 2022 *Obiter* 633.

¹²⁷ Neethling 2021 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 173.

¹²⁸ *Dempsey v Ncube and Others* (48584/2017) [2022] ZAGPPHC 81 para 34.

¹²⁹ Schulze and Mokobi 2021 *SA Mercantile Law Journal* 419.

¹³⁰ Zitzke 2020 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 420.

¹³¹ *VM and Another v Member of the Executive Council for Education, Eastern Cape Provincial Government and Others* (360/2019) [2020] ZAECBHC 32 para 10.

duty is for purposes of judicial resolve, involving legal and public policy that is consistent with the constitutional standards.¹³² Consequently, negligent omissions by an employer that result in injury or loss are held as actionable and wrongful if South Africa's legal or public policy deliberations require that the omission ought to attract legal responsibility for the ensuing damages.¹³³

The causation element has a legal and factual component. South African courts employ the "but for" test to establish that the employer's conduct caused factually the suggested harm. The plaintiff has to prove that the suffered harm could not have happened but for the employer's conduct.¹³⁴ In *OK Bazaars Ltd v Standard Bank of South Africa Ltd*, the court states that:

When directed specifically to whether a new intervening cause should be regarded as having interrupted the chain of causation (at least as a matter of law if not as a matter of fact) the foreseeability of the new act occurring will clearly play a prominent role. If the new intervening cause is neither unusual nor unexpected, and it was reasonably foreseeable that it might occur, the original actor can have no reason to complain if it does not relieve him of liability.¹³⁵

In citing *novus actus interveniens*, Dendy states that breaking the causation chain requires illustrating that something new, unwarrantable, unreasonable, extrinsic and extraneous disturbed the arrangement of events.¹³⁶

For the element of harm, South Africa's law of delict distinguishes between non-patrimonial and patrimonial harm.¹³⁷ Patrimonial harm comprises financial loss emanating from pure monetary loss, property or bodily injuries of the sexual harassment. Non-patrimonial harm comprises two distinct categories: a) suffering and pain and b) infringement of personality rights. Suffering and pain include actionable types of harm, like physical discomfort and pain, emotional tremor, disfigurement, shortened life expectancy, and loss of life amenities.¹³⁸ For

¹³² *Hawekwa Youth Camp and Another v Byrne* (615/2009) 2010 (6) SA 83 (SCA) para 22.

¹³³ Neethling 2021 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 173.

¹³⁴ Veldsman *De Rebus* 247.

¹³⁵ *OK Bazaars 1929 Limited v Standard Bank of South Africa Limited* (278/2000) [2002] ZASCA 5 para 33.

¹³⁶ Dendy 1998 *South African Law Journal* 583.

¹³⁷ Scott 2022 *Journal of South African Law* 231.

¹³⁸ Sonnekus 2022 *Journal of South African Law* 159.

infringements of personality rights, non-patrimonial harm prevails in factual violations of acknowledged personality human rights like bodily (integrity corpus), reputation (*fama*) or the rights to identity, privacy and dignity (*dignitas*).¹³⁹

3.4 Employer Liabilities for sexual harassment

The Constitutional Court, in *Mashongwa v Passenger Rail Agency of South Africa*, indicated that, while not automatic, the liability of an employer found guilty for a breach of its duties under common law results in compensating the employee or providing damages as the court deems fit.¹⁴⁰ The compensation emanates from the delictual remedies of a) *actio legis Aquiliae* that relates to the employee's patrimonial loss, b) *actio iniuriarum* that relates to injuries of personality, c) psychiatric injury, suffering and pain.¹⁴¹ The Courts must find that the employer did not take any *reasonable* efforts to protect the worker or resolve the alleged sexual harassment.¹⁴²

Given the essential differences between government and private companies, the standard of a reasonable person in state organs is the measures for advancing the realisation of human rights in The Constitution and Bill of Rights, as well as the availing of resources to resolve the alleged sexual harassment. In private entities, the test of reasonableness is, if, in their position, the employer must have anticipated the sexual harassment and acted to prevent or stop it.¹⁴³

In delict, victims of sexual harassment suffer both psychologically as well as physically. Therefore, the victims can employ the principle of *Lex Aquilia* to seek compensation for the sustained patrimonial loss from the sexual harassment.¹⁴⁴ Under common law, an employer found liable for sexual harassment has to compensate the victim for intentional damage to their mental and bodily integrity as well as violation of their personal human right to dignity.¹⁴⁵ The other liability

¹³⁹ Mujuzi 2023 *Obiter* 53.

¹⁴⁰ *Mashongwa v PRASA* (CCT03/15) 2016 (3) SA 528 (CC) para 26.

¹⁴¹ Neethling 2021 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 176.

¹⁴² Narayanasami 2020 <https://www.mondaq.com/southafrica/rail-road--cycling/977050/as-a-n-organ-of-state-prasa-has-an-obligation-to-protect-passengers-bodily-integrity> .

¹⁴³ *Minister of Police v K* (403/2019) 2020 (2) SACR 1 (SCA) para 20.

¹⁴⁴ *Fose v Minister of Safety and Security* (CCT14/96) 1997 (3) SA 786 para 62.

¹⁴⁵ Zitzke 2020 *Journal of South African Law/Tydskrif vir die Suid-Afrikaanse Reg* 421.

under common law for employers facing sexual harassment is general damages for the suffering and pain resulting from the sexual harassment, including shock or mental distress. For the infringement of constitutional rights, South African courts award constitutional damages alongside patrimonial compensation. Common law recognises offers of *imperfect compensation* for sexual harassment.¹⁴⁶ The term *imperfect* means an employer found liable must, under common law, deliver either actual or full restitution to the victim.¹⁴⁷

3.5 Common Law defences against employer liability

Employers sued for liability against sexual harassment have to draw the distinction between wrongfulness defences and the defences serving to discount employer fault. The employer's grounds of justification are circumstances occurring practically, regularly, or typically, to conclusively indicate reasonable interferences with the legally-protected interests of the claimant.

3.5.1 Deviations (acting outside the scope of employment)

Acting outside the scope of employment is one of the key defences for employers under common law against sexual harassment claims. In *Costa Da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy*, the court held that an assault by an employee outside their scope of employment or abandonment of official duties are personal acts undertaken, neither in furtherance of the interests of the employer, nor their implied or express power, nor as incidents in or to consequences of anything the employee is officially hired to undertake.¹⁴⁸ In the case, the court held that while the circumstances and reasons leading up to the employee assaulting a client may have risen from Goldie being an employee of the appellant, the personal maliciousness leading to the assault does not cause liability on the employer.¹⁴⁹

¹⁴⁶ Buthelezi 2020 *Obiter* 633; See also *R K and Others v Minister of Basic Education and Others* (754/2018; 1051/2018) 2020 (2) SA 347 (SCA) para 59.

¹⁴⁷ Cliff Dekker Hofmeyr 2019
<https://www.cliffedekkerhofmeyr.com/en/news/publications/2019/Dispute/dispute-resolution-alert-11-september-Constitutional-damages-and-grief-the-SCA-will-soon-say.html>.

¹⁴⁸ *Costa Da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy* (486/01) [2003] 2 All SA 201 (C) para 7.

¹⁴⁹ *Costa Da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tavern v Reddy* (486/01) [2003] 2 All SA 201 (C) para 6.

The court in *Minister of Law and Order v Ngobo* emphasises that the test is not if the omission or act complained of happened whilst the employee was undertaking affairs of the employer, but if it amounted to a neglectful performance of their work.¹⁵⁰ An employee's omission or act, while engaged in the employer's affairs, to satisfy a personal grudge does not make an employer liable for such actions because they are not connected to the employer's work and were performed outside or ancillary to the duties entrusted to the employee.¹⁵¹

3.5.2 Mistaken belief and Volenti non fit injuria (Consent)

According to the Supreme Court, in *Meritor Savings Bank v Vinson*, if employees engage in sexual or intimate relations during the time of employment, such a relation is voluntary and has nothing to do with the employer, work promotions or advancement.¹⁵² As a general defence, mistaken belief and consent involve agreeing to sexual harassment and/or assuming the risks connected to sexual harassment. An employer in businesses like adult movie production can claim the defence of consent by establishing that a) the victim had legal capacity to consent to the appreciation and knowledge, and voluntarily and freely assumed the risk of sexual harassment and bodily touch. The employer can also indicate that the consent was neither revoked, out of seduction, nor socially unwanted.¹⁵³

3.6 Conclusion

This chapter establishes that, under the common law of delict, an employer's liability for sexual harassment emanates from their occupation of authority positions. An employer is liable, if a significant link prevails between the enhancement and creation of a risk and wrong regardless of relation to the employer's wants. South Africa's common law of delict is a flexible principle

¹⁵⁰ *Minister of Law and Order v Ngobo* (642/91) [1992] 2 All SA 492 (A) para 18.

¹⁵¹ *Minister of Safety and Security v F* (592/09) (2011) 32 ILJ 1856 (SCA) para 61.

¹⁵² *Meritor Savings Bank v. Vinson* 477 U.S. 57 (1986) 477 U. S. 68-69.

¹⁵³ SA guild of actors

<https://www.saguildofactors.co.za/sites/default/files/downloads/SA%20Protocols%20for%20Intimate%20Content%20in%20TV%2C%20Film%20and%20Associated%20Media.pdf>.

founded on policy deliberations, objective compensation, and effective deterrence of imminent harassment. South Africa's common law of delict takes into account the changing economic and social situations as well as the altering nature of people's employment.

CHAPTER FOUR: EMPLOYER LIABILITY TOWARDS THE SEXUALLY HARASSED EMPLOYEE

4.1 Introduction

Section 60 of the EEA places liability on employers when sexual harassment has been reported. Section 60 does not make an employer liable for the actions of their employees, but rather liable for their failure to act.¹⁵⁴

The chapter discusses the employer's liability toward the sexually harassed employee according to Section 60 of the Employment Equity Act (EEA). This chapter also analyses the consequences following the employer's failure to act.

4.2 Statutory definition of sexual harassment

The Employment Equity Act is the only South African legislation which provides for protection against sexual harassment that is undefined but includes bullying.¹⁵⁵ According to the EEA, employee harassment is a type of unfair discrimination that is prohibited on the grounds of unfair discrimination in section 6(1), including sex.¹⁵⁶ South African courts have to take consideration of international law in their interpretation of the Bill of Rights.¹⁵⁷ According to S233 of The Constitution, the court has to prefer reasonable construction of the laws that are consistent with international legislation during the interpretation of legislation.¹⁵⁸ Therefore, it is mandatory that courts consider international instruments when defining sexual harassment in the workplace.¹⁵⁹ The Violence and Harassment Convention (herein after referred to as V&H Convention) and Recommendation 206 provide for dealing with and eliminating all types of harassment and violence in the workplace.¹⁶⁰

¹⁵⁴ Le roux 2006 *Obiter* 414.

¹⁵⁵ Calitz 2022 *Potchefstroom Electronic Law Journal* 14.

¹⁵⁶ S 6(3) of Employment Equity Act No 55 of 1998 (EEA).

¹⁵⁷ S 39(1)(b) of The Constitution of the Republic of South Africa, 1996.

¹⁵⁸ S 223 of The Constitution of the Republic of South Africa, 1996.

¹⁵⁹ Smit 2022 *Law, Democracy & Development* 39.

¹⁶⁰ Violence and Harassment Convention 2019 (No. 190).

According to the V&H convention, harassment and violence in the workplace means: several threats, unacceptable practices, and behaviours, whether repeated or a single event, directed at, concluding in, and/or likely to cause psychological, physical, economic or sexual harm, including harassment and gender-based violence.¹⁶¹ On the 29th of November, 2021, South Africa ratified the V&H Convention by adopting the 2022 Code Of Good Practice On The Prevention And Elimination of Harassment In The Workplace (herein after referred to as the 2022 Code).¹⁶² The 2022 Code is intended to make provision for the prevention, management and elimination of all kinds of workplace harassment as indicated by the EEA and V&H Convention. ¹⁶³

The 2022 Code defines harassment as undesirable behaviour which creates an intimidating or hostile environment, damages dignity and relates to the EEA and its forbidden instances of discrimination.¹⁶⁴ South Africa's Protection from Harassment Act (PHA) defines sexual harassment as any:

a) unwelcome sexual attention from a person who knows or ought reasonably to know that such attention is unwelcome; (b) 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; (c) implied or expressed promise of reward for complying with a sexually oriented request; or (d) implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually oriented request.¹⁶⁵

4.3 Employer liability towards the sexually harassed employee

Section 60 of the EEA provides that, if an alleged conduct of sexual harassment is brought to the immediate attention of the employer, the employer needs to: consult the appropriate parties, undertake necessary measures to eradicate the

¹⁶¹ Article 1(a) of the Violence and Harassment Convention No 190 (2019) (the V&H Convention).

¹⁶² GN 11409 in GG 46056 of 18 March 2022.

¹⁶³ Item 3.1 GN 11409 in GG 46056 of 18 March 2022.

¹⁶⁴ Item 4.1 GN 11409 in GG 46056 of 18 March 2022.

¹⁶⁵ S 1 of the Protection from Harassment Act (PHA) No. 17 of 2011.

supposed sexual harassment and observe the EEA provisions.¹⁶⁶ The employer is deemed to be in contravention of the EEA if proven they failed to undertake the required steps.¹⁶⁷

Item 10.2 of the 2022 Code identifies three (3) key employer liabilities towards a sexually harassed employee stating that the employer needs to start with a consultation process with the relevant parties, the employer needs to take all needed steps to address the complaint with the 2022 Code, employers' policy and, if applicable, collective agreements and try to eliminate the sexual harassment.¹⁶⁸

4.3.1 Advise and reassure the employee

Item 10 of the 2022 Code obliges the employer to advise the sexually harassed employee of the formal and informal procedures that are available to deal with their sexual harassment.¹⁶⁹ Upon receiving the employee's complaint, an employer should offer the employee assistance, counselling and advice where reasonably practicable as indicated in item 9.6 of the code. Complainants of sexual harassment require assistance and advice, including counselling.¹⁷⁰

Employers have to, as far as it is practicable, designate competent people outside the line management that alleged sexually harassed employees can reach out to for confidential counselling and/or advice, including designated employees, trade union representatives, and professional co-employees.¹⁷¹ The employer is obligated to make sure that the designated person, whom the sexually harassed employees approach for advice, possesses appropriate experience and skills, including labour relations and counselling skills. The employer has to guarantee the person is trained properly and availed of suitable resources. ¹⁷²

¹⁶⁶ S 60(1) -(2) of Employment Equity Act No.55 of 1998.

¹⁶⁷ S 60(2)-(3) of Employment Equity Act No.55 of 1998.

¹⁶⁸ Item 10.2 GN 11409 in GG 46056 of 18 March 2022.

¹⁶⁹ Item 10 GN 11409 in GG 46056 of 18 March 2022.

¹⁷⁰ Item 9.6 GN 11409 in GG 46056 of 18 March 2022.

¹⁷¹ Item 10.5.2 GN 11409 in GG 46056 of 18 March 2022.

¹⁷² Item 10.5.2.2-10.5.2.3 GN 11409 in GG 46056 of 18 March 2022.

4.3.2 Employer investigations and/or consultations

It is the employer's liability to a sexually harassed employee to consult or internally investigate the sexual harassment. Consultation and investigations include internal inquiries and the employee proving the sexual harassment. The employer has the obligation to ensure procedural and substantive fairness of the disciplinary consultations, investigations and enquiries.¹⁷³

In *Piliso v Old Mutual Life Assurance Company (SA) Limited and Others*, the court stated that the legal convictions of the community require employers to, inter alia, start the investigation process to find the culprit.¹⁷⁴ The court, in *Amathole District Municipality v Commission for Conciliation, Mediation and Arbitration and Others*, has indicated that consultations and investigations form the first part of reasonable steps any employer must take when any allegation or complaint of sexual harassment is brought to their attention.¹⁷⁵ Any failure to investigate an allegation of sexual harassment amounts to the protection of the perpetrator by the employer and unfair discrimination against the alleged victim.¹⁷⁶

During the consultations or investigations, the employee will need to establish sexual harassment.¹⁷⁷ The court, in *Mokoena and another v Garden Art (Pty) Ltd and another*, indicates that, for an employer to be liable for sexual harassment in section 60 of the EEA, the worker must prove during the investigations that a) the perpetrator was in employment of the employer who committed the sexual harassment that amounts to unfair discrimination, b) the sexual harassment happened whilst the victim was at work and the sexual harassment was brought to the immediate attention of the employer.¹⁷⁸ The employer can establish a

¹⁷³ Item 10.8 GN 11409 in GG 46056 of 18 March 2022.

¹⁷⁴ *Piliso v Old Mutual Life Assurance Company (SA) Limited and Others* (2007) 28 ILJ 897 (LC) .

¹⁷⁵ *Amathole District Municipality v Commission for Conciliation, Mediation and Arbitration and Others* [2023] 2 BLLR 103 (LAC) para 60.

¹⁷⁶ *Solidarity obo Oosthuizen v South African Police Service and Others* [2023] 3 BLLR 258 (LC) para 42.

¹⁷⁷ *Amathole District Municipality v Commission for Conciliation, Mediation and Arbitration and Others* [2023] 2 BLLR 103 (LAC) para 42. See also *Piliso v Old Mutual Life Assurance Company (SA) Limited and Others* (2007) 28 ILJ 897 (LC) para 15.

¹⁷⁸ *Mokoena and Another v Garden Art (Pty) Ltd and Another* [2008] 5 BLLR 428 (LC) Para 40-41.

committee of inquiry and subject both the alleged victim and perpetrator of sexual harassment to polygraph tests during consultations as a way of investigating the offence.¹⁷⁹

4.3.3 *Protect the alleging employee*

The employer has the responsibility of protecting the alleged victim of sexual harassment as they conduct their consultations or investigations on the alleged sexual harassment. According to the 2022 code, the employer is obliged to advise and explain to the sexually harassed employee the informal and formal procedures that are available to them.¹⁸⁰ In choosing a procedure, the employer has the responsibility of re-assuring the sexually harassed employee of their job security and protection against any adverse consequences.¹⁸¹ Regardless of the employee's choice of procedure to follow (formal or informal), employers have the duty to assure the sexually harassed employee that their allegation will be handled with utmost confidentiality.¹⁸² It is important to note that, in certain circumstances, an employer may still follow the formal procedure even if the informal procedure was chosen by the harassed employee¹⁸³.

In, *Christian v Colliers Properties*, the court stated that other than " *dismissing her in a callous manner, compounded the gravity of the situation by seeking to justify the dismissal on a false pretext* ", the employer had a duty to protect the sexually harassed employee throughout the duration of their investigations. The court stated further that those employees who have been newly appointed and more established employees both deserve equal protection, as they are equally vulnerable to sexual harassment. ¹⁸⁴

In *Makoti v Jesuit Refugee Service SA*, the court reaffirmed the employer's liability to protect the alleging employee during the investigations and course of

¹⁷⁹ *A.K v Right to Care NPC* (JS597/21) [2023] ZALCJHB 205 para 3.

¹⁸⁰ Item 10.6.1.1 GN 11409 in GG 46056 of 18 March 2022.

¹⁸¹ Item 10.6.1.4 GN 11409 in GG 46056 of 18 March 2022.

¹⁸² Item 10.6 GN 11409 in GG 46056 of 18 March 2022.

¹⁸³ Item 10.6.1.3 GN 11409 in GG 46056 of 18 March 2022.

¹⁸⁴ *Christian v Colliers Properties* (C323/2004) [2005] ZALC 56 (25 February 2005).

employment. The court held that the dismissal of the sexually harassed employee was automatically unfair since there was no point in time during the employee's tenure that employment performance assessments were a pre-requisite for renewing her employment. The employer did not present evidence that the non-renewal of her contract was based on the harassed employee's poor conduct .¹⁸⁵

Failures by employers to renew contracts and such other employer activities that violate the employees' rights are held as unfair dismissal and failure to protect her as an alleging victim of sexual harassment. For instance, the failure of an employer to attend to the alleged harassment within a time reasonable results in legal penalties.¹⁸⁶ The court, in *Matambuye v MEC for education and Others*, reaffirms the employer's liability to protect a sexually harassed employee during and after the investigations or consultations of sexual harassment¹⁸⁷. Dismissing an employee on the same day that they lodge a grievance of sexual harassment amounts to failure on the employer's part to protect a sexually harassed employee. According to the holding in *Ntsabo v Real Security*, the employee who successfully attained compensation for their constructive dismissal based on the sexual harassment allegations is still entitled to any subsequent claims of compensation for the sexual harassment.¹⁸⁸

4.3.4 Take the steps necessary to address the harassment in accordance with the workplace policy and 2022 Code

Item 1.3 of the 2022 code identifies establishing policies as an alternative and necessary measure to address sexual harassment in the workplace.¹⁸⁹ It compels employers to create policies and statements that make clear their position on workplace harassment. The employer has to communicate the approved

¹⁸⁵ Kubjana 2020 *Obiter* 88; *Makoti v Jesuit Refugee Service South Africa* (JS 323B/09) (2012) 33

¹⁸⁶ CDH 2022 <https://www.cliffedekkerhofmeyr.com/practice-areas/downloads/Sexual-Harassment-in-the-Workplace-including-the-Vitual-World-of-Work.pdf>.

¹⁸⁷ *Matambuye v MEC for education and Others* (JS840/2012) [2015] ZALCJHB 455 (2 November 2015) para 15.

¹⁸⁸ *Ntsabo v Real Security CC* (2003) 4 ILJ 2341 (LC).

¹⁸⁹ Item 1.3 GN 11409 in GG 46056 of 18 March 2022.

harassment policies.¹⁹⁰ The policies must clearly indicate the protection of the alleging employee, as well as confidential investigation and management of the filed grievance.¹⁹¹

The employer has a duty to make sure their collective agreement and/or sexual harassment policy outlines the formal procedure of handling a sexually harassed employee, including the person that the employee should lodge their harassment allegations against, internal grievance procedures and desired outcomes, and time frame for expeditious resolution. The employer has the duty to indicate in the policy and offer the employee external avenues of satisfactorily resolving their matter if not satisfied with the internal procedures, mainly referring the sexual harassment complainant to the Commission for Conciliation Mediation and Arbitration (CCMA).¹⁹²

Similarly, the alleged sexual harassment perpetrator can refer the dispute and employer's disciplinary action to the CCMA.¹⁹³ In *Amathole District Municipality v The Commission for Conciliation, Mediation and Arbitration*, the court confirms that the alleged must prove the sexual harassment on a balance of probabilities. The demeanour and surrounding evidence are all important when assessing the credibility of the alleged, furthermore, compensation by the employer is not automatic. The alleged needs to prove that the harassment has been brought to the attention of the employer and the employer failed to act.¹⁹⁴

4.3.5 Take the steps necessary to eliminate sexual harassment

The other liability of an employer to a sexually harassed employee is to take all the alternative and necessary measures to eradicate the sexual harassment.¹⁹⁵ In

¹⁹⁰ Item 9 GN 11409 in GG 46056 of 18 March 2022.

¹⁹¹ Item 10 GN 11409 in GG 46056 of 18 March 2022.

¹⁹² CCMA <https://www.ccma.org.za/wp-content/uploads/2022/06/Sexual-Harassment-Info-Sheet-2022-01.pdf>.

¹⁹³ Item 8.7.3.5 GN 11409 in GG 46056 of 18 March 2022.

¹⁹⁴ *Amathole District Municipality v Commission for Conciliation, Mediation and Arbitration and Others* (PA9/2018) [2022] ZALAC 119; (2023) 44 ILJ 109 (LAC); [2023] 2 BLLR 103 (LAC) (10 November 2022) para 21.

¹⁹⁵ *Mokoena and Another v Garden Art (Pty) Ltd and Another* [2008] 29 ILJ 1196 (LC) at para 63.

Moatshe v Legend Golf And Safari Resort Operations (Pty) Ltd, the court cautioned that an objective evaluation is taken of the whole measures the employer took to ascertain whether they were practicable and reasonable to avoid obligation accruing to the victim in terms of the EEA.¹⁹⁶ The employer has to demonstrate their endeavours to practicably and reasonably aid the employee for avoiding contravention of the EEA.¹⁹⁷

The most notable step to remove sexual harassment, is the employer consulting with the sexually assaulted employee at all applicable times and initiating protection of the employee.¹⁹⁸ The court, in *A.K v Right to Care NPC*, offers other practicable and reasonable steps an employer can take as part of the liability towards a sexually harassed employee, including a) challenging the perpetrator and setting up a disciplinary enquiry, b) suspending the perpetrator from work during the inquires, reaffirming the sexual harassment policy, c) issue of a formal warning and d) accordingly dismissing the perpetrator in accordance with sexual harassment policy of the company.¹⁹⁹

Employers are advised to stay proactive to allegations of harassment and not merely react to further the EEA provisions.²⁰⁰ In *Potgieter v National Commissioner of the SA Police Service and Another*, the court restated the employer's obligation towards a sexually harassed employee to undertake all measures practical and reasonable to guarantee that workers do not contravene EEA provisions.²⁰¹

4.3.6 Compensate the employee for any procedural failures

While not automatic, the employer has a liability to compensate or offer damages to a sexually harassed employee if the employer received a report on the

¹⁹⁶ *Moatshe v Legend Golf and Safari Resort Operations (Pty) Ltd* [2014] 12 BLLR 1213 (LC) at Para 46.

¹⁹⁷ S 60(4) of Employment Equity Act No.55 of 1998 (EEA).

¹⁹⁸ Van De Merwe <https://www.schindlers.co.za/news/sexual-harassment-in-the-workplace-the-employers-obligation-to-take-positive-steps-in-protecting-its-employees/#:~:text=If%20an%20employee%20alleges%20that%20they%20have%20been,to%20ensure%20that%20the%20conduct%20is%20not%20repeated.>

¹⁹⁹ *A.K v Right to Care NPC* (JS597/21) [2023] ZALCJHB 205 (7 July 2023) para 2.

²⁰⁰ Le Roux 2006 *Obiter* 420.

²⁰¹ *Potgieter v National Commissioner of the SAPS & another* [2009] 2 BLLR 144 (LC) para 42.

allegations and failed to undertake steps to assess, protect the employee and eliminate the harassment. The court, in *PE v Dr Beyers Naude Local Municipality and Another*, awarded 4 million rand (ZAR) to the Municipality's Registry and Archives Clerk for an employer's failure to undertake steps to assess, protect the employee and eliminate the harassment. The judge labelled the behaviour of the employer as an example of ill management of sexual assault at the workplace.²⁰² An employer that adopts an approach of defending themselves against the sexually harassed employee, abdicates its duties to safeguard or protect the employee and/or falls sorrowfully short of the requirements of the employer in such circumstances has to offer redress and compensate the employee.²⁰³

4.4 Limitation of employer's liability

4.4.1 Delayed reporting

Employers are not liable for any sexual harassment if the employee did not bring it to their attention immediately. Section 60 of the EEA states that, should there be any conduct that is in contravention of the Act, it should be brought to the employer's immediate attention.²⁰⁴ In sexual harassment instances, the term '*immediately*' means without unwarranted delay and as soon as reasonably thinkable in the circumstances. Consideration needs to be given to the nature of the sexual harassment; the sensitivity of the issue, fear of reprisals, the perpetrator and complainant's relative position at the workplace.²⁰⁵

The court, in *the National Union of Metal Workers of South Africa (NUMSA) and Another v Passenger Rail Agency of South Africa*, held that the employer's responsibility to eliminate sexual harassment allegations starts only when the employee reports it to the employer.²⁰⁶ The employer is relieved of any liability towards a sexually harassed employee if the employee did not report the harassment to the employer. The court, in *Public Service Association of South*

²⁰² *PE v Dr Beyers Naude Local Municipality and Another* 2022 (1) SA 560 (ECG) para 39.

²⁰³ *Ntsabo v Real Security* CC 2003 24 ILJ 2341 (LC) para 2384F.

²⁰⁴ S60 of the EEA.

²⁰⁵ Item 10.1.3 GN 11409 in GG 46056 of 18 March 2022.

²⁰⁶ *National Union of Metal Workers of South Africa (NUMSA) and Another v Passenger Rail Agency of South Africa* [2022] 1 BLLR 90 (LC) para 24.

Africa and Another v Department of Mineral Resources Resources, dismissed claims against an employer, since it was binding upon the sexually harassed employee to bring to the employer's attention, immediately, or even at a later stage, her grievances. Since the sexually harassed employee did not report the sexual harassment to the employer, the employer remained ignorant of the issue and only came to know of the issue at trial.²⁰⁷

Employers will be liable to employees if the employee can prove they brought the sexual harassment to the employer's attention and the employer then failed to act against the sexual harassment.²⁰⁸ Workers also have to act with the needed haste when bringing it to the employer's attention. The courts attached some meaning to the term "immediate". They stated that limited delays which amount to weeks in the delayed reporting of sexual harassment are held acceptable.²⁰⁹ The "immediately" requirement does not mean reporting the sexual harassment within minutes of its occurrence because fulfilment is dependent on reporting within a time reasonable and in consideration of the circumstances.²¹⁰ The court, in *Liberty Group Limited v M*, held that the requirement of immediate reporting should be given some sensible meaning, even if it means departing from the literal meaning of the used words.²¹¹

4.4.2 Employees "while at work"

The employer's liability to a sexually harassed employee is limited to the perpetrator being a fellow employee and not a customer. In *the CCMA matter of JAMAFO obo Annekie Pieterse v Pick n Pay Retailers*, the applicant alleged that the worker (security guard) of the sub-contractor to her employer sexually harassed her. The employer raised a point of jurisdictional *limine*, contending that an employer cannot be liable under the EEA (section 60) since it is not an employee

²⁰⁷ *Public Service Association of South Africa and Another v Department of Mineral Resources* [2022] ZALCJHB 307 para 28.

²⁰⁸ *Ehlers v Bohler Uddeholm Africa (Pty) Ltd* (JS296/09) [2010] ZALC 117; (2010) 31 ILJ 2383 (LC) para 49.

²⁰⁹ *Solidarity obo B v South African Police Service and Others* (P 03/19) [2022] ZALCPE 26; (2022) 43 ILJ 2869 (LC) (22 September 2022) para 51-53.

²¹⁰ *Ntsabo v Real Security CC* 2003 24 ILJ 2341 (LC) para 2349A-E.

²¹¹ *Liberty Group Limited v M* (JA105/2015) [2017] ZALAC 19 para 51.

of the employer that engaged in the sexual harassment. The court held that it is very clear under Section 60 of the EEA that only the employer of a sexually harassed employee has liability for unfair discrimination towards such an employee.²¹²

In *Shoprite Checkers (Pty) Ltd v Samka and Others*, a worker sought damages against the employer for racial abuse by a customer. The Court found that section 60 of the EEA envisages that the employer's liability to an employee is limited to only their employees while at work.²¹³ An employee is not an independent contractor but any person working for the employer and entitled to or receiving remuneration in a manner that assists in conducting the employer's business.²¹⁴ The employer's liability is limited to sexually harassed employees that the employer has authority over and not the customer or public members.²¹⁵

"While at work" needs differentiation from the requirements of "within the scope and course of employment" in vicarious liability and common law contexts.²¹⁶ The EEA confers direct (strict) liability for the "while at work" measure regardless of whether the employees are outside the workplace and engaged in activities connecting or relating to work.²¹⁷ Liability of the employer according to section 60 of the EEA is seen as location-based rather than activity-based. Section 60 should not be viewed as an employer's liability for another's wrongful actions, but rather a failure by the employer to address equity in the workplace.²¹⁸ Employers are obliged to take the relevant steps to address the complaint. The court, in *A.K v Right to Care NPC*, stated that "while at work" is a notable requirement that forms a statutory vicarious liability for the employers under section 60 for an employee's conduct, which contravenes EEA provisions. On establishing that the alleged is an

²¹² Consolidated Employers Organisation 2023 <https://ceosa.org.za/sexual-harassment-by-an-employee-of-a-service-provider-do-the-ccma-have-jurisdiction/>.

²¹³ *Shoprite Checkers (Pty) Ltd v Samka and Others* (C844/15) [2017] ZALCCT 64; [2018] 9 BLLR 922 (LC); (2018) 39 ILJ 2347 (LC) (29 November 2017) para 12.

²¹⁴ De Rebus 2020 <https://www.derebus.org.za/employment-law-update-can-an-employer-be-held-liable-for-discrimination-perpetrated-by-a-customer/> .

²¹⁵ *Shoprite Checkers (Pty) Ltd v Samka and Others* (C844/15) [2017] ZALCCT 64; [2018] 9 BLLR 922 (LC); (2018) 39 ILJ 2347 (LC) (29 November 2017) para 23-24.

²¹⁶ Pineiro and Kitada 2020 *Marine Policy* 117 103938.

²¹⁷ Naylor 2020 *Acta Juridica* 40.

²¹⁸ Le Roux 2006 *Obiter* 414.

employee, the employer is liable to show, they did everything reasonable to form an environment, which is free of sexual harassment.²¹⁹

4.5 Conclusion

This chapter establishes that the leading employer liability towards a sexually harassed employee includes taking the steps necessary to advise and protect the alleging employee, consult the involved parties and investigate the harassment. Employers have a positive responsibility to reasonably resolve the harassment and guarantee that they are not violating the EEA provisions. Besides establishing policies that ensure sexual harassment does not happen in the workplace, the employer must undertake necessary and reasonable measures to eliminate sexual harassment from the workplace, including prosecution and dismissal of the perpetrator. The other liability of an employer towards a sexually harassed employee is the payment of damages for failure to take measures to resolve or eliminate the harassment.

²¹⁹ *A.K v Right to Care NPC* (JS597/21) [2023] ZALCJHB 182 (5 June 2023) at para 29.

CHAPTER 5: CONCLUSION AND DIFFERENCE BETWEEN COMMON LAW LIABILITY AND SECTION 60 OF THE EEA

5.1 INTRODUCTION

This chapter provides a conclusion and summary of the common law responsibility placed on employers and how it differs from Section 60 of the EEA.

5.1 *Common law*

Common law is the unwritten principles, practices and body of law that courts in South Africa have developed over time, based initially on English and Roman-Dutch law. Roman-Dutch law tradition endures the changes to judicial institutions in post-apartheid South Africa and remains the foundation of South Africa's legal structure. Judges in South Africa use common law to shape the law.²²⁰ Common law insists that employment dealings are founded on trust between parties and very particular rights. Both the employer and employee have a duty to act in good faith and take reasonable care in their undertakings for the safety and protection of each other. Any shortages or in fulfilling the duty may be held as misconduct or failure and may result in damages and compensation.²²¹

5.2 *Vicarious liability*

Vicarious liability means a third party, including an employer, can be held responsible for delicts by some other person, including an employee or agent. Vicarious liability is the exception to the law that a person that suffers damage can make a claim for damages against only the perpetrator by proving the negligence or intentional wrongful conduct on the perpetrator's part is linked to the personal injury or damage of a person.²²² At common law, there is no need for the claimant to prove negligent or wilful action by the employer.²²³ In contrast, statutory vicarious liability requires the employer to prove they took all steps reasonable to

²²⁰ Du toit 2014 *Verdiping* 278.

²²¹ Labour guide <https://labourguide.co.za/general/employee-a-employer-rights>.

²²² *National Union of Metalworkers of South Africa and another v Passenger Rail Agency of South Africa* (2022) 31 LC 1.13.3 para 10.

²²³ *Grobler v Naspers* 2004 2 All SA 160 (C) para 26.

prevent and avoid the delict, including risk assessment and identification, code of conduct and policy and/or incorporating regulations in the employment conditions.²²⁴ Employers that act proactively cannot be found liable for employee delict.²²⁵

5.3 Section 60 of the EEA

The EEA is a piece of law that acknowledges the incapacity of common law and its concepts to solely determine all labour law issues in a manner acceptable. This includes the possibility of moving away from approaches which place common law in lasting clash with the other sources of law like legislation. It acknowledges that no particular source of law enjoys primacy.²²⁶ Section 60 gives greater acknowledgement to competing party interests and a constant need to find balance as a whole. Finding balance will permanently be a matter of contestation in democratic nations like South Africa because of changes and fluctuations in government.²²⁷ Section 60 of the EEA is, therefore, the attempt to find a balance between competing powers in the arena of employment, including giving constitutional importance and protection of fair labour practices. ²²⁸

Section 60 is the attempt to find a necessary merger of competing sources of law.²²⁹ For instance, the whole operation of Section 60 of EEA remains entrenched in common law because resorting to common law helps ascertain to whom the section applies. The clear difference between Section 60 of the EEA, vicarious liability and common law is that while common law and vicarious liability are substantive matters, Section 60 is a matter of procedure. Section 60 of the EEA takes precedence over common law and covers the loopholes left behind by the unchanging common law due to its flexibility to amendment, prevailing regimes and societal situations. The rules of statutory interpretation are rules evolved by the courts in a gradual process over time. Section 60 cannot avoid entirely the

²²⁴ S 60 (3). See also *Ntsabo v Real Security* CC 2003 24 ILJ 2341 (LC) para 2378G-H.

²²⁵ S 60(4) of the EEA.

²²⁶ Wallis 2005 *Law, Democracy & Development* no 2 181-191.

²²⁷ Kubjana 2020 *Obiter* 88.

²²⁸ Le Roux "Collective Agreements on The Crest of The Legislative Wave, but Common Law Still Making Ripples " 351-368.

²²⁹ Cooper 2002 *International Law Journal* 10-17.

embracing of common principles of delict and contract as well as its arbitral process because common law rules still determine the extent, meaning and scope of party obligations and rights.

5.4 Conclusion

This study set out to establish the liability of employers for sexual harassment cases in the workplace. The common law position was examined and established that liability can be imposed on the employer, notwithstanding the fact that they were not involved in any wrongful act.

Employers are obliged to provide a safe and healthy working environment for employees. This includes employees not being harassed. Employees who have been harmed during employment are allowed to claim damages from the employer.

To establish liability under common law, certain elements would need to be established. The elements that need to be proved are: the harassment was part of the course and scope of employment, there was a sufficient link between the employer and employee and the employee had committed the delict.

Once the victim is able to establish and prove each element, the victim is allowed to claim compensation from delictual remedies. These include repatriations for pain and suffering by the victim.

Employers may escape liability if they are able to prove that the perpetrator abandoned this duty and acted outside the course and scope of employment. The employer can also prove that there was consent in order to evade liability.

Furthermore, the study aimed to look at legislation, such as the EEA, which was created to ensure employment equity in the workplace.

The purpose of section 60 in the EEA is to discourage unfair discrimination in the workplace which includes sexual harassment. The act provides guidelines to employers to address and prevent sexual harassment. Employers are obliged to create a working environment free from sexual harassment and take immediate action on incidents that

are reported.

Employers are obliged to establish and implement policies and procedures for the reporting and investigations of complaints regarding sexual harassment. It further provides that employers need to provide training and education on the prevention of sexual harassment and take the appropriate disciplinary steps against perpetrators.

Employers are forced to take immediate action by consulting all relevant parties and proactive steps to eliminate the sexual harassment once it has been brought to their attention.

The EEA was established to create a form of statutory vicarious liability for unfair discrimination. This section allows other interested parties to bring the harassment to the employer's attention and is not limited to the victim.

From the decisions of the courts and the development of statutory laws, it is evident that there is no one set route that may be applied in all sexual harassment cases. An aggrieved employee may claim compensation from our common law remedies available to them together with remedies from S60 of the EEA.

Sexual harassment is an undeniable pandemic occurring within the workplace. The education of all role players will be imperative in helping to identify and deal with sexual harassment cases expeditiously. Legislation that provides timeframes for employees to act when sexual harassment cases are reported will hasten the process.

It is undeniable that sexual harassment will not disappear from the workplace. Legislation and employers need to be forward-thinking to minimise these occurrences in the workplace.

It is my view that awareness of sexual harassment is of paramount importance. The progression of times translates to the manner in which sexual harassment occurs developing as well. Updated legislation on the definition of sexual harassment coupled with regular training will allow employees and key players to be well-equipped to easily identify sexual harassment. This may reduce the number

of cases that remain unreported and reduce delays in reporting. Government and employers should also be stricter regarding the punishment of sexual harassment cases. This will be a deterrent to harassers as they are aware of the attached consequences of their actions, rather than believing that there is a possibility that they might get a slap on the wrist.

Employers should provide mandatory counselling and assistance to the victim once the sexual harassment has been reported. This will remove the fear of victimisation that many employees have when contemplating whether or not to report sexual harassment.

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