

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

***“A CRITICAL ANALYSIS OF THE EMPLOYERS’ OBLIGATIONS IN
COMBATTING AND ELIMINATING SEXUAL HARASSMENT AT THE
WORKPLACE OR EXTENSION OF THE WORKPLACE IN SOUTH AFRICA”***

EV Mabunda

2016

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

***“A critical analysis of the employers’ obligations in combatting and
eliminating sexual harassment at the workplace in South Africa”***

By

Name: Emmanuel Vusi Mabunda

Student number: 208525071

Supervised by

Nicci Whitear-Nel

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

DECLARATION

I, Emmanuel Vusi Mabunda do hereby declare that, unless specifically indicated to the contrary in this text, this dissertation consists of my own original work and has not been submitted to any other university in full or partial fulfilment of the academic requirements of any other degree or qualification.

Signed at PIETERMARITZBURG on this the 10 March 2017.

Signature: -----

STATEMENT OF ORIGINALITY

This dissertation is an original piece of work which is made available for photocopying and for inter-library loan.

Signed at PIETERMARITZBURG on this the 10 March 2017.

Signature: -----

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

ACKNOWLEDGEMENTS

As a family man, I would like to thank my family for their continued support throughout my journey to accomplishing this massive task but the greatest milestone. I truly appreciate their understanding and courage to allow me to take away their quality time while pursuing my future endeavours to produce this piece of work. My special thanks to my supervisor for her patience, kindness, tireless support and for allowing me to trouble her even during the December 2016 festive season in trying to complete this work timeously with view to graduating in the year 2017. My supervisors' expertise and skills in the area of labour law and related matters thereto made my work much easier and thus shall never go unnoticed. Lastly, to all my friends, colleagues and everyone who have supported me to this end product, I affirm that their love, support and contributions made it possible for me to achieve my dream. And for that, I shall always cherish our friendship and remember their contributions and support.

ABSTRACT

The Republic of South Africa, as a sovereign and democratic state, and through the first democratically elected State President, the late Dr. Nelson Rolihlahla Mandela, adopted and signed a new Constitution, (the 1996 Constitution) into law at Sharpeville on 10 December 1996, the 1996 Constitution with the founding values of human dignity, equality and freedom. The country has also enacted the various pieces of critical labour legislation such as the Labour Relations Act; Employment Equity Act 55 of 1998 including the adoption and the implementation of the 1998 Code and 2005 Amended Code of Good Practice on the Handling of Sexual Harassment Cases at the Workplace in South Africa. Notwithstanding these achievements, many female employees remain the victims of sexual harassment at the workplace or extension of the workplace in South Africa. They often find themselves subjected to sexual harassment directed at them by their superiors. Furthermore, in most cases regarding this scourge of sexual harassment, the employers are either failing to adequately deal with sexual harassment cases brought to their attention or not deal with them at all. In that regard, the employers violate their duties and responsibilities to protect their sexually harassed employees as envisaged in the 1996 Constitution, the Employment Equity Act, 1998 Code and 2005 Amended Code and in terms of the Common Law principles amongst others. In view of the above, the victims of sexual harassment in the workplace or extension of the workplace in South Africa, may claim from the employer for:

- Unfair labour practice in terms of s 186(1) (e) of the Labour Relations Act.
- Automatically unfair dismissal in terms of s 187(1) (f).
- Vicarious liability.
- Violating the provisions of the Employment Equity Act.
- Failure to provide safe working environment free of sexual harassment.

This paper focuses on analysing the employers' obligations in combating and eliminating sexual harassment at the workplace or extension of the workplace in South Africa. It further makes recommendations seeking to combat and eliminate sexual harassment at the workplace or extension of the workplace in South Africa.

CONTENTS

Chapter one: Background to the study

1	Introduction.....	1
1.1	Background and outline of the research problem.....	2
1.2	Research question.....	3
1.3	Research sub-questions.....	3
1.4	Rationale for the study.....	4
1.5	Research methodology.....	4
1.6	Structure of dissertation.....	4
1.6.1	Chapter one: Introduction.....	5
1.6.2	Chapter two: Different forms and appropriate tests for sexual harassment in the workplace or extension of the workplace.....	5
1.6.3	Chapter three: Employers' obligations in dealing with sexual harassment at the workplace.....	5
1.6.4	Chapter four: Employers' liability – Remedies for the complainant.....	6
1.6.5	Chapter five: Conclusions, summary and recommendations.....	6

Chapter two: Definition of sexual harassment in different jurisdictions

2.1	Introduction.....	7
2.2	Defining sexual harassment.....	7
2.2.1	An overview of the international law on issues of sexual harassment at the workplace or extension of the workplace.....	8
2.2.2	The Law in United States of America.....	10
2.2.3	The Law in Canada.....	11
2.2.4	The Law in South Africa.....	12
2.2.5	Test for sexual harassment.....	15
2.2.6	Test for sexual harassment – According to the Code of Good Practise on the Handling of Sexual Harassment Cases in the Workplace of 1998 (“the 1998 Code”)	16

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

2.2.7 Test for sexual harassment – According to the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace of 2005 (“the 2005 Amended Code”)17

Chapter three: Employers’ obligations to combat and eliminate sexual harassment at the workplace or at the extension of the workplace

3.1 Introduction.....	20
3.2 International Law.....	20
3.3 The Constitution of the Republic of South Africa, 1996 (the Constitution)	22
3.4 The Employment Equity Act 55 of 1998 (the EEA)	23
3.4.1 Remedies available to the complainant of sexual harassment in terms of South African labour law.....	27
3.5 The Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace of 2005 (the 2005 Amended Code)	32

Chapter four: Extent of the employers’ liability and the different forms that liability may take in cases of sexual harassment in the workplace or extension of the workplace

4.1 Introduction.....	37
4.2 Remedies of the complainant.....	37
4.3 Liability of the employer.....	38
4.3.1 Statutory liability.....	38
4.3.1.1 The Constitution.....	38
4.3.1.2 The Labour Relations Act 66 of 1995 (the LRA)	39
4.3.1.3 The Promotion of Equality and Prevention of Unfair Discrimination Act (the PEDUDA)	41
4.3.1.4 The Employment Equity Act 55 of 1998 (the EEA)	42
4.3.2 Common Law Liability.....	51

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

4.3.3 Vicarious Liability.....	52
4.3.3.1 Requirements of vicarious liability.....	53
4.3.3.2 Rationale for vicarious liability of employer of sexual harassment.....	54
4.4 Various tests to determine whether a delict has been committed by an employee.....	56
4.4.1 The standard test.....	56
4.4.2 The superior test.....	57
4.4.3 The ‘risk of employer’ test.....	58
4.5 Direct liability.....	60
4.6 Analysis of the decisions of the courts in <i>Grobler v Naspers Bpk en ‘n Ander and Media 24 Ltd and Another v Grobler cases</i>)	62

Chapter five: Consolidation of the findings of the previous chapters and a conclusion, summary and recommendations

5.1 Introduction.....	67
5.2 Conclusion.....	67
5.3 Summary (comparing; contrasting and commenting on both the 1998 and 2005 Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the workplace or extension of the workplace)	68
5.4 Recommendations.....	70
Bibliography.....	73-80

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

1.1. Background and outline of the research problem

Sexual harassment is an extensive problem in the workplace, it manifests as subtle hints; inappropriate behaviour; blatant propositions and physical conduct.¹³ The number of sexual harassment complaints increases every year, although researchers estimate that 80 to 90 per cent of such cases go unreported.¹⁴ Sexual harassment at the workplace has been recognised as a social problem with enormous ramifications in South Africa and the world at large. Sexual harassment can be described as a hazard encountered in workplaces which reduces the quality of working life; jeopardizes the well-being of women and men; undermines gender equality and imposes costs and liability on firms and organizations.¹⁵

Sexual harassment, depending on the form it takes, violates the right to integrity of the body and personality which belongs to every person and which is protected in our legal system.¹⁶ It is a form of unfair sexual discrimination that can be described as an egregious invasion of the victims' employment security and dignity.¹⁷ It is trite law that employees do not shed their constitutional rights at the workplaces gate, and amongst these rights is the right to be free from sexual harassment in the workplace. It is against this background that an employer is under a duty to protect its employees against sexual harassment in the employment relationship.¹⁸ If the employer breaches this duty, he or she will be liable not only because of the acts of discrimination itself, but also because of the failure to address equity in the workplace or extension of the workplace and through vicarious liability for the acts of the harassing employee.¹⁹ Sexual harassment can be viewed in many different ways,²⁰ it may

¹³ A Aggarwal, *Sexual Harassment in the Workplace*. 2ed. (1992) p 7.

¹⁴ G Monti, 'A reasonable woman standard in sexual harassment litigation' (1999) 19/4 *Legal Studies* 552 at 552. Vetten says the number is even higher in South Africa following a survey conducted by the Institute of Directors that puts the figure at 80 to 90 per cent; L Vetten 'Adding up the costs of sexual harassment' (1998), Centre for the Study of Violence and Reconciliation, available at: <http://www.csvr.org.za/articles/artcostl.htm>. Accessed 26 October 2015. It is stated in *J v M Ltd* (1989) 10 ILJ 755:757H that 63 per cent of women in Johannesburg are exposed to sexual harassment.

¹⁵ SM Mallow 'Sexual harassment in the workplace: An overview of the international law and current law and practice in Malaysia' (2013) 3(13) *International Journal of Humanities and Social Science* 75. In *J v M Ltd* (1989) 10 ILJ 755, this view appears to be endorsed as it is argued that sexual harassment, 'violates 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.'

¹⁶ A De Kock, '*J v M Ltd*' (1989) 10 ILJ 755.

¹⁷ *Intertech Systems (Pty) Ltd v Sowter* (1997) 18 ILJ 689 (LAC) 705.

¹⁸ C Sutherland, 'Paying for stolen kisses: Sexual harassment and the law' (1992) (Paper presented at the Centre for the Study of Violence and Reconciliation, Seminar No. 2, 24 March).

¹⁹ S Murray, *The extent of an employer's vicarious liability when an employee act within the scope of employment*. Unpublished LLM dissertation (North-West University) 2012.

²⁰ CN Nana 'Sexual harassment in the workplace in South Africa': The unlimited vicarious liability of employers? (2008) 52 (2) *Journal of African Law*, 245-267.

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

be seen as a form of unfair discrimination,²¹ as an unfair labour practice,²² a failure to provide safe working conditions²³ and alleged unlawfulness in the form of breach of the duty to care.²⁴ Thus, an employer undoubtedly has a duty to ensure that its employees are not subjected to this form of violation (sexual harassment) within the work-place either by fellow employees or customers. An employee guilty of sexual harassment may be dismissed for misconduct. An employee who resigns because of sexual harassment may claim constructive dismissal.²⁵

1.2. Research question

The main research question of this dissertation is what are the employers' obligations in combatting and eliminating sexual harassment at the workplace or extension of the workplace in South Africa?

1.3. Research sub-questions

- (a) What is the current legal framework dealing with sexual harassment at the workplace or extension of the workplace?
- (b) Can an employer be held liable for the damage occasioned by its employees as a result of sexual harassment at the workplace or extension of the workplace?
- (c) If so, what is the extent and form of the employer's liability?
- (d) How can an employer manage the risks involved in sexual harassment cases at the workplace or extension of the workplace?

1.4. Rationale for the study

The aim of this dissertation is to critically analyse the employers' obligations in combating and eliminating sexual harassment in the workplace. The dissertation will also focus on the extent of the employers' liability for claims of sexual harassment brought against them. The

²¹ Act 55 of 1998, Section 6(3) *supra*; and items 3 and 7.4.1 of 2005 Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace published in terms Employment Equity Act 55 of 1998 GG No. 27865 of 2005, 4 August 2005.

²² *J v M Ltd* (1989) 10 ILJ 755 H (IC).

²³ See the United Kingdom case of *Wigan Borough Council v Davies* [1979] IRLR 127. See also the United States case of *Marantette v Michigan Host Inc* (1981) 24 FEP 990.

²⁴ *Media 24 Ltd & Another v Grobler* [2005] JOL 14595 (SCA) 47.

²⁵ *J v M Ltd supra* (n22).

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

harassment in the workplace or at the extension of the workplace. By doing so, the employer would have succeeded in combatting and eliminating sexual harassment in the workplace or at the extension of the workplace.

2.2.3 The Law in Canada

The Canadian legislation defines sexual harassment in as,⁶²

“any conduct, comment, gesture or contact of a sexual nature that (a) is likely to cause offence or humiliation to any employee; and (b) that might, on reasonable grounds, be perceived by that employee as placing a condition of a sexual nature on employment or on an opportunity for training or promotion.”⁶³

According to Canadian law, sexual harassment can be carried out by anyone, for example, manager, work-mate, customer or anyone else. In general, one party has more power than the other.⁶⁴ For example, a manager has more power than an employee. Moreover, Canadian law stipulates that there are two types of sexual harassment, namely verbal and non-verbal.⁶⁵ Examples of verbal are: ogling, leering and suggestive gestures and examples are: clothing together with sexual advances, vulgar or coarse remarks, comments about the complainants' body and sexual advances. The examples of non-verbal are: sexual looks and lewd gestures touching oneself sexually, displaying sexually suggestive pictures or posters and sending emails and pictures with sexual connotations to people or colleagues of opposite sex.⁶⁶

The researcher is of the same view that, the employer has a legal duty to provide a working environment free of any acts of sexual harassment so as to ensure that their employees are at all times feel free; safe and protected against the scourge of sexual harassment in the workplace or at the extension of the workplace. To add on, the employer is under a legal duty to ensure that there is no among others things: display of sexually suggestive pictures or posters and sending of emails and pictures with sexual connotations to people or colleagues of opposite sex in the workplace or at the extension of the workplace. By so doing, the employer would have

⁶² Canada Labour Code (R.S.C., 1985, c. L-2)

⁶³ The U.S. government body that enforced the Civil Rights Act, the Equal Employment Opportunity Commission (EEOC).

⁶⁴ Ibid.

⁶⁵ Ibid.

⁶⁶ Ibid.

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

succeeded to striving to combat and eliminate sexual harassment at the workplace or the extension of the workplace as required so by the legislation of the country.

2.2.4 The Law in South Africa

The South African common law also plays a part in the issue of sexual harassment in the workplace. Before the statutory enactments, the common law position was highlighted in the case of *J v M*⁶⁷ where the court held that sexual harassment is unwanted sexual attention or conduct in the employment environment. The court went on to say that the conduct which can constitute sexual harassment ranges from:

“innuendo, inappropriate gestures, suggestions or fondling without consent, or by force, to its worst form, rape.”⁶⁸ ‘This conduct need not be necessarily repeated, a single act can constitute sexual harassment.’⁶⁹

Section 9 of the Constitution⁷⁰ provides that everyone is equal before the law and is entitled to equal protection of the law. The Constitution imposes an obligation on the state to pass legislation prohibiting unfair discrimination. Sections 9 (3)⁷¹ and 9 (4)⁷² prohibit discrimination by both the state and private individuals on a number of grounds, including sex. To give effect to this constitutional obligation, the state passed the EEA.⁷³ Section 6 (3) of the EEA⁷⁴ provides that harassment of an employee is a form of unfair discrimination and is prohibited on any one or combination of grounds of unfair discrimination listed in the Act. The researcher is of the view that it is significant that legislation identified sexual harassment as a form of unfair discrimination because it violates the provisions of s 9 of the Constitution⁷⁵ on the basis that the perpetrator by their sexual harassing act unfairly discriminate the complainant on the basis of their sex, the discrimination of which is prohibited in terms of the provisions of s 9 of the Constitution. An act of sexual harassment by the perpetrator further violates the right to human dignity of the complainant in a sense that the complainant feels their right to human dignity not being respected and protected as

⁶⁷ *J v M* supra (n22).

⁶⁸ Ibid.

⁶⁹ Ibid.

⁷⁰ The 1996 Constitution supra.

⁷¹ Ibid.

⁷² Ibid.

⁷³ Act 55 of 1998 supra.

⁷⁴ Ibid.

⁷⁵ The 1996 Constitution – right to equality.

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

envisaged in s 10 of the Constitution.⁷⁶ The purpose of the EEA⁷⁷ includes the achievement of equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination.’ Section 60 of the EEA⁷⁸ also provides remedy for victims of sexual harassment as it provides for the liability of the employer who fails to adequately deal with the issue of sexual harassment at the workplace. Further, it provides amongst other things that:⁷⁹

- (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 act after it has been brought to their attention that there was a contravention of the Act, the employer must be deemed also to have contravened that provision; and
- (4) Despite subsection (3), the employer is not liable for the conduct of an employee if that employer is able to prove that it did all what was reasonably practicable to ensure that the employee would not act in contravention of this Act.

The 1998 Code⁸⁰ defines sexual harassment as, unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual. On the other hand, the 2005 Amended Code⁸¹ defines sexual harassment as,

‘a conduct of any unwelcome sexual advance; request for sexual favour; verbal or physical conduct or gesture of a sexual nature; or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another.’

However, other researchers have argued that the EEA⁸² will favour the employer more than the employee.⁸³ This is because the employer can, in terms of the EEA,⁸⁴ take the necessary recommended steps to address and remove the conduct of sexual harassment at the workplace, and thus not be held vicariously liable for the conduct of their harassing

⁷⁶ The 1996 Constitution – right to human dignity.

⁷⁷ Act 55 of 1998 - Preamble.

⁷⁸ Ibid.

⁷⁹ Ibid.

⁸⁰ 1998 Code (n28).

⁸¹ 2005 Amended Code (n29).

⁸² Supra (n12).

⁸³ See R Le Roux ‘Section 60 of the Employment Equity Act 1998: Will a comparative approach shake this joker out of the pack?’ (2006) 27(3) *Obiter* p 411.

⁸⁴ Act 55 of 1998 supra.

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

employees; whilst the affected or sexually harassed employee will still be affected after the event without any liability attributed to the employer as a result of the conduct of the employers' sexually harassing employees.⁸⁵

The Promotion of Equality and Prevention of Unfair Discrimination Act⁸⁶ (hereafter referred to as the PEPUDA), defines harassment as a 'persistent and unwelcoming conduct which is hostile and offensive to a reasonable person and induces a fear of harm and demeans, humiliates or creates a hostile and intimidating environment.'⁸⁷ It is when this conduct stated in the PEPUDA⁸⁸ definition of harassment becomes sexual or is sexual, that it becomes sexual harassment. However, a person who brings a claim of harassment in terms of the EEA⁸⁹ may not bring a claim of harassment in terms of the PEPUDA.⁹⁰ This is because the PEPUDA⁹¹ is there to provide a remedy for the victims of sexual harassment who are harassed by a non-employees of the employer such as the customers or clients of the employer whereas the EEA⁹² is there to provide a remedy to the victims of sexual harassment who are harassed by either their fellow colleagues (employees); superiors; juniors; or any other person including customers of the employer while in the workplace or the employer's premises. This includes sexual harassment by employees of the employer while outside their normal place of employment; such as police officers, who by virtue of their employment, are supposed to protect civilians at all times whether they are on or off duty.

The researcher is of the view that South Africa as a country is on the right track in combatting and eliminating sexual harassment in the workplace or at the extension of the workplace. The definition of sexual harassment, both verbal and non-verbal form, seems to be the same in the three different jurisdictions (USA, Canada and South Africa) and the manner in which these countries address the issue of sexual harassment looks the same. In this regard, the researcher views South Africa as a country that is in line with the international countries such as USA and Canada with regard to the compliance in

⁸⁵ 2005 Amended Code, item 2, supra. Also see Le Roux (n77).

⁸⁶ The Promotion of Equality and Prevention of Unfair Discrimination Act, No 4 of 2000.

⁸⁷ Ibid.

⁸⁸ Ibid.

⁸⁹ Act 55 of 1998 (n12).

⁹⁰ PEPUDA (n73).

⁹¹ Ibid.

⁹² Act 55 of 1998.

combatting and eliminating sexual harassment in the workplace or at the extension of the workplace. This seems a good sign for the country and the jurisprudence confirms same.

2.2.5 Test for sexual harassment

There are three types of tests that are used to investigate sexual harassment, these are the subjective, objective and compromise tests.⁹³ A subjective test relies exclusively on the perceptions of the victim (employee in this study) - if the victim experienced conduct as unwelcome or offensive, the conduct would constitute harassment.⁹⁴ For instance, if an employer uses vulgar language offending an employee, this may be deemed as sexual harassment. However, the victim may be over-sensitive and a subjective test may very well cast the net of harassment too wide.⁹⁵

On the other hand, a purely objective test may cast the net too narrow.⁹⁶ An objective test uses an independent observer to assess the circumstances of the matter discussed. The independent observer is called 'reasonable man or woman.' In this case, the values of society and the use of the 'reasonable man or person' test is the means used to determine whether the perpetrator foresaw, or should reasonably have foreseen that his or her conduct would constitute sexual harassment.⁹⁷ It is often argued that this test relies on the 'reasonable man test', which means there are male dominated values.⁹⁸ However, the outcome of this test may differ if a 'reasonable woman' is used as the test. For example, if a supervisor circulates a picture of nude man (that is an employee), male employees may not feel intimidated, whereas if the same supervisor circulates a nude picture of a woman, female employees may feel intimidated. This will indicate differences in sensitivity between the opposite sexes (man and woman). The case of *Ellison v Brady*⁹⁹ supports the use of the reasonable woman test where the Court accepted:

⁹³ A Gordon, M Cohen, E Grauer, & S Rogelberg, 'Innocent flirting or sexual harassment? Perceptions of ambiguous work-place situations'. (2005) 28 *Representative Research in Social Psychology* 47-58.

⁹⁴ D Du Toit et al *Labour Relations Law: A Comprehensive Guide* (2003) 575. In the USA and Canada, courts have adopted a mixed test combining both subjective and objective elements to prevent overly sensitive people from successfully claiming damages.

⁹⁵ Supra (n1).

⁹⁶ Act 55 of 1998 (n12).

⁹⁷ Ibid.

⁹⁸ Ibid.

⁹⁹ *Ellison v Brady* 1991 924 F 2d 872 (9th Cir).

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

“...the perspective of a reasonable woman primarily because we believe that a sex-blind reasonable person standard tends to be male-biased and tends to systematically ignore the experiences of women...”¹⁰⁰

However, the ‘reasonable victim test’ or ‘compromise test’, tries to reach a compromise between the two tests.¹⁰¹ The advantage of this test is that it takes into account the experiences of the victim, but also the surrounding circumstances and fault on the part of the perpetrator. If one uses this test, no single factor alone will be decisive in determining if the conduct was sexual harassment, and all the factors surrounding the incident will be considered.

The researchers’ view and comment regarding the three tests is that the reasonable victim test is the better test compared to the subjective and objective tests, because it considers all relevant surrounding factors of the incident as opposed to singling out one or two factors. The test is good because it promotes a much wider approach in dealing with cases of sexual harassment. Further, it promotes a situation where sexual harassment cases would be dealt with on a case by case basis in order to give full regard to all the surrounding factors of the incidents. This does not seek to cast any element of doubt on the victims’ case and circumstances. However, it serves as a good test to digging into the root causes and effects of the incident in order to address the scourge of sexual harassment cases.

2.2.6 Test for sexual harassment – According to the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace of 1998 (“the 1998 Code”)

The 1998 Code¹⁰² elaborates on the impact of the conduct on the employee in question as a factor to be taken into account in dealing with sexual harassment cases in the workplace. The conduct in question should ‘constitute an impairment of the employees’ dignity, taking into account the circumstances of the employee as well as the respective positions of the employee and the perpetrator in the workplace.

The provision¹⁰³ shifts the focus away from the intent or negligence (fault) of the perpetrator to the effect of the conduct on the victim. Sexual harassment is ‘a discrimination issue and

¹⁰⁰ 2005 Amended Code (n29).

¹⁰¹ Ibid.

¹⁰² 1998 Code (see supra note 28).

¹⁰³ Ibid. Defining sexual harassment.

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

therefore fault is not a requirement for discrimination. It is defined as ‘an 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:

- (a) Whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation.
- (b) Whether the sexual conduct was unwelcome.
- (c) The nature and extent of the sexual conduct.
- (d) The impact of the sexual conduct on the employee.

By providing that harassment is about the impairment of dignity and that the circumstances of the employee should be taken into account, the test moves away from the standard objective test to a more subjective approach.¹⁰⁴

2.2.7 Forms of Sexual Harassment – According to the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace of 2005 (“the 2005 Amended Code”)

Item 5.3 of the 2005 Amended Code¹⁰⁵ describes and explains the different forms of sexual harassment. The aim of this item is to illustrate the extent and nature of the unwelcome conduct of the employer or perpetrator. Sexual harassment can take different forms, which include but not limited to:

‘any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another.’¹⁰⁶

Sexual harassment may occur when it interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive environment.¹⁰⁷ It can include a one-off incident or a series of incidents.¹⁰⁸ Sexual harassment may be deliberate, unsolicited and coercive. Both male and female employees can either be the complainant or perpetrator.¹⁰⁹ Sexual harassment may also occur outside the workplace or outside working

¹⁰⁴ O Dupper, U Bhoola and C Garbers, *Understanding the Employment Equity Act* (2009) 71.

¹⁰⁵ 2005 Amended Code Item 5.3.

¹⁰⁶ S Ebobrah and A Tanoh, *Compendium of African Sub-Regional Human Rights Documents*. (2010).

¹⁰⁷ United Nations. UNHCR’s Policy on Harassment, Sexual Harassment, and Abuse of Authority (2005) http://www.un.org/womenwatch/osagi/UN_system_policies/policy_on_harassment.pdf. Accessed on 4 April 2016.

¹⁰⁸ Ibid.

¹⁰⁹ Ibid.

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

hours. For example, in a recent case of *Campbell Scientific Africa (Pty) Ltd v Simmers* (*Simmers' LAC case*)¹¹⁰ where a junior consultant, while on a survey in Botswana, was asked for sexual pleasures at night at a Lodge by a manager of the firms' Human Resources department, which was considered an extension of the workplace by the court.

It is important to note that sexual attention becomes sexual harassment if:

- (a) The behaviour is persisted in, although a single incident of harassment can constitute sexual harassment;
- (b) The recipient has made it clear that the behaviour is considered offensive; or
- (c) The perpetrator should have known that the behaviour is regarded as unacceptable.¹¹¹

The forms of sexual harassment illustrated in Item 5.3¹¹² are more or less the same as those discussed in item 4 of the 1998 Code.¹¹³ The difference is that the 1998 Code¹¹⁴ demonstrates that sexual harassment occurs only if the conduct is unwelcoming and is of a sexual nature while the 2005 Amended Code¹¹⁵ demonstrates that 'sexual harassment occurs when there is conduct of any unwelcome sexual advance; request for sexual favour; verbal or physical conduct or gesture of a sexual nature; or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another.

The study is of the view that the 1998 Code¹¹⁶ is still relevant and applicable to our legal system is dealing with the cases of sexual harassment at the workplace. The 2005 Code¹¹⁷ therefore does not replace the 1998 Code.¹¹⁸ However, the 2005 Code¹¹⁹ seeks to define sexual harassment broadly, provide for different forms of sexual harassment and tests that may be applied when dealing with sexual harassments issues regardless of the gender of the complainant versus the perpetrator. It places more responsibility onto the employer to put systems in place in order to eliminate and combat issues of sexual harassment at the workplace or extension of the workplace. It further increases the employers' liability for damages that arise as a result of sexual harassment caused by its employees to other

¹¹⁰ *Simmers v Campbell Scientific Africa (Pty) Ltd & Others* (2016), CA14/2014, 37 ILJ 116 (LAC) (2016) ILJ p 116.

¹¹¹ PEDUDA (n73).

¹¹² Act 55 of 1998.

¹¹³ 1998 Code, Item 4.

¹¹⁴ Ibid - Instances when sexual harassment occurs (n28).

¹¹⁵ 2005 Amended Code - Instances when sexual harassment occurs (n29).

¹¹⁶ 1998 Code.

¹¹⁷ 2005 Amended Code.

¹¹⁸ 1998 Code.

¹¹⁹ 2005 Amended Code.

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

employees and customers in the workplace. It attributes liability to the employer for their failure to act when a case of sexual harassment has been brought to their attention. The two Codes might have their similarities and differences but they both remain relevant to our legal system in the endeavor to eliminate and combat issues and cases of sexual harassment at the workplace or extension of the workplace.

This chapter has succeeded in defining sexual harassment in the workplace; evaluating different forms and appropriate tests for sexual harassment in different jurisdictions such as the United States of America and Canada and link them with the South African context in combatting and eliminating sexual harassment at the workplace or extension of the workplace.

CHAPTER 3

Employers' obligations to combat and eliminate sexual harassment at the workplace or extension of the workplace.

3.1 INTRODUCTION

The previous chapter defined and identified different tests used to identify sexual harassment at the workplace or extension of the workplace. Furthermore, the chapter evaluated different forms of sexual harassment at the workplaces or extension of the workplace. This chapter specifically deals with the obligations of employers in combatting and eliminating sexual harassment at the workplace or extension of the workplace. The chapter will evaluate the employers' obligations to combat and eliminate sexual harassment in the workplace. Different statutory enactments and mechanisms used to combat and eliminate sexual harassment will be assessed. These include amongst others: International Labour Organization (hereinafter referred to as the ILO);¹²⁰ the Constitution;¹²¹ the EEA;¹²² the LRA;¹²³ National Economic Development and Labour Council (hereinafter referred to as the NEDLAC);¹²⁴ 2005 Amended Code;¹²⁵ and the 1998 Code.¹²⁶ Furthermore, the chapter will critically analyse scholars' writings, case law and the existing legislative and policy guidelines regulating the employers' obligations.

3.2 INTERNATIONAL LAW

The ILO¹²⁷ has addressed sexual harassment in a range of instruments and during deliberations at tripartite conventions. Research and training¹²⁸ has also been conducted on the issue by the organisation and it has also furnished information and technical support to its constituents. The

¹²⁰ International Labour Organization (ILO), *Discrimination (Employment and Occupation) Convention, C111*, 25 June 1958.

¹²¹ The 1996 Constitution.

¹²² Act 55 of 1998.

¹²³ Section 187 of Act 66 of 1995.

¹²⁴ National Economic Development and Labour Council.

¹²⁵ 2005 Amended Code.

¹²⁶ 1998 Code.

¹²⁷ ILO *supra*.

¹²⁸ D McCann, 'Sexual harassment at work: National and international responses' (2005).

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

eradication of sexual harassment and violence at the workplace has been underscored as a crucial element in promoting decent work for women.¹²⁹ Various conventions prohibiting sexual harassment have been promulgated by the ILO¹³⁰ including the Discrimination (Employment and Occupation) Convention¹³¹ and the International Labour Conference Resolution.¹³² This resolution dealt with the equal opportunity and equal treatment for men and women in employment. According to the Resolution, the advancement of equality includes taking measures to combat and address sexual harassment in the workplace. In 1991, the International Labour Conference Resolution Concerning ILO Action for Women Workers¹³³ invited the Governing Body to request that the Office develop guidelines, training and information materials on issues of specific and major importance to women workers, including sexual harassment in the workplace. Subsequently, in 2003, the ILOs' Governing Body adopted the Code of Practice on Workplace Violence in Services Sectors and Measures¹³⁴ to combat and eliminate this phenomenon. It is a non-binding instrument which 'offers guidance in addressing workplace violence in the Services Sectors and measures and which makes specific reference to sexual harassment.

It is against this background that sexual harassment is regarded as a form of an unfair discrimination and a behaviour that is unwanted in the workplace as it violates the rights of others (complainants) to a free and fair working environment where the rights of the others including a right to human dignity is respected; protected and defended at all times. To this end, the position is clear that all employers are called upon to have clear policies and guidelines addressing issues of sexual harassment in their work place and to act expeditiously against the perpetrator when a case of sexual harassment has been brought to their attention. A failure to

¹²⁹ The elimination of sexual harassment and violence was identified as a priority gender issue in ILO: Decent work for women: An ILO proposal to accelerate the implementation of the Beijing Platform for Action (Geneva, March 2000), paper presented at the Symposium on Decent Work for Women; Women 2000: Gender equality, development and peace for the twenty-first century (New York, 5-9 June 2000).

¹³⁰ ILO (n37).

¹³¹ International Labour Organization (ILO), *Discrimination (Employment and Occupation) Convention, C111*, 25 June 1958.

¹³² 'Collective Agreement on the Prevention and Resolution of Harassment-related Grievances'. Available at <http://www.ilo.org/public/english/staffun/docs/harassment.htm> Accessed on 24 March 2016.

¹³³ International Labour Organisation 'International Labour Conference Resolution Concerning ILO Action for Women Workers' available at <http://www.ilo.org/public/english/bureau/leg/resolutions.htm>. Accessed on 24 March 2016.

¹³⁴ International Labour Organisation 'Code of practice on workplace violence in services sectors and measures to combat this phenomenon' October 2003. Available at http://www.ilo.org/wcmsp5/groups/public/@ed_protect/@protrav/@safework/documents/normativeinstrument/wcms_107705.pdf. Accessed on 24 March 2016.

do as mentioned, renders the employer vicariously or strictly liable for the conduct of their employees and customers towards other employees in cases of sexual harassment at the workplace.

3.3 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, 1996 (THE CONSTITUTION)

Section 8(1) of the Constitution¹³⁵ states that “the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of the duty imposed by the right.” To that extent, the source of employers’ duties and responsibilities to prevent sexual harassment in the workplace can be found in the Constitution. Furthermore, s 23¹³⁶ guarantees every employee the right to fair labour practices. Sections 9¹³⁷ and 10¹³⁸ guarantee the right to equality; dignity and integrity respectively and sexual harassment has an adverse impact on the dignity of the victim in particular. Section 11¹³⁹ guarantees the right to privacy which is compromised by sexual harassment. Section 9¹⁴⁰ is important because it guarantees the right to equality and not to be unfairly discriminated on the basis of gender and sex, amongst others. Sexual harassment in the workplace is generally deplored, destructive of working relationships and unlawful.¹⁴¹ This raises questions about the role of employers.

In the case of *NK v Minister of Safety and Security*¹⁴² the learned Judge, O’Regan, stated that the principles of vicarious liability and their application needs to be developed to accord more fully with the spirit, purport and objects of the Constitution.

The aforesaid Constitutional Court decision confirms that sexual harassment and the employers’ failure to adequately address cases of sexual harassment in their working

¹³⁵ The 1996 Constitution.

¹³⁶ Ibid.

¹³⁷ Ibid.

¹³⁸ Ibid.

¹³⁹ Ibid.

¹⁴⁰ Ibid.

¹⁴¹ *Supra* (n1), pp 183.

¹⁴² *NK v Minister of Safety and Security* 2005 (6) SA 419 (CC) para 23.

environment or extension of their workplace go against the spirit and objects of the provisions of s 23(1) of the Constitution.¹⁴³

It further confirms that the scourge of sexual harassment cases and the employers' failure to deal with them will undoubtedly lead to the employer being held vicariously liable for the wrongful acts of their employees and for their failure to provide a safe working environment or extension of the workplace free of sexual harassment.

In that regard, the Constitutional Court endorsed the constitutional¹⁴⁴ supremacy and the principles as envisaged in different pieces of legislation such as the EEA¹⁴⁵ that, sexual harassment is indeed a constitutional threat that must be rejected with contempt, combated and eliminated expeditiously in an a manner that is not effective and efficient but that is seen to be effective and efficient at all times.

3.4 THE EMPLOYMENT EQUITY ACT (EEA)

Section 60 of the EEA¹⁴⁶ imposes an obligation on the employer, after becoming aware of sexual harassment in the workplace, to consult all the relevant parties and take the necessary steps to eradicate the conduct. Moreover, the role of employer is, among other important responsibilities, to provide a working environment that is free of any dangers to the employees and that includes an environment that is free of sexual harassment incidents or cases thus to ensure both the safety of the employees and a conducive working environment for effective and productive delivery of services rendered. In this regard, the role of the employer is crucial because the employer controls the workplace and sexual harassment cannot be combated effectively unless the employer takes the necessary action in cases of sexual harassment in the workplace.¹⁴⁷ In terms of the EEA¹⁴⁸ sexual harassment is a form of discrimination which goes against the spirit and object of the provisions of s 9 of the Constitution.¹⁴⁹ In recent years, the law has increasingly recognised the employer's responsibility in this regard. In terms of South

¹⁴³ The 1996 Constitution.

¹⁴⁴ The 1996 Constitution - as the supreme law of the land.

¹⁴⁵ Act 55 of 1998 (n12).

¹⁴⁶ Ibid.

¹⁴⁷ Du Toit (n1), pp 200.

¹⁴⁸ Act 55 of 1998.

¹⁴⁹ Ibid.

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

Africa law, employers' liability for wrongful conduct by their employees has been extended expressly to include liability for acts of sexual harassment by their employees.¹⁵⁰ The aim is to encourage employers to be more vigorous in discouraging sexual harassment.¹⁵¹

Section 203 of the LRA¹⁵² states that NEDLAC¹⁵³ may prepare and issue Codes of Good Practice. The provision further requires any person applying or interpreting the Act to consider the relevant Code of Good Practice which is applicable in the circumstances. In 1998, NEDLAC¹⁵⁴ published the 1998 Code¹⁵⁵ pursuant to s 203(2) of the LRA.¹⁵⁶ Before the 1998 Code¹⁵⁷ there were no clear guidelines on how to deal with sexual harassment cases. The 1998 Code¹⁵⁸ 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.¹⁵⁹ However, the 1998 Code¹⁶⁰ has been criticised because it did not seem to grasp the discriminatory nature of sexual harassment. The 2005 Amended Code¹⁶¹ has also been used to further support the 1998 Code¹⁶² on the handling of sexual harassment cases in the workplace which means therefore that the 1998 Code¹⁶³ is still applicable and relevant to handling the cases of sexual harassment in the workplace. Although the 2005 Amended Code¹⁶⁴ is not binding law, s 3 of the EEA¹⁶⁵ provides that it must be taken into account when interpreting the EEA.

This dissertation argues that the employers' fundamental responsibility is to create and maintain a working environment in which the dignity of employees is respected.¹⁶⁶ This includes adopting a sexual harassment policy as well as clearly defined procedures for reporting

¹⁵⁰ Du Toit (n1), pp 185.

¹⁵¹ Du Toit (n1), pp 189.

¹⁵² Section 203 Act 66 of 1995.

¹⁵³ NEDLAC (n120).

¹⁵⁴ Ibid.

¹⁵⁵ 1998 Code.

¹⁵⁶ Act 66 of 1995.

¹⁵⁷ Ibid.

¹⁵⁸ Ibid.

¹⁵⁹ A Mukheibir and L Ristow 'An overview of sexual harassment: Liability of the employer' 2006 (26) *Obiter* 256.

¹⁶⁰ 1998 Code.

¹⁶¹ 2005 Amended Code.

¹⁶² Ibid.

¹⁶³ Ibid.

¹⁶⁴ Ibid.

¹⁶⁵ Act 55 of 1998 *supra*.

¹⁶⁶ Du Toit (n1), pp 190.

and dealing with complaints of sexual harassment in the workplace.¹⁶⁷ Employers must adopt a policy on sexual harassment and communicate it to all employees and ensure that it is adhered to at all times. If an incident of sexual harassment takes place, the procedure and disciplinary process prescribed in the policy must be enforced.¹⁶⁸

It terms of the common law, an employer has a duty to provide its employees with a safe and healthy working environment.¹⁶⁹ A breach of this duty, if it results in harm, may lead to an action based on delict against the employer. It is possible that failure to provide a safe working environment, free of sexual harassment, 'could lead to termination of the employment contract by the employee and a claim for constructive dismissal'.¹⁷⁰ An employee can sue the employer directly for failing to provide a safe working environment in which the dignity of employees is respected. Alternatively, a claim against the employer may be based on the concept of vicarious liability where the employer is held liable for the wrongful acts committed in the course and scope of the employees' employment.¹⁷¹

In the *Media 24 and another v Grobler* case (*Media 24 case*),¹⁷² this is an appeal by both the first appellant (the employer) and the second appellant (alleged sexually harassing employee / trainee manager) against the decision of the court a quo (Cape High Court) where they were held jointly and severally liable to pay to the respondent a total amount of R776 814. This was the figure at which the trial court quantified the damages which she had suffered as a result of sexual harassment to which it held she had been subjected over a period of approximately five months by the second appellant and for which it held that the first appellant was vicariously liable.

The Supreme Court of Appeal had to determine whether the second appellant was indeed guilty of committing an act of sexual harassment against the respondent and thereby being liable for the damages claimed by the respondent. Also to determine whether the first appellant was vicariously liable for the wrongful acts occasioned by their employee (second appellant) as his employer (first appellant) and whether they had negligently breached their legal duty to create and maintain a working environment free of not only the physical harm of their employees but

¹⁶⁷ Act 55 of 1998 - Section 60(3).

¹⁶⁸ Ibid.

¹⁶⁹ Smit and V Du Plessis 'Sexual harassment in the education sector'. (2011) 14(6) *PER / PELJ*.

¹⁷⁰ Ibid.

¹⁷¹ Ibid.

¹⁷² *Media 24 v Grobler* 2005 6 SA 328 (SCA).

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

also free of psychological harm which includes an environment free of sexual harassment of the employees while at the workplace or extension of the workplace.¹⁷³

The court found the employer liable, not on the basis of vicarious liability but instead for violating its common law duty of providing a safe working environment towards their employees while at the workplace. In this regard, the court applied the direct liability which is primarily based on the common law legal duty that the employer owes to their employees to take reasonable care of their safety.¹⁷⁴ According to this test as was laid down by the court in *Minister van Polisie v Ewels*,¹⁷⁵ in order to determine the wrongfulness of an act or omission, due regard must be given to the legal convictions of the community because sexual harassment is a serious matter that threatens the safety and security of the employees at the workplace and therefore it requires the employers' serious attention. The court reasoned that, for Van As (employers' management member) to whom the respondent had at a very early stage complained about the second appellant sexually harassing her, ought to have reported the matter to Werner Wager (the then chief manager of Tydskrifte) for further investigation but Van As failed to do so. Further, his refusal to believe that the second appellant was indeed harassing the respondent rendered the employer liable for a negligent breach of their legal duty to protect their employees while at the workplace not only against physical harm suffered but also against the psychological harm that includes sexual harassment of their employees either by their fellow colleagues; superiors or employers' clients while at the workplace.¹⁷⁶

The court said that, in the circumstances, Van As' failure to deal with the matter when the respondent reported it to him was culpable. He was in a managerial position and Tydskrifte, his employer, was clearly vicariously liable for his failure to act in this regard.¹⁷⁷ The court further indicated that, if Van As had acted earlier when the matter was reported to him by the respondent, the court was of the view and satisfied that, Wager should (and on the probabilities would) at least have informed the second appellant that his conduct *vis-à-vis* the respondent had not gone unnoticed and have warned him that, if such conduct persisted, not only his ambition of rising to a senior managerial position in the company would come to nought but there was a very real danger of him being dismissed.¹⁷⁸ The court said it was indeed satisfied

¹⁷³ Ibid.

¹⁷⁴ Ibid.

¹⁷⁵ *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A-B.

¹⁷⁶ *Media 24 v Grobler* 2005 6 SA 328 (SCA).

¹⁷⁷ *Media 24* supra para 71.

¹⁷⁸ *Media 24* supra para 72.

that the respondent had succeeded in proving that the employers' negligent breach of legal duty to provide a safe working environment free of sexual harassment of their employees while at the workplace. Further, the court found that the psychological disorder from which the respondent has been suffering was ultimately contracted because of the harassment which occurred during the flat incident though the incident happened outside the course and scope of her employment with the first appellant.¹⁷⁹

The court held the employer had failed to provide the victim with a work environment safe from sexual harassment.¹⁸⁰ The court concluded and ordered that the appeals of both appellants must fail and dismissed with costs. To this end, the decision of the court a quo was upheld and both the first and second appellants were held jointly and severally liable for the damages claimed by the respondent.¹⁸¹

In the *Piliso* case,¹⁸² the judge concluded that the employer was liable to pay constitutional damages to the employee for a violation of her constitutional right to fair labour practices. The employer did not provide a safe and healthy working environment to the employee who was sexually harassed by a non-employee.

3.4.1 Remedies of the complainant of sexual harassment in terms of South African labour law

South African labour law provides employees who are subjected to sexual harassment with various remedies in terms of the constitution, common law, and the statutes. The victims of sexual harassment have different remedies in terms of the common law and statute.¹⁸³ In terms of the common law, the employer can be liable if it negligently fails to protect its employees from workplace sexual harassment on two accounts. Firstly, through vicarious liability¹⁸⁴ and secondly, the breach of the duty to provide and to maintain a working environment safe from physical and psychological hazards including sexual harassment. In terms of the statutory provisions, an employee who is a victim to sexual harassment has three possible claims against

¹⁷⁹ *Media 24* supra para 77.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.*

¹⁸² *Piliso* supra.

¹⁸³ MA Chicktay, 'Sexual harassment and employer liability: A critical analysis of the South African legal position'. (2010) 54 *Journal of African Law*, pp 290.

¹⁸⁴ *Grobler* supra.

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

the employer one in terms of the EEA¹⁸⁵ and two in terms of LRA,¹⁸⁶ which will be discussed hereunder:

(a) *Failure to comply with the Employment Equity Act*

The EEA¹⁸⁷ provides significant protection to victims of sexual harassment. It expressly obliges the employer to take measures to prevent sexual harassment in the workplace.¹⁸⁸ Section 6(3)¹⁸⁹ stipulates that, sexual harassment of an employee is a form of unfair discrimination and is prohibited at the workplace. The employee may resign and claim constructive dismissal if their resignation was a result of sexual harassment where the employer had failed to deal or adequately deal with a complaint of sexual harassment brought to their attention by their employees who have been sexually harassed while at the workplace or extension of the workplace. This was the case in *Media 24* case¹⁹⁰ where an employee resigned due to the employers' failure to deal with her complaint of sexual harassment against her supervisor. Alternatively, they may claim that the employer breached their legal duty to provide a safe working environment free of sexual harassment.

(b) *Automatically unfair dismissal in terms of the Labour Relations Act*

Section 187 of the LRA¹⁹¹ has a list of categories of automatically unfair dismissals. Included in this list under s 187(1) (f)¹⁹² is a dismissal where the employer, 'unfairly treats an employee, directly or indirectly, on any arbitrary ground, including ... sex. In the case of *Christian v Colliers Properties*¹⁹³ where it was held that the applicant, a 23 year old female and an employee of the Colliers Properties was asked for sexual favours by the respondent, Mr Collier who had also kissed her on the neck after making numerous sexual gestures that were rejected by the applicant. The applicant later came back to the respondents' office to voice and discuss her displeasure about the respondents' unwanted sexual behaviour. However, the respondent never showed any sympathy, instead he asked, among other things if she was in or out. The

¹⁸⁵ Act 55 of 1998.

¹⁸⁶ Act 66 of 1995.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ *Media 24 v Grobler* 2005 6 SA 328 (SCA).

¹⁹¹ Act 66 of 1995.

¹⁹² Ibid.

¹⁹³ *Christian v Colliers Properties* (2005) 26 ILJ 234 (CC).

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

applicant felt the question was referring to whether or not she was subscribing to the respondents' sexual advances. The applicant answered by saying she was out meaning she was not agreeing to the sexual advances made to her by the respondent. It is common cause that later on the day of the incident, Mr Colliers' dismissed the applicant paying her for the two days worked and cited the reason that 'other secretaries had been reporting on the work that she had been doing and that it was clear to him that she was not fit for the job.

The applicant sued the respondent for damages for an automatic unfair dismissal in terms of s 187(1) (f) of the LRA as amended. She claimed that she was dismissed in the circumstances amounting to sexual harassment. She prayed for an order for compensation in terms of s 194 of the LRA as well as order for payment of damages in terms s 50(1) (e) of the EEA.

The court held that there had been no complaints about the applicants' performance in the days preceding her dismissal. The raising of the complaint after she had indicated that she was not prepared to make herself sexually available to Mr Collier, make it implausible that the concerns he raised about her suitability for the job were genuine ones. She was only dismissed because she was not prepared to accept Mr Colliers' advances.

Accordingly, the court ordered the respondent to pay the applicant:

- The full 24 months' compensation (R48 000.00) in terms of s 194(3) of the LRA, and
- The sum of R10 000.00 in terms of section 50(1) (e) of the EEA.

(c) *Unfair labour practices under the Labour Relations Act*

According to s 186 (1) of the LRA,¹⁹⁴ an employee who terminates a contract of employment with or without notice because the employer made continued employment intolerable for the employee. The employer in that regard would have unfairly dismissed the employee by their unfair labour practice in failing to make working conditions tolerable for effecting working free of sexual harassment at their workplace places or extension of the workplace leading to termination of contract of employment. In this regard, the employer would have failed discharge their legal duty to ensure that working environment free of physical and psychological harm including sexual harassment prevails at their work or employment places. In addition to the protection given to employees under the LRA,¹⁹⁵ an employee is also given

¹⁹⁴ Act 66 of 1995.

¹⁹⁵ Ibid.

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

employee could have successfully made out their case that their resignation amounts to the constructive dismissal. In turn thereof, it would be difficult for the employer to deny constructive dismissal as a reason leading to the employee terminating their contract of employment.

In *Pretoria Society for the Care of the Retarded v Loots*,²⁰² the court formulated the test for establishing a constructive dismissal in the following terms:

‘...when an employee resigns or terminates the contract as a result of constructive dismissal such employee is in fact indicating that the situation has become so unbearable that the employee cannot fulfil what is the employee’s most important function, namely to work...’

The court referred to *Jooste v Transnet Ltd t/a SA Airways*²⁰³ stating that the first test whether, when resigning, there was no other motive for the resignation – in other words the employee would have continued the employment relationship indefinitely had it not been for the employers’ unacceptable conduct.

The court further stated that when any employee resigns and claims constructive dismissal, he or she is in fact stating that under the intolerable situation created by the employer, he or she can no longer continue to work, and has construed that the employers’ behaviour amounts to a repudiation of the employment contract. As a result of the employers’ repudiation, the employee terminates the contract.

Accordingly, the court unequivocally found that the appellant (employer) had rendered the working environment intolerable for the respondent (employee) by, among other things, throwing the book at her; finding her guilty of matters for which she could not be held responsible; humiliating her by publishing the news of her final written warning to the parents of inmates; and depriving her of keys. Consequently, the appeal against the findings by the court a quo that the constructive dismissal was proved was dismissed.

Section 193 of the LRA²⁰⁴ provides a wide range of remedies for unfair dismissal and unfair labour practice. The remedies include the compensation to the employee who resigned due to the constructive dismissal created by the employers’ failure to provide safe working environment free from physical and psychological hazards including sexual harassment.

²⁰² *Pretoria Society for the Care of the Retarded v Loots* [1997] 6 BLLR 721 (LAC) para 9.

²⁰³ *Jooste v Transnet Ltd t/a SA Airways* (1995) 16 ILJ 629 (LAC).

²⁰⁴ Act 66 of 1995 – providing remedies for unfair dismissal and labour practices.

The constitutional test for determining whether unfair discrimination has occurred was set out in the case of *Harksen v Lane No*²⁷³ where the court held that ‘the determination of unfair discrimination involves a three-pronged enquiry. Firstly, the court has to determine if the provision or conduct differentiates between people or categories of people. After making such a determination, the court then has to decide if such differentiation amounts to unfair discrimination. If the court finds that it does, an enquiry as to whether the discrimination is justifiable in light of s 36(1) of the Constitution²⁷⁴ will be conducted in order for the court to give effect to the limitation clause which is based on the notion of a general application as envisaged in s 36 of the Constitution.²⁷⁵

4.3.1.2 The Labour Relations Act (“the LRA”)

An employer may be held liable for sexual harassment through the lens of unfair labour practices and unfair dismissals as envisaged in the provisions of the LRA.²⁷⁶

(a) Unfair dismissal

Section 187 of the LRA²⁷⁷ lists various reasons for dismissal that constitute automatically unfair dismissals. However, sexual harassment is not listed under s 187(1) (f)²⁷⁸ which lists various grounds of unfair discrimination that constitute unfair dismissals. Nonetheless, Lawlor²⁷⁹ argues that even if sexual harassment is not listed as a ground for unfair discrimination, it is listed in the EEA,²⁸⁰ and it follows that where an employer dismisses an employee on the basis of sexual harassment, it is an automatically unfair dismissal. This approach was also adopted by the court in the case of *Christian v Collier Properties*²⁸¹ wherein the court expressly concluded that sexual harassment constituted an automatically unfair dismissal and therefore the victim was entitled to compensation pursuant to s 194(3) of the

²⁷³ *Harksen v Lane NO and Others* 1998 (1) SA 300 (CC) para 56.

²⁷⁴ *Ibid.*

²⁷⁵ *Ibid.*

²⁷⁶ Act 66 of 1995.

²⁷⁷ *Ibid.*

²⁷⁸ *Ibid.*

²⁷⁹ Lawlor (n259).

²⁸⁰ Act 55 of 1998.

²⁸¹ 2005 (86) SA 56 (LC).

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

LRA²⁸² According to Le Roux *et al*,²⁸³ sexual harassment in cases of dismissal arises in two ways. The harassing employee may be dismissed for misconduct or the victim may unilaterally resign citing the employers' failure to resolve the sexual harassment. The latter constitutes constructive dismissal.

(b) Constructive dismissal

Constructive dismissal occurs where an employee resigns with or without a notice or leaves employment due to unfair pressure; unreasonable instruction; or unbearable conduct on the part of the employer.²⁸⁴ According to Le Roux,²⁸⁵ in order for an employee to succeed in his or her claim, they have to prove that they terminated the contract of employment service because the conduct of the employer made the employment intolerable and that all reasonable options short of termination had been unsuccessful.

In the case of *Intertech Systems (Pty) Ltd v Sowter*²⁸⁶ the respondent resigned from her job citing sexual harassment by a fellow employee as the reason. The cause of action arose from a tripartite agreement between the employer, the respondent and the fellow employee (the alleged harasser) who sexually harassed the respondent. According to the agreement, Herder, the employee who was accused of the sexual harassment, undertook to resign from his position. However, this agreement proved to be a sham as Herder continued to work for the employer. Moreover, he was ordered to investigate the respondent for security breaches. The court held that 'the side-lining of the respondent and the continued solicitation of the victim by the harasser which led to her resignation amounted to constructive dismissal'.²⁸⁷

(c) Unfair labour practice

An unfair labour practice is, amongst other things an unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee.²⁸⁸ According to Le Roux *et al*,²⁸⁹ this means that an employee who alleges that he or she has been unfairly suspended or disciplined in any other way short of dismissal arising from disciplinary

²⁸² Act 66 of 1995.

²⁸³ Le Roux (n77), p 22.

²⁸⁴ CCMA Info Sheet: Constructive Dismissal 2002.

²⁸⁵ Le Roux (n77).

²⁸⁶ *Intertech. Systems [Pty] Limited v Sowter* (1997) 18 ILJ 689 (LAC).

²⁸⁷ Ibid.

²⁸⁸ Act 66 of 1995 - section 186(2) (b).

²⁸⁹ Le Roux (n77), p 24.

proceedings concerning sexual harassment will be entitled to approach the CCMA or bargaining council on the grounds of unfair labour practices. The researcher is of the view that this is relevant to the victim because some victims may find themselves unfairly charged and suspended for the mere fact that they have reported the cases of sexual harassment either against their fellow colleagues, supervisors or clients of the employer, while at the workplace. The employer, in trying to silence or intimidate the alleged victim, may decide not to attend to the reported alleged sexual harassment incident but rather to discriminate against the alleged victim through unfair suspension or disciplinary proceedings against the victim as a way of silencing them.

4.3.1.3 The Promotion of Equality and Prevention of Unfair Discrimination Act (“the PEPUDA”)

The objective of PEPUDA²⁹⁰ is to give effect to s 9 of the Constitution.²⁹¹ PEPUDA aims to do so by, among other things, preventing unfair discrimination and protecting the rights to dignity and the right to equality.²⁹² Section 11 of the PEPUDA²⁹³ states that no person is allowed to subject another to harassment. Section 15²⁹⁴ further provides that it is not a prerequisite for the harassment to be unfair to constitute discrimination. PEPUDA²⁹⁵ defines harassment as:

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

- (a) sex; gender or sexual orientation; or
- (b) persons’ membership or presumed membership of a group identified by one or more of the prohibited grounds or a characteristic associated with such group.”

In that regard, an employee who has been sexually harassed can approach the courts in terms of the PEPUDA²⁹⁶ and seek relief. It should be noted, however, that the PEPUDA²⁹⁷ does not

²⁹⁰ Objects of the PEPUDA supra (n73).

²⁹¹ Ibid.

²⁹² Ibid.

²⁹³ Ibid.

²⁹⁴ Ibid.

²⁹⁵ Ibid.

²⁹⁶ Ibid.

²⁹⁷ Ibid.

apply to cases where the EEA²⁹⁸ applies because the EEA²⁹⁹ is the primary legislation which regulates sexual harassment in the workplace.

4.3.1.4 The Employment Equity Act ("the EEA")

Section 2 of the EEA³⁰⁰ states that 'the objective of the Act is to promote equal opportunity and fair treatment in the workplace by eliminating all forms of unfair discrimination.' Section 5³⁰¹ imposes an obligation on the employer to take steps to achieve the objectives of the EEA³⁰² in the implementation of both practice and policy. Section 6(1)³⁰³ lists various grounds of unfair discrimination, including sex and gender. Furthermore, s 6(3)³⁰⁴ provides that harassment of an employee also constitutes a form of unfair discrimination and is therefore prohibited.

The argument that sexual harassment constitutes unfair discrimination on the grounds of sex and gender is supported by Cooper. She states that sexual harassment constitutes discrimination on the grounds of sex and gender is premised on the realisation that the conduct which constitutes sexual harassment on the victim mainly arises because of the sex or the gender of the victim. Furthermore, such conduct is detrimental on the ground of sex or gender because it acts as an arbitrary restriction on the victim's ability to do his or her job; violates the victims' right to human dignity and in that regard, there is a limitation on the victim's right to equality.³⁰⁵ However, the ambit of the application of the EEA³⁰⁶ is limited by the restriction that the EEA³⁰⁷ applies only when the employer has harassed one of his or her employees except where liability is imputed on the employer in terms of s 60.³⁰⁸ Section 60 provides that 'if an employee, while at work, engages in conduct that violates the provisions of the EEA,³⁰⁹ such conduct should be brought to the attention of the employer.

²⁹⁸ Act 55 of 1998 - Section 5(3).

²⁹⁹ Ibid.

³⁰⁰ Ibid.

³⁰¹ Ibid.

³⁰² Ibid.

³⁰³ Ibid.

³⁰⁴ Ibid.

³⁰⁵ C Cooper, "Harassment on the basis of sex and gender: A form of unfair discrimination" 2002 *ILJ* 1

³⁰⁶ Act 55 of 1998.

³⁰⁷ Ibid.

³⁰⁸ Le Roux (n77), p 94.

³⁰⁹ Act 55 of 1998.

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

The employer must, in turn, after extensive consultation with interested parties, take the necessary steps to ensure compliance with the EEA by eliminating the conduct.³¹⁰ Failure to do so, would result in the liability arising from the conduct to be imputed on the employer.³¹¹ The rationale behind this is to ensure that the employer adopts the necessary measures to prevent sexual harassment in the workplace.³¹² According to Le Roux³¹³ s 60³¹⁴ applies only when the infraction occurs when the employee is at work. In that regard, sexual harassment is prohibited by the EEA,³¹⁵ therefore if it occurs at work and the employer does not follow the demands of the EEA, the employer will be held liable on the basis of vicarious liability emanating from their failure to act as required by the EEA.³¹⁶ Le Roux³¹⁷ draws a distinction between the EEA which requires the infringement of the EEA to occur at work and the common law vicarious liability which demands that the employee must have acted within the course and scope of his or her employment.

The researcher is of the view that this distinction is important because in terms of the EEA,³¹⁸ the sexual harassment infringement must have occurred at the workplace, which means therefore that if an employee has been harassed by another employee or the customer of their employer outside the workplace, the victim may not use the EEA to hold the harasser liable for their conduct or the employer on the basis of vicarious liability for their failure to follow the demands of the EEA.³¹⁹

The research shows that in recent years, both in South Africa and in other jurisdiction, there has been an improvement in the understanding of and the dealing with the scourge and the serious effects of sexual harassment in the workplace or extension of the workplace, and that sexual harassment is a serious misconduct that could result in dismissal. In *Gaga v Anglo-Platinum Ltd & Others*,³²⁰ the court stated that by and large, employers are entitled to regard

³¹⁰ Ibid - Section 60(2).

³¹¹ Ibid - Section 60(3).

³¹² Lawlor (n259) mp 12.

³¹³ Le Roux (n77), p 95.

³¹⁴ Act 55 of 1998.

³¹⁵ Ibid.

³¹⁶ Ibid.

³¹⁷ Le Roux (n77).

³¹⁸ Act 55 of 1998.

³¹⁹ Ibid.

³²⁰ *Gaga v Anglo-Platinum Ltd and Others* (2012) 33 ILJ 329 (LAC) para 48.

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

sexual harassment by an older superior on a younger subordinate as serious misconduct, normally justifying dismissal.

Campbell Scientific Africa (Pty) Ltd v Simmers and Others (Simmers' LAC case),³²¹ Savage AJA said:

"Our constitutional democracy is founded on the explicit values of human dignity and the achievement of equality in a non-racial, non-sexist society under the rule of law. Central to the transformative mission of our Constitution is the hope that it will have us re-imagine power relations within society so as to achieve substantive equality, more so for those who were disadvantaged by past unfair discrimination."

The court in this case emphasised that sexual harassment is considered serious misconduct which is a dismissible offence, even where there was no physical element, the conduct was not persistent, the complainant was not an employee and where the conduct took place after working hours at a dinner outside of the borders of South Africa. The court found that the conduct of Mr Simmers to Markides constituted sexual harassment which justified dismissal.³²² Further the court noted that the misconduct occurred within the context of a work related social event and that the parties would not have been present there (a Lodge in Botswana) together had it not been for Simmers' employment.³²³ Therefore the incident was not unrelated to his employment.³²⁴ The decision of the LAC in this regard, means that places outside the workplace may be regarded as extensions of the workplace. This is significant in that it qualifies that the employer might be held vicariously liable for the wrongful acts of their employees should they be notified but fail to act against an act of sexual harassment that has taken place at their workplaces or extension of their workplace. And for their failure to provide a safe working environment or extension of the workplace free of sexual harassment.

The complainant may use the other pieces of legislation such as the PEPUDA³²⁵ and the Constitution³²⁶ to hold either the harasser or the employer or both liable for the actual act of sexual harassment and the failure to follow the demands of the EEA³²⁷ respectively. On the other hand, the common law requires that the employee (harasser) must have acted in the course

³²¹ *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) para 18.

³²² *Simmers* supra para 18.

³²³ *Simmers* supra para 21.

³²⁴ *Simmers* supra para 26.

³²⁵ PEPUDA.

³²⁶ The 1996 Constitution.

³²⁷ Act 55 of 1998.

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

and scope of their employment. This is interesting on the basis that, if one takes the literal meaning of the phrases 'acting in the course and scope of employment,' this would translate into the fact that if the harasser committed an act of sexual harassment while outside their normal working station where they do their day to day duties, the victim may not, in terms of the common law, lay a charge of sexual harassment within the relevant office of the employer against the harasser, because the alleged sexual harassment would have been viewed as if it did not happen, while the harasser was in the course and scope of their employment. In that regard, the employer would not be held vicariously liable for the actions of their employees.

However, recent developments in our legal system proves that the employer may indeed be held vicariously liable for the actions of their employees that occur outside the working environment or working hours. In the case of *P.E. v Ikhwezi Municipality and Another (Ikhwezi case)*³²⁸ the court dealt with an action for damages based on the employers' vicarious liability. In this case the plaintiff, P. E., an adult female of Jansenville, claimed damages in the sum of R4 028 416, 80 jointly and severally from the first defendant, Ikwezi Municipality, and the second defendant, Xola Vincent Jack. This arose out of an alleged sexual assault committed upon her by the second defendant during the course of his duties with the first defendant at the offices of first defendant in Jansenville on Monday 16 November 2009.

The learned Judge,³²⁹ said that the second defendant, as Corporate Services Manager, was in a position of authority over the plaintiff and was her immediate superior. She trusted him implicitly. She was obliged, by virtue of her position as archives clerk, not only to report to him but also to work with him closely, at times after hours when they were alone at the offices. It was because of the nature of their employment relationship that the opportunity presented itself to the second defendant, in the course of carrying out his duties during his hours of work at his employers' facilities, to abuse his authority and to take advantage of the vulnerability of the plaintiff.

The judge further said that the first defendant placed the second defendant in the situation where he was able to act as he did. First defendant gave him the authority to control the

³²⁸ *P.E. v Ikhwezi Municipality and Another* [2016] 2 All SA 869.

³²⁹ *Ikhwezi* supra para 76.

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

conditions under which the plaintiff, as his subordinate did her daily work. This employment relationship facilitated his actions.³³⁰

Leading to the conclusion on employers' liability based on vicarious liability, the learned Judge, said:³³¹

"So too, in my view, in cases involving sexual harassment. Section 12 of Schedule 2 to the Local Government: Municipal Systems Act 32 of 2000³³² provides: "a staff member of a municipality may not embark on any actions amounting to sexual harassment."

The judge further said that it was common cause that there is also in place a Code of Good Practice on Sexual Harassment.³³³ There was certainly no evidence in this case that the first defendant had provided any training to its employees with regard to sexual harassment and its dire consequences thereof. It would have been reasonably foreseeable to the second defendant that there would be occasions when he would meet the plaintiff at the Jansenville offices and that the plaintiff would be further traumatised thereby.³³⁴

Accordingly, the court concluded and ordered that the first and second defendants are jointly and severally liable for such damages, as the plaintiff may prove she has suffered as a consequence of the sexual assault upon her on 16 November 2009 at the offices of the first defendant in Jansenville. The judge further held the defendants jointly and severally liable to pay the costs of the action on the merits, the one paying the other to be absolved.³³⁵

The approach by the South African courts as exemplified above is an indication that the legislature has enacted laws that are enforceable to deal with the scourge of sexual harassment. The courts have also proven that, they can, in terms of s 39 of the Constitution,³³⁶ successfully develop the common law where necessary when dealing with the cases of sexual harassment in order to promote the spirit, purport and objects of the Bill of Rights to curtail the cases of sexual harassment cases and its effects thereof.

³³⁰ *Ikhwezi* supra para 77.

³³¹ *Ikhwezi* supra para 79.

³³² Municipal Systems Act 32 of 2000.

³³³ 1998 Code and 2005 Amended Code.

³³⁴ *Ikhwezi* supra para 81.

³³⁵ *Ikhwezi* supra para 82.

³³⁶ The 1996 Constitution – Interpretation of the Bill of Rights.

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

It is in light of the above discussion and premise that, the employers must, in terms of the demands of the EEA,³³⁷ take an action against the harasser when a case of sexual harassment has been reported to them. The employers' failure to act thereof, would make them liable on the basis of vicarious liability. In *Ntsabo v Real Security CC (Ntsabo case)*,³³⁸ the applicant was a female employed as a security guard by the respondent company. She alleged that she had been sexually harassed on a regular basis and was subsequently sexually assaulted by her superior. The company failed to take action against the perpetrator after the victim had complained to the employer. The employee was then compelled to resign. The applicant sought compensation in terms of the EEA³³⁹ for patrimonial damages and non-patrimonial damages pursuant to the LRA³⁴⁰ in respect of her constructive dismissal by the company. The court, after finding that the employee had indeed been sexually harassed, went on to consider if the victim had indeed informed the employer of the alleged sexual harassment as required by s 60 of the EEA.³⁴¹ The court found that 'the failure of the victim to report the incident within a reasonable time did not constitute non-compliance because of the circumstances surrounding the case.'³⁴² The court further held that after the employee had reported the sexual harassment, the employer failed to take punitive and preventative measures as required by the EEA.³⁴³ In that regard, the employer had failed to prevent the further harassment of the employee.³⁴⁴ Due to the failure of the employer to do so, continued employment of the victim was rendered intolerable.

The court dismissed the employees' argument that her dismissal amounted to unfair discrimination pursuant to s 187(1) (f) of the LRA.³⁴⁵ However, the court 'considered the provisions of s 186(1) (e)³⁴⁶ and held that an employee may resign as a result of the employers' conduct which had made the continued employment relationship intolerable.'³⁴⁷ The court found that such conduct does not necessarily refer to proactive conduct by the employer but can also refer to an omission to deal with an intolerable situation as envisaged in s 186(1)(e) of

³³⁷ Ibid.

³³⁸ *Ntsabo v Real Security CC* (2003) 24 ILJ 2341 (LC).

³³⁹ Act 55 of 1998.

³⁴⁰ Act 66 of 1995.

³⁴¹ Ibid.

³⁴² *Ntsabo supra*, para 2374I.

³⁴³ *Ntsabo supra*, para 2375B.

³⁴⁴ *Ntsabo supra*, para 2376C.

³⁴⁵ Act 66 of 1995.

³⁴⁶ Ibid.

³⁴⁷ *Ntsabo supra*, para 2375H.

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

the LRA.³⁴⁸ The conduct of the employee (perpetrator) must be so intolerable that the employee cannot fulfil his or her most important function, that is, to work.³⁴⁹

In dealing with the requirements for constructive dismissal in the EEA,³⁵⁰ the court found that, in the particular circumstances, the employer had not done anything to remedy the situation after the respondent employee had notified it of the harassment. This led to the creation of an intolerable environment for the employee which necessitated the termination of her employment.³⁵¹ The failure by the respondent to rectify the situation was unfair and led to the working environment becoming intolerable for the applicant to continue with the employment relationship. Consequently, the employee (victim) was compelled to terminate her contract of employment. It was the duty of the respondent to foresee the development of the hostile and intolerable working environment. The respondent did not justify its approach and instead denied that it was informed of the problem. In that regard, the court³⁵² found that the respondent had been constructively dismissed in accordance with s 186(1) (e) of the LRA.³⁵³ The court discussed sexual harassment in terms of s 6 of the EEA³⁵⁴ and the 1998 Code³⁵⁵ and concluded that the conduct of the employees' superior fell within the ambit of the definition of sexual harassment in the EEA and the code.³⁵⁶ Furthermore, the court³⁵⁷ held that the failure of the employer (company) to redress the employee's complaint of sexual harassment constituted unfair discrimination based on sexual harassment as envisaged by s 6(3)³⁵⁸ read with s 6(1)³⁵⁹ of the EEA.

To interpret the discussion of the *Ntsabo* case, according to Mukheibir and Ristow,³⁶⁰

"The LRA is 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

³⁴⁸Act 66 of 1995.

³⁴⁹*Ntsabo* supra p 2375I.

³⁵⁰Act 55 of 1998.

³⁵¹*Ntsabo* supra p 2377.

³⁵²*Ibid.*

³⁵³Act 66 of 1995.

³⁵⁴*Ibid.*

³⁵⁵1998 Code.

³⁵⁶*Ntsabo* supra p 2378.

³⁵⁷*Ntsabo* supra p 2382.

³⁵⁸Act 55 of 1998 - Section 6(3).

³⁵⁹Section 6(1).

³⁶⁰Mukheibir and Ristow 'An overview of sexual harassment: Liability of the employer' 2006 (27) *Obiter* 246.

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

harassment constitutes a form of unfair discrimination. 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)."

The court in the *Ntsabo case*³⁶¹ 'dealt with the issue of constructive dismissal in the context of sexual harassment. The judgment of the court has been criticised for disregarding the victims' argument that her constructive dismissal amounted to unfair discrimination on the grounds of sexual harassment. The court should have taken cognisance of s 6(3) of the EEA,³⁶² which provides that harassment of an employee constitutes unfair discrimination. Furthermore, s 60(3) of the EEA³⁶³ also provides that an employer should be held liable if he or she violates a provision of the EEA.³⁶⁴ In that regard, Mukheibir and Ristow³⁶⁵ argue that due consideration should have been given to these provisions by the court in reaching its conclusion.

This is the approach adopted by the court in *Christian v Colliers Properties*.³⁶⁶ In that case, the applicant was employed as a secretary by the respondent. Whilst in the respondents' office, discussing her conditions of employment, the manager (respondent) closed his office door and kissed her on her neck. She rejected his advances and later returned to voice her discomfort. Due to her displeasure for such advances, the applicant was dismissed. The court held that the reason for the secretary's dismissal was that she was not willing to accept the managers' advances.³⁶⁷ The reasoning behind the finding of the court was that:

"there had been no complaints about her performance in the days preceding her dismissal, and the raising of the complaint after she had indicated that she was not prepared to make herself sexually available to Mr Collier, makes it implausible that the concerns he raised about her suitability for the job were genuine ones."³⁶⁸

In that regard, the court found that her dismissal was automatically unfair as envisaged by the LRA³⁶⁹ and granted her compensation pursuant to s 194 of the LRA.³⁷⁰

³⁶¹*Ntsabo* supra p 2378.

³⁶²Act 55 of 1998.

³⁶³*Ibid.*

³⁶⁴*Ibid.*

³⁶⁵Mukheibir and Ristow (n154).

³⁶⁶*Christian v Colliers Properties* (2005) 26 ILJ 234 (CC).

³⁶⁷*Christian* supra p 239D.

³⁶⁸*Ibid.*

³⁶⁹Act 66 of 1995.

³⁷⁰*Ibid.*

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

In the more recent *Ntsundu and Three Cities Inn on the Square (Pty) Ltd (Ntsundu case)*³⁷¹ the CCMA considered whether the defendant, by failing to provide a working environment free from sexual harassment, had made itself guilty of unfair discrimination. It was found that in order for the court to make such a finding, the employer would have had to have been aware of the sexual harassment and done nothing to address it.³⁷² However, in the circumstances, the CCMA found against the victim because even though the employee (complainant) had been sexually harassed, she did not take adequate steps to address her complaint to the management.³⁷³ The difference between this particular case and the *Ntsabo case*³⁷⁴ is that, in the present case, the employee fell short of s 60(1) of the EEA³⁷⁵ by failing to bring the alleged sexual harassment to the attention of the employer.

In the *Pillay v Old Mutual (Pty) Ltd case*,³⁷⁶ it was held that in order to find a claim for constructive dismissal, the employee had to establish that the sexual harassment had occurred and that the employer had failed or omitted to deal with that sexual harassment by remedying the situation and ensuring the risk to the employee was terminated. It was further held that the employee had failed to discharge this burden because in the circumstances, the employer had taken all reasonable steps to address the situation. The employer had not acted in an oppressive manner to such an extent that the employee had to resign. The CCMA concluded that there was no causal link between the conduct of the employer and the decision of the employee to resign. This case should be distinguished from the *Ntsabo case*³⁷⁷ because in the latter case, the employer failed to take reasonable steps to address the situation but in this case, the employer did indeed take reasonable steps as required by s 60(3) of the EEA.³⁷⁸

The *Ntsabo case*,³⁷⁹ should, however be commended for its application of s 60 of the EEA.³⁸⁰ The court held the employer is liable for the conduct of the employee based on its failure to eliminate the sexual harassment from the workplace and failure to take reasonable steps to guard

³⁷¹*Ntsundu and Three Cities Inn on the Square (Pty) Ltd* (2016) 37 ILJ 749 (CCMA).

³⁷²*Ntsundu supra* p 750E.

³⁷³*Ntsundu supra* p 750F.

³⁷⁴*Ntsabo supra*.

³⁷⁵Act 55 of 1998.

³⁷⁶*Pillay v Old Mutual Property (Pty) Ltd* (2015) 36 ILJ 1961 (CCMA).

³⁷⁷*Ibid*.

³⁷⁸Act 55 of 1998.

³⁷⁹*Ntsabo supra*.

³⁸⁰Act 55 of 1998.

against sexual harassment which ultimately creates a hostile and an uncondusive working environment.

4.3.2 Common law liability

According to Le Roux³⁸¹ the liability of an employer for sexual harassment is also regulated by the common law doctrine of vicarious liability. It is important to determine whether the EEA³⁸² hinders the victim from suing the employer in terms of the common law. Section 63 of the EEA³⁸³ expressly states that whenever a conflict arises between the provisions of the EEA,³⁸⁴ besides the Constitution³⁸⁵ or any Act amending the EEA,³⁸⁶ the EEA³⁸⁷ shall prevail. Le Roux³⁸⁸ is of the opinion that 63 of the EEA³⁸⁹ does not apply to the common law remedy of vicarious liability because the two bodies of law regulate different causes of action. Le Roux argues that the objective of vicarious liability is to redress unlawful conduct whereas the EEA³⁹⁰ aims to eliminate restrictions to equality in the workplace.³⁹¹ Furthermore, it is argued that s 49³⁹² which gives the Labour Court exclusive jurisdiction does not deprive the victim of the common law remedies.³⁹³ In that regard, it can therefore be concluded that s 60 of the EEA³⁹⁴ does not, in any way, deprive the employee (complainant) of his or her right to institute a common law delictual claim against the employer in terms of vicarious liability. South African laws and courts have decided that the employer may be vicariously liable for sexual harassment perpetrated by an employee on a co-employee or on a third party in the workplace.³⁹⁵ The notion of vicarious liability was confirmed by the Constitutional and the

³⁸¹Le Roux (n77), p 76.

³⁸²Act 55 of 1998.

³⁸³Ibid.

³⁸⁴Ibid.

³⁸⁵The 1996 Constitution.

³⁸⁶Act 55 of 1998.

³⁸⁷Ibid.

³⁸⁸Le Roux (n77), p 77.

³⁸⁹Act 55 of 1998 – Section 63.

³⁹⁰Ibid.

³⁹¹Le Roux (n77), p 77.

³⁹²Act 66 of 1996.

³⁹³Le Roux (n77), p 77.

³⁹⁴Act 55 of 1998 – Section 60.

³⁹⁵CN Nana 'Sexual harassment in the workplace in South Africa: The unlimited vicarious liability of employers? (2008) 52 (2) *Journal of African Law* 245.

Labour Appeal Courts in among other cases such as *Ntsabo*,³⁹⁶ *Grobler v Naspers Bpk en 'n Ander (Grobler case)*³⁹⁷ and *Intertech Systems (Pty) Ltd v Sowter*³⁹⁸ respectively.

4.3.3 Vicarious Liability

Vicarious liability holds the employer liable for a delict committed by his or her employee if the delict was committed in the course and scope of the employee's employment.³⁹⁹ This type of liability is not dependant on the existence of fault therefore it is strict liability.⁴⁰⁰ Accordingly, vicarious liability is an exception to the law of delict principle that fault is a prerequisite for delictual liability.⁴⁰¹ The rationale for extending liability for sexual harassment to employers is that employers play a vital role in the elimination and combating of sexual harassment in the workplace. The employer controls the workplace and therefore if the employer does not take necessary action, sexual harassment cannot be combated effectively. In that regard, holding employers vicariously liable would encourage employers to be more vigorous and effective in dealing with sexual harassment in the workplace.⁴⁰² Public policy further dictates that the rule is also justified on the basis that:

“...because the employer's work is done 'by the hand' of an employee, the employer creates a risk of harm to others should the employee proves to be negligent, inefficient or untrustworthy. The employer is therefore under a duty to ensure that no injury befalls others as a result of the employee's improper or negligent conduct in carrying on his or her work.”⁴⁰³

Unlike liability based on s 60 of the EEA,⁴⁰⁴ vicarious liability is not limited by the requirement that the complainant must be a co-employee.⁴⁰⁵

³⁹⁶ *Ntsabo* supra.

³⁹⁷ *Grobler* supra.

³⁹⁸ *Intertech Systems* supra.

³⁹⁹ J Neethling et al *Law of Delict* 6ed (2010) 365.

⁴⁰⁰ J Neethling et al *Law of Delict* 6ed (2010) 373.

⁴⁰¹ MM Botha & D Millard, 'The past, present and future of vicarious liability in South Africa' 2012 *De Jure* 227.

⁴⁰² Du Toit, (n1), p 183.

⁴⁰³ *Ess Kay Electronics Pte Ltd and Another v First National Bank of Southern Africa Ltd* 2001 (1) SA 1214 (SCA) para 8.

⁴⁰⁴ Act 55 of 1998.

⁴⁰⁵ Le Roux, (n77), p80.

4.3.3.1 Requirements of vicarious liability

In order to hold an employer vicariously liable for the conduct of an employee, the following requirements must be established:

- (a) “the perpetrator was an employee of the employer;
- (b) the perpetrator committed a delict against the plaintiff; and
- (c) while acting within the course and scope of his or her employment.”⁴⁰⁶

An employer-employee relationship

A valid employment relationship between the employer and the employee must be in existence. The LRA⁴⁰⁷ defines an employer as:

‘...any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and any other person who in any manner assists in carrying on conducting the business of an employer.’

Both the definition of the term employee in the LRA⁴⁰⁸ and the Basic Conditions of Employment Act (BCEA)⁴⁰⁹ expressly exclude independent contractors. The courts have grappled with the distinction between an independent contractor and an employee for different reasons.⁴¹⁰ According to Le Roux *et al*, the courts previously used to consider the extent of the employers’ control over the alleged employee as a test for determining the existence of an employment relationship. However, the courts have since preferred to adopt the dominant impression test.⁴¹¹ This test was outlined in the case of *Stein v Rising Tide Productions*.⁴¹² The dominant impression test requires a consideration of various factors. The court opined that, the right of control is not a prerequisite for the existence of an employment relationship, but it is merely one of a number of indicia. The court identified other various factors that could be useful in determining the existence of an employment relationship, ‘including the nature of the work; the manner of payment; the relative dependence of the employee in the performance of his or her duties and whether the employee was precluded from working for another employer.’⁴¹³ In *Midway Two Engineering & Construction Services v Transnet Bpk*⁴¹⁴ the court

⁴⁰⁶Neethling et al *Law of Delict* 6ed (2010) 373.

⁴⁰⁷Act 66 of 1995 – section 1- defining an employee.

⁴⁰⁸Ibid.

⁴⁰⁹Basic Conditions of Employment Act 75 of 1997.

⁴¹⁰Le Roux, (n77), p 81.

⁴¹¹Ibid.

⁴¹²*Stein v Rising Tide Productions* (2002) 23 ILJ (C).

⁴¹³*Stein* supra p 2017B-E.

⁴¹⁴*Midway Two Engineering & Construction Services v Transnet Bpk* 1998 (3) SA 17 (SCA).

dismissed the control test as being simplistic and obsolete.⁴¹⁵ The court suggested a multifaceted approach that considered all relevant factors in order to determine whether there is an employer-employee relationship.⁴¹⁶ The following are some of the relevant factors or questions to consider:

(a) Did the employee commit a delict?

This requirement requires all the elements of a delict to be fulfilled by the employee. These are: an act; wrongfulness; fault; harm and causation. If any of these requirements are not satisfied, no delict arises and therefore the employer will not be held liable on the grounds of vicarious liability.

(b) If the delict occurred, was it committed within the course and scope of employment?

According to Le Roux, the existence of an employment relationship is not sufficient to impute vicarious liability on the employer. Policy considerations dictate that an employer should be held liable for the risk of harm created by its operations to others. In that regard, the harm should be related to the risk and therefore the requirement that the employee must commit the delict within the course and scope of employment is vital.⁴¹⁷ The determination of whether or not an employee acted within the scope of his employment has proven to be problematic over the years.⁴¹⁸ Various tests have been formulated in order to determine whether a delict committed by an employee was committed within the course and scope of his employment.

4.3.3.2 Rationale for vicarious liability of employer of sexual harassment

One of the primary difficulties in holding an employer vicariously liable for sexual harassment by its employee, is the fact that employees who commit sexual harassment often act in their own capacity and not within the course and scope of their employment.⁴¹⁹ The wrongful act is committed in the course of an intentional deviation from the normal performance of an

⁴¹⁵Midway Two Engineering & Construction Services supra p 22E.

⁴¹⁶Midway Two Engineering & Construction Services supra p 23G.

⁴¹⁷Le Roux, (n77) p 83.

⁴¹⁸MM Botha & D Millard, 'The past, present and future of vicarious liability in South Africa' 2012 *De Jure* 230

⁴¹⁹S Murray, *The Extent of an Employer's Vicarious Liability When an Employee Acts Within the Scope of Employment*. Unpublished LLM dissertation (North-West University) 2012.

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

employees' duties and the deviation constitutes an intentional wrong such as sexual harassment.⁴²⁰ The rationale of employers' liability was explained as follows:

"I am answerable ... for the wrongs of my servant or agent, not because he is authorized by me or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others."⁴²¹

It can be argued that if the employee acts in doing the employers' work, or his or her activities incidental to or connected with it are carried out in a negligent or improper manner so as to cause harm to a third party, the employer is responsible for the harm.⁴²² The other reason for holding the employer liable is based on policy considerations or the social necessity to hold responsible those who create situations of risk or harm to others as held in the case of *Bazley v Curry*,⁴²³ fairness and the maintenance of good practice standards by employees, along with financial considerations as rationales for holding an employer vicariously liable.⁴²⁴

In the Constitutional Court decision of *NK v Minister of Safety and Security*⁴²⁵ it was held that the foundation for vicarious liability can be identified as the following:

"The rationale for vicarious liability is found in a range of underlying principles. An important one is the desirability of affording claimants' efficacious remedies for harm suffered. Another is the need to use legal remedies to incite employers to take active steps to prevent their employees from harming members of the broader community. There is a countervailing principle too, which is that damages should not be borne by employers in all circumstances, but only those circumstances in which it is fair to require them to do so."⁴²⁶

Pursuant to the above court decision, in the case of *Minister of Defence v Benecke*⁴²⁷ where a Defence Force employee who was in charge of the safekeeping and storage of weapons and ammunition at the military base concerned, had stolen and handed over R4 parts and ammunition to a person not employed by the appellant. The person used them together with a previously stolen rifle body to assemble the weapon used in an armed robbery. The court held that the appellant was vicariously liable for injuries sustained by the respondent when he was

⁴²⁰K Ainslie, 'Vicarious liability & sexual harassment - the full circle - The Full Circle'. (2005) (Introduction - Paper delivered at Deneys Reitz Labour Seminar on 20 September 2005) <http://www.nortonrosefulbright.com/knowledge/publications/43341/vicarious-liability-sexual-harassment-the-full-circle-the-full-circle>. (Accessed on 24 March 2016).

⁴²¹F Pollock, 'Liability for the torts of Agents and Servant' (1885) 1 *Law Q Rev*, 207, 209 cited in *The Law of Delict* by RG Mckerron, 2ed. (1999) p 99.

⁴²²*Feldman (Pty) Ltd. V Mall* 1945 AD 733 (741).

⁴²³*Bazley v Curry* 1999 (2) SCR 534 p 30.

⁴²⁴*Majrowski v Guy's and St. Thomas' NHS Trust* 2006 UKHL 34 at p 7.

⁴²⁵*NK v Minister of Safety and Security* 2005 (6) SA 419 (CC).

⁴²⁶*NK v Minister of Safety and Security* 2005 (6) SA 419 (CC) p 21.

⁴²⁷*Minister of Defence v Benecke* 2013 (2) SA 361 (SCA) referred to in the *P.E. v Ikwezi* case [2016] 2 All SA 869 (ECG).

shot during an armed robbery with a stolen defence force R4 rifle parts and ammunition. The decision by the court was a further confirmation that the employer may be held vicariously liable for the eventualities resulting from the wrongful acts of their employees.

4.4 VARIOUS TESTS TO DETERMINE WHETHER A DELICT HAS BEEN COMMITTED BY AN EMPLOYEE

4.4.1 The standard test

This test was formulated in the case of *Minister of Police v Rabie*.⁴²⁸ According to the standard test, the question is whether the employee subjectively promoted his or her own interests, but objectively also dissociated himself or herself from the affairs of the employer.⁴²⁹ The court further stated that if there is nevertheless an adequate close nexus between the employees' acts for his own interests and purposes and the business the employer, the employer may still be liable. The courts must apply an objective test.⁴³⁰ In that regard, the employer will take responsibility even for acts which he or she has not authorised provided that there are so connected with acts which he or she has authorised that they may rightly be regarded as modes of doing them.⁴³¹ The standard test was also applied in the case of *ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd*.⁴³² In that case, the employee of the bank was accused of fraudulent misappropriation of the banks' cheques. The court opined that the relevant question was whether at the time in question, the employee was conducting the affairs or business of the employer. The court noted that it should be borne in mind that the affairs of the employer must pertain to what the employee was employed or instructed to do.⁴³³ In applying the standard test, the court found that the employee had no subjective intention to act on behalf of the employer and no objective connection was established with his prescribed functions.⁴³⁴

The standard test was subsequently applied by the Supreme Court of Appeal in the case of *Kern v Minister of Safety and Security*.⁴³⁵ In that case, three on-duty policemen offered to take a

⁴²⁸*Minister of Police v Rabie* 1986 (1) SA 117 (A).

⁴²⁹*Rabie* supra, p 134D-E.

⁴³⁰*Ibid.*

⁴³¹*Ibid.*

⁴³²*ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd* (2001) 22 ILJ 95 (SCA).

⁴³³*ABSA Bank Ltd* supra p 98D.

⁴³⁴*ABSA Bank Ltd* supra p 101J.

⁴³⁵*Kern v Minister of Safety and Security* 2005 (3) SA 179 (SCA).

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

stranded young woman home. The three officers subsequently raped the stranded young woman and she sought to hold the Minister of Police liable. The court held that 'holding that the rape was committed within the course and scope of employment would only occur in very rare circumstances considering the nature of the crime.'⁴³⁶ The court was of the opinion that the policemen were motivated by self-gratification. In applying the standard test, the court found that, 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.⁴³⁷ This decision was overturned on appeal, with the Constitutional Court⁴³⁸ holding that although it is clear that the policemen's conduct constituted a clear deviation from their duty, there nevertheless existed a sufficiently close relationship between their employment and the wrongful conduct. The court considered that the Constitution⁴³⁹ and statute imposed a duty on the police to prevent crime and protect the members of the public. Such a duty, the court held, also rests on their employer. The court further held that the wrongful conduct of the policemen coincided with their failure to perform their duties to protect the applicant and therefore the employer must be held liable. The court found that the court a quo failed to apply the standard test as set out in the case of *Minister of Police v Rabie*.⁴⁴⁰

4.4.2 The Supervisor Test

This test was imported from US jurisprudence and was formulated in the case of *Faragher v City of Boca Raton*.⁴⁴¹ The court considered that the harassment was perpetrated by employers in a supervisory position, and found that the employer should be held liable for their conduct. The rationale behind this is that such conduct could be regarded as a legitimate business risk. In *Burlington Industries Inc v Ellerth*⁴⁴² the court 'drew a distinction between categories. Firstly, the court found that in instances where the harassment culminated in a palpable employment action such as dismissal, in such instances, the employer would be held liable. In circumstances where no employment action resulted and the supervisor made the working environment hostile, the employer could avoid liability by showing that it took reasonable care

⁴³⁶Kern supra p 5.

⁴³⁷Ibid.

⁴³⁸Kern v Minister of Safety and Security 2005 (6) SA 419 (CC)

⁴³⁹The 1996 Constitution.

⁴⁴⁰Rabie supra p 134D-E.

⁴⁴¹Faragher v City of Boca Raton 524 US 775 (1998).

⁴⁴²Burlington Industries Inc v Ellerth 524 US 742 (1998).

to prevent the harassment and to rectify it. The employer may avoid liability by showing that the victim unreasonably failed to utilise the corrective opportunities the employer made available to her. Nel J described the test as follow:

“An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defence to liability or damages, subject to proof by a preponderance of the evidence. The defence comprises of two elements: that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behaviour and that the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise... No affirmative defence is available, however, when the supervisor’s harassment culminates in a tangible employment action, such as discharge, demotion or undesirable reassignment.”⁴⁴³

4.4.3 The ‘risk of enterprise’ test

This test was formulated in the case of *Bazley v Curry*⁴⁴⁴. The court held that some employment environments are more susceptible to abuse than others. In that regard, the employer is responsible for operating an enterprise that is accommodating to abuse. The court found that the employer will be held vicariously liable if there is a close causal nexus between what he or she instructed the employee to do and the wrongful conduct.⁴⁴⁵ The court then outlined factors which should be taken into account in determining whether the particular enterprise creates risks of sexual harassment, among others factors: the circumstances such as the vulnerability of the victim and the ambit of the perpetrators’ authority including the opportunity that the enterprise gave the employee to abuse his or her authority and the extent of the power the particular position conferred on the employee vis’ a’ vis the victim.⁴⁴⁶

The judgment in the *Grobler v Naspers Bpk en ‘n Ander* case (*Grobler* case)⁴⁴⁷ is a leading case with regard to vicarious liability of an employer for sexual harassment committed by an employee. The court in this case sought to address the issue that sexual harassment in the workplace amounts to a frolic and detour because no one is employed to harass. In that regard, it is difficult to justify imposition of vicarious liability on the employer for acts of sexual

⁴⁴³Ibid.

⁴⁴⁴*Bazley* supra.

⁴⁴⁵*Bazley* supra, p 26.

⁴⁴⁶*Bazley* supra, p 41.

⁴⁴⁷2004 (4) SA 220 (CC).

harassment committed by the employee. The court in the present case, however devised innovative methods to justify such liability due to policy considerations that advocate for such liability.⁴⁴⁸ These methods are 'the tests discussed above. The plaintiff in this case was employed by the first defendant, the employer, as a secretary for the production manager, and for the trainee manager in the production planning department for the second defendant. The second defendant was subsequently dismissed after a disciplinary inquiry in which he was found guilty of various charges of sexual harassment. The victim alleged that the second defendant had sexually harassed her during the period January to July 1999 to such an extent that in August 1999 and after the disciplinary hearing, she suffered an emotional breakdown and was, at the time of the hearing, still unfit to return to work. As a result of these circumstances, the plaintiff instituted action against both the first defendant and the second defendant.

The court held that testing the vicarious liability of an employer against an inflexible rule negated the developments of the last few decades in several relevant jurisdictions. Initially, in English law, the doctrine of vicarious liability had its origin in the liability of the head of the household for the behaviour of his family and employees. This rule evolved gradually to conform to dynamic circumstances. The two most important policy grounds for the flexible application of the rule were the provision of a fair and practical right to recovery of damages and the creation of a deterrent against future harm. It also had to be kept in mind that the risk of damages had been created by the employer in the establishment and operation of his business.⁴⁴⁹ The court also adopted the supervisor test by holding that where the alleged sexual harassment culminated in palpable employment action such as employment, failure to promote, dismissal or a material change in the provision of benefits for the victim, among others, would result in the employer being held liable because in such circumstances, it will be clear that if the supervisor had not been appointed to that position, the said harassment would not have occurred and consequently, no actionable hostile environment would have been created.

The court went on to hold that the employer may escape liability if no tangible employment action emanated from the conduct of the employee by establishing that he or she took reasonable care to prevent the sexual harassment from occurring and to rectify the situation immediately. The employer further has to prove that the victim had unreasonably failed to

⁴⁴⁸ Le Roux, (n77), p 85.

⁴⁴⁹ 2004 (4) SA 220 (CC) supra p 277.

make himself or herself available for any preventative or corrective measures, or that he or she had unreasonably failed to prevent harm.⁴⁵⁰ The court went on to adopt the risk of enterprise test by holding that there has to be a sufficiently close nexus between the conduct instructed by the employer and the unlawful act to justify the imposition of vicarious liability. Generally, the court found that in certain instances, the relationship between the creation of the risk by the employer and the unlawful conduct is significantly close to justify the imposition of liability on the employer. In determining whether the relationship is sufficiently close, due regard must be given to circumstances like the vulnerability of the victim and the ambit of the perpetrators' authority.⁴⁵¹ The factors were outlined in *Bazley v Curry*.⁴⁵² The court 'concluded that after taking into account all the relevant factors, the working relationship between manager and secretary was one that created or increased the inherent risk of sexual harassment. In the circumstances, the court held that it was fair to hold the employer vicariously liable for the conduct of his employee.

The court, however, found that if the approach it adopted was wrong and that it had misapplied the existing rules of vicarious liability in a way that was not flexible enough to address the problems of sexual harassment in the workplace, the constitutional duty to protect the right to dignity⁴⁵³ and the right to freedom and security of the person⁴⁵⁴ requires that the common law rules regarding vicarious liability be developed to give effect to the rights in the workplace. This would be consistent with section 173 of the Constitution⁴⁵⁵ which bestows upon the High Court the duty to develop the common law.⁴⁵⁶

4.5 Direct liability

Direct liability for sexual harassment is primarily based on the common law legal duty the employer owes to its employees to take reasonable care of their safety.⁴⁵⁷ According to the general principles of delict, wrongfulness in the case of an omission exists where the defendant

⁴⁵⁰ 2004 (4) SA 220 (CC) supra p 279.

⁴⁵¹ 2004 (4) SA 220 (CC) p 286.

⁴⁵² *Bazley* supra.

⁴⁵³ The 1996 Constitution - Section 10.

⁴⁵⁴ The 1996 Constitution - Section 12.

⁴⁵⁵ Ibid.

⁴⁵⁶ 2004 (4) SA 220 (CC) p 514.

⁴⁵⁷ Le Roux 'Sexual harassment in the workplace: A matter of more questions than answers or do we simply know less the more we find out?' (2006) 10 (1) *Law, Democracy and Development* 53.

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

in question had a legal duty to act positively to prevent the harm from occurring.⁴⁵⁸ This nature of liability is premised on the law of delict and the element of delict in question will be that of wrongfulness. Direct liability is illustrated by the Supreme Court of Appeal in the *Media 24 Ltd and Another v Grobler* case⁴⁵⁹ that was an appeal of the decision of *Grobler* case⁴⁶⁰ in the High Court. Below is the case that illustrates the approach that was adopted by the Supreme Court of Appeal in endorsing the employers' common law duty to take reasonable care for their employees, a duty that, according to the court extends beyond the employers' duty to take the necessary reasonable steps to prevent their employees from suffering physical harm but to further prevent them from psychological harm. This kind of harm includes the one that emanates from the sexual harassment in the workplace. The employers' failure to protect their employees as indicated above, renders the employer directly liable for the act of sexual harassment caused by their employees or customers to other employees in the workplace.

In *Media 24 Ltd and Another v Grobler case (Media 24 case)*⁴⁶¹ the Supreme Court of Appeal accepted that it is trite law that an employer owes its employees a common law duty to take reasonable care for their safety. The court went on to hold that this duty should not be limited to instances whereby an employer is required to take reasonable steps to prevent an employee from suffering physical harm, but should extend to include a duty to take steps to prevent psychological harm. In order to decide whether an employer failed to execute his or her duty to take reasonable care of the safety of his or her employees, the court cited with approval the test laid down in *Minister van Polisie v Ewels*.⁴⁶² According to the test, in order to determine the wrongfulness of an act or an omission, due regard must be given to the legal convictions of the community.⁴⁶³ In applications of this test, the court considered that sexual harassment is a serious matter in the workplace and therefore it requires the employer's attention.

The court also considered that sexual harassment violates various constitutional rights which are protected by the law.⁴⁶⁴ In that regard, there is indeed a legal duty on the employer to ensure that employees are not subjected to sexual harassment. The court examined the impact of sexual harassment on the employee and found that it is embarrassing and humiliating. Furthermore,

⁴⁵⁸ Mukheibirand Ristow 'An overview of sexual harassment: Liability of the employer' 2006 (27) *Obiter* 249.

⁴⁵⁹ *Media 24* supra.

⁴⁶⁰ 2004 (4) SA 220 (CC) supra.

⁴⁶¹ *Media 24* supra p 66.

⁴⁶² *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A-B.

⁴⁶³ *Media 24* supra p 67.

⁴⁶⁴ *Ibid*.

sexual harassment creates an intimidating; hostile; and offensive work environment.⁴⁶⁵ This results in poor work performance and the lowering of career commitment. The psychological effect on employees can be severe, substantially affecting the emotional and psychological well-being of the person involved. In that regard, the court held that the legal convictions of the community impose an obligation on the employer to take reasonable steps to prevent sexual harassment of its employees in the workplace and to be obliged to compensate the victim for harm caused thereby should it negligently fail to do so.⁴⁶⁶ The court proceeded to determine whether the employer had failed to take such reasonable steps. The court held that the employer had failed properly to react to the employees' complaints and was therefore negligent and thus that the employer was found liable⁴⁶⁷

4.6 Analysis of the decisions of the courts in Grobler v Naspers Bpk en 'n Ander and Media 24 Ltd and Another v Grobler cases

Le Roux⁴⁶⁸ agrees with the courts' view that the common law of vicarious liability should be developed. However Le Roux 'argues that the court erred in developing new rules instead of developing existing rules further.⁴⁶⁹ Le Roux disagrees with the notion of the court that sexual harassment does not fall within the course and scope of employment because sexual harassment is a 'frolic and detour'. She argues that this view undermines the very essence of vicarious liability, that it exists largely because employees do certain things that they are not employed to do.⁴⁷⁰ Lawlor⁴⁷¹ agrees with Le Roux⁴⁷² that, instead of extending complicated tests to fit the circumstances, the courts should have developed the "standard test" laid down in the *Rabie* case.⁴⁷³ An appropriate decision would have been reached by considering factors like proximity of the connection between the harassment and the employment; the employment environment; and the relationship between the harasser and the victim.

⁴⁶⁵Ibid.

⁴⁶⁶*Media 24* supra p 68.

⁴⁶⁷*Media 24* supra p 73.

⁴⁶⁸ Le Roux, (n77), p 90.

⁴⁶⁹ Le Roux, (n77), p 91.

⁴⁷⁰Ibid.

⁴⁷¹Lawlor (n259) p 38.

⁴⁷²R Le Roux 'Sexual harassment in the workplace: Reflecting on *Grobler v Naspers* (2004) 25 *ILJ* 1900.

⁴⁷³*Minister of Police v Rabie* 1986 (1) SA 117 (A).

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

Usually, employers seek to evade liability by arguing that although the employment relationship exists, at the time the employee committed the delict, the conduct is a frolic and detour. Le Roux argues that the court rejected this defence because it does not take cognisance of the fact that sexual harassment occurs widely and it has far-reaching and psychological consequences.⁴⁷⁴ The court does this by broadening the extent of vicarious liability, following the example set in foreign jurisdictions. The rationale behind such an extension is that vicarious liability is a flexible principle and policy considerations requires it to ensure effective compensation and to deter future harm. Le Roux⁴⁷⁵ agrees with the decision of the court, but has certain reservations. Le Roux⁴⁷⁶ further argues that in terms of the decision in the *Grobler* case⁴⁷⁷ vicarious liability will not be imposed where sexual harassment occurs in a low or no risk or equal relationship. Policy considerations and constitutional values, however, would not be served by this notion.

Du Toit⁴⁷⁸ argues that it seems that vicarious liability for sexual harassment is being approached differently in comparison to other circumstances where vicarious liability could be imposed.' This approach would not be in the best interests of justice. Le Roux⁴⁷⁹ goes further and states that the foreign judgments relied on by the court in *Naspers*⁴⁸⁰ in which the risk test was applied, dealt with very special responsibilities, which included the care of children and other vulnerable people. For instance, the *Bazley v Curry* case⁴⁸¹ concerned a paedophile who was appointed to perform the duties of a surrogate parent at an orphanage, but sexually harassed the orphans. This raises the issue of whether the risk identified in *Naspers*⁴⁸² is really comparable to those foreign jurisdiction cases.⁴⁸³ Whitcher,⁴⁸⁴ however, agrees with the court when she states that those cases laid a basis for the departure from South African precedent. Developments of the principle of vicarious liability in foreign jurisdictions are relevant in South Africa because the doctrine of vicarious liability emanated from England and because the

⁴⁷⁴R Le Roux (n460).

⁴⁷⁵Ibid.

⁴⁷⁶Ibid

⁴⁷⁷2004 (4) SA 220 (CC).

⁴⁷⁸Du Toit 'Enterprise responsibility for sexual harassment in the workplace: Comparing Dutch and South African law. In F Pennings, Y Konijn & A Veldman (eds). *Social Responsibility in Labour Relations: European and Comparative Perspectives International* (2008) 13.

⁴⁷⁹Le Roux 'Sexual harassment in the workplace: Reflecting on *Grobler v Naspers* (2004) 25 ILJ 1903.

⁴⁸⁰2004 (4) SA 220 (CC).

⁴⁸¹*Bazley* supra.

⁴⁸²2004 (4) SA 220 (CC).

⁴⁸³*Bazley* supra.

⁴⁸⁴B Whitcher, 'Two roads to an employer's vicarious liability for sexual harassment: *Grobler v Naspers Bpk en 'N Ander and Ntsabo v Real Security CC*' (2004) 25 ILJ 1909.

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

Constitution empowers the court to consider foreign law and to develop South Africa's common law within the spirit, purport, and object of the Bill of Rights.⁴⁸⁵

The *Grobler* case⁴⁸⁶ should also be applauded for solving a conundrum that faced previous courts, that is, reluctance to hold an employer responsible for conduct outside the employees' authority and not in furtherance of the employers' business. Previous cases did not provide any guidelines, since sexual harassment would always be against the employers' instructions and could not be described as being done in furtherance of the employer's business and therefore not within the scope of the employees' appointment.⁴⁸⁷ The court devised innovative methods of holding employers vicariously liable for sexual harassment by adopting flexible tests that are consistent with developments in foreign jurisdictions like Canada and New Zealand.⁴⁸⁸ The approach adopted by the courts is also consistent with constitutional objects and values in South Africa.

Le Roux⁴⁸⁹ argues that the court should have primarily addressed whether the employer could be held directly liable for the conduct of the employee before addressing the issue of vicarious liability. The SCA in the *Media 24* case⁴⁹⁰ held 'the employer liable on the basis of direct liability. It is this judgement that this Chapter now seeks to analyse. According to Le Roux,⁴⁹¹ the judgment answers a lot of questions, but on the other hand, it leaves some questions unanswered. These are:

- (a) "What reasonable steps should an employer take in the ordinary course to meet its common law duty to provide a safe working environment free from sexual harassment?"
- (b) Can the employer still be vicariously liable even though it has met the above common law duty? What is the appropriate test to determine the employer's vicarious liability for sexual harassment?
- (c) What, if any, is the synergy between the common law and the EEA?⁴⁹²

⁴⁸⁵The 1996 Constitution.

⁴⁸⁶2004 (4) SA 220 (CC).

⁴⁸⁷K Calitz, 'Vicarious liability of employers: reconsidering risk as the basis for liability' (2005) 3 *TSAR* 225.

⁴⁸⁸*Ibid.*

⁴⁸⁹Le Roux 'Sexual harassment in the workplace: Reflecting on *Grobler v Naspers* (2004) 25 *ILJ* 1903.

⁴⁹⁰*Media 24 Ltd and Another v Grobler* [2005] 3 All SA 297 (SCA).

⁴⁹¹Le Roux 'Sexual harassment in the workplace: A matter of more questions than answers or do we simply know less the more we find out?' (2006) 10 (1) *Law, Democracy and Development* 52.

⁴⁹²Act 55 of 1998.

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

In answering these questions, Le Roux opines that the duty to ensure a safe environment for employees is both a proactive and reactive duty.⁴⁹³ This duty will be discharged by the employer if he or she implements a workplace policy pursuant to the 1998 and 2005 Amended Codes of Good Practice on the Handling of Sexual Harassment Cases in the Workplace.⁴⁹⁴ The 2005 Amended Code⁴⁹⁵ underscores the need for employers to take action if there is a risk of harm to others in the workplace, regardless of the fact that the employee does not wish to follow a formal procedure. In certain instances, however, this duty will overlap with the common law duty to take reasonable steps to ensure a safe working environment. In that regard, an employer may escape liability in terms of s 60 of the EEA⁴⁹⁶ they can prove that the employee is unwilling to follow a formal or informal procedure pursuant to an effectively communicated policy. However, according to the judgment in the *Media 24* case⁴⁹⁷ ‘the employer may still be held liable in terms of the common law duty to take care of their employees and protect them against the risk of physical and psychological harm which includes sexual harassment that must be eliminated and combated by the employer and all those involved in the day to day running of the employers’ business, including the employees themselves and employer’s clients at the workplace.’

In answering the second question, Le Roux⁴⁹⁸ is of the opinion that the route followed by the SCA suggests that, indeed the employer may still be held vicariously liable. The rationale for this opinion is that there is no other basis on which the court could have expected the employer to reprimand or dismiss the offending employee save for the fact that the employer did have authority over the conduct of the employee. Finally, Le Roux⁴⁹⁹ finds that the EEA⁵⁰⁰ does not deprive an employee (complainant) from pursuing common law remedies. The employee

⁴⁹³Le Roux ‘Sexual harassment in the workplace: A matter of more questions than answers or do we simply know less the more we find out?’ (2006) 10 (1) *Law, Democracy and Development* 62.

⁴⁹⁴1998 Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace Govt. Notice 1367 of 1998; and the 2005 Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace GG 27865 of 2005.

⁴⁹⁵2005 Amended Code.

⁴⁹⁶Act 55 of 1998.

⁴⁹⁷*Media 24* supra.

⁴⁹⁸Le Roux ‘Sexual harassment in the workplace: A matter of more questions than answers or do we simply know less the more we find out?’ (2006) 10 (1) *Law, Democracy and Development* 64.

⁴⁹⁹ Ibid.

⁵⁰⁰Act 55 of 1998.

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

should not be deprived of his or her right to proceed with both claims nonetheless the amounts awarded in one matter should be considered in the other.⁵⁰¹

This chapter has successfully discussed and analysed—

- (a) The remedies that may be used by an employee or victim if they have been sexually harassed at their workplaces;
- (b) The liability of the employer for an act of sexual harassment committed by their employees;
- (c) The above point has been exhaustively dealt with by looking at the different types of liabilities such as the statutory liability with a special focus amongst others to the Constitution; EEA Act and Common Law. And mostly the vicarious liability;
- (d) The requirements for vicarious liability;
- (e) The various tests to determine whether a delict has been committed by an employee leading to the direct liability of the employer; and
- (f) The in-depth analysis of the decisions by the different courts with regard to sexual harassment and the liability that may be attached to the employer for their failure to act as required by law in cases of sexual harassment in their workplace.

In view of the above, this chapter has succeeded in showing that the position is clear that the sexually harassed employee (complainant) may, in the workplace, invoke the provisions of the EEA;⁵⁰² LRA⁵⁰³ and quote the Constitution⁵⁰⁴ in cases of sexual harassment at the workplace. Further, the complainant may not be deprived of their legal right to use the common law to hold the employer liable for their failure to protect their employees against the risk of physical harm. The common law duty which according to the courts, extends further to the protection of employees against the psychological harm which includes sexual harassment. Consequently, the employers must have clear systems and policies in place to address, eliminate and combat cases of sexual harassment which is an unwarranted and discriminatory behaviour in the workplace or extension of the workplace.

⁵⁰¹Le Roux 'Sexual harassment in the workplace: A matter of more questions than answers or do we simply know less the more we find out?' (2006) 10 (1) *Law, Democracy and Development* 66.

⁵⁰²Act 55 of 1998.

⁵⁰³Act 66 of 1995.

⁵⁰⁴The 1996 Constitution.

CHAPTER FIVE

Consolidation of the findings of the previous chapters and a conclusion; summary and recommendations

5.1 INTRODUCTION

The previous chapter looked at the extent of the employers' liability and the different forms that liability may take. Moreover, the chapter evaluated different remedies which are available for the victim of the alleged sexual harassment. This chapter will present closing arguments drawn from the preceding chapter. To add on, the chapter will further consolidate all the findings of the previous chapters.

5.2. CONCLUSION

In conclusion, the legislature from different countries such as the United States; Canada and South Africa have managed to define sexual harassment. In this research, sexual harassment has been defined according to international labour law and United Nations. Furthermore, sexual harassment has been defined according to the South African Constitution,⁵⁰⁵ the EEA,⁵⁰⁶ the LRA,⁵⁰⁷ 1998 Code and 2005 Amended Code⁵⁰⁸ of Good Practice on the Handling of Sexual Harassment Cases in the Workplace and PEPUDA.⁵⁰⁹

⁵⁰⁵The 1996 Constitution.

⁵⁰⁶Act 55 of 1998.

⁵⁰⁷Act 66 of 1995 - Section 187.

⁵⁰⁸1998 Code and 2005 Amended Code.

⁵⁰⁹PEPUDA.

5.3. SUMMARY (COMPARING; CONTRASTING AND COMMENTING ON BOTH THE 1998 CODE AND 2005 AMENDED CODE OF GOOD PRACTICE ON THE HANDLING OF SEXUAL HARASSMENT CASES IN THE WORKPLACE)

To summarise, sexual harassment has been defined as unwelcome behaviour of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace.⁵¹⁰ In s 6(3) of the EEA,⁵¹¹ sexual harassment is defined as a form of unfair discrimination. From the researcher's point of view, sexual harassment occurs when there is no agreement to an act of sexual nature between two parties or more parties involved, which could either be employer versa employee. This is absolute improper behaviour which impairs the right to the dignity; privacy and equality of the other (complainant). The behaviour affects the recipient (in most cases, the employee) negatively.⁵¹² To avoid this unwelcoming behaviour, employers must protect their employees and should know what the consequences of committing such offences are.⁵¹³ On the other hand, employees must also know their rights and obligations.

This research has identified that there are three tests that are used to examine sexual harassment; these are the subjective, objective and compromise tests.⁵¹⁴ Additionally, the research considered the sentiments mentioned in Item 5.3 of the 2005 Amended Code⁵¹⁵ which explained the different forms of sexual harassment. Sexual harassment can take different forms, which includes 'any unwelcome sexual advance, request for sexual favour, verbal or physical conduct or gesture of a sexual nature, or any other behaviour of a sexual nature that might reasonably be expected or be perceived to cause offence or humiliation to another.'⁵¹⁶ Sexual harassment may occur when it interferes with work, is made a condition of employment or creates an intimidating, hostile or offensive environment.⁵¹⁷ It can include a once-off incident

⁵¹⁰2005 Amended Code.

⁵¹¹Act 55 of 1998.

⁵¹²Smit and Van Der Nest, 'When sisters are doing it for themselves: Sexual harassment claims in the workplace' 2004 (3) *TSAR* at 520.

⁵¹³ Smit and Van Der Nest 'When sisters are doing it for themselves: Sexual harassment claims in the workplace' (2004) 3 *TSAR* at 521.

⁵¹⁴ Gordon, *et al.* 'Innocent flirting or sexual harassment? Perceptions of ambiguous work-place situations'. (2005) 28 *Representative Research in Social Psychology* 47-58.

⁵¹⁵ 2005 Amended Code.

⁵¹⁶ Ebobrah and Tanoh. 'Compendium of African Sub-Regional Human Rights Documents'. (2010), p 427.

⁵¹⁷United Nations. 'UNHCR's Policy on Harassment, Sexual Harassment, and Abuse of Authority' (2005) http://www.un.org/womenwatch/osagi/UN_system_policies (UNHCR) policy_on_harassment.pdf. (Accessed on 26 October 2015).

or a series of incidents.⁵¹⁸ Sexual harassment may be deliberate, unsolicited and coercive. Both male and female colleagues can either be the victim or offender.⁵¹⁹ Sexual harassment may also occur outside the workplace or outside working hours. The forms of sexual harassment listed in Item 5.3⁵²⁰ of the 2005 Amended Code is more or less the same as those discussed in Item 4 of the 1998 Code.⁵²¹ The difference is that the 1998 Code⁵²² demonstrates that sexual harassment occurs only if the action happens in isolation, is unwelcoming and is of a sexual nature. For example, it becomes sexual harassment if a male employer asks for sexual favours from a married employee in private.⁵²³

In the South African context, it is important to assess the employers' obligations in combating and eliminating sexual harassment at the workplaces. Sexual harassment is a common behaviour in most institutions in South Africa.⁵²⁴ Both the common law and statutes provide the victims of sexual harassment with remedies.⁵²⁵ The 2005 Amended Code⁵²⁶ expressly states that the Code does not limit the rights of the victim of sexual harassment and gives the victim the right to press criminal charges or pursue a civil case against the perpetrator.⁵²⁷ Furthermore, the EEA⁵²⁸ also holds the employer liable for the conduct of its employees on the basis that sexual harassment is categorised as a form of unfair discrimination.⁵²⁹ The employee may also hold the employer liable directly or vicariously through the common law remedies. The doctrine of vicarious liability has been utilised in cases of sexual harassment to extend the liability for the conduct of employees to employers.⁵³⁰

In a nutshell, the researcher has highlighted and explored the fact that sexual harassment is a common issue in South African workplaces. This issue tends to affect both employee and employer on a daily basis. Employers should always ensure that they protect their employees from internal or external sexual harassment. The predicament of sexual harassment affects the

⁵¹⁸Ibid.

⁵¹⁹Ibid.

⁵²⁰2005 Amended Code.

⁵²¹1998 Code.

⁵²²Ibid.

⁵²³ Ibid.

⁵²⁴Halfkenny 'Legal and workplace solutions to sexual harassment in South Africa part 2: The South African experience' (1996) 17(2) *ILJ* p 213.

⁵²⁵Mukheibir Ristow 'An overview of sexual harassment: Liability of the employer' 2006 *Obiter* 246

⁵²⁶2005 Amended Code.

⁵²⁷Article 7(6) 2005 Amended Code.

⁵²⁸Act 55 of 1998.

⁵²⁹Ibid.

⁵³⁰Gule 'Employers' vicarious liability for sexual harassment' (2005) 13 (2) *JBL* 66.

employee more than compared to the employer. Some of the effects of sexual harassment on employees in South Africa are job loss, traumatization, unbudgeted medical costs, low self-esteem, unmotivated to work for the same employer, reputation damage and possible psychological disorders. Therefore, it is important to critically analyse the employers' obligations in combating and eliminating sexual harassment in the South Africa workplaces.

The researcher concurs with Whitear-Nel⁵³¹ in that while the judgment of the LAC in *Simmers*' case seeks to clarify and fortify the strong approach to be taken in dealing with sexual harassment cases, the difference in the approach taken by the Labour Court (LC) and the LAC on the same facts illustrates the complexity of the sexual harassment disputes. The LC focussed its attention on the words used and the fact that the perpetrator did not pursue the matter further once he was rebuffed to conclude that there was no harassment, and that the conduct was merely "an unreciprocated advance. The LAC, on the other hand, focussed its attention on the circumstances surrounding the words used to conclude that the conduct constitutes sexual harassment. The extent to which the surrounding circumstances of sexual harassment generally, in South Africa should play a greater role in determining the dispute than the actual conduct complained of, raises some questions and remains unanswered.

5.4 RECOMMENDATIONS

In terms of comparison with other nations, unfortunately, South Africa has not yet reached the international level pertaining to legislation and regulation on sexual harassment in workplaces. The following recommendations have been suggested:

The South African Commission for Conciliation, Mediation and Arbitration (CCMA)⁵³² should always keep track of all reported workplace sexual harassment cases. Creating a national database on cases of sexual harassment will be a good idea because the sexual harassment offenders will be listed on the sexual harassment database similar to the data base created for sexual offences and related matters in terms of the Criminal Law Amendment Act (referred hereinafter as the Sexual Offences Act).⁵³³ It is suggested that the CCMA should set tough

⁵³¹N Whitear-Nel 'Do you want a lover tonight?' Unpublished article by the UKZN (PMB campus) lecturer. See also a discussion of *Campbell Scientific Africa (Pty) Ltd v Simmers and others* (2016) 37 ILJ 116 (LAC) p 17, para 5.

⁵³² Commission for Conciliation, Mediation and Arbitration.

⁵³³ Criminal Law Amendment Act No. 32 of 2007.

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

measures for employers or perpetrators of sexual harassment at workplaces. This may reduce, henceforth preventing and protecting employees from this predicament. It will be ideal for the South African legislature to set up a board such as EEOC of the United States. The task of the board will be to deal with protecting employees from internal or external sexual harassment, enforcing employee and employer awareness of sexual harassment and enforcing employer liability for sexual harassment.

In the case of *SA Metal Group (Pty) Ltd v CCMA and Others*⁵³⁴ the court found that there was no adherence to the Code of Good Practice on Handling Sexual Harassment. Therefore, it is important to enforce what is provided in the code. The Code should not just serve as a document of display. It is advisable that employers should be trained on what is stipulated in the Code. Failure to comply will lead to harsh sentencing such as revoking company or firms' license to operate in the Republic of South Africa.

It is important to involve all the stakeholders of a company, for example employees, management and shareholders when drafting internal policies on sexual harassment at workplaces. The internal policy document should stipulate the reporting structures, protection provided, penalties for perpetrators and counseling for victims. South African labour legislature should raise awareness on sexual harassment at work. This can be done through many media channels, for instance, advertisements, newspapers, radio, whatsapp, twitter and many more platforms. Moreover, it is necessary for labour legislation to ensure that companies should make training for their entire stakeholders including employees and employers on sexual harassment in the workplace compulsory. Lastly, employees should always be encouraged to report cases on this matter. Confidentiality should also be guaranteed to victims of sexual harassment.

South African employers: small; medium and big businesses must amongst other things make their employees upon their employment or assumption of duty to sign a declaration form wherein they are making a pledge that they would respect, protect and promote all the available sexual harassment pieces of legislation; policies and practice notes in support of the fight in combatting and eliminating sexual harassment at the workplace or extension of the workplace. The employers must also make it a norm that at least once a month they get the services of professional individuals to come to their workplaces where all the employees

⁵³⁴ *SA Metal Group (Pty) Ltd v CCMA and others* (2014) 35 ILJ 2848 (LC).

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

including their superiors would be present so that a discussion of sexual harassment can take place. Further, scenarios where a use of the actual reported sexual harassment cases that were before the courts and CCMA forums get to be canvassed in depth in view of making one another aware of their roles and responsibilities at the workplace with regard to the combatting and eliminating sexual harassment at the workplace and the consequences that flow from one's failure towards their duties thereof. This exercise will assist to address the challenges highlighted during the research such as the employers who are failing to provide their employees with safe working environment free of sexual harassment; their constant failure to deal with the cases of sexual harassment that have been brought by the victims of sexual harassment at their workplaces and the employees sexually harass their fellow colleagues but not knowing that their conducts amount to sexual harassment as defined in South African labour laws and codes of conduct on the handling of sexual harassment cases at the workplace.

It is therefore against the above background that this research has succeeded in answering the question of what are the employers' obligations in combatting and eliminating sexual harassment at the workplace or extension of the workplace. This has been done by fully examining the current legal framework in dealing with sexual harassment at the workplace or extension of the workplace. The question of whether the employer can be held liable for the damages occasioned by their employees as a result of sexual harassment at the workplace or extension of the workplace has been answered to the affirmative. Further, the questions of what extent and form of the employers' liability as a result of sexual harassment by their employees at the workplace or extension of the workplace have been duly answered. This has been done by examining amongst others both the national and international pieces of legislation that seek to combat and eliminate sexual harassment at the workplace or extension of the workplace including an in-depth analysis of case law and the 1998 Code and 2005 Amended Code of Good Practice on the Handling of Cases of Sexual Harassment at the workplace or extension of the workplace in South Africa. Lastly, the question of how an employer can manage the risks involved in sexual harassment cases at the workplace or extension of the workplace has also been successfully answered by providing the necessary recommendation in trying to combat and eliminate the scourge of sexual harassment at the workplace or extension of the workplace in South Africa.

BIBLIOGRAPHY

PRIMARY SOURCES

Table of cases

South Africa

ABSA Bank Ltd v Bond Equipment (Pretoria) (Pty) Ltd (2001) 22 ILJ 95 (SCA).

Bazley v Curry (1999) 2 SCR 534.

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

Christian v Collier Properties (2005) 26 ILJ 234 (CC).

Ess Kay Electronics Pte Ltd and Another v First National Bank of Southern Africa Ltd 2001 (1) SA 1214 (SCA).

Feldman (Pty) Ltd. V Mall 1945 AD 733 (741).

Gaga v Anglo-Platinum Ltd & Others (2012) 33 ILJ 329 (LAC).

Grobler v Naspers Bpk en 'n Ander 2004 (4) SA 220 (C).

Grobler v Naspers (2005) 25 ILJ 439 (C).

Harksen v Lane NO and Others 1998 (1) SA 300 (CC).

Jooste v Transnet Ltd t/a SA Airways (1995) 16 ILJ 629 (LAC)

Intertech. Systems [Pty] Limited v Sowter (1997) 18 ILJ 689 (LAC).

Kern v Minister of Safety and Security (1997) 18 ILJ 689 (LAC).

Media 24 Ltd and Another v Grobler [2005] 3 All SA 297 (SCA).

Midway Two Engineering & Construction Services v Transnet Bpk 1998 (3) SA 17 (SCA).

Minister of Defence v Beneke 2013 (2) SA 361 (SCA).

Minister of Police v Rabie 1986 (1) SA 117 (A).

Minister van Polisie v Ewels 1975 (3) SA 590 (A).

NK v Minister of Safety and Security 2005 (6) SA 419 (CC).

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

Internet

Harington, M. 'How to prove a sexual harassment case at CCMA'. Available at <http://meredithharington.co.za>. Accessed on 7 January 2017.

Ainslie, K. 'Vicarious liability & sexual harassment - the full circle - The Full Circle'. (2005) (Introduction - Paper delivered at Deneys Reitz Labour Seminar on 20 September 2005) <http://www.nortonrosefulbright.com/knowledge/publications/43341/vicarious-liability-sexual-harassment-the-full-circle-the-full-circle>. Accessed on 27 March 2016.

International Labour Organisation. 'Collective Agreement on the Prevention and Resolution of Harassment-related Grievances'. Available at <http://www.ilo.org/public/english/staffun/docs/harassment.htm> Accessed on 24 March 2016.

International Labour Organisation 'Code of practice on workplace violence in services sectors and measures to combat this phenomenon' October 2003. Available at http://www.ilo.org/wcmsp5/groups/public/@ed_protect/@protrav/@safework/documents/normativeinstrument/wcms_107705.pdf. Accessed on 24 March 2016.

International Labour Organisation 'International Labour Conference Resolution Concerning ILO Action for Women Workers' available at <http://www.ilo.org/public/english/bureau/leg/resolutions.htm>. Accessed on 24 March 2016.

International Labor Organisation. 'Decent work for women: An ILO proposal to accelerate the implementation of the Beijing Platform for Action' (Geneva, March 2000), paper presented at the Symposium on Decent Work for Women; Women 2000: Gender equality, development and peace for the twenty-first century (New York, 5-9 June 2000).

United Nations. 'UNHCR's Policy on Harassment, Sexual Harassment, and Abuse of Authority' (2005) [http://www.un.org/womenwatch/osagi/UN_system_policies/\(UNHCR\)policy_on_harassment.pdf](http://www.un.org/womenwatch/osagi/UN_system_policies/(UNHCR)policy_on_harassment.pdf). Accessed on 27 October 2016.

International Labour Organization. 'Discrimination (Employment and Occupation) Convention', C111, 25 June 1958.

The Discrimination (Employment and Occupation) Convention (No. C111) 25 June 1958.

**This Research Project is submitted in fulfilment of the regulations for the LLM Degree
at the University of KwaZulu-Natal: Mabunda EV: 208525071**

US Equal Employment Opportunity Commission Enforcement Guidance. 'Policy guidance on current issues sexual harassment guidance on defining sexual harassment and establishing employer liability in light of recent cases' (2010). URL

UN Committee on the Elimination of Discrimination Against Women (CEDAW). CEDAW General Recommendation No. 19: Violence against women, 1992, available at: <http://www.refworld.org/docid/52d920c54.html> Accessed 26 October 2015.

Vetten, L. 'Adding up the costs of sexual harassment (1998), Centre for the Study of Violence and Reconciliation, available at: <http://www.csvr.org.za/articles/artcostl.htm>. Accessed 26 October 2015.