

# **AN OVERVIEW OF SEXUAL HARASSMENT: LIABILITY OF THE EMPLOYER**

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## **SUMMARY**

In the last number of years several labour laws dealing with the issue of sexual harassment have been passed, however, the common law of delict still provides valuable remedies for the victim of sexual harassment. This article attempts to juxtapose the common law and statutory law pertaining to sexual harassment in the light of important decisions by both the Supreme Court of Appeal and Constitutional Court reported during 2005. In this article the liability of the employer at both common law and in terms of statutory law will be reviewed.

“Sexual harassment, whether it be between members of the opposite sex or of the same sex is, despite the fact that it is often a subject for uncouth jokes, a serious matter which does require attention from employers. Sexual harassment, depending on the form it takes, will violate that right to integrity of body and personality which belongs to every person and which is protected in our legal system both criminally and civilly.”<sup>1</sup>

## **1 INTRODUCTION**

Sexual harassment is a common occurrence in workplaces around the world and, unfortunately, South Africa is no exception. To date, the problem of sexual harassment has not given rise to extensive litigation in South Africa. However, the prevalence of sexual harassment cannot simply be measured

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<sup>1</sup> *J v M Ltd* (1989) 10 *ILJ* 755 (IC) 757G-758D.

from case law alone. Due to the nature of the harassment, there are many factors that discourage victims from coming forward. Sexual harassment has become a very controversial issue in the workplace because of the many different views of what constitutes harassment. Although there are no reliable statistics available on the extent of sexual harassment in the workplace, there is an increasing recognition that it is a serious form of misconduct which constitutes a violation of the dignity of the victim and may warrant the dismissal of the perpetrator.

Both the common law and statutory law provide remedies for the employee who has been harassed in the workplace. The employee may institute the common law delictual remedies whereby employers may be held liable both directly and vicariously. The Employment Equity Act<sup>2</sup> (hereafter "the EEA") now provides that harassment is a form of unfair discrimination and makes the employer liable for the harassing conduct of its employees in certain circumstances. Harassment is discriminatory because it raises an arbitrary barrier to the full and equal enjoyment of a person's rights in the workplace.<sup>3</sup>

The fact that there are statutory remedies in place should not preclude an employee from instituting common law delictual remedies. Thus the court held in *Media24 v Grobler*:<sup>4</sup>

"I do not think that the fact that the legislature has enacted legislation providing a statutory remedy for unfair labour practices involving sexual harassment justifies a holding that, absent the statutory remedy (which presumably was intended to be quicker, cheaper and more convenient than the common law remedy), the common law is defective in failing to provide a remedy in a situation which cries out for one."

This article attempts to juxtapose the employer's liability for sexual harassment in terms of the common law and statutory law against the background of landmark cases that were reported in 2005, and to draw comparisons with regard to issues such as the nature of the liability, when the employer will be liable, the nature of the damage and the role of precautions taken by the employer.

## 2 COMMON LAW

The common law of delict has in the past decade been profoundly influenced by the Constitution.<sup>5</sup> In accordance with the constitutional imperative, the courts have developed the common law to bring it in line with the "spirit, purport and objects" of the Constitution.<sup>6</sup> These developments have invariably also influenced the liability of employers for the sexual harassment

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<sup>2</sup> 55 of 1998.

<sup>3</sup> Cooper "Harassment on the Basis of Sex and Gender: A Form of Unfair Discrimination" 2002 *ILJ* 1.

<sup>4</sup> 2005 6 SA 328 (SCA).

<sup>5</sup> Constitution of the Republic of South Africa, 1996 (hereinafter "the Constitution").

<sup>6</sup> S 39(2).

of employees in the workplace. The employer can in terms of the common law of delict be held liable both directly and vicariously. The victim of the sexual harassment can in principle claim both patrimonial and non-patrimonial loss, depending on the kind and severity of the damage that is suffered. In order to succeed with both direct and vicarious liability, the elements of delict have to be proven. In addition, for the employer to be held vicariously liable the requirements of vicarious liability (including the fact that the harassing employee committed a delict) have to be met.

## 2 1 Vicarious liability

In a recent decision regarding the vicarious liability of an employer for the sexual harassment of an employee, the Supreme Court of Appeal left open the question of whether the employer could be held vicariously liable, because in that case the court found that the employer was directly liable.<sup>7</sup> Nevertheless, potentially an employer could be held vicariously liable, provided the elements of vicarious liability are met. The most contentious of these is the requirement that the harassing employee had to have acted in the scope of his or her employment (see (c) below).

The requirements for vicarious liability are the following:

(a) *There has to be an employer-employee relationship*

In *Midway Two Engineering & Construction Services v Transnet Bpk*<sup>8</sup> the court adopted a multi-faceted test which takes all relevant factors into account in order to establish whether the relationship between the perpetrator and the defendant is an employer-employee relationship. Although control is an important factor, it is not the most important criterion as was previously the case.<sup>9</sup>

(b) *The employee has to commit a delict*

In this instance the elements of delict have to be proven with regard to the employee.

(c) *The employee has to act within the scope of his employment when committing the delict*

The classic test for this requirement is that which was formulated in *Minister of Police v Rabie*<sup>10</sup> and entails both a subjective and an objective element.<sup>11</sup>

<sup>7</sup> *Media24 v Grobler supra*.

<sup>8</sup> 1998 3 SA 17 (SCA).

<sup>9</sup> See Neethling, Potgieter and Visser *Law of Delict* 5ed (2006) 340 fn 120 for examples of cases that applied the control test.

<sup>10</sup> 1986 1 SA 117 (A).

<sup>11</sup> See also Neethling, Potgieter and Visser 341ff.

The subjective element of the test looks at whether the employee exclusively promoted his own interests – if this is indeed the case, the conduct could fall outside the scope of his employment. A further objective test has, however, also to be undertaken. This test looks at whether, despite the fact that the employee was satisfying his own interests, there was not a “sufficiently close link” between the employee’s own interests and the business of the employer. If there is such a link, the employer may be held vicariously liable.

This requirement recently featured prominently in the case of *K v Minister of Safety and Security*.<sup>12</sup> The plaintiff in this case sought damages from the Minister of Safety and Security because she had been raped by three policemen who had given her a lift home in a police vehicle and whilst they were in uniform. The Supreme Court of Appeal dismissed the claim, on the ground that the policemen had not been acting within the scope of their employment.<sup>13</sup> The Supreme Court of Appeal referred to various cases dealing with instances of “deviation” (that is, where the employee in committing the delict is promoting his or her own interests), but the court did not refer to *Minister of Police v Rabie*,<sup>14</sup> which had generally been regarded as the leading authority regarding the law on this third requirement. Instead the court held as follows:<sup>15</sup>

“In the present case, everything points to the three policemen being motivated by nothing more than self-gratification. Acting in concert, they deviated from their functions and duties as policemen to such a degree that it cannot be said that in committing the crime of rape they were in any way exercising those functions or performing those duties.”

On appeal to the Constitutional Court it was held, per O’Regan J, that the test enunciated in *Minister of Police v Rabie*<sup>16</sup> was similar to that used in foreign jurisdictions.<sup>17</sup> In addition, it was in line with the Constitution:<sup>18</sup>

“[The test] is sufficiently flexible to incorporate not only constitutional norms, but other norms as well. It requires a court when applying it to articulate its reasoning for its conclusions as to whether there is a sufficient connection between the wrongful conduct and the employment or not. Thus developed, by the explicit recognition of the normative content of the objective stage of the test, its application should not offend the Bill of Rights or be at odds with our constitutional order.”

The question of the employer’s vicarious liability was considered in *Grobler v Naspers Bpk*,<sup>19</sup> where it was found that the employer was vicariously liable for acts of sexual harassment committed by one employee against another. On appeal (the appeal was reported as *Media24 v*

<sup>12</sup> 2005 6 SA 419 (CC).

<sup>13</sup> Par 5.

<sup>14</sup> *Supra*.

<sup>15</sup> *K v Minister of Safety and Security* 2005 3 SA 179 (SCA) par 5.

<sup>16</sup> *Supra*.

<sup>17</sup> Such as the United Kingdom and Canada.

<sup>18</sup> Par 44 of the Constitution.

<sup>19</sup> 2004 4 SA 220 (C).

*Grobler*<sup>20</sup>) the Supreme Court of Appeal instead held the employer to be directly liable (see below) and decided to leave the question of vicarious liability open.<sup>21</sup>

## 2.2 Direct liability of employer

In order to hold an employer directly liable for damage sustained as a result of sexual harassment, it will be necessary to establish the elements of delict with regard to the employer. In most instances such liability will result from an omission, due to the employer's failure to take precautions, or to respond to complaints made by the victim. Liability for an omission has a long and interesting history, which has continued into the constitutional era.<sup>22</sup> In the case of omissions it is mostly the element of wrongfulness that gives rise to problems. According to the general principles, wrongfulness for an omission will only exist where the defendant had a legal duty to act positively to prevent harm. The existence of this legal duty will depend on the circumstances of the case. In effect the existence of the legal duty is nothing other than a variation on the usual test for wrongfulness; a legal duty to prevent harm will therefore exist if the *boni mores* of society would regard it as reasonable for the defendant to have done something to prevent harm.<sup>23</sup>

In *Media24 v Grobler*<sup>24</sup> the Supreme Court of Appeal had to consider whether the employer had a legal duty to an employee to protect her from being sexually harassed by a fellow employee. Both on the facts of the case in question and as a point of law, it was held that an employer not only had a duty to protect an employee against physical harm, but also against psychological harm such as sexual harassment.<sup>25</sup> The court referred to the well-known dictum from *Minister van Polisie v Ewels* (own translation).<sup>26</sup>

“It appears as if that stage of development has been reached where an omission may also be regarded as wrongful where the circumstances of the case are such that the omission not only gives rise to moral indignation, but also that the legal convictions of society expect that the omission ought to be regarded as wrongful and that the damage suffered ought to be compensated by the person who failed to act positively. To determine whether or not wrongfulness is present in the case of a particular omission is thus not a

<sup>20</sup> *Supra*.

<sup>21</sup> Par 63ff.

<sup>22</sup> *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC).

<sup>23</sup> *Minister van Polisie v Ewels* 1975 3 SA 590 (A). See also Neethling, Potgieter and Visser 49ff.

<sup>24</sup> *Supra*.

<sup>25</sup> Par 65.

<sup>26</sup> *Supra* 597 A-B. The original Afrikaans reads as follows:

“Dit skyn of dié stadium van ontwikkeling bereik is waarin 'n late as onregmatige gedrag beskou word ook wanneer die omstandighede van die geval van so 'n aard is dat die late nie alleen morele verontwaardiging ontlok nie maar ook dat die regsoortuiging van die gemeenskap verlang dat die late as onregmatig beskou behoort te word en dat die gelede skade vergoed behoort te word deur die persoon wat nagelaat het om daadwerklik op te tree. Om te bepaal of daar onregmatigheid is, gaan dit, in 'n gegewe geval van late, dus nie oor die gebruikelike 'nalatigheid' van die *bonus paterfamilias* nie, maar oor die vraag of, na aanleiding van al die feite, daar 'n regsplig was om redelik op te tree.”

question about the usual 'negligence' of the *bonus paterfamilias*, but rather whether with regard to all the facts there was a legal duty to act reasonably."

The court also referred to *J v M Ltd*<sup>27</sup> in which sexual harassment was defined and the detrimental effects thereof discussed. In particular it was held that sensitive and immature employees can suffer severe psychological side-effects as a result of such harassment, and where the victim is in an inferior position and being harassed by a superior, this only exacerbates the harassment. The Supreme Court of Appeal concluded that the legal convictions of the community clearly require an employer to take reasonable steps to prevent sexual harassment in the workplace.<sup>28</sup>

Furthermore, the fact that statutory remedies have been created does not preclude a remedy at common law. One of the jurisdictional defences raised by the employer as well as the harassing employee was the fact that the court had no jurisdiction to deal with this claim, as an employer's obligations in this regard arose from the provisions<sup>29</sup> of the Labour Relations Act<sup>30</sup> (hereafter "the LRA"). This matter would therefore only be justiciable in the labour court.<sup>31</sup> Both the trial court and the Supreme Court of Appeal rejected this defence. The Supreme Court of Appeal referred to Item 7(6) of the 1998 Code of Good Practice on the Handling of Sexual Harassment Cases (hereinafter "the 1998 Code") which reads as follows:<sup>32</sup>

"A victim of sexual assault has the right to press separate criminal and/or civil charges against an alleged perpetrator and the legal rights of the victim are in no way limited by this code."

The court found that although the references to "sexual assault" and "civil charge" were not clear, it was safe to assume that "sexual assault" included "sexual harassment", and that "civil charge" meant a civil action for damages. The first appellant furthermore relied on items 2(1)(a) and 3 of Schedule 7 to the LRA, in terms of which matters relating to unfair labour practices had to be adjudicated upon by the labour court. With reference to *Fedlife Assurance Ltd v Wolfaardt*<sup>33</sup> the court found that in the present case the problem dealt with the wrongfulness (the court used the term "unlawfulness", which, it is submitted, ought rather to be reserved for criminal liability) of the employer's conduct rather than the unfairness thereof and this is a not a matter reserved for the labour court.<sup>34</sup>

The attribution of fault to the employer could be problematic. According to the general rules of the law of delict, the question of fault can only arise once wrongfulness has been established.<sup>35</sup> In several decisions pertaining to

<sup>27</sup> *Supra*.

<sup>28</sup> Par 68.

<sup>29</sup> Item 2(1)(a) of Schedule 7.

<sup>30</sup> Act 66 of 1995.

<sup>31</sup> Par 9.

<sup>32</sup> See par 75 of judgment.

<sup>33</sup> 2002 1 SA 49 (SCA) 261E-H par 27.

<sup>34</sup> Par 26 and 27.

<sup>35</sup> Neethling, Potgieter and Visser 109.

liability for an omission, however, the Supreme Court of Appeal has seen fit to deal firstly with the issue of negligence, and only then to address the question of wrongfulness.<sup>36</sup> This is clearly wrong and in *Carmichele v Minister of Safety and Security*<sup>37</sup> the Constitutional Court adopted the correct approach. In *Media24 v Grobler* the court also had to deal with the issue of negligence, and found that the employer had in fact been negligent, because despite the fact that the harassment had been reported, the official to whom the report had been made negligently failed to do anything.

### 2 3 What kind of damage is actionable?

As a general rule a victim of delictual conduct is entitled to an award of damages for both patrimonial and non-patrimonial loss. In the case of sexual harassment the damage is psychological. In *Media24 v Grobler*<sup>38</sup> the court considered the severity of the damage suffered by the victim and drew a clear distinction between psychological trauma and post-traumatic stress syndrome (hereafter “PTSS”) as defined by the American Psychiatric Association (the publishers of the fourth edition of the Diagnostic and Statistical Manual of Mental Disorders).<sup>39</sup> In accordance with *Barnard v Santam Bpk*<sup>40</sup> the court held that the plaintiff would at least have to show that she suffered a recognised psychiatric injury in order to qualify for legal redress.<sup>41</sup>

It is submitted, however, that a victim should also be entitled to redress in the absence of having suffered PTSS. At the very least the victim’s right to dignity has been infringed, and this should entitle a victim to claim satisfaction in terms of the *actio iniuriarum*. The right to dignity is also entrenched in the Constitution,<sup>42</sup> and although the Constitutional Court has held that there is no remedy for constitutional damages,<sup>43</sup> it has also been held that where an infringement of a fundamental right falls within the ambit of the law of delict, a plaintiff should be able to claim delictual damages.<sup>44</sup>

### 2 4 Prescription of claim in the case of PTSS

Prescription for a claim of sexual harassment will, as is the case with all delictual claims, be subject to the provisions of the Prescription Act.<sup>45</sup> Section 12 of the Act reads as follows:

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<sup>36</sup> See also Mukheibir “The Cart Pulling the Horse – Does the Enquiry as to Wrongfulness Necessarily Precede the Question of Fault?” 2001 *Obiter* 397.

<sup>37</sup> *Supra*.

<sup>38</sup> *Supra*.

<sup>39</sup> This reference work is a standard work referred to by psychologists and psychiatrists and is commonly referred to as *DSMIV*.

<sup>40</sup> 1999 1 SA 202 (SCA) 216.

<sup>41</sup> *Media24 v Grobler supra* par 60.

<sup>42</sup> S 10 of the Constitution.

<sup>43</sup> *Fose v Minister of Safety and Security* 1997 3 SA 786 (CC).

<sup>44</sup> *Fose v Minister of Safety and Security supra* par 67ff.

<sup>45</sup> 18 of 1969.

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- (1) Subject to the provisions of subsections (2) and (3), prescription shall commence to run as soon as the debt is due.
- (2) If the debtor wilfully prevents the creditor from coming to know of the existence of the debt, prescription shall not commence to run until the creditor becomes aware of the existence of the debt.
- (3) A debt shall not be deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises: Provided that a creditor shall be deemed to have such knowledge if he could have acquired it by exercising reasonable care."

The prescription period is three years.<sup>46</sup>

In *Van Zijl v Hoogenhout*<sup>47</sup> the Supreme Court of Appeal had to deal with a claim of sexual abuse which had been instituted long after the prescription date. The defendant raised the prescription as a defence. The victim in question had suffered extreme PTSS. Based on the debilitating effect this had on her, the Supreme Court of Appeal found that the claim had not prescribed. In order for prescription to commence, there has to be awareness on the part of the plaintiff:<sup>48</sup>

"The knowledge which is required is the minimum necessary to enable a creditor to institute action ... The ascribing of blame to a particular defendant is a necessary element of any claim in delict. Prescription penalizes unreasonable inaction not inability to act. Where, therefore, the statute speaks of prescription beginning to run when a wrong is 'first brought to the knowledge of the creditor', it presupposes a creditor who is capable of appreciating that a wrong has been done to him or her by another ..." (own emphasis).

Until the victim has such an appreciation, the claim does not begin to prescribe. The court found that the effect of PTSS on a victim was such as to negate this requirement. Although this case dealt with the Prescription Act of 1943, the 1969 Act contains a similar provision<sup>49</sup> and it is submitted that where a plaintiff is claiming damages for conduct which has resulted in post-traumatic stress syndrome, the prescription period will likewise not commence until it can be said that the requisite "knowledge" is present.

Although the case dealt with sexual abuse, it is submitted that it would also be applicable in the case of sexual harassment which results in PTSS.

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<sup>46</sup> S 23.

<sup>47</sup> 2005 2 SA 93 (SCA). See also Mukheibir "Sexual Abuse, Post-Traumatic Stress Syndrome and Prescription – A Comparison between the South African and Dutch Positions" 2005 *Obiter* 140.

<sup>48</sup> Par 18 and 19.

<sup>49</sup> See above s 12(3).



### 3 STATUTORY LAW

#### 3.1 The Constitution

Although the Bill of Rights does not specifically refer to sexual harassment, the fundamental rights that would be relevant with regard to sexual harassment in the workplace include the right to equality,<sup>50</sup> more specifically the right not to be unfairly discriminated against,<sup>51</sup> and the right to fair labour practices.<sup>52</sup> Although section 9(3) does not list sexual harassment as a prohibited ground of discrimination, the listed grounds of sex and gender clearly would be relevant in the context of sexual harassment. In any event the EEA has now settled the debate as to whether sexual harassment constitutes a form of discrimination by expressly providing so in section 6(3).<sup>53</sup>

With regard to the right to equality, the EEA and the Promotion of Equality and Prevention of Unfair Discrimination Act<sup>54</sup> (hereinafter “PEPUDA”) are the legislation that give effect to this fundamental right. Therefore the application of this fundamental right will enter the sphere of the workplace via the EEA. PEPUDA will apply to cases of unfair discrimination outside the labour environment. With regard to the right to fair labour practices, the LRA is the legislation that gives effect to this right.

Although discrimination (in this case sexual harassment) is dealt with specifically in the EEA and PEPUDA, when interpreting these statutes, particular attention must be paid to the constitutional right to equality and the Constitutional Court’s approach to the application of this right. In fact, the EEA specifically makes this point in its preamble. The specific mention here of the right to equality is a clear indication that this should be the primary reference point for the interpretation of the EEA’s provisions.<sup>55</sup> Of particular interest in this regard is the test for unfair discrimination as set out in *Harksen v Lane*.<sup>56</sup> The test comprises 3 stages. Firstly, one must ask whether the conduct amounts to differentiation, and if so, whether it amounts to discrimination. Secondly, one must determine whether the discrimination is unfair. Thirdly, if the discrimination is found to be unfair, then one must establish whether the discrimination can be justified in terms of section 36 of the Constitution.<sup>57</sup> However, with regard to sexual harassment, the test for unfairness will not be applied in the same way. This will be discussed further below.

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<sup>50</sup> S 9.

<sup>51</sup> S 9(3).

<sup>52</sup> S 23.

<sup>53</sup> S 6(3) provides “Harassment of an employee is a form of unfair discrimination and is prohibited on any one or a combination of any of the grounds for unfair discrimination listed in subsection (1).”

<sup>54</sup> Act 4 of 2000.

<sup>55</sup> Cooper 2002 *ILJ* 21.

<sup>56</sup> 1998 1 SA 300 (CC) 325.

<sup>57</sup> For a discussion on how the Constitutional paradigm applies to the EEA in this regard, see Van der Walt and Partington “The Development of Defences in Unfair Discrimination Cases (Part 2)” 2005 *Obiter* 595.

## 3 2 The Labour Relations Act

The LRA is particularly relevant to sexual harassment in the context of unfair dismissals and unfair labour practices. Regarding unfair dismissals, if it is established that an employee was dismissed for one of the reasons listed in section 187 of the LRA, the dismissal is deemed automatically unfair. Although sexual harassment is not specifically listed as a prohibited ground in section 187 of the LRA, the EEA specifically states that sexual harassment constitutes a form of unfair discrimination. Le Roux, Orleyn and Rycroft<sup>58</sup> point out that sexual harassment in dismissal cases is likely to arise in one of two ways. Firstly, the harassing employee may be dismissed for misconduct, and secondly, the complainant may feel forced to resign because of the employer's failure to address the sexual harassment (the so-called constructive dismissal cases).

In *Ntsabo v Real Security CC*<sup>59</sup> the court found that the failure of the employer to address the sexual harassment in question created an intolerable working environment for the applicant and that she had no choice but to resign. It is interesting to note that the court rejected the applicant's claim that her (constructive) dismissal amounted to an automatically unfair dismissal. Section 6(1) of the EEA contains a prohibition against unfair discrimination listing similar grounds to those listed in section 187(1)(f) of the LRA. Section 6(3) of the EEA then goes on to say that harassment of an employee is a form of unfair discrimination. Regarding the liability of the employer, section 60(3) deems an employer similarly liable in circumstances where an employee contravenes a provision of the EEA. As the discrimination of the harassing employee was assigned to the employer in the *Ntsabo* case, it can be said that the applicant's (constructive) dismissal arose from this unfair discrimination deemed to be perpetrated by the employer. It can therefore be argued that the court should have given greater consideration to this issue, as a different finding would have had the effect of doubling the compensation awarded in terms of section 194 of the LRA.<sup>60</sup> This approach was followed in the more recent case of *Christian v Colliers Properties*<sup>61</sup> where the court found that the dismissal of the employee for refusing to accept her employer's advances was automatically unfair. She was accordingly awarded the full 24 months' compensation.

Section 186(2)(b) describes an unfair labour practice as, *inter alia*, the unfair suspension of an employee or any other unfair disciplinary action short of dismissal. Therefore, if an employee alleges that he or she has been unfairly suspended or has been unfairly disciplined (but not dismissed) after being found guilty of sexual harassment, such employee will be entitled to refer an unfair labour practice dispute in terms of the dispute resolution mechanisms of the LRA.

<sup>58</sup> *Sexual Harassment in the Workplace* (2005) 22.

<sup>59</sup> 2003 24 ILJ 2341 (LC).

<sup>60</sup> Ristow and Govindjee "Sexual Harassment as a Form of Unfair Discrimination: *Ntsabo v Real Security*" 2004 *Speculum Juris* 146 149-150.

<sup>61</sup> 2005 26 ILJ 234 (CC).

### 3 3 PEPUDA

PEPUDA also regulates harassment. Section 5(3) provides, however, that the Act does not apply to any person to whom, and to the extent to which, the EEA applies. Section 11 of PEPUDA provides that no person may subject any person to harassment. This Act differs from the EEA in that it provides a comprehensive definition of harassment. Also, it does not place harassment within the ambit of unfair discrimination as section 15 specifically states that harassment is not subject to a determination of fairness. As mentioned above, the central piece of legislation concerning sexual harassment in the workplace will be the EEA as it aims to regulate the employment relationship with regard to discrimination and affirmative action measures. *Le Roux et al*<sup>62</sup> point out that those outside the employment relationship (such as independent contractors and clients) will generally not proceed against the employer for unfair discrimination against them by an employee in terms of PEPUDA since there is no provision assigning liability to the employer for the discriminating conduct of its employees.<sup>63</sup> Such victims will probably proceed against the employer in terms of the common law doctrine of vicarious liability.

### 3 4 The Employment Equity Act

The EEA aims to regulate the relationship between employers and employees on matters relating to discrimination and affirmative action measures. Section 5 provides that every employer must take steps to promote equal opportunity in the workplace by eliminating unfair discrimination in any employment policy or practice. Section 6(1) provides that no person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice on one or more grounds in section 6(1). The grounds relevant to sexual harassment would include sex and gender.

Section 6(3) specifically states that harassment of an employee is a form of unfair discrimination. Therefore, once it has been established that harassment on any of the prohibited grounds has taken place, it is unfair and cannot be justified in terms of any general limitations clause. It can therefore be argued that the constitutional jurisprudence on unfair discrimination cannot be strictly applied. However, it must be remembered that the unfair discrimination provision has been shifted to the EEA in an amended form and has been released from the ambit of the unfair labour practice. One can therefore argue for an interpretation of fairness which is unequivocally located within the Constitutional Court's equality jurisprudence with its focus on the impact of discrimination on the complainant and the violation of dignity.<sup>64</sup>

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<sup>62</sup> 20.

<sup>63</sup> Such as s 60(3) of the EEA.

<sup>64</sup> Cooper 2002 *ILJ* 25.

Regarding harassment, one needs to ascertain which perpetrators of harassment the Act seeks to regulate as section 6(3) is silent on this. Even though section 6(1) states that “no person” may unfairly discriminate against an employee, a closer examination of various provisions of the Act clearly indicates that the section only regulates discriminatory acts of employers, including where liability is assigned to the employer in terms of section 60(3).<sup>65</sup> It should also be noted in this regard that, in terms of section 9, applicants for employment are for the purposes of section 6 deemed to be employees.

### **3 5 The Code of Good Practice on the Handling of Sexual Harassment Cases**

In the second half of 1998, the National Economic and Labour Council (NEDLAC) published the 1998 Code in terms of section 203(2) of the LRA. Prior to this, employers had no clear guidelines on how to deal with sexual harassment cases. The 1998 Code attempted to eliminate sexual harassment in the workplace by providing procedures that would enable employers to deal with occurrences of sexual harassment and to implement preventative measures. There has been much criticism leveled at the Code because it did not seem to grasp the discriminatory nature of sexual harassment.<sup>66</sup> The 2005 Draft NEDLAC Code of Good Practice on the Handling of Sexual Harassment Cases (hereinafter “the 2005 Code”) has replaced the 1998 Code. Although such a code is not binding law, section 3 of the EEA provides that it must be taken into account when interpreting the EEA.

One of the main criticisms leveled at the 1998 Code concerned the test for sexual harassment proffered in the Code, as such test did not make it clear whether the test for sexual harassment is an objective or subjective test. The 2005 Code attempts to rectify this confusion by defining sexual harassment in the following way:

“Sexual harassment 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:

- 1.1 whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
- 1.2 whether the sexual conduct was unwelcome;
- 1.3 the nature and extent of the sexual conduct; and
- 1.4 the impact of the sexual conduct on the employee.”

Le Roux *et al*<sup>67</sup> argue that that 2005 Code has shifted the test to one that requires a consideration of subjective feelings in the context of that particular

<sup>65</sup> For a full discussion in this regard see Cooper 2002 *ILJ* 36.

<sup>66</sup> See generally in this regard Cooper 2002 *ILJ* 26-35.

<sup>67</sup> 39.

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workplace and that the context will introduce objective elements as to the reasonableness of the subjective impact.

## **4 LIABILITY OF THE EMPLOYER IN TERMS OF THE EEA**

One of the most important issues in sexual harassment cases is the issue of liability. In many instances the complainant will want to take action against his or her employer as the employer will generally have greater means and is the only one that would be able to introduce effective measures to eradicate sexual harassment in the workplace.<sup>68</sup> Although the EEA seeks to regulate the relationship between employers and employees, if an employee was harassed by a fellow employee, the complainant would be afforded protection by the EEA and would not simply have to seek a remedy in the equality courts (established in terms of PEPUDA) or the civil courts. Section 60 specifically provides for this by making the employer liable for the discriminatory conduct of its employees in certain circumstances. Before any liability will be attached to the employer for any harassing conduct of an employee, one needs to consider the responsibilities placed on the employer and the employee-victim of harassment by section 60. It is submitted that this approach is the correct one as it focuses on preventative measures and education in order to create a workplace that is free of discrimination rather than on simply punishing the employer for the prohibited conduct of its employees.

The question of what kind of harm or damage the employee must suffer before the employer will be liable should also be considered. It is submitted that there is no minimum damage, such as post-traumatic stress syndrome, that needs to be suffered. The issue is simply whether sexual harassment has taken place. Although the EEA does not provide a definition of sexual harassment, it is clear that the test would be concerned with whether or not the rights of the victim have been violated. These rights would include the right not to be unfairly discriminated against and the right to dignity.

### **4.1 The nature of the employer's liability**

In the *Ntsabo* case, the harassment took place in the guardroom from where the security staff operated. Pillay AJ held that "Where the employer allows and condones, either directly or by inaction, conduct which is or leads to a violation of the EEA, as in this case, then the employer is vicariously liable for any damages flowing from such conduct."<sup>69</sup> It is submitted that this statement is problematic, since the EEA does not envisage the employer's liability to be in the form of common law vicarious liability. Notwithstanding the fact that the test for common law vicarious liability and the requirements of section 60 are different, the statutory liability created in terms of section 60 serves a different purpose. As will be shown below, if the employer takes

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<sup>68</sup> Ristow and Govindjee 2004 *Speculum Juris* 148.

<sup>69</sup> Par 2382A.

the necessary steps to deal with incidents of harassment or if it did all that was reasonably practicable to ensure that the harassment would not take place, the employer will escape liability. The purpose of section 60, then, is not simply to punish the employer for the wrongful acts of its employee, but to penalize the employer for not taking steps to achieve equality in the workplace through the elimination of unfair discrimination. Therefore it can be argued that it should rather be regarded as a form of direct liability than as a form of statutory vicarious liability.<sup>70</sup>

## 4.2 When will the employer be held liable?

Section 60(1) provides:

“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.”

This section does not require that the victim be the one to report the harassment to the employer. Therefore if the complainant is too afraid or embarrassed to report the harassment, a fellow employee, trade union representative or even a friend or family member may report the harassment. In the *Ntsabo* case, the victim’s brother was the one who brought the harassment to the attention of the employer.

Section 60(1) requires that the conduct be immediately brought to the attention of the employer. This aims to allow the employer the opportunity to deal as soon as possible with such prohibited conduct and also to inform the employer of any potential liability.<sup>71</sup> In the *Ntsabo* case, the court found that the word “immediately” cannot be construed to mean “within minutes of the incident complained of”.<sup>72</sup> The court held that the requirement would have been met if the employer was informed within a reasonable time in the circumstances. What is a reasonable time will depend on the circumstances of each case. In this case, the victim went home after the final incident of harassment and reported it to her family in order to obtain advice from her elders, as was custom in her family. The court accepted that her failure to report the problems directly and immediately to her family would not exclude the liability of the employer.<sup>73</sup> It is submitted that this is the correct interpretation, taking into account the sensitive nature of sexual harassment particularly if the victim is a junior employee or the harasser is the victim’s supervisor.<sup>74</sup>

It should also be noted that section 10(2) requires that the employee victim refer the dispute to the CCMA within six months of the harassment

<sup>70</sup> For a full discussion in this regard see *Le Roux et al* 94.

<sup>71</sup> *Cooper* 2002 *ILJ* 39.

<sup>72</sup> 2374D.

<sup>73</sup> 2374E-G.

<sup>74</sup> *Ristow and Govindjee* 2004 *Speculum Juris* 149.

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having taken place. Although, section 10(2) does provide that the CCMA may grant condonation on good cause shown.

It is also necessary to interpret the words “while at work”. This is very different from the requirement of “within the course and scope of employment” within the context of the common law vicarious liability of the employer. It has been suggested that “while at work” should be interpreted far more broadly than “within the course and scope of employment” and should mean “at the workplace or while the employed parties are engaged in activities relating or connecting to work”.<sup>75</sup> It will certainly become difficult to determine whether the harassment took place “while at work” if parties are engaged in work activities outside normal work hours and/or away from the workplace such as business trips, office parties and incentive trips.

### **4 3 Steps the employer may take to avoid liability**

As mentioned previously, the employer may take steps in order to escape liability. Section 60(2) provides as follows in this regard:

“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.”

The employer is therefore afforded the opportunity to address the problem, thereby escaping liability. To determine “the necessary steps” to be taken by the employer, the employer should consult its sexual harassment policy or, if there is no existing policy, should be guided by the Code of Good Practice on the Handling of Sexual Harassment Cases.

Section 60(3) states as follows:

“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.”

In the *Ntsabo* case, it was held that the harassing conduct was brought to the attention of the employer who did not attend to the issue as envisaged in section 60(2) for at least five to six weeks after being so informed and turned a blind eye to the applicant. The court therefore attributed liability to the employer in terms of section 60(3).

However, section 60(4) goes on to say that:

“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.”

The effect of this subsection is that employers should not be held liable when they have taken action to ensure that harassing conduct does not take

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<sup>75</sup> Cooper 2002 ILJ 41.

place. Action contemplated by this subsection would include the implementation of a sexual harassment policy, as well as appropriate information sharing and training aimed at the creation of a harassment-free workplace. In the *Ntsabo* case, not only did the employer fail to act upon receiving complaints of sexual harassment, it had no sexual harassment policy in place.

## **5 COMPARISON**

This comparison refers to certain key aspects of the common law and the provisions of the EEA identified by the authors as particularly significant. These aspects could *inter alia* assist a victim of harassment in his or her decision regarding what possible steps he or she ought to take, and whether he or she ought to proceed in terms of the common law or the statutory law, or follow both routes. The nature of the respective remedies offered in terms of the common law and the statutory law and how these remedies would interact will be dealt with in a subsequent article.

### **5 1 Influence of preventative measures taken by the employer**

Section 60(2) of the EEA provides that the employer has to take necessary steps to put preventative measures into place.<sup>76</sup> Failure to do so will result in the employer being held liable, unless it can be proven that the employer did everything reasonably practicable to prevent the harassment.

At common law, steps that the employer has taken to prevent sexual harassment could be relevant with regard to both the question of wrongfulness and of negligence in the case of the direct liability of the employer. Where the employer took reasonable steps to prevent harassment, this could be regarded as complying with his legal duty to prevent harm; thus he will escape liability for an omission.

In the case of vicarious liability such steps taken could have a bearing on the "scope of employment" question - if there is a very clear sexual harassment policy in place, and an employee acts in contravention of this policy, he or she cannot be said to have acted in the scope of his or her employment.

### **5 2 The respective requirements of "scope of employment" versus "while at work"**

The common law requirement of "scope of employment" was recently subject to constitutional interpretation in *K v Minister of Safety and Security*.<sup>77</sup> The *Rabie* test which was applied by the Constitutional Court was found to be flexible enough to be in line with the Constitutional norms. How

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<sup>76</sup> See below.

<sup>77</sup> See above.



this will translate to a sexual harassment case is not clear, but this more flexible interpretation could no doubt also extend to activities not *per se* taking place in the office or during office hours (such as a business trip, conference or an office party).

The EEA requirement of “while at work” seems to be wide enough to encompass the situations referred to above. What the exact extent of “while at work” will be remains to be seen, because this provision has not been subject to as much scrutiny as its common law counterpart.

### 5 3 Prescription of claims

At common law, claims prescribe within three years, but as was noted above, the Supreme Court of Appeal has recognised that in the case of PTSS, the victim may not have the realisation that a wrong was perpetrated against her, and until the condition is treated, will not be able to institute proceedings.

The EEA requires that incidences of harassment be brought to the attention of the employer “immediately”, which has been interpreted as “within a reasonable time”.<sup>78</sup> If a victim is therefore severely traumatised by such harassment, to the extent of suffering from PTSS, one can argue that until this condition has been treated, the victim cannot reasonably report the matter to the employer, or put otherwise, where the employee is unable (because of PTSS) to report the matter immediately after the occurrence of the harassment, and only does so once the PTSS has been treated, that employee will still have reported the matter within a reasonable time.

### 5 4 The requisite harm

In *Media24 v Grobler*<sup>79</sup> the victim alleged that she had developed PTSS. It is not clear on which basis the victim proceeded in this case, but if the court was referring to psychological damage for which compensation is sought in terms of the *actio legis Aquiliae*, this is correct. However, the victim would have been able to claim satisfaction for infringement of dignity in terms of the *actio iniuriarum*, without having had to allege that the damage constituted PTSS. Dignity has been acknowledged as a personality right for many decades in our law, and an infringement of this right which is both wrongful and intentional could give rise to a claim of satisfaction. In addition the right to dignity is entrenched in the Bill of Rights, and this should accord even greater protection to this right and the access to justice in case of infringement of this right. In the case of an infringement of dignity which does not result in post-traumatic stress syndrome, the victim should still in terms of the common law be able to claim satisfaction, provided of course that the infringement is not a case of *de minimus non curat lex*.

The EEA does not lay down such a requirement.

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<sup>78</sup> See above.

<sup>79</sup> *Supra*.

## **6 CONCLUSION**

Sexual harassment has become a buzzword in this era of political correctness, and it is one which could be abused. However, our country is infamous for acts of abuse against women in general, and this also takes place within the workplace, in particular as more women enter the workplace. In order to ensure gender equity in the workplace it is not only necessary to create opportunities for women, but also to ensure that their working conditions will be free from acts of harassment. At the same time, as gender equity in the workplace is promoted, it is not inconceivable that women in high positions could also assume predatory roles and harass junior male employees.

Legislation has gone a long way to address the problem of sexual harassment; in the meantime the law of delict with its flexible, generalising approach, also provides remedies for a victim of sexual harassment. In the case of the common law of delict the requirements of wrongfulness and legal causation will prevent the proverbial "floodgates of liability" being opened; in addition because all the elements will have to be proven, including wrongfulness and fault, one hopes that employees will not abuse the law to settle petty grievances.