



# Legislative protection measures against bullying in the South African workplace

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## **Abstract**

The primary objective of this study is to determine and assess the current legislative protection measures against workplace bullying in South Africa. This topic is not well-researched within the South African context and has limited academic sources. Since the enactment of the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace in March 2022,<sup>1</sup> the South African legal framework on protection against workplace bullying changed drastically. The study discusses the current legislation as well as all legislation prior to March 2022 within the South African context.

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<sup>1</sup> GN R1890 in GG46056 of 18 March 2022.

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## **List of abbreviations**

CCMA	Commission for Conciliation, Mediation and Arbitration
EEA	Employment Equity Act 55 of 1998
ILO	International Labour Organisation
LRA	Labour Relations Act 66 of 1995
OHSA	Occupational Health and Safety Act 85 of 1993
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000
PHA	Protection from Harassment Act 17 of 2011
PTSD	Post-traumatic stress disorder

# Chapter 1: Introduction

## ***1.1 Introduction and historical background***

*Leadership is not bullying, and leadership is not aggression. Leadership is the expectation that you can use your voice for good. That you can make the world a better place.<sup>2</sup>*

Most people are familiar with the concept of bullying and somewhat always link it to a school-type scenario with children. Nevertheless, no one asks what happens to the school-bully after they graduate. The school-bully eventually enters the labour market and is a colleague, a manager or even the director wherein he or she continues with the bullying conduct. This theory is confirmed by an early 2003 study conducted by the International Labour Organisation (hereafter ILO) which showed that 80% of South African employees experienced some form of bullying in the workplace.<sup>3</sup>

Bullying in general can be defined as the "systematic abuse of power by way of persistent and repeated actions which are intended to intimidate or hurt another person".<sup>4</sup> The concept of bullying in the workplace was undefined and uncategorised in South Africa until the publication of the Draft Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the World of Work<sup>5</sup> (hereafter Draft Code of Good Practice on Violence and Harassment in the World of Work) in 2020. In terms of the Draft Code of Good Practice on Violence and Harassment in the World of Work, bullying in the workplace<sup>6</sup> is defined as:

Unwanted conduct in the workplace, which is persistent or a single incident which is serious and insults, demeans, humiliates, lowers self-esteem or self-confidence or creates a hostile or intimidating environment or is calculated to induce by submission or by actual or threatened adverse consequences, which includes the abuse of coercive power by either an individual or a group of individuals in the internal or external workplace or by an external client.

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<sup>2</sup> Quote Fancy date unknown <https://quotefancy.com/sheryl-sandberg-quotes>

<sup>3</sup> Smit and Viviers *Vulnerable employees* 4.

<sup>4</sup> Smit and Viviers *Vulnerable employees* 2.

<sup>5</sup> GN R896 in GG4360 of 20 August 2020.

<sup>6</sup> Reg 1 in GN R896 in GG4360 of 20 August 2020.

Workplace bullying can take the form of belittling remarks, withholding important information, or training to set the employee up for failure, demoting an employee or removing any form of responsibility, deliberately assigning tedious tasks to an employee, spreading gossip about the employee, and setting unreasonable targets, workloads, or deadlines for the employee.<sup>7</sup>

The concept of bullying in the South African workplace was only defined, categorised, and supplemented with prevention and care methods in 2020 in terms of the Draft Code of Good Practice on Violence and Harassment in the World of Work as the need to clarify and adopt local workplace bullying legislation and common law methods was influenced by newly adopted international instruments.

The 2020 Draft Code of Good Practice on Violence and Harassment in the World of Work is based on the C190 - Violence and Harassment Convention, 2019<sup>8</sup> (hereafter C190 Convention) adopted by the ILO in July 2019. The standards contained in Conventions of the ILO are only binding on member states when a particular Convention is ratified and incorporated into domestic law, nevertheless, all conventions are binding international treaties that may be ratified by members of the ILO.<sup>9</sup> A thorough analysis of international law and the incorporation of domestic law follows in chapter 3 of this study.

Once the Convention is ratified by a member of the ILO, the member state must implement national laws that are congruent with the standards stipulated in the ratified Convention and report on its application at regular intervals to the International Labour Office.<sup>10</sup> South Africa as a member state of the ILO ratified the

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<sup>7</sup> Smit 2021 Law Democracy & Development 32.

<sup>8</sup> International Labour Organisation C190 - Violence and Harassment Convention No.190 (2019).

<sup>9</sup> International Labour Organisation date unknown

<https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang--en/index.htm>

<sup>10</sup> A 22 of the ILO Constitution (1997).

C190 Convention on 21 November 2021, after which the Convention came into force on 29 November 2022.<sup>11</sup>

The core value of the C190 Convention is that each member state which ratifies the Convention will respect, promote, and realise that everyone is afforded the right to a work environment free from violence and harassment, by implementing prohibitive measures in law, developing policies, establishing enforcement, and monitoring mechanisms, as well as providing for appropriate sanctions.<sup>12</sup>

### ***1.2 Academic and practical reasons for the selection of the topic***

The above historical and background discussion illustrates that this topic requires more academic research based on the fact that the C190 Convention was only drafted by the ILO during the year 2019. Nevertheless, workplace bullying has been taking place for centuries with various research dating back to the early 1940s.<sup>13</sup>

The currently available research on this topic is not only restricted to South Africa's legislative framework as it includes other countries' progress and legislative measures. The aim of this study is, therefore, to limit the scope of research only to South Africa in order to have a clear view of what legislative protection measures against workplace bullying are available within the South African context.

This research is of great importance when considering the effects of workplace bullying on the victim. These include but is not limited to, physical effects such as bruises or looking distressed and emotional effects such as anger or depression. In addition, the social effects such as insecurity and damage to social identity, and lastly psychological effects such as anxiety or post-traumatic stress disorder (hereafter PTSD).<sup>14</sup>

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<sup>11</sup> International Labour Organisation date unknown  
[https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:102888](https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102888).

<sup>12</sup> International Labour Organisation C190 - Violence and Harassment Convention No.190 (2019).

<sup>13</sup> International Labour Organisation 2019 [https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS\\_698989/lang--en/index.htm](https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_698989/lang--en/index.htm)

<sup>14</sup> Smit 2021 Law Democracy & Development 29.

The abovementioned effects on the victim are of a serious nature and can be long-term. This study, therefore, aims to investigate the legislative measures that can be used by the victim for protection with a long-term goal of prevention of bullying in the workplace. South Africa has one of the highest violent crime rates in the world, which implies that violence can be linked to sexual harassment as well as workplace bullying.<sup>15</sup>

### ***1.3 The legal problem presented by workplace bullying***

The primary objective of this study is to critically analyse the extent of protection against workplace bullying afforded in terms of the South African legal framework. Further secondary objectives will form part of the critical analysis, such as to contextualise workplace bullying, and to identify and scrutinise legislative and common law methods that potentially provide protection and remedies to victims of workplace bullying. The intention is to subsequently critique the level of protection currently offered to employees against workplace bullying in order to conclude with appropriate recommendations.

The legal problem presented in this study is that prior to the Draft Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the World of Work, the South African legal framework did not directly define workplace bullying nor regard it as a cause of action. Victims of workplace bullying were, therefore, left in the dark pertaining to general workplace protective measures and legislative remedies to prosecute or punish the wrongdoer.

Prior to the Draft Code of Good Practice on the Prevention and Elimination of Violence and Harassment in the World of Work, workplace bullying was being dealt with by way of using sections of various parts of legislation. For example, South African protective measures against workplace bullying were derived from the *Employment Equity Act* 55 of 1998 (hereafter the *EEA*), or the *Labour Relations Act* 66 of 1995 (hereafter the *LRA*).

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<sup>15</sup> Smit 2021 Law Democracy & Development 30.

Nevertheless, the *EEA* and *LRA* provided for limited protective measures against workplace bullying and did not specifically cover a workplace bullying set of facts. The application of the *EEA* in itself was also difficult as bullying *could* be brought within the scope of the *EEA*, but only if it can be proven to be discrimination. It is not always an easy task to prove discrimination as the scope of 'bullying' is wide and does not always include the elements of discrimination.<sup>16</sup> The application of the *EEA* and the issue of discrimination is analysed thoroughly in chapter 3 of this study.

Currently, South Africa has the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (hereafter Code of Good Practice on Harassment).<sup>17</sup> This Code came into effect on the 18<sup>th</sup> of March 2022, based on the comments and recommendations of the Draft Code of Good Practice on Violence and Harassment in the World of Work.

The Code of Good Practice on Harassment is relatively new and could provide for clear protective measures against bullying in the workplace. In addition, it should fill the gaps where the *EEA* or *LRA* lacked protective measures for bullying in the workplace. The Code of Good Practice on Harassment will be analysed in-depth since its application in the world of work is still limited which creates a further legal problem to be addressed herein as this study will have to provide alternative prevention methods.

In essence, the two legal problems that this study will analyse is the legislative protective measures prior to the enactment of the Code of Good Practice on Harassment and lastly, whether the current protective measures would be sufficient to combat workplace bullying.

#### **1.4 Conclusion**

The study herein aims to address the above concerns by determining how workplace bullying is being dealt with within the South African context. To answer the identified legal problems, a comprehensive analysis is presented on what bullying in the

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<sup>16</sup> Smit Bullying in the workplace 300.

<sup>17</sup> GN R1890 in GG46056 of 18 March 2022

workplace entails with defined terms and concepts including the effects of bullying. After the discussion on bullying in the workplace the legislative framework is identified and discussed in order to conclude by way of case law how the South African courts apply the available legal principles. The last chapter of this research paper contains alternative prevention methods and recommendations to combat workplace bullying.

## **Chapter 2 Contextualising Workplace Bullying**

### ***2.1 Introduction***

The content of this chapter focuses on the concept of general bullying and bullying in the workplace. It is important to understand the meaning of workplace bullying in order to recognise the need for legislative protection measures. Workplace bullying affects all people in a working environment as they are either bullied, or a witness to bullying, or they are the bully themselves. Research shows that workplace bullying can even be affected by socio-demographic characteristics as black people experience a higher level of workplace bullying compared to other races.<sup>18</sup> In addition, older employees experience lower levels of bullying.<sup>19</sup> Further, the government sector reflects high levels of bullying of employees by supervisors than the private sector.<sup>20</sup>

### ***2.2 Defining bullying and workplace bullying***

As previously stated, there is no uniform definition of workplace bullying and various available definitions stipulate the acts or omissions of what workplace bullying *could* entail. An analysis of available definitions of workplace bullying, as formulated in legal instruments and academici must be included to grasp the concept and to be able to identify workplace bullying in a set of facts.

In the first instance, bullying can be defined as “repeated, unreasonable behaviour directed towards an employee, or a group of employees, that creates a risk to health and safety”.<sup>21</sup> Bullying in itself can also be defined as a type of psychological abuse and terror wherein the victim is subjected to the actions of the bully.<sup>22</sup> Workplace bullying in such an instance may be direct or indirect, once-off or repetitively

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<sup>18</sup> Cunniff Workplace bullying of South African employees: Prevalence and the relationship with sense of coherence and diversity experiences 10.

<sup>19</sup> Cunniff Workplace bullying of South African employees: Prevalence and the relationship with sense of coherence and diversity experiences 10.

<sup>20</sup> Cunniff Workplace bullying of South African employees: Prevalence and the relationship with sense of coherence and diversity experiences 10

<sup>21</sup> Smit 2021 Law Democracy & Development 31.

<sup>22</sup> Smit and Viviers *Vulnerable employees* 8.

conducted, either vertically (between management and a lower employee) or horizontally (between co-workers on the same level).<sup>23</sup>

Workplace bullying can further be defined as a situation where an individual or several individuals are at the receiving end of negative acts performed by one or several other persons, and they have trouble defending themselves against such negative acts.<sup>24</sup> Another definition constructed by Von Bergen *et al* states that workplace bullying is harassment that causes a hostile work environment for an employee by a co-worker or co-workers by way of “inappropriate, and unwelcome verbal, non-verbal and/or low-level physical behaviours that a reasonable person would find threatening, intimidating, harassing or humiliating” occurring repeatedly.<sup>25</sup>

There are also different terms for “bullying” which include mobbing, harassment or abusing. Mobbing is defined as:<sup>26</sup>

Hostile and unethical communication, which is directed in a systematic way by one or a number of persons towards one individual. These actions often take place (almost every day) over a long period (at least six months) and because of the frequency and duration result in considerable psychic, psychosomatic and social misery.

Harassment on the other hand can be defined as:<sup>27</sup>

Unwanted conduct, which impairs dignity, creates a hostile or intimidating work environment for one or more employees or is calculated to, or has the effect of, inducing submission by actual or threatened adverse consequences and is related to one or more grounds in respect of which discrimination is prohibited in terms of section 6 (1) of the *EEA*. Harassment includes violence, physical abuse, psychological abuse, emotional abuse, sexual abuse, gender-based abuse and racial abuse. It includes the use of physical force or power, whether threatened or actual, against another person or against a group or community. Harassment against all employees in the workplace is an abuse of power.

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<sup>23</sup> Smit 2021 Law Democracy & Development 31.

<sup>24</sup> Smit and Viviers *Vulnerable employees* 6.

<sup>25</sup> Smit and Viviers *Vulnerable employees* 7.

<sup>26</sup> Calitz 2022 *PER* 4.

<sup>27</sup> Article 4 GN R1890 in GG46056 of 18 March 2022.

It is of utmost importance to include the newly formulated definition by the Draft Code of Good Practice on Violence and Harassment in the World of Work regarding workplace bullying:<sup>28</sup>

Workplace bullying is unwanted conduct which is persistent or a single incident which is serious and demeans, humiliates, or creates a hostile or intimidating environment, or is aimed to induce, through submission or through actual or threatened adverse consequences. It includes any unfavourable or offensive conduct which has the effect of creating a hostile workplace environment.

The Code of Good Practice on Harassment, as in effect now, does not refer to a single definition of workplace bullying. The Code uses the term harassment as an umbrella concept which includes the following forms of harassment, namely sexual harassment, gender-based violence, bullying and racial, ethnic, or social origin harassment.<sup>29</sup>

Considering the above definitions of bullying and workplace bullying, a further definition of workplace bullying can be drawn up as: an act or omission that takes place frequently or repeatedly that causes indirect or direct harm to the victim. The act of abuse may be physical, verbal, or physiological and include insults, sabotage, spreading of rumours and/or violence.

### ***Elements of workplace bullying***

From the above definitions, certain elements and aspects of workplace bullying can be identified, namely, frequency; persistency; hostility; and a power imbalance.<sup>30</sup>

A victim would, therefore, use the above elements within their set of facts to determine whether workplace bullying occurred or not. A brief analysis and overview of the above elements follows.

Firstly, the term frequency refers to how many times the act or omission of bullying takes place. Was the victim insulted as a once-off or is the victim insulted repeatedly on a daily or weekly basis? Researchers suggest that an act of bullying must take

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<sup>28</sup> Reg 1 in GN R896 in GG4360 of 20 August 2020.

<sup>29</sup> Introduction GN R1890 in GG46056 of 18 March 2022.

<sup>30</sup> Smit and Viviers *Vulnerable employees* 9.

place repeatedly.<sup>31</sup> A once-off act or omission may not be considered as bullying except if the particular act or omission is of such great harm that it must be considered as bullying. An example in such instance is the spreading of a rumour. The type and effect of a rumour will depend on the victim's perception, one person may laugh it off and another person may go into a depressive state. If the rumour is also only told to one person, the effect thereof is not that extreme, but if the bully spreads the rumour to numerous other people the effect thereof can be extreme.

The general rule with regard to frequency is that if an act of bullying occurs only once, weighed against the effect and type of act, the victim may have an alternative claim of discrimination in terms of the *EEA* and not bullying.<sup>32</sup> This position was confirmed with the enactment of the Code of Good Practice on Harassment in that harassment may be persistent conduct or a single occurrence. In the case of a single occurrence, the harassment must be of serious nature, judged subjectively to the perception of the complainant.<sup>33</sup>

The next element is persistency, meaning the act or omission of bullying must continue over a period of time. The element of persistency is linked to the element of frequency. The act or omission of bullying must take place frequently over a continuous period. Again, the type of act or omission is weighed against the harm and effect to determine whether the conduct can be constituted as workplace bullying.<sup>34</sup>

The last two elements relate to hostility and power imbalance. A hostile working environment can be caused by malice from co-workers or management, such as providing incorrect information or instructions willingly knowing that it is incorrect or will cause damage. The Code of Good Practice on Harassment refers specifically to a hostile work environment in that Article 4.6 of the Code states that a hostile work environment is present when the conduct of the bullying has a negative impact

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<sup>31</sup> Smit and Viviers *Vulnerable employees* 10.

<sup>32</sup> Smit and Viviers *Vulnerable employees* 11.

<sup>33</sup> Article 4.5.1 GN R1890 in GG46056 of 18 March 2022.

<sup>34</sup> Article 4.5 GN R1890 in GG46056 of 18 March 2022

on the employee's ability to work or their well-being.<sup>35</sup> Further, a hostile work environment may also be present where an employer anticipates that his employees may be subjected to abusive grounds by other employees or clients, but fails to take necessary protective measures.<sup>36</sup>

Lastly, power imbalance normally takes place when a higher-positioned employee, such as the manager bullies a lower-positioned employee.<sup>37</sup> Nevertheless, bullying can also take place between employees at the same level of employment.

#### ***2.4 Categories of workplace bullying***

For the purpose of this study, a brief overview of the categories of workplace bullies is provided to assist vulnerable workers with the identification and application of workplace bullying in order for them to seek help or to prevent further workplace bullying. The four categories of workplace bullies as identified by Geldenhuys are:<sup>38</sup>

The screaming Mimi:

This type of bully influences the working environment with his or her mood swings and cause unnecessary fear.<sup>39</sup> An example of this type of bully in the workplace is when a person makes comments about increases, job cuts or the general financial position of the company, due to their own financial stress (or current mood) thereby causing unnecessary panic to other employees.

Constant critic:

This type of bully always find fault with everything and everyone. This bully is more focused on other employees than themselves with the aim on taunting.<sup>40</sup>

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<sup>35</sup> Article 4.6.1 GN R1890 in GG46056 of 18 March 2022.

<sup>36</sup> Article 4.6.2 GN R1890 in GG46056 of 18 March 2022.

<sup>37</sup> Article 4.5.2 GN R1890 in GG46056 of 18 March 2022.

<sup>38</sup> Geldenhuys SERVAMUS Community-based Safety & Security Magazine 2.

<sup>39</sup> Mullan 2019 <https://www.linkedin.com/pulse/four-workplace-bully-types-martin-mullan/>

<sup>40</sup> Mullan 2019 <https://www.linkedin.com/pulse/four-workplace-bully-types-martin-mullan/>

The two-headed snake:

This bully spreads rumours and tell lies to get ahead within the company for their own personal gain. They also act as everyone's friend for their own benefit.<sup>41</sup>

The gatekeeper bully:

This bully thrives on power and wants to oversee everything and everyone by either withholding information or to use it as leverage against another employee.<sup>42</sup>

The above four categories provide a short identification and explanation of the type of bullies in a workplace environment. Nevertheless, a bully can still be a bully even if he or she does not fall within one of the above categories. To assist with this issue, the categories of bullying conduct are discussed below to provide further assistance in the identification process.

### ***2.5 Categories of bullying (the conduct)***

The next discussion identifies and analysis the different categories of bullying, meaning the conduct and action exhibited or executed by the bully. There are eight categories of bullying as founded by Smit and Viviers:<sup>43</sup>

Overt (direct bullying):

Direct or overt bullying occurs in person, normally face to face. It is said that overt bullies are "aggressive, sarcastic, domineering, and unpleasant".<sup>44</sup> The conduct of this type of bullying includes public humiliation, intimidation, belittling remarks, and verbal abuse.

Covert (indirect bullying):

This type of bullying is more subtle with the aim of abusing the victim emotionally. The conduct indirectly affects the victim and includes setting too high targets and

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<sup>41</sup> Mullan 2019 <https://www.linkedin.com/pulse/four-workplace-bully-types-martin-mullan/>

<sup>42</sup> Mullan 2019 <https://www.linkedin.com/pulse/four-workplace-bully-types-martin-mullan/>

<sup>43</sup> Smit and Viviers *Vulnerable employees* 16.

<sup>44</sup> Smit and Viviers *Vulnerable employees* 16.

expectations or withholding important information and assigning less favourable tasks.

Sporadic bullying and once-off bullying:

This type of bullying can take place as a once-off where the conduct thereof is normally extreme. The once-off action or conduct might be so extreme that it results in bullying, especially conduct that takes place electronically, as such can be viewed or shared continuously.

Subtle and serious bullying:

Acts of bullying can range from subtle acts, such as belittling remarks and continuous criticism or sarcastic remarks to serious acts such as physical assault. It has been reported that subtle bullying is more severe in terms of long-term effects and even reported suicides.<sup>45</sup>

Individual and group bullying:

This type of bullying is what takes place within schools whereby certain social standards or norms are set by a group and if an individual does not "fit in", he or she is bullied.

Bystander/witness bullying:

This type of bullying can be two-fold, meaning either it is a person who sees the bullying and take part therein, or it is a person who witnesses the conduct and feel helpless. The witness may suffer the same negative effects as the victim.

Organisational or corporate bullying:

This type of bullying is where companies and organisations allow bullying within their environment by way of using it as a motivational tool to get rid of lower-performing employees.

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<sup>45</sup> Smit and Viviers *Vulnerable employees* 17.

Work-related bullying:

This type of bullying relates to the type of work or position assigned to the employee. It includes their daily tasks, amount of work, targets, or performance reports.

From the above categories of bullying conduct, there may be an overlap between the categories and some victims may even be bullied in terms of various categories, with a mix of bullying conduct. The Code of Good Practice on Harassment also provides a list of what conduct can be seen as harassment. The list includes, but is not limited to, pressurising an employee to engage in illegal activities or resigning, sabotaging, or obstructing work performance, slandering or maligning an employee or spreading rumours maliciously and conduct which humiliates, insults or demeans an employee.<sup>46</sup>

## ***2.6 Negative effects of workplace bullying***

To emphasise the importance of this research topic, one must consider the negative effects of bullying in the workplace. The effect of bullying motivates and inspires researchers, scholars, and the legislature as to why this concept must continually be researched and updated due to the various negative effects.

There are various negative effects of bullying in general, as well as in the workplace. This study provides a basic overview of the negative effects and does not delve deeper into a specific effect or condition that may require the expertise of a medical practitioner.

Research has found that workplace bullying can be linked to the following physical effects: eating disorders; sleeping disorders; cardiovascular disease; heart palpitations and excessive sweating; and frequent migraines or headaches.<sup>47</sup>

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<sup>46</sup> Article 4.7.5 GN R1890 in GG46056 of 18 March 2022.

<sup>47</sup> Gordon 2022 <https://www.verywellmind.com/what-are-the-effects-of-workplace-bullying-460628>

The above physical effects are not limited, and victims may suffer from other physical conditions linked to the bullying. Following the physical effects, reference must be made to the psychological effects of workplace bullying. Physical effects can be seen, which makes it more treatable. However, psychological effects cannot always be seen with the naked eye, or until so severe that it leads to physical conditions, which makes it difficult for the victim's family or employer to see.

Some psychological effects of workplace bullying may include: psychosomatic effects; clinical depression and suicidal attempts; clinical levels of anxiety; and Loss of confidence and self-esteem. <sup>48</sup>

The long-term effect of workplace bullying eventually leads to PTSD, wherein the victim relives the traumatic events continually. This causes major problems for the victim and their ability to work, either their productivity levels become low, or they may be absent from work frequently.<sup>49</sup> Symptoms of PTSD include intense fear or feelings of helplessness, which may continue for a period of 5 years.<sup>50</sup>

As discussed above, a victim of workplace bullying may suffer from PTSD for a period of 5 years, therefore, making it impossible to work.<sup>51</sup> Either the victim requests unpaid time off from work, quits their jobs, or might not be able to re-enter the labour market due to the negative effects of bullying and the fear that attaches thereto. The physical and psychological effects of bullying in the workplace will eventually cause a financial effect to the employee and employer.

The effects of workplace bullying also negatively affect the employer or organisation. A bullied employee might be more absent from work or work at a slower pace due to their health. This will cause a loss in productivity. The following negative effects have been linked to the employer in terms of bullying in the workplace: increase in turnover in terms of hiring new staff; increase in legal costs; increase in absenteeism; lower morale of staff; lower productivity; costs of illness

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<sup>48</sup> Smit and Viviers *Vulnerable employees* 23.

<sup>49</sup> Smit and Viviers *Vulnerable employees* 23.

<sup>50</sup> Smit and Viviers *Vulnerable employees* 24.

<sup>51</sup> Smit and Viviers *Vulnerable employees* 25.

and sickness; premature retirement costs; reputational damage; replacement costs; and damage to equipment and production.<sup>52</sup>

## ***2.7 Conclusion***

This chapter provided the necessary information pertaining to what bullying and more specifically bullying in the workplace entails with the negative effects thereof. The following chapters provide the legislative framework for South Africa, meaning what victims can do for relief or how they can be protected. Examples of recent case law is analysed to review the application and interpretation of the legislation by South African courts. Lastly, alternative prevention methods and a conclusion are provided to answer the research question herein.

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<sup>52</sup> Gordon 2022 <https://www.verywellmind.com/what-are-the-effects-of-workplace-bullying-460628>

## **Chapter 3 Current legal position in South Africa**

### ***3.1 Introduction***

This chapter focuses on the South African legislative framework pertaining to workplace bullying. The analysis includes all possible legislative frameworks that were used or could have been used prior to the enactment of the Code of Good Practice on Harassment to show the relevant progress made to date.

### ***3.2 The Constitution and workplace bullying***

As a starting point, the relevant provisions of the *Constitution of the Republic of South Africa*, 1996 (hereafter the *Constitution*) are identified herein seeing that the *Constitution* is the supreme law of the Republic and any conduct or action inconsistent with it, is invalid.<sup>53</sup> The applicable labour law legislation mentioned herein was promulgated to give effect to the *Constitution* and the fundamental rights relevant to bullying are of the most part covered in sections 9, 10 and 23(1).

The first relevant provision of the *Constitution* is section 9, which is the equality provision. In terms of this section, everyone is equal before the law and has the right to equal protection and benefit from the law.<sup>54</sup> Further, this section provides for an anti-discrimination clause, in that the state nor any person may directly or indirectly discriminate on one or more of the following grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.<sup>55</sup>

A victim can use the anti-discrimination clause as identified above if the bullying, or the conduct or action thereof falls within the listed grounds in terms of section 9 of the *Constitution*. A claim in terms of section 9 of the *Constitution* might be difficult to prove when the bullying was based on sarcastic comments or isolation in the

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<sup>53</sup> Section 2 Constitution of the Republic of South Africa, 1996.

<sup>54</sup> Section 9 Constitution of the Republic of South Africa, 1996.

<sup>55</sup> Section 9(3) – (4) Constitution of the Republic of South Africa, 1996.

workplace. However, if the bullying was in form of insults regarding the victim's disability, a discrimination case could be successful.

Protection can also be derived from section 10,<sup>56</sup> which states that everyone has inherent dignity and the right to have their dignity respected and protected. The negative effects of bullying in the workplace indicated that the victim may feel worthless as their perception of themselves is influenced by the bully. This may link with section 10 of the *Constitution* and the right to dignity. The victim's dignity may be affected and thus, entitled to proceed with a civil claim. Nevertheless, this will still be difficult to prove. If the bully only insulted the victim privately, the court would have to look at how the victim's dignity was affected. If the victim is a well-known engineer who was insulted publicly by a co-worker, the claim in terms of section 10 may likely be more successful.

Further, section 23(1) of the *Constitution*, states that everyone has the right to fair labour practices in terms of constitutional rights.<sup>57</sup> The victim might not be able to directly apply section 23(1) for relief as bullying does not explicitly form part of the sub-sections of this right. The victim may have to consider other labour laws to support this claim.

One can even include section 12 of the *Constitution* as a possible prohibitive measure, as this section provides the right to bodily and psychological integrity.<sup>58</sup> If the bullying is of such a nature that it infringes the person's integrity, as discussed in the effects of bullying, the victim may be successful with a claim based on this constitutional right.

Lastly, section 14 of the *Constitution* which states that everyone has a right to privacy, may also be used in conjunction with the abovementioned constitutional rights seeing that the conduct of bullying can lead to an infringement of privacy. An

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<sup>56</sup> Constitution of the Republic of South Africa, 1996.

<sup>57</sup> Constitution of the Republic of South Africa, 1996.

<sup>58</sup> Section 12(2) of the Constitution of the Republic of South Africa, 1996 states that everyone has the right to bodily and psychological integrity, which includes the right— (a) to make decisions concerning reproduction; (b) to security in and control over their body; and (c) not to be subjected to medical or scientific experiments without their informed consent.

example of an infringement of privacy would be where a bully gains access to private information or documentation of another employee and uses it against that employee for their own personal advantages.

In terms of the principle of constitutional avoidance, no employee can directly approach the Constitutional Court for protection against workplace bullying without first applying the rights and protection in terms of national legislation.<sup>59</sup> The above provisions are the only constitutional provisions that *may* assist a victim of bullying in the workplace. There is no direct right which states that one should not be bullied nor a section containing punishments or fine amounts for a bully.

The analysis below now provides the relevant labour laws applicable to workplace bullying.

### ***3.3 Legislative protection***

The introduction referred briefly to legislation, namely the *EEA* and the *LRA*, which will now be analysed herein along with other legislation that may possibly apply to workplace bullying.

Firstly, the *EEA* was enacted to promote equal opportunity and fair treatment in the workplace by eliminating unfair discrimination.<sup>60</sup> This Act is therefore linked with the anti-discrimination clause found in the *Constitution*, section 9, as the *EEA* provides in section 6(1) that:

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

Section 6(3) of the *EEA* further states specifically that harassment is a form of unfair discrimination and same is prohibited in terms of the above grounds for discrimination. Bullying can be regarded as a form of harassment, and it would have

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<sup>59</sup> Kago 2019 *Pretoria Student Law Review* 59.

<sup>60</sup> Section 2 of the *Employment Equity Act* 55 of 1998.

likely been covered by section 6(3). Bullying based on a prohibited ground such as sex, gender or sexual orientation would fall within the scope of sexual harassment and subsequently, the Code of Good Practice on the Handling of Sexual Harassment in the Workplace<sup>61</sup> issued in terms of the *EEA* would apply. However, bullying on any other ground would, therefore, not be covered by this Code, resulting in a limited application of the *EEA* in terms of its protection against bullying in the broad sense.

The *EEA* also has a limited liability clause for the employer in that if it is proven that the employer took all reasonable or preventative steps to eliminate the discrimination or harassment, the employer will not be held liable for the conduct of the employee.<sup>62</sup>

When the *EEA* is applied to bullying in the workplace, the victim must prove that the bullying constituted to unfair discrimination.<sup>63</sup> Again, this is difficult as the bullying does not always amount to unfair discrimination, or the limitation clause may be applied by the employer in that the employer proceeded with all reasonable steps to stop bullying, nevertheless, the conduct continued. The victim is left with no further option as the employer cannot be held liable nor the employee if the bullying did not amount to unfair discrimination.

The next legislative instrument is the *Promotion of Equality and Prevention of Unfair Discrimination Act, 4 of 2000* (hereafter *PEPUDA*). The objective of this Act is:<sup>64</sup>

- a) to enact legislation required by section 9 of the *Constitution*;
- b) to give effect to the letter and spirit of the *Constitution*...

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<sup>61</sup> Gen Not 1357 in GG 27865 of 4 August 2005.

<sup>62</sup> Section 60 of *EEA*. Section 60(2) states that the employer must consult with all relevant parties and must take the necessary steps to eliminate the alleged conduct.

<sup>63</sup> Smit and Viviers *Vulnerable employees* 31.

<sup>64</sup> Section 2 of the Promotion of Equality and Prevention of Discrimination Act, 4 of 2000.

This Act focuses primarily on equal enjoyment of all rights, equality, the prevention of unfair discrimination and remedies for victims, educational methods and lastly setting standards for compliance with international obligations.<sup>65</sup>

From the above objective of *PEPUDA*, it is clear that the Act was promulgated as an anti-discrimination document. Section 11 of *PEPUDA* provides for the prohibition of harassment in that no person may subject any person to harassment. To determine whether bullying would fall within this particular section, one must consider the definition of "harassment" in terms of the *PEPUDA*.

According to section 1 of the *PEPUDA*, "harassment" means the following:

Unwanted conduct which is persistent or serious or demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to –

- a) sex, gender or sexual orientation or
- b) a person's membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group.

The definition of "harassment" in terms of *PEPUDA* would exclude bullying, except if the bullying is related to sex, gender or sexual orientation or based on a person's membership or presumed membership. Therefore, *PEPUDA* may provide protection against workplace bullying and only if the *EEA* does not apply as section 5 of the *PEPUDA* provides that the Act will not apply when the *EEA* applies.

Pursuant to the discussions on the *EEA*, it was confirmed that it may apply if the bullying led to discrimination on one of the prohibited grounds. There is, therefore, a diminutive chance that *PEPUDA* will apply in a workplace bullying scenario.

The next Act for analytic purposes is the *Protection from Harassment Act, 17 of 2011* (hereafter *PHA*). This Act forms the basis of remedies available to victims of harassment as well as enables relevant organs of state with the required means to

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<sup>65</sup> Section 2 of the Promotion of Equality and Prevention of Discrimination Act, 4 of 2000.

implement the remedies afforded. According to section 1 of the *PHA*, "harassment" means:

directly or indirectly engaging in conduct that the respondent knows or ought to know- (a) causes harm or inspires the reasonable belief that harm may be caused to the complainant or a related person by unreasonably- (i) following, watching, pursuing or accosting of the complainant or a related person, or loitering outside of or near the building or place where the complainant or a related person resides, works, carries on business, studies or happens to be; (ii) engaging in verbal, electronic or any other communication aimed at the complainant or a related person, by any means, whether or not conversation ensues; or (iii) sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the complainant or a related person or leaving them where they will be found by, given to or brought to the attention of, the complainant or a related person; or (b) amounts to sexual harassment of the complainant or a related person.

The above definition in terms of the *PHA* is broad and can cover the scope of bullying. In terms of the application of the Act, and more specifically section 2, the remedy afforded to a victim of harassment is to apply for a protection order. The victim of workplace bullying should, therefore, attend a court that has the necessary jurisdiction and apply for a protection order in the prescribed manner, in terms of the *PHA*.

A protection order in a workplace bullying scenario may not suffice. The relationship between employer, employee and co-workers is more complex than the normal family or ex-lover dispute wherein a protection order normally assists.

The following problems occur when a victim of workplace bullying authorises a protection order:<sup>66</sup>

The protection order, whether final or interim, will cause problems within the workplace with regard to the implementation thereof. An example would be where one of the conditions of the protection order is that the respondent (bully) may not have direct or indirect contact, or through others, with the applicant (victim). The implementation of this condition in the workplace will be extremely difficult and even impossible, seeing that the respondent may be the manager that must communicate

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<sup>66</sup> Smit and Viviers *Vulnerable employees* 33.

with the applicant, or depending on the type of working environment, co-workers might have group projects where communication is required.

The protection order will be heard in court, meaning the relevant Human Resource Department of that particular organisation will be part of it. This can cause damage to the reputation of the company as well as loss in productivity and higher absenteeism seeing that the court may subpoena other co-workers to testify.

The protection order remains in force for a period of 5 years, or longer as the court may determine.<sup>67</sup> This means that within that period if a transgression of any of the protection order conditions take place, a warrant of arrest will be executed against the respondent. This may be abused by the applicant as the effects of bullying and the stress thereof may cause the applicant to act emotionally or out of anger and arrest the respondent every month. If the protection order is against the manager of an organisation and he or she gets arrested, it will be of great consequences for the company.

The company may subsequently decide to conduct a disciplinary hearing and decide based on the conditions of the protection order that neither employees can reasonably stay within their employment due to the nature of their job and duties. This will result in unemployment for both the applicant and respondent.

The *PHA* serves its purpose for remedies in terms of harassment and sexual harassment. Nevertheless, from the above it is not realistic to proceed with it in a workplace bullying situation. The victim may proceed with the protection order, as bullying in the workplace will fall within the scope of the *PHA*. This Act is thus far the only Act that covers workplace bullying definitely.

Mention must also be made to the *Occupational Health and Safety Act, 85 of 1993* (hereafter *OHSA*). The *OHSA* was promulgated to provide for the health and safety of persons at work and for the health and safety of persons in connection with the use of plant and machinery.<sup>68</sup> This Act is part of the general legislative framework

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<sup>67</sup> Section 9(8) of the *Protection from Harassment Act, 17 of 2011*.

<sup>68</sup> Preamble of the *Occupational Health and Safety Act, 85 of 1993*.

of South Africa's labour laws with certain provisions that might be linked to workplace bullying.

Section 8(1) of the *OHS Act* states that every employer shall provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his employees. Section 8(2) further then provides a list of duties linked to section 8(1) of the *OHS Act*. There is one particular duty that may be linked to workplace bullying being, section 8(2)(e) of the *OHS Act* which states that it is an employer's duty "to provide information, instructions, training and supervision as may be necessary to ensure, as far as is reasonably practicable, the health and safety of the employees at work".

Further, section 14 of the *OHS Act* provides a list of duties for employees in terms of their health and safety. One of these duties is that every employee must "take reasonable care for the health and safety of himself and of other persons who may be affected by his acts or omissions". The discussions on the negative effects of bullying in the workplace showed that the employee's long-term health will be affected in terms of PTSD.

The *OHS Act* might assist a victim of workplace bullying, seeing that the scope of "harm" can be physical, psychological or mental wherein it was the duty of the employer to protect the employee from harm. The employer must provide instructions, training or supervision regarding workplace bullying in terms of the *OHS Act* duty.<sup>69</sup> This could be reasonable, practicable and act as a prevention method of workplace bullying. The application of the *OHS Act* by a court, tribunal or forum in a workplace bullying situation has not taken place to date.<sup>70</sup>

The last legislative instrument for analytic purposes herein is the *LRA*. The purpose of the *LRA* is to:<sup>71</sup>

advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which

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<sup>69</sup> Section 8(2) of the *OHS Act*.

<sup>70</sup> Smit 2021 Law Democracy & Development 36.

<sup>71</sup> Section 1 of the *Labour Relations Act* 66 of 1995.

are- (a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution; (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organisation; (c) to provide a framework within which employees and their trade unions, employers and employers' organisations can- (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and (ii) formulate industrial policy; and (d) to promote- (i) orderly collective bargaining; (ii) collective bargaining at sectoral level; (iii) employee participation in decision-making in the workplace; and (iv) the effective resolution of labour disputes.

The *LRA* in a like manner does not specifically address workplace bullying or protective measures but does provide the Commission for Conciliation, Mediation and Arbitration (hereafter CCMA) with the powers to provide employees, employers, registered trade unions or registered employers' organisations with advice or training relating to the prevention of sexual harassment in the workplace.<sup>72</sup> The application is, therefore, limited as the bullying must be based on a prohibited ground of sex, gender, or sexual orientation.<sup>73</sup> Thus, the protection against workplace bullying in terms of the *LRA* is unsubstantial. The *LRA* covers broadly all matters relating to fair labour practices and sanctions unfair labour practices.<sup>74</sup>

The *LRA* may apply in terms of constructive dismissal, wherein the employee (victim) terminated a contract of employment with or without notice because the employer made continued employment intolerable.<sup>75</sup> Constructive dismissal relates to work conditions that is constructed or created by the employer whereby the only solution for the employee is to resign.<sup>76</sup> The employee will have to prove that the employer is the party to blame in that he or she is the reason for the intolerable condition or for it to continue and that the employee had no further alternative than to resign.<sup>77</sup>

With a constructive dismissal referral to the Commission, the employee will firstly be unemployed until the matter is finalised. Secondly, if the employer proves that

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<sup>72</sup> Section 28 *Labour Relations Act* 66 of 1995.

<sup>73</sup> Section 115(3)(i) of the *Labour Relations Act* 66 of 1995.

<sup>74</sup> Section 193 of the *Labour Relations Act* 66 of 1995.

<sup>75</sup> Section 186(1)(e) of the *LRA*.

<sup>76</sup> Atkinson 2021 <https://www.mondaq.com/southafrica/employee-rights-labour-relations/1141362/constructive-dismissal-what-do-i-need-to-know>

<sup>77</sup> Labour Guide date unknown <https://www.labourguide.co.za/constructive-dismissal>.

he or she reasonably tried to resolve the issue of bullying by providing information sessions or even lodging a warning against the bully the employer will not be held liable for the intolerance.<sup>78</sup>

The legislative framework in terms of bullying in the workplace was very limited. There was no certain legislation that directs the victim to protection measures or prevention measures for the employer. The legislation was based on *might*. From the analytic discussions on the available legislation, the victim of workplace bullying can proceed with a claim in terms of the *EEA*, nevertheless, the bullying must be linked to discrimination on one of the listed grounds. If the act or omission is not linked to discrimination, the victim cannot proceed with the *EEA*.

If the victim cannot proceed with the *EEA* there is no further alternative except to proceed with the *OHSA*, which has not been attempted and thus, the outcome thereof is uncertain. The discussion below continues to identify alternative means that could be used for workplace bullying such as common law methods as well as international law instruments. Nevertheless, it can be concluded that South Africa's labour laws in terms of the protection and prevention of workplace bullying were non-existent prior to the enactment of the Code of Good Practice on Harassment.

### ***3.4 Common law position***

Despite the lack of legislative protection in terms of South Africa's labour laws prior to the enactment of the Code of Good Practice on Harassment, there were a few common law remedies that the victim of bullying could have used. It must be noted that these remedies are aimed at financial compensation or a claim for damages. Therefore, the remedies are not the answer to preventing or ending bullying in the workplace.

The first common law remedy would be in terms of the common duty of the employer to provide a safe working environment.<sup>79</sup> If the employee is bullied, meaning that they are not working in a safe environment, the duty has been

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<sup>78</sup> Labour Guide date unknown <https://www.labourguide.co.za/constructive-dismissal>.

<sup>79</sup> Smit 2021 Law Democracy & Development 36.

breached. The breach is also referred to as the *iniurio*, meaning an invasion of rights.<sup>80</sup> The alternative is not to proceed with the breach but rather to proceed with the claim of damages on the basis of vicarious liability.<sup>81</sup>

The above common law remedies are available for use by a victim of bullying in the workplace. It must further be noted that such a civil claim is costly and might take years to finalise. It is an option, but definitely not the long-term answer to combating workplace bullying.

The last means of protection and remedies to be analysed are the international law instruments.

### ***3.5 International agreements***

International agreements are part and parcel of the legislative framework and, therefore, must be included to determine whether protection and prevention can stem therefrom. The *Constitution* makes provision for the use of international law in section 39(1)(b), which states that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law.

Further, chapter 14 of the *Constitution* governing general principles, makes further reference to the use of international law. Section 231 of the *Constitution* specifically regulates the use of international agreements in that an international agreement is binding on the Republic after it has been approved by resolution in both the National Assembly and the National Council of Provinces, unless ratification is not required as determined in section 231(3).

Subsequently, any international agreement becomes law in the Republic when it is enacted into law by national legislation.<sup>82</sup> Section 232 of the *Constitution* further regulates the use of customary international law in that same is law in the Republic unless it is inconsistent with the *Constitution* or an Act of Parliament.

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<sup>80</sup> Smit and Viviers *Vulnerable employees* 30.

<sup>81</sup> Smit and Viviers *Vulnerable employees* 31.

<sup>82</sup> Section 231(4) Constitution of the Republic of South Africa, 1996.

During the introduction of this study, reference was made to the ILO as well as to the C190 Convention. These two concepts are of great importance to this study and their connection to international law. The ILO is a well-known organisation that was established in 1919 to act as a tripartite United Nations Agency which regulates the relationship between employees, employers and governments, regarding labour standards, development of policies and promoting decent work for all.<sup>83</sup>

The ILO provides for international labour standards in the form of conventions and recommendations.<sup>84</sup> Conventions are legally binding international agreements that may be ratified by member states.<sup>85</sup> It was already confirmed in the introduction that South Africa is a member state of the ILO, therefore, it is expected to ratify conventions if the content thereof relates to or is relevant to domestic matters. On the other hand, recommendations are only non-binding guidelines to be used for assistance.<sup>86</sup>

The Constitution of the ILO provides for the process of ratification in Article 19 which briefly states that each member state will within one year from closing of the Conference bring the Convention before the authority for the enactment of the legislation. Whereafter, the Director-General of the International Labour Office must be informed of the steps taken as well as when the formal ratification will take place and the process thereof.<sup>87</sup>

The above ratification process and the process in terms of section 231 of the *Constitution* are similar. As confirmed, South Africa as a member state of the ILO ratified the C190 Convention on 21 November 2021, of which the Convention came

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<sup>83</sup> International Labour Organization date unknown <https://www.ilo.org/global/about-the-ilo/lang-en/index.htm>.

<sup>84</sup> International Labour Organization date unknown.  
<https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang-en/index.htm>.

<sup>85</sup> International Labour Organization date unknown.  
<https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang-en/index.htm>.

<sup>86</sup> International Labour Organization date unknown.  
<https://www.ilo.org/global/standards/introduction-to-international-labour-standards/conventions-and-recommendations/lang-en/index.htm>.

<sup>87</sup> ILO Constitution (1997).

into force on 29 November 2022.<sup>88</sup> The below analysis focuses on the C190 Convention whereafter the discussion focuses on the application in terms of the ratification and what South Africa intends to do.

Article 4 of the C190 Convention specifically states the core principles of such Convention, with the most important one being that:<sup>89</sup>

Each member shall adopt, in accordance with national law and circumstances and in consultation with representative employers' and workers' organisations, an inclusive, integrated and gender-responsive approach for the prevention and elimination of violence and harassment in the world of work. Such an approach should take into account violence and harassment involving third parties, where applicable, and includes (a) prohibiting in law violence and harassment; (b) ensuring that relevant policies address violence and harassment...

From the above, it is noted that the C190 Convention was developed to prevent and combat violence and harassment in the workplace. One must then determine what violence and harassment are in terms of this Convention since from all the above discussions in this study, bullying was never directly part of the definition of harassment prior to the Code of Good Practice on Harassment.

Article 1 of the C190 Convention defines violence and harassment as:<sup>90</sup>

a range of unacceptable behaviours and practices, or threats thereof, whether a single occurrence or repeated, that aim at, result in, or are likely to result in physical, psychological, sexual or economic harm, and includes gender-based violence and harassment.

The above definition of violence and harassment provides for a comprehensive scope of what conduct can be included as harassment or violence. Further, the Convention does not stipulate exact protective measures or remedies but provides measures to reach this protection and remedies.

Prevention measures against violence and harassment in the world of work are stipulated in Article 8 of the C190 Convention in that members must recognise the

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<sup>88</sup> International Labour Organization date unknown  
[https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:102888](https://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102888).

<sup>89</sup> International Labour Organization C190 - Violence and Harassment Convention No.190 (2019).

<sup>90</sup> International Labour Organization C190 - Violence and Harassment Convention No.190 (2019).

important role of public authorities, the identification of workers who are more exposed and by taking measures to protect such identified persons.<sup>91</sup>

Lastly, Article 9 of the C190 Convention provides that each member shall adopt laws and regulations requiring employers to take appropriate steps to prevent violence, harassment, and gender-based violence in the world of work, by adopting and implementing a workplace policy on violence and harassment; to take into account violence, harassment and associated psychosocial risks; identifying hazards; and to provide workers with information and training.<sup>92</sup>

The C190 Convention is, therefore, not an all-inclusive document with the exact list of protective, remedies or sanctions measures. It enables member states to draft their own laws with the C190 Convention as a guideline of minimum standards. The South African parliament and courts, therefore, have an obligation in terms of international law to take the C190 Convention into account. In addition, seeing that the C190 Convention was ratified by South Africa, it further attracts responsibilities, in terms of the ILO Constitution.

Article 26 of the ILO Convention provides for non-compliance in that a member may file a complaint with the International Labour Office if it is dissatisfied with another member's application of the ratified Convention, whereafter further administrative steps will be taken against the non-compliant member.<sup>93</sup>

In terms of international law, South Africa has two obligations in which the C190 Convention must be considered. Firstly, in terms of their constitutional duty to apply international law and secondly, their duty in terms of the ratification and following the applicable ILO Convention standards and requirements. Based on the ratification of the C190 Convention, South Africa proceeded with the drafting of the Draft Code of Good Practice on Violence and Harassment in the World of Work.<sup>94</sup>

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<sup>91</sup> International Labour Organization C190 - Violence and Harassment Convention No.190 (2019).

<sup>92</sup> International Labour Organization C190 - Violence and Harassment Convention No.190 (2019).

<sup>93</sup> International Labour Organization C190 - Violence and Harassment Convention No.190 (2019).

<sup>94</sup> GN R896 in GG4360 of 20 August 2020.

A bill is a draft version of the law which must first be approved by the Cabinet before being submitted to Parliament whereafter it is published in the Government Gazette for public comment and if passed, it will go to the President for signature.<sup>95</sup> The Draft Code of Good Practice on Violence and Harassment in the World of Work was published in the Government Gazette for public comment in August 2020. A further notice was placed in the Government Gazette on the 18<sup>th</sup> of March 2022 confirming that the code is effective from the date of publication.<sup>96</sup> A Code of Good Practice is not a normal Bill, meaning after publication it does not become domestic law nor is it signed by the President – a Code of Good Practice is soft law.<sup>97</sup>

Codes of Good Practice are policies and guidelines that prescribed certain expectancies concerning a particular matter.<sup>98</sup> Codes of Good Practice are regulated by legislation such as the *LRA* in section 203 which provides that NEDLAC may prepare, issue, change or replace a Code of Good Practice. When interpreting or applying an Act whereby a Code of Good Practice is issued the relevant Code must be considered. The *EEA* also provides for Codes in terms of section 54, in that the Minister may on advice of the Commission issue, change or replace any Code of Good Practice.

The *EEA* further provides a list of possible Codes of Good Practice that may be issued in terms of such Act, being the preparation of employment equity plans, advertising, recruitment procedures and selection criteria, sexual harassment and racial harassment or even internal procedures to resolve disputes about the interpretation or application of the Act.<sup>99</sup>

The above explanation on how and where a Code of Good Practice falls within the South African legal framework is of great importance to this study as one needs to know what law is and what a guideline is. Although the *LRA* and *EEA* were discussed under the legislative framework, the specific reference thereto is needed under

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<sup>95</sup> <https://www.parliament.gov.za/how-law-made>

<sup>96</sup> GN R1890 in GG46056 of 18 March 2022.

<sup>97</sup> International Labour Organization *Labour Codes (Codes of Good Practice)* 1.

<sup>98</sup> International Labour Organization *Labour Codes (Codes of Good Practice)* 1.

<sup>99</sup> Section 54(a) of the *EEA*.

international law seeing that the C190 Convention paved the way for the Draft Code of Good Practice on Violence and Harassment in the World of Work. The below analysis focuses on the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, as in operation since 18 March 2022.<sup>100</sup>

The analysis resumes under the heading of international law and agreements due to the origin of the Code of Good Practice on Harassment and seeing that it is not domestic legislation but soft law. Article 2 of the Code of Good Practice on Harassment provides a list of people that are covered under the Code, meaning who qualifies as a victim or a bully which includes, but is not limited to, owners, employers, employees, job seekers, volunteers as well as clients and customers.<sup>101</sup>

The above Article 2 of the Code of Good Practice on Harassment provides a comprehensive list of people who are covered by the Code and extends protection outside of the normal employment relationship as an employee can also be bullied by a client or supplier. The Code further makes provision that protection extends outside of the normal work area, and include work-related trips, travelling, training events or social activities as well as employer-provided accommodation.<sup>102</sup>

Article 4.2 of the Code of Good Practice on Harassment specifically states that harassment includes “violence, physical abuse psychological abuse, emotional abuse, sexual abuse, gender-based abuse and racial abuse”.<sup>103</sup> The elements for harassment, meaning to determine whether the person was indeed a victim of harassment, are unwanted conduct, repeated or serious conduct and a hostile work environment.

Unwanted conduct, according to the Code of Good Practice on Harassment, is determinable by whether the harasser knew or should have known that the conduct was unwanted.<sup>104</sup> This issue will be determined whether the victim communicated

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<sup>100</sup> GN R1890 in GG46056 of 18 March 2022.

<sup>101</sup> GN R1890 in GG46056 of 18 March 2022.

<sup>102</sup> Article 2.3 GN R1890 in GG46056 of 18 March 2022.

<sup>103</sup> GN R1890 in GG46056 of 18 March 2022.

<sup>104</sup> Article 4.4.1 GN R1890 in GG46056 of 18 March 2022.

to the harasser that the conduct was unwelcome and whether this took place verbally, non-verbally, or communicated directly or indirectly.<sup>105</sup> If it is found that no communication took place, the investigation will turn to the conduct of the harasser and whether the harasser should have known or ought to know that such conduct is generally unacceptable.<sup>106</sup>

The act of harassment must be repeated or of a serious nature, meaning a "pattern of persistent conduct or a single instance or event".<sup>107</sup> The Code further explains that if the conduct took place as a single once-off occurrence, harassment will only be present if the conduct is of a serious nature.<sup>108</sup> The Code further addresses bullying in the workplace specifically in that it will be an escalating type of harassment, meaning it may be once-off occurrences that take place over time building up, wherein the victim ends up in an inferior position.<sup>109</sup>

The Code of Good Practice on Harassment provides three factors for determining whether harassment has taken place in terms of the Code, namely the context or situation of the harassment; the circumstances of the victim and the impact (effect) that the act or omission; and the respective positions of the harasser and victims.<sup>110</sup>

The last element in terms of harassment is a hostile work environment. The Code specifically defines a hostile work environment as:<sup>111</sup>

Conduct related to a prohibited ground impacts the dignity of one or more employees. This will be present if the conduct has a negative impact on the employee's ability to work and/or on their personal well-being. This may be a result of conduct of persons in authority such as managers and supervisors or the conduct of other employees.

The Code further states that it is unnecessary when establishing if the element of a hostile work environment is present, that the victims or complainants have not

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<sup>105</sup> Article 4.4.2 GN R1890 in GG46056 of 18 March 2022.

<sup>106</sup> Article 4.4.3 GN R1890 in GG46056 of 18 March 2022.

<sup>107</sup> Article 4.5.1 GN R1890 in GG46056 of 18 March 2022.

<sup>108</sup> Article 4.5.1 GN R1890 in GG46056 of 18 March 2022.

<sup>109</sup> Article 4.5.2 GN R1890 in GG46056 of 18 March 2022.

<sup>110</sup> Article 4.5.4 GN R1890 in GG46056 of 18 March 2022.

<sup>111</sup> Article 4.6.1 GN R1890 in GG46056 of 18 March 2022.

received a particular benefit.<sup>112</sup> The Code provides an extensive list of what harassment could be, or rather what will constitute as harassment which covers physical, verbal or psychological conduct, violence or gestures of violence, and verbal bullying, with examples of each possible type of harassment.<sup>113</sup>

Important examples of harassment to mentioned specifically herein are, spreading rumours maliciously, humiliating conduct, withholding work-related information or providing incorrect information or pressuring the employee to resign.<sup>114</sup> From these examples, there is a clear connection between the information provided in defining workplace bullying. The Code went above and beyond the normal definitions and preventative measures, which are normally found in any code or instrument, by providing actual practical examples that can be applied to the factual situation.

The term bullying is specifically placed under Article 4.7, relating to the types of harassment, wherein it is reiterated that workplace bullying involves harassment by way of coercive power by an individual or group of individuals in the workplace.<sup>115</sup> The Code also confirms that there are various sub-terms for harassment which include, bullying, intimidation, mobbing and online harassment which may be vertically or horizontally experienced.<sup>116</sup>

The first part of the Code provides an in-depth description of what harassment entails as well as the test for harassment. Nevertheless, the Code goes further and provides prevention guidelines for the employer. Article 8 and 9 of the Code of Good Practice on Harassment makes provision for prevention in that an employer is required to follow section 60 of the *EEA* regarding proactive steps, by way of assessing the risks of harassment that employees are exposed to while performing their day-to-day duties.<sup>117</sup>

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<sup>112</sup> Article 4.6.3 GN R1890 in GG46056 of 18 March 2022.

<sup>113</sup> Article 4.7 GN R1890 in GG46056 of 18 March 2022.

<sup>114</sup> Article 4.7.5 GN R1890 in GG46056 of 18 March 2022

<sup>115</sup> Article 4.7.7 GN R1890 in GG46056 of 18 March 2022.

<sup>116</sup> Article 4.7.8 GN R1890 in GG46056 of 18 March 2022.

<sup>117</sup> Article 8.1 GN R1890 in GG46056 of 18 March 2022.

Article 8.2 of the Code of Good Practice on Harassment further provides a list of guidelines that an employer can implement in the workplace to eliminate or prevent harassment. This list includes guidelines wherein employers, trade unions and employees have a contributing role in creating and maintaining a working environment free from harassment.<sup>118</sup> The guidelines further require an employer to adopt policies and procedures on the prevention, elimination and management of harassment as well as the implementation of awareness campaigns.<sup>119</sup>

Lastly, Article 10 of the Code deals with the procedure for reporting harassment. This Article provides that when a victim has laid a complaint of harassment, the employer is obliged to investigate such a complaint and provide the victim with the relevant formal or informal procedures to deal with the harassment.<sup>120</sup> The reporting of harassment must be done immediately, immediately as in each unique case, seeing that a bullied person can do so immediately after the incident, or depending on the circumstances may not do so as a result of fear or threats received.<sup>121</sup>

The obligations of the employer after receiving the complaint of harassment are very serious as failing to adhere these obligations will lead to vicarious liability.<sup>122</sup> Therefore, upon receiving the complaint, the employer must consult with all relevant parties, take the necessary steps to address the complaint in terms of this Code and the employer's code of conduct or relevant collective bargaining agreement and take the necessary steps to eliminate the harassment.<sup>123</sup>

The Code of Good Practice on Harassment is, therefore, the first progress made by South Africa with regard to eliminating and preventing harassment in the workplace. Bullying has previously been an uncertain concept as seen from the discussions above and was first excluded from the concept of harassment. Bullying has now

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<sup>118</sup> Article 8.2 GN R1890 in GG46056 of 18 March 2022.

<sup>119</sup> Article 8.2 GN R1890 in GG46056 of 18 March 2022.

<sup>120</sup> Article 10 GN R1890 in GG46056 of 18 March 2022.

<sup>121</sup> Article 10.1.3 GN R1890 in GG46056 of 18 March 2022.

<sup>122</sup> Article 10.3 GN R1890 in GG46056 of 18 March 2022.

<sup>123</sup> Article 10.2 GN R1890 in GG46056 of 18 March 2022.

been defined and placed with harassment in terms of this Code, paving a way for further development and protection measures.

Seeing that the Code of Good Practice on Harassment is relatively new, since it has only been in effect for 8 months, the record of its application is limited. Following this analysis is the application of courts in terms of the current legislative framework to determine how South African courts deal with cases of bullying in the workplace.

### ***3.6 Application of the current legislative protection by Courts and Tribunals***

In the first matter of *Private Sector Workers Trade Union obo Opperman v Gerrie Ebersohn Attorneys*,<sup>124</sup> the applicant, a former employee of the respondent referred her dismissal case to the CCMA based on discrimination. The discrimination was in connection with repeated verbal abuse and bullying by the firm's director.<sup>125</sup>

This case had a few grounds of discrimination in that the applicant alleged misconduct based on religion, her qualifications and harassment.<sup>126</sup> For the purpose of this research, only the argument by the Commissioner regarding harassment and bullying is considered.<sup>127</sup>

The applicant gave oral evidence as to what transpired between herself and her employer as well as SMS messages shared between the two of them.<sup>128</sup> The employer denied every allegation made by the applicant by changing the scenario and/or circumstances in which the conversation took place.

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<sup>124</sup> [2018] 4 BALR 395 (CCMA).

<sup>125</sup> *Private Sector Workers Trade Union obo Opperman v Gerrie Ebersohn Attorneys* [2018] 4 BALR 395 (CCMA) para 3.

<sup>126</sup> *Private Sector Workers Trade Union obo Opperman v Gerrie Ebersohn Attorneys* [2018] 4 BALR 395 (CCMA) para 4.

<sup>127</sup> Various Case Law deals with sexual harassment in the workplace which will be excluded from this study in order to focus on bullying.

<sup>128</sup> *Private Sector Workers Trade Union obo Opperman v Gerrie Ebersohn Attorneys* [2018] 4 BALR 395 (CCMA) para 5.

The Commissioner applied the two-stage analysis test as set out in the judgment of *Harksen v Lane*<sup>129</sup> to the set of facts before him to determine the differentiation and discrimination aspect in terms of sections 6 and 11 of the *EEA*.<sup>130</sup>

Firstly, does the differentiation amount to 'discrimination'? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner. If the differentiation amounts to "discrimination", does it amount to 'unfair discrimination'? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 8(2) of the Constitution.

By applying the above test of differentiation, the Commissioner found that the harassment did not fall on "a specified ground", therefore, there was no discrimination and no further recourse in terms of this claim. The applicant's case was subsequently dismissed on all alleged grounds of dismissal. This case shows the importance and need for legislation or any legislative framework that regulates specific issues, such as workplace bullying.

If the above case took place today in 2022, more effort would have been put into the evidence presented. In my view, the applicant provided substantial evidence of certain experiences and what the employer did. The mere fact that the employer stated that he normally uses vulgar language due to the nature of his job shows his character, which the Commissioner did not take into account.<sup>131</sup> There is a reasonable ground that this applicant was in fact bullied and was left with the effect thereof. The labour laws and Commission failed this employee.

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<sup>129</sup> 1998 (1) SA 300.

<sup>130</sup> Private Sector Workers Trade Union obo Opperman v Gerrie Ebersohn Attorneys [2018] 4 BALR 395 (CCMA) para 77.

<sup>131</sup> Private Sector Workers Trade Union obo Opperman v Gerrie Ebersohn Attorneys [2018] 4 BALR 395 (CCMA) para 53.

In the matter of *Centre for Autism Research and Education cc V CCMA*,<sup>132</sup> an important judgment for the recognition of workplace bullying was taken on review to the Labour Court by the employer. The facts of this case relate to a constructive dismissal claim. As discussed during the legislative framework of available labour laws in this research, constructive dismissal is when an employee resigns from their employment because the employer made continued employment intolerable.<sup>133</sup>

Two former employees, teachers of the Centre for Autism Research and Education, referred a section 186(1)(e) of the *LRA* claim to the CCMA. The basis of their claim was bullying, harassment and sexual harassment in the workplace initiated by the owner/director of the school. The two former employees provided oral evidence during the arbitration, whereafter the employer's legal representative proceeded with cross-examination of the evidence presented before the Commissioner and closing arguments followed. It is important to mention that the respondent /owner of the school never testified.<sup>134</sup>

The evidence presented by the two former employees was vulgar and alarmingly. Seeing that the evidence was never challenged by the respondent/owner of the school, nor did she deny any allegations made during the arbitration hearing, it was accepted as the truth. The Commissioner subsequently made a monetary award in favour of the two former employees. The award was then taken on review by the owner of the school to the Labour Court.

On review at the Labour Court, the only issue at hand that was determined by the learned Judge was not whether the test for constructive dismissal was applied correctly, but a review of whether the Commissioner ignored the fact that the former employees did not lodge a grievance with their employer, as stipulated in their employment contract.<sup>135</sup> The further ground for review was that the employees in

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<sup>132</sup> [2020] 11 BLLR 1123 (LC).

<sup>133</sup> Section 186(1)(e) of the *LRA*.

<sup>134</sup> Centre for Autism Research and Education cc V CCMA [2020] 11 BLLR 1123 (LC) para 2.

<sup>135</sup> Centre for Autism Research and Education cc V CCMA [2020] 11 BLLR 1123 (LC) para 32.

their resignation letter offered to work one month's notice, which the respondent felt showed that the working environment was not intolerable.

The learned Judge confirmed that employment relationships are complicated with considerable levels of irritation, frustration and tension.<sup>136</sup> The court looked at what workplace bullying entails and whether it is linked to harassment by way of the following definition:<sup>137</sup>

Workplace harassment impacts in different ways. Sexual harassment impacts on an employee's dignity, bodily integrity, job security and personal safety. Racial harassment impacts on an employee's sense of worth, dignity and empowerment. Workplace bullying has been linked to a feeling of incompetence in handling the job, to a sense of alienation from colleagues to anxiety that there will be no promotional recognition, to job security, to feelings of inadequacy, to knock on tensions in personal relationships, and to depression.

The court further noted that the presented evidence exhibits a "workplace operated by a narcissistic personality whose offensive and unwelcome conduct had the effect of creating a toxic working environment in which discrimination, degradation and demeaning behaviour became the norm".<sup>138</sup> The learned Judge held that the former employees were exposed to extreme workplace bullying and that the award in terms of constructive dismissal was correct, although no grievances were submitted by the employees.<sup>139</sup>

The learned Judge took into consideration the circumstances of the case, being that the grievance must be lodged with the owner of the school, meaning the person who is bullying the employees. Further, even though the employees offered to work one month's notice, the Judge accepted their reason for such, being that they work with children with special needs and any transition for the children may need to take place over a period of time. Upon handing in their resignation letters, the former employees were escorted off the premises by security. The application for

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<sup>136</sup> Centre for Autism Research and Education cc V CCMA [2020] 11 BLLR 1123 (LC) para 33.

<sup>137</sup> Centre for Autism Research and Education cc V CCMA [2020] 11 BLLR 1123 (LC) para 39.

<sup>138</sup> Centre for Autism Research and Education cc V CCMA [2020] 11 BLLR 1123 (LC) para 45.

<sup>139</sup> Centre for Autism Research and Education cc V CCMA [2020] 11 BLLR 1123 (LC) para 35.

review was subsequently set aside and a punitive cost order was granted against the respondent/owner of the school.<sup>140</sup>

The outcome of the above case confirms the remedy of constructive dismissal for workplace bullying. The Labour Court acknowledged workplace bullying as harassment in general and did not make use of any further legislation except for the *LRA* on dismissal.

The next matter is the judgment of *Samka v Shoprite Checkers (Pty) Ltd and others*.<sup>141</sup> The facts of this matter relate to the application of the *EEA* in terms of whether the employer can be held liable for discrimination by a customer towards an employee of the employer as well as whether bullying falls within the ambit of discrimination.

The employee proceeded with a claim in terms of the *EEA* section 60, dealing with an employer's obligations in that:

(1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.

(2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.

(3) If the employer fails to take the necessary steps referred to in subsection 2, and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.

(4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to provide that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.

The Labour Court, the court of first instance, held that the employer could not be liable in terms of section 60 of the *EEA* as an employer cannot be held liable for the conduct of its customers.<sup>142</sup> On appeal, the learned Judge proceeded to interpret the meaning of the relevant *EEA* provisions seeing that the employee held that the

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<sup>140</sup> Centre for Autism Research and Education cc V CCMA [2020] 11 BLLR 1123 (LC) para 48.

<sup>141</sup> [2020] JOL 47968 (LAC).

<sup>142</sup> *Samka v Shoprite Checkers (Pty) Ltd and others* [2020] JOL 47968 (LAC) para 6.

employer failed to provide her with a safe working environment with regards to the racist conduct of the client as well as the bullying by co-workers.<sup>143</sup>

The learned Judge confirmed the requirements and application for section 60 of the *EEA* in that:<sup>144</sup>

1. The conduct must be by an employee of the employer.
2. The conduct must constitute unfair discrimination.
3. The conduct must take place while at work.
4. The alleged conduct must immediately be brought to the attention of the employer.
5. The employer must be aware of the conduct.
6. There must be a failure by the employer to consult all relevant parties, or to take the necessary steps to eliminate the conduct or otherwise to comply with the *EEA*, and
7. The employer must show that it did all that was reasonably practicable to ensure that the employee would not act in contravention of the *EEA*.

The above interpretation of application is the express wording of the section, and the Court could not extend the scope of the provision as it believed that it was clear and unambiguous.<sup>145</sup> The court further noted that an employer has no control over its clients and the action of the client towards the employee, therefore, they find it hard to apply section 60 of the *EEA* to such a situation.<sup>146</sup> The court concluded on this aspect that the employee is not left without a cause as she may proceed with a delictual claim against the client personally or approach the Equality Court for relief.<sup>147</sup>

The last issue decided by the Labour Appeal Court was the issue of bullying, harassment and/or victimisation in relation to discrimination. The court of first instance concluded on this issue that the harassment was not based on an arbitrary

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<sup>143</sup> Samka v Shoprite Checkers (Pty) Ltd and others [2020] JOL 47968 (LAC) para 7.

<sup>144</sup> Samka v Shoprite Checkers (Pty) Ltd and others [2020] JOL 47968 (LAC) para 12.

<sup>145</sup> Samka v Shoprite Checkers (Pty) L td and others [2020] JOL 47968 (LAC) para 13.

<sup>146</sup> Samka v Shoprite Checkers (Pty) Ltd and others [2020] JOL 47968 (LAC) para 14.

<sup>147</sup> Samka v Shoprite Checkers (Pty) Ltd and others [2020] JOL 47968 (LAC) para 26.

ground in terms of section 6 of the *EEA* and, therefore, discrimination was not present. The Labour Appeal Court considered the direct application of the *EEA*, as well as the evidence presented before them and stated that:<sup>148</sup>

no evidence which the appellant was able to produce discharged the onus that she had been harassed on an arbitrary ground which would bring the first respondent's conduct within the scope of the *EEA*.

The court further noted that the complaints of the employee regarding the bullying were lodged with management and that they (management) dealt with it accordingly.<sup>149</sup> The appeal was dismissed without costs.

The outcome of this case confirms the fears of victims of bullying in the workplace. The Labour Appeal Court confirmed that there is no recourse in terms of the *EEA* if the bullying and/or harassment is not based on one of the arbitrary grounds listed in the *EEA*. This means, to be successful with your claim of harassment in terms of the *EEA*, the bullying conduct has to be in terms of your age, for example.<sup>150</sup> The referral to "any other arbitrary ground" in terms of section 6 of the *EEA* had no effect on the court's application and interpretation.

It must be noted that this case was heard on the 25<sup>th</sup> of February 2020, before the effective date of the Code of Good Practice on Harassment. However, the C190 Convention of the ILO was already adopted, but not yet ratified at that time. The court made no referral or mention of it, but since it is international law in terms of section 39 of the *Constitution*, it must be considered.

The outcome of this case shows the lack of interpretation and application for harassment and/or bullying type of matters. The victim was left without any recourse based on the fact that her verbal assault by a client did not fall within the scope of the *EEA* nor was her bullying on an arbitrary ground to constitute discrimination. The outcome of this case would have been different if heard in the present time, with the operation of the Code of Good Practice on Harassment. This

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<sup>148</sup> Samka v Shoprite Checkers (Pty) Ltd and others [2020] JOL 47968 (LAC) para 26.

<sup>149</sup> Samka v Shoprite Checkers (Pty) Ltd and others [2020] JOL 47968 (LAC) para 26.

<sup>150</sup> Section 6(1) of the *EEA*.

Code must be used with the application of the *EEA*. As stated in the discussion on the Code, an employee must be protected from harassment by a client, and bullying constitutes harassment even if it is not based on an arbitrary ground. The victim of this case would have won her claim.

A subsequent matter for discussion is the judgment of *Standard Bank of South Africa v Makuleni*.<sup>151</sup> This is a very interesting case where the roles were reversed in that the employer dismissed a bullying employee. Standard Bank, the employer, proceeded with a disciplinary inquiry against the employee on the basis of misconduct. The employee was charged with four counts of misconduct relating to the treatment of her subordinates. She was found guilty of three of the charges, and subsequently dismissed.<sup>152</sup>

The dismissed employee referred a dispute of unfair dismissal to the CCMA wherein the Commissioner found that the dismissal was substantively unfair seeing that the bullied employees never lodged a grievance against the dismissed employee.<sup>153</sup> The Commissioner ordered that the dismissed employee be reinstated in her employment.

During a review by the Labour Court, the learned Judge took into consideration all evidence of the witnesses (bullied employees) as given during the arbitration hearing. It must be noted that the dismissed employee was a branch manager of the Bank since 1995, with no previous offences nor any complaints against her.<sup>154</sup> The type of position held by the dismissed employee played a vital role in this matter.

All nine witnesses' testimonies were taken into consideration during the review, but the crux of their testimonies was that the dismissed employee was a rude manager who screamed, insulted and belittled co-workers in front of each other and in front of customers, as well as made personal comments regarding their bodies or clothes.

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<sup>151</sup> [2021] JOL 51428 (LC).

<sup>152</sup> *Standard Bank of South Africa v Makuleni* [2021] JOL 51428 (LC) para 14.

<sup>153</sup> *Standard Bank of South Africa v Makuleni* [2021] JOL 51428 (LC) para 12.

<sup>154</sup> *Standard Bank of South Africa v Makuleni* [2021] JOL 51428 (LC) para 14.

One of the victims consulted with a human resource business manager of another branch of the bank regarding a transfer as she could no longer be harassed by her manager. This particular manager from another branch then initiated the investigation against the dismissed employee by way of a "climate survey".<sup>155</sup>

The employees were so terrified of the dismissed employee that complaints had to be dealt with through a survey. The learned Judge referred to the above judgment for guidance, being the *Centre for Autism Research and Education CC v CCMA*.<sup>156</sup> This matter was in regard to constructive dismissal, nevertheless, the Judge used the specific reference to harassment and bullying in the workplace as well as the requirement of lodging a grievance.

Firstly, the learned Judge found that the need to lodge a grievance with the employer depends on the circumstances of each case. Some of the employees tried to raise internal concerns but were never really assisted. Therefore, the next step would be to approach the manager who was the bully herself.

One cannot expect the employees to lodge a grievance against the person who was bullying them based on how terrified the employees were.<sup>157</sup> The issue of substantive fairness is, therefore, not an issue anymore. Further, the Commissioner viewed the statements of the witnesses in isolation whereas they should have been viewed together to weigh up similarities and comparisons between the different witness testimonies.<sup>158</sup>

The learned Judge held that the dismissal was indeed fair and that there is no alternative remedy available, seeing that the employer cannot be forced to search for an alternative placement for this employee nor can the employee be placed in a different position as the bully substantially damaged the interpersonal relationships between the parties.<sup>159</sup> The Judge further noted that the bully showed little to no

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<sup>155</sup> Standard Bank of South Africa v Makuleni [2021] JOL 51428 (LC) para 44.

<sup>156</sup> [2020] 11 BLLR 1123 (LC).

<sup>157</sup> Standard Bank of South Africa v Makuleni [2021] JOL 51428 (LC) para 68.

<sup>158</sup> Standard Bank of South Africa v Makuleni [2021] JOL 51428 (LC) para 73.

<sup>159</sup> Standard Bank of South Africa v Makuleni [2021] JOL 51428 (LC) para 76.

remorse for her conduct, neither did she ever deny her actions but merely explained that the context of her sayings was misinterpreted. Therefore, the order of the CCMA was set-aside, and the dismissal of the bully was upheld.

### ***3.7 Conclusion***

Based on the outcomes of the above few judgments relating to workplace bullying, it can be confirmed that there is no clear-cut approach by the courts. None made reference to or took into consideration international law, which would have assisted with the interpretation and application of workplace bullying. The courts are only, at this stage, applying domestic labour law. Since the enactment of the Code of Good Practice on Harassment, it must be applied with the *EEA*. To date of this research, there were no further judgments with the application of the Code of Good Practice on Harassment in a bullying set of facts.

## **Chapter 4 Reflections and possible solutions**

### ***4.1 Introduction***

Upon reflecting on the above information and research, there are still a few problems within our legislative framework regarding workplace bullying. The Code of Good Practice on Harassment is definitely a step in the right direction with regard to setting standards on the prevention and elimination of all the different types of harassment. The Code will be used in conjunction with the *EEA*, meaning the South African tribunals, forums and courts have a clear direction of what must be applied, whereas prior to the Code, there was no direct guideline.

The Code is not the answer to all the problems in terms of bullying in the workplace, therefore, legislation should thus still develop. In the interim, there are other possible solutions to combat workplace bullying whilst keeping in mind the Code of Good Practice on Harassment. The discussion herein continues to identify possible practical solutions to prevent and combat bullying in the workplace.

### ***4.2 Establishment of workplace policies***

Firstly, internal workplace policies against workplace bullying must be established. This is in any case a requirement in terms of the Code of Good Practice on Harassment.<sup>160</sup> A well-written and implemented policy reflects the inner workings of the company, its relationship with its employees as well as what is expected of employees.<sup>161</sup> A policy should not just be developed because it is required in terms of legislation, but should be implemented by involving all partners in the employment relationship.<sup>162</sup>

A well-established policy will have long-term benefits for the company and the employees. The policy can include methods for submitting grievances as well as internal steps to be taken before the matter is referred to the CCMA for assistance.

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<sup>160</sup> Article 9 GN R1890 in GG46056 of 18 March 2022.

<sup>161</sup> Smit and Viviers *Vulnerable employees* 35.

<sup>162</sup> Calitz 2022 *PER* 26.

This will assist the company as well as the aggrieved employee to avoid lengthy and costly legal battles. The policy can include remedial steps as well, such as a referral to a psychologist, counselling or a medical practitioner of choice depending on the type of harassment that occurred, which costs will be paid for by the company. Employees would want to work at a company knowing that there are protective measures in place for them and that the employer cares about their well-being. A happy and peaceful working environment is a productive one.

Policies on harassment should at least include the following information: a statement by the organisation to show their opposition towards bullying in the workplace; the rationale for the policy; definition of workplace bullying as well as examples of conduct; grievances and procedure about harassment will be investigated and handled in a confidential manner; complainants in harassment matters have the right to follow the procedures in the policy and appropriate action must be taken by the employer; it will be a disciplinary offence to victimise or retaliate against an employee who, in good faith, lodges a grievance about harassment, whether in respect of themselves or another employee.<sup>163</sup>

It must be noted that a policy in itself will not be sufficient, so further acts of implementation will be required such as informal investigations, mediation, training, assurances, and support readily available for the victim.<sup>164</sup> Researchers refer to certain "post-implementation activities" for a successful bullying in the workplace policy which includes: design and administer bullying-related indices prior to policy implementation and at periodic intervals thereafter to measure efficiency of the intervention; design and prepare internal educators to train peers and managers; board and executive training; training for investigators; production of training, material and programme material; plan to integrate the policy principles into performance appraisal/evaluation system; new employee orientation module; and plan to revisit, revise, and sustain policy and procedures.<sup>165</sup>

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<sup>163</sup> Article 9.4 GN R1890 in GG46056 of 18 March 2022.

<sup>164</sup> Denine 2016 ILJ 801.

<sup>165</sup> Smit and Viviers *Vulnerable employees* 38.

Despite policies seemingly seen as another alternative, mention must also be made of the negative implications of policy implementation. Small companies may find it difficult to adhere to internal policies, especially since drafting of such policies can be costly. A large company may on the other hand have its own legal team ready to draft a new policy, whereas a small to medium-sized company will have to appoint the services of an attorney or a consultant to assist with the drafting.

Research found that small business owners may find South Africa's labour legislation very restrictive, and that it hinders their full potential.<sup>166</sup> One should, therefore, also consider other means to implement prevention strategies in the workplace for bullying that is more accessible to the small business owner. A small business owner cannot be lawless, and the implementation of legislation must be part of their business and budget strategy.

### ***4.3 Informal prevention methods***

A further recommendation in the combat of workplace bullying is the implementation of conflict resolution strategies. Dispute resolution by way of mediation can be introduced in the workplace. Depending on the size of the company, a small company can appoint a certain employee as the contact officer for any complaints and/or grievances. A larger company can always have an outside counsellor or mediator readily available for any complaint. Having uniform rules as to the procedure for a complaint will provide stability in the workplace as well as reflect the image of the company, in that it will deal with bullies accordingly.

Further alternatives to conflict resolution in the workplace include the implementation of general informal dispute resolution strategies namely:<sup>167</sup>

Open door policies:

An open-door policy means that an employee has direct access to their superior and/or manager. The aggrieved employee may directly approach their superior for

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<sup>166</sup> Smit and Viviers *Vulnerable employees* 39.

<sup>167</sup> Smit and Viviers *Vulnerable employees* 39.

assistance. This type of strategy builds the confidence of employees in that they know they are allowed to raise concerns. The only problem with this strategy is that the bully may be the superior and/or manager. The employees will, therefore, not be able to have an open and honest discussion and their concerns will remain unresolved.

Senior management review:

This is more of a formal approach to senior management to submit your unresolved dispute.

Peer review:

Is an informal approach that builds confidence among employees. The aggrieved employee will present their case to other employees with management and the bully. This strategy might not work in sensitive matters but where a group of employees are bullied, they can stand together in unison and discuss the same with management directly.

Facilitation:

A facilitator is like a chairperson with neutral grounding who will listen to both sides of the story and make a finding.

Ombudsperson:

This can be an internal person such as a member of a trade union or Commission who will do the reporting on behalf of the employees to the relevant body for further assistance.

If all else fails, three different types of mediation may be applied to resolve the matter, being facilitative mediation, transformative mediation and evaluative

mediation.<sup>168</sup> A brief mention of the three types of available mediations follows below:

#### Facilitative mediation:

This is done by a neutral mediator who acts between both sides with dialogue. The aim of this mediation is outcome-based and to repair the relationship between parties.<sup>169</sup>

#### Transformative mediation:

This type of mediation is whereby the other party places themselves in the shoes of the other, and they must not think about their own feelings or dispute, but rather see the point of the other.<sup>170</sup> This might be difficult in a workplace bullying situation as the victim's feelings and emotions are valid and to expect him or her to think as the bully might be unreasonable.

#### Evaluative mediation:

This type of mediation is considered a pre-trial, where the mediator will hear both parties' cases and only focus on the legal basis of each to decide on prospects.<sup>171</sup>

An alternative to the above dispute resolution options is also readily available. These types of methods are more direct to the individual and include constructive leadership, organisational support, organisational culture, individual coping strategies, employee assistance programmes, health care, pre-hiring procedures and establishing hotlines.<sup>172</sup>

#### Constructive leadership:

Throughout the study, it was mentioned that normally the bully is in a superior role such as the supervisor or manager. It has been found that poor leadership in a

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<sup>168</sup> Smit and Viviers *Vulnerable employees* 40.

<sup>169</sup> Smit and Viviers *Vulnerable employees* 40.

<sup>170</sup> Smit and Viviers *Vulnerable employees* 41.

<sup>171</sup> Smit and Viviers *Vulnerable employees* 41.

<sup>172</sup> Smit and Viviers *Vulnerable employees* 42 & 43.

workplace lead to aggravated bullying.<sup>173</sup> Therefore, constructive leadership can assist in combating workplace bullying in that it will consist of a “demonstrated set of behaviours that encourages and recognises individuals’ contributions, support their needs and foster growth and development...”<sup>174</sup> This may be the more suitable method for combating bullying in the workplace for smaller and medium-sized companies. The company will have some seniority person and, this person is required to apply and execute this type of leadership approach.

Perceived organisational support:

This is mainly concerned with the image of the company and how it is perceived by the employees. One should create an image where employees know and believe that if they have some issue or concern, they may freely raise them and the company will actually listen, care and resolve it. The company can show support by caring about the well-being and performance of their employees, valuing their ideas and contributions and showing effective methods of countering bullying.<sup>175</sup>

Organisational culture:

According to researchers, this method is the “most powerful way to prevent workplace bullying”.<sup>176</sup> This combating method is also related to how the company is seen and perceived by the employees, resulting in the employees becoming the culture (reflection) of the company. To facilitate the culture of a company, it is recommended that the principle of *CLEAR* must be applied:<sup>177</sup>

C – Communication

L – Listen to Learn

E – Evaluate and Examine

A – Accountability

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<sup>173</sup> Smit and Viviers *Vulnerable employees* 41.

<sup>174</sup> Smit and Viviers *Vulnerable employees* 41.

<sup>175</sup> Smit and Viviers *Vulnerable employees* 42.

<sup>176</sup> Smit and Viviers *Vulnerable employees* 42.

<sup>177</sup> Smit and Viviers *Vulnerable employees* 43.

R – Respond to issues

From the application of *CLEAR*, it is once more confirmed that communication is the most important aspect in the workplace. If employees feel safe to communicate issues, it will result in resolving disputes. Bullies will be held accountable, therefore, preventing further bullying incidents.

Individual coping strategies:

This type of combating method is not about how the victim should cope with the bullying, but how the victim should react to the bullying incident. Studies have found that a low self-esteem may provoke bullying or attracts bullying behaviour to the victim.<sup>178</sup> The company should, therefore, invest in training programs to foster positive, confident and strong employees that have the courage to stand up against the bully and/or know how to respond to the bullying act.

Employee assistance programs:

Assistance programs are programs that are presented by the company and paid for by the company. This can include the services of a psychologist and/or non-clinical therapists.<sup>179</sup> Employees can make use of these services for personal- and work-related issues. The assistance programmes act as a prevention as well as a cure method which restore the employee's faith in the organisation and ignite a sense of safety within the company.<sup>180</sup>

Healthcare professionals:

As discussed in the negative effects of workplace bullying, an organisation must provide access to healthcare professionals post the bullying incident. This includes the services of a general practitioner, clinical psychologist and/or any referral deemed necessary by the general practitioner. The company can go an extra mile and even assist with co-payments for any prescribed medication.

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<sup>178</sup> Smit and Viviers *Vulnerable employees* 43.

<sup>179</sup> Smit and Viviers *Vulnerable employees* 45.

<sup>180</sup> Smit and Viviers *Vulnerable employees* 45.

Proper pre-hiring procedures:

Another method of combating bullying in the workplace is not to hire bullies. This can be done during the pre-hiring of candidates by including appropriate screening methods. During the interview process, employers can also discuss their internal procedures regarding bullying to set high standards for the company and inform the potential employee what is expected of him or her. The best pre-hiring procedure is to call the references on the candidate's curriculum vitae. These include personal as well as previous employers' references to perceive a clear view of who this person is.

Hotlines for reporting workplace bullying:

The last combating method for workplace bullying is the establishment of an anonymous hotline or reporting method to be used by employees.<sup>181</sup> Small organisations can always have a reporting box whereby employees can anonymously send letters. A larger organisation can establish a hotline or electronic centre whereby employees can submit any complaint with regard to bullying. This reporting method can be used by the victim as well as other co-workers who are aware of the bullying conduct. Those having access to the hotline, meaning the receivers of the messages, should be various persons in senior positions as well as a representative of the employee and/or trade union for transparency, if and when the complaint is about a manager.

#### ***4.4 Conclusion***

The above are few alternatives to the legislative framework as a means of combating bullying in the workplace as extracted from the available research on workplace bullying and interpreted further herein. Prevention is always the best method which begins internally in every organisation. If prevention methods are applied early within an organisation, they can save organisations the costs of prolonged legal disputes and the negative effect on the company image.

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<sup>181</sup> Calitz 2022 *PER* 27.

## Chapter 5 Conclusion

In conclusion, this study aimed to provide the current legislative protection means in terms of workplace bullying focused on the South African perspective. A further objective of this study was to provide an informative study that provides the legislative means of protection, but further alternative solutions to the problem of workplace bullying, and in return, act as a protective and preventative guide.

It can be concluded that the South African legal framework regarding bullying in the workplace was non-existent until the Code of Good Practice on Harassment came into force in March 2022. The Code confirmed that the *EEA* applies to bullying in terms of harassment and discrimination. Without the implementation of the Code, the *EEA* was insufficient in that it could apply to a certain extent. Nevertheless, it was confirmed in the above court judgments that the courts were very reluctant in applying the *EEA* to a workplace bullying set of facts.

The South African legislative framework requires further development as the *EEA* with the Code of Good of Practice on Harassment would be the only legislative document that the courts, tribunals or forums would follow with a workplace bullying dispute. As seen, the courts are also not applying international law as what is required from them which causes a further limitation. The ILO amends its conventions or recommendations as a society and the working environment adapts. This means if there is a new development in terms of international law, applicants or victims of bullying might miss out on it since the courts did not refer to international law for assistance, even once in any of the cases presented in this study.

In the researcher's view, the only way to preventing workplace bullying, including all forms of harassment, would be to enact domestic law. In terms of the South African courts and CCMA's application style domestic law will regulate workplace bullying and aid in prevention. Legislation is always referred to as the first source for a dispute, therefore, if a special harassment act would be enacted it would assist

victims, employers, the courts and CCMA with disputes. This will ensure that every victim receives a fair hearing and justice will prevail.

Many victims of workplace bullying in the past were left with scars and the legislative framework failed them. If the act or omission of bullying did not fall within the grounds of discrimination, they were left without recourse. A civil action is expensive and not every victim of workplace bullying has the means to proceed with this route. The CCMA provides free services to the public, therefore, their first stop for assistance would be the CCMA. It is highly unlikely that if the CCMA dismisses their case, they will proceed with any further action taking into account their financial means, the risk of being unemployed as well as the negative effects of bullying and “reliving the moment” continuously.

Considering South Africa’s financial difficulties as well as the position of companies, which are still recovering after the COVID-19 pandemic, the Code of Good Practice on Harassment might find difficult application. A small company will not have the financial and administrative means to implement policy frameworks immediately and therefore, the best way forward would be to start with internal changes as discussed in chapter 4 herein.

If the legislature can start by developing domestic law on bullying in the workplace, considering the challenges of implementation, and creating substituting methods for smaller organisations, South Africa will be heading for the perfect application and prevention method.

Domestic law that covers all aspects of bullying for the employee and employer will be widely accepted and applied. Employees will feel protected and safe, and employers will not feel burdened with just another bunch of frameworks and laws for them to implement.

To be able to comment on the Code of Good Practice on Harassment and the efficiency thereof, would be impossible as one would require the application and interpretation by the South African courts as well as the CCMA. This specific research

topic can thus be researched further over the upcoming years to determine whether the Code is successful.

Challenges in respect of this research topic are that there is limited information available, either repetitive information or research by the same author which made it difficult to provide a new perspective on this topic. Nevertheless, the available research on workplace bullying always refers to other countries, this specific research only focused on South Africa and did not compare South Africa to another country – which makes this study unique. Lastly, available research mainly focuses on sexual harassment in the workplace and not bullying in itself which also limited the available resources as the focus herein was primarily on bullying, and not necessarily on sexual conduct.

Workplace bullying may be a common topic, but academic research focused on the South African aspect is rare.

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