

A critical analysis of labour legislation on sexual harassment in the workplace

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ABSTARCT

There is a recurring problem of sexual harassment in South African workplaces. The disclosures in 2017 and 2018 social media campaign of “#MeToo #Notokay #NotInMyName” demonstrates that there is a high rate of sexual harassment around the world, including in the workplace. This study raises concern about both the interpretation and labour laws and policies regulating sexual harassment in the workplace. This study strives to investigate whether South African labour laws provide adequate measures to curb sexual harassment in the workplace.

The original Code of 1998 and the amended 2005 Code leans more on application of subjective approaches when dealing with sexual harassment in the workplace. The CCMA and court decisions bear testimony to this claim. Firstly, this study contends that a subjective approach may lead to malpractice in case law by overly sensitive employees who may interpret any situation as hostile despite the alleged conduct. Moreover, this mini-dissertation argues for the adoption of reasonable victim person tests based on the facts and lodge of complaint when dealing with sexual harassment in the workplace, taking into consideration that it comprises both the subjective test and objective test.

Sexual harassment is defined as unwanted conduct that infringes upon the employee’s human right to dignity, privacy and bodily integrity. This analysis reflects on the nature and forms of sexual harassment, the factors that the court could consider in determining what constitutes unwanted conduct, the impact of sexual harassment on the employee and its effect on the human rights of employees. Furthermore, it examines the remedies that could be invoked by the victims of sexual harassment in the workplace. The analysis concludes with recommendations that may be adapted by South African labour laws in prohibiting sexual harassment in the workplace.

Keywords: objective test, subjective test, physical conduct, verbal conduct, non-verbal conduct, *quid pro quo*, victimisation, unwanted conduct, Sexual harassment

TABLE OF CONTENTS

ACKNOWLEDGEMENTS.....	ii
ABSTARCT.....	iii
KEYWORDS.....	iii
LIST OF ABBREVIATIONS.....	ix

Chapter 1: Introduction.....1

1.1	<i>Background</i>	1
1.2	<i>Statement of the problem</i>	3
1.3	<i>Motivation</i>	6
1.4	<i>Research question.....</i>	7
1.5	<i>Research aims and objectives</i>	7
	<i>1.5.1 Aims of the study.....</i>	<i>7</i>
	<i>1.5.2 Objectives of the study</i>	<i>8</i>
1.6	<i>Research methodology.....</i>	8
1.7	<i>Framework of the study</i>	9
1.8	<i>Relevance to the Research Unit.....</i>	11
1.9	<i>Statement regarding ethics</i>	11

Chapter 2: Historical development of sexual harassment in South Africa.....12

2.1 Introduction.....12

2.2 History of sexual harassment law in South Africa workplaces 12

2.3 Legal reform and a progressive stand on sexual harassment in South Africa..... 14

2.3.1 Protection of unfair discrimination.....14

2.4 Conclusion 16

Chapter 3: Understanding the nature and forms of sexual harassment.....17

3.1 Introduction..... 17

3.2 Meaning of sexual harassment..... 17

3.3 Nature and extent of sexual harassment 18

3.3.1 Physical conduct 18

3.3.3 Non-Verbal Conduct..... 20

3.3.4 Victimisation 21

3.3.5 Hostile work environment..... 22

3.4 The role of power imbalances in sexual harassment at the workplace.....	23
3.5 Towards a threshold test	25
3.5.1 Subjective test.....	26
3.5.2 Objective test	27
3.5.3 Reasonable victim test	28
3.6 Conclusion	29
Chapter 4: Factors to consider for determination of unwelcome element.....	31
4.1 Introduction.....	31
4.2 Understanding the unwelcome element of sexual harassment	31
4.2.1 Once-off incident	34
4.2.2 Consensual element.....	34
4.2.3 Sexual history of the harasser.....	36
4.2.4 Sexual history, clothes and behaviour of the harassed.....	37
4.3 Reasons why employees are so reluctant to report sexual harassment in the workplace.....	38
4.4 Conclusion	40

Chapter 5: Impact of sexual harassment on the employer and its effects on human rights of employees.....41

5.1 Introduction..... 41

5.2 Vicarious liability of the employer in terms of section 60 of the EEA41

5.3 Requirements of Vicarious Liability..... 44

5.3.1 There must be an employment relationship45

5.3.2 The employee must commit a delict.....47

5.3.3 The employee must act within the course and scope of his employment.....47

5.4 Employer's defences to avoid vicarious liability in delict or section 60 of the EEA 48

5.5 Employer's duty to provide employees with a safe work environment free from sexual harassment 49

5.6 The effects of sexual harassment on human rights of employees ... 50

5.7 Remedies available for employees 51

5.7.1 Constructive dismissal52

5.7.2 Unfair discrimination claim.....53

5.7.3 Unfair labour practices in terms of the LRA.....53

5.7.4 Protection from Harassment Act 17 of 2011.....54

5.8 Conclusion	56
-----------------------------	-----------

Chapter 6: Conclusion and recommendations.....	57
---	-----------

6.1 Conclusion	56
-----------------------------	-----------

6.2 Recommendations	60
----------------------------------	-----------

<i>6.2.1 The reasonable victim test must be adopted by the courts..</i>	<i>60</i>
---	-----------

<i>6.2.2 The South African labour legislation should provide a clear and concise definition of sexual harassment</i>	<i>60</i>
--	-----------

<i>6.2.3 The South African workplaces should adopt to bystander intervention</i>	<i>61</i>
--	-----------

<i>6.2.4 Implementation of a consensual romantic relationship policy in the workplace</i>	<i>61</i>
---	-----------

<i>6.2.5 The adoption of sexual harassment policy at the workplace.....</i>	<i>62</i>
---	-----------

<i>6.2.6 Employers must take necessary steps to prevent possible harassers from entering the workplace.....</i>	<i>63</i>
---	-----------

<i>6.2.7 Establishment of a national list of persons convicted of committing sexual harassment at workplace</i>	<i>63</i>
---	-----------

Bibliography.....	65
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LIST OF ABBREVIATIONS

CCMA Commission for Conciliation, Mediation and Arbitration

LRA Labour Relations Act

EEA Employment Equity Act

OHS Act Occupational Health and Safety Act

LAC Labour Appeal Court

LC Labour Court

PHA Protection from Harassment Act

ILO International Labour Organization

SCA Supreme Court of Appeal

Chapter 1: Introduction

1.1 Background

The United States of America was the first country to create the concept of sexual harassment and recognise it as a form of unfair discrimination against women in the 1970s.¹ Only six more nations had passed legislation openly forbidding sexual harassment by 1992; currently, at least forty countries, including South Africa, have passed legislation specifically prohibiting sexual harassment.² The first case in South Africa to deal with sexual harassment in the workplace was the case of *J v M*,³ which defined sexual harassment as unwanted conduct of sexual nature in the workplace.⁴

South Africa formally joined countries that forbid sexual harassment as a form of unfair discrimination in 1998 by passing the *Employment Equity Act* 55 of 1998 (hereafter EEA), which stipulates that harassment is a form of unfair discrimination if it is connected to any of the prohibited grounds of discrimination mentioned in section 6(1).⁵ It is of the writer's view that South Africa has joined countries that forbid sexual harassment because sexual harassment is a growing workplace scourge. Among other grounds, the *Constitution of the Republic of South Africa*, 1996 (hereafter *Constitution*) prohibits unfair discrimination in section 9(3) against any person based on sex, gender and sexual orientation.⁶

In the recent 2021 judgment of *Shoprite Checkers (Pty) Ltd v JL*,⁷ the Labour Court (hereafter LC) described sexual harassment as "the most heinous misconduct that plagues a workplace".⁸ In this case, JL was sexually harassed by a manager who slapped her on the buttocks, which he later found amusing. After the matter was reported, the company conducted interviews, including a polygraph test. The

¹ Zalesne 2002 *HWLJ* 145.

² Zalesne 2002 *HWLJ* 145.

³ *J v M* (1989) *ILJ* 755 (IC).

⁴ *J v M* (1989) *ILJ* 755 (IC) para 4.

⁵ Section 6 (1) of the *Employment Equity Act* 55 of 1998.

⁶ Section 9 (3) of the *Constitution of the Republic of South Africa*, 1996.

⁷ *Shoprite Checkers (Pty) Ltd v JL* (2022) 43 *ILJ* 903 (LC).

⁸ *Shoprite Checkers (Pty) Ltd v JL* (2022) 43 *ILJ* 903 (LC) para 95.

company reached a conclusion that there was insufficient evidence by JL to support the sexual harassment allegations.⁹

The court examined all the tests of sexual harassment, as stipulated in item 4 of the Code.¹⁰ Whether the harassment is on the prohibited grounds of sex, gender, sexual orientation; whether the conduct was unwanted; the nature and extent; the impact of harassment on the employee.¹¹ All the tests of sexual harassment received an affirmative answer. The court was in favour of JL and the employee was remunerated in respect of her constructive dismissal.¹²

Most employees in the working environment experience *quid pro quo*, which is when the superior or employer uses his powers in a negative way including taking decisions of employment, promotion and remuneration increments based on sexual favours she or he receives from the employees.¹³ Basson¹⁴ stipulates that *quid pro quo* is when the employee is forced to submit to sexual favours to the employer under duress, in fear of losing employment benefits and losing his or her job.¹⁵ It has been recently confirmed that *quid pro quo* occurs mostly in cases of recent graduates who are desperately looking for employment and need to pay back their study loans. *Quid pro quo* has been explained as intimidating and unwanted conduct from superiors which make the junior employees feel uncomfortable.¹⁶

The case of *Taljaard v Securicor*¹⁷ gives a clear example of *quid pro quo*. In this case the complainant was interviewed by Mr. Taljaard for a vacancy in which the interview had irregularities hinging on exchange of sexual favours. After she got the job, Mr. Taljaard started to sexually harass the complainant; she laid a complaint, and Mr. Taljaard was dismissed from work. The CCMA upheld the decision made by

⁹ Shoprite Checkers (Pty) Ltd v JL (2022) 43 ILJ 903 (LC) para 5-7.

¹⁰ Shoprite Checkers (Pty) Ltd para 46.

¹¹ Item 4 in Gen Not 482 in GG 27867 of 4 August 2005.

¹² Shoprite Checkers (Pty) Ltd v JL (2022) 43 ILJ 903 (LC) para 80.

¹³ Reg 5.2.3.2 in GN 1357 in GG 27865 of 4 August 2005.

¹⁴ Basson et al The New Essential Labour Law Handbook, 7th edition.

¹⁵ Basson et al The New Essential Labour Law Handbook, 7th edition 241.

¹⁶ Khumalo et al/2015 SAJ 111.

¹⁷ *Taljaard v Securicor* (2003) 24 ILJ 116.

the company because Mr Taljaard was a well-educated white male with a senior position at the company, who was very powerful. The complainant, on the other hand, was a young, coloured female with low education, which amounted to skewed imbalances in terms of power and inequality.¹⁸ The court held that the test is whether the victim regarded the behaviour as unwanted, not whether the perpetrator alleged that his behaviour is acceptable.¹⁹

1.2 Statement of the problem

The safety of employees in South Africa is protected by common law, and statutes such as EEA and *Labour Relations Act* 66 of 1995 (hereafter LRA).²⁰ These statutes provide an obligation to the employer to ensure the safety of all employees at the working environment. Employee's safety does not only refer to physical security; it also includes freedom from sexual harassment.²¹ According to Grogan,²² one of the employer's three primary responsibilities is to ensure that workplace is safe and healthy. An employer would not be accomplishing his or her obligations if their employees get sexually harassed.²³

The courts have continued to resolve legal disputes pertaining sexual harassment in the workplace in a manner that raise the question whether the *Code of Good Practice on Handling Sexual Harassment* (hereafter the Code) provides a firm and precise definition of sexual harassment.²⁴ There has been inconsistencies in verdicts reached relating to sexual harassment. Such inconsistency is reflected in how sexual harassment is defined where the lack of a precise definition of sexual harassment has led to cases going back and forth through South African courts.²⁵

¹⁸ Naylor 2006-2010 <https://shukumisa.org.za/wp-content/uploads/2017/09/Sexual-Harassment-English.pdf>.

¹⁹ Naylor 2006-2010 <https://shukumisa.org.za/wp-content/uploads/2017/09/Sexual-Harassment-English.pdf>.

²⁰ Kubjane & Manamela 2019 SLJ 88.

²¹ Nana 2008 *ALJ* 245.

²² Grogan Workplace Law.

²³ Grogan Workplace Law 17.

²⁴ Mukheibir and Ristow 2006 *EJC* 245.

²⁵ Nhlebeya A critical analysis of sexual harassment in the workplace 4.

Sexual harassment is considered a debatable topic in the working environment because different people have different definition of what constitute sexual harassment.²⁶ This basically derives from the fact that, while the accused alleged conduct may be unpleasant and unwanted in the view of the harassed, they may appear to be acceptable from the alleged harasser's perspective.²⁷ Thus, although the unwelcome element has proved to be challenging to prove before the courts, its importance cannot be deemphasised because in almost all cases in relation to sexual harassment the unwelcome element is an essential factor that should be considered by the courts when determining what constitute sexual harassment.²⁸

*Campbell Scientific Africa v Simmers*²⁹ is one significant judgment where the courts interpreted the meaning of sexual harassment. The legal question in this case was whether the invitation "do you need a lover tonight" crosses the line from being an inappropriate invitation to one of sexual harassment. Mr. Simmers, a 48-year-old installation manager employed by appellant Campbell Scientific Africa (Pty) Ltd, was dismissed for sexually harassing Ms. Catherine Markides, a 23-year-old employee of Loci Environmental (Pty) Ltd, a business with which the appellant had a partnership agreement to work on a collaborative project in Botswana.³⁰

The CCMA held that the invitation words by Mr. Simmers constituted unwanted conduct of sexual harassment, taking into consideration that Ms. Catherine Markides submitted that the invitation was unprofessional and made her feel uncomfortable. The labour court (hereafter LC) disagreed with the judgment of the CCMA. The LC found that Mr. Simmers' invitation was not an explicit demand for sex. It was an unreciprocated advance. In other words, he was "trying his luck".³¹ Furthermore, The CCMA failed to consider that Ms. Catherine Markides did not feel nervous or threatened by the invitation.³² Human communication frequently involves

²⁶ Mukheibir and Ristow 2006 *EJC* 245.

²⁷ O'Connell Drawing a line between permissible and impermissible behaviour in sexual harassment cases 23.

²⁸ Olivier Sexual harassment in the workplace: A critical analysis of the unwelcome element 43.

²⁹ *Campbell Scientific Africa (Pty) Ltd v Simmers and others* 2016 37 ILJ 116 (LAC).

³⁰ *Campbell Scientific Africa (Pty) Ltd v Simmers and others* 2016 37 ILJ 116 (LAC) para 2.

³¹ *Campbell Scientific Africa (Pty) Ltd v Simmers and others* 2016 37 ILJ 116 (LAC) para 13.

³² *Campbell Scientific Africa (Pty) Ltd v Simmers and others* 2016 37 ILJ 116 (LAC) para 15.

misunderstandings, and, in this case, sexual harassment is not always implied by an inappropriate comment.³³

It was argued that although the original 1998 and amended 2005 Codes make provision for subjective and objective tests, the courts today rely more on a subjective approach.³⁴ The LAC in *Simmers* disregarded all the factors as stipulated in the applicable Codes, and instead chose to place significant weight on the factors that the victim took offence to Simmer's conduct and her dignity was infringed. In this regard, the LAC held that Simmer's conduct constituted sexual harassment.³⁵

As it currently stands, the definition of sexual harassment in both the 1998 and 2005 Codes does not clarify the matters pertaining to clarity. This dilemma also creates misunderstanding for the courts in applying the appropriate test as seen in the conflicting judgment of both *Simmers* CCMA, LC and LAC.

The problem with the interpretation of labour legislation in sexual harassment cases is that the complainant must decide whether the conduct is unwelcomed or unwanted.³⁶ If an employee receives objectively sexually harassing behaviour without complaint, does that behaviour change simply because it does not bother the recipient?³⁷ The courts cannot use an individual's perception as a factor to determine what constitutes sexual harassment. The law does not provide functioning legislature that delegates law-making powers to private persons.³⁸ To rely on a complainant's perception or feelings is at least a rejection of the legislature's constitutional mandate to make the law - at worst, a recipe for legal anarchy. The legislature has a duty to pass reasonably clear and precise legislation to enable the people to understand what is expected of them.³⁹

³³ Campbell Scientific Africa (Pty) Ltd v Simmers and others 2016 37 ILJ 116 (LAC) para 14.

³⁴ Botes Identifying Sexual harassment in the Workplace? Do not forget to Remember the Code of Good Practice 4.

³⁵ Campbell Scientific Africa (Pty) Ltd v Simmers and others 2016 37 ILJ 116 (LAC) para 25-27.

³⁶ Kujane 2020 *Obiter* 98.

³⁷ Kujane 2020 *Obiter* 98.

³⁸ Monti 2000 Feminist Legal Studies 369.

³⁹ Kujane 2020 *Obiter* 98.

According to the 2005 Code, a behaviour must be unwanted to qualify as sexual harassment.⁴⁰ Apparently, this requirement imposes a duty on the complainant to alert the accused if the behaviour is unacceptable. In essence, there are types of behaviours that may be acceptable and those that may not. Significantly, the Code's also outlines that the recipient must give a warning about the alleged unwanted conduct to the harasser, for him or her to discontinue with the unwanted conduct. It is inconceivable that the EEA would require employer's liability dependent on the employer's knowledge, while the same is not required for an employee to be held liable for their actions.⁴¹

It is for this purpose that the aim of this research study is to critically analyse labour legislation on sexual harassment in the workplace.

1.3 Motivation

Item 1(1) of the Code stipulates that the objective of this provision is to prohibit sexual harassment in the workplace.⁴² The Code encourages and promotes the formation of legal policies and measures that may result in the formation of workplaces devoid of sexual harassment in which both employers and employees uphold one another's integrity, human dignity, and rights to equality in the workplace.⁴³

The high rate in cases of sexual harassment of employees by employers in the workplace is predicated on the powers that employers wield. In a case where sexual harassment has taken place in an employment relationship, there is an apparent level of exploitation of power, due to the imbalances in the power of the employer and that of the employee. In this regard, less powerful persons become vulnerable to sexual harassment by the senior in the exchange of employment benefits.⁴⁴ Women suffer the most because they are regarded as one of the most vulnerable

⁴⁰ Item 4 (1) in Gen Not 482 in GG 27867 of 4 August 2005.

⁴¹ Kujane 2020 *Obiter* 99.

⁴² Item 1 (1) in Gen Not 482 in GG 27867 of 4 August 2005.

⁴³ Tshoose 2017 *JFS* 130.

⁴⁴ Blacher Sexual harassment, special relationships, and consensual engagement policies within higher learning institution- a labour perspective 43.

groups in the society.⁴⁵ Several employees are afraid of reporting seniors who sexually harass them because they fear losing their jobs and other employments benefits, which include promotions and wage increments.⁴⁶

Out of the definition of sexual harassment and the inconsistency of the application to settle legal disputes by the CCMA and the courts employees are charged, found guilty and dismissed from the workplace on sexual harassment charges. Court decisions set precedents; however, different case laws demonstrate that there is no certainty and precision on the issue of sexual harassment charges or allegations. Certainty is important in any society as it enables its members to personally monitor their behaviours.

In the workplace as there are diverse point of view as to what constitutes sexual harassment.⁴⁷ If the employers are not well trained to deal with the appropriate test for sexual harassment, it could increase their liability for claims related to the provision in terms of section 60 (3) of the EEA.⁴⁸ It is of the writer's view that the reasonable victim test must be used by the courts for cases relating to sexual harassment in the workplace, to deal away with any uncertainty.

1.4 Research question

Do South African labour laws provide adequate measures to curb sexual harassment in the workplace?

1.5 Research aims and objectives

1.5.1 Aims of the study

The aims of this research study are to:

- Examine what constitute unwanted conduct for sexual harassment in the workplace;

⁴⁵ Kujana 2020 *Obiter* 88.

⁴⁶ Botes 2016 *SJHRM* 5.

⁴⁷ Rampsaroop and Parumasure 2007 *SA Journal of Industrial Psychology* 25.

⁴⁸ Section 60 of the *Employment Equity Act* 55 of 1998.

- Investigate whether South African labour laws provide sufficient measures to curb sexual harassment in the workplace; and
- Examine whether the tests of sexual harassment are effective in assisting the victims in the workplace to enforce their rights.

1.5.2 Objectives of the study

The main objective of this mini-dissertation is to critically analyse the labour legislation on sexual harassment in the work place. To determine the main objective, the following secondary objectives set to:

- Discuss different forms and behaviour of sexual harassment;
- Examine the objective and subjective tests on matters of sexual harassment at the workplace and examine the judicial interpretation of the unwelcome conduct in order to identify the factors used by courts to determine whether the conduct of the harasser was unwelcome.; and
- Analyse the impact of sexual harassment on the employer and its effect on human rights of employees.

1.6 Research methodology

Research methods are constituted of the techniques and procedures used to collect data. There are two main research methods. Firstly, the quantitative research method relies on numerical data to quantify findings, and the data used can easily be transformed into statistics.⁴⁹ The qualitative research method, on the other hand, is descriptive and includes subjective concepts deployed to understand reasons, motivation, opinions, and trends.⁵⁰

This study utilises a qualitative research method to collect data to understand concepts and opinions.⁵¹ As its main objective, this study strives to establish an in-

⁴⁹ Flick Introducing Research Methodology 131.

⁵⁰ Mbao Guidelines to Research Students 7.

⁵¹ Flick Introducing Research Methodology 131

depth understanding of human behaviour and the reasons behind such behaviours. It also investigates not only the where, what and when but also the why and how of the research conundrum⁵² The researcher uses qualitative research method because in qualitative research, the issue of quality can be addressed by dealing with constructs of validity, practicality, and effectiveness.⁵³ The method allows the generation of insights into people and systems by analysing their meanings and interpretations.⁵⁴

The researcher relies on primary and secondary sources of law. Primary sources include cases, statutes, regulations, and the constitution. Secondary sources include books, book chapters, internet sources, journal articles, law reviews, theses, and dissertations. The various forms of knowledge are gathered from reliable sources like, Google Scholar, Labour Guide, Juta, Lexis-Nexis website and Sabinet Online.

1.7 Framework of the study

This research study consists of six interrelated chapters.

Chapter one: Introduction

This chapter introduces the topic and contains the background to the study, the problem statement, motivation, the research question, research aims and objectives, research methodology, framework of the study and relevance to the research unit.

Chapter two: Historical development of sexual harassment in South Africa

This chapter examine the historical overview in relation to sexual harassment in the workplace in South Africa. It also analyses the slow progress in dealing with sexual harassment cases in the workplace before 1998. In addition, it explains how sexual

⁵² Walcott Qualitative Inquiry in Education the Continuing Debate 11.

⁵³ Maree First Steps in Research 38.

⁵⁴ Maree First Steps in Research 51.

harassment in the workplace was covered by the common law and how the courts developed the ways to deal with sexual harassment at the workplace.

Chapter three: Nature and forms of Sexual harassment in the workplace

This chapter focuses on the understanding of sexual harassment. It commences with a brief definition of sexual harassment. Moreover, it explains the forms and behaviour of sexual harassment, the role of power imbalances in sexual harassment at the workplace and the subjective and objective tests of sexual harassment.

Chapter four: The factors to consider to determine the elements of unwelcome conduct

This chapter examines the judicial interpretation of the unwelcome conduct, in order to identify the factors used by courts to determine whether the conduct of the harasser was unwanted. It explores the degree required for the conduct to be accepted as or considered to be unwanted.

Chapter five: Impact of sexual harassment on the employer and its effect on human rights of employees

This chapter discuss the impact of sexual harassment on the employer in relation to section 60 of the *Employment Equity Act*. It also explores the impact of sexual harassment on human rights of the employee such as the right to human dignity, the right to bodily integrity and the right to privacy. Furthermore, it highlights available remedies that can be exhausted by employees who find themselves sexually harassed at the workplace.

Chapter six: Conclusion and recommendations

The final chapter concludes the findings of the mini-dissertation as a whole. In addition, it provides answers to the research questions and provide recommendations to improve the current situation on sexual harassment at the workplace.

1.8 Relevance to the Research Unit

The North-West University Faculty of Law has one research unit which is Law, Justice and Sustainability and five sub-project groups. This study critically analyses the labour legislation on sexual harassment at the workplace and is relevant to the Faculty of Law Research Unit as it focuses on one of its sub-project groups which is Vulnerable Society. Some employees are vulnerable to discrimination and sexual harassment in the workplace because there exist levels of exploitation of power and imbalances in hierarchy. As a result, some victims of sexual harassment fail to report such incidents because they are afraid of losing their jobs. In essence, many employees are not informed about their rights in the workplace, including freedom from sexual harassment. They are also afraid to seek relief when they are sexually harassed because the victims have a duty to prove that the harasser indeed harassed him or her and as such, they believe that they do not have enough evidence, as there is no eyewitness in many such incidents. In addition, they may worry that they would not be believed.

1.9 Statement regarding ethics

Please find here attached the checklist.

Chapter 2: Historical development of sexual harassment in South Africa

2.1 Introduction

Labour law have undergone, and continues to undergo, dynamic changes regarding legal development of sexual harassment in the workplace.⁵⁵ The goal in this refinement is to ensure that the working environment is safe for all employees, and they are free from sexual harassment.⁵⁶ This chapter examines the history and the South African laws that governed sexual harassment before the 1998 era. Furthermore, it assesses legal development reforms of sexual harassment in the workplace.

2.2 History of sexual harassment law in South Africa workplaces

Prior to 1998 there was no specific labour law legislation that addressed issues of sexual harassment in the workplace.⁵⁷ There were no remedies available to employees who were sexually harassed at workplaces. The South African apartheid employment laws did not recognise the concept of sexual harassment in the workplace.⁵⁸ However, there were possible avenues of general laws which prohibited sexual harassment under common law. All employees' right to privacy, human dignity and equal treatment were protected in the workplace under this common law.⁵⁹

Before the enactment of the EEA which protects sexual harassment as form unfair discrimination, the cases of sexual harassment in the workplace were brought under the LRA and its predecessor, Act 28 of 1956. The claims were not brought by sexual harassment victims; rather, they were based on unfair dismissal by the aggrieved harasser.⁶⁰ Only limited remedies were available under the LRA for sexual

⁵⁵ Mogorosi et al 2021 Gender & Behaviour 17268.

⁵⁶ Grogan *Workplace Law* 12th ed 1.

⁵⁷ Zalense 2001 *SAJHR* 509.

⁵⁸ Zalense 2001 *SAJHR* 509.

⁵⁹ Naylor 2006 Women's Legal Centre 6.

⁶⁰ Zalense 2001 *SAJHR* 511.

harassment during that time. The plaintiff was not permitted to claim for damages for humiliation or loss of opportunities. The only remedy available was unfair labour practice; in this regard, the employer could only be instructed to cease the unfair labour practice.⁶¹

The first case that dealt with sexual harassment in the workplace was the case of *J v M*⁶² which was in 1989. In this case the court upheld the dismissal of the applicant who worked as a senior executive employee and was found guilty of sexual harassment against a female co-employee. On occasions, the harasser would molest the victim and forcefully touch her inappropriately. During the disciplinary hearing, it was proved that the applicant did not only sexual harass one female co-employee; he sexually harassed other co-employees by caressing and slapping their buttocks and fondling their breasts. All these unwanted conducts were humiliating and offensive.⁶³

The court held that regardless of the form of the conduct, whether physical or verbal, the act violated the employee's right to the integrity of their body and personality, which was regulated by both criminal and civil laws in South Africa. It was the responsibility of the employer to prevent such unwelcome conduct of sexual harassment from occurring at work.⁶⁴ The court defined sexual harassment as unwanted attention of sexual nature in the working environment. The court took into consideration how the conduct of the harasser affected the harassed.⁶⁵

Employees who were subjected to sexual harassment in the workplace had an option to claim for a remedy under the law of delict. Nevertheless, there were several limitations under delict. Most importantly, the victim would not receive compensation for lost wages or other material losses. Only when the victim's physical integrity, dignity, or reputation have been wrongfully and intentionally compromised could damages be sought under the *delictual* head of *injuria*. Additionally, filing a lawsuit for delict was extremely expensive for the

⁶¹ Zalense 2001 *SAJHR* 511.

⁶² *J v M* (1989) 10 *ILJ* 755 (IC).

⁶³ *J v M* (1989) 10 *ILJ* 755 (IC) para 756,759.

⁶⁴ *J v M* (1989) 10 *ILJ* 755 (IC) para 755.

⁶⁵ *J v M* (1989) 10 *ILJ* 755 (IC) para 757,762.

plaintiff because they would need to employ a lawyer and possibly be responsible for the defendant's legal costs if they lost. Therefore, there were no reported cases of sexual harassment in the workplace under the law of delict.⁶⁶

Sexual harassment in the workplace gave rise to criminal cases such as rape, assault and *crimen injuria*.⁶⁷ Employees in such circumstances could need to apply for criminal prosecution. However, since criminal law only permitted direct lawsuits against those who were believed to have committed the crime, a victim who sought to file for criminal charges would not be able to sue her employer for sexual harassment committed by a co-employee or recover any monetary damages. The other challenge was that in contrast to civil suits, the burden of proof was higher in criminal prosecutions of the harasser.⁶⁸

2.3 Legal reform and a progressive stand on sexual harassment in South Africa

The EEA was passed on 19 October 1998, and it came into effect in August 1999. This legislation encourages affirmative action and prohibits inequalities in the workplace in a bid to remove the long-standing discriminations in the labour market brought on by apartheid regulations, societal prejudices, and stereotypes.⁶⁹

2.3.1 Protection of unfair discrimination

The law of unfair discrimination is largely protected by the labour laws in South Africa. The amended Code of 2005 in item 3 recognises sexual harassment as a form of unfair discrimination.⁷⁰ Section 6 (1) of the EEA gives effect to section 9 (3) of the Constitution. It stipulates that:

No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour,

⁶⁶ Zalense 2001 *SAJHR* 511.

⁶⁷ Zalense 2001 *SAJHR* 512.

⁶⁸ Zalense 2001 *SAJHR* 512.

⁶⁹ Zuma The extent to which the South African law governing racial discrimination protects employees: a comparison between South Africa and Canada 13.

⁷⁰ Reg 3 in GN 1357 in GG 27865 of 4 August 2005.

sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth.⁷¹

The main purpose of the above-mentioned provision is to eradicate inequality in workplaces. Section 6 in the context of sexual harassment prohibits unfair discrimination of sexual harassment against employees by any person. The provision also protects individuals seeking employment.⁷² Section 5 of the EEA obliges an employer to ensure that he or she promotes equal opportunities by implementing workplace policy that eliminates unfair discrimination.⁷³ In this regard, the employer has to ensure that all employees are not sexually harassed in the workplace. The burden of proof rests on the victim of sexual harassment to prove on the balance of probability to the court that she or he was sexually harassed in the workplace. Thereafter, the employer or respondent must prove on the balance of probability that she or he did not sexually harass the employee.⁷⁴

In the case of *Makoti v Jesuit Refugee Service SA*,⁷⁵ the alleged harasser made an application against Mr G Shivatu who was a national director at the time of their employment at the company. The applicant submitted to the court that she was unfairly dismissed by the national director for failing to accept sexual advances from him. She additionally alleged that she was the victim of unfair discrimination under section 50(1) (d) and (e) of the EEA.⁷⁶

The court found that the applicant was substantively and procedurally unfairly dismissed. She was subject to compensation in terms of section 50(2) of the EEA. Moreover, the court held that sexual advances by the national director consisted of the element of *quid pro quo* harassment.⁷⁷ The conduct of

⁷¹ Section 6 (1) of the *Employment Equity Act* 55 of 1998.

⁷² Grogan *Employments Rights* 3rd ed 228.

⁷³ Section 5 of the *Employment Equity Act* 55 of 1998.

⁷⁴ Section 11 of the *Employment Equity Act* 55 of 1998.

⁷⁵ *Makoti v Jesuit Refugee Service SA* (2012) 33 ILJ 1706 (LC).

⁷⁶ *Makoti v Jesuit Refugee Service SA* (2012) 33 ILJ 1706 (LC) para 1.

⁷⁷ *Makoti v Jesuit Refugee Service SA* (2012) 33 ILJ 1706 (LC) para 55.

providing employment benefits in return for sexual favours occurs when an employee is disadvantaged for not granting such favours. It was apparent that using this standard to treat employees differently was unlawful and resulted in unfair discrimination.⁷⁸

Basson⁷⁹ argues that it is challenging to protect sexual harassment as unfair discrimination, considering that the unfair discrimination test is not viable in the case of sexual harassment because the essential element of unfair discrimination is for the employee to prove that there is a different treatment. It is not always possible for the employee to establish differential treatment in such cases.⁸⁰

2.4 Conclusion

After the apartheid era, South Africa has taken progressive measures to prohibit sexual harassment under the EEA and other legal policies. However, currently there is still a high rate of reports of sexual harassment in the workplace.⁸¹ Although legal reform takes time, and the path is always difficult, the legislature should not be discouraged, as it is obviously time to address the unspeakable matters interrelated to the pervasive incidence of sexual harassment in the workplace.⁸² The following chapter focuses on understanding the nature and forms of sexual harassment.

⁷⁸ Makoti v Jesuit Refugee Service SA (2012) 33 ILJ 1706 (LC) para 54.

⁷⁹ Basson 2007 Sterlllenbosch Law Review.

⁸⁰ Basson 2007 Sterlllenbosch Law Review 441-442.

⁸¹ Choo & Ping 2021 International Journal of Humanities & Social Studies 29.

⁸² Naylor 2006 Women's Legal Centre 26.

Chapter 3: Understanding the nature and forms of sexual harassment

3.1 Introduction

Sexual harassment in the workplace is the most extensive form of harassment and it has been subject to significant interrogation leading to diverse judicial responses.⁸³ The challenge with sexual harassment in the workplace environment is that the incidents are increasingly coming out of the closet as a matter of great concern.⁸⁴ The lack of a legal definition of sexual harassment allows such conduct to continue as a silent yet powerful pandemic in the workplace.⁸⁵ In the modern day, sexual harassment often takes place in unnoticeable ways that shroud the existence of the conduct.⁸⁶ In a noticeable way, some employees may sexually be touched inappropriately by their employers; however, in current environment employees may receive sexually suggestive images on their cell phones, intolerable sexual comments and invitation to meetings that eventually turn into dates.⁸⁷ This chapter focuses on understanding the forms and behaviour of sexual harassment, the prevalence of power of disparities within the workplace, including an assessment of the objective and subjective tests.

3.2 Meaning of sexual harassment

The International Labour Organisation outlines sexual harassment as an unwelcome and inappropriate conduct of a sexual nature that infringes the person right to human dignity, bodily integrity, and privacy.⁸⁸ It creates a hostile, intimidating and offensive workplace environment.⁸⁹ The 1998 and amended 2005 Code cases

⁸³ Meyersfeld 2020 Constitutional Court Review 301.

⁸⁴ Du Toit et al Labour Relations Law A Comprehensive Guide 6th ed 700.

⁸⁵ Botes Identifying Sexual Harassment in the Workplace? Do Not Forget to Remember the Code of Good Practice 2.

⁸⁶ Mogapaesi Sexual harassment in the workplace: Lessons for Botswana from a South African legal perspective 1.

⁸⁷ Cliffe Dekker Hofmeyr Sexual harassment in the workplace-including the virtual world of work 4.

⁸⁸ International Labour Organisation 2015 https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-hanoi/documents/publication/wcms_421220.pdf.

⁸⁹ International Labour Organisation 2015 https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-hanoi/documents/publication/wcms_421220.pdf.

provide a more similar definition. The 1998 Code outline sexual harassment as 'unwanted conduct' of a sexual nature. In contrast, the amended 2005 Code uses 'unwelcome conduct' to define such harassment. Kubjana⁹⁰ submits that these two words can be used interchangeably.⁹¹ As a result, the words 'unwanted' and 'unwelcome' will be used interchangeably in this research.

In the case of *McGregor v Public Health and Social Development Sectoral Bargaining Council and Others*,⁹² it was held that sexual harassment was the most horrific type of wrongdoing that occurred in the workplace. Despite being against the law in this country, it is persistent and prevalent in the workplace. It presents a barrier of the right to equality of employees, and it is hostile to the constitutional values of human dignity, the realisation of equality, the development of human rights and freedoms, and non-sexism.⁹³

3.3 Nature and extent of sexual harassment

In *J Mampuru v PUTCO*,⁹⁴ the court stipulated that:

Sexual harassment may take many different forms. It may be trivial, it may be verbal but gross, or it may be physical, again varying from trivial or gross. It may be a single act or repeated. The action as such discloses a total disrespect for the feelings and the integrity of the recipient.⁹⁵

3.3.1 Physical conduct

This conduct is characterised by physically touching another person in an unwelcome sexual manner, including rape, sexual assault or being strip searched by an opposite sex.⁹⁶ In addition, standing close or brushing up against another

⁹⁰ Kubjana 2020 *Obiter*.

⁹¹ Kubjana 2020 *Obiter* 98.

⁹² *McGregor v Public Health and Social Development Sectoral Bargaining Council and Others* 2021 (10) *BCLR* 1131 (CC).

⁹³ *McGregor v Public Health and Social Development Sectoral Bargaining Council and Others* 2021 (10) *BCLR* 1131 (CC) para 1.

⁹⁴ *J Mampuru v PUTCO* (1989) *ILJ* 755 (IC) unreported para 2136.

⁹⁵ Seenarayan A critical examination of the pandemic of sexual harassment in the South African workplace 19.

⁹⁶ Reg 5.3.1.1 in GN 1357 in GG 27865 of 4 August 2005.

person and giving massage around the neck or shoulders, singly or all in combination, constitute assault of a sexual nature.⁹⁷ The case of *F v Minister of Safety and Security*⁹⁸ clearly illustrates physical conduct of sexual harassment. A police officer who was on standby wearing a police uniform and using a police car raped a thirteen-year girl. The police officer made threats to the young girl that if she reported the incident he would harm and kill her. The employer suspended the police officer, and he was convicted and imprisoned for 12 years.⁹⁹

The Constitutional Court held South African Police Service was vicariously liable for sexual assault of a young teenage girl by a police officer who was on standby at the time.¹⁰⁰ The court further stipulated that sexual assault and threats of sexual violence were at the heart of women's social inequality. Under international law, South African law is required to prevent all gender-based violence that has the effect of restricting individual's enjoyment of fundamental rights and freedoms protected in the Constitution, as well as to take appropriate and effective steps to avoid the infringement of those rights. Moreover, the court held that the police are one of the state organisations trusted with protecting the public, women, and children, against the abuse of their fundamental rights by violent criminals.¹⁰¹

3.3.2 Verbal Conduct

Verbal conduct includes unwelcome sexual remarks made about the other person's body, jokes and hints that are sexually related, whistling in a sexually suggestive manner and sending sexual text or images by electronic gadgets.¹⁰² Verbal conduct of sexual harassment further includes making sexual comments about someone's body appearance despite the fact that the person was present or not at the time the comment was made.¹⁰³ In the case of *Gaga v Anglo Platinum*,¹⁰⁴ the applicant

⁹⁷Obra date unknown https://www.academia.edu/37986742/SEXUAL_HARASSMENT-IN_A_WORKPLACE_WHAT_SEXUAL_HARASSMENT.

⁹⁸ *F v Minister of Safety and Security* 2012 (1) SA 536 (CC).

⁹⁹ *F v Minister of Safety and Security* 2012 (1) SA 536 (CC) para 14-15.

¹⁰⁰ *F v Minister of Safety and Security* 2012 (1) SA 536 (CC) para 48.

¹⁰¹ *F v Minister of Safety and Security* 2012 (1) SA 536 (CC) para 37.

¹⁰² Reg 5.3.1.2 in GN 1357 in GG 27865 of 4 August 2005.

¹⁰³ Nemavhidi Understanding the beast of sexual harassment in the workplace 148.

¹⁰⁴ *Gaga v Anglo Platinum Ltd and Others* [2012] 3 BLLR 285 (LAC).

who was a senior employee, was found guilty of sexually harassing his personal assistant during a disciplinary hearing procedure.¹⁰⁵ The verbal conduct made by the applicant included requesting sexual favours, making suggestions in sexual activity, making remarks regarding the personal 'assistant's appearance and on several occasions requesting the personal assistant to meet with him somewhere to engage in sexual activity.¹⁰⁶

3.3.3 Non-Verbal Conduct

Non-verbal conduct is contrary to verbal conduct and it does not consist of words.¹⁰⁷ It can be identified by sending or exposing sexual parts to the other person that is construed as an unwelcome sexual gesture.¹⁰⁸ In addition, elevator eyes looking at a person's body up and down and making facial expressions such as throwing kisses or linking lips are versions of non-verbal sexual assault.¹⁰⁹ In the case of *NUMSA obo Mafuto v Duferco Steel Processing (Pty) Ltd*,¹¹⁰ the court held that sexually suggestive dancing towards a co-worker was unwanted conduct constituting sexual harassment of a non-verbal nature.¹¹¹

In *Vodacom Service Provider Company (Pty) Ltd v Phala*,¹¹² the court dealt with a matter of non-verbal conduct of sexual harassment. The alleged perpetrator exposed her artificial breast to other employees, grabbed one of the complainant's cell phones, took a picture under her skirt and showed the complainant without his consent, and in some instances, she also called the complainant to her office where she wanted to measure his private part.¹¹³ The alleged perpetrator was dismissed

¹⁰⁵ *Gaga v Anglo Platinum Ltd and Others* [2012] 3 BLLR 285 (LAC) para 10.

¹⁰⁶ *Gaga v Anglo Platinum Ltd and Others* [2012] 3 BLLR 285 (LAC) para 5.

¹⁰⁷ Nemavhidi Understanding the beast of sexual harassment in the workplace 147.

¹⁰⁸ Reg 5.3.1.3 in GN 1357 in GG 27865 of 4 August 2005.

¹⁰⁹ Obra date unknown
https://www.ecademia.edu/37986742/SEXUAL_HARASSMENT_IN_A_WORKPLACE_WHAT_SEXUAL_HARASSMENT.

¹¹⁰ *NUMSA obo Mafuto v Duferco Steel Processing (Pty) Ltd* (MENT 21080) unreported.

¹¹¹ Nemavhidi Understanding the beast of sexual harassment in the workplace 149.

¹¹² *Vodacom Service Provider Company (Pty) Ltd v Phala* (J R2178/05) [2007] ZALC 13.

¹¹³ *Vodacom Service Provider Company (Pty) Ltd v Phala* (J R2178/05) [2007] ZALC 13 para 4-6.

by the employer as it was stipulated that exposure of her private parts to the employees was unacceptable behaviour from a senior.¹¹⁴

3.3.4 Victimisation

Victimisation arises when the employee is victimised for failing to surrender to sexual favours.¹¹⁵ Even though both victimisation and *quid pro qua* are closely related the *code* treats these conducts separately because victimisation is a more serious variation of sexual harassment, characterised by making the working environment intolerable for subordinates who do not agree to provide sexual favours to superiors.¹¹⁶

In the case of *Amarall Christian v Colliers Properties*,¹¹⁷ the applicant was dismissed after she refused sexual harassment of victimisation from the employer. In some instances, the employer kissed the applicant on her neck and insisted that she should sit on his lap, however, the applicant refused. Later, the employer asked the applicant if she had a boyfriend and whether she was "in or out". In a general understating of whether the applicant was "in or out", the employee had to tell Mr Collier whether she was prepared to accept his sexual advances or not. The applicant did not agree to the sexual advances. As a result, the employer asked the applicant why she should continue to work for him, since she denied sexual advances from him.¹¹⁸

The court held that the dismissal of the applicant was substantively and procedurally unfair, and the employer had to pay the employee the total of R 48 000.00 in terms of section 194(3) of the LRA being reimbursement ordered in respect of the automatically unfair dismissal and the total of R10 000.00 in terms of section 50 of the EEA being reparation in respect of sexual harassment.¹¹⁹

¹¹⁴ Kujana 2020 *PELJ* 92.

¹¹⁵ Reg 5.3.2.1 in GN 1357 in GG 27865 of 4 August 2005.

¹¹⁶ Ndema A critical analysis of the law on sexual harassment in the workplace in South Africa in a comparative perspective 23.

¹¹⁷ *Christian v Colliers Properties* (2005) 26 ILJ 234 (LC).

¹¹⁸ *Christian v Colliers Properties* (2005) 26 ILJ 234 (LC) para 2-3.

¹¹⁹ *Christian v Colliers Properties* (2005) 26 ILJ 234 (LC) para 8.

3.3.5 Hostile work environment

This conduct occurs when there is abuse of power in a work relationship between the employee as a victim and the employer as a perpetrator.¹²⁰ It includes conduct that establishes an intimidating working environment, and a working environment that is humiliating.¹²¹ This may result in affecting the victim negatively in such a way that it hampers him or her from performing the job required adequately.¹²² Unlike *quid pro qua* that is based on economic power, a hostile working environment is more about perceived social power of men over women. A co-worker may also conduct *quid pro qua* against another co-employee, and therefore not only a superior may exercise this type of sexual harassment.¹²³

The case of *Centre for Autism Research and Education CC v CCMA and others*,¹²⁴ clearly illustrates a hostile working environment in the workplace. In this case four employees who were employed by the applicant as special needs teachers were held in a hostile working environment by the employer. The incidents of hostile working environment included attacking the other employee about his homosexuality.¹²⁵ On another occasion, while they were on a business trip the employer stated that “hey let me see that little bum your boyfriend is a lucky man” to the other employee.¹²⁶

The commissioner found that the employees were constructively dismissed as they were subjected to continued intolerable working environment. Furthermore, the unwelcome conduct by the employer was wholly unacceptable and impaired the human dignity of the employees.¹²⁷ On the analysis of the court, it was held that the employee’s conduct included sexual orientation discrimination, embarrassing

¹²⁰ Nemavhidi Understanding the beast of sexual harassment in the workplace 148.

¹²¹ Britz The perceptions of employees regarding sexual harassment in an administrative higher educational work environment 16.

¹²² Basson Sexual harassment in the workplace: an overview of developments 425.

¹²³ Basson Sexual harassment in the workplace: an overview of developments 425.

¹²⁴ Centre for Autism Research and Education CC v CCMA and others [2020] 11 BLLR 1123 (LC).

¹²⁵ Centre for Autism Research and Education CC v CCMA and others [2020] 11 BLLR 1123 (LC) para5.

¹²⁶ Centre for Autism Research and Education CC v CCMA and others [2020] 11 BLLR 1123 (LC) para7.

¹²⁷ Centre for Autism Research and Education CC v CCMA and others [2020] 11 BLLR 1123 (LC) para 28-29.

and humiliating conduct, sexual harassment and undermining and belittling the employees.¹²⁸

3.4 The role of power imbalances in sexual harassment at the workplace

The power imbalance makes it difficult for an employee to voice out disapproval of unwanted conduct of sexual harassment against an employer.¹²⁹ The harassed person's circumstances may get worse by the power imbalances that exist in the workplace.¹³⁰ The courts and Human Rights Tribunals have acknowledged that a person's relative authority can have a huge impact on how they react to unwelcome behaviour.¹³¹ When a person has the power to influence things for another, for instance, salary increase, promotion, or other workplace benefits, then there are patent power imbalances. When there is a supervisor, an age difference, a gap in the level of pay ranges, or a distinction in position within a business, a power imbalance may give rise to instances of harassment. The lack of a power connection that makes one person more vulnerable because they are dependent on the other requires free and full consent. Regardless of how the employment relationship appears, if there is no full and free consent, there is sexual harassment.¹³²

It is evident looking at the definition of *quid pro qua* that some supervisors may exercise sexual harassment on employees who not only respond to their sexual favours by providing them with employment benefits.¹³³ In the employment relationship, but the power can also be abused due to the skewed distribution of such power in favour of the higher position and authority. In this regard, the less powerful person involuntarily consents to a sexual harassment conduct, due to the power that the senior has in the exchange of employment benefits. If the more

¹²⁸ Centre for Autism Research and Education CC v CCMA and others [2020] 11 BLLR 1123 (LC) para 37.

¹²⁹Keith 2019 <https://workplacelawblog.harpergrey.com/2019/11/07/workplace-romance-the-impact-of-power-imbalance-on-ability-to-consent/>.

¹³⁰Keith 2019 <https://workplacelawblog.harpergrey.com/2019/11/07/workplace-romance-the-impact-of-power-imbalance-on-ability-to-consent/>.

¹³¹Keith 2019 <https://workplacelawblog.harpergrey.com/2019/11/07/workplace-romance-the-impact-of-power-imbalance-on-ability-to-consent/>.

¹³²Keith 2019 <https://workplacelawblog.harpergrey.com/2019/11/07/workplace-romance-the-impact-of-power-imbalance-on-ability-to-consent/>.

¹³³ Blacher Sexual harassment, special relationships and consensual engagement policies within higher learning institution- a labour perspective 42.

powerful person did not hold the position, the less powerful person would have not likely consented to the sexual advances.¹³⁴ In most cases, women are more sexually harassed in the workplace than men. In this regard, if power differentiation between men and women exists in the workplace, sexual harassment is bound to persevere.¹³⁵

When it comes to sexual harassment in the workplace, the power disparity necessitates a deeper examination of the notion of choices that women have. It is possible that a person's ability to refuse sexual favours is limited.¹³⁶ In power control, the person is technically free to refuse the sexual advances and lodge a complaint, unless the situation includes physical subjugation or threats of violence.¹³⁷

In the recent case of *McGregor v Public Health and Social Development Sectoral Bargaining Council and Others*,¹³⁸ the Constitutional Court dealt with a case that exhibits the focus on workplace power imbalances. Dr. Mc Gregor was found guilty of sexually harassing an intern doctor who was completing a medical internship under his supervision. Dr. Mc Gregor was employed at George hospital as head of anaesthesiology. The unwelcome conduct of sexual harassment included Dr. McGregor asking the intern to remove her clothes and swim naked. He suggested that they should have a romantic relationship. In some instances, he performed unwanted sexual advances to the intern.¹³⁹

The Constitutional Court held that here was an undeniable power disparity between Dr. McGregor and the intern doctor, which must be understood as the root of the entire situation. Dr. McGregor was in a position of authority and was thirty years older than the victim. The power disparity did not only tip in favour of professional

¹³⁴ Blacher Sexual harassment, special relationships and consensual engagement policies within higher learning institution- a labour perspective 43.

¹³⁵ Garbers 2002 *Merc II* 376.

¹³⁶ Mayersfeld 2020 Constitutional Court Review 310.

¹³⁷ Mayersfeld 2020 Constitutional Court Review 310.

¹³⁸ *McGregor v Public Health and Social Development Sectoral Bargaining Council and Others* 2021 (10) BCLR 1131 (CC).

¹³⁹ *McGregor v Public Health and Social Development Sectoral Bargaining Council and Others* 2021 (10) BCLR 1131 (CC) para 3.

position, but it has also tipped in favour of gender at the intersection of age. Furthermore, the behaviour was grossly unwelcome regardless of the target, and the difference in age and level of position was certainly a highlighted factor in this case.¹⁴⁰

Le Roux, in her commentary in *Contemporary labour law*, argues that the affirmation of the idea that sexual harassment in situations where the perpetrator is in a position of power over the harassed person is a key component in judging the nature of the perpetrator's conduct, and it is the most important aspect to be considered.¹⁴¹ The writer is of the opinion that workplace relationships that appear to be consensual could entail unwanted behaviour that qualifies as sexual harassment. This might be the case if the employee only agrees to the behaviour of sexual advances out of a concern for job security, or if the employee only agreed to some of the behaviour within the context of the relationship.¹⁴²

3.5 Towards a threshold test

The relevant test for sexual harassment in the workplace has been a controversial topic.¹⁴³ They are three possible tests that may be utilised in the cases of sexual harassment, namely a subjective test, an objective test, or a reasonable victim test.¹⁴⁴ Item 4 of the code examines sexual harassment toward a subjective test where it becomes the complainant's call whether the alleged conduct was unwanted.¹⁴⁵ In essence, the complainant should warn the perpetrator that the conduct was unwanted, so that the perpetrator should stop continuing with the unwanted conduct.¹⁴⁶

¹⁴⁰ McGregor v Public Health and Social Development Sectoral Bargaining Council and Others 2021 (10) BCLR 1131 (CC) para 43.

¹⁴¹ Le Roux 2014 *Contemporary Labour Law* 103.

¹⁴² Zhang 2018 <https://www.insidehr.com.au/power-imbalance-consent-sexual-harassment/>.

¹⁴³ Du Toit et al *Labour Relations Law A Comprehensive Guide* 6th ed 701.

¹⁴⁴ Cooper 2002 *ILJ* 23.

¹⁴⁵ Reg 4 in GN 1357 in GG 27865 of 4 August 2005.

¹⁴⁶ Kubjana 2020 *Obiter* 99.

3.5.1 Subjective test

The courts seem to be inconsistent when applying and interpreting the conduct of sexual harassment in the workplace. Nevertheless, the three approaches should be determined: the perspective of the harassed, the perspective of the harasser, and the perspective of both parties.¹⁴⁷ The objective test concentrate only on the perception of the harassed employee. This means that the accused person should have reasonably known that the sexual advances were unwelcome in nature.¹⁴⁸

In the case of *Motsamai v Everite Buildings Products*,¹⁴⁹ the court emphasised the subjective test of sexual harassment in the workplace. The appellant who was a foreman of the two respondents was found guilty of sexually harassing the respondents. The alleged perpetrator behaved inappropriately on different occasions.¹⁵⁰ On one occasion, he touched the private parts of one of the respondents, namely Msibi.¹⁵¹ The court held that sexual harassment should be determined from the viewpoint of the victim. In essence, the victim was bound to express her disapproval to the alleged perpetrator and further to determine whether the alleged conduct was reasonable or not. Sexual harassment was labelled as a wrongful act that undermined the human dignity, integrity, and self-worth of the employee.¹⁵²

The subjective test can be criticised in two ways. Firstly, Kujana¹⁵³ stipulates that *Du Toit et al.*, argues that the use of this criterion may lead to malpractice in case law by overly sensitive employees who may interpret any circumstances as hostile, regardless of the alleged sexual conduct. Secondly, application of a subjective test may result in liability fault, a condition that South African, in general, does not allow, particularly when it comes to workplace discipline.¹⁵⁴ The disadvantage of any subjective test is that the victim must not only demonstrate that she or he was

¹⁴⁷ Olivier Sexual harassment in the workplace: A critical analysis of the unwelcome element 54.

¹⁴⁸ Basson et al The New Essential Labour Law Handbook 7th ed 363.

¹⁴⁹ *Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC).

¹⁵⁰ *Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC) para 1-3.

¹⁵¹ *Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC) para 6.

¹⁵² *Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC) para 20.

¹⁵³ Kujana 2020 *Obiter* 99.

¹⁵⁴ Companella 1994 *ILJ* 492.

harassed, but the victim should also prove that she or he was treated unfairly because of her sex.¹⁵⁵

3.5.2 Objective test

The objective test in sexual harassment means that the court should determine whether the harasser ought reasonably to have known that the alleged conduct is unwelcome.¹⁵⁶ Every case of sexual harassment should be examined on its merit, and what may constitute sexual harassment for one person may not constitute sexual harassment for another. The objective assessment necessitates a detailed examination during the investigation phase of the complainant of sexual harassment. As a result, employers should be extremely cautious while administering this assessment of the test.¹⁵⁷

In the case of *Gerber v Algorax (Pty) Ltd*,¹⁵⁸ one of the problems that had to be determined was whether sexual harassment should be applied subjectively or objectively. The female employees laid several complaints against the senior employee, who was sexually harassing them by physically touching them and making unwelcome suggestive sexual comments.¹⁵⁹ The employer dismissed the senior employee and the senior employee referred the matter to the CCMA. The CCMA applied an objective test to the matter.¹⁶⁰ The court cited the case of *Pretorius v Britz*,¹⁶¹ it was held that, the approach which was applied to determine whether the conduct was unwelcome was an objective one.¹⁶²

O'Connell¹⁶³ argues that an objective test embodies society's values that, to a large extent, remain male-dominated.¹⁶⁴ The writer argues that, by applying an objective

¹⁵⁵ Monti 2000 Feminist Legal Studies 368.

¹⁵⁶ Mohlahlo An Analysis of the regulation of sexual harassment in the workplace in South Africa 11.

¹⁵⁷ Webber Wentzel 2022 <https://www.webberwentzel.com/News/Pages/new-harassment-code-will-require-employers-to-overhaul-existing-policies.aspx>.

¹⁵⁸ *Gerber v Algorax (Pty) Ltd* (1999) 20 ILJ 2994 (CCMA).

¹⁵⁹ *Gerber v Algorax (Pty) Ltd* (1999) 20 ILJ 2994 (CCMA) para 3004.

¹⁶⁰ *Gerber v Algorax (Pty) Ltd* (1999) 20 ILJ 2994 (CCMA) para 3004.

¹⁶¹ *Pretorius v Britz* [1997] 5 BLLR 649 (CCMA).

¹⁶² *Gerber v Algorax (Pty) Ltd* (1999) 20 ILJ 2994 (CCMA) para 3005.

¹⁶³ O'Connell Drawing a line between permissible and impermissible behaviour in sexual harassment cases.

¹⁶⁴ O'Connell Drawing a line between permissible and impermissible behaviour in sexual harassment

test from a woman's point of view regarding sexual harassment will not in general be considered in weighing whether the conduct in question constitutes sexual harassment.

3.5.3 Reasonable victim test

The reasonable victim test means that the court should apply both the objective test and subjective test to determine whether the alleged conduct constitutes unwelcome conduct of sexual harassment.¹⁶⁵ There are three elements applied in reasonable victim test. Firstly, whether a reasonable person in the same situation would have expected the possibility of the given outcome. Secondly, whether a reasonable person would have applied caution in same situation. Lastly, whether a reasonable person would have acted otherwise in the same set of circumstances as the accused.¹⁶⁶ In sexual harassment cases, the above-mentioned elements could be elaborated in this way: whether the offender should have reasonably known that the complainant would view behaviour as sexual harassment and whether the offender continued the harassment despite the possibility that their action might be perceived as such.¹⁶⁷

In the case of *Taljaard and Securicor*,¹⁶⁸ the court supported the combined approach of subjective test and objective test. By pointing out that in the objective test the inquiry is whether the victim felt the perpetrator's behaviour to be unwelcome and whether a reasonable person in the similar situation would find it to be unwelcome.¹⁶⁹

The 2005 code makes provision for a subjective test, but the challenge with this approach is that it provides ground of a negative outcome in jurisprudence in that it is inconsistent. This deducible from the fact that what may constitute sexual

cases 28.

¹⁶⁵ O'Connell Drawing a line between permissible and impermissible behaviour in sexual harassment cases 23.

¹⁶⁶ Van der Westhuizen 1999 Southern African Business Review 56.

¹⁶⁷ Van der Westhuizen 1999 Southern African Business Review 57.

¹⁶⁸ *Taljaard and Securicor* (2003) 24 ILJ 1167 (CCMA).

¹⁶⁹ O'Connell Drawing a line between permissible and impermissible behaviour in sexual harassment cases 28.

harassment in the workplace to another employee, may not be the case to another.¹⁷⁰ On the other hand, the 1998 Code makes provision for an objective test where the challenge with an objective approach is that it is male dominated; therefore, conduct that men view as reasonable and inoffensive may offend women.¹⁷¹

It is the writer's view that South African courts should apply a reasonable victim test because this approach comprises both objective and subjective elements. Moreover, it examines all factors that are relevant to the alleged conduct.¹⁷² Firstly, it is practical since it gives us a real way of identifying situations in which sexual harassment exists. Identifying sexually hostile situations merely requires that we ask reasonable victims if they see the alleged conduct as unwanted. Secondly, it encourages people to uphold their moral obligation to protect innocent people because it makes them consider sexually hostile environments from the point of view of the innocent person. Lastly, it shows that both the victim and the perpetrator have different points of view.¹⁷³

3.6 Conclusion

International Labour Organisation outlines sexual harassment as an unwelcome and inappropriate conduct of a sexual nature that infringes the person right to human dignity, bodily integrity, and privacy.¹⁷⁴ Sexual harassment in the workplace manifests in different forms from physical conduct, *quid pro qua*, verbal conduct, non-verbal conduct, victimisation, and hostile working environment.¹⁷⁵ Power imbalances within the workplace in one the factor that increase chances of sexual harassment in the workplace. It is possible for the employer to use his or her power

¹⁷⁰ Ndema A critical analysis of the law on sexual harassment in the workplace in South Africa in a comparative perspective 44.

¹⁷¹ Seenarayan S A critical examination of the pandemic of sexual harassment in the South African workplace 16.

¹⁷² O'Connell Drawing a line between permissible and impermissible behaviour in sexual harassment cases 28.

¹⁷³ Wells and Kracher 1993 *Journal of Business Ethics* 428.

¹⁷⁴ International Labour Organisation 2015 https://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---ilo-hanoi/documents/publication/wcms_421220.pdf.

¹⁷⁵ Reg 5.3 in GN 1357 in GG 27865 of 4 August 2005.

to demand sexual favours from the employee in exchange of employment benefits.¹⁷⁶

The 2005 code makes provision for subjective test, while the 1998 code makes provision for objective test.¹⁷⁷ One may ask whether the current test of sexual harassment in the workplace is sufficient in holding the perpetrator liable for the alleged conduct of sexual harassment. It is recommended that the courts should apply the reasonable victim test. The court should consider the point of view of the reasonable harasser, the point of view of the reasonable victim and the point of view of a reasonable person. This could prevent the court from providing judgment on the grounds of emotional expediency inherent in the subjective approach that South African courts seem to support.¹⁷⁸ The following chapter focuses on the factors to consider for determination of unwelcome element.

¹⁷⁶ Seenarayan S A critical examination of the pandemic of sexual harassment in the South African workplace 16.

¹⁷⁷ O'Connell Drawing a line between permissible and impermissible behaviour in sexual harassment cases 28.

¹⁷⁸ Wells and Kracher 1993 *Journal of Business Ethics* 427.

Chapter 4: Factors to consider for determination of unwelcome element

4.1 Introduction

A Botes¹⁷⁹ asks the following questions:

Will sexual attention in the form of an intimate invitation extended towards another constitute sexual harassment? Does it have to be continuous to receive this label or will a singular incident suffice? Could the nature of the conduct or simply the perception of the recipient have a bearing on this enquiry?¹⁸⁰

The *Code* stipulates that sexual harassment is unwelcome conduct of a sexual nature that infringes the rights of an employee and constitutes an obstacle to equity in the workplace.¹⁸¹ It is apparent that 'unwelcome element' is an essential factor that lies at the centre of the controversy for purposes of determining what constitute sexual harassment.¹⁸² This chapter primarily focuses on the guidelines and the understanding of the unwelcome conduct of sexual harassment in a regulatory framework by looking at the factors that are considered to determine unwelcome conduct through a case law lens and the Codes.

4.2 Understanding the unwelcome element of sexual harassment

In the case of *Pillay and Old Mutual Property (Pty) Ltd*¹⁸³ the court held that unwelcome element is an important factor in determining what constitutes sexual harassment in the workplace.¹⁸⁴ Sexual harassment does not always lack consent¹⁸⁵ as an employee may consent to a particular conduct even though it is offensive in exchange of receiving employment benefits. Moreover, unwelcome conduct could be regarded as unwelcome whenever the person subjected to it considers it to be

¹⁷⁹ Botes 2017 *TSAR* 761.

¹⁸⁰ Botes 2017 *TSAR* 761.

¹⁸¹ Reg 4 in GN 1357 in GG 27865 of 4 August 2005.

¹⁸² Olivier Sexual harassment in the workplace: A critical analysis of the unwelcome element 4.

¹⁸³ *Pillay and Old Mutual Property (Pty) Ltd* (2015) 36 ILJ 1961 (CCMA).

¹⁸⁴ Botes 2017 *TSAR* 761.

¹⁸⁵ Cliffe Dekker Hofmeyr Sexual harassment in the workplace-including the virtual world of work 5.

unwelcome.¹⁸⁶ The following factors are guidelines on what the courts and labour tribunals may consider in determining whether the harassment is prohibited: grounds of sex, gender or sexual orientation, whether the sexual harassment was unwelcome, the nature and extent of the unwelcome behaviour, and the impact of the sexual harassment on the employee.¹⁸⁷

In the case of *Zaindeen and Clicks Retailers (Pty) Ltd*¹⁸⁸ the manager was dismissed on the ground of sexual harassment after a disciplinary hearing at work. The case was thereafter taken to the CCMA. The commissioner held that the manager was unfairly dismissed on the grounds that the junior employee did not report the manager's conduct of inviting her into the stockroom and kissing her to the employer.¹⁸⁹ She did not warn the manager that the conduct was offensive and unwelcome. The commissioner reinstated the manager, and the dismissal of the manager was found to be unfair.¹⁹⁰ The question then arises on how employers approach this dilemma in the working environment where sexual harassment is endemic.

It is the research's view that, even though the amended code requires that the employee should report the alleged conduct of sexual harassment to the employer, in order for the employer to take relevant steps to eliminate sexual harassment and to also ensure that the victim receives redress, the court should also consider the purpose of the employee not reporting the perpetrator to the employer. It is unfair for the perpetrator not to be punished for his or her wrong doings on the basis that the victim did not report the incident of sexual harassment to the employer. The reason is that some perpetrators may threaten to kill the victims if they report the case of sexual harassment to the employer.

To determine unwelcome conduct, the harassed employee should prove that she or he did not want to be treated in the manner that she or he was treated. Instead of examining whether the conduct of the harasser was unwelcomed for the workplace

¹⁸⁶ Cliffe Dekker Hofmeyr Sexual harassment in the workplace-including the virtual world of work 6.

¹⁸⁷ Reg 4 in GN 1357 in GG 27865 of 4 August 2005.

¹⁸⁸ *Zaindeen and Clicks Retailers (Pty) Ltd* 35 ILJ (CCMA).

¹⁸⁹ Cooper, Vosloo, Beer 2014 *ILJ* 4.

¹⁹⁰ Cooper, Vosloo, Beer 2014 *ILJ* 4.

environment, this element shifts focus to the victim's reaction.¹⁹¹ The court considers whether the victim did not want the sexual attention. Consequently, the question that arises is whether the victim asked for it and whether she or he enjoyed it. The dilemma that arises in cases of unwelcome conduct of sexual harassment is between moral obligation and self-interest. The unwelcome conduct interferes with the individual's dignity and self-respect in the workplace. It further deprecates the social status, reputation, income and job security of the harassed person.¹⁹²

Monti¹⁹³ provides guidelines that the court may consider in determining what constitutes unwanted conduct of sexual harassment. The harasser's conduct should affect the harassed person's dignity negatively. The harassed individual should define to the court what he or she deems unwelcome. Subsequently, there may be a dilemma between what the court defines as unwelcome conduct and what the victim recognises as unwelcome. The court should not only consider the harm caused to the victim by the factor of unwelcome conduct, rather, all factors should be examined cumulatively and concurrently.¹⁹⁴

To determine what constitutes unwelcome conduct of sexual harassment, it is concluded that the conduct must not have been encouraged.¹⁹⁵ However, these guidelines could have a wide range of practical implications and may leave many issues unresolved.¹⁹⁶ The courts have used many different approaches to determine whether the conduct by the harasser is unwelcome. Depending on the merits of the case, welcome conduct may be interpreted as any behaviour that is not specifically objected to by an employee, or it may only refer to behaviour that is explicitly accepted by an employee.¹⁹⁷ The conduct may not be deemed welcome when it is so habitual and endemic in the workplace that the only appropriate behaviour is the unwillingness to partake in the inappropriate behaviour.¹⁹⁸

¹⁹¹ Jackson 2005 North Dakota Law Review 741.

¹⁹² Jackson 2005 North Dakota Law Review 741.

¹⁹³ Monti 2000 Feminist Legal Studies 369.

¹⁹⁴ Monti 2000 *Feminist Legal Studies* 369-370.

¹⁹⁵ Chambers 2002 *Alabama Law Review* 750.

¹⁹⁶ Chambers 2002 *Alabama Law Review* 750.

¹⁹⁷ Wiener R L and Hurt L E 1997 *California Western Law Review* 55.

¹⁹⁸ Chambers 2002 *Alabama Law Review* 752.

4.2.1 Once-off incident

Overall, it is possible that a single conduct constitutes sexual harassment.¹⁹⁹ In the case of *Motor Transport Workers Union obo Zikhali v Izinkobe Construction (Pty) Ltd*,²⁰⁰ the court held that unwelcome conduct could be once-off incident.²⁰¹ It is evident that a once-off incident of sexual harassment is sufficient for the harassed person to claim successfully against the harasser. It is not a prerequisite that the conduct be repeated.²⁰² Botes²⁰³ stipulates that a once-off conduct may be unwanted if such conduct is serious and has a perceptible injurious impact on the harassed.²⁰⁴ In the instance of sexual harassment, a once-off occurrence should not be taken into account in isolation; rather, consideration should be given to the situation as a whole, as brought on by the single incident.²⁰⁵

When reporting a sexual harassment offence at work it is often advised that the victim should report the sexual harassment immediately as noted in the Code. This immediate report assists the victim to explain the incident while fresh and easy to secure available evidentiary materials and it also assures reliability.²⁰⁶ In Setswana there is a phrase that says "*ngwana o sa lleng o swela tharing*" which means "a child who does not cry dies in the shawl". Thus, when a victim reports the unwelcomed conduct at the workplace, it is an expression of hope that the superiors will conduct a disciplinary hearing and rescue the victim.²⁰⁷

4.2.2 Consensual element

Any conduct of a sexual nature which is consented, wanted or reciprocated is not considered as sexual harassment, because it is a desired sexual conduct. In addition,

¹⁹⁹ Monti 2000 *Feminist Legal Studies* 369-370.

²⁰⁰ *Motor Transport Workers Union obo Zikhali v Izinkobe Construction (Pty) Ltd* (2020) 7 BALR 715 (BCCEI).

²⁰¹ Lindsay Keller Attorneys Sexual harassment in the workplace 1.

²⁰² Grant *et al* 2017 *ILJ* 780.

²⁰³ Botes Identifying Sexual Harassment in the Workplace? Do Not Forget to Remember the Code of Good Practice.

²⁰⁴ Botes Identifying Sexual Harassment in the Workplace? Do Not Forget to Remember the Code of Good Practice 15.

²⁰⁵ Grobler & Erasmus A model for management of sexual harassment in South Africa companies 38.

²⁰⁶ Kubjana 2020 *PELJ* 97.

²⁰⁷ Kubjana 2020 *PELJ* 100.

a person engages in sexual conduct for him or herself and not for any other reason.²⁰⁸ In cases of sexual harassment, the court should differentiate between exploited consent and manipulated consent. Exploited consent means that the victim consented to the sexual harassment incapacitated by ignorance or failure of the will, while on the other hand, manipulated consent means that the victim's emotion or will has been manipulated to secure the agreement between the parties.²⁰⁹ The main question in this element is whether the consent was given voluntarily or under duress. Sexual conducts, give and take, are based on mutual consent, not on behaviours that are exploitative and abusive.²¹⁰ As such, if a party did not consent to the sexual conduct, he or she can claim successfully for sexual harassment. Sexual consent must be informed, freely and actively given.²¹¹

In the recent judgement that was delivered by the court on 10 November 2022 of *Amathole district municipality v CCAM and Others*,²¹² the court dealt with the aspect of consensual element. The CCMA and LC delivered contrary judgements after analysing the merits of the case.

The respondent who was employed by the municipality as an Administrative Assistant alleged that she was sexually harassed by his co-worker Mr. Fredericks. The unwelcome conduct of sexual harassment included performing oral sex, touching her private parts and pressing her breast.²¹³ One of the pieces of evidence that was presented before the court was an SMS by the respondent to Mr. Fredericks written: "u knw what I am hungry for u now serious sweetie what' ur plans for today."²¹⁴ The respondent explained to the court that she did not resist the

²⁰⁸ Chen 1999 Hofstra Labour and Employment Law Journal 169.

²⁰⁹ World Health Organization unknown https://www.who.int/docs/default-source/documents/ethics/sexual-exploitation-and-abuse-pamphlet-en.pdf?sfvrsn=409b4d89_2.

²¹⁰ Bleacher Sexual harassment, special relationship and consensual engagement policies within higher learning institutions -A labour law perspective 40.

²¹¹ Chen 1999 Hofstra Labour and Employment Law Journal 168.

²¹² *Amathole district municipality v CCAM and Others* [2022] ZALAC 119 (10 November 2022).

²¹³ *Amathole district municipality v CCAM and Others* [2022] ZALAC 119 (10 November 2022) para 4.

²¹⁴ *Amathole district municipality v CCAM and Others* [2022] ZALAC 119 (10 November 2022) para 47-48.

unwelcome conducts because she feared to lose her job. As Mr. Fredericks was one of superior employees at the municipality.²¹⁵

The CCMA held that indeed the respondent was unfairly discriminated in terms of section 6 of the EEA. As a result, the commissioners determined that Mr. Fredericks had in fact harassed the employee sexually. They also determined that because the employer had not taken the necessary precautions to protect the employee from Mr. Frederick's sexual advances, the appellant's actions constituted unfair discrimination in relation to sexual harassment. As a result, they were ordered, among other things, to pay the employee R150 000.00 of compensation.²¹⁶

On the other hand, the LC raised the question why would the respondent call the alleged perpetrator "sweety" when addressing him in an SMS as explained in the above-mentioned set of facts. The court held that the SMS and emails by the respondent to the alleged perpetrator tend to support observation that unwelcome conduct of sexual nature was consensual between the parties.²¹⁷ In addition, the respondent did not resist the unwelcome conduct. Despite understanding that Mr. Frederick's sexual advances was inappropriate and unwelcome, she did not walk away and continued to entertain Mr. Fredricks. The responded did not report the alleged conduct of sexual harassment immediately to the employer, she waited for approximately 3 months to raise the complaint.²¹⁸ The appeal was set aside by the LC.²¹⁹

4.2.3 Sexual history of the harasser

To identify whether the conduct is unwelcome, the court may also consider the sexual history of the harasser. In practice the question that may be raised is whether

²¹⁵ Amathole district municipality v CCAM and Others [2022] ZALAC 119 (10 November 2022) para 4.

²¹⁶ Amathole district municipality v CCAM and Others [2022] ZALAC 119 (10 November 2022) para 16.

²¹⁷ Amathole district municipality v CCAM and Others [2022] ZALAC 119 (10 November 2022) para 54.

²¹⁸ Amathole district municipality v CCAM and Others [2022] ZALAC 119 (10 November 2022) para 58.

²¹⁹ Amathole district municipality v CCAM and Others [2022] ZALAC 119 (10 November 2022) para 65.

such person has been previously found guilty of sexual harassment or not. This line of enquiry is important to establish whether the harasser is a habitual and serial sexual harasser.²²⁰

4.2.4 Sexual history, clothes, and behaviour of the harassed

The court may consider the sexual history of the harassed to decide whether the conduct was unwelcomed or welcome.²²¹ In the case of *Lynne Martin-Hancock v Computer Horizon*,²²² it was held that sexual history of the victim can be used as evidence, as a “worldly streetwise and experienced woman”. This factor may assist the court to consider whether the harassed would regard the alleged conduct of the harasser as unwelcome. South African society still holds the belief that one of the reasons why women are the most sexually harassed in the workplace is because of the way they dress at the workplace, and as such they ask for it. In simpler interpretation, it is the dress code of the harassed that implicates the conduct of the harasser as more welcoming.²²³ In the case of *Pick 'n Pay Stores Ltd v An Individual*²²⁴ the court stipulated that a woman’s dress code and behaviour plays a trivial role in the victim’s sexual harassment.²²⁵

Snayman²²⁶ *et al* determine that attire and conduct only occasionally contribute to sexual harassment. One should not continue to wear certain clothes in the workplace that cause people to respond negatively, even if everyone has the right to wear whatever they choose without allowing another person the right to violate their physical integrity. It is crucial to note that it is challenging to establish rules on attire and actions that could invite unwanted conduct of sexual harassment. The verdict varies from case to case.²²⁷

²²⁰ Ramsaroop & Parumasur 2007 SA Journal of Industrial Psychology 25.

²²¹ Oliver Sexual harassment in the workplace: A critical analysis of the unwelcome element 60.

²²² *Lynne Martin-Hancock v Computer Horizon* unreported case no NH 11/2/11268 (October 1994).

²²³ Oliver Sexual harassment in the workplace: A critical analysis of the unwelcome element 61.

²²⁴ *Pick 'N Pay Stores Ltd v An Individual* (1994) 3 (1) ARB 2.25.136.

²²⁵ Seenarayan A critical examination of the pandemic of sexual harassment in the South African workplace 50.

²²⁶ Snayman *et al* 2002 Acta Academia Supplementum 210.

²²⁷ Snayman *et al* 2002 Acta Academia Supplementum 210.

In criticism, the court has argued that considering the sexual history of the harassed is not applicable because firstly, the harasser may not have been aware of the victim's sexual history, in which case, from that point of view, he would not have known that she would be more accepting of his behaviour. Secondly, the victim's past cannot be used to imply that she would be more tolerant of current unwanted sexual advances. It is not acceptable to consider that the unwelcome conduct was invited or welcome due to the dress code or behaviour of the harassed.²²⁸ It is the research's opinion that considering the sexual history of the harassed is an attempt to blame the victim for the accused's conduct. Submitting that a colleague is correct in sexually harassing his or her fellow co-worker for wearing a short skirt is unacceptable.

4.3 Reasons why employees are so reluctant to report sexual harassment in the workplace

Sexual harassment is under-reported in the workplace.²²⁹ The challenge for this under-reporting is because of the current disciplinary procedure which is reliant on the employee reporting sexual harassment. Most companies get paralysed if the employee fails to report. The causes for under-reporting are numerous, but the difficulty of filing a complaint is the main cause of under-reporting.²³⁰

In the case of *Rustenburg Platinum Mines Limited v UASA OBO Steve Pietersen and others*²³¹ the court held that it took years for the victims to report incidents of sexual harassment because they firstly needed to acquire the courage to report as they feared that they might cause disharmony at the workplace, with allegations that might not be believed. In some instances, other victims do not want other co-employees to feel pity for them. Some victims do not report the incident because of the pain endured; this is done as a trauma response, and it is also coupled with the sense of guilt of the possibility that the harasser may lose their jobs.²³²

²²⁸ Oliver Sexual harassment in the workplace: A critical analysis of the unwelcome element 60.

²²⁹ Meyersfeld 2020 Constitutional Court Review 306.

²³⁰ Meyersfeld 2020 Constitutional Court Review 306.

²³¹ *Rustenburg Platinum Mines Limited v UASA OBO Steve Pietersen and others* (2018) 39 ILJ 1330 (LC).

²³² *Rustenburg Platinum Mines Limited v UASA OBO Steve Pietersen and others* (2018) 39 ILJ 1330

In the above-mentioned case, the complainant Ms Jane Kgole laid complain of sexual harassment against the perpetrator Mr Steve Pietersen. Ms Jane Kgole who worked as a boilermaker submitted to the court that the perpetrator would ask her to have sex with him, so that he would help the complainant with household expenses.²³³ On some occasion, Mr Steve Pietersen who worked in a senior position of engineering would promise the complainant that if she slept with him, he would ensure that the complainant received promotion at the workplace.²³⁴ The complainant failed to report the alleged conduct of sexual harassment to the employer as she thought refusal to acquiesce would not assist her. She also considered the possibility that if she reported the sexual harassment, Pietersen's life would be destroyed. Nevertheless, she had told her husband and a few of her co-workers about Pietersen's behaviour.²³⁵

The harassment remained unreported for years because the complainant thought that the perpetrator would stop with the unwelcome conduct. The labour court held that the dismissal of the complainant was procedurally and substantively fair. Moreover, a workplace is not "a lonely-hearts club for love-sick employees". While there may be attraction between co-employees as normal human beings, a behaviour can go beyond the line of being welcome when it undermines the dignity, privacy, and integrity of the harassed person by creating a sexually hostile and intimidating workplace environment.²³⁶

In many situations, some victims at the workplace do not report sexual harassment cases because the victim has a duty to prove that the harasser indeed harassed him or her and as such, they are convinced that they do not have enough evidence, there is no other eyewitness; in addition, they may worry that they will not be

(LC) para 51.

²³³ Rustenburg Platinum Mines Limited v UASA OBO Steve Pietersen and others (2018) 39 ILJ 1330 (LC) para 4.

²³⁴ Rustenburg Platinum Mines Limited v UASA OBO Steve Pietersen and others (2018) 39 ILJ 1330 (LC) para 10.

²³⁵ Rustenburg Platinum Mines Limited v UASA OBO Steve Pietersen and others (2018) 39 ILJ 1330 (LC) para 9.

²³⁶ Rustenburg Platinum Mines Limited v UASA OBO Steve Pietersen and others (2018) 39 ILJ 1330 (LC) para 60-64.

believed.²³⁷ Some victims of sexual harassment fear losing their employment due to power imbalances. Furthermore, employees are afraid to report the incident because they are apprehensive of publication, in which other employees would know that they have been sexually harassed. The disclosure of sexual harassment creates significant embarrassment and humiliation.²³⁸ Some victims at the workplace are concerned that the outcome of the investigation could be unsatisfactory, and they are discouraged from reporting. They are concerned about social, professional and other people's perceptions that could lead to exclusion and labelling as troublemakers.²³⁹

4.4 Conclusion

In conclusion, it can be submitted that unwelcome element means that the conduct must cross the line into the realm of the inappropriate. In some cases, it is difficult for the courts to determine whether the incident constitutes unwanted conduct of sexual harassment. As a result, the court considers different factors. A once-off incident is accepted as a conduct of sexual harassment if such act is a serious transgression of an oppressive nature.²⁴⁰ Due to the nature of sexual harassment itself, not many victims at the workplace are willing to disclose the fact that they have been sexually harassed because of the attitude towards the behaviour, cultural and subjective norms and most victims depend on their jobs.²⁴¹ The following chapter focuses on the impact of sexual harassment on the employer and its effects on human rights of employees.

²³⁷ Jackson 2005 North Dakota Law Review 747.

²³⁸ Jardin The Management of Sexual Harassment in the Workplace 43.

²³⁹ Johnson et al 2016 Harvard Business Review 3.

²⁴⁰ Botes 2017 *TSAR* 767.

²⁴¹ Naulapwa date unknown Sexual harassment proposal. docxfilename UFT8 Sexual 20 harassment 20 proposal 20.

Chapter 5: Impact of sexual harassment on the employer and its effects on human rights of employees

5.1 Introduction

The *Occupational Health and Safety Act 85 of 1993* (hereafter OHSA) outlines that employers are obliged to have and maintain, as far as reasonably possible, a workplace that is safe.²⁴² This includes freedom from sexual harassment. Failure for the employer to follow proper procedure to protect his or her employees, he or she will be held vicariously liable for the unwelcome conduct.²⁴³ The South African Constitution promotes the founding values of human dignity, equality and freedom.²⁴⁴ It is essential that all employees should be treated with respect and dignity within the workplace. This chapter focuses on the impact of sexual harassment on the employer and its effect on the human rights of employees. It also discusses the remedies available for victims of sexual harassment in the workplace.

5.2 Vicarious liability of the employer in terms of section 60 of the EEA

Section 60 of the EEA stipulates that the employer may be held vicariously liable for the perpetrator's alleged conduct that is in contravention of the EEA, that is committed within the course and scope of their employment duties; in the case where the victim reports the matter to the employer and the employer fails to follow proper procedure to address the alleged conduct.²⁴⁵ The aim of this provision is to encourage employers to do as much as possible to eliminate discrimination in the workplace and to penalise employers who fail to eradicate equity in the workplace.²⁴⁶ In the case of *Liberty Group Limited v M.M*²⁴⁷ the employee alleged

²⁴² Occupational Health and Safety Act 85 of 1993.

²⁴³ Section 60 of the *Employment Equity Act* 55 of 1998.

²⁴⁴ Chicktay 2010 *Journal of African Law* 283.

²⁴⁵ Section 60 of the *Employment Equity Act* 55 of 1998.

²⁴⁶ Mohlahlo An analysis of the Regulation of Sexual harassment in the Workplace in South Africa 35.

²⁴⁷ *Liberty Ltd v M* (2017) 38 *ILJ* 1318 (LC).

that she was sexually harassed by the manager. The employee reported the matter to employer, however; the employer did not follow any procedure to eliminate the alleged conduct.²⁴⁸

The court emphasised the prerequisite that must be met for vicarious liability in terms of section 60 of the *EEA* and the requirements were also discussed in the case of *Potgieter v National Commissioner of the SA Police Service and another*²⁴⁹. The alleged conduct should be committed by another employee. The alleged conduct should constitute unfair discrimination of sexual harassment. The court should consider whether the alleged conduct took place at the workplace. The unwelcome conduct was reported to the employer immediately after the conduct took place. The employer was made aware of the harassment. The employer failed to take all relevant steps to eradicate the alleged conduct.²⁵⁰

The LAC found the employer vicariously liable for sexual harassment committed by the manager. Firstly, the employee reported the matter to the employer, however; the employer failed to take the necessary steps. Secondly, it was found that the respondent's resignation was driven by the fact that she had no other option but to deal with the perpetrator and this left her without any option but to resign. In conclusion, the employer was ordered to pay an amount of R250 000 to the victim.²⁵¹

In the recent 2021 judgment of *P-A-E v DR Beyers Naudes Local Municipality and Another*,²⁵² the court upheld the penalties for an employer who failed to give employees a safe workplace, including freedom from sexual harassment. In this case, a 23 old year female who worked as a registry and archives clerk at Ikwezi Municipality was sexually harassed by the supervisor. When she complained about the alleged conduct to her employer, she was placed on two days leave. Despite proving the alleged conduct of sexual harassment, the alleged perpetrator was not

²⁴⁸ *Liberty Ltd v M* (2017) 38 *ILJ* 1318 (LC) para 6-7.

²⁴⁹ *Potgieter v National Commissioner of the SA Police Service and another* [2009] 2 *BLLR* 144 (LC).

²⁵⁰ *Liberty Ltd v M* (2017) 38 *ILJ* 1318 (LC) para 38.

²⁵¹ *Liberty Ltd v M* (2017) 38 *ILJ* 1318 (LC) para 59-62.

²⁵² *P-A-E v Dr Beyers Naude Local Municipality and Another* (2021) 42 *ILJ* 1545 (ECG).

dismissed, and he was requested to stop visiting the victim's workplace.²⁵³ On at least three events, he failed to abide by this request and the victim had to see him. In addition, no immediate action was taken against the perpetrator for the alleged conduct. The alleged victim resigned from work due to Post Traumatic Stress Disorder caused by the intolerable working environment.²⁵⁴

The employer and perpetrator were found both jointly and severally liable for the damages, on the ground that the employer had an obligation to ensure that his or her employees worked in a safe and healthy working environment. It was also noted that the perpetrator had continued to work, while the victim was forced to resign due the intolerable conduct.²⁵⁵ In conclusion the court quoted the case of *V v Passenger Rail Agency of South Africa (PRASA) and Others*²⁵⁶, where the court held that:

Taking disciplinary steps does not of necessity lead to the elimination of the conduct. Where an employer adopts a code on sexual harassment, such is a step aimed at eliminating the conduct of sexual harassment.²⁵⁷

*5.2.1 The interpretation of the word "immediately" in section 60(1) of the EEA*²⁵⁸

It is required that the employee of the alleged conduct should report the alleged incident *immediately* to the employer.²⁵⁹ The qualifier 'immediately' does not mean a minute after the incident has been conducted; it simply means that the alleged conduct should be reported within a reasonable time after the alleged incident has occurred. In the case of *Liberty Group Limited v M.M.*²⁶⁰ the court held that the concept of immediacy should be understood

²⁵³ P-A-E v Dr Beyers Naude Local Municipality and Another (2021) 42 ILJ 1545 (ECG) para 22.

²⁵⁴ P-A-E v Dr Beyers Naude Local Municipality and Another (2021) 42 ILJ 1545 (ECG) para 30.

²⁵⁵ P-A-E v Dr Beyers Naude Local Municipality and Another (2021) 42 ILJ 1545 (ECG) para 60.

²⁵⁶ V v Passenger Rail Agency of South Africa (PRASA) and Others (P60/2018) [2020] ZALCPE 6.

²⁵⁷ V v Passenger Rail Agency of South Africa (PRASA) and Others (P60/2018) [2020] ZALCPE 6 para 15.

²⁵⁸ Section 60(1) of the *Employment Equity Act* 55 of 1998.

²⁵⁹ Section 60(1) of the *Employment Equity Act* 55 of 1998.

²⁶⁰ Liberty Group Limited v M.M (2017) 38 ILJ 1318 (LC).

on what is termed a "sensible meaning", and that a reasonable delay in reporting the alleged incident of sexual harassment would be acceptable.²⁶¹

In the case of *National Union of Metal Workers of South Africa and Another v Passenger Rail Agency of South Africa*,²⁶² an employee lodged a formal grievance of sexually harassment to the employer, after three years of being sexually harassed by the manager. The court found that this could not be taken as a limited delay as envisaged and found to be acceptable in holding the employer vicariously liable. In this instance and given the delay, the court found that Passenger Rail Agency of South Africa (PRASA) had been deprived of its obligation to eradicate the alleged conduct of sexual harassment. Sexual harassment was not immediately brought to the attention of the employer as required in terms of section 60(1) of the LRA.²⁶³ The court did not condone delays in reporting the sexual harassment matter.²⁶⁴

5.3 Requirements of Vicarious Liability

In the case of *Grobler v Naspers BPK*²⁶⁵ the court held that there were three requirements that the court should consider to find the employer vicariously liable. Firstly, there had to be an employment relationship. Secondly, the employee should have committed a delict. Lastly, the employee had to act within the course and scope of his employment.²⁶⁶

In the case of *Ntsabo v Real Security CC*²⁶⁷, the applicant was sexually harassed by a senior co-employee. The applicant later reported the alleged conduct to the employer; however, the employer failed to follow the relevant procedure to eliminate the alleged conduct. Instead, the applicant was moved to another

²⁶¹ Liberty Group Limited v M.M (2017) 38 ILJ 1318 (LC) para 51.

²⁶² National Union of Metal Workers of South Africa (NUMSA) and another v Passenger Rail Agency of South Africa (JS1071/18) [2021] ZALCJHB 312.

²⁶³ National Union of Metal Workers of South Africa (NUMSA) and another v Passenger Rail Agency of South Africa (JS1071/18) [2021] ZALCJHB 312 para 47.

²⁶⁴ Cliffe Dekker Hofmeyr 2021 Downloads/Employment-Law-Alert-18-October-2021.pdf.

²⁶⁵ Grobler v Naspers BPK 2004 4 SA 220 (C).

²⁶⁶ Reubenheimer Employment Liability for Sexual harassment in the Workplace Revisited 17.

²⁶⁷ Ntsabo v Real Security CC 2003 24 ILJ 2341 (LC).

department. The applicant resigned and claimed for constructive dismissal for intolerable conduct.²⁶⁸

The employer was found vicariously liable in terms of section 60 of the EEA²⁶⁹ because he failed to act against the senior co-employer. The court held that there was an employment relationship, it was proved that the applicant was sexually harassed by the co-employee and that sexual harassment was committed within the scope of employment. It was held that the employer had effectively supported the harasser by not sanctioning him. Furthermore, the court found that the fact that the employer moved the applicant to another department confirmed a lack of appreciation of and sensitivity to its legal obligation to provide the applicant with a safe working environment.²⁷⁰

5.3.1 There must be an employment relationship

The employer may be held vicariously liable for the employees' sexual harassment conduct in the case where it is proved that there is an employment relationship between the parties, as defined in terms of section 213 of the LRA. Independent contractor is excluded from the definition.²⁷¹ It is impossible to hold the employer vicariously liable in terms of section 60 of the LRA if the perpetrator is not an employee.²⁷²

In the case of *Shoprite Checkers (Pty) Ltd v Samka & Others*²⁷³ the legal question was whether the employer could be held liable in terms of section 60 of the EEA for racist remarks by a customer.²⁷⁴ In this case a white female customer Mrs Price called the applicant "You stupid kaffir".²⁷⁵ The court agreed that Mrs Price's remarks constituted an unfair racial discrimination which was in contravention with the EEA; however, the employer could not be held vicariously liable for the customer's unwelcome conduct. In this regard, it was clear to the court that section 60 of the

²⁶⁸ Gule 2005 *EJC* 66.

²⁶⁹ Section 60 of the *Employment Equity Act* 55 of 1998.

²⁷⁰ Gule 2005 *EJC* 67.

²⁷¹ Lowlar Vicarious and direct liability of an employer for sexual harassment at the workplace 23.

²⁷² Basson et al *The New Essential Labour Law Handbook* 365.

²⁷³ *Shoprite Checkers (Pty) Ltd v Samka & Others* (2018) 39 ILJ 2347 (LC).

²⁷⁴ *Shoprite Checkers (Pty) Ltd v Samka & Others* (2018) 39 ILJ 2347 (LC) para 1.

²⁷⁵ *Shoprite Checkers (Pty) Ltd v Samka & Others* (2018) 39 ILJ 2347 (LC) para 3.

EEA applied only to the alleged conduct by an employee of the defendant employer.²⁷⁶

In the case of *Public Servants Association of South Africa obo AG v Department of Agriculture, Land Reform and Rural Development*,²⁷⁷ the employee was sexually harassed by a fellow trade union member, as a shop steward during a trade union meeting. The employee reported the alleged unwelcome conduct to her employer immediately after the meeting. However, the employer failed to assist the employee on the grounds that the alleged conduct was between the employee as a member of trade union and a fellow union member, and the meeting was unauthorised. As a result, the incident should be reported to the trade union.²⁷⁸

The employee took the grievance further to the CCMA. The commissioner held that the employer's judgment was incorrect on the basis that both parties were employees of the employer and there was an employment relationship between the employee and employer.²⁷⁹ At the time of the alleged conduct both parties were on duty within the course and scope of the employment. The commissioner held that the employer failed to comply with section 60 of the EEA, by investigating the alleged conduct of sexual harassment and taking all relevant measures to prevent the alleged conduct. As a result, the employer was ordered to pay the employee ten months' compensation.²⁸⁰

Looking at the case law above, it is evident that the provision of section 60 of the EEA is only applicable where there is an employment relationship between the parties.

²⁷⁶ Shoprite Checkers (Pty) Ltd v Samka & Others (2018) 39 ILJ 2347 (LC) para 14.

²⁷⁷ Public Servants Association of South Africa obo AG v Department of Agriculture, Land Reform and Rural Development [2021] 1 BALR 76 (CCMA).

²⁷⁸ Cliffe Dekker Hofmeyr 2021

<https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2021/Employment/Downloads/Employment-Law-Alert-8-March-2021.pdf>.

²⁷⁹ Cliffe Dekker Hofmeyr 2021

<https://www.cliffedekkerhofmeyr.com/export/sites/cdh/en/news/publications/2021/Employment/Downloads/Employment-Law-Alert-8-March-2021.pdf>.

²⁸⁰ Van der Sandt 2022 <https://serr.co.za/sexual-harassment-and-vicarious-liability-of-the-employer>.

5.3.2 *The employee must commit a delict*

Five elements of a delict must be met by the employee, namely an act, wrongfulness, fault (intention or negligence), harm and causation.²⁸¹ The aspect of delict is to ensure that a remedy is granted for the harm suffered.²⁸²

5.3.3 *The employee must act within the course and scope of his employment*

One of the challenges with the application of vicarious liability is that employees often act in their own capacity and not within the course and scope of their employment.²⁸³ It is essential that the court should apply vicarious liability in accordance with the spirit and purpose of the constitution.²⁸⁴ The inquiry whether the act falls within or outside the scope of employment has been described as a question of law, but it has also been said that each case should rightfully depend on its own facts.²⁸⁵

In the case of *K v Minister of Safety and Security*,²⁸⁶ the legal question was whether the court should apply the principle of vicarious liability in terms of section 39(2) of the Constitution. In this case Ms K who was 20 years old was sexually harassed by three police officers while on duty. The three police officers were found guilty of rape. Ms K instituted a *delictual* claim against the Minister of Police for the harm caused to her by the three policemen.²⁸⁷

The HC and SCA rejected the claim on the basis that the three policemen were not acting within the scope and course of their employment.²⁸⁸ The Constitutional Court disagreed with these judgments on the basis that the three police officers were on duty at the time of the rape, wearing employment uniform and using the employment vehicle. In this regard, they had a duty to protect Ms K. Further, the

²⁸¹ Lowlar Vicarious and direct liability of an employer for sexual harassment at the workplace 24.

²⁸² Van Eeden The constitutionality of vicarious liability in the context of the South African Labour Law: A Comparative study 8.

²⁸³ Van Eeden The constitutionality of vicarious liability in the context of the South African Labour Law: A Comparative study 5.

²⁸⁴ Chicktay 2010 *JAL* 288.

²⁸⁵ Calitz 2005 *TSAR* 218.

²⁸⁶ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

²⁸⁷ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) para 1-4.

²⁸⁸ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC) 8.

police officers had a constitutional duty to stop crime and protect the members of the public, that was a duty which also rested on the employer and they were employed by their employer to perform this obligation.²⁸⁹ The judgment of the Constitutional Court is significant because it has expanded the scope of vicarious liability in terms of section 60 of the EEA, allowing victims of sexual harassment to sue employers vicariously for unwanted conduct committed by their employees.²⁹⁰

It is also vital to clarify what is meant by "while at work." In the context of the employer's common law vicarious liability, the requirement of "during the course and scope of employment" is substantially different from this. According to some, "while at work" should be construed far more widely than "during the course and scope of employment" and should instead mean "at the workplace or when the employed parties are engaged in activities related or connected to work."²⁹¹ If the parties are involved in work-related activities outside of regular business hours or away from the workplace, such as business trips, employment events, and incentive vacations, it could be challenging to prove whether the harassment occurred "while at work."²⁹²

5.4 Employer's defences to avoid vicarious liability in delict or section 60 of the EEA

Section 60 (2) stipulates steps that the employee may take to avoid liability. It is stipulated that the employer should engage with all relevant parties and take all steps prescribed by the Act. The employer should comply with the EEA in order to ensure that no conduct in the workplace contravenes the Act.²⁹³ If there is no sexual harassment policy in the workplace as required by the Act, the employer should use the guidelines in the original and amended Codes.²⁹⁴

²⁸⁹ K v Minister of Safety and Security 2005 (6) SA 419 (CC) para 45.

²⁹⁰ Chicktay 2010 JAL 288.

²⁹¹ Mukheibir & Ristow 2006 EJC 259.

²⁹² Mukheibir & Ristow 2006 EJC 259.

²⁹³ Section 60 (2) of the *Employment Equity Act* 55 of 1998

²⁹⁴ Mukheibir & Ristow 2006 EJC 259.

5.5 Employer's duty to provide employees with a safe work environment free from sexual harassment

The common law imposes an obligation upon the employer to ascertain that he or she ensures and maintains a safe workplace.²⁹⁵ It is necessary to prove the elements of delict in order to hold the employer directly liable for harm suffered as a result of sexual harassment. In most occasions such liability will result from an omission due to the employer's failure to take safeguards, or to take action for the complaints made by the employee.²⁹⁶ The employer should take all necessary steps to prevent sexual harassment in the workplace; for instance, the employers should have a code of practice that is in accordance with the amended Code.²⁹⁷

In the case of *Media24 v Grobler*,²⁹⁸ a 33-year-old secretary employed by Nasionale Tydskrifte Ltd was sexually harassed by a trainee manager.²⁹⁹ The legal question was whether the employer owed a legal duty to an employee to protect her from being sexually harassed by a fellow employee. The court referred to the case of *Van Deventer v Workman's Compensation Commissioner*,³⁰⁰ where it was held that an employer was obliged by common law duty to take reasonable care for the safety and health of their employees.

In addition, the court also referred to the case of *Vigarito v Afrox Ltd*,³⁰¹ which held that the common law duty could not be limited to the duty to take reasonable precautions to safeguard employees from bodily injury brought on by what might be referred to as physical risks. In suitable situations, it must also involve a responsibility to safeguard employees from psychological injury, such as that brought on by co-employees' conduct of sexual harassment.³⁰²

The respondent was diagnosed with post-traumatic stress disorder just after the disciplinary enquiry; it was proved to the court that this psychiatric harm was caused

²⁹⁵ Basson The new essential labour law handbook 41.

²⁹⁶ Mukheibir & Ristow 2006 *EJC* 249.

²⁹⁷ Fawzia Khan 2022 https://www.findanattorney.co.za/content_sexual-harassment-workplace-SA.

²⁹⁸ Media 24 Ltd v Grobler 2005 26 ILJ 1007 (SCA).

²⁹⁹ *Media 24 Ltd v Grobler* 2005 26 ILJ 1007 (SCA) para 33.

³⁰⁰ Van Deventer v Workman's Compensation Commissioner 1962 (4) SA 28 (T).

³⁰¹ *Vigarito v Afrox Ltd* 1996 (3) SA 450.

³⁰² *Media 24 Ltd v Grobler* 2005 26 ILJ 1007 (SCA) para 65.

by sexual harassment.³⁰³ The court held that failure of the employer to protect the employee from any harm, including from being sexually harassed, would result in the employer having to pay compensation to the victim of such sexual harassment.³⁰⁴ The employer has a duty to take necessary steps to prohibit all employees from being sexually harassed in the workplace. If the employer negligently fails to do so, the employer is obliged to compensate the victim for the harm caused.³⁰⁵

5.6 The effects of sexual harassment on human rights of employees

Everyone has inherent protection of human rights, recognised by various international and regional organisations in a multitude of instruments, including all the employees.³⁰⁶ In the case of *Prinsloo v Van der Linder*³⁰⁷ the court held that all human beings are inherently equal in dignity.³⁰⁸ As a result, all employees should be treated with respect and dignity in the workplace.³⁰⁹ Every person is entitled of respect and care from others and should not be treated as a sexual object for pleasure. A person may feel violated, impure, and offended by being sexually harassed.³¹⁰

Sexual harassment committed against another employee violates his or her right to human dignity;³¹¹ the employee's right to equality;³¹² the employee's right to bodily and psychological integrity;³¹³ and the employee's right to privacy.³¹⁴ The unwelcome conduct of sexual harassment constitutes an unfair discrimination based on sex, gender and sexual orientation.³¹⁵ These fundamental rights must be

³⁰³ *Media 24 Ltd v Grobler* 2005 26 ILJ 1007 (SCA) para 56.

³⁰⁴ *Media 24 Ltd v Grobler* 2005 26 ILJ 1007 (SCA) para 64.

³⁰⁵ Meyersfeld 2020 Constitutional Court Review 322.

³⁰⁶ United Nation unknown <https://www.un.org/en/global-issues/human-rights>.

³⁰⁷ *Prinsloo v Van der Linder* (3) SA 1012 (CC).

³⁰⁸ Du Plessis & Fouchie A practical guide to labour law 9th ed 98.

³⁰⁹ Botes 2019 <https://www.litnet.co.za/sexual-harassment-in-the-south-african-workplace-from-a-human-rights-perspective/>.

³¹⁰ Botes 2019 <https://www.litnet.co.za/sexual-harassment-in-the-south-african-workplace-from-a-human-rights-perspective/>.

³¹¹ Section 10 of the Constitution of the Republic of South Africa, 1996.

³¹² Section 9 of the Constitution of the Republic of South Africa, 1996.

³¹³ Section 12 of the Constitution of the Republic of South Africa, 1996.

³¹⁴ Section 14 of the Constitution of the Republic of South Africa, 1996.

³¹⁵ Section 9 of the Constitution of the Republic of South Africa, 1996.

acknowledged in interpreting not only in national legislation but also in developing common law. This is so, as section 39(1) (a) of the Constitution orders the courts to promote the values that underlie an open and democratic society based on human dignity, equality and freedom.³¹⁶

Sexual harassment challenges the employee's worth as a human being, it also treats the employee with disrespect. In the case of *S v Makwanyane*,³¹⁷ the court held that "recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern."³¹⁸ Sexual harassment violates a person's right to individual autonomy by using force against a particularly private and vulnerable aspect of their identity, specifically their sex. In the case of *Motsamai v Everite Building Products (Pty) Ltd*,³¹⁹ the court noted the fact that sexual harassment at the workplace undermines the dignity, integrity and self-worth of the harassed employee.³²⁰

The African Union and the ILO categorise sexual harassment as sex discrimination and expressly link this type of harassment to a violation of the victim's right to respect for their dignity.³²¹ Moreover, the ILO stipulates violation of human rights component on sexual harassment cases and states that this behaviour undercuts the equality of those who are exposed to it, calling into question of their personal integrity, and jeopardises their wellbeing.³²²

5.7 Remedies available for employees

In several cases most employees remain silent about sexual harassment incidents than to report the harassers. However, there are external remedies available for employees to seek relief for sexual harassment in the workplace whose grievances

³¹⁶ Section 39(1) (a) of the Constitution of the Republic of South Africa, 1996.

³¹⁷ *S v Makwanyane* 1995 (3) SA 391 (CC).

³¹⁸ *S v Makwanyane* 1995 (3) SA 391 (CC) para 328.

³¹⁹ *Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC).

³²⁰ *Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC) para 20.

³²¹ Botes 2019 <https://www.litnet.co.za/sexual-harassment-in-the-south-african-workplace-from-a-human-rights-perspective/>.

³²² Botes 2019 <https://www.litnet.co.za/sexual-harassment-in-the-south-african-workplace-from-a-human-rights-perspective/>.

have not been adequately addressed by the employer.³²³ The employee can choose a remedy depending on his or her relief sought, this includes common law, labour law, civil law,³²⁴ constitutional law and criminal law.³²⁵ The focus will be on constructive dismissal, unfair discrimination claim, unfair labour practice, Protection from Harassment Act 17 of 2011.

5.7.1 Constructive dismissal

Section 186 (1) (e) stipulates that constructive dismissal is when the employee terminates a contract of employment with or without notice, due to the intolerable conduct within the workplace because of the employer.³²⁶ According to section 192 (a) of the LRA, the employee must prove, on balance of probabilities, the existence of the dismissal.³²⁷ For the victim of sexual harassment to claim successfully under the relief of constructive dismissal, she or he must prove that firstly, the contract of employment was terminated due to employer's conduct of sexual harassment; secondly, the purpose of the termination of the employment contract was because of the continued intolerable conduct of sexual harassment and lastly, she or he should prove that it was his or her employer who made the workplace intolerable.³²⁸

In the case of *Pretorius v Britz*,³²⁹ Ms Pretorius was an employee of Mr Brits. Ms Pretorius terminated her employment contract without notice due to the intolerable conduct of sexual harassment by the employer which included inappropriate touching, being required to travel with him on business trips, dirty language and unsolicited gifts.³³⁰ The employee claimed successfully for constructive dismissal because she proved to the court that the reason for terminating her employment

³²³ Seenarayan A critical examination of the pandemic of sexual harassment in the South African Workplace 42.

³²⁴ Aeberhard-Hodges 1996 *International Labour Review* 500.

³²⁵ Mohlahlo An analysis of the Regulation of Sexual harassment in the Workplace in South Africa 22.

³²⁶ Section 186 (1) (e) of the *Labour Relation Act* 66 of 1995.

³²⁷ Section 192 (a) of the *Labour Relation Act* 66 of 1995.

³²⁸ CCMA 2018 <http://uat.ccma.org.za/wp-content/uploads/2022/02/Constructive-Dismissal-Info-Sheet-2018-01.pdf>.

³²⁹ *Pretorius v Birtz* (1997) 5 BLLR 649 (CCMA).

³³⁰ Van Rensburg Intolerable conduct in a constructive dismissal 15.

contract was because of the intolerable conduct of sexual harassment by the manager and she had no other option but to resign.³³¹ The employee was awarded compensation equal to 9 months' salary.³³²

In the case of *Murray v Minister of Defence*,³³³ the court held that constructive dismissal was a triumph of content over form in employment law. Its main idea was that even though the employee resigned, the employer was still held accountable for the implications because it was his or her continuous intolerable behaviour that led to the employee's termination of employment.³³⁴

5.7.2 Unfair discrimination claim

Section 6 (1) EEA, which gives more detailed content to the right to equality enshrined in section 9 of the Constitution of South Africa, prevents unfair discrimination on the grounds listed on the provision. These include, but not limited to sex, gender and sexual orientation.³³⁵ In this regard, sexual harassment is classified as a form of unfair discrimination, and an employee who is a victim of sexual harassment may seek relief under the provision of section 6 (1) EEA.³³⁶ In the case of *Dudley v City of Cape Town and Another*³³⁷ the court held that the EEA was a legislation that was passed to give effect to the constitutional right to equality by, amongst other things, eliminating unfair discrimination in the workplace.³³⁸

5.7.3 Unfair labour practices in terms of the LRA

The right of unfair labour practices is protected in terms of section 185 of the LRA.³³⁹ The South African Constitution also provides a broader protection of the right to fair labour practices in section 23 (1).³⁴⁰ An employee who is denied his or her

³³¹ Mohlahlo An analysis of the Regulation of Sexual harassment in the Workplace in South Africa 36.

³³² Taylor & Francis Group 2005 Agenda Empowering Women for Gender Equity 96.

³³³ *Murray v Minister of Defence* 2009 3 SA 130 (SCA).

³³⁴ *Murray v Minister of Defence* 2009 3 SA 130 (SCA) para 8.

³³⁵ Section 6 (1) of the *Employment Equity Act* 55 of 1998.

³³⁶ Mohlahlo An analysis of the Regulation of Sexual harassment in the Workplace in South Africa 23.

³³⁷ *Dudley v City of Cape Town and Another* [2004] 7 BLLR 623 (CC).

³³⁸ *Dudley v City of Cape Town and Another* [2004] 7 BLLR 623 (CC) para 6.

³³⁹ Section 185 (b) of the *Labour Relation Act* 66 of 1995.

³⁴⁰ Section 23 (1) of the Constitution of the Republic of South Africa, 1996.

employment rights or benefits for failing to give in to sexual favours has the right to sue an employer or fellow employee for committing an unfair labour practice.³⁴¹

In the case of *Piliso v Old Mutual Life Assurance Co (SA) Ltd and Others*,³⁴² the Labour Court stated that where the employer failed to protect an employee from sexual harassment in the workplace, the employee's right to "fair labour practices" has been violated.³⁴³ The Labour Court stated that when an employee suffered psychological trauma at work, the community's legal convictions required the employer to carry out a thorough investigation to try and identify the perpetrator, to support the employee through counselling to lessen the psychological trauma she had experienced, to regularly communicate with the employee about her needs, and to take all reasonable precautions to prevent the incident from happening again.³⁴⁴

5.7.4 Protection from Harassment Act 17 of 2011

The South African law that aims to prevent sexual harassment has recently been strengthened with the *Protection from Harassment Act* (hereafter PHA). The objective of this legislation is to address harassment broadly and it does not only focus on sexual harassment. Nevertheless, this discussion focuses on how relevant the PHA is to sexual harassment in the workplace and applies its provisions only with reference to sexual harassment matters. It is essential to note that the PHA was passed considering the South African Constitution's guiding principles.³⁴⁵

The objectives of the PHA are to give effect to the Bill of Rights in the Constitution of the Republic of South Africa, 1996, including the right to equality, privacy, dignity, freedom, and security of the person. It affords victims of harassment and sexual harassment an effective remedy, and it also introduces measures which will enable

³⁴¹ Chicktay 2010 Journal of African Law 295.

³⁴² *Piliso v Old Mutual Life Assurance Co (SA) Ltd and Others* (2007) 28 ILJ 897 (LC).

³⁴³ *Piliso v Old Mutual Life Assurance Co (SA) Ltd and Others* (2007) 28 ILJ 897 (LC) para 80.

³⁴⁴ *Piliso v Old Mutual Life Assurance Co (SA) Ltd and Others* (2007) 28 ILJ 897 (LC) para 80.

³⁴⁵ Mogapaesi Sexual harassment in the workplace: Lessons for Botswana from a South African Legal Perspective 51.

the relevant organs of state to give effect to the provision of the Act.³⁴⁶ In the case of *Mnyandu v Padayachi*³⁴⁷ the court held that:

The Protection from Harassment Act applies to everyone. It also applies to an employer and employee and it may have an effect on a workplace, management and personal issues.³⁴⁸ The application of the Act may prove useful in the workplace environment as it enhances the remedies for harassment in the workplace available under other legislation.³⁴⁹ Consequently, employers and employees can invoke the provisions of the Act when subjected to harassment in the workplace.³⁵⁰

PHA does not only protect the physical harassment that constitute sexual harassment in the workplace, it also protects cyber-related harassment, meaning sexual harassment that may transpire through any form of telephonic and or technological communication.³⁵¹ The primary aim of this Act is to provide redress that is effective and speedy. An employee who is sexually harassed in the workplace may apply for protection order against the harasser in the manner prescribed by the Act.³⁵² The court is empowered to handle the application of a protection order as soon as reasonably possible. An application may be filed outside of regular court hours or on a regular court day, if the court has a reasonable belief that the employee will or may suffer harm if the matter is not handled quickly.³⁵³

If there is *prima facie* evidence that the respondent is still continuing with the harassment despite being reported and pending a decision from the employee and the court, an interim protection order may be given following an *ex parte* application.³⁵⁴ If the evidence before the court satisfies this requirement, a

³⁴⁶ Preamble of Protection from Harassment Act 17 of 2011.

³⁴⁷ *Mnyandu v Padayachi* 2017 (1) SA 151 (KZP).

³⁴⁸ *Mnyandu v Padayachi* 2017 (1) SA 151 (KZP) para 42.

³⁴⁹ *Mnyandu v Padayachi* 2017 (1) SA 151 (KZP) para 43.

³⁵⁰ *Mnyandu v Padayachi* 2017 (1) SA 151 (KZP) para 43.

³⁵¹ Le-Ann Batchelor & Makore 2021 *Obiter* 273.

³⁵² Section 2 of the *Protection from Harassment Act* 17 of 2011.

³⁵³ Section 2 (5) *Protection from Harassment Act* 17 of 2011.

³⁵⁴ Section 3 *Protection from Harassment Act* 17 of 2011.

sexually harassed employee in such a situation is not required to give notice of court proceedings to the employer or a work colleague.³⁵⁵

5.8 Conclusion

In 1994, South Africans moved to a new constitutional era, with the founding values of dignity, equality, and freedom.³⁵⁶ In spite of the new constitutional era, most employees remain victims of sexual harassment at the workplace, especially women. Some employees are either deprived of equal working opportunities for refusing to give in to accept sexual advances from the perpetrators or they are forced to work in an intolerable working condition that severely infringes on their human dignity.³⁵⁷ A victim of workplace harassment has recourse under both common law and statute law. Employers may be held responsible both directly and vicariously liable under common law for *delictual* remedies.³⁵⁸ The following chapter focuses on conclusion and recommendations.

Chapter 6: Conclusion and recommendations

6.1 Conclusion

South Africa has developed legal provisions to deal with sexual harassment in the workplaces. For instance, legislation such as the EEA, LRA and the Codes has been crafted to this end. Sexual harassment has been explained as unwelcome conduct of a sexual nature which violates the employee's fundamental right to dignity,

³⁵⁵ Mogapaesi Sexual harassment in the workplace: Lessons for Botswana from a South African Legal Perspective 54.

³⁵⁶ Preamble of the Constitution of the Republic of South Africa, 1996.

³⁵⁷ Chicktay 2010 *JAL* 283.

³⁵⁸ Mukheibir & Ristow 2006 *EJC* 246.

security and bodily integrity.³⁵⁹ Any unwanted conduct whether continuously or once-off may amount to sexual harassment.³⁶⁰

Despite the efforts of the legal interventions regulating sexual harassment, it is apparent that the South African labour laws does not provide adequate measures to curb sexual harassment in the workplace. The disclosures in 2017 and 2018 social media campaign of “#MeToo #Notokay #NotInMyName” demonstrates that there is a high rate of sexual harassment around the world, including in the workplace.

There have been irregularities in decisions reached in relation to sexual harassment. Such inconsistency is reflected in how sexual harassment is explained in both the 2005 and 2008 Codes as there is a lack of precise definition of sexual harassment. The Codes classify sexual harassment as unfair discrimination.³⁶¹ The question that this classification raise is: would sexual harassment still be considered sexual harassment if the unwelcome conduct committed does not constitute a barrier to equality or where is committed to all groups in discriminatory. It is important to note that it is not always possible for the employee to establish differential treatment in cases of sexual harassment in the workplace.

Through the analysis of the judicial interpretation from the LC to LAC and SCA for instance in *Campbell Scientific Africa v Simmers*³⁶² it appears that there is inconsistency in examining what constitutes sexual harassment in the workplace. Each case depends on its own merit. In addition, the problem is the overly subjective approach the courts and CCMA have adopted. Item 5 (4) of the Code stipulates that sexual harassment should infringe upon the employee’s dignity and that the circumstances of the employee should be considered. The test of sexual harassment moves away from the objective approach toward a more subjective approach.³⁶³ A completely subjective test has the singular problem of focusing solely on the perception or feelings of the victim, which may encourage extremely sensitive

³⁵⁹ Mogapaesi Sexual harassment in the workplace: Lessons for Botswana from a South African Legal Perspective 62.

³⁶⁰ See para 4.2.1.

³⁶¹ See para 2.3.1.

³⁶² *Campbell Scientific Africa (Pty) Ltd v Simmers and others* 2016 37 ILJ 116 (LAC).

³⁶³ Basson et al The new essential labour law handbook 364.

employees to file frivolous lawsuits because they perceive any environment as hostile. Furthermore, the use of this test could result in liability without fault, which is not truly permitted under South African employment law.³⁶⁴

The researcher argues that the SCA's ruling in *Campbell Scientific Africa v Simmers*³⁶⁵ as the facts are explained in the research statement, can be questioned in this situation. Simmer's invitation was sexual attention. As there was a once-off, non-threatening encounter, the court did not appropriately weigh all the facts against the test of sexual harassment as stipulated in item 4 of the Code.³⁶⁶ Simmers apparently stopped engaging in the alleged unwanted behaviour when the complainant turned down the invitation. Only if he had continued in it or if it had been a major one-time offence could it have escalated into sexual harassment. There was no power imbalance at work, the persons involved were not co-employees, and the alleged conduct occurred after hours. Although the advance was wrong from a sexual standpoint, it did not go far enough to qualify as sexual harassment.

The 2005 Code stipulates that there are different types of sexual harassment which are: physical, verbal, non-verbal, *Quid pro qua*, sexual favouritism and hostile working environment.³⁶⁷ Chapter three of this study provided evidence that not all conduct constitutes sexual harassment, and therefore the court is often faced with a problematic duty in determining between permissible and impermissible behaviour.³⁶⁸ A number of tests in item 4 of the Code³⁶⁹ need to be carefully considered and evaluated in light of a certain set of facts in determining what constitutes unwelcome conduct of sexual harassment in the workplace. By not doing so presiding officers set themselves up for failure and criticism. In addition to failing

³⁶⁴ O'Connell Drawing a line between permissible and impermissible behaviour in sexual harassment cases 52.

³⁶⁵ *Campbell Scientific Africa (Pty) Ltd v Simmers and others* 2016 37 ILJ 116 (LAC), See para 1.2.

³⁶⁶ See chapter 1.1

³⁶⁷ Basson et al The new essential labour law handbook 362.

³⁶⁸ O'Connell Drawing a line between permissible and impermissible behaviour in sexual harassment cases 51.

³⁶⁹ Reg 4 in GN 1357 in GG 27865 of 4 August 2005.

to fulfil their legal obligation, they also fail to adequately defend the human and labour rights of sexual harassment victims.³⁷⁰

Section 60 of the EEA stipulates that the employer may be held vicariously liable for the discriminatory conduct of its employee, if the employer fails to take all necessary steps to eliminate the unfair discrimination;³⁷¹ however, this provision is limited. It requires that the employee should have been working within the course and scope of the workplace.³⁷² In order for the employer to escape liability she or he should consult all relevant parties and takes all reasonably practicable measures to eliminate the alleged conduct and ensure that all employees are not harassed.³⁷³

There are several remedies available for victims of sexual harassment. They can be categorised into common law and statutory remedies. Common law remedies include common law duty of the employer to provide a safe working environment and vicarious liability of the employer.³⁷⁴ Statutory remedies include constructive dismissal, protection from unfair discrimination in terms of the EEA; protection from unfair labour practice in term of the LRA; protection from harassment in terms of Protection from Harassment Act 17 of 1997.³⁷⁵

Not only do the remedies outlined in this mini-dissertation hold the key to prohibit sexual harassment in the workplace, but also education plays a crucial role in changing people's attitudes and developing respect for other employees' human dignity, or *ubuntu*, as well as a comprehensive campaign by both employees and employers to ensure a workplace free from sexual harassment.³⁷⁶

³⁷⁰ Botes Identifying Sexual Harassment in the Workplace? Do Not Forget to Remember the Code of Good Practice 21.

³⁷¹ See chapter 5.2.

³⁷² Chicktay 2010 Journal of African Law 296.

³⁷³ Section 60 of the *Employment Equity Act* 55 of 1998.

³⁷⁴ See chapter 5.2, 5.5.

³⁷⁵ See chapter 5.7.

³⁷⁶ Ndema A critical analysis of the law on sexual harassment in the workplace in South Africa in a comparative perspective 276.

6.2 Recommendations

6.2.1 The reasonable victim test must be adopted by the courts

The current code should be amended to eliminate all types of uncertainty. Both 2008 and 2005 Codes are used concurrently by the courts to determine what constitutes sexual harassment. These Codes have similarities and differences, and they create significant confusion in an already difficult situation.³⁷⁷

The reasonable victim test, which comprehends both subjective and objective elements, is recommended in all cases dealing with sexual harassment in the workplace. The purpose is to minimise the risk for employers who have to defend legal disputes of sexual harassment which are frivolous.³⁷⁸ The courts should not depend more on subjective test.³⁷⁹ The reasonable victim test criterion is in line with the Constitution in that the objectionable conduct must go beyond what could be deemed reasonable behaviour in an open and democratic society and must violate the principles of dignity, equality, and *ubuntu*.³⁸⁰

6.2.2 The South African labour legislation should provide a clear and concise definition of sexual harassment

There is no doubt that the interpretation of the meaning of sexual harassment has a bearing on the outcome of different case laws. The legislation should provide a clear definition of sexual harassment. The unwelcome conduct of sexual harassment goes beyond the description of unfair discrimination. It goes with manipulation of one's position of power in the workplace. The Codes should not only include serious incidents of sexual nature, it should also include minor sexual harassment incidents that calls for punishment short dismissal.

³⁷⁷ Botes Identifying Sexual Harassment in the Workplace? Do Not Forget to Remember the Code of Good Practice 5.

³⁷⁸ O'Connell Drawing a line between permissible and impermissible behaviour in sexual harassment cases 51.

³⁷⁹ Kujana 2020 *Obiter* 98.

³⁸⁰ Ndema A critical analysis of the law on sexual harassment in the workplace in South Africa in a comparative perspective 278.

6.2.3 The South African workplaces should adopt to bystander intervention

The South African workplaces should adapt a bystander intervention training to help in preventing the high rate of sexual harassment in the workplace. The aim of a bystander intervention is to ensure that a bystander recognises a potential harmful circumstance in the workplace and the intervention should assist in choosing to respond in a way that could possibly provide a positive outcome.³⁸¹ There are four strategies applied by a bystander. Firstly, intervention - the bystander should intervene and stop the conduct of sexual harassment that is occurring in workplace, by revealing the incident to the employer or an authority figure. Secondly, tertiary prevention - the bystander should motivate the victim to step in, take action and confront the perpetrator. Thirdly, secondary prevention - the bystander should recognise and address the heightened situation of sexual harassment by keeping an eye on the safety of the sexually harassed employee. Lastly, primary prevention - provide the bystander with resources that would help and support them with their intervention.³⁸²

Bystander intervention does not only include people who witness the incident of sexual harassment. It also includes those who subsequently hear about the incident. Bystander in the workplace could include range of people, from managers to supervisors. The reporting of sexual harassment can be either formally or informally.³⁸³

6.2.4 Implementation of a consensual romantic relationship policy in the workplace

Employers should implement a consensual relationship policy at the workplace that imposes a duty on co-employees to report and disclose a romantic relationship to the concerned relevant stakeholders. This policy should provide a clear statement

³⁸¹ UNDP 2021 <https://www.undp.org/south-africa/blog/role-bystander-part-one-intervention-during-different-stages-violence>.

³⁸² Australia Human Rights Commission 2012 <https://www.humanrights.gov.au/publications/encourage-support-act-bystander-approaches-sexual-harassment-workplace-2012>.

³⁸³ Australia Human Rights Commission 2012 <https://www.humanrights.gov.au/publications/encourage-support-act-bystander-approaches-sexual-harassment-workplace-2012>.

that disciplinary action will be taken against co-workers who violate the policy by failing to disclose the relationship. The policy should stipulate standards for acceptable behaviour in the workplace for consensual relationship partners. For example, both parties should keep their personal issues and discussions out of the workplace.³⁸⁴ The importance of this policy is to prevent any awkward or problematic associations in the workplace.³⁸⁵

In addition, it will assist to prohibit the danger of sexual harassment lawsuits. If a consensual relationship in the workplace does not work out, one person might say they were coerced into it, especially if one of them holds a greater position inside the company than the other. Such allegations can be effectively refuted by strong evidence that both employees entered the relationship voluntarily provided through a consenting relationship contract that is executed after the relationship has started. The aim of this policy is to eradicate the impact of sexual harassment on the employer being held directly liable for the sexual harassment of the employee when co-employees had a romantic relationship.³⁸⁶

6.2.5 The adoption of sexual harassment policy at the workplace

Item 7 of the Code encourages employers to adopt a sexual harassment policy guided by the provision of the Code.³⁸⁷ Studies have proved that workplaces without sexual harassment policies report the highest incidents of sexual harassment.³⁸⁸ It is recommended that the Code should impose penalties on an employer for failing to have a sexual harassment policy in the working environment. The policy will not only be beneficial to eliminate sexual harassment at the workplace; it will highly limit the legal risk against the employer.³⁸⁹ It is of the writer's view that sexual harassment policy should be communicated to all employees. In addition, each employee must take a firm commitment not to engage in any act that constitutes

³⁸⁴ Workable date unknown <https://resources.workable.com/workplace-romance-policy-Example>.

³⁸⁵ Society for Human Resource Management 2022 <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/consensual-dating-contract.aspx>.

³⁸⁶ Society for Human Resource Management 2022 <https://www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/consensual-dating-contract.aspx>.

³⁸⁷ Item 7 in Gen Not 482 in GG 27867 of 4 August 2005.

³⁸⁸ Mohlahlo An Analysis of the regulation of sexual harassment in the workplace in South Africa 42.

³⁸⁹ Zalesne 2001 *SAJHR* 516.

sexual harassment in the workplace. During induction programme, new employees should be informed of the content of sexual harassment policy and the consequences of violating the sexual harassment policy.

6.2.6 Employers must take necessary steps to prevent possible harassers from entering the workplace

At the time of the recruitment period, the employer should investigate the person seeking employment before hiring him or her. The employer should consider the employer's reasons for leaving his or her previous workplace and equally consider whether the employee has not undergone any disciplinary hearing on the ground of sexual harassment from their previous employer. The researcher submits that an employer should not employ any person who has been previously found guilty of sexual harassment at the workplace because it is mostly likely that the person will repeat the unwanted conduct of sexual harassment at the workplace.

The employer should establish a list of persons who are convicted of sexual harassment at their workplace. The list can assist in ensuring that these persons are not employed as a measure to eradicate sexual harassment at the workplace. It can also act as a deterrent for persons who may think of committing sexual harassment at the workplace.

6.2.7 Establishment of a national list of persons convicted of committing sexual harassment at workplace

The national list can act as a deterrent for persons to be involved in sexual harassment at workplace. Furthermore, individuals who have been found guilty of committing sexual harassment at workplace should not be allowed to enter employment services where they can be able to commit the same misconduct. Employment services must be free from individuals who have potential to commit sexual harassment within the workplace.

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