The prevention of sexual harassment in the workplace

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Abstract

Sexual harassment in the workplace is a pervasive and serious problem that affects both men and women, though it disproportionately impacts women. It violates fundamental rights to dignity, equality and personal security, leading to negative consequences for victims, the workplace and the society. The *Constitution of South Africa* and the *Employment Equity Act* provide a legal framework to prohibit and prevent sexual harassment in the workplace, and to protect and provide remedies for victims. However, there are gaps and challenges in the legal framework and its implementation, such as the lack of a clear and consistent definition of sexual harassment, the inadequacy of the existing remedies and sanctions, and the barriers to access justice and support services. This research study aims to critically analyse the law on sexual harassment in the workplace, to ascertain whether robust measures exist for the victim to curb sexual harassment in the workplace or whether the victim must pursue the matter through the court system, and also to provide measures to curb sexual harassment in the workplace in South Africa. The main research question is: Are the existing laws sufficient to effectively prevent and address sexual harassment in the workplace? The research findings and recommendations will contribute to the development and reform of the law and policy on sexual harassment in the workplace in South Africa and to the promotion of gender equality and human dignity in the workplace.

Keywords: Employee, sexual harassment, workplace, employer, equality, unfair discrimination.

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Abbreviation list

CCMA	Commission for Conciliation, Mediation and Arbitration
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
EEA	*Employment Equity Act*
ILO	International Labour Organisation
LGBTQ:	Lesbian, Gay, Bisexual, Transgender, Questioning
LRA	*Labour Relations Act*
NGOs	Non-Governmental Organisations
OHSA	*Occupational Health and Safety Act*
SABC	South African Broadcasting Corporation
SADC	Southern African Development Community
SVC	Sexual Violence in Conflict
UN	United Nations
VAWG	Violence Against Women and Girls

Chapter 1: Introduction

1.1 Background to the study

Sexual harassment in the workplace is a form of unfair discrimination that violates the rights of employees in South Africa.[1] The main legal framework that deals with sexual harassment is the *Employment Equity Act* (hereafter the *EEA*),[2] which defines sexual harassment as unwanted conduct of a sexual nature that makes a person feel offended, humiliated or intimidated. The EEA also provides a *Code of Good Practice on the Handling of Sexual Harassment Cases* (the *Code*), which sets out the best ways to deal with complaints about sexual harassment.[3]

According to the *Code*, sexual harassment can take various forms, such as physical contact, verbal comments, jokes, gestures, display of pictures, sending of emails or SMS messages.[4] The Code also distinguishes between two types of sexual harassment: *quid pro quo* and hostile work environment. *Quid pro quo* harassment occurs when a person's employment conditions or benefits are made dependent on the person's submission to or rejection of sexual advances.[5] Hostile work-environment harassment occurs when a person's dignity or well-being is affected by unwelcome sexual conduct that creates an intimidating, hostile, or offensive work environment.[6]

The Code recommends that employers should adopt a sexual harassment policy that clearly prohibits sexual harassment and outlines clear procedures for reporting and resolving complaints.[7] The Code also suggests that employers should provide training and awareness programmes for employees and managers to prevent and address sexual

[1] Mabunda 2017 *Critical analysis of the employer's obligations in combating and eliminating sexual harassment at the workplace or extension of the workplace in South Africa* 2.
[2] *Employment Equity Act* 55 of 1998.
[3] *Code of Good Practice on the Handling of Sexual Harassment Cases* of 2005 (GN 27865 GG 482).
[4] Section 3 of *Code of Good Practice on the Handling of Sexual Harassment Cases of* 2005 (GN 27865 GG 482).
[5] Basson *et al. The New Essential Labour Law Handbook* 7th edition.
[6] Khumalo *et al.* 2015 *SAJ* 111.
[7] Section 4 of *Code of Good Practice on the Handling of Sexual Harassment Cases of* 2005 (GN 27865 GG 482).

harassment.[8] Employees who are victims of sexual harassment have the right to lodge a grievance with their employer or to refer the matter to the Commission for Conciliation, Mediation and Arbitration (CCMA) or to the Labour Court.[9] The remedies for sexual harassment may include an apology, counselling, disciplinary action, transfer, or compensation.[10]

1.2 Problem statement

Sexual harassment in the workplace has become a common problem in South Africa, as is the case globally. Sexual harassment at work affects both men and women; however, most reported incidents portray women as more vulnerable than men.[11] This pattern is also reflected in South Africa, where the regulation of sexual harassment in the workplace is a significant concern.[12]

Sexual harassment is an extensive problem in the workplace, manifesting through inappropriate behaviour and unlawful physical behaviour, especially toward women.[13] The number of sexual harassment complaints increases yearly.[14] Sexual harassment in the workplace has been declared a social problem.[15] This problem not only reduces the working life of female employees and male employees, jeopardising their well-being, but it also undermines gender equality.[16]

[8] Section 5 of *Code of Good Practice on the Handling of Sexual Harassment Cases of* 2005 (GN 27865 GG 482).
[9] Section 6 of *Code of Good Practice on the Handling of Sexual Harassment Cases of* 2005 (GN 27865 GG 482).
[10] Section 7 of *Code of Good Practice on the Handling of Sexual Harassment Cases of* 2005 (GN 27865 GG 482).
[11] Kubjana and Lesley 2020 *Obiter* 88-105.
[12] Kubjana and Lesley 2020 *Obiter* 88-105.
[13] Mabunda 2017 *Employer's obligations in combating and eliminating sexual harassment at the workplace* 2.
[14] Mabunda 2017 *Employer's obligations in combating and eliminating sexual harassment at the workplace* 2.
[15] Mabunda 2017 *Employer's obligations in combating and eliminating sexual harassment at the workplace* 2.
[16] Mabunda 2017 *Employer's obligations in combating and eliminating sexual harassment at the workplace* 2.

Sexual harassment, depending on the form it takes, violates the right to integrity of the body and personality, which is protected in our Constitution.[17] Sexual harassment is a form of unfair discrimination that can be described as an invasion of a person's security and dignity, as well as privacy, as embodied in sections 10 and 14 of the Constitution.[18] It is acknowledged that employees' constitutional rights should also be protected in the workplace, and among these rights is the right to be free from sexual harassment.[19] Employers are legally bound by the law and have a legal duty to protect their employees against sexual harassment in the employment relations in their workplace.[20]

If the employer breaches this duty, he or she will be responsible for unfair discrimination and will also be liable for failure to address equity in the workplace.[21] There are insufficient and inadequate legal measures to curb or eliminate sexual harassment in the workplace, as laws to prevent sexual harassment at work are not adequate to provide remedies for victims and measures to deal with perpetrators.[22] There should be adequate remedies, such as automatic termination of the contract if sexual harassment has occurred. These measures will be explored and addressed throughout this mini-dissertation.

Section 9 of the Constitution provides that everyone is equal before the law and is entitled to equal protection of the law.[23] The Constitution further imposes an obligation on the state to pass legislation that prohibits unfair discrimination. Section 9(3) and (4) of the Constitution prohibits discrimination on various grounds, including sexual harassment.[24] The EEA was passed to give effect to the constitutional obligation to prohibit sexual harassment in the workplace.[25]

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[17] Constitution of the Republic of South Africa, 1996.
[18] Constitution of the Republic of South Africa, 1996.
[19] Mabunda 2017 *Employer's obligations in combating and eliminating sexual harassment at the workplace* 2.
[20] *Code of Good Practice on the Handling of Sexual Harassment Cases* of 1998 (GG 19049 of July1998).
[21] Kubjana and Lesley 2020 *Obiter* 88-105.
[22] Calitz 2022 *South African Law Journal*.
[23] Constitution of the Republic of South Africa, 1996.
[24] Constitution of the Republic of South Africa, 1996.
[25] The *Employment Equity Act* 55 of 1998.

Researchers estimate that 30% of women and 18% of men reported unwanted sexual advances in their workplaces during 2018; the victims reported that harassment came in many forms.[26] A total of 15% of those who experienced harassment reported that the advances were verbal in nature, while 38% admitted that it turned physical with unwanted touching. Approximately 42% reported experiencing lustful staring at their body parts, and 32% reported receiving messages of a sexual nature. About 57% of women and 47% of men claimed that the unwanted advances came from a workplace peer, while 26% of women reported that a boss or superior was the source of the harassment.[27] On the other hand, 20% of men said they received unwanted attention and advances from their subordinates.[28]

A victim, such as rape or sexual assault victims, may be affected psychologically and may have experienced trauma.[29] Victims experience profound mental and emotional stress that can result in depression, decreased productivity, increased absenteeism, fear, guilt and impacts on personal life and relationships, and all these symptoms may also manifest as physical illness, fatigue, headaches and stomach problems.[30] Harassers may range from the ordinary co-worker to the employer, and even a third party, such as a client or customer.[31]

In *J v M Ltd*,[32] the applicant brought a claim against her employer after experiencing unwelcome sexual advances from a colleague.[33] The Industrial Court dealt with South Africa's first sexual harassment case, broadly defining sexual harassment. It explained that, in its narrowest form, sexual harassment occurs when a person is expected to engage in sexual activity to gain or keep employment or promotion, while the wider

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[26] Smith 2018 https://www.news24.com/fin24/dismaying-level-of-sexual-harassment-in-corporate-sa survey- 20180901-2.
[27] Smith 2018 https://www.news24.com/fin24/dismaying-level-of-sexual-harassment-in-corporate-sa survey- 20180901-2.
[28]Smith 2018 https://www.news24.com/fin24/dismaying-level-of-sexual-harassment-in-corporate-sa-survey- 20180901-2.
[29] Hoosain 2017 https://www.up.ac.za/student-affairs/news/post_2557382-effects-of-sexual-harassment-in-the-workplace.
[30] Hoosain 2017 https://www.up.ac.za/student-affairs/news/post_2557382-effects-of-sexual- harassment-in-the-workplace.
[31] Seenarayan *A Critical Examination of The Pandemic Of Sexual Harassment in the South African Workplace* 5.
[32] *J v M Ltd* 1989 10 *ILJ* (IC) (hereafter *J v M*).
[33] *J v M* para 3–5.

definition covers any unwanted sexual behaviour or comment that negatively affects the recipient.[34] The court outlined conduct ranging from *innuendo* and inappropriate gestures to non-consensual touching and rape, and held employers liable for failing to prevent or address such harassment.[35]

A single act can constitute sexual harassment.[36] This form of harassment also impacts the victims' advancement in the workplace, particularly women.[37] These victims of sexual harassment either take days off from work, transfer or leave the job altogether, which has a detrimental effect on the long-term prospects of success at work.[38] Further, sexual harassment of the victim could result in a violation of certain rights, such as the right to dignity,[39] equality,[40] privacy[41] and freedom of bodily integrity.[42]

Section 9(3) of the *Constitution* prohibits discrimination on the basis of sex and gender and sets the standard for legislation aimed at preventing discrimination.[43] The above have paved the way for South African labour laws in respect of gender inequality and related aspects of sexual harassment.[44] Section 6(3) of the *EEA*[45] provides that harassment based on any of the listed grounds, which includes sex, is a "form of unfair discrimination".[46] The *Labour Relations Act*[47] (hereafter the *LRA*) also prohibits discrimination in terms of section 187(1)(f).[48]

The *Code of Good Practice on Handling Sexual Harassment Cases* of 1998 (1998 Code) was attached to the *LRA*, and the C*ode of Good Practice on Handling Sexual Harassment*

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[34] *J v M* para 6–10.
[35] *J v M* para 12 & 18.
[36] *J v M* para 757.
[37] Mowatt 1987 *ILJ* 652.
[38] Hadjifotiou *Women and Harassment at Work* 21.
[39] Section 10 of the *Constitution of the Republic of South Africa*, 1996.
[40] Section 9 of the *Constitution of the Republic of South Africa*, 1996.
[41] Section 14 of the *Constitution of the Republic of South Africa*, 1996.
[42] Section 12 of the *Constitution of the Republic of South Africa*, 1996.
[43] Gaibie 2011 *ILJ* 26.
[44] Le Roux, Orleyn and Rycroft *Sexual Harassment in the Workplace Laws, Policies and Processes* 12.
[45] Section 6(3) of the *Employment Equity Act* 55 of 1998.
[46] Gaibie 2011 *ILJ* 26.
[47] *Labour Relations Act* 66 of 1995.
[48] Section 187(1)(f) of the *Labour Relations Act 66* of 1995.

Cases of 2005 (2005 Code) is attached to the *EEA*.[49] It must be highlighted that as of 19 December 2018, the Minister of Labour issued a notice, formally repealing the 1998 Code. The effect of the repeal is that, moving forward, the 2005 Code should only be relied upon in relation to sexual harassment incidents in the workplace.[50]

1.3 Motivation

Since 1989, starting with the case, officially known as the *J v M*, South Africa has made efforts to combat sexual harassment in the workplace.[51] As a result, laws, codes and policies were enacted to address sexual harassment. These Acts include the *Protection From harassment Act, the EEA,* and *the Code of Good Practice on the Handling of Sexual Harassment in the Workplace*. Despite all these initiatives, workplace sexual harassment is said to be at an all-time high.[52] Particularly noteworthy is the fact that the idea of "sexual harassment" has yet to acquire a definitive and relevant definition that can be used as a benchmark in all situations of sexual harassment.[53]

In the case of *Media 24 and Another v Grobler,*[54] the appellant was sexually harassed for five consecutive months. She then approached the court for quantified damages and compensation for the harm caused. The victim succeeded in her claim of sexual harassment, but it was not sufficient, as the court decision did not prevent the harassing employee from continuing to work, and thus, continuing to jeopardise her safety and well-being in the workplace.[55]

Courts and the CCMA have yet to provide clear guidance on the appropriate action to take when dealing with sexual harassment claims.[56] The application of the Code[57] has

[49] *Code of Good Practice on the Handling of Sexual Harassment Cases* of 1998 (GG 19049 of July 13, 20221998) and *Code of Good Practice on the Handling of Sexual Harassment Cases* of 2005 (GN 27865 GG 482).
[50] *Code of Good Practice on the Handling of Sexual Harassment Cases* of 1998 (GG 19049 of July 1998).
[51] *J v M Ltd* 1989 *ILJ* 755.
[52] Hoosain 2017 https://www.news24.com/SouthAfrica/News/sexual-harassment-complaints-ignored for-eight-years.
[53] Kubjana 2020 *Obiter* 85.
[54] *Media 24 v Grobler* 2005 6 SA 328 (SCA).
[55] *Media 24 v Grobler* 2005 6 SA 328 (SCA).
[56] Kubjana 2020 *0biter* 85.
[57] *Code of Good Practice on the Handling of Sexual Harassment Cases* of 1998 (GG 19049 of July 1998)

also not significantly contributed to the development of a practical methodology, leaving us with a legacy of jurisprudential variances and contradictions regarding what constitutes sexual harassment.[58] In every conflict resolution forum that addresses it, the concept of "sexual harassment" has gone through an unstable period of acquiring, discarding and recovering interpretations.[59]

In the case of *Christian v Colliers Properties,*[60] two days after an employee began to work for the company, the owner took her to dinner, urged her to sit on his lap and kissed her on the neck. When she resisted the owner's advances, she was fired with two days' salary and referred to a sexual harassment dispute.[61] The Court held that dismissing an employee for declining the owner's advances constituted automatically unfair dismissal based on sexual discrimination.[62]

Again, in the case of *SABC Ltd v Grogan,*[63] a regional sales manager was fired for sexual harassment, among other things, after he reportedly kissed a junior female colleague multiple times, provided her with erotic literature, and had physical contact with her in his car.[64] An arbitrator eventually determined that, while he was guilty of sexual harassment, the nature of his conduct did not warrant dismissal, in part because the claimed victim did not appear to mind his advances and stated that he should not be dismissed.[65] The arbitrator, therefore, ordered the employer to reinstate the employee.[66]

Furthermore, in *Rustenburg Platinum Mines Ltd v United Association of SA on behalf of Pietersen*,[67] a male colleague suggested that he stayed with Ms Kgole and helped her pay expenses and on several occasions proposed to have sex with her. She consistently

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and *Code of Good Practice on the Handling of Sexual Harassment Cases* of 2005 (GN 27865 GG 482).
[58] Kubjana 2020 *Obiter 86*.
[59] Kubjana 2020 *Obiter* 86.
[60] *Christian v Colliers Properties* (C323/2004) [2005] ZALC 56.
[61] *Christian v Colliers Properties* (C323/2004) [2005] ZALC 56 para 5.
[62] *Christian v Colliers Properties* (C323/2004) [2005] ZALC 56 para 25.
[63] *SABC Ltd V Grogan* 2006 2 BLLR 207 (LC).
[64] *SABC Ltd V Grogan* 2006 2 BLLR 207 (LC) para 3.
[65] *SABC Ltd V Grogan* 2006 2 BLLR 207 (LC) para 12.
[66] *SABC Ltd V Grogan* 2006 2 BLLR 207 (LC) para 12.
[67] *Rustenburg Platinum Mines Ltd v United Association* 2018 39 *ILJ* 1330 (LC).

refused these advances but never reported them as required by law. Internal disciplinary processes found his actions to amount to sexual harassment and dismissal was recommended. The aggrieved Pietersen referred the matter to the CCMA and was vindicated by the Commissioner who ordered reinstatement and compensation.[68] The Commissioner held that the conduct appeared to be a love proposal and that the docile conduct displayed by the complainant was inviting; at no point did she raise or report the incident as required by law.[69] The Labour Court dismissed this reasoning and held that sexual harassment had taken place.

Although the courts have mainly responded by dismissing sexual harassment perpetrators, educational campaigns against sexual harassment continue, and organisations and social media influence are continuing to apply pressure to raise awareness of this epidemic. Despite these efforts, the number of sexual harassment cases continues to rise.[70] As a result, it raises the question of whether current legislation, codes and activism are sufficiently addressing sexual harassment, whether the concept of sexual harassment is adequately defined, whether the laws in place effectively deal with sexual harassment and also whether the rulings of the courts are clear enough to help us comprehend sexual harassment.[71] Considering the growing number of reports of sexual harassment in the workplace, this research paper investigates sexual harassment in the workplace and its impact.

1.4 Research question

Are the existing laws sufficient to prevent sexual harassment in the workplace in South Africa?

1.5 Aims and objectives of the study

This research study aims to:

a) analyse sexual harassment in the workplace as well as its causes;

[68] *Rustenburg Platinum Mines Ltd v United Association* 2018 39 *ILJ* 1330 (LC) para 2
[69] *Rustenburg Platinum Mines Ltd v United Association* 2018 39 *ILJ* 1330 (LC) paras 9 and 39.
[70] Kubjana 2020 *Obiter* 86.
[71] Kubjana 2020 *Obiter* 86.

b) ascertain whether robust measures exist to assist the victim to curb sexual harassment in the workplace or whether he/she must pursue the matter through the court system; and
c) provide the measures that can enhance and promote equality in the workplace in South Africa.

The objectives of this research study are to:

a) establish what causes or constitutes sexual harassment within the working environment that many females and occasionally male employees encounter, as well as the extent to which such conduct constitutes sexual harassment;
b) provide measures to victims to curb sexual harassment in the workplace;
c) establish whether the South African sexual harassment practices comply with international and regional laws; and
d) recommend appropriate measures to eliminate sexual harassment.

1.6 Research methodology

Bailey defines research methodology as the philosophy of the research and the standards or criteria the researcher used for interpreting data and reaching conclusions.[72] After an explanation of the research methodology has been outlined, the focus shifts to unpacking the various available types of methodologies and seeing which of these would be suitable for the study.[73] Generally speaking, there are two main research methods: qualitative and quantitative research methods.

1.6.1 The quantitative research method

This is the systematic scientific investigation of quantitative properties and phenomena and their relationship, with the objective of developing and employing mathematical models and theories and/or hypotheses pertaining to natural phenomena.[74] The process of measuring is central to this method due to its nature to provide an empirical

[72] Bailey *Methods of Social Research* 33.
[73] Bailey *Methods of Social Research* 33.
[74] Stem and Kalof *Evaluating Social Sciences* 10.

observation and mathematical expression of quantitative relationships. In this method, evidence is evaluated, and theories and hypotheses are refined, technical advances are made, and so on.[75] Moreover, the quantitative method is defined as the numerical representation and manipulation of observations for the purpose of describing and explaining the phenomena that these observations reflect.[76]

1.6.2 The qualitative research method

The qualitative research method is a non-numerical examination and interpretation of observation for the purpose of discovering underlying meanings and patterns of relationships.[77] The major advantage of the qualitative research method is that it is efficient in that it is less time-consuming and it is more cost-effective as opposed to the quantitative method.[78]

This method of research is widely used in both the natural and social sciences.[79] It is the examination, analysis and interpretation of the observations for the sole purpose of discovering underlying meanings and patterns of relationships, including classifications of types of phenomena and entities in a manner that does not involve mathematical models.[80] In other words, it investigates the why and the how of the decision making, and not just the what, where and when aspects. The qualitative research method was appropriate for this study.

In conducting this study, the researcher used primary sources of law, such as the Constitution, statutes, cases, international laws and regional laws. The researcher also used secondary sources of law, including journal articles, books, chapters in books and other relevant documents on sexual harassment. The internet was used to find and access

[75] Stem and Kalof *Evaluating Social Sciences* 10-11.
[76] Phaz *The Role and Impact of the Judiciary in the Law making Process in South Africa* 34.
[77] Denzin and Lincoln *The Sage Handbook of Qualitative Research 54.*
[78] Denzin and Lincoln *The Sage Handbook of Qualitative Research 54.*
[79] Phaz *The Role and Impact of the Judiciary in the Law making Process in South Africa* 34.
[80] Denzin and Lincoln *The Sage Handbook of Qualitative Research 54.*

relevant content. For this research, the North-West University Potchefstroom Electronic Law Journal Referencing style was used.

1.7 Chapter outline

The research study consists of five interrelated chapters.

Chapter 1: Introduction

This chapter covers the background to the study, problem statement, motivation, research question, aims and objectives of the study, research methodology and framework of the study.

Chapter 2: International and regional legal frameworks on sexual harassment in the workplace

Chapter 2 examines the international and regional legal frameworks that address sexual harassment in the workplace, such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the International Labour Organisation (ILO) conventions and recommendations, and the African Charter on Human and Peoples' Rights.

Chapter 3: Legal framework on sexual harassment in the workplace in South Africa

Chapter 3 explores the legal framework on sexual harassment in the workplace in South Africa, such as the *Constitution of the Republic of South Africa,* the *EEA,* the *LRA, the Code of Good Practice on the Handling of Sexual Harassment Cases*, and relevant case law.

Chapter 4: Legal consequences for employees committing sexual harassment offences in the workplace

Chapter 4 analyses the legal consequences for employees who commit sexual harassment offences in the workplace, such as disciplinary actions, civil remedies and criminal

sanctions. It also discusses the challenges and gaps in the enforcement of the law and the protection of the victims.

Chapter 5: Conclusion and recommendations

This chapter concludes the research study and provides specific recommendations to address the current problem of sexual harassment in the workplace.

1.8 Relevance for the research unit

This research study discusses sexual harassment in the workplace in South Africa. Sexual harassment severely affects the victims in different ways and infringes on their constitutional rights, including equality, dignity, bodily integrity, privacy, psychological integrity and labour rights. Sexual harassment also negatively impacts on the perpetrators as severe punishments, such as dismissals, are implemented. This research study discusses cutting-edge and cross-cutting topics in labour law, specifically sexual harassment in the workplace, and thus falls under the Law, Justice and Sustainability Research Unit, specifically under the Vulnerable Societies research project in the Faculty of Law at the North-West University. The Law, Justice and Sustainability Research Unit addresses developmental and legal challenges in South Africa.[81]

1.9 Statement regarding ethics

The research study is a desktop analysis, primarily discussing primary and secondary sources of law. There are no interviews involving sensitive topics that can be embarrassing and upsetting. For this reason, an ethical clearance certificate from the Ethics Committee of the Faculty of Law was not required for this study.

1.10 Summary

The purpose of the study was to ascertain the law on sexual harassment in the workplace in South Africa and to further examine the problems surrounding this issue. In addition,

[81] North-West University 2022 https://law.nwu.ac.za/law-justice-and-sustainability/Home1.

the researcher attempted to introduce new measures/ways to curb sexual violence in the workplace. The following chapter will address international and regional perspectives on workplace sexual harassment in South Africa.

Chapter 2: International and regional legal framework on sexual harassment in the workplace

2.1 Introduction

Around the globe, inappropriate behaviour in the working environment is considered an infringement of women's privileges and nobility and is considered sexual orientation-based brutality.[82] Sexual harassment is currently observed as a mirror image of male predominance over women. Over the years, the global sphere has provided international guidelines and global norms to prevent sexual harassment in the workplace and spread awareness regarding the same.[83] The goal of achieving global equality must be upheld. Certain observations made by the international community, like the recognition of sexual harassment in the workplace as a form of human rights violation, are also considered as gender-specific violence.[84]

The value of human life, equality and dignity shall always be upheld. Gender-based violence includes sexual harassment in the workplace.[85] The legislation enacted in different countries for the protection of sexual harassment should define sexual harassment as a form of discrimination and a violation of the rights of women. The ILO has given specific attention to domestic workers and focuses on protecting their human rights, including safeguarding them against gender-based violence.[86]

Laws made in the international arena for the prevention of sexual harassment in the workplace provide a blueprint to increase equality between men and women as an inalienable human right.[87] In every workspace, provisions must be made to deal with cases of sexual harassment. Effective global norms have been formulated for the protection of women in the workplace.[88] The framework provided by the Convention

[82] Ayushi 2020 *Law Audience Journal* 2581-6705.
[83] Chinkin 1994 *European Journal of International Law* 326-341.
[84] Sigal 2006 *New York Academy of Sciences* 356-369.
[85] Netkova and Mustafa 2021 *Journal of Liberty and International Affairs* 111-122.
[86] Netkova an d Mustafa 2021 *Journal of Liberty and International Affairs* 111-122.
[87] Ayushi 2020 *Law Audience Journal* 2581-6705.
[88] Charlesworth and Chinkin 1991 *American Journal of International Law* 613-645.

Concerning Discrimination in Respect of Employment and Occupation 1958 aims to give everyone, irrespective of sex, race or creed, economic security, equal opportunities and a life of dignity.[89]

This convention has been adopted by many countries and has proved to be efficient. Other international standards and policies, such as the Indigenous and Tribal Peoples' Convention 1989, work to protect the tribal and socially marginalised people, especially women who cannot stand up for themselves as they may not be aware of their rights.[90]

Globally, the presence of sexual harassment victims is felt, and their rights should be protected.[91] Another important convention, which was a landmark convention passed by the UN, significantly impacting the international community and adopted by most countries, is the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW) 1979. This convention was framed with the intention to eliminate all kinds of discrimination against women and ensure equality.[92] Many countries ratified the CEDAW and have implemented it in their own jurisdictions. The CEDAW ensures the availability of social, political, cultural forms of equality and freedom to women.[93] This chapter will provide an analysis of the international and regional perspectives of law on sexual harassment.

2.2 International laws and policies addressing sexual harassment in the workplace

2.2.1 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW)

CEDAW was adopted in 1979 when awareness of sexual harassment in the workplace only started to emerge; therefore, it did not contain a specific prohibition.[94] However, in

[89] Ayushi 2020 *Law Audience Journal* 2581-6705.
[90] Mauro 2009 *international & Comparative Law Quarterly 957*-983.
[91] Liebenberg 1997 *Southern African Feminist Review* 27.
[92] Himat 2015 *International Journal of Gender and Woman's Studies 120*-137.
[93] Ayushi 2020 *Law Audience Journal* 2581-6705.
[94] Janet 2006 *Annals of the New York Academy of Sciences* 356-369.

its General Recommendation, the CEDAW characterised gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms, as discrimination.[95] Thus, the principles of CEDAW ensure that women enjoy the same rights as men. The Recommendation notes that equality in employment can be seriously impaired when women are subjected to gender-specific violence, such as sexual harassment in the workplace.[96]

The CEDAW was enacted with the intention to eliminate any kind of discrimination that exists between men and women and to provide equal rights to both genders.[97] Article 1 of the Convention states that it is the duty of the states to prevent any economic, social, political, cultural and civil rights discrimination. Article 3 states that with respect to the mentioned aspects, the states must maintain equality between men and women.[98]

One of the most important provisions, Article 6, expects state authorities to prevent trafficking in persons and prostitution. Article 7 promotes the participation of women in political activities in the public sphere or institutions.[99] Article 11 of the Convention determines to eliminate discrimination on the basis of sex in employment matters, and states the following: (a) the right to work is an inalienable right, (b) the right to same employment opportunity, (c) equal pay for the equal work, (d) right to free choice of employment or profession, (e) right to social security, and (f) maternity leave along with salary.[100]

At the Fourth World Conference on Women in Beijing (1995), the CEDAW was a central point of discussion, and a Platform for Action was adopted, which included provisions on sexual harassment in the workplace.[101] It calls on governments, trade unions, employers, community and youth organisations, and NGOs to eliminate sexual harassment. More

[95] CEDAW 1992 *General Recommendation No. 19: Violence against women*.
[96] Janet 2006 *Annals of the New York Academy of Sciences* 356-369.
[97] Khan and Haffez 2021 *Journal of Religious Studies* 1-23.
[98] *International Labour Organisation* (1919).
[99] Khan and Haffeez 2021 *Journal of Religious Studies* 1-23.
[100] *International Labour Organisation* (1919).
[101] Resnick 1995 *Afillia* 206-208.

specifically, governments are urged to enact and enforce laws and administrative measures on sexual and other forms of harassment in the workplace.[102]

2.2.2 Declaration on the Elimination of Violence against Women 1993

The 1993 General Assembly Declaration on the Elimination of Violence against Women affirms that violence against women constitutes a violation of women's rights and fundamental freedoms and calls on States to condemn it and to create a policy to eliminate it.[103] This plays a major role in the elimination of all forms of violence against women.

2.2.2.1 Discrimination (Employment and Occupation) Convention, 1958

This convention addresses discrimination in employment on a number of grounds, including sex, and requires that ILO member States declare and pursue a national policy designed to promote equality of opportunity and treatment with a view to eliminate discrimination.[104] Like CEDAW, the Convention was adopted before widespread awareness of the issue of sexual harassment.

However, in its general survey on this fundamental Convention concerning rights at work in light of the ILO Declaration on Social Justice for a Fair Globalization, 2008, the Committee of Experts on the Application of Convention and Recommendations (CEACR) affirmed that the Committee has consistently expressed the view that sexual harassment, as a serious manifestation of sex discrimination and a violation of human rights, is to be addressed within the context of the Convention.[105]

Moreover, the Committee stated that the elimination of sexual harassment should be an integral part of a legislative or other policies, independently of policies on discrimination on the basis of sex. Sexual harassment undermines equality in the workplace by calling into question the integrity, dignity and well-being of workers.[106] It damages an enterprise

[102] Paudel and Manusha 2023 *Historical Journal* 69-79.
[103] Joachim 1999 *Gender Politics in Global Governance* 142-160.
[104] Oelz 2014 *International Labour Review* 143-172.
[105] Oelz 2014 *International Labour Review* 143-172.
[106] Oelz 2014 *International Labour Review* 143-172.

by weakening the bases upon which work relationships are built and by affecting productivity.[107]

Given the gravity and serious repercussions of sexual harassment, the Committee recalls its general observation, highlighting the importance of taking effective measures to prevent and prohibit sexual harassment at work. Such measures should address both *quid pro quo* and hostile environment regarding sexual harassment, and the Committee's general observation provides further guidance in this regard.[108]

2.2.4. Indigenous and Tribal Peoples' Convention, 1989

This 1989 convention is an International Labour Organisation Convention, dealing with the tribal people in independent countries where their social, economic and cultural situations are different from those of other persons.[109] The objective of this Convention is to provide special protection, either in whole or partially, to the tribal groups to maintain their dignity and status by eliminating discrimination, as included in Article 1 of the Convention.[110] Article 2 further puts the responsibility to maintain the dignity of indigenous and tribal groups on the governments of the states.

Article 3 creates a legal duty for governments to provide equal rights and freedom without discrimination to all people in the country. Article 20 deals with recruitment and employment matters where, under Clause (1), it is stated that, according to the national laws, the government should cooperate to maintain the dignity and social, cultural and economic status of the people.[111] Clause (2) states that it is the duty of the Government to prevent discrimination between tribal communities from other communities. This convention prevents any gender-based violence, discrimination or conduct, including sexual harassment, especially against women.[112]

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[107] Oelz 2014 *International Labour Review* 143-172.
[108] Mallow 2013 *International Journal of Humanities and Social Sciences* 43-91.
[109] *International Labour Organisation* (1919).
[110] Lee 2015 *The Foundations of Modern International Law on Indigenous and Tribal Peoples* 343-358.
[111] Lee 2015 *The Foundations of Modern International Law on Indigenous and Tribal Peoples* 343-358.
[112] Lee 2015 *The Foundations of Modern International Law on Indigenous and Tribal Peoples* 343-358.

2.2.5. Convention Concerning Discrimination in Respect of Employment and Occupation, 1958

The aim of this convention is to ensure that all humans, irrespective of sex, race, creed, are treated equally and provided with opportunities and freedoms to maintain their dignity and economic security.[113] It comprises 6 Articles. Art 1(a) defines discrimination as the exclusion of any preference or distinction made based on sex, race, creed, religion or political opinion, which has the effect of nullifying equal opportunities in employment and occupation matters. Art 1(b) does not consider the inheritance of office under discrimination.[114]

Article 2 describes the meaning of employment and occupation, which includes vocational training and access to employment in a particular occupation. Article 3(a) states that it is the responsibility of the employer to implement policies of equal employment. Article 3(b) promotes educational policies and awareness campaigns. This convention relates to sexual harassment in the workplace as it aims to achieve employment equity and eradicate all forms of violence.[115]

2.2.6. International Labour Organisation (ILO) on sexual harassment in the workplace

2.2.6.1 What is sexual harassment in terms of the ILO?

Sexual harassment is a serious manifestation of sex discrimination and a violation of human rights, which is addressed in the context of the ILO Discrimination (Employment and Occupation) Convention 1958 (No. 111), under Convention No. 190. Sexual harassment is not defined, but it is clearly included within the definition of gender-based violence and harassment.[116] In terms of these conventions, sexual harassment can therefore encompass a range of behaviours and practices of a sexual nature, such as unwanted sexual comments or advances, "jokes", displaying pictures or posters

[113] *International Labour Organisation* (1919).
[114] Goran 2004 *The Raoul Wallenberg Institute Compilation of Human Rights Instruments* 433-437.
[115] Goran 2004 *The Raoul Wallenberg Institute Compilation of Human Rights Instruments* 433-437.
[116] Article 1(1)(b) *International Labour Organisation* (1919).

objectifying women, physical contact or sexual assault. Sexual harassment may be perpetrated by different individuals, including colleagues, supervisors, subordinates and third parties.[117] This convention further states that sexual harassment results in an unsafe and hostile work environment for the person experiencing it, as well as for witnesses and co-workers.

2.2.6.2 Who are the victims of sexual harassment in the workplace in terms of the ILO?

Sexual harassment can affect anyone in a working environment. However, it is often based on the abuse of power, and reported cases usually involve actions committed against women and perpetrated by men.[118] Furthermore, women from specific groups such as those with low socio-economic status, indigenous women, women from ethnic minorities, lesbian, bisexual, or gender non-conforming women, women migrant workers, women with disabilities and young women may face sexual harassment in specific ways.[119] This is due to the intersection or combination of factors or circumstances that can exacerbate the risk of violence and harassment.[120]

2.2.6.3 Preventive measures against sexual harassment in terms of the ILO

It is important to take effective measures to prevent and prohibit sexual harassment in the workplace. Sexual harassment is one of the most regulated forms of violence and harassment in the workplace environment,[121] and all 80 countries studied by the ILO regulate this phenomenon. Action against sexual harassment at work requires an inclusive, integrated and gender responsive approach, and legislative gaps need to be closed to ensure the effective prevention of and protection against sexual harassment.[122] For example, criminal law allows victims to seek police protection, but it is usually limited to sexual assault. It requires a high burden of proof and does not address the wide range of unacceptable behaviours and practices that sexual harassment includes. In practice,

[117] Mallow 2013 *International Journal of Humanities and Social Sciences* 43-91.
[118] Carlson and Olney 2021 *ABA Journal of Labor & Employment Law* 493-510.
[119] Carlson and Olney 2021 *ABA Journal of Labor & Employment Law* 493-510.
[120] Carlson and Olney 2021 *ABA Journal of Labor & Employment Law* 493-510.
[121] Hodges and McFerran 2018 *Journal of Industrial Relations* 246-265.
[122] Hodges and McFerran 2018 *Journal of Industrial Relations* 246-265.

prosecutions of sexual harassment under criminal law are rare and unlikely to succeed in a court of law.[123]

On the other hand, labour law can cover a wider range of behaviours, but its scope may be limited by the type of contract.[124] The scope of labour law is often limited to those with an employment contract and a strict employee-employer relationship, thus excluding independent contractors, trainees, volunteers, job applicants and others. Specific categories of workers may also be excluded, such as domestic workers or agricultural workers, despite being more exposed to the risk of sexual harassment.[125] As such, it is important to cover sexual harassment in different areas of law.

2.2.6.4 Violence and Harassment Convention, 2019

The Violence and Harassment Convention, 2019 (No. 190) was adopted by the ILO and seeks to address violence and harassment in the workplace. The Convention is groundbreaking as it recognises that violence and harassment at work can constitute a violation of human rights and present a threat to equal opportunities. It applies to all workers, irrespective of their contractual status, and covers all sectors, both private and public, including informal work.[126]

Article 1 of this convention defines "violence and harassment" as:

> "a range of unacceptable behaviours and practices that may result in physical, psychological, sexual, or economic harm"[127]

The Convention emphasises the importance of creating inclusive, safe and respectful workplaces, free from violence and harassment, and sets obligations for member States

[123] *International Labour Organisation* (1919).
[124] *International Labour Organisation* (1919).
[125] *International Labour Organisation* (1919).
[126] *International Labour Organisation* (2019).
[127] *International Labour Organisation* (2019).

to adopt laws, regulations and policies to prevent and address violence and harassment in the workplace.[128]

2.2.6.5 Recommendation No. 206 Concerning the Elimination of Violence and Harassment in the World of Work, 2019

The Recommendation Concerning the Elimination of Violence and Harassment in the World of Work, 2019 (No. 206) was adopted by the ILO alongside the Violence and Harassment Convention (No. 190). This recommendation provides essential guidance for the implementation of the Convention, offering practical measures that governments, employers and workers can adopt to prevent and address violence and harassment in the workplace.[129]

The recommendation applies to all workers across various sectors, including the informal economy. One of the key aspects of the recommendation is its emphasis on comprehensive prevention strategies.[130] It advocates for the implementation of risk assessments, awareness-raising campaigns, and training programmes to educate both employers and employees about the nature and impacts of violence and harassment in the workplace.[131] Furthermore, it calls for the establishment of support systems for victims, which include accessible reporting procedures, counselling services, and protection against retaliation for those who come forward.[132]

Lastly, the recommendation encourages the collection of data and research on incidents of violence and harassment to inform policies and actions.[133] By promoting monitoring and reporting mechanisms, the ILO aims to ensure that workplace safety and respect are prioritised, ultimately leading to a healthier work environment for all individuals.[134]

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[128] *International Labour Organisation* (2019).
[129] *International Labour Organisation* (2019).
[130] *International Labour Organisation* (2019).
[131] *International Labour Organisation* (2019).
[132] *International Labour Organisation* (2019).
[133] *International Labour Organisation* (2019).
[134] *International Labour Organisation* (2019).

2.2.7 Sexual harassment and Article 1 of Convention No. 190 and Recommendation No. 206

Article 1 of the Convention provides that, to prevent and address violence and harassment, fundamental principles and rights at work, including the right to non-discrimination, need to be respected, promoted and realised.[135] Specific measures are required under the instruments in the context of gender-based violence and harassment, including adopting prevention and protection measures such as workplace risk assessments that consider hazards and risks that arise from discrimination, abuse of power relations, and gender, cultural and social norms supporting violence and harassment.[136]

The Convention also calls for access for victims to gender-responsive, safe and effective complaint and dispute resolution mechanisms, support, services and remedies.[137] Details of possible support, services and remedies for victims of gender-based violence and harassment are set out in the Recommendation and include support to help them re-enter the labour market and counselling and information services. Sexual harassment is still widely tolerated in the world of work, and deeper societal change is needed.[138]

As recognised by the Convention, in order to address gender-based violence, it is necessary to tackle its underlying causes and risk factors.[139] These include gender stereotypes, multiple and intersecting forms of discrimination, and unequal gender-based power relations (Preamble).[140] In this regard, workers and employers and their organisations, play an essential role in building respectful, gender-responsive workplace cultures. This can be achieved through how a specific member State has adopted legislation, collective agreements and other measures aiming at breaking down the

[135] Politakis 2022 *International & Comparative Law Quarterly* 1-20.
[136] Ochieng and Kamau 2021 *International Journal of Law and Policy* 15-27.
[137] Ochieng and Kamau 2021 *International Journal of Law and Policy* 15-27.
[138] Ochieng and Kamau 2021 *International Journal of Law and Policy* 15-27.
[139] Ochieng and Kamau 2021 *International Journal of Law and Policy* 15-27.
[140] Ochieng and Kamau 2021 *International Journal of Law and Policy* 15-27.

climate of tolerance and impunity that often surrounds sexual harassment at the workplace.[141]

2.3 Regional legal framework on sexual harassment in the workplace

2.3.1 Legal framework on sexual harassment in the workplace in Europe

2.3.1.1 European Convention on Human Rights (ECHR)

The European Convention on Human Rights (ECHR), adopted in 1950, establishes fundamental human rights and freedoms, including the right to respect for private and family life as outlined in Article 8. Although the Convention does not explicitly mention sexual harassment, the European Court of Human Rights (ECtHR) has interpreted Article 8 as encompassing the right to protection against sexual harassment, recognising it as a violation of individual dignity and privacy.[142]

2.3.1.2 Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention)

The Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, commonly known as the Istanbul Convention, was adopted in 2011 and represents a significant treaty aimed at preventing and combating violence against women. Article 40 specifically addresses harassment in the workplace, mandating states to take necessary measures to prevent and combat all forms of harassment, including sexual harassment. The Convention emphasises the importance of awareness-raising, education and training to change societal attitudes and prevent violence.[143]

2.3.1.3 European Union (EU) Law

Within the European Union (EU) framework, various directives address sexual harassment in the workplace. Directive 2006/54/EC on Equal Opportunities and Equal Treatment of Men and Women in Matters of Employment and Occupation requires member States to

[141] Ochieng and Kamau 2021 *International Journal of Law and Policy* 15-27.
[142] *European Convention on Human Rights* (1950).
[143] *Council of Europe* (2011).

ensure that workers are protected against discrimination and harassment, including sexual harassment. This directive emphasises the obligation of employers to take preventive measures and provide an environment free from harassment.[144] Additionally, Directive 2019/1158 on Work-Life Balance for Parents and Carers promotes measures to prevent harassment and discrimination in the workplace, particularly against parents and caregivers.[145]

2.3.1.4 European Court of Justice (ECJ) Jurisprudence

The European Court of Justice (ECJ) has played a crucial role in interpreting EU directives related to sexual harassment. In landmark cases such as C-177/88 (Dekker)[146] and C-303/06 (Sooden)[147], the ECJ ruled that sexual harassment constitutes a form of discrimination and that member States must ensure effective remedies for victims.[148]

2.3.1.5 National Legislation

Each EU member State is responsible for implementing EU directives into national law. Consequently, many countries have established specific laws and regulations addressing sexual harassment in the workplace. For instance, the Sexual Harassment Act in the United Kingdom and the General Act on Equal Treatment in Germany provide comprehensive frameworks for preventing and addressing sexual harassment.[149]

2.3.1.6 Workplace Policies and Codes of Conduct

In addition to legal frameworks, many organisations in Europe have adopted internal policies and codes of conduct aimed at preventing sexual harassment in the workplace. These policies typically outline reporting procedures, investigation protocols, and

[144] *European Union* (2006).
[145] *European Union* (2019).
[146] *Dekker v Stichting Vormingscentrum voor Jong Volwassenen* (1990).
[147] *Sooden and Others v Minister van Justitie* (2008).
[148] *European Court of Justice* 1998; *European Court of Justice* 2006.
[149] UK Government, 1997; Germany Federal Ministry of Justice, 2006.

measures to support victims, contributing to a safer and more inclusive work environment.[150]

2.3.2 Legal framework on sexual harassment in the workplace in Africa

2.3.2.1 African Union's policies on sexual harassment in the workplace

In Africa, the most prevalent forms of Violence against Women and Girls (VAWG) reported and documented include, among others, Intimate Partner Violence (IPV), which manifests in physical, sexual or psychological violence by an intimate partner.[151] Sexual harassment activities include, among others, Female Genital Mutilation (FGM), which is a common cultural practice in some parts of Africa; early child and forced marriage where girls below 18 years are forced into marriage, as well as Sexual Violence in Conflict (SVC), which includes rape, sexual assault with violent physical assault, kidnapping, sexual slavery and forced prostitution in conflict situations.[152]

The persistence of VAWG in Africa is mainly associated with gender power relations reflected in well and commonly ascribed and accepted social norms, entrenched in patriarchal systems characterised by male dominance, unequal distribution of resources and power combined with social institutions that sustain gender inequality.[153] These norms, in the name of 'culture', dictate behaviours and attitudes that perpetuate stereotypes which are the most significant barriers to eliminating and preventing VAWG. Poverty and lack of income and assets add to women's vulnerability to violence.[154]

The rights of women to physical and psychological integrity are often compromised when women are subjected to violence and violations, which often happen in the context of

[150] *International Labour Organisation* (2019).
[151] Bushra 2020 *Health care for Woman International* 1294-1312.
[152] Bushra 2020 *Health care for Woman International* 1294-1312.
[153] *UN Women* (2020).
[154] Tornius 2022 *African Studies Review* 615-641.

violence against women, harmful traditional practices, poor health services and sexual violence during armed conflict.[155] The AU views Violence Against Women and Girls as one of the critical impediments to women's realisation of their fundamental rights, including the rights to life, human dignity, peace, justice, socio-economic and political development.[156] The AU implemented campaigns and conventions to prevent any oppression or sexual violence against women, including sexual harassment in the workplace. These conventions view sexual harassment as violence against women, which should be nullified.[157]

2.4 African jurisprudence on sexual harassment in the workplace

The African Court on Human and Peoples' Rights has dealt with various cases that touch on issues of human rights, including aspects related to sexual harassment and gender-based violence. For example, in *African Commission on Human and Peoples' Rights v. Libya*, the Court emphasised that states have an obligation to protect women from all forms of violence, including sexual violence, highlighting the need for laws and policies that promote gender equality.[158]

In *Femi Falana v. Nigeria*, the applicant argued that the Nigerian government failed to protect women's rights, specifically in terms of gender-based violence and sexual harassment.[159] The Court ruled that Nigeria had violated several provisions of the African Charter on Human and Peoples' Rights, including the rights to equality and non-discrimination, setting a precedent in holding states accountable for failing to protect individuals from sexual harassment and gender-based violence.[160]

[155] Tornius 2022 *African Studies Review* 615-641.
[156] Tornius 2022 *African Studies Review* 615-641.
[157] Tornius 2022 *African Studies Review* 615-641.
[158] African Court on Human and Peoples' Rights *African Commission on Human and Peoples' Rights v. Libya* (2017).
[159] African Court on Human and Peoples' Rights *Femi Falana v. Nigeria* (2019).
[160] African Court on Human and Peoples' Rights *Femi Falana v. Nigeria* (2019).

Additionally, In *P.M. v. United Republic of Tanzania*[161], the African Court on Human and Peoples' Rights addressed the critical issue of state accountability in cases of sexual violence against women. The applicant, a Tanzanian woman, alleged that national authorities had failed to properly investigate and prosecute her claims of sexual assault, thereby denying her justice and protection under the law.[162] The Court found that this inaction constituted a violation of several provisions of the African Charter on Human and Peoples' Rights, including the rights to dignity, equality before the law, and access to effective remedies.[163] It held that the Tanzanian government had an obligation not only to prevent and punish acts of sexual violence but also to ensure that victims have access to justice and adequate reparations.[164] The ruling reinforced the principle that states must take proactive and concrete measures to address sexual harassment and gender-based violence, including by ensuring that legal frameworks are responsive, law enforcement is effective, and survivors are supported through victim-sensitive procedures.

In *The Coalition of African Lesbians (CAL) v. Tanzania*, the Court examined the discrimination and violence faced by lesbian women, which often includes sexual harassment.[165] The judgment emphasised the need for states to address and combat discrimination and violence against marginalised groups, reaffirming the obligation of states to protect all individuals from violence and harassment.[166]

Lastly, in *A.H. v. Tanzania*, the Court ruled on the forced sterilisation of a woman living with HIV, underscoring issues related to women's rights and bodily autonomy.[167] While not directly a case of sexual harassment, it highlighted the Court's commitment to addressing gender-based violence.

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[161] African Court on Human and Peoples' Rights *P.M. v. Tanzania* (2021).
[162] African Court on Human and Peoples' Rights *P.M. v. Tanzania* (2021).
[163] African Court on Human and Peoples' Rights *P.M. v. Tanzania* (2021).
[164] African Court on Human and Peoples' Rights *P.M. v. Tanzania* (2021).
[165] African Court on Human and Peoples' Rights *the Coalition of African Lesbians (CAL) v. Tanzania* (2018).
[166] African Court on Human and Peoples' Rights *the Coalition of African Lesbians (CAL) v. Tanzania* (2018).
[167] African Court on Human and Peoples' Rights *A.H. v. Tanzania* (2018).

The African Court on Human and Peoples' Rights has demonstrated its commitment to addressing issues of sexual harassment and gender-based violence through various judgments. These cases reflect the Court's recognition of the systemic nature of gender inequality and the need for states to take proactive measures to protect individuals from violence and harassment.

2.5 African Commission on Human and Peoples Rights on sexual harassment in the workplace

The African Commission on Human and Peoples' Rights has taken on issues of sexual harassment that fall within the scope of human rights.[168] This commission safeguards the rights of lesbian, gay, bisexual, transgender, and questioning LGBTQ individuals in the workplace by eradicating any form of sexual orientation against them and preventing any conduct that threatens their human rights and identity in the workplace. The Commission further states that Africa-based nongovernmental organisations and human rights defenders involved with the Commission's work should be fully supported in speaking out. They should refer to this body of soft law and encourage local and regional leaders to apply African human rights standards to sexual orientation and gender identity issues.[169] The Commission should continue to interpret the African Charter in a manner that ensures the protection and promotion of human and peoples' rights for all Africans.[170]

2.6 Workplace policy on sexual harassment in the Southern African Development Community (SADC)

Any form of sexual harassment is discriminatory and a gross violation of the rights of the individual.[171] A committee, chaired by the Deputy Executive Secretary (DES) and including

[168] Isaack 2017 https://www.hrw.org/news/2017/06/01/african-commission-tackles-sexual-orientation-gender-identity.
[169] Isaack 2017 https://www.hrw.org/news/2017/06/01/african-commission-tackles-sexual-orientation-gender-identity.
[170] Isaack 2017 https://www.hrw.org/news/2017/06/01/african-commission-tackles-sexual-orientation-gender-identity.
[171] Eerdewijk and Van De Sand 2014 *Gender Equality Norms in Regional Governance: Transnational. Dynamics in Europe, South America and Southern Africa* 193-217.

representatives from the Administration and Human Resources Unit, shall be established to address any matters relating to sexual harassment. Procedures for confidentiality in managing sexual harassment cases shall be developed without delay. There shall be a focus on the prevention of sexual harassment through targeted action, including routine public staff awareness activities.[172] This corporate sexual harassment policy shall be well disseminated, and steps taken to create a conducive environment for women and men to report incidents of sexual harassment.[173]

2.6.1 SADC Protocol on gender and development

Article 22 of the protocol stipulates that state parties shall enact legislative provisions, adopt and implement policies, strategies and programmes which define and prohibit sexual harassment in all spheres, including the workplace and provide deterrent sanctions for perpetrators of sexual harassment. State parties shall ensure equal representation of women and men in adjudicating bodies hearing sexual harassment cases.[174]

2.6.2 Definition of sexual harassment in the SADC Parliamentary Forum

This section defines sexual harassment. It is important to note that the list below is not exhaustive, and that sexual harassment can include any conduct of a sexual nature which is unwanted and unwelcome by the recipient.[175] Sexual harassment is unwelcome conduct of a sexual nature which makes a person feel offended, humiliated and intimidated.[176] It includes situations where a person is asked to engage in sexual activity as a condition of that person's employment, as well as situations which create an environment which is hostile.[177]

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[172] Eerdewijk and Van De Sand 2014 *Gender Equality Norms in Regional Governance: Transnational. Dynamics in Europe, South America and Southern Africa* 193-217.
[173] Eerdewijk and Van De Sand 2014 *Gender Equality Norms in Regional Governance: Transnational Dynamics in Europe, South America and Southern Africa* 193-217.
[174] Malebakeng and Stone 2009 *African Human Rights Law Journal* 434-458.
[175] Mothepane and Selebogo 2013 *Gender and Behaviour* 5175-5196.
[176] Mothepane and Selebogo 2013 *Gender and Behaviour* 5175-5196.
[177] Mothepane and Selebogo 2013 *Gender and Behaviour* 5175-5196.

2.7 Conclusion

This chapter has examined the international and regional legal framework regarding sexual harassment. It is clear that international and regional frameworks regulate sexual harassment in the workplace as not just a private problem between the harasser and the victim, but as an issue that has implications for all employees and management in the workplace. Sexual harassment in the workplace encompasses various types of behaviour ranging from flirting and verbal remarks to physical contact and sexual advances.[178] It can manifest as a display of power, intimidation, or abuse from a superior or co-worker.

Moreover, the perception in different contexts and cultures of what constitutes sexual harassment in the workplace is extremely diverse.[179] To the extent that a society tolerates unwelcome sexual conduct of male members, the values of individuals within that society will develop accordingly. Attitudes of gender inequality are deeply embedded in many cultures, and sexual harassment of women in the workplace can be viewed as a violent expression of the cultural norm.[180] International and regional laws have clearly stated that discrimination against women and gender stereotypes in the workplace tend to perpetuate sexual harassment of women in the workplace. The next chapter will deal with the South African legal framework on sexual harassment.

[178] Ramsaroop and Parumasur 2007 *SA Journal of Industrial Psychology* 25-33.
[179] Ramsaroop and Parumasur 2007 *SA Journal of Industrial Psychology* 25-33.
[180] Ramsaroop and Parumasur 2007 *SA Journal of Industrial Psychology* 25-33.

Chapter 3: Legal framework on sexual harassment in the workplace in South Africa

3.1 Introduction

In South Africa, sexual harassment in the workplace is regarded as unwanted conduct of a sexual nature.[181] The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual. Although a single incident of harassment can constitute sexual harassment, sexual attention often becomes sexual harassment if the behaviour persists.[182]

Sexual harassment may include unwelcome physical, verbal or non-verbal conduct, but is not limited to the examples listed as follows.[183] Physical conduct of a sexual nature includes all unwanted physical contact, ranging from touching to sexual assault and rape, and includes a strip search by or in the presence of the opposite sex.[184] Verbal forms of sexual harassment include unwelcome *innuendo,* suggestions and hints; sexual advances; comments with sexual overtones; sex-related jokes or insults; or unwelcome graphic comments about a person's body made in their presence or directed toward them; unwelcome and inappropriate enquiries about a person's sex life; and unwelcome whistling directed at a person or group of person.[185]

In terms of the EEA, sexual harassment of an employee at work is a form of unfair discrimination and it is prohibited on any one or combination of grounds of unfair discrimination listed in the Act.[186] Sexual harassment is a form of unfair discrimination based on the grounds of sex, gender and or sexual orientation.[187]

[181] Kubjana 2020 *Obiter* 88-105.
[182] Kubjana 2020 *Obiter* 88-105.
[183] Kubjana 2020 *Obiter* 88-105.
[184] Molelemane 2014 https://www.news24.com/fin24/dealing-with-sexual-harassment-at-work-20140809
[185] Kubjana 2020 *Obiter* 88-105.
[186] *Employment Equity Act* 55 of 1998.
[187] *Employment Equity Act* 55 of 1998.

Sexual harassment also results in losses for employers, both in terms of productivity and efficiency, and has a detrimental effect on their brand and reputation.[188] Employers must also take note of the Draft Code of Good Practice on the Prevention of Violence and Harassment in the Workplace (Draft Code),[189] which expands upon the definition of workplace harassment and bullying and sets out further obligations for employers in relation to harassment in the workplace.[190] The comment period on the Draft Code has since closed and we await a further draft or a final code from the Department of Employment and Labour. This chapter analyses South African law on sexual harassment with reference to the Constitution, the relevant provisions embodied in the *LRA* regarding sexual harassment, the Code of Good Practice on Sexual Harassment, and most importantly, the provision of the *EEA* relating to sexual harassment in the workplace as a prohibited ground.[191] It also analyses the law on sexual harassment with reference to judgments from case laws, recent articles and other applicable legislation.

3.2 Legal framework addressing sexual harassment in the workplace in South Africa

The legal framework regulating sexual harassment consists of common law, the Constitution, the *LRA*, the *EEA*, as well as the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (The Code).[192]

The Bill of Rights, as outlined in the Constitution, guarantees a multitude of rights for everyone. In the context of sexual harassment, these rights include the rights to equality and freedom from discrimination in section 9 and the right to dignity in section 10.[193] In the case of *J v M,* the court recognised that sexual harassment violates the right to

[188] Smit 2022 *Law, Democracy & Development* 24-63.
[189] Smit 2022 *Law, Democracy & Development* 24-63.
[190] Smit 2022 *Law, Democracy & Development* 24-63.
[191] Smit 2022 Law, Democracy & Development 24-63.
[192] Khalema 2023 *de Rebus* https://www.derebus.org.za/eliminating-sexual-harassment-in-the-workplace-timesup-for-employers/.
[193] *Constitution of the Republic of South Africa*, 1996.

bodily integrity and personality in terms of section 12. Section 23 guarantees 'the right to fair labour practices.[194]

The *LRA*, as part of the legal framework on sexual harassment, is particularly applicable in cases of sexual harassment where there are claims of unfair labour practices and unfair dismissals. If an employee is dismissed on one of the grounds listed in section 187, such as misconduct due to committing sexual harassment offences,[195] the dismissal will be automatically unfair. This may happen, for example, where an employee is dismissed because they reported sexual harassment, as was the case in *Lynne Martin-Hancock v Computer Horizons*.[196] Section 186(1) also states that an employee may resign and claim constructive dismissal where an employer fails to address a report of sexual harassment.[197]

The *EEA* brings equity in the workplace, promoting fair treatment and eliminating unfair discrimination. Section 6 specifically prohibits any form of harassment and defines harassment as unfair discrimination.[198] Section 60 of the Act codifies vicarious liability and places a duty on the employer to take action in reported incidents of sexual harassment. It states that if the employer fails to take the necessary steps and the sexual harassment by an employee is proven, the employer must be held liable as though the employer had contravened the relevant provision.[199]

The Code of Good Practice on the Prevention and Elimination of Sexual Harassment in the Workplace is also the legal framework that came into effect in March 2022 and repeals the Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace.[200] The Code was published in terms of the *EEA* and follows the ratification by

[194] *J v M* 1989 10 ILJ 755 1989 (IC) 7571.
[195] *Labour Relations Act 66* OF 1995.
[196] *Lynne Martin-Hancock v Computer Horizons* (unreported case no NH 11/2/14268, 10-1994.
[197] *Lynne Martin-Hancock v Computer Horizons* (unreported case no NH 11/2/14268, 10-1994.
[198] *Employment Equity Act* 55 of 1998.
[199] *Employment Equity Act* 55 of 1998.
[200] Reg 5 in GN R1890 in GG 11409 of 18 March 2022.

South Africa of the International Labour Organisation's (ILO) Convention Concerning the Elimination of Violence and Harassment in the World of Work in November 2021.[201] This framework includes the following features:

- While 'sexual harassment' is not defined in the EEA, the Code provides a definition of 'sexual harassment'.
- It makes it clear that employers have an obligation to 'take proactive and remedial steps to prevent all forms of harassment in the workplace'.
- Employers are required to include the issue of harassment in orientation and training programmes in an accessible manner.
- It provides the 'minimum' provisions to be included in an employer's harassment policy.
- It refers to other legislation, which employers are required to comply with in order to prevent harassment in the workplace. These include the *Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000,* the *LRA,* the *Occupational Health and Safety Act 85 of 1993 (*hereafter the *OHSA)* and the *Protected Disclosures Act 26 of 2000.*
- It not only applies to employees in a formal workplace, but also to apprentices, volunteers, job applicants, interns, suppliers, contractors and even customers. The protection of employees is extended to work-related trips, training or social activities, work-related communications, and employer-provided accommodation.
- It provides detailed procedures as to how employers are required to handle reports of sexual harassment, providing for confidentiality and even additional sick leave for victims.[202]

The *OHSA,* another leading legal framework on sexual harassment, further addresses the issue of the protection and promotion of employees' health and safety.[203] Section 8 of

[201] Reg 5 in GN R1890 in GG 11409 of 18 March 2022.
[202] Reg 5 in GN R1890 in GG 11409 of 18 March 2022.
[203] *Occupational Health and Safety* Act 85 of 1993.

the OHSA provides that the employer must, as far as is reasonably practicable, provide and maintain a working environment that is safe and without risk to the health of employees.

3.3 Overview of sexual harassment in the workplace in South Africa

3.3.1 Who can be a victim or perpetrator of sexual harassment in the workplace?

Although our law mostly focuses on the relationship between the employer and the employee when it comes to victims and perpetrators of sexual harassment in the workplace, this is not always the case.[204] The ambit of who may be a victim or a perpetrator of sexual harassment in the workplace includes persons such as clients, job applicants, supervisors, contractors, owners, employees, employers and managers.[205]

3.3.2 Should the sexual harassment occur at the employer's workplace or within working hours in order for the employer to take disciplinary action?

In *Campbell Scientific Africa (Pty) Ltd v Simmers and Others*,[206] sexual harassment occurred away from the employer's premises and after working hours. The court held that the employer was entitled to discipline the employee as the sexual harassment occurred in the context of a work-related social event and affected the employment relationship.[207] Every employer in South Africa should implement robust disciplinary measures or steps in order to defeat this epidemic of sexual harassment in the workplace.

[204] *International Labour Organisation* (1919).
[205] Ristow and Mukheibir 2006 *Obiter* 245-262.
[206] *Campbell Scientific Africa (Pty) Limited v Simmers and others* [2015] JOL 34906 (LAC).
[207] *Campbell Scientific Africa (Pty) Limited v Simmers and others* [2015] JOL 34906 (LAC).

3.3.3 What is quid pro quo sexual harassment in the workplace?

Quid pro quo harassment occurs where a person influences or tries to influence an employee's employment situation (usually promotion or salary increase) by forcing or attempting to force the employee to surrender to sexual advances. This is unacceptable in our law as it creates undue influence on the surrendering employee.[208]

3.3.4 Why is it important to have a sexual harassment policy in place in the workplace, and what should the policy entail?

A sexual harassment policy assists in the elimination of sexual harassment in the workplace. It educates employees and provides for appropriate and consistent procedures to deal with sexual harassment and to prevent its recurrence. The contents of the sexual harassment policy and how it is communicated to employees are among the factors that will be considered when determining whether an employer took the necessary steps to eliminate sexual harassment.[209]

The sexual harassment policy should be guided by the Amended Code. It should record matters such as reporting, the obligations of the employer, advice and assistance available to a victim of sexual harassment, what procedures should be followed when sexual harassment has been reported, and the possible disciplinary sanctions if the perpetrator is found guilty of sexual harassment.[210] The sexual harassment policy must at least include the following statements:

- Sexual harassment is a form of unfair discrimination based on sex and gender or sexual orientation, which infringes the rights of the complainant and constitutes a barrier to equity in the workplace;

[208] Chicktay 2010 *Journal of African Law* 283-297.
[209] Chicktay 2010 *Journal of African Law* 283-297.
[210]Chicktay 2010 *Journal of African Law* 283-297.

- Sexual harassment in the workplace will not be permitted or condoned.

From the researcher's perspective, complainants in sexual harassment matters have the right to follow the procedures outlined in the policy, and appropriate action must be taken by the employer to prevent such offences from materialising in the future.[211]

3.3.5 What does the Protection from Harassment Act 17 of 2011 say about sexual harassment?

In section 1 of the Protection from Harassment Act, harassment is defined as any abusive, extreme, or rude behaviour that harms another individual or makes another person believe that he or she will suffer.[212] Generally, it can include physical, emotional, financial, or psychological harm. Harassment may be defined as any behaviour that includes observing, following, chasing, or accosting the complainant, such as lurking near or outside the complainant's home or office.[213] It also covers contact via written, verbal, and technological means of communication that might cause injury or make the complainant feel threatened in any manner.[214] When a complaint falls on deaf ears or the employer dismisses it as minor and fails to take prompt measures to prevent sexual harassment from worsening, the employer will be held accountable for damages. Furthermore, the employer's failure to aid the complainant may result in a claim for constructive dismissal.[215]

3.3.6 Who can apply for a harassment order under the Protection from Harassment Act?

Any individual who is harassed may petition the Magistrate's Court for the issuing of a protection order against the harasser under section 2 of the Protection from Harassment

[211] Chicktay 2010 *Journal of African Law* 283-297.
[212] Section 1 of the *Protection from Harassment Act* 17 of 2011.
[213] Section 1 of the *Protection from Harassment Act* 17 of 2011.
[214] Section 1 of the *Protection from Harassment Act* 17 of 2011.
[215] Section 1 of the *Protection from Harassment Act* 17 of 2011.

Act.[216] The application for the protection order can be made by the complainant or by another individual acting on their behalf with a written agreement. The act allows the court to decide whether to impose a protection order without obtaining written permission if the complainant cannot submit one.[217]

3.3.7 How does the Protection from Harassment Act protect victims of sexual harassment in the workplace?

This Act allows a complainant to obtain a protection order from the court to protect her or him from future harassment. A protection order is a court order that forbids the harasser from continuing with the unwanted and harmful conduct.[218]

The Act provides the following:

- The complainant may approach the court for a protection order.
- The complainant does not need the services of an attorney as assistance is given throughout the process by the clerk of the court.
- The court, by means of a protection order, is able to make a wide range of orders to ensure that the complainant is protected from further harassing conduct.[219]

3.3.8 What does the Employment Equity Act 55 of 1998 say about sexual harassment in the workplace?

This is the primary piece of legislation which provides a protective mechanism for employees.[220] As already discussed above, the *EEA*, in section 6, stipulates that no person may unfairly discriminate against another and that "harassment of an employee is a form

[216] Section 2 of the *Protection from Harassment Act* 17 of 2011.
[217] Section 2 of the *Protection from Harassment Act* 17 of 2011.
[218] Section 2 of the *Protection from Harassment Act* 17 of 2011.
[219] Section 3 of the *Protection from Harassment Act* 17 of 2011
[220] Section 2 of the *Employment Equity Act* 55 of 1998.

of unfair discrimination and is prohibited on anyone, or a combination of grounds of unfair discrimination".[221] These listed grounds include gender or any other arbitrary ground.[222]

This Act also sets out further practical details on the handling of sexual harassment cases, primarily through the Code of Good Practice on the Handling of Sexual Harassment, issued under the *EEA*. The Code also gives guidelines as to what type of conduct will be considered sexual harassment.[223]

The well-established forums available to employees to resolve labour disputes are also available in the case of sexual harassment in the workplace, in order to provide employees with an affordable, effective and easily accessible mechanism to deal with these issues. An employee may refer a dispute to the CCMA or the Labour Court for sexual harassment. If the CCMA provides an arbitration award, it can order compensation of up to 12 months' remuneration and damages of up to R205 433,30.[224]

The Labour Court can similarly order this level of compensation, but has the discretion to award unlimited damages.[225] The CCMA and Labour Court have shown themselves to be unsympathetic to employers who allow sexual harassment of their employees and have consistently found that in cases of sexual harassment leading to resignation by the victim, unfair dismissal (constructive dismissal) has occurred.[226] As such, employers should be aware that they have a positive obligation to ensure that their employees are not victims of constructive dismissals. Employers should adopt a sexual harassment policy in line with the Code of Good Practice on the Handling of Sexual Harassment, which should be effectively communicated to all employees. The policy must provide for clear procedures to deal with sexual harassment, which will enable the resolution of problems in an efficient, effective and sensitive way. Another critical issue for employers to consider is

[221] Section 40.
[222] *Employment Equity Act* 55 of 1998.
[223] Sections 54 and 55 of the *EEA* of 1998
[224] Sections 51 and 52 of the *EEA* 55 of 1998.
[225] *Shoprite Checkers (Pty) Ltd v JL and Others* (C886/17; C627/2018) [2021] ZALCCT 95; (2022) 43 ILJ 903 (LC) (10 December 2021)
[226] *Shoprite Checkers (Pty) Ltd v JL and Others* (C886/17; C627/2018) [2021] ZALCCT 95; (2022) 43 ILJ 903 (LC) (10 December 2021) para 34.

that instances of sexual harassment of their employees may lead to direct liability on their part.[227] This could be based on the fact that the employer could be held vicariously liable for the conduct of employees who committed acts of sexual harassment against a colleague, or due to the provisions of the *EEA*, requiring that all employers must take steps to eliminate unfair discrimination in any employment policy or practice.[228]

Complainants should never feel that their grievances are ignored or trivialised, nor fear reprisals.[229] Furthermore, grievances must be handled confidentially to protect the identities of the parties involved. Section 11 of the Promotion of Equality and Prevention of Unfair Discrimination Act states that no one may subject any person to harassment.[230] This Act safeguards the dignity of sexual harassment victims by prohibiting any conduct that may lead to sexual harassment.

3.4. Early developments in what constitutes sexual harassment in the workplace

The early jurisprudence in sexual harassment cases in South African courts, mostly involved employees who were dismissed for sexually harassing co-employees.[231] Many of these cases addressed the question of whether the alleged harassers had been unfairly dismissed and whether their conduct constituted sexual harassment.[232] From there, the courts established one of the foundational principles, namely that a single incident is sufficient to amount to sexual harassment.[233] The theme of a 'power difference' between perpetrator and complainant also features in earlier cases.

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[227] *Shoprite Checkers (Pty) Ltd v JL and Others* (C886/17; C627/2018) [2021] ZALCCT 95; (2022) 43 ILJ 903 (LC) (10 December 2021) para 32.
[228] *Shoprite Checkers (Pty) Ltd v JL and Others* (C886/17; C627/2018) [2021] ZALCCT 95; (2022) 43 ILJ 903 (LC) (10 December 2021) para 43.
[229] *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000.
[230] *Promotion of Equality and Prevention of Unfair Discrimination Act 4* of 2000.
[231] Nana 2008 *Journal of African Law* 245-267.
[232] Khalema *De Rebus* 2023 https://www.derebus.org.za/eliminating-sexual-harassment-in-the-workplace-timesup-for-employers/.
[233] Nana 2008 *Journal of African Law* 245-267.

J v M Ltd [234] is often referred to as the first reported case on sexual harassment in South Africa (SA). In this case, the court upheld the dismissal of a senior executive employee who was asked to resign after being found guilty of sexually harassing several of his female co-workers.[235] Here, the court described sexual harassment as unwanted sexual attention in the employment environment.[236] Although there was no legislation at that time, specifically with regard to sexual harassment in the workplace, the court recognised the devastating effect that sexual harassment had on victims. It commented that sexual harassment violates the right to bodily integrity and personality, and that it creates an intimidating, hostile and offensive work environment. The court also established that a single incident could constitute sexual harassment.[237]

3.5 Vicarious liability and the employer's duty to provide a safe working environment

In *Grobler v Naspers Bpk en 'n Ander,*[238] the common law concept of vicarious liability made its way into the sexual harassment jurisprudence. Grobler was sexually harassed by her immediate supervisor while employed by Naspers.[239] She suffered an emotional breakdown and, as a result, could no longer work. She instituted a claim against her employer in the High Court, claiming that the employer had failed to provide a safe working environment and was thus vicariously liable for her supervisor's actions and the damages she suffered.[240]

In another case of *Media 24 Ltd and Another v Grobler,*[241] the court confirmed that an employer was required to take reasonable measures to prevent sexual harassment, and if there is a failure to provide such protection, the employer would be liable to compensate

[234] *J v M* 1989 10 ILJ 755 1989 (IC) 7571.
[235] *J v M* para 22.
[236] *J v M* para 23.
[237] *J v M* para 23.
[238] *Grobler v Naspers Bpk en 'n Ander* (2004) 25 ILJ 439 (C).
[239] *Grobler v Naspers Bpk en 'n Ander* (2004) 25 ILJ 439 (C) para 34.
[240] *Grobler v Naspers Bpk en 'n Ander* (2004) 25 ILJ 439 (C) para 32.
[241] *Media 24 Ltd and Another v Grobler* [2005] 3 All SA 297 (SCA) para 23.

a victim for harm suffered.[242] The Supreme Court of Appeal held that in terms of the common law, employers owed their employees a duty of reasonable care for their safety, which duty not only extended to physical safety, but also against psychological harm, which may manifest itself in the form of sexual harassment. Time and again, employers who are found lacking in the way they handle or fail to handle cases of sexual harassment in their workplace have been held vicariously liable.[243]

3.6 Unfolding sexual harassment's true nature: a symbol of power

In the recent cases of *Erasmus v Beyers Naude Municipality* and *McGregor v Public Health and Social Development Sectoral Bargaining Council and Others*,[244] the pronouncements made by the judiciary sent out a clear message that sexual harassment had no place in the workplace and would not be tolerated. In the former case, the employer, a municipality in the Eastern Cape, failed to address complaints of sexual harassment and was ordered to pay R 3 998 955 to the complainant.[245] This should be used as a reference and a lesson that sexual harassment has no place in our society, and we should take measures to prevent it.

This further entrenches employers' vicarious liability for failing to put in place proper measures to address sexual harassment. In the latter case, the CC significantly reduced the amount of damages[246] awarded to a senior employee of the Western Cape Department of Health who was found guilty of sexually harassing an intern under his supervision. He was bold enough to appeal due to a minor deviation in the disciplinary procedure.[247]

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[242] *Media 24 Ltd and Another v Grobler* [2005] 3 All SA 297 (SCA) para 24.
[243] *Media 24 Ltd and Another v Grobler* [2005] 3 All SA 297 (SCA) para 26.
[244] *Erasmus v Beyers Naude Municipality* unreported case no 828/2011, 13-4-2021).
[245] *Erasmus v Beyers Naude Municipality* unreported case no 828/2011, 13-4-(2021) para 45.
[246] *McGregor v Public Health and Social Development Sectoral Bargaining council and Others* 2021 (5) SA 425 (CC) para 44.
[247] *McGregor v Public Health and Social Development Sectoral Bargaining council and Others* 2021 (5) SA 425 (CC) para 45.

The court highlighted the fact that sexual harassment is often about a display of power. Khampepe J said, "At its core, sexual harassment is concerned with the exercise of power and in the main reflects the power relations that exist both in society generally and specifically within a particular workplace."[248] This sentiment is backed by extensive research, showing that sexual harassment has less to do with sex than it does with power and fear. It is a way to keep women in their place.[249]

3.7. Case law review on sexual harassment in the workplace

In *SA Metal Group (Pty) Ltd v CCMA*,[250] the (male) alleged perpetrator had asked the complainant, a female colleague, whether she was offering to play with him and had further mentioned that he could not wait for summer to see her strut her stuff.[251] The complainant, for her part, had on one occasion sent a "Little Love" card to the alleged perpetrator as a birthday wish. The Commissioner did not find the alleged perpetrator's statements to be sexually harassing but instead regarded the claim for sexual harassment to be nothing other than a fabrication. The Commissioner found that the comments did not contain any explicit sexual connotations and that the complainant did not make the proposer aware that the verbal banter was unwelcome.[252]

In *Rustenburg Platinum Mines Ltd v United Association of SA on behalf of Pietersen*,[253] a male colleague suggested that he stayed with Ms Kgole and helped her pay expenses, and on several occasions, proposed to have sex with her. She consistently rejected these advances but never reported them as required by law. Internal disciplinary processes

[248] *McGregor v Public Health and Social Development Sectoral Bargaining council and Others* 2021 (5) SA 425 (CC) para 56.
[249] *McGregor v Public Health and Social Development Sectoral Bargaining council and Others* 2021 (5) SA 425 (CC) para 56.
[250] *SA Metal Group (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* C350/13) [2014] ZALCCT 68; (2014).
[251] *SA Metal Group (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* (C350/13) [2014] ZALCCT 68; (2014) para 34.
[252] *SA Metal Group (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others* (C350/13) [2014] ZALCCT 68; (2014) para 35.
[253] *Rustenburg Platinum Mines Limited v UASA obo Pietersen and Others* (JR641/2016) [2018] ZALCJHB 72.

found his actions to amount to sexual harassment and dismissal was recommended.[254] The aggrieved Pietersen referred the matter to the CCMA and was vindicated by the Commissioner who ordered reinstatement and compensation. In support of the decision, the Commissioner held that the conduct appeared to be a love proposal and that the docile conduct displayed by the complainant was inviting; at no point did she raise or report the incident as required by law. The Labour Court dismissed this reasoning and held that sexual harassment had taken place.[255]

In *Campbell Scientific Africa (Pty) Ltd v Simmers*, Mr Simmers, a 48-year-old installation manager employed by the appellant, was dismissed following a disciplinary hearing for unprofessional conduct and sexual harassment.[256] According to the evidence, Mr Simmers said to Ms Markides something along the lines of "Do you need a lover tonight? and when she did not reciprocate, he said, "In case you change your mind, just knock at my door."[257] The CCMA found Mr Simmers' conduct to be harassment of a sexual nature. Mr Simmers took the matter under review to the Labour Court, where it was found that sexual harassment had not taken place. In the view of the Labour Court, as per Steenkamp J, Mr Simmers' conduct did not cross the Rubicon line, as it had been a single unreciprocated sexual advance.[258] The above case tells us that sexual harassment can also be verbal in a way that people can make sexual remarks that may be unlawful.

In *Vodacom Service Provider Company (Pty) Ltd v Phala*,[259] the alleged perpetrator was said to have exposed her artificial breast to the complainants (allegedly after they requested her to do so). She also called the complainants to her office to measure the

[254] *Rustenburg Platinum Mines Limited v UASA obo Pietersen and Others* (JR641/2016) [2018] ZALCJHB 72 para 23.
[255] *Rustenburg Platinum Mines Limited v UASA obo Pietersen and Others* (JR641/2016) [2018] ZALCJHB 72 para 23.
[256] *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (CA 14/2014) [2015] ZALCCT 62 (23 October 2015) para 24.
[257] *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (CA 14/2014) [2015] ZALCCT 62 (23 October 2015) para 34.
[258] *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (CA 14/2014) [2015] ZALCCT 62 (23 October 2015) para 34.
[259] *Vodacom Service Provider Company (Pty) Ltd v Phala* (JR2178/05) [2007] ZALC 13 (7 March 2007).

size of their manhood,[260] which allegedly stemmed from a conversation between the complainants and the accused. She then pinched the complainants' bottoms, grabbed one of the complainants by his crotch, tried to pull off his belt, grabbed one of their cellular phones, placed it underneath her skirt, took a picture of her private parts and showed it to one of them. She was dismissed after the disciplinary hearing.[261]

In the case of *Liberty Group Limited v M*,[262] the accused had touched the complainant, rubbed his manhood against her body, and forced a kiss on her, despite clear disapproval from her. She lodged a complaint in terms of section 60 of the *EEA*, and then resigned in desperation when it was clear that her complaint was not receiving any attention.[263]

On 10 November 2022, the Labour Appeal Court, in Gqeberha, handed down the judgment in *Amathole District Municipality v CCMA,*[264] in which the Court clarified the principles of dealing with cases of alleged sexual harassment in the workplace by an employer.[265] The complainant alleged that she was sexually harassed by her manager, with whom she shared an office. She alleged that her manager subjected her to multiple acts of sexual harassment including a request that she performed oral sex on him. The complainant said she did not resist because she feared dismissal as her manager was senior and had authority over her. The manager denied the allegations and said the conduct was consensual.[266]

The complainant referred an unfair discrimination case in terms of the *EEA* to the CCMA and claimed compensation for the unfair discrimination. The CCMA found that the

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[260] *Vodacom Service Provider Company (Pty) Ltd v Phala* (JR2178/05) [2007] ZALC 13 (7 March 2007) para 23.
[261] *Vodacom Service Provider Company (Pty) Ltd v Phala* (JR2178/05) [2007] ZALC 13 (7 March 2007) para 34.
[262] *Liberty Group Limited v Moosa* (126/2021) [2023] ZASCA 52 (14 April 2023).
[263] Liberty Group Limited v Moosa (126/2021) [2023] ZASCA 52 (14 April 2023) para 56.
[264] *Amathole District Municipality v Commission for Conciliation, Mediation and Arbitration and Others* (PA9/2018) [2022] ZALAC 119; (2023).
[265] *Amathole District Municipality v Commission for Conciliation, Mediation and Arbitration and Others* (PA9/2018) [2022] ZALAC 119; (2023) para 53.
[266] *Amathole District Municipality v Commission for Conciliation, Mediation and Arbitration and Others (*PA9/2018) [2022] ZALAC 119; (2023).

complainant had indeed been subjected to sexual harassment and that there was no reason to believe that the complainant had fabricated the allegations.[267] The CCMA found that the evidence of the shop steward corroborated that of the complainant, while the manager's evidence was rejected as flimsy and unbelievable.

From the researcher's perspective, this judgment crystallises two important principles, which are significant for employers to bear in mind. First, the credibility of evidence regarding the alleged sexual harassment must be proven on a balance of probabilities and not simply be taken for granted (as happened in *Amathole District Municipality v Commission for Conciliation, Mediation and Arbitration and Others*). Secondly, the credibility of witnesses must be carefully assessed. In this regard, their behaviour is important, but so is any other evidence regarding the surrounding circumstances.

3.8 Conclusion

South Africa has developed a variety of legal interventions to deal with sexual harassment in workplaces.[268] Legislation and codes of good practice have established accessible procedures (formal or informal) and advice desks, enabling complainants to report their grievances to relevant authorities or institutions. These measures also provide guarantees to victims of sexual harassment to protect them against vengeance from perpetrators or other persons. Additionally, they promise confidentiality in cases that involve sexual harassment in the workplace. Despite these strategies, sexual harassment in the workplace is still prevalent and needs to be eradicated. Therefore, the existing legal measures aimed at eliminating sexual harassment in the workplace are inadequate and insufficient to address this pervasive issue.

[267] *Amathole District Municipality v Commission for Conciliation, Mediation and Arbitration and Others (*PA9/2018) [2022] ZALAC 119; (2023) para 13.
[268] *Amathole District Municipality v Commission for Conciliation, Mediation and Arbitration and Others (*PA9/2018) [2022] ZALAC 119; (2023) para 26.

Employees who are victims of sexual harassment in the workplace may often resign and claim constructive dismissal.[269] This occurs when the working environment has become intolerable for the victims of sexual harassment to continue to work. What is apparent from the cases discussed above is that most of the victims are women in lower levels of employment. Perhaps one of the solutions to eradicate sexual harassment in the workplace can be to empower women and assist them to aspire to and occupy leadership positions. There is a need to create a strong sexual harassment policy that is properly drafted in line with the Code of Good Conduct and to clearly communicate it to all employees. This can be a tool to create a safe working environment and avoid or restrict the employers' vicarious liability for sexual harassment cases in the workplace. The policy on sexual harassment must protect all employees and discourage perpetrators from engaging in these actions. The next chapter will address the legal consequences, procedures of sexual harassment offences, the position of employees who are victims of sexual harassment, as well as measures against employees/employers who commit sexual harassment offences in the workplace.

[269] *Shoprite Checkers (Pty) Ltd v JL and Others* (C886/17; C627/2018) [2021] ZALCCT 95; (2022) 43 ILJ 903 (LC) (10 December 2021).

Chapter 4: Legal consequences for employees committing sexual harassment offences in the workplace

4.1 Introduction

Sexual harassment creates an offensive and very often an intimidating work environment that undermines the dignity, privacy and integrity of the victim, and creates a barrier to substantive equality in the workplace.[270] It is the most heinous misconduct that plagues a workplace.[271] Employers have a legal duty to provide a safe working environment, show respect to victims and take steps to eliminate sexual harassment, including implementing policies in line with the *EEA* and the Code of Good Practice.[272]

Sexual harassment is not a new phenomenon in South Africa, but until recently, nothing significant was done to address it. The problem is currently being addressed through legislation aimed at preventing and eradicating sexual harassment in the workplace.[273] Employers have a crucial role to play in eradicating this epidemic in their workplaces. They must apply robust measures to effectively address and prevent sexual harassment.[274]

Sexual harassment in the employment environment is an area of great concern. With the advent of new legislation, a positive duty has been placed on employers to take steps to combat the problem.[275] Recent decisions have spelt victory for victims of sexual harassment while sending out a clear message to perpetrators and employers.[276]

There have been recent legislative and non-legislative attempts to deal with sexual harassment, especially in the employment context.[277] A striking legislative attempt was

[270] *Rustenburg Platinum Mines Limited v UASA Obo Steve Pietersen* Jr 641/2018 para 24, 25 & 27.
[271] *Rustenburg Platinum Mines Limited v UASA Obo Steve Pietersen* Jr 641/2018 para 24, 25 & 27.
[272] *Rustenburg Platinum Mines Limited v UASA Obo Steve Pietersen* Jr 641/2018 para 24, 25 & 27.
[273] Govender 2005 *International Journal of Discrimination* 229-251.
[274] Govender 2005 *International Journal of Discrimination* 229-251.
[275] Govender 2005 *International Journal of Discrimination* 229-251.
[276] Kim and Motsei 2002 *Social Science & Medicine* 1243-1254.
[277] Smit and Du Plessis 2011 *Potchefstroom Electronic Law Journal* 173-217.

the introduction of the Code of Good Practice on the Handling of Sexual Harassment Cases (hereinafter referred to as 'the Code') issued under section 203(1) of the *LRA*. Many non-governmental organisations are also addressing the problem by conducting workshops and training employers to deal with the problem.[278]

This chapter will deal with the legal consequences for perpetrators of sexual harassment offences in the workplace environment in South Africa. It will also discuss the measures available to victims of sexual harassment at the workplace.

4.2 Statutory remedies for sexual harassment offences in the workplace

4.2.1 The Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace

The Code requires employers to develop clear procedures to deal with sexual harassment. Employees must be informed of the options available to them to resolve a problem relating to sexual harassment.[279] The procedures can be formal and informal. If the informal procedure is chosen, the victim will have the opportunity to explain to the harasser that his or her behaviour is not welcome, that it offends him or her, or makes him or her uncomfortable, and that it interferes with his or her work.[280]

The formal procedure is the employer's disciplinary procedure. The employee must know how and with whom the grievance is to be lodged, the time period within which to lodge the grievance, and what to do if the problem is not resolved satisfactorily.[281] If the company's internal procedures do not result in proper resolution, either party may, within 30 days of the dispute having arisen, refer the matter to the CCMA for conciliation in accordance with section 135 of the *LRA*.[282]

If the dispute still remains unresolved, either party may refer the dispute to the Labour Court within 30 days of receipt of the certificate issued by the Commissioner in terms of

[278] Smit and Du Plessis 2011*Potchefstroom Electronic Law Journal* 173-217.
[279] Botes 2015 *Identifying Sexual Harassment in the Workplace* 2.
[280] Botes 2015 *Identifying Sexual Harassment in the Workplace* 2.
[281] Botes 2015 *Identifying Sexual Harassment in the Workplace* 2.
[282] Botes 2015 *Identifying Sexual Harassment in the Workplace* 2.

section 135(5) of the Act. It is important to note here that a victim has the right to institute separate criminal and civil proceedings against a perpetrator. Such rights are not limited by the Code.[283]

4.2.2 The LRA 66 of 1995 approach

A victim may also seek relief in terms of the *LRA*. Victims of sexual harassment who quit their jobs because of a hostile work environment and who can show that the environment was created by the negligence of the employer are also covered by a constructive dismissal provision.[284] The court or the arbitrator in such a situation may make one of the following orders: reinstatement of the employee from a date not earlier than the date of dismissal, re-employment of the employee in the same, or other reasonably suitable position, and compensation. The court may also order that the victim be compensated for lost income or benefits. The researcher argues that the LRA should be amended to include robust measures for perpetrators who commit sexual offences at the workplace.

4.2.3 The Employment Equity Act 55 of 1998 approach

The *EEA* imposes a duty on all employers to protect their employees against offensive conduct, and failure to do so is a violation of the law. For the purposes of this Act, the employer's failure to address a complaint of sexual harassment constitutes discrimination in the workplace.[285]

In a case where the Labour Court decides that an employee has been unfairly discriminated against, the Court has the power, in terms of section 50(2) of the EEA, to make an order that is just and equitable in the circumstances.[286] Such an order may include the payment of compensation by the employer to the employee, payment of damages by the employer to the employee, or an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice from occurring in the

[283] Botes 2015 *Identifying Sexual Harassment in the Workplace* 2.
[284] Livingston 1982 *Journal of Social Sciences* 5-22.
[285] Zalesne 2001 *South African Journal of Human Rights* 503-530.
[286] Kubjana 2020 *Obiter* 88-105; *Employment Equity Act* 55 of 1988.

future in respect of other employees.[287] The steps or measures available to victims of sexual harassment are outlined in section 6(3) of the *EEA*, which treats sexual harassment as an instance of unfair discrimination. This should always be applied by employers as a defence against sexual harassment cases.[288]

4.3 Civil law remedies applicable for sexual harassment cases in the workplace

A victim of sexual harassment may seek redress either in the law of delict or in the law of contract.[289] In terms of the law of delict, a victim may claim damages for the wrongful and intentional impairment of his/her physical integrity, dignity or reputation.[290] Damages may be claimed in respect of pecuniary losses already suffered, future pecuniary losses, as well as general damages. The relief provided here is much wider than that provided by the law of contract.[291]

The other advantage is that the plaintiff is required to prove the defendant's liability on a balance of probabilities and not beyond a reasonable doubt, as is the case in criminal law. With regard to the law of contract, an employer who wrongfully and without justification dismisses an employee will be liable for damages for breach of contract. Sexual harassment (depending on the form it takes) may constitute a sufficiently serious breach to allow the aggrieved employee to terminate the contract of employment and seek relief.[292]

The court may order reinstatement or award damages.[293] The amount of damages awarded would be the actual loss suffered, such as the amount due to the employee for

[287] *Employment Equity Act* 55 of 1998.
[288] Section 6 of the EEA 55 of 1998.
[289] Seenarayan *A Critical examination of the pandemic of sexual harassment in the South African workplace* 2017.
[290] Seenarayan *A Critical examination of the pandemic of sexual harassment in the South African workplace* 2017.
[291] Snyman 2002 *Acta Academica* 196-221.
[292] Seenerayan *A Critical examination of the pandemic of sexual harassment in the South African workplace* 2017.
[293] Seenerayan *A Critical examination of the pandemic of sexual harassment in the South African workplace* 2017.

the unexpired period of the contract, less any amount that the employee earned or could reasonably have earned in similar employment during such period.[294] The contractual remedy can only be used if the victim has been dismissed or has terminated her contract of employment.[295] As mentioned above, this remedy is much narrower than that provided for in the law of delict. Here, a person may only claim for actual losses suffered and not for future losses or sentimental damages.

Sexual harassment violates an individual's fundamental right to equality, bodily integrity (*corpus*) and dignity (*dignitas*), and creates a barrier to substantive equality in the workplace.[296] The researcher argues that sexual harassment has been characterised by the court in *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* as the most heinous misconduct that plagues a workplace.[297]

The psychological effect of sexual harassment can be severe and debilitating, affecting the well-being of the employee and leading to reduced productivity, commitment and work performance as well as creating an intimidating and hostile work environment.[298] It is common for employees to rather resign than be subjected to sexual harassment.[299]

In terms of the common law, the wrongdoer as well as the wrongdoer's employer may be held liable for the sexual harassment. An employer is held vicariously liable for the wrongful conduct of his or her employee.[300] This is due to the fact that the employer has a common law duty to protect employees against harm, and in this case sexual harassment, in the workplace.[301] In terms of sexual harassment in the workplace, the employer must determine whether the offence took place within the work premises and within the scope of the working hours.

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[294] Manamela 2018 *Pretoria Student Law Review* 95.
[295] Manamela 2018 *Pretoria Student Law Review* 95.
[296] Manamela 2018 *Pretoria Student Law Review* 95.
[297] *Campbell Scientific Africa (Pty) Ltd v Simmers & Others* (2016) 37 ILJ 116 (LAC).
[298] Squelch 2001 *Perspective in Education* 137-149.
[299] Squelch 2001 *Perspective in Education* 137-149.
[300] Calitz and De Villers 2020 *South African Law Journal* 72-107.
[301] Calitz and De Villers 2020 *South African Law Journal* 72-107.

According to the case in *Media 24 v Grobler,*[302] it is clear that the legal convictions of the community require an employer to take reasonable steps to prevent the sexual harassment of its employees in the workplace. The employer is obliged to compensate the victim of sexual harassment for the harm he or she has suffered due to its negligence. Sexual harassment is totally unacceptable at any level within the workplace environment.

In the instance where, as a result of the sexual harassment, an employee has suffered an occupational detriment (for example, being dismissed, demoted, suspended, resigning, or being refused a promotion or salary increase), such employee has a right to approach a court and claim pecuniary loss from the wrongdoer in the form of loss of income or earning capacity.[303] Moreover, where an individual has been hospitalised or has received psychological therapy as a result of the sexual harassment, he or she has a right to claim the medical costs incurred.[304]

In the instance where the individual has suffered mentally and psychologically as a result of the sexual harassment, he or she has a right to claim non-pecuniary loss in the form of general damages as a result of the pain and suffering, loss of amenities of life and psychological trauma incurred as a result of the sexual harassment.[305]

4.4 Criminal law remedies and measures to be applied for sexual harassment cases in the workplace

Some forms of sexual harassment constitute criminal acts, such as rape, attempted rape, common assault, assault with intent to do grievous bodily harm, indecent assault, *crimen iniuria,* and extortion.[306] The accused can be prosecuted for such acts under criminal law. The action is brought against the accused personally. Where the victim also seeks

[302] *Media 24 and Another v Grobler* (2005) 3 All SA 297 (SCA).
[303] *Media 24 and Another v Grobler* (2005) 3 All SA 297 (SCA).
[304] *Media 24 and Another v Grobler* (2005) 3 All SA 297 (SCA).
[305] *Media 24 and Another v Grobler* (2005) 3 All SA 297 (SCA).
[306] Govender 2005 *International Journal of Discrimination* 229-251.

to attribute liability to the employer, the employer will have to be charged as an accomplice.[307]

The employer in this situation will be liable as an accomplice if he knew that one employee was sexually harassing another employee by committing any of the crimes mentioned above and he impliedly authorised or encouraged such conduct.[308] An employer who has knowledge of sexual harassment being committed by one employee against another, but refrains from doing anything to stop it, may also be held liable as an accomplice because he has a legal duty to control the actions of his employees and provide a safe working environment.[309]

4.5 Labour remedies applicable to sexual harassment cases in the workplace

The labour route provides another legal avenue available to a victim of sexual harassment based on legislation that has been adopted to protect employees against sexual harassment in the workplace.[310] In terms of this route, an employee may approach the Commission for Conciliation, Mediation and Arbitration to enforce his or her rights.[311]

It is common knowledge that sexual harassment impedes equal opportunity and fair treatment in the workplace.[312] Unfair discrimination means differential treatment of an individual in the workplace that is discriminatory in nature (for example, on the basis of sex, gender, or sexual orientation), which cannot be justified and impairs the dignity of the individual.[313] The *EEA* and the Code of Good Practice on the handling of sexual harassment prohibit sexual harassment in the work environment on the basis that it constitutes unfair discrimination.[314]

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[307] Govender 2005 *International Journal of Discrimination* 229-251.
[308] Govender 2005 *International Journal of Discrimination* 229-251.
[309] Govender 2005 *International Journal of Discrimination* 229-251.
[310] Basu 2003 *Journal of Economic Perspective* 141-157.
[311] *Labour Relations Act* 66 of 1998.
[312] *Employment Equity Act* 55 of 1998.
[313] *Employment Equity Act* 55 of 1998.
[314] Zalesne 2001 *South African Journal of Human Rights* 503-530.

Every employer has a duty to be proactive and take steps to promote equality in the workplace by creating an employment policy and ensuring a working environment where the dignity of employees is respected.[315] In terms of the EEA, where sexual harassment does occur in the workplace (this includes work-related events outside the workplace, such as company conferences), the conduct must be immediately reported to the employer, who must consult with all relevant parties and take the necessary steps to eliminate the conduct.[316]

If the employer fails to take the necessary steps, such an employer would be held liable in terms of the principle of vicarious liability for the sexual conduct of his or her employee.[317] The researcher argues that, depending on the circumstances of the matter, the courts normally deem sexual harassment of an employee by a manager as serious misconduct justifying dismissal.

In the case of *Motsamai v Everite Products (Pty) Ltd,*[318] the court stated that sexual harassment is the most heinous misconduct that plagues a workplace. It is not only demeaning to the victim, but it also undermines the dignity, integrity and self-worth of the harassed employee.[319] One can come to the conclusion that in this case, the harshness of the wrong is compounded when the victim suffers at the hands of his or her supervisor.[320] This demonstrates that supervisors or individuals holding authority in the workplace should not use their positions to commit sexual harassment against other employees. Supervisors can be dismissed if they commit sexual harassment against their employees at the workplace.

In *University of Venda v Maluleke and Others,*[321] a lecturer asked students for sexual favours and intercourse in exchange for marks.[322] He grabbed a student, kissed her and

[315] Zalesne 2011 *South African Journal of Human Rights* 503-530.
[316] *EEA Act* 55 of 1998.
[317] Zalesne 2001 *South African Journal of Human Rights* 503-530.
[318] *Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC).
[319] *Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC) para 46.
[320] *Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC) para 45.
[321] *University of Venda v Maluleke and Others* (2017) 38 ILJ 1376 (LC).
[322] *University of Venda v Maluleke and Others* (2017) 38 ILJ 1376 (LC) para 54.

touched her buttocks. Commissioner Mande accepted that the inappropriate behaviour had occurred but did not consider it to be sexual harassment, as the victim did not expressly declare it to be unwelcome and had responded that she would think about it. As a result, the harasser was retrospectively reinstated. However, Snyman AJ had difficulty sustaining this reasoning on any basis and held that the award lacked any logic.[323]

In *E v Ikhwezi Municipality and Another,*[324] the victim was subjected to sexual molestation when the harasser attempted to force his tongue into her mouth.[325] The chairperson of the disciplinary hearing found the harasser guilty of sexual harassment and suspended him from work for two weeks to ensure that he became aware that his general behaviour was unacceptable and needed appropriate corrections. The High Court expressed surprise at the presiding officer's conclusion regarding the appropriate penalty imposed and labelled the presiding officer's comments as "unfathomable".[326]

In *Gaga v Anglo Platinum Ltd and others,*[327] the harasser had a desire to engage intimately with the victim and made it clear on numerous occasions. Commissioner Mbelengwa found that this conduct did not constitute sexual harassment as the victim enjoyed the attention given to her, as evidenced by her dismissing the advances with a simple "ok whatever". The harasser was reinstated with back pay. The researcher believes that the Labour Appeal Court (LAC) was justified in its finding that the commissioner's decision was irrational and sent out a clear message that senior managers who perpetrate sexual harassment do so at their peril and should generally expect to face the harshest penalties.[328] The LAC found that this was a sexual offence case and upheld the dismissal of the perpetrator.

[323] *University of Venda v Maluleke and Others* (2017) 38 ILJ 1376 (LC) para 19.
[324] *E v Ikhwezi Municipality and Another* [2016] 7 BLLR 723 (ECG).
[325] *E v Ikhwezi Municipality and Another* [2016] 7 BLLR 723 (ECG) para 19.
[326] *E v Ikhwezi Municipality and Another* [2016] 7 BLLR 723 (ECG).
[327] *Gaga v Anglo Platinum Ltd and others* [2012] 3 BLLR 285 (LAC) para 26.
[328] *Gaga v Anglo Platinum Ltd and others* [2012] 3 BLLR 285 (LAC) para 12.

In *UASA obo Zulu v Transnet Pipelines*[329], the harasser demanded sex, spoke about the victim's genitals in intimate detail, told her that he had an erection and would like to penetrate her and even sexually assaulted her. At the arbitration hearing, the harasser sought to explain his conduct as being part of his Zulu culture. The harasser's attitude was that if he wanted a woman, he could take a woman. The harasser's trade union supported this argument and, at the arbitration, submitted that what the harasser had done was very common in his culture. The sanction imposed was that the harasser was then found guilty of sexual harassment and was set to face the penalties, such as dismissal.[330]

4.6 Measures for employers to prevent sexual harassment cases in the workplace

4.6.1 The victimisation clause

The Code provides that company policy statements should include provisions which protect employees against victimisation, retaliation for lodging grievances and from false accusations. Employers are required to make it clear in their policy statements that it is a disciplinary offence to victimise or retaliate against an employee who, in good faith, lodges a grievance of sexual harassment.[331]

The *EEA* provides that a person may not be discriminated against for exercising any right conferred by the Act.[332] Such discrimination may include, inter alia, threatening or actually preventing an employee from exercising any right conferred by the Act, prejudice to an employee because of the past, present or anticipated exercise of such rights, and rewarding an employee for not exercising such rights. This protection is extended to applicants for employment.[333] Therefore, the employers can use the victimisation policy in employment contracts to prevent incidents of sexual harassment at the workplace.

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[329] *UASA obo Zulu v Transnet Pipelines* (2008) 29 ILJ 1803.
[330] *UASA obo Zulu v Transnet Pipelines* (2008) 29 ILJ 1803.
[331] Joubert, Van Wyk and Rothmann 2011 S*A Journal of Human Resources* 1-10.
[332] Section 6 of the EEA Act 55 of 1998.
[333] Joubert, Van Wyk and Rothmann 2011 S*A Journal of Human Resources* 1-10.

4.6.2 Policy statement

As a first step in expressing concern and commitment to deal with the problem of sexual harassment, employers should issue a policy statement which provides that all employees, job applicants and other persons who have dealings with the business have the right to be treated with dignity.[334] Sexual harassment in the workplace will not be permitted or condoned. Victims of sexual harassment in the workplace have a right to lodge a grievance and to take appropriate action against the perpetrators.[335]

Management should have a positive duty to implement the policy and take disciplinary action against employees who do not comply with the policy. Furthermore, a policy on sexual harassment should also explain the procedure to be followed by employees who are victims of sexual harassment. The policy should contain a clear provision in this regard. Allegations of sexual harassment will be dealt with seriously, expeditiously, sensitively and confidentially.[336] If all employees comply with the policy statement on sexual harassment, it can be eradicated from the workplace environment.

4.7 Employers' procedures to deal with perpetrators of sexual harassment at workplace

Employers should develop clear procedures to address sexual harassment. These procedures should ensure the resolution of problems in a sensitive, efficient and effective way. All employers should have and apply a zero tolerance policy on sexual harassment and any incident should be considered seriously. While maintaining a fair procedure that allows perpetrators to exercise their rights, employers must take appropriate measures against those found guilty of sexual harassment based on the severity of the offence.[337]

[334] Betton and Forsyth 2017 *Business Horizons* 101-111.
[335] Betton and Forsyth 2017 *Business Horizons* 101-111.
[336] Betton and Forsyth 2017 *Business Horizons* 101-111.
[337] Betton and Forsyth 2017 *Business Horizons* 101-111.

The measures can include warning, suspension and dismissal of the perpetrators. Some of the measures and procedures are discussed below.[338]

4.7.1 Advice and Assistance

Sexual harassment is a sensitive issue, and a victim may feel unable to approach the perpetrator, lodge a formal grievance or turn to colleagues for support. As far as is practicable, employers should designate a person outside of line management whom victims may approach for confidential advice.[339] Such a person:

(a) could include persons employed by the company to perform inter alia such a function, a trade union representative or co-employee, or outside professionals;

(b) should have the appropriate skills and experience or be properly trained and provided with adequate resources; and

(c) could be required to have counselling and relevant labour relations skills and be able to provide support and advice on a confidential basis.

4.7.2 Options to resolve a problem

(a) Employees should be advised that there are two options to resolve a problem relating to sexual harassment. Either an attempt can be made to resolve the problem in an informal way, or a formal procedure can be embarked upon.[340]

(b) The employee should be under no duress to accept one or the other option.

[338] Marshall 2005 *Law, Society & Review* 83-124.
[339] Marshall 2005 *Law, Society & Review* 83-124.
[340] Marshall 2005 *Law, Society & Review* 83-124.

4.7.2.1 Informal procedure

(a) It may be sufficient for the employee concerned to have an opportunity where she or he can explain to the person engaging in the unwanted conduct that the behaviour in question is not welcome, that it offends them or makes them uncomfortable, and that it interferes with their work. If the informal approach has not provided a satisfactory outcome, or if the case is severe or if the conduct continues, it may be more appropriate to embark upon a formal procedure. Severe cases may include sexual assault, rape, a strip search and quid pro quo harassment.[341]

4.7.2.2 Formal procedure

Where a formal procedure has been chosen by the aggrieved party, a formal procedure for resolving the grievance should be available and should:[342]

(a) specify to whom the employee should lodge the grievance;

(b) make reference to timeframes which allow the grievance to be dealt with expeditiously; and

(c) provide that if the case is not resolved satisfactorily, the issue can be dealt with in terms of the dispute procedures contained in item 7(7) of the Code of Good Practice.

[341] Marshall 2005 *Law, Society & Review* 83-124.
[342] Marshall 2005 *Law, Society & Review* 83-124.

4.7.3 Investigation and disciplinary action

(a) Care should be taken during any investigation of a grievance of sexual harassment that the aggrieved person is not disadvantaged, and that the position of other parties is not prejudiced if the grievance is found to be unwarranted.[343]

(b) The Code of Good Practice regulating dismissal contained in Schedule 8 of the *LRA* reinforces the provisions of Chapter VIII of the *LRA* and provides that an employee may be dismissed for serious misconduct or repeated offences. Serious incidents of sexual harassment or continued harassment after warnings are dismissible offences.

(c) In cases of persistent harassment or single incidents of serious misconduct, employers ought to follow the procedures set out in the Code of Practice contained in Schedule 8 of LRA.

(d) The range of disciplinary sanctions to which employees will be liable should be clearly stated, and it should also be made clear that it will be a disciplinary offence to victimise or retaliate against an employee who, in good faith, lodges a grievance of sexual harassment.

4.7.4 Employers' compliance with Section 6(1) of the Employment Equity Act 5 of 1998 (EEA)

Employers should also follow section 6(1) of the *EEA,* which prohibits unfair discrimination on the grounds that include gender, sexual orientation and birth. Section 6(3) provides that 'harassment of an employee is a form of unfair discrimination and is prohibited'. Incorporated in the EEA is the *Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace* (the *EEA Code of Good Practice*).[344]

[343] Landis 2014 *Employment and the Law: A practical guide for the Workplace*. Juta and Company Ltd, 2014.
[344] Section 6 of the EEA Act 55 of 1998.

Another measure is to follow the guidelines of section 4 of the EEA Code of Good Practice, which provides a 'test for sexual harassment'. This test includes criteria such as whether the harassment is based on the prohibited grounds of sex, gender, and sexual orientation, whether the sexual conduct was unwelcome, the nature and extent of the sexual conduct, and the impact of the sexual conduct on the employee.[345]

There is also the 2005 Amended Code on the Handling of Sexual Harassment Cases in the Workplace ('the amended code'), issued by the Minister of Labour in terms of section 54(1)(b) of the EEA, that employers should follow to prevent sexual harassment.[346] The courts have also been clear about the seriousness of sexual harassment and its diminution of equality and dignity. In *Campbell Scientific Africa (Pty) Ltd v Simmers*,[347] it was said that by its nature, such harassment creates an offensive and very often intimidating work environment that undermines the dignity, privacy and integrity of the victim and creates a barrier to substantive equality in the workplace. It is for this reason that this court has characterised it as the most heinous misconduct that plagues a workplace.[348]

4.7.5 Dismissal of perpetrators of sexual harassment in the workplace

Another legal consequence of sexual harassment offences is dismissal for misconduct in the workplace.[349] This should be applied strictly by employers. In cases where the dismissal is not automatically unfair, the employer must show that the reason for dismissal is a related to the employee's conduct or capacity.[350] Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable.[351]

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[345] Section 4 of the EEA Act 55 of 1998.
[346] Section 54 (1) of the EEA Act 55 of 1998.
[347] *Campbell Scientific Africa (Pty) Ltd v Simmers* (CA 14/2014) [2015] ZALCCT 62.
[348] Section 54 of the EEA Act 55 of 1998; *Campbell Scientific Africa (Pty) Ltd v Simmers* (CA 14/2014) [2015] ZALCCT 62.
[349] *Code of Good Practice on the Handling of Sexual Harassment Cases* of 1998 (GG 19049 of July 1998).
[350] Mogapaesi 2019 *Commonwealth Law Bulletin* 431-453.
[351] Mogapaesi 2019 *Commonwealth Law Bulletin* 431-453.

A sexual harassment offence is a serious misconduct in the workplace and dismissal should be a measure that employers use to curb this offence.[352] A formal enquiry is not necessary. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and acquire the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision, and preferably furnish the employee with written notification of such decision.

4.8 Sanctions applicable to the offenders of sexual harassment and a relief for victims

Anyone who has been found to have sexually harassed another person in the workplace under the terms of this policy is liable to any of the following sanctions: verbal or written warning, adverse performance evaluation, reduction in wages, transfer, demotion, suspension and dismissal.[353] The nature of the sanctions will depend on the gravity and extent of the harassment. Suitable deterrent sanctions will be applied to ensure that incidents of sexual harassment are not treated as trivial. Certain serious cases, including physical violence, will result in the immediate dismissal of the harasser.[354] The policy should be applied consistently throughout the company and sanctions should be based on the gravity of the conduct.

[352]Mogapaesi 2019 *Commonwealth Law Bulletin* 431-453.
[353] *Code of Good Practice on the Handling of Sexual Harassment Cases* of 1998 (GG 19049 of July 1998).
[354] Mogapaesi 2019 *Commonwealth Law Bulletin* 431-453.

4.9 The new Code of Good Practice on the Prevention and Elimination of Harassment in the workplace (2022)

On 18 March 2022, the Minister of Labour, Thulas Nxesi, repealed the Code of Good Practice on the Handling of Sexual Harassment Cases in the workplace.[355] This code dealt solely with sexual harassment in the work environment. The new Code of Good Practice on the Prevention and Elimination of Harassment in the workplace now casts a net over conduct much wider than sexual harassment.[356]

The new code deals with harassment on two grounds:[357] sexual harassment and racial harassment. Sexual harassment does not only encompass harassment of the opposite sex but also "same sex" harassment on the grounds of gender or sexual orientation. Apart from the recognised forms of sexual harassment such as sexual assault and rape, the code now also deems the acts of following someone, watching someone, and sharing sexually explicit pictures or objects via an electronic device with a person who finds such content unacceptable as forms of sexual harassment.[358]

The test for sexual harassment is partially subjective, whereas with racial harassment, there is a presumption that racial harassment has occurred even if the particular person at whom it is aimed is not offended or unaware of it.[359] The test for racial harassment is with reference to the reaction of a normal, reasonable person in keeping with the values of the constitutional order and considering South Africa's history of institutionalised discrimination.[360]

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[355] Van Staden 2022 https://www.dailymaverick.co.za/opinionista/2022-07-07-sexual-harassment-is-a-growing-workplace-scourge-and-laws-dealing-with-it-are-fragmented/.
[356]Van Staden 2022 https://www.dailymaverick.co.za/opinionista/2022-07-07-sexual-harassment-is-a-growing-workplace-scourge-and-laws-dealing-with-it-are-fragmented/.
[357]Van Staden 2022 https://www.dailymaverick.co.za/opinionista/2022-07-07-sexual-harassment-is-a-growing-workplace-scourge-and-laws-dealing-with-it-are-fragmented/.
[358]Van Staden 2022 https://www.dailymaverick.co.za/opinionista/2022-07-07-sexual-harassment-is-a-growing-workplace-scourge-and-laws-dealing-with-it-are-fragmented/.
[359]Van Staden 2022 https://www.dailymaverick.co.za/opinionista/2022-07-07-sexual-harassment-is-a-growing-workplace-scourge-and-laws-dealing-with-it-are-fragmented/./.
[360]Van Staden 2022 https://www.dailymaverick.co.za/opinionista/2022-07-07-sexual-harassment-is-a-growing-workplace-scourge-and-laws-dealing-with-it-are-fragmented/.

Harassment may occur in public and private areas, even though the harassment being referred to is in relation to work relationships.[361] It may occur where employees take their lunch breaks, during a work-related trip or social event, in homes in which domestic workers or caregivers work, and in the homes of employees working remotely from home, in accommodation or on transport provided by employers.[362]

4.10 Conclusion

Chapter 4 dealt with the legal consequences for employees committing sexual harassment offences in the workplace. In this regard, it has discussed the punishment for offences related to sexual harassment at the workplace. It has been demonstrated that the conduct of perpetrators of sexual harassment in the workplace will never be tolerated. In the workplace, employers should also put in place adequate measures to curb sexual harassment at the workplace. The law is evolving and frequently changes to ensure a safe working environment free from sexual harassment. However, the discussion has demonstrated that sexual harassment in the workplace is still a reality in South Africa.

The last chapter will attempt to provide solutions to the problems identified in this research study.

[361]Van Staden 2022 https://www.dailymaverick.co.za/opinionista/2022-07-07-sexual-harassment-is-a-growing-workplace-scourge-and-laws-dealing-with-it-are-fragmented/.
[362] Van Staden 2022 https://www.dailymaverick.co.za/opinionista/2022-07-07-sexual-harassment-is-a-growing-workplace-scourge-and-laws-dealing-with-it-are-fragmented/.

Chapter 5: Conclusion and recommendations

5.1 Conclusion

Sexual harassment in the workplace negatively impacts affected employees, their productivity, as well as the institution that employs perpetrators.[363] South Africa's jurisprudence on sexual harassment in the workplace has undoubtedly come a long way. Statutes enacted to address sexual harassment continue to be inadequate in their role to address sexual harassment with the seriousness and urgency it deserves.[364]

A sexual harassment policy that is properly aligned with the Code of Good Practice and clearly communicated can be an effective tool to create a better working environment and limit an employer's liability. Moreover, it is likely to embolden victims and discourage would-be perpetrators.[365] The Bill of Rights guarantees a multitude of rights for everyone. In the context of sexual harassment, these rights include the rights to equality and freedom from discrimination and the right to dignity.[366]

Sexual harassment has been regulated as a form of unfair discrimination, which is prohibited on the grounds of sex, gender and sexual orientation.[367] Sexual harassment is unwelcome conduct of a sexual nature which impairs human dignity and creates a hostile working environment. It is an abuse of power, and it includes physical, verbal or psychological conduct and it particularly affects employees in vulnerable employment.[368]

Sexual harassment poses a major problem for companies and employers; therefore, a successful company requires the existence of good relations among its employees and the people with whom the company does business.[369] Sexual harassment may cause an

[363] Mowatt 1987 *ILJ*
[364] Ramsaroop 2007 *SA Journal of Industrial Psychology* 25-33.
[365] Smit 2022 *Law, Democracy & Development* 24-63.
[366] *Constitution of the Republic of South Africa*, 1996.
[367] Coetzee 2012 *Stellenbosch Law Review* 76-87.
[368] Smit and Du Plessis 2011 *Potchefstroom Electronic Law Journal* 173-217.
[369] Smit and Du Plessis 2011 *Potchefstroom Electronic Law Journal* 173-217.

uncomfortable working environment with relationships between employees, clients or employers, managers and supervisors being strained. This is because one of the greatest problems associated with sexual harassment is its acceptance by both men and women as either natural or, at most, a trivial disciplinary offence.[370] It can be read throughout the research study that sexual harassment is prohibited within our workplaces, including the government sector.

The researcher has answered the research question posed in Chapter 1 by thoroughly analysing the international and regional legal frameworks on sexual harassment in the workplace, the legal framework on sexual harassment in South Africa, and the legal consequences for employees committing sexual harassment offences in the workplace. This analysis provided a comprehensive understanding of the protections in place, the obligations of employers, and the penalties for those found guilty of such misconduct. Each aspect contributed to evaluating whether the current laws are effective in preventing sexual harassment and ensuring accountability in the workplace. However, legal measures available to curb sexual harassment are not adequate to prohibit it.

In Chapter 2, in the discussion on the international and regional legal frameworks of the law on sexual harassment in the workplace, the prohibition of such conduct through various of international perspectives was examined. The researcher has undertaken a comprehensive examination of international instruments aimed at curbing sexual harassment, including the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), the Declaration on the Elimination of Violence against Women (1993), and the Discrimination (Employment and Occupation) Convention of 1958.

The study also considered the World Conference on Women in 1993, the Indigenous and Tribal Peoples' Convention of 1989, and the Convention concerning discrimination in respect of employment and occupation from 1958. Furthermore, the researcher explored the ILO's instruments, notably the ILO's foundation in 1919, as well as the specific focus on sexual harassment and Article 1 of Convention No. 190 and Recommendation No. 206.

[370] Smit and Du Plessis 2011 *Potchefstroom Electronic Law Journal* 173-217.

Additionally, the study delved into regional instruments addressing sexual harassment and incorporates the AU's perspective on sexual harassment in the workplace. This comprehensive approach allows for a nuanced understanding of the global, regional and continental frameworks designed to combat sexual harassment across diverse contexts.

Chapter 3 dealt with the South African legal framework regarding sexual harassment in the workplace. The researcher has attempted to assess the available laws or policies on sexual harassment and concluded that the current legal framework is not adequate to curb sexual harassment in the workplace.

This chapter has defined sexual harassment and provided guidelines on sexual harassment conduct, as well as shortcomings insofar as the remedies of sexual harassment are concerned. Chapter 3 has further identified that South Africa has classified sexual harassment as the most heinous form of misconduct within the workplace. Ways to ensure that the South African legislative framework regulating sexual harassment is compliant and effective were also addressed.

Chapter 4 dealt with the legal consequences and measures for employees who commit sexual harassment offences in the workplace. The researcher found that South Africa has no adequate legal measures to prohibit sexual harassment. It was clear from this chapter that employers have an obligation to take proactive and remedial steps to prevent all forms of sexual harassment in the workplace. The research indicates that employers are required to include the issue of sexual harassment in orientation and training programmes in an accessible manner. Further, employers' policy on harassment should include, at a minimum, the necessary statements to address sexual harassment. The chapter also focuses on and discusses detailed procedures that employers must follow to handle reports of sexual harassment, respecting the importance of confidentiality and even providing additional sick leave for victims.

The study has identified various causes of sexual harassment within the working environment, impacting both female and occasionally male employees. It manifests through inappropriate behaviour and unlawful physical conduct, especially toward

women. The number of sexual harassment complaints increases yearly, signalling that this issue has been declared a social problem. The problem reduces the working life of both female and male employees, jeopardising their well-being and undermining gender equality. Sexual harassment, depending on the form it takes, violates the right to bodily and personal integrity, which belongs to everyone and is protected under our Constitution. It is also a form of unfair discrimination that invades a person's security, dignity and privacy, as enshrined in sections 10 and 14 of the Constitution, as highlighted in footnotes 13 to 18.

These causes contribute to the prevalence of such conduct, shedding light on the extent to which it constitutes sexual harassment. By uncovering the root causes and assessing the scope of the issue, the study provides valuable insights into understanding and addressing sexual harassment within the workplace. This knowledge can inform the development of targeted interventions and policies for prevention and mitigation. It provides alternative measures that are appropriate to eliminate sexual harassment.

5.2 Recommendations

5.2.1 Mandatory policy on sexual harassment

The employer must enforce items 5 and 6 of the Code of Good Practice, which means that employers have to develop and implement sexual harassment policies. Currently, this is not mandatory for employers.[371] According to section 60 of the EEA, the employer is liable for the actions of its employees if the employer fails to take reasonable steps to eliminate discrimination or sexual harassment after becoming aware of it.[372] Employers must thus be held liable for not having sexual harassment policies in place.

However, despite the enactment of laws, sexual harassment continues to be a scourge in the South African workforce due to the ineffective implementation of these laws.[373]

[371] Joubert, Van Wyk and Rothman 2011 *Journal of Human Resources Management* 1-10.
[372] Section 60 of the EAA 55 of 1998.
[373] Manjoo, Gift and Suzzie 2016 *Criminal Law Reform and Transitional Justice* 269-295.

Therefore, the improvements should focus on three key aspects: first, legal awareness for employees; secondly, effective policies and procedures; and thirdly, assessing how gender stereotypes hinder the implementation of laws.

5.2.2 Ensuring equality for employees in the workplace

It is observed that, since sexual harassment often happens due to power differentials in age and positions of authority, harassers are often older and occupy a superior position to the harassed.[374]

a) Workplace culture should value diversity and inclusion

It is recommended that organisations should foster a workplace culture that values diversity and inclusion. This can be achieved by promoting respect for all employees, regardless of age, gender, race, or position within the company. By creating a culture where differences are celebrated, power dynamics that often lead to harassment can be mitigated. Employers should actively work to ensure that all employees feel valued and respected, which in turn can reduce instances of discrimination and harassment. Diversity and inclusion should not only be seen as policies but also integrated into the daily operations of the organisation. This can involve diverse leadership teams, equitable opportunities for career advancement, and a commitment to creating an inclusive environment where everyone, regardless of their background, feels safe and empowered.

b) Every employer should have regular training sessions on the prevention of sexual harassment in the workplace for all employees.

It is crucial that employers implement regular training sessions on the prevention of sexual harassment for all employees, including managers and leadership. These sessions should cover the definition of sexual harassment, its various forms, and the negative impact it has on individuals and the workplace. The training should also include the legal consequences of such behaviour, as outlined by labour laws and company policies, emphasising that harassment is not only unlawful but will be met with strict penalties.

[374] Gouws 1995 *South African Sociological Review* 1-24.

Furthermore, these sessions should empower employees by teaching them how to recognise harassment, report it safely, and support colleagues who may be experiencing it. Managers, in particular, should be trained to identify early signs of inappropriate behaviour and to handle complaints with sensitivity and confidentiality. By making such training sessions mandatory and regularly updating them, employers can create a workplace where awareness is heightened and harassment is actively discouraged. Regular monitoring and evaluations of these training initiatives should also be done to ensure they are effective in changing workplace attitudes and behaviour.

5.2.3 Provision of internal procedure in handling sexual harassment complaints

The researcher recommends that a provision of internal procedure in handling sexual harassment should be outlined in the policy at the workplace and should be signed by the employers and employees as an agreement. The purpose of such an agreement is to include provisions that the relationship is voluntary, and should unwanted conduct occur, the complaint procedures are set out. Furthermore, the agreement should contain provisions that if a problem arises, it is to be resolved internally first and not via the legal route.[375] The internal procedure on how to handle sexual harassment in the workplace should be communicated to all employees.

5.2.4 Vicarious liability for sexual harassment for employers in the workplace

The common law vicarious liability of the employer should be implemented.[376] The entire concept of the law of delict is to remedy the harm suffered. In terms of common law, employers can be held vicariously liable for the sexual harassment committed by their employees if it can be demonstrated that the harassment occurred within a valid working relationship, the harassment involved a delict and the act took place within the course and scope of the employee's employment.[377] In such instances where a conduct of sexual

[375] Halfkenny 1995 *Industrial Law Journal* 1-15.
[376] Schwartz 1995 *Hidden and Fundamental Issue of Employer Vicarious Liability* 1739.
[377] Calitz and De Villiers 2005 *Journal of South African Law* 215-235.

harassment has occurred outside the scope and the course of an employee's duties, the employer cannot, as a result, be held liable for sexual harassment.

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