UNDERSTANDING THE LAW ON SEXUAL HARASSMENT IN THE WORKPLACE (THROUGH A CASE LAW LENS): A CLASSIC FOOL'S ERRAND

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SUMMARY

Sexual harassment at the workplace has become commonplace in South Africa, as is the case elsewhere in the world. International study that investigated the prevalence of sexual harassment at workplaces points that although it affects both men and women, most reported incidents portray women as more prone than men. Similar outlook is reflected in South Africa. The author is of the view that these numbers provide an opportunity to reflect and review the status quo insofar as regulation of sexual harassment is concerned. While this article acknowledges the general will to combat sexual harassment in South Africa, it raises concerns about both the regulation of and the interpretation of the sexual harassment regulatory framework. These two components do not seem to complement one another as they should. This is evident from a reading of the Code of Good Practice on the Handling of Sexual Harassment Cases, both in its original and amended form, which have leanings towards a subjective and guilt-presuming inquiry in the determination of what constitutes sexual harassment. Irreconcilable CCMA and court decisions bear testimony to this claim. First, the article argues that a subjective approach is susceptible to abuse and provides a breeding ground for more inconsistencies in sexual harassment jurisprudence. Moreover, individual perception cannot be determinative. Secondly, it bemoans the pattern by courts and the CCMA of overlooking the grammatical meaning of the words used in the Code of Good Practice. This article argues for the adoption of a pragmatic and objective approach based on facts and logic when dealing with sexual harassment at the workplace.

1 INTRODUCTION

Statistics on sexual assaults in South Africa reveal a rate of 142 reports a day in the 2015/16 financial year.[1] Excluding unreported incidents, simple arithmetic shows that about 51 830 sexual offences are committed in South Africa annually. Notwithstanding that courts have mostly responded with the

[1] TIMESLIVE "#MeToo – SA Women Share Stories of Sexual Assault, Harassment" (17 October 2017) https://www.timeslive.co.za/news/south-africa/2017-10-17-watch--metoo-sa-women-share-stories-of-sexual-assault-harassment/ (2019-03-08).

sanction of dismissal on sexual harassment cases, that educational drives to combat sexual harassment continue, and that pressure groups[2] and social media influence are also used to bring about awareness of this scourge, the numbers continue to increase. It thus begs the question as to whether there are statutes, Codes and activism in place to deal with sexual harassment. Do we understand sexual harassment? Perhaps, we do not. Are the laws properly constructed to deal with sexual harassment? Are the courts' pronouncements clear enough to help us understand sexual harassment? This article tries to answer all these questions in the wake of the alarming number of cases of sexual harassment at workplaces.

Naturally, there must be a link between the regulation and the status quo – a simple cause-and-effect logic attests to that. The spiralling number of cases or statistics on sexual harassment should be seen in that light.[3] South Africa has taken steps aimed at curbing sexual harassment at the workplace from as far back as 1989 in the case that has become commonly known as the *J v M* case.[4] Subsequently, laws, codes and policies were introduced to deal with harassment of a sexual nature. Furthermore, courts and the CCMA have pronounced on sexual harassment matters.

Notwithstanding all these interventions, cases of sexual harassment at the workplace are reportedly at an all-time high.[5] Of particular interest is the fact that "sexual harassment" as a concept has yet to attract one determinative and meaningful definition that can be used as a yardstick in all cases of sexual harassment. Courts and the CCMA have to date not offered certainty with regard to an effective approach to be adopted when dealing with cases of sexual harassment. The use of the Code[6] too has not contributed anything considerable towards finding a workable approach, leaving us with the legacy of jurisprudential differences and inconsistencies when it comes to what qualifies as harassment of a sexual nature.

Instead, as is demonstrated in this article, the concept of "sexual harassment" has been through an unstable period of gaining, dropping and regaining meanings in every dispute resolution platform entertaining it. The absence of a stable meaning has created confusion for users. This article humbly suggests the adoption of an objective and pragmatic approach based on reasons for the determination of issues pertaining to harassment of a sexual nature. It is submitted that the battle to develop a working and meaningful definition of the concept "sexual harassment" cannot be won on

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2 #MenAreTrash, #Metoo, #NotInMyName, The Silence Breakeakers, #BalanceTonPorc or "Out your pig" and so on.

3 See statistics in Minhas https://www.opinium.co.uk/one-in-five-women-have-been-sexually-harassed-in-the-workplace/; Smit https://www.fin24.com/Economy/dismaying-level-of-sexual-harassment-in-corporate-sa-survey; TIMESLIVE https://www.timeslive.co.za/news/south-africa/2017-10-17-watch--metoo-sa-women-share-stories-of-sexual-assault-harassment/.

4 (1989)10 ILJ 755 (IC).

5 Yende https://www.news24.com/SouthAfrica/News/sexual-harassment-complaints-ignored-for-eight-years. See also Snyman-Van Deventer, Du Plessis and Du Bruin "Seksuele Teistering in Werkplek: 'n Suid Afrikanse Perspektief" 2014 29(1) *TRW* 28.

6 The Code of Good Practice on the Handling of Sexual Harassment Cases, in both its original (1998) and amended form (2005), published and gazetted in GN 1367 in *GG* 19049 of 14 July 1998, and GN 1357 in *GG* 27865 of August 2005 respectively. The original was withdrawn in 2018 by GNR 1394 in *GG* 42121 of 19 December 2018.

the basis of the emotional expediency inherent in the subjective approach courts seem to support.[7] This article deals with this subject in five sections: an introduction; a review of sexual harassment cases; the legislative framework; comments; and a conclusion.

2 CASE LAW REVIEW

In *SA Metal Group (Pty) Ltd v CCMA*,[8] the (male) alleged perpetrator had asked the complainant, a female colleague, whether she was "offering to play with me (him)" and had further mentioned that he "can't wait for summer to see you (her) strut your stuff". The complainant, for her part, had on one occasion sent a "Little Love" card to the alleged perpetrator as a birthday wish.[9] The commissioner did not find the alleged perpetrator's statements to be sexually harassing but instead regarded the claim for sexual harassment to be nothing other than a fabrication. The commissioner found that the comments did not contain any explicit sexual connotations and that the complainant did not make the proposer aware that the verbal banter was "unwelcome".[10] This decision did not survive the review by the Labour Court, which found sexual harassment to have happened and ordered dismissal.

Lessons should also be learnt from the *Maepe* matter, which was first heard internally. The chairperson found that sexual harassment had occurred and recommended dismissal, which the employer effected. Aggrieved by this, the alleged perpetrator (a senior commissioner of the CCMA) referred the matter to the CCMA. The arbitrating commissioner gave an award to the effect that the dismissal of Maepe was too harsh a sanction and ordered his reinstatement with a final written warning. Unsurprisingly, this was referred for review to the Labour Court, and eventually to the Labour Appeal Court.[11] The complaints included the "blowing of a kiss", and the statement "I love you and/or that I wanted to kiss you and or I want to keep your photograph to put on my chest when I sleep at night", allegedly made to the female colleague. The commissioner did not find these to constitute sexual harassment. In support thereof, the commissioner reasoned that the complainant had not indicated that the advances towards her were unwelcome, and nor had she at any point reported these incidents as required by law.[12] Unsatisfied with this, the complainant referred the matter for review to the Labour Court. The Labour Court overturned the commissioner's decision and found that sexual harassment had taken place and ordered dismissal.

Maepe appealed. The Labour Appeal Court set aside the Labour Court's decision but ordered the CCMA to pay compensation to Maepe as opposed to reinstatement.[13] The court did not order reinstatement as requested by

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7 A movie entitled "Disclosure" (1994) explains this very well.

8 C350/13) [2014] ZALCCT 15.

9 Par 3.

10 Par 4.

11 *Maepe v Commission for Conciliation, Mediation and Arbitration* (JA 48/04) [2008] ZALAC 2; [2008] 8 BLLR 723 (LAC); (2008) 29 ILJ 2189 (LAC).

12 Par 26. See also par 12 as per Jappie JA decision.

13 Par 26–28 and 51.

Maepe, citing that, although it could not find he had committed sexual harassment, he had been a dishonest witness and could therefore not be a fit and proper person to occupy an office at the CCMA. In essence, the Labour Appeal Court confirmed the commissioner's order. Simply put, the accused was not found guilty of sexual harassment.

In *Rustenburg Platinum Mines Ltd v United Association of SA on behalf of Pietersen*,[14] a male colleague suggested that he stay with Ms Kgole and help her pay expenses and on several occasions proposed to have sex with her. She consistently rebuffed these advances but never reported them as required by law. Internal disciplinary processes found his actions to amount to sexual harassment and dismissal was recommended. The aggrieved Pietersen referred the matter to the CCMA and was vindicated by the commissioner who ordered reinstatement and compensation.[15] In support of the decision, the commissioner held that the conduct appeared to be a love proposal and that the docile conduct displayed by the complainant was inviting; at no point did she raise or report the incident as required by law.[16] The Labour Court dismissed this line of reasoning and held that sexual harassment had taken place. The court took a swipe at the commissioner's approach in this matter, which it described as misogynistic, patriarchal and insensitive … and that … the commissioners require urgent training.[17]

Meanwhile, in *Campbell Scientific Africa (Pty) Ltd v Simmers,*[18] Mr Simmers, a 48-year-old installation manager employed by the appellant was dismissed following a disciplinary hearing for unprofessional conduct and sexual harassment. According to the evidence led, Mr Simmers said to Ms Markides something along the lines of: "Do you need a lover tonight?*"* and when she did not reciprocate, he said, "in case you change your mind, just knock at my door*"*. The CCMA found Mr Simmers' conduct to be harassment of a sexual nature. Mr Simmers took the matter on review to the Labour Court where it was found that sexual harassment had not taken place. In the view of the Labour Court, as per Steenkamp J, Mr Simmers's conduct did not cross the (Rubicon) line, as it had been a single unreciprocated sexual advance. In this regard, the Labour Court took the view that it was a once-off thing and that Mr Simmers had backed off when Ms Markides made it plain that his advances were not welcome.[19]

In *Bandat v De Kock Consulting Engineering CC*,[20] the alleged perpetrator is said to have behaved inappropriately on three different occasions – namely:

- taken off his underpants in full view of the complainant (female colleague) while swimming, in the result, allegedly laying bare his genitals;

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14 (2018) 39 ILJ 1330 (LC).
15 Par 2.
16 Par 9 and 39.
17 Par 2 and 3.
18 (CA 14/2014) [2015] ZALCCT 62.
19 Par 13.
20 (JS832/2013) [2014] ZALCJHB 342; (2015) 36 ILJ 979 (LC).

- offered her money (R1 000.00) for sex, to which she responded jokingly, according to her evidence, by saying her rate is R10 000.00; and
- invited her to Teazers where they watched strippers dancing.[21]

The court found the case not to be one of sexual harassment given, first, the relationship that the parties had had, and secondly, that as much as the complainant claimed to have been victimised, she never at any point or occasion expressed her discomfort.

None of these incidents were ever reported, and nor did the complainant express her disapproval to the alleged perpetrator at any point until after she was issued with a written warning for poor work performance by the alleged perpetrator.[22]

In another case, *Liberty Group Limited v M*,[23] the accused had touched the complainant, rubbed his manhood against her body, and forced a kiss, despite clear disapproval from her. She lodged a complaint in terms of section 60 of the Employment Equity Act[24] (EEA), and then resigned in desperation when it was clear that her complaint was not receiving any attention.

In *Vodacom Service Provider Company (Pty) Ltd v Phala*,[25] the alleged perpetrator was said to have:[26]

- exposed her artificial breast to the complainants (allegedly after they requested her to do so);
- called the complainants to her office to measure the size of their manhood, something which it is alleged arose from a conversation between the complainants and the accused;
- pinched the complainants' bottoms;
- grabbed one of the complainants by his crotch and tried to pull off his belt; and
- grabbed one of their cellular telephones, placed it under her skirt, took a picture of her private parts and showed it to one of them.

She was dismissed in the disciplinary hearing but the commissioner reinstated her with compensation equivalent to six months' remuneration. The commissioner condemned the exposure as being merely unacceptable conduct from a person in a senior position. The matter was then referred for review to the Labour Court, which ordered a *de novo* hearing.[27]

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21 Par 27, 28 and 29.
22 Par 32, 62, 63, 87, 88 and 91.
23 (2017) 38 ILJ 1318 (LAC); [2017] 10 BLLR 991 (LAC).
24 55 of 1998.
25 (JR2178/05) [2007] ZALC 13.
26 Par 4–6.
27 Par 31.

3 THE LEGAL FRAMEWORK ON SEXUAL HARASSMENT IN SOUTH AFRICA

In South Africa, the safety of employees is guaranteed both at common law and in a number of statutes. In terms of the common law, employers are duty-bound to ensure the safety of employees at the workplace.[28] In this sense, safety means much more than physical security. It also means freedom from sexual harassment and its psychological effects.

3 1 The Constitution of the Republic of South Africa, 1996

The Constitution ushered in a new South Africa founded on, among other principles, human dignity and the achievement of equality and supremacy of the Constitution and the rule of law.[29] Section 9 of the Constitution provides for the right to equality and condemns any form of unfair discrimination. The Constitution also guarantees every employee the right to fair labour practices.[30] Courts are enjoined to promote the spirit, purport and objects of the Bill of Rights when conducting interpretational responsibilities.[31] It follows that constitutional values and principles are central to the development of laws in South Africa. Although the Constitution does not explicitly provide the right to a safe workplace, it does so by implication if regard is had to the provisions of section 24, which provides that everyone has the right to an environment that is not harmful to their health or well-being. In addition, the Constitution clearly provides for everyone's right to security in terms of section 12 and to dignity in terms of section 10. Nowhere does the Constitution define or regulate the concept "sexual harassment". However, it warns the courts to promote the values that underlie an open and democratic society based on human dignity, equality and freedom in the Bill of Rights.[32] According to courts' pronouncements, sexual harassment discriminates unfairly and violates a person's dignity.[33]

3 2 The Employment Equity Act, 1998

As the title suggests, the EEA aims to ensure equity and justice in the employment environment, thus giving effect to equality as a founding value and a right in terms of the Constitution.[34] Section 6 of the EEA condemns and discourages any form of harassment. Subsection 3 provides that harassment of an employee is a form of unfair discrimination and is

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28 Van Niekerk, Smit, Christianson, McGregor and Van Eck *Law@work* (2015) 93. See also *Nicholson v East Rand (Pty) Mines Ltd* 1910 WLD 235; *Lahrs v SAR&H* 1931 CPD 289; *SAR&H v Cruywagen* 1938 CPD 219; *Van Heerden v SA Pulp & Paper Industries Ltd* 1946 AD 385.

29 S 1 of the Constitution.

30 S 23 of the Constitution.

31 S 39 of the Constitution.

32 S 7 of the Constitution.

33 *Campbell Scientific Africa (Pty) Ltd v Simmers supra* par 21; *Motsamai v Everite Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC) par 19; s 6(1) of the EEA.

34 S 1 and 9 of the Constitution.

prohibited on any one ground, or a combination of grounds, of unfair discrimination listed in subsection 1. Furthermore, section 51(1), read with section 60 of the EEA, protects employees from discrimination, by anyone (including the employer), for exercising any right conferred by the Act. Section 51 reads:

> "(1) No person may discriminate against an employee who exercises any right conferred by this Act.
> (2) Without limiting the general protection conferred by subsection (1), no person may threaten to do, or do any of the following:
> (*a*) prevent an employee from exercising any right conferred by this Act or from participating in any proceedings in terms of this Act; or
> (*b*) prejudice an employee because of past, present or anticipated–
> (i) disclosure of information that the employee is lawfully entitled or required to give to another person;
> (ii) exercise of any right conferred by this Act; or
> (iii) participation in any proceedings in terms of this Act.
> (3) No person may favour, or promise to favour, an employee in exchange for that employee not exercising any right conferred by this Act or not participating in any proceedings in terms of this Act.
> (4) Nothing in this section precludes the parties to a dispute arising out of an alleged breach of any right conferred by this Part, from concluding an agreement to settle the dispute.
> (5) For the purposes of this section 'employee' includes a former employee or an applicant for employment."

These sections were made in view and anticipation of the possibility that some employers may wish, for whatever reason and given the disciplinary powers they have, to retaliate against an employee for reporting harassment at a workplace. Good examples in this regard are the cases of *Christian v Colliers Properties*[35] and *Makoti v Jesuit Refugee Service SA.*[36] In these cases, employers embarked on disciplinary actions to punish an employee for not reciprocating sexual advances and the courts later found their actions to be retaliatory. The dismissals were found to be automatically unfair. In effect, the law provides protection and encourages victims of sexual harassment to report without fear. The EEA also makes a commitment to penalise employers who retaliate or fail to act on reported complaints.[37]

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35 C323/2004 [2005] ZALC 56.

36 (2012) 33 ILJ 1706 (LC).

37 S 60 of the EEA provides:

> "(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 prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act."

In addition to the protection given in terms of section 60, the subsequent section, being section 61, provides:

What this means is that, for section 60 liability to trigger, the employer must have known about the alleged conduct.

Legislation has provided for the issue of any code of good practice.[38] In the context of the subject of discussion in this article, the Code of Good Practice on the Handling of Sexual Harassment Cases ("the Code") was issued in 1998, publicised and later amended in 2005.[39] The Code encourages employers to develop policies that would deal with sexual harassment and to publicise them to their employees. The legal position has been that employers who fail to act against sexual harassment complaints will be liable vicariously.[40]

What the EEA does not do is define "sexual harassment". However, this aspect is covered in the original Code of Good Practice on the Handling of Sexual Harassment Cases. This Code remained operational alongside the amended version until 2018.[41] The original version provided quite a loaded and open-ended definition in the following terms:

> "[u]nwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual."[42]

Item 3 (2) of the Code also provides that sexual attention becomes sexual harassment if:

> "(a) The behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and/or
> (b) The recipient has made it clear that the behaviour is considered offensive; and/or
> (c) The perpetrator should have known that the behaviour is regarded as unacceptable."

"(1) No person may–
(*a*) obstruct or attempt to improperly influence any person who is exercising a power or performing a function in terms of this Act: or
(*b*) knowingly give false information in any document or information provided to the Director-General or a labour inspector in terms of this Act.
(2) No employer may knowingly take any measure to avoid becoming a designated employer.
(3) A person who contravenes a provision of this section commits an offence and may be sentenced to a fine not exceeding R10 000,00.
(4) The Minister may, with the concurrence of the Minister of Justice and by notice in the *Gazette,* amend the maximum amount of the fine referred to in subsection (3) in order to counter the effect of inflation."

38 Section 54 of the EEA.

39 The Code of Good Practice on the Handling of Sexual Harassment Cases was issued in 1998 and amended in 2005. These versions were gazetted in GN 1367 in *GG* 19049 of 14 July 1998, and GN 1357 in *GG* 27865 of August 2005 respectively, and the original was withdrawn by GNR 1394 in *GG* 42121 of 19 December 2018.

40 Section 60 of the EEA. See also *Ntsabo v Real security CC* [2004] 1 BLLR 58; *Liberty Group Ltd v M* [2017] 38 ILJ 1318 (LAC); *Potgieter v National Commissioner of the SAPS & another* [2009] 2 BLLR 144 (LC) and more.

41 *Campbell Scientific Africa (Pty) Ltd v Simmers* [2016] 37 ILJ 116 (LAC) par 24. See also Collier; Cohen; Le Roux; Fergus; Du Plessis; Singlee and Godfrey *Labour Law in South Africa: Context and Principles* (2018) 219 and 457.

42 Item 3(1) of the Code.

Item 4 of the Code provides the following examples as forms of sexual harassment:

> "(1) Sexual harassment may include unwelcome physical, verbal or non-verbal conduct, but is not limited to the examples listed as follows:
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> a) Physical conduct of a sexual nature includes all unwanted physical contact, ranging from touching to sexual assault and rape, and includes a strip search by or in the presence of the opposite sex.
>
> b) Verbal forms of sexual harassment include unwelcome innuendoes, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults or unwelcome graphic comments about a person's body made in their presence or directed toward them, unwelcome and inappropriate enquiries about a person's sex life, and unwelcome whistling directed at a person or group of persons.
>
> c) Non-verbal forms of sexual harassment include unwelcome gestures, indecent exposure, and the unwelcome display of sexually explicit pictures and objects.
>
> d) Quid pro quo harassment occurs where an owner, employer, supervisor, member of management or co-employee, undertakes or attempts to influence the process of employment, promotion, training, discipline, dismissal, salary increment or other benefit of an employee or job applicant, in exchange for sexual favours.
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> (2) Sexual favouritism exists where a person who is in a position of authority rewards only those who respond to his/her sexual advances, whilst other deserving employees who do not submit themselves to any sexual advances are denied promotions, merit rating or salary increases."

It should be noted that in 2005 some amendments were effected to the 1998 Code. Notable in the amended version and relevant to this discussion is that, unlike its predecessor, the 2005 version introduced a test for sexual harassment in place of the definition provided in the original version. Also notable is the exclusion of the requirement that the alleged conduct be repeated in order to constitute sexual harassment. In terms of the test, the conduct will amount to sexual harassment if it is:

> "unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all of the following factors:
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> 4.1 whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
> 4.2 whether the sexual conduct was unwelcome;
> 4.3 the nature and extent of the sexual conduct; and
> 4.4 the impact of the sexual conduct on the employee."[43]

Except for what is mentioned above, the 2005 version is not materially different from its predecessor. It remains the recipient's call whether the conduct is deemed sexual harassment.[44] It is also not clear why the requirement that conduct be repeated or persistent has been removed in the Amended Code. The implication is that unreciprocated love proposals may amount to sexual harassment if the recipient deems it so and this is arguably not what the drafters of the Code envisaged. This, it is argued, is prone to

[43] Item 4 of the Code.

[44] Item 4.4 of the Amended Code.

abuse, cruel and unfair. The core of the law should be to educate and not penalise.

In addition, the Amended Code requires not only confidentiality in the handling of sexual harassment cases, but also encourages victims of sexual harassment to report incidents immediately.[45] This requirement speaks to a reliability issue. It is based on the view that an immediate report not only stimulates an immediate reaction from the employer but also presents an opportunity for the victim to relate the experience while still fresh in his or her mind and to secure available evidentiary material if it exists. As an example, one can imagine possible make-up marks on a harasser's clothing, skin or lips in case of a forced kiss.

3 3 The Occupational Health and Safety Act, 1993

The issue of the protection and promotion of employees' health and safety is taken further in terms of the Occupational Health and Safety Act[46] (OHSA). Section 8 of OHSA provides that the employer must as far as is reasonably practicable provide and maintain a working environment that is safe and without risk to the health of employees. Implicit in this protection is protection against sexual harassment.

3 4 The Labour Relations Act, 1995

Just as with the EEA, the Code of Good Practice on the Handling of Sexual Harassment Cases finds application under the LRA. The LRA takes the protection against sexual harassment a little further by providing that a dismissal is automatically unfair if the reason for the dismissal is that the employee made a report of sexual harassment.[47] Moreover, the LRA provides that employees may resign and claim constructive dismissal in terms of section 186(1)(*e*) where the employer fails to act on a reported case of sexual harassment.[48]

3 5 The Protection From Harassment Act, 2011

The Protection From Harassment Act[49] does little more than confirm the definition of the term "sexual harassment" in the EEA and the Code. Going further than the EEA and the Code, the Act provides and regulates some other forms of harassment.

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45 Items 7 and 8 of the Code.

46 85 of 1993.

47 S 187(1) of the LRA provides: "A dismissal is automatically unfair … if the reason for the dismissal is– … (*d*) that the employee took action, or indicated an intention to take action, against the employer by– (i) exercising any right conferred by this Act; or (ii) participating in any proceedings in terms of this Act".

48 Constructive dismissal is defined as an instance in which an employee terminated employment with or without notice because the employer made continued employment intolerable for the employee.

49 17 of 2011.

4 COMMENTS

The EEA, read with the Code, regulates sexual harassment and provides guidelines. Courts, the CCMA and the internal disciplinary processes are urged by the LRA to use the Code when determining cases of sexual harassment.[50] The LRA uses emphatic language, stating that any person interpreting or applying the Act "must take into account" any relevant code of good practice.[51] The purpose is to eliminate sexual harassment in the workplace. The Code and the Acts read together state that any person applying or interpreting any employment law must take into account any code issued by the Act.

The original Code went on to define "sexual harassment" as unwanted conduct of a sexual nature while the Amended Code uses the word "unwelcome".[52] It is submitted that, these two words in the context used have logically the same meaning. Effectively, this means the guidelines can only be used if the conduct constitutes sexual harassment as perceived by the complainant. In essence, it becomes the complainant's call whether the conduct is unwelcome or unwanted.

A similar view is echoed in *Reed and Bull Information Systems Ltd v Stedman*.[53] In this case, it was held that it is for the complainant to decide what is regarded as offensive and therefore as sexual harassment.[54]

This reliance on the complainant begs to be challenged. It is bad law that is susceptible to abuse and cannot pass the legality test.[55] If behaviour that objectively constitutes sexual harassment is received without complaint by an employee, does that behaviour transform itself simply because it does not bother the recipient? The author disagrees and argues that this was not the intention of the drafters of the Code. It is submitted that an individual's feelings or perception cannot be the determinant of what constitutes sexual harassment. The author does not know of any functioning legislature that delegates law-making powers to private persons. To rely on a complainant's perception is at least an abdication of the legislature's constitutional mandate to make the law – at worst, a recipe for anarchy. The legislature

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50 S 203 of the LRA. See also *Masemola v CCMA* (JR 1025/2013) [2016] ZALCJHB 183 par 23.

51 S 138(6) read with s 203(3) and (4) of the LRA. See also *SA Metal Group (Pty) Ltd v CCMA supra* par 8.

52 Items 4 and 5.4 of the Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace as published under GN 1357 dated 4 August 2005.

53 (1999) IRLR 299 (EAT).

54 302. *Reddy v University of Natal* (1998) 1 BLLR 29; (1998) 19 *ILJ* 49 (LAC). See also Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie and Steenkamp *Labour Relations Law: A Comprehensive Guide* (2015) 701; Ramsaroop and Brijball Parumasur "The Prevalence and Nature of Sexual Harassment in the Workplace: A Model for Early Identification and Effective Management Thereof" 2007 33(2) *SA Journal of Industrial Psychology* 25; Botes "Identifying Sexual Harassment in the Workplace? Do Not Forget to Remember the Code of Good Practice" 2015 36 *ILJ* 1719.

55 Specifically, *ius certum* and *ius strictum.* Read together these principles of legality loosely mean that the law must be certain, clear and unambiguous.

has a duty to pass reasonably clear and precise legislation to enable consumers to understand what is expected of them.[56]

The observations made in the case of *Johnson v Rajah NO*[57] are relevant, although the case was about constructive dismissal. In this case, an employee claimed that intolerable conditions caused by the employer were the condition *sine qua non* for her resignation as an employee. The court held that intolerability is not established by an employee's say-so, perception or state of mind. What is relevant is the conduct of the employer viewed in an objective sense.[58]

Du Toit *et al* argue that the problem with using a subjective approach is that forms of conduct that an overly sensitive person would deem to be harassment could then be included for sanction.[59]

According to Brassey,[60] sexual harassment denotes more than just an act by which the perpetrator seeks some sexual or similar gratification from an unwilling victim.

In order for an act to qualify as sexual harassment, the Code states that the conduct in question should be unwelcome.[61] Logically, this requirement creates a corresponding obligation on the complainant to warn the accused if the conduct is unwelcome. In essence, there is conduct that may be welcomed and that which is not. Notably, the Code's words further require that there be an indication or warning from the recipient.[62] The reading together of these guidelines in this light makes sound and practical sense of the Code. It is unimaginable that the EEA would make an employer's liability dependent on the employer's knowledge while the same is not required for the "liability" of the employee responsible for the conduct.[63] The legislature

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56 *Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re Hyundai Motors Distributors (Pty) Ltd v Smit NO* (2001) 1 SA 545 (CC) par 24. See also the principle of legality.

57 (JR33/15) [2017] ZALCJHB 25.

58 Par 50 and 51.

59 Du Toit *et al Labour Relations Law: A Comprehensive Guide* 700–701. For the same reasons, the reliance on a subjective approach was heavily criticised in constructive dismissal cases. See *Smithkline Beecham (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* (2000) 21 ILJ 988 (LC) par 38*; see also Asara Wine Estate and Hotel (Pty) Ltd v Van Rooyen* (2012) 33 ILJ 363 (LC) par 38; *Bandat v De Kock supra* par 74.

60 Brassey *Employment and Labour Law* (1998) Vol 1 at E.4 26–27. [Loose leaves]. See also *Nehawu obo Jantjes v Department of Health: Western Cape* PSHS592-11-12 par 37.

61 Item 4 of the Code. See also *Potgieter v National Commissioner of the SA Police Service* (2009) 30 ILJ 1322 (LC) par 46; *Rustenburg Platinum Mines Ltd v UASA obo Pietersen supra* par 39, S*A Metal Group (Pty) Ltd v CCMA supra* par 23 and 24.

62 Item 5.1 of the Amended Code. See *Rustenburg Platinum Mines Ltd v UASA obo Pietersen supra* par 39; *Grobler v Naspers Bpk* [2004] 5 BLLR 455 (C).

63 S 60 of the LRA reads–

"(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.

would not have conceived of the proposer as a prophet armed with foreknowledge of the response to his or her proposition.

In *Reed*,[64] the court recommended a partially subjective approach. This approach, according to Monti, has two dimensions. Although it empowers the victim by allowing her (or his) reality to be incorporated into legal norms on the one hand, it generates a number of uncertainties and is doctrinally odd on the other.[65] While this approach respects the complainant's perception regarding the proposition, it requires the complainant to express the unwelcomeness of the conduct to the proposer.

To "harass" is to annoy or worry somebody by putting pressure on them or to make repeated attacks.[66] To be "persistent" is to continue to do something in spite of … opposition or to repeat frequently, especially in a way that is annoying and/or cannot be stopped.[67] The word "repeat" seems to be operative in both dictionary meanings. This may suggest that the drafters of the Code may have intended to make sexual harassment dependent on repeated, yet unwelcome, conduct except for the single, yet serious, instances referred to in item 5.3.3 of the Amended Code. Item 5.3.3 says a "single incident of unwelcome sexual conduct may constitute sexual harassment". The latter part sounds more of an exception than a rule.

As they say, forewarned is forearmed. If a would-be complainant receives potentially unwanted attention, he or she should decide on the offensiveness or otherwise of the conduct and then warn or indicate to the proposer whether he or she welcomes the same. This is the most sensible way in which the guidelines should be read and understood. It is in the fibre of fairness that a proposer be made aware of resistance to his or her intentions. This goes a long way to ensuring that a wrongdoer's rights to fair labour practices are also protected.[68] It is *ubuntu*-like: as much as the law condemns sexual harassment, it also continues to respect the perpetrator as a human being whose case should be dealt with humanely. It is humane to communicate. It resonates with common sense, as expressed in the African idiom that says, *"ngwana a sa lleng o swela tharing"*, which loosely translated means "a child who does not cry dies in the shawl".[69] It is held that crying (complaining) is a sign of hope that someone will hear and come to

(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 prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act."

See also Monti "Understanding Sexual Harassment a Little Better: *Reed and Bull Information Systems Ltd v Stedman"* 2000 8(3) *Feminist Legal Studies* 369.

64 *Supra*.

65 Monti 2000 *Feminist Legal Studies* 372.

66 Hornby *Oxford Advanced Learners Dictionary of Current English* (2000). See also https://dictionary.cambridge.org/dictionary/english/harass.

67 Item 3(2)(b) of the Code.

68 S 9, 10, 16 and 23 of the Constitution. Henagen "False Claims of Sexual Harassment in Education: The Path to an Appropriate Remedy for the Wrongly Accused" 1998 76(4) *Washington University Law Review* 1432.

69 See Hopkins and Lewis *Another World is Possible: Spiritualties and Religions of Global Darker Peoples* (2014) 177.

one's rescue.[70] The law could never have intended the alleged perpetrator to divine what the response would be to his or her advances. A clear warning is therefore crucial. An expression of a "yes" or a "no" by the recipient of sexual attention seems to be contemplated in terms of the Code. Once a warning has been issued as envisaged by the Code, then the ball is in the court of the warned person, who may decide to desist or be persistent.

Grogan observes correctly so and thus launching an attack on the original Code that item 3(2) of the Code provides that sexual harassment is not merely any "sexual attention", but only (a) that which is persistent, (b) that which the recipient has clearly indicated is offensive and (c) that which the perpetrator should have known is unacceptable.[71]

In *Simmers*,[72] the Labour Court found that the employee's conduct did not amount to sexual harassment because the employee did not persist in the behaviour after the complainant told him that his overtures were unwelcome.[73]

However, a single serious incident may amount to a sexual harassment.[74] A clear-cut example would be where the perpetrator forcefully kisses, looks up a person's skirt, gropes or pinches or touches someone sexually, as occurred in the historical case of *J v M*[75] and in the case of *Naptosa obo Makhaphela Khayalethu v South West Gauteng TVET & Department of Higher Education & Training*,[76] or where conduct constitutes objective sexual harassment.

Victims of sexual harassment should inform the perpetrator directly that his or her conduct is unwelcome and must stop.[77] In the *Simmers* case, Steenkamp J referred to a US Supreme Court decision relating to sexual harassment, where it was held:

> "the prohibition of sexual harassment only relates to behaviour so objectively offensive as to alter the conditions of the victim's employment. This, it is held is done to ensure that Courts and juries do not mistake ordinary socializing in

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70 Hopkins and Lewis *Another World is Possible* 177. See also Diale who defines "*Ngwana o a sa lleng, o swela tharing*! In other words if you don't seek help you will not find help and you will suffer in silence" https://www.mediaupdate.co.za/publicity/43808/angie-diale-stands-up-against-abuse-of-women-and-children.

71 Grogan *Workplace Law* (2017) 111.

72 *Campbell Scientific Africa (Pty) Ltd v Simmers supra.*

73 Par 31.

74 Item 3(2)(a) of the Code.

75 *Supra*. In this case, the alleged perpetrator is said to have caressed, slapped buttocks and fondled the complainant's breast.

76 Case NO: ELRC97-16/17GP. In this case, the harasser was charged with sexual harassment in that the harasser called the complainant into his room, tried to kiss her, fondled, touched her private parts and breast, even when she was crying out for help (par 24–27). In *University of Venda v Maluleke* (2017) 38 ILJ 1376 (LC), the harasser made it clear that the complainant would not pass the paper he was teaching unless she submitted to his sexual advances (par 29). This is a clear case of *quid pro quo* – a single yet serious incident.

77 Monti 2000 *Feminist Legal Studies* 369; Pluta "Harassment in the Workplace: Problems and Solutions" *https://academic.oup.com/labmed/article-pdf/32/2/67/24958059/labmed32-0067.pdf.* This is in accordance with the South African Code of Good Practice in the Handling of Sexual Harassment Cases. See also *Campbell Scientific Africa (Pty) Ltd v Simmers supra* par 27.

> the workplace … such as intersexual flirtation … for discriminatory conditions of employment."[78]

In the *Bandat* case, the court made the following observation, with which the author agrees for the reasons indicated above:

> "How does one then go about in objectively determining whether the kind of conduct as set out in clause 5 of the Code is unwelcome? In my view, the first question that has to be asked is whether the conduct was ever complained about by the employee. This can be done by the perpetrator being informed that the employee considered the conduct to be unwelcome and the perpetrator then being called on to cease the conduct. Or the employee can formally pursue a complaint with more senior management using relevant harassment policies that may be applicable, or raising a grievance. I therefore accept that it is not the be all and end all for an employee to have raised a grievance but at least the employee must make it clear to the perpetrator that what is happening is not acceptable and must stop."[79]

While it would be foolhardy to underestimate the devastating effect of sexual harassment and the sophistication with which it has manifested itself in the employment spaces, it would be equal folly to describe, in desperation, any conduct with sexual undertones as sexual harassment. It is trite that a proposal for a sexual relationship carries sexual undertones just as a winery smells of wine. Zondo JP (as he then was) made this crystal clear in the *Maepe* case. Although the judge acknowledged the presence of sexual advances, he found the conduct was not sexual harassment because the complainant encouraged it by not objecting to it. This, the judge stated, was informed by the fact that the complainant never objected to the advances until she was rated poorly in a performance appraisal, following negative reports made to the registrar by Maepe.[80] The reporting by the complainant was opportunistic conduct, which fits well with the description of what Snyman AJ calls "unwanted after the fact".[81]

Creating relations is human nature, an innate thing, but the art of creating sexual relations is seldom straightforward. Quite correctly, Tlhotlhalemaje J observed that human beings are "part of *Homo sapiens* with feelings and emotions".[82] The judge also acknowledged the possibility of happily-ever-after unions emanating from workplaces. Besides, there is no law prohibiting workplace romance. It is from this score that the author argues for a great circumspection when dealing with sexual harassment cases to avoid the risk of confusing a genuine attempt to propose a love relationship, or workplace flirtations or ordinary socialising, with sexual harassment. Surely, there is a fine line.

There is only one way a proposer can make the proposed aware of a sexual proposition. That is through an expression, which may be welcomed or not welcomed by the recipient. It does not follow that if a recipient does not reciprocate, he or she has been harassed sexually – except where a

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78 *Campbell Scientific Africa (Pty) Ltd v Simmers supra* par 32.

79 *Bandat v De Kock Consulting Engineering CC supra* par 74. See also *University of Venda v Maluleke supra* 65.

80 Par 26.

81 *Bandat supra* par 87.

82 *Rustenburg Platinum Mines Ltd v UASA obo Pietersen supra* par 40.

single yet objectively serious incident is at issue.[83] Law that is in touch with reality requires the recipient to make it clear to the proposer when behaviour is unwelcome or offensive.[84] Naturally, an expression of a "yes" or a "no" will be sufficient. If a "no" is expressed and the proposer persists, then the conduct becomes sexual harassment.[85]

The *Maepe* decision (as per Jappie JA) raised a logically important question as to how the appellant would have known that advance(s) made were unwelcome if the complainant did not express that.[86] To walk away or push the harasser away (as occurred in the *Maluleke* case) seems to be a clear, though non-verbal, way of showing discomfort or indicating disapproval of the advance.[87] Yet, being docile or sharing sexual experiences or sending a "Little Love" card as a birthday wish to the harasser cannot by any stretch of the imagination be described as disapproval.[88] The latter conduct seems, to the author, to be probable actions from a willing participant. Similar would be to say "I will think about it", as was the case in *Maluleke*.[89]

On the other hand, there is a devoted voice that argues against a complainant's obligation to inform a perpetrator of the unwelcomeness of the advances. Proponents of this view argue that power differentials may play a role. In this regard, it is argued that junior employees, who are the most likely victims of sexual harassment by influential senior colleagues, are less likely to report for fear of victimisation.[90] This is arguably a preposterous view and should not be sustained. First, the Amended Code offers comprehensive protection to the victims of sexual harassment.[91] In terms of item 6, a climate should be created and maintained in which victims of sexual harassment do not feel that their grievances are ignored or trivialised for fear of reprisal; and that employees will be protected against victimisation, retaliation for lodging grievances and from false accusations. Secondly, the Amended Code encourages victims to report sexual harassment while guaranteeing protection to the victim against employers who may want to frustrate processes that deal with sexual harassment.[92] The third reason is evidence of forethought by the drafters of the code. Realising the sensitivity of sexual harassment, tailor-made processes are provided to deal with sexual harassment cases in terms of item 8 of the Amended Code, which says that sexual harassment is a sensitive issue and a victim may feel unable to approach the perpetrator, lodge a formal grievance or turn to colleagues for support. To cure this, the Code urges

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83 *Campbell Scientific Africa (Pty) Ltd v Simmers supra* par 31. See also Item 3(2)(a) of the Code and item 5.3.3 of the Amended Code.

84 Item 3(2)(b) of the Code. See Hopkins and Lewis *Another World is Possible* 177. Grogan *Workplace Law* 111.

85 Item 3(2)(a) of the Code.

86 Par 12.

87 *University of Venda v Maluleke* (2017) 38 *ILJ* 1376 (LC) par 30.

88 *SA Metal Group (Pty) Ltd v CCMA supra* par 3. See also *Vodacom Service Provider Company (Pty) Ltd v Phala supra* par 5.

89 *University of Venda v Maluleke supra* 73.

90 *Rustenburg Platinum Mines Ltd v UASA obo Pietersen supra* par 47.

91 Items 5, 6, 7, 8 and 9 of the Amended Code.

92 Item 7 read with 9 of the Amended Code.

employers to designate a person outside of line management whom victims may approach for confidential advice. This person could be a trained trade union representative, a co-employee with appropriate skills and experience, or be properly trained and armed with adequate resources.

In addition to that, more support is provided in terms of section 60 of the EEA, which penalises employers who fail to deal with reported sexual harassment cases. Subsection 3 provides that if an employer fails to take the necessary steps referred to in subsection 2, and it is proved that an employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision. Cases in point are *Ntsabo v Real Security CC,*[93] *Media 24 Ltd v Grobler,*[94] *Liberty Group Limited v M*,[95] *K v Minister of Safety & Security,*[96] *Christian v Colliers Properties and Makoti v Jesuit Refugee Service SA*.[97] What is glaringly obvious is that victims of sexual harassment are relatively well protected – enough to allay fears about reporting owing to power dynamics. As demonstrated, there are laws and codes that provide all kinds of support to the victims of sexual harassment.

5 CONCLUSION

South Africa has developed a network of legal interventions, as discussed above, to deal with sexual harassment at workplaces. Legislation and codes of good practice have gone so far as to create accessible procedures (formal or informal) and advice desks to enable complainants to report their grievances, while also guaranteeing them protection against vengeance and the promise of confidentiality. Employee victims may even resign and claim constructive dismissal.[98]

What is glaringly obvious from the case law discussed is that most victims are women who are occupationally in the lower ranks. If this is correct, then the solution is to start taking the women empowerment agenda more seriously. There is also a view (which the author with much due respect, doubts) that there is a prevailing misogynistic culture in society.[99] The latter view cannot be reconciled with the statistical reports at the time of writing of this article.[100]

It is the author's humble view that existing regulatory interventions in South Africa on sexual harassment are sufficient and that the only problem is the overly subjective approach the courts and CCMA have adopted. This approach incorrectly expects the proposer to foresee what the recipient's response to a proposition would be. The result of that exercise should not be the law but explains why there is a certainty crisis insofar as conduct constituting sexual harassment is concerned. Lessons should be taken from

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93 (2004) 1 BLLR 58 (LC).
94 (2005) 7 BLLR 649 (SCA).
95 *Supra.*
96 (2007) 8 BLLR 749 (CC).
97 *Supra.*
98 Section 186(1)(*e*) of the LRA.
99 *Rustenburg Platinum Mines Ltd v UASA obo Pietersen supra.*
100 Smit https://www.fin24.com/Economy/dismaying-level-of-sexual-harassment-in-corporate-sa-survey.

the decision of *Reed*, where a so-called partially subjective approach is used. This approach is not only sensible but is in touch with reality. It is practical and resonates with common sense. It is submitted that the concerns raised in this article, although historical, remain valid as they are not addressed in the Amended Code. Therefore, changes introduced in the Amended Code have taken us nowhere and, if anything, contribute to more uncertainty as to what conduct constitutes sexual harassment.

Alternatively, a law prohibiting sexual relationships in the workplace and/or related conducts should be enacted. This would not be a new thing. For example, basic educational institutions in South Africa have in place a policy prohibiting educator-learner relationships.[101]

Lastly, the courts are courts of law and not of emotions – and courts should apply the law all the time if legal certainty is to be realised. An individual's say-so cannot be the law and will never offer the legal certainty we so much need.

[101] S 17(1)(*g*) of the Employment of Educators Act 76 of 1998 provides that an educator is guilty of misconduct if the educator … commits sexual or any other form of harassment. See items 3.8, 3.9, 3.10 and 3.11 of the South African Council for Educators Code of Professional Ethics https://www.sace.org.za/assets/.../sace_58684-2018-11-22-Ethics%20 brochure.pdf. See also Coetzee "Law and Policy Regulating Educator-on-Learner Sexual Misconduct" 2012 1 *Stell LR* 76 76.