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Critical analysis of harassment in the changing workplace: how the courts developed the definition of sexual harassment and the parameters of the employer's responsibility in curbing this problem

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A CRITICAL ANALYSIS OF HARASSMENT IN THE CHANGING WORKPLACE: HOW THE COURTS DEVELOPED THE DEFINITION OF SEXUAL HARASSMENT AND THE PARAMETERS OF THE EMPLOYER'S RESPONSIBILITY IN CURBING THIS PROBLEM

by

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CONTENTS

ABSTRACT 3

INTRODUCTION 4

THE LEGAL FRAMEWORK 5

HOW THE COURTS HAVE DEVELOPED THE DEFINITION OF SEXUAL HARASSMENT 7

1. **THE 1998 CODE OF GOOD PRACTICE ON HANDLING SEXUAL HARASSMENT CASES IN THE WORKPLACE AND THE RELEVANT CASE LAW** 8
2. **THE 2005 AMENDMENTS TO THE CODE OF GOOD PRACTICE ON HANDLING SEXUAL HARASSMENT CASES IN THE WORKPLACE AND THE RELEVANT CASE LAW** 10
3. **CRITIQUE OF THE COURTS DEVELOPMENT OF THE DEFINITION OF SEXUAL HARASSMENT** 15
4. **THE CODE OF GOOD PRACTICE ON THE PREVENTION AND ELIMINATION OF HARASSMENT IN THE WORKPLACE** 16
5. **COMPARISON TO THE DEVELOPMENT OF THE SEXUAL HARASSMENT DEFINITION USING CASE LAW FROM THE NETHERLANDS** 17

THE PARAMETERS OF THE EMPLOYER'S RESPONSIBILITY IN CURBING THIS PROBLEM 20

1. **COMMON LAW DUTY** 20
2. **DUTY IN TERMS OF THE CODES OF GOOD PRACTICE** 20
3. **CASE LAW AND THE EMPLOYER'S LIABILITY** 21
4. **SUGGESTED APPROACH FOR EMPLOYERS TO CURB SEXUAL HARASSMENT** 23

CONCLUSION 24

BIBLIOGRAPHY 27

ABSTRACT

The definition of the workplace is changing as more employee's start to work remotely. This change in the workplace will affect the manner in which employees communicate and engage with one another. It will also change the manner in which employees are harassed within the work environment.

Sexual harassment has been regulated in South Africa for over 20 years in Codes of Good Practice. The regulations define sexual harassment and indicate the obligations of the employer to take steps to prevent the conduct within its workplace. In addition to the Codes of Good Practice, the courts have continuously developed the definition of sexual harassment.

Through the development by the courts, the definition of sexual harassment remains current and in line with international standards. However, important factors are not always given the same weight by judges which has led to inconsistent decisions by the courts. The definition of sexual harassment and the manner in which the court applies the definition is analysed in this thesis and compared to recent decisions in the Netherlands.

The employer's responsibility to prevent sexual harassment is regulated by the Employment Equity Act, 55 of 1998. The court's findings on whether an employer is liable for failing to prevent sexual harassment has also been developed by the courts. Through the court decisions, the obligations of the employer have been advanced and clarified. This thesis looks at the obligation of the employer to curb sexual harassment in the workplace and what further steps employers can take to assist victims who report this conduct.

INTRODUCTION

The European Parliament found that women have been subjected to sexual harassment since they entered the workplace.[1] Despite this, sexual harassment was only defined as harmful conduct by feminists in the United States of America in the 1970s.[2] After the term sexual harassment was coined, Catherine MacKinnon linked this to workplace discrimination on the ground of sex which was a cause of legal action.[3] The reasoning MacKinnon used was that "*sexual harassment singles out a gender defined group, women, for special treatment in a way which adversely affects and burdens their status as employees*" and it limits women in a manner which does not affect men to the same extent.[4]

This classification has influenced many jurisdictions including South Africa. These early decisions, and the subsequent decision of the South African legislature to classify sexual harassment as a form of unfair discrimination, indicates that sexual harassment has always been concerned with the adverse impact it has on victims in the workplace and the inequality it creates, rather than it being about the sexual act.

The first case of sexual harassment was decided by the South African labour court in 1989. At that time, the court acknowledged that sexual harassment was not a new or rare occurrence.[5] Since then, the Labour Appeal Court has opined that sexual harassment is the '*most heinous*' form of misconduct in the workplace.[6] A survey in 1988 found that 63% of women working in Johannesburg had been subjected to unwelcome sexual advances from men in the workplace.[7] It is now estimated that 1 in 4 employees will experience some form of sexual harassment during their working life.[8] The hashtag movements have encourage women to speak up about sexual harassment and abuse.[9] The Commission for Conciliation, Mediation and Arbitration (CCMA) has reported an increase in the number of sexual harassment cases referred to the tribunal, however, a study found that, while 48% of female employees will experience sexual harassment, only 39% will report it.[10] The Netherlands has similarly seen an increase in sexual harassment cases being reported since 2017 when the hashtag movements commenced. In 2021, reports made to the sexual assault center went up by 509% after a popular television show highlighted sexual assault cases.[11]

Remote work and working from home has become more popular recently. This trend has been gaining popularity due to developments in technology. A lot of employees now use laptops to perform their work which can be

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[1] European Union Adopted Text *Measures to prevent and combat mobbing and sexual harassment at the workplace, in public spaces, and in political life in the EU* (2018).
[2] T Nkosi 'The Prohibition on Sexual Harassment in the Workplace: It Was Never Just About Sex' (2021) 42 *ILJ* 2081.
[3] Supra p2088
[4] Supra.
[5] *J v M LTD* (1989) 10 ILJ 755 p757.
[6] *Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC).
[7] Supra.
[8] J Botes 'South Africa: The economic cost of sexual harassment' https://www.globalcompliancenews.com/2021/08/13/south-africa-the-economic-cost-of-sexual-harassment-05082021/ accessed on 20 August 2022.
[9] Hashtag movements include #MeToo, #RUReferenceList, #AmINext, #EndRapeCulture and #NotInMyName.
[10] M van Staden 'Sexual harassment is a growing workplace scourge and laws dealing with it are fragmented' https://www.dailymaverick.co.za/opinionista/2022-07-07-sexual-harassment-is-a-growing-workplace-scourge-and-laws-dealing-with-it-are-fragmented/ accessed on 20 August 2022; H Badenhorst '"Sexual harassment – the most heinous misconduct that plagues the workplace"' Without Prejudice February 2019.
[11] Eline Schaart "The Netherlands appoints #MeToo commissioner after fresh wave of sexual assault cases" johttps://www.politico.eu/article/netherlands-metoo-commissioner-mariette-hamer-sexual-assault-case/, accessed 30 April 2023.

done anywhere. Although popularity around remote work was increasing already, the COVID-19 pandemic and the national lockdown accelerated the number of companies and employees who worked in this manner. Since lockdown, more companies have allowed employees to continue to work remotely, either part-time or permanently.

There are many benefits to working remotely. These include increased flexibility, more of a work-life balance and less time wasted commuting to the office. The main disadvantage to remote working is the lack of in-person interaction. As humans are social beings, this has increased the need for technology which allows employees to collaborate and keep in contact other than using formal methods (such as email).[12]

The change in the workplace means that harassment, including sexual harassment, will likely start to change as well. Working remotely will likely result in a decrease in some forms of harassment, however, it will not be the end of harassment. International studies show that sexual harassment has already adapted to remote work.[13] Remote sexual harassment includes inappropriate behaviour during virtual meetings, messages of a sexual nature, cyber harassment and sexual calls.[14]

With the change in how individuals are making unwelcome sexual advances on employees or colleagues, employment tribunals will need to adapt and develop what is considered sexual harassment to include this conduct. Further, the steps employers take to protect employees while at the workplace will need to develop. This thesis will critically analyse, the way the CCMA, the labour courts and the Constitutional Court have developed the definition of sexual harassment. In addition, the parameters of the employers responsibility to curb sexual harassment will be analysed.

THE LEGAL FRAMEWORK

The Constitution gives every person the right to equality.[15] No person may be directly or indirectly discriminated against on the basis of *inter alia* gender, sex, sexual orientation, and/or age. Human dignity is also a fundamental human right in terms of the Constitution.[16] These rights are infringed when a person is sexually harassed at work.[17] Further, every person has the right to fair labour practices.[18]

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[12] M Dinnen 'The Importance of Human Connection in Remote Work' https://www.workhuman.com/blog/the-importance-of-human-connection-in-remote-work/, accessed 18 May 2023.
[13] A survey conducted in the United Kingdom and Wales in early 2021 found that women who were experiencing sexual harassment in the workplace were still being sexually harassed when working from home, with 15% reporting an increase in the unwanted conduct. ('Rights of Women survey reveals online sexual harassment has increased, as women continue to suffer sexual harassment whilst working through the Covid-19 pandemic' https://rightsofwomen.org.uk/news/rights-of-women-survey-reveals-online-sexual-harassment-has-increased-as-women-continue-to-suffer-sexual-harassment-whilst-working-through-the-covid-19-pandemic/, accessed 29 April 2023.) A survey conducted by Project Include indicates that women and nonbinary individuals experienced increased harassment while working remotely during the pandemic. (Y Hong, M Mack, E Pao, *et al* "Remote work since Covid-19 is exacerbating harm" https://projectinclude.org/assets/pdf/Project-Include-Harassment-Report-0321-F3.pdf, accessed 29 April 2023.)
[14] Supra.
[15] Section 9 of the Constitution of the Republic of South Africa, 1996.
[16] Section 10 of the Constitution.
[17] M Khalema 'Eliminating sexual harassment in the workplace – #TimesUp for employers' https://www.derebus.org.za/eliminating-sexual-harassment-in-the-workplace-timesup-for-employers/, accessed 19 May 2023.
[18] Section 23(1) of the Constitution.

The Employment Equity Act[19] (EEA) was promulgated to give effect to these rights. Chapter 2 of the EEA places on obligation on employers to promote equal opportunities in the workplace by eliminating unfair discrimination.[20] In terms of section 6 of the EEA, no person may directly or indirectly discriminate against an employee on the basis of a listed ground including, *inter alia*, gender, sex, sexual orientation, and/or age.[21] Harassment is specifically included in the EEA as unfair discrimination and may be based on any of the listed grounds or an arbitrary ground.[22] An arbitrary ground is one that is analogous to one of the listed grounds and impairs on the victims dignity.[23]

The EEA makes provision for an employer to be held vicariously liable for the conduct of its employees where the employee's conduct contravenes the EEA.[24] There is an obligation on the employer to take steps to consult the relevant employees and to eliminate the cause of the complaint.[25] Where the employer fails to take the proper steps, it may be held liable for the conduct of its employees.[26] The employer can avoid liability if it can prove that it was not reasonably practical for it to ensure that an employee would not contravene the EEA.[27] If an employee refers their unfair discrimination claim to the CCMA, damages are limited, however the damages an employee can claim at the labour court are unlimited.[28]

Harassment, and specifically sexual harassment, has been developed and codified in labour laws since 1998. The original Code of Good Practice on Handling Sexual Harassment Cases in the Workplace was published in 1998 and amended in 2005. This Code of Good Practice was recently repealed and replaced by the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace (2022 Code). The development of the definition of sexual harassment in each of these codes will be discussed below.

The International Labour Organisation (ILO) has adopted Convention I90 and its recommendation concerning the elimination of Violence and Harassment in the World of Work 2019 (CI90). This convention is the first international treaty which recognises that every person has the right to work in an environment which is free from violence and harassment, including gender-based harassment.[29] The convention requires that member states implement laws to eliminate violence and harassment in the workplace.[30] South Africa ratified this convention on 29 November 2019.[31] The 2022 Code ratifies CI90 and enacts the principles of the convention in South African law.[32]

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[19] 55 of 1998.
[20] Section 5 of the EEA.
[21] The following grounds are also included in the EEA for which an employee may not be directly or indirectly discriminated on race, pregnancy, marital status, family responsibility, ethnic or social origin, colour, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground
[22] Section 6(3) of the EEA,
[23] *Naidoo v Parliament of the Republic of South Africa* (2020) 41 *ILJ* 1931 (LAC).
[24] Section 60(1) of the EEA.
[25] Section 60(2) of the EEA.
[26] Section 60(3) of the EEA.
[27] Section 60(4) of the EEA.
[28] Supra; damages are limited to the amount set by the Minister of Employment and Labour in terms of the Basic Conditions of Employment Act, 75 of 1997.
[29] Preamble of CI90.
[30] Article 4 of CI90.
[31] ILO 'Ratifications of C190 - Violence and Harassment Convention, 2019 (No. 190)' https://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:3999810, accessed 1 May 2023.
[32] Introduction of the 2022 Code of Good Practice.

HOW THE COURTS HAVE DEVELOPED THE DEFINITION OF SEXUAL HARASSMENT

The first sexual harassment case decided by the Labour Court was J v M LTD.[33] In this matter, a senior executive was dismissed for sexual harassment after being warned about his conduct earlier in the year.[34] The applicant had on numerous occasions fondled female employee's breasts and buttocks. The employees had complained about the applicant's behaviour which lead to a warning and finally the applicant's dismissal. Before the applicant's dismissal, employees resigned from the respondent due to his actions. The employees were under the applicant's control. The female employees testified that they were embarrassed by his actions and one complainant confirmed that she did not want to be "*rude*" by verbally refusing his advances, so she tried to show her displeasure by pulling away. The applicant referred his dismissal to the Industrial Court for procedural unfairness as the respondent did not follow its own procedure set out in its disciplinary policy and the applicant claimed dismissal was too harsh due to the effect it would have on him and his family.

As sexual harassment had not been decided before, the court looked at the dictionary meaning of the words. Sexual harassment was found to mean "*to trouble another continually in a sexual sphere*".[35] The court also looked at narrower definition of sexual harassment, which was where a person is expected to engage in sexual conduct to obtain, maintain or improve employment and the terms and conditions thereof. In the wider sense, sexual harassment in the workplace was considered "*unwanted sexual attention in an employment environment*".[36]

The court went further to state that the types of conduct which may constitute sexual harassment may range from "*innuendo, inappropriate gestures, suggestions, or hints or fondling without consent or by force, and in the worst form, namely, rape*".[37] De Kock opined that the conduct did not need to be repeated to constitute sexual harassment.[38]

The court confirmed that the employer had a duty to ensure that employees were not subject to any form of violation in the workplace.[39] The court further found that sexual harassment was a violation to a person's right to integrity of body and personality.[40] When determining the procedural fairness of the dismissal, the court found that if the respondent's disciplinary procedure had been followed, the outcome would have been the same. The court decided it should not interfere with an employer's own assessment, especially when the assessment dealt with the standard of conduct the employer expected. Therefore, the court found that the dismissal of the applicant was fair.

J v M was the main precedent for sexual harassment cases until the 1998 Code of Good Practice was promulgated. The Industrial Court used the definition of sexual harassment provided by De Kock in the matter

[33] Supra fn 7.
[34] Supra para 28.
[35] Supra.
[36] Supra.
[37] Supra.
[38] Supra.
[39] Supra.
[40] Supra.

of *Van Leeuwen v Nettex (Pty) Ltd*.[41] The industrial court found that conversations which were "*below the belt*" constituted sexual harassment.[42] In this matter, three employees had reported sexual harassment by the applicant. In one complaint, the applicant had physically harassed the complainant, where the other two complaints related to verbal harassment.

The Labour Appeal Court agreed with De Kock's judgement in the matter of *Reddy v University of Natal*[43], where the court defined sexual harassment in the same manner. The LAC "*developed*" the definition of dismissible sexual harassment as it opined that not all forms of sexual harassment warranted dismissal but the current set of facts did as "*[t]he harassment was of an aggravated kind*".[44] The factors Myburgh J took into consideration were that the incident lasted for 4 hours and the applicant showed no remorse.[45] This addition was considered when determining whether applicant's should be dismissed for sexual harassment in subsequent cases.[46]

The CCMA was tasked with deciding a constructive dismissal case due to sexual harassment in 1997.[47] The commissioner did not refer to *J v M* (or any case law) in making their decision. Commissioner Radebe looked at various factors to determine if sexual harassment was present including, whether the conduct was physical, verbal or both, whether there was *quid pro quo* sexual harassment and whether the sexual harassment created a hostile working environment.[48] Further, Commissioner Radebe needed to establish if the sexual conduct was unwelcome as he opined that "*sexual conduct becomes unlawful only when it is unwelcome and if the employee regarded the conduct as undesirable or offensive*".[49] This expanded the definition of sexual harassment to conduct which was offensive and unwanted.

1. THE 1998 CODE OF GOOD PRACTICE ON HANDLING SEXUAL HARASSMENT CASES IN THE WORKPLACE AND THE RELEVANT CASE LAW

The first Code of Good Practice on Handling Sexual Harassment Cases in the Workplace was promulgated in 1998. The 1998 Code defined sexual harassment as:

1. "*unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.*

2. *Sexual attention becomes sexual harassment if—*

    a. *the behaviour is persisted in, although a single incident of harassment can constitute sexual harassment; and*

[41] [1994] 11 BLLR 108 (IC).
[42] Supra para F p109.
[43] [1998] 1 BLLR 29 (LAC).
[44] Supra para E p32.
[45] Supra.
[46] In *SATAWU obo Hassiem v Autonet (A Division Of Transnet)* 1256 [1999] 10 BALR 1256 (IMSSA), the panelist found that sexual harassment which lasted for 30 minutes satisfied the requirement that it be "*aggravated*" in kind and held that the employee had also shown no remorse. Therefore, the dismissal of the employee was found to be justified.
[47] *Pretorius v Britz* [1997] 5 BLLR 649 (CCMA).
[48] Supra para I - J p652.
[49] Supra para C p653.

b. the recipient has made it clear that the behaviour is considered offensive; and/or

c. *the perpetrator should have known that the behaviour is regarded as unacceptable*."

Aspects of De Kock's opinions and comments on the nature of sexual harassment persisted and were included in the 1998 Code. These aspects include that sexual harassment did not need to be a repeated or continuous behaviour to be classified as sexual harassment and the conduct needed to be unwanted conduct of a sexual nature.

After the legislature attempted to define sexual harassment in the 1998 Code, further developments were still made by the courts and employment tribunals. In 2000, Commissioner Grogan found that a single incident of molestation amounted to misconduct for common assault but was not harassment as the word "*connotes conduct of a continuing nature*".[50] The 1998 Code definition was not referred to in this matter. In the matter of *Gerbber v Algorax (Pty) Ltd*,[51] Commissioner Brand used the definition of sexual harassment from the 1998 Code.[52]

Both of the CCMA decisions introduce a form of a test for sexual harassment. Commissioner Brand opines that the test must be objective to determine "*whether the advances were welcome or whether the accused reasonably believed them to be so*".[53] Commissioner Grogan took the victims disposition into consideration by finding that a "*perpetrator of blatant sexual molestation cannot complain if he happens to choose a sensitive victim*".[54] By setting out a test for sexual harassment, the Commissioners indirectly developed the definition of sexual harassment as only when the aspects set out in the test were met, would the conduct be considered sexual harassment.

In the matter of *Ahmod v Defy Appliances Ltd*,[55] the commissioner applied the definition from the 1998 Code. The commissioner found that the conduct of the applicant was sexual harassment regardless of who initiated the advances as the applicant was aware that his advances were unwelcome six months before.[56] This case varies to most sexual harassment cases where it is generally the perpetrator who initiates the conduct. It is usually considered more difficult to determine whether conduct constitutes sexual harassment when the complainant and the perpetrator previously had a consensual relationship. This becomes more difficult where the complainant withdraws consent when the conduct evolves. In my opinion, the commissioner in this matter took all aspects into consideration, leading to a fair and accurate decision on the sexual harassment claim.

[50] *Ngantwini v Daimler Chrysler* [2000] 9 BALR 1061 (CCMA)
[51] [2000] 1 BALR 41 (CCMA).
[52] Supra.
[53] Supra para A p52.
[54] Supra fn 50.
[55] [2004] 5 BALR 529 (MEIBC).
[56] Supra para B p536.

2. THE 2005 AMENDMENTS TO THE CODE OF GOOD PRACTICE ON HANDLING SEXUAL HARASSMENT CASES IN THE WORKPLACE AND THE RELEVANT CASE LAW

In 2005, the Code of Good Practice on Handling Sexual Harassment Cases in the Workplace was amended. This amendment changed the definition of sexual harassment and set out the factors which must be considered to determine if conduct amounted to sexual harassment. The 2005 Code defined sexual harassment as "*unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace*".[57] The 2005 Code sets out a test to determine whether the conduct amounts to sexual harassment. The following factors be considered in the test:

1. "*whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;*
2. *whether the sexual conduct was unwelcome;*
3. *the nature and extent of the sexual conduct; and*
4. *the impact of the sexual conduct on the employee*".

Section 138(6) of the LRA provides that a commissioner must take any code of good practice which is relevant to the matter before them into consideration for arbitration. The Labour Court has expanded on this and found that a code of good practice must be taken into consideration but it can be departed from.[58] A commissioner's failure to take the current Code into account when deciding a matter of sexual harassment was found to be a reviewable defect.[59] As the 1998 Code was not repealed, the court found that both codes could be used to determine whether an employee had been sexually harassed.[60] It was argued that the 2005 Code was broader than the 1998 Code and that the latter should have been withdrawn.[61]

In *Campbell Scientific Africa v Simmers and others*[62], Simmers, a male senior manager, accompanied a contractor, Le Roux, and a female consultant, Ms. CM, to a site where the company was installing equipment in Botswana.[63] After dinner on the last night, Simmers asked Ms. CM if she wanted a "*lover*".[64] Ms. CM told Simmers that she had a boyfriend and Simmers responded that if she changed her mind, she should come to his room.[65] When Le Roux joined Simmers and Ms. CM, she said goodnight and went to her room.[66] Simmers did not make any more advances on Ms. CM.[67] Ms. CM mentioned the incident to Le Roux the next day, who informed the managing director of the company upon returning to South Africa.[68] Simmers was subsequently

[57] Section 4 of the 2005 Code of Good Practice on Handling Sexual Harassment Cases in the Workplace.
[58] The Law of South Africa Labour Law: Part 2 (Volume 24(2) - Third Edition) 244 Codes of good practice; *Chetty v Scotts Select A Shoe* 1998 *ILJ* 1465 (LC) 1471C.
[59] *SA Metal Group (Pty) Ltd v CCMA* [2019] JOL 44233 (LC).
[60] *Campbell Scientific Africa (Pty) Ltd v Simmers and others* [2016] 1 BLLR 1 (LAC).
[61] 'Do You want a Lover Tonight?' A Discussion of Campbell Scientific Africa (Pty) Ltd v Simmers & others (2016) 37 ILJ 116 (LAC) (2017) 38 ILJ 769.
[62] [2016] 1 BLLR 1 (LAC).
[63] Supra para 4.
[64] Supra.
[65] Supra.
[66] Supra.
[67] Supra
[68] Supra.

invited to a disciplinary hearing for allegations of sexual harassment, bringing the employers name into disrepute and unprofessional conduct.[69] Simmers was dismissed. [70]

At arbitration, the commissioner found that Simmers' conduct did amount to sexual harassment.[71] This finding was based on the fact that Simmers had not denied making the comments, that he should have been aware that his comments were not welcome, that his comments were inappropriate and Ms. CM had made it known to Simmers that the comments were not welcome by walking away.[72] The commissioner found that dismissal was fair, even though the Code of Good Practice: Dismissal[73] promotes progressive discipline.[74]

In the labour court, Steenkamp J had to determine whether the words "*do you want a lover tonight*" and "*come to my room if you change your mind*" constituted sexual harassment.[75] Steenkamp J questions whether Simmers' conduct amounts to sexual attention or sexual harassment.[76] As the company did not have a sexual harassment policy, the CCMA and the labour court relied on the 1998 Code. [77] The 1998 Code makes it clear that a person may show that conduct is unwelcome by walking away and that verbal conduct can amount to sexual harassment.[78] However, Simmers did not persist with this conduct once Ms. CM indicated that she was not interested.[79] Steenkamp J agrees that a single incident of unwelcome sexual conduct can constitute sexual harassment, however, this was only in the most serious cases where the conduct "*constitute[s] an impairment of the complainant's dignity, taking into account her circumstances and the respective positions of the parties in the workplace*".[80] Steenkamp J found that Simmers' conduct was crude and inappropriate sexual attention as it was a single incident, not of a serious nature and there was no workplace power disparity between the parties.[81] In addition, the parties were not expected to work together again as Ms. CM left for Australia after the incident.[82] On this basis, Steenkamp J found that the conduct did not "*[cross] the line where sexual attention becomes sexual harassment*"[83] and if it did, it would not be serious enough to justify dismissal.[84]

The company appealed this decision, and the LAC overturned Steenkamp J's judgment.[85] The LAC found that Steenkamp J had erred in finding that Simmers' conduct did not constitute sexual harassment.[86] The LAC took into consideration that Ms. CM was 25 years younger than Simmers, which created a power disparity between them.[87] In addition, Ms. CM's dignity was impaired by Simmers' unwelcome conduct as it caused feelings of insecurity and insult.[88] The LAC found that the parties not being co-employees did not mean that there was no

[69] Supra para 8.
[70] Supra.
[71] Supra para 12.
[72] Supra para 12-13.
[73] Schedule 8 of the LRA.
[74] Supra.
[75] Supra para 16.
[76] Supra para 25.
[77] Supra para 26.
[78] Supra para 27.
[79] Supra para 28.
[80] Supra para 29.
[81] Supra para 31.
[82] Supra.
[83] Supra para 126.
[84] Supra para 43.
[85] *Campbell Scientific Africa (Pty) Ltd v Simmers and others* [2016] 1 BLLR 1 (LAC).
[86] Supra para 27.
[87] Supra.
[88] Supra.

power disparity between them.[89] The power disparity was rather found in that Simmers was an older male.[90] The court found that Simmers had taken advantage of Ms. CM being isolated in Botswana to make unwelcome sexual advances.[91] The conduct infringed on Ms. CM's right to equality in the workplace, and therefore, constituted sexual harassment.[92] The incident was considered serious on this basis, despite the fact that it was a single incident and that Simmers did not persist in his advances.[93] The LAC found that dismissal was a fair sanction and upheld the appeal.[94]

The Simmers' case introduces the consideration of power disparity between the victim and the perpetrator of sexual harassment. In this case, the parties' age and gender were considered sufficient to create a power disparity. Further, the fact that the person who was harassed was a contractor and not an employee did not affect the court's decision to classify the conduct as sexual harassment. This broadened the definition of sexual harassment to contractors of a company and enables employers to take disciplinary action against employees for this conduct.

In the matter of *Vezile v Passenger Rail Agency of South Africa (PRASA) and others,*[95] Mr. Mbatha was an employee of PRASA investigating allegations of fraud and misconduct in the Eastern Cape.[96] His office was based in Kwa-Zulu Natal.[97] The appellant, a Human Resources manager, lodged a grievance against Mr. Mbatha for sending her a video via WhatsApp of a couple engaging in sexual intercourse.[98] Mr. Mbatha had sent the appellant videos of a similar nature on two previous occasions. After the first video, the appellant responded with pleasantries when she realised it was from a colleague and she did not respond to the second video.[99] After the third and final video, the appellant responded saying that she did not appreciate the videos.[100] Mr. Mbatha apologised and indicated that he thought he was sending the videos to another person.[101]

The appellant lodged a grievance with her employer, who investigated the incidents and found that Mr. Mbatha had not intended to send the videos to the appellant.[102] The company did not take any further actions. The appellant then referred her grievance to the CCMA, where the parties could not resolve the dispute at conciliation and the commissioner at arbitration similarly found that Mr. Mbatha's conduct did not amount to sexual harassment.[103]

At the labour court, Moshoana J relied on the definition of sexual harassment from the 2005 Code.[104] Emphasis was placed on the conduct being unwelcome by the recipient. Based on the appellant's reaction to the first

[89] Supra para 33.
[90] Supra.
[91] Supra.
[92] Supra.
[93] Supra.
[94] Supra para 37.
[95] [2020] JOL 47018 (LC).
[96] Supra para 2.
[97] Supra.
[98] Supra para 7.
[99] Supra para 12.
[100] Supra para 7.
[101] Supra.
[102] Supra para 8.
[103] Supra para 3.
[104] Supra para 11.

videos, Moshoana J found that at some point she did welcome the videos.[105] The court had to determine whether a person who receives a video on social media, which may go viral, has been sexually harassed.[106] Moshoana J found that this did not constitute sexual harassment.[107] He held that only after a recipient has indicated that the conduct is unwelcome and the employee does not stop, can the conduct become sexual harassment.[108] Relying on *Campbell Scientific Africa v Simmers*, Moshoana J agreed that sexual harassment must involve an exercise of power to gain an advantage.[109] This was not present in the current matter. Therefore, the appeal was dismissed.[110]

A more recent decision from the labour court is a good example that the definition of sexual harassment needs to continue to be developed by the judiciary. In the matter of *Liberty Group Limited v Mkhabele and others*[111], the labour court found that Mr. Mkhabele had been unfairly dismissed for sexual harassment.[112] The labour court does not set out the facts in much detail, but the material facts stated are as follows: Mr Mkhabele sent a male colleague, Mr. Miller, WhatsApp messages of a sexual nature about a female colleague, Ms. Chiloane.[113] These employees all worked in the same department.[114] Ms. Chiloane was informed by Mr. Miller of these messages and she asked him to inform Mr. Mkhabele to stop sending messages of this nature about her.[115] Mr. Miller often allowed Ms. Chiloane to read messages between him and his girlfriend for advice. While Ms. Chiloane had Mr. Miller's phone one day, she looked at the messages between the two men where they were still discussing her.[116] Ms. Chiloane said she read these messages "*because of how [Mr. Mkhabele] looks at [her]*".[117] The employer dismissed Mr. Mkhabele after a disciplinary hearing where Ms. Chiloane testified.[118]

At the CCMA, the commissioner found that Mr. Mkhabele had been unfairly dismissed and was awarded compensation.[119] The employer then reviewed the matter at the labour court.

Nieuwoudt AJ, in deciding whether the award was reviewable, opined on the facts of the case. He refers to the 2005 Code and the test for sexual harassment. [120] Nieuwoudt AJ distinguishes between the current set of facts and an instance where Mr. Mkhabele sent the WhatsApp directly to Ms. Chiloane.[121] He opines that the latter conduct would amount to sexual harassment, where the parties "*had no more than a working relationship*".[122] This distinction is superficial as the examples of non-verbal conduct is not an exhaustive list and both forms of

[105] Supra.
[106] Supra.
[107] Supra.
[108] Supra.
[109] Supra para 14.
[110] Supra para 18.
[111] [2021] JR295/19 (unreported) (LC).
[112] Supra.
[113] Supra.
[114] Supra.
[115] Supra.
[116] Supra.
[117] Supra para 5.
[118] Supra.
[119] Supra.
[120] Supra para 14.
[121] Supra para 16.
[122] Supra.

conduct may amount to sexual harassment. Further, Ms. Chiloane and Mr. Mkhabele did not have more than a working relationship.

Nieuwoudt AJ states that there is no authority dealing with a similar set of facts, where a third party accesses private communication about them.[123] He refers to numerous case law and indicates that they are all distinguishable from the present facts, however, he does not draw meaningful differences between the facts indicating that the conduct is not sexual harassment.

He refers to *Motsamai v Everite Building Products (Pty) Ltd* where the LAC held that "*sexual harassment is the most heinous misconduct which plagues a workplace*".[124] He compares the facts of the matter and found that the sexual harassment complaint in the Motsamai case is more serious. This finding is based on the conduct including physical harassment and showing the complainant inappropriate visuals and objects.[125]

He then referred to the matter of *Rustenburg Platinum Mines Ltd v United Association of SA on behalf of Pieterson and others*.[126] He differentiates the facts in the current matter as in the Rustenburg matter the conduct was continuous by a more senior employee who took disciplinary action against the complainant when she refused to reciprocate.[127]

The main distinction drawn between the case law and the current set of facts is the abuse of power.[128] Based on the facts provided, it is difficult to confirm that there was no power play between Mr. Mkhabele and Ms. Chiloane as their positions at the employer are not provided. Nieuwoudt AJ also refers to the Simmers matter.[129] However, he opines that the decision does not assist the court in making a finding with these facts.[130]

Nieuwoudt AJ had to determine whether there were grounds to review the CCMA's arbitration award.[131] His first consideration was Mr. Mkhabele's right to privacy.[132] He opines that Mr. Mkhabele had "*no reason to believe that his private communication*" might be read by Ms. Chiloane.[133] Further, he found that Ms. Chiloane had not had permission to read the messages.[134] Based on these facts, Nieuwoudt AJ was "*not inclined*" to find that the conduct amounts to sexual harassment, and even if it did, the conduct would not justify dismissal.[135] However, in Nieuwoudt AJ's final decision, he made no finding on whether the conduct was sexual harassment and dismissed the application as he found that the conclusion was one that a reasonable arbitrator would have made.[136]

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[123] Supra para 17.
[124] Supra fn 8; Supra fn 111 para 18.
[125] Supra para 19.
[126] (2018) 39 ILJ 1330 (LC).
[127] Supa fn 111 para 20.
[128] Supra para 20.
[129] Supra para 21.
[130] Supra para 22.
[131] Supra para 23.
[132] Supra para 25; section 14(f) of the Constitution provides that every person has the right not to have the privacy of their communications infringed.
[133] Supra para 25.
[134] Supra.
[135] Supra para 26.
[136] Supra para 29.

Relying on the case law analysed in this thesis, the decision in the Liberty case is concerning for the following reasons. Nieuwoudt AJ touched briefly on some of the important factors which should be considered for sexual harassment, such as the nature and extent of the conduct, the power disparity between parties and the continuous nature of sexual harassment. However, he stops short to compare the facts of the current matter to these factors. He does not indicate that there is no power disparity between Mr. Mkhabele and Ms. Chiloane. He fails to recognise that the conduct was continuous. Ms. Chiloane had asked Mr. Miller to tell Mr. Mkhabele to stop sending messages of a sexual nature about her. Despite this, Mr. Mkhabele continued to send messages to Mr. Miller about Ms. Chiloane. Lastly, he fails to take any cognisance of Ms. Chiloane's comments that the way Mr. Mkhabele looked at her prompted her to look at the messages between the two men.

Nieuwoudt AJ put substantial weight on Mr. Mkhabele's right to privacy, completely disregarding Ms. Chiloana's right to equality, human dignity and fair labour practices. Even if the conduct is not dismissible misconduct when taking these rights into account, they should not have been overlooked so blatantly by Nieuwoudt AJ.

Nieuwoudt AJ states that "*[in] the absence of comparative legal precedents…[he] was not prepared to make a definitive ruling…*"[137] No facts of a case are exactly the same. Nieuwoudt AJ failed to apply the law to the current facts because he did not have an exact comparator. This failure is why the judgment is so concerning in my opinion. If all judges in the labour court are too afraid to apply the current law and precedents to new ways in which sexual harassment (and harassment in general) are conducted, the definition of sexual harassment cannot be developed to include evolving workplaces, different or new forms of sexual harassment.

3. CRITIQUE OF THE COURTS DEVELOPMENT OF THE DEFINITION OF SEXUAL HARASSMENT DURING THE 1998 AND 2005 CODES

Thulani Nkosi critiques the manner in which sexual harassment is being litigated in her article "*The Prohibition on Sexual Harassment in the Workplace: It Was Never Just About Sex*".[138] She suggests that courts should scrutinise the sexual conduct to determine whether it amounts to sexual harassment or crude and inappropriate sexual attention.[139] This distinction is not merely for semantics but based on the common misunderstandings that occur in human interactions.[140]

Nkosi has compared the Simmers and the PRASA cases in her critique. The Simmers and PRASA decisions directly contradict one another. Both cases include conduct of a sexual nature which did not persist after the complainant indicated that the conduct was unwelcome. However, the courts made conflicting decisions on these similar facts. She opined that sexual harassment has become "*a general remedy for every sexual act or conduct viewed as inappropriate in the workplace*".[141] Nkosi's main critique is that sexual harassment has become more about the sex and less about the "*elimination of sexism and the prejudicial impact sexist conduct and sexist attitudes have on gender equality*".[142] Nkosi quotes a feminist scholar, Jane Gallop, who said "*now*

[137] Supra para 26.
[138] Supra fn4.
[139] Supra p2082.
[140] Supra p2083.
[141] Supra p2084.
[142] Supra p2085.

that sexual harassment is widely recognized, it is widely misrecognized as a form of perverted sexuality rather than a garden variety form of sexism".[143]

Nkosi opines that the labour court dealt with the allegations of sexual harassment correctly in the PRASA decision.[144] The Simmers judgement is criticised for finding that the conduct created a hostile work environment, where one of the key factors for creating a hostile work environment is long term or persisting sexual harassment.[145] Further, this judgement has been criticised for turning on the complainants emotions instead of the definitions set out in the Codes, logic and reason.[146] Nkosi opines that this judgement conflicts with the historical foundations of sexual harassment, which is to eradicate unfair discrimination.[147]

The PRASA judgement is praised for highlighting two important aspects of sexual harassment which are often overlooked.[148] Firstly, the judgement rejects that sexual harassment should be used to regulate all crude and inappropriate sexual conduct in the workplace.[149] The author clarifies that employers should still take action against this conduct, however, it should not be done as sexual harassment.[150] Secondly, the judgement correctly highlights the harm which is caused by sexual harassment, namely, the abuse of power by the harasser over the victim.[151]

4. THE CODE OF GOOD PRACTICE ON THE PREVENTION AND ELIMINATION OF HARASSMENT IN THE WORKPLACE

This year, the 1998 and 2005 Codes were repealed and replaced by the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace. The 2022 Code aims to bring South African law on harassment more in line with international standards and is guided by the ILO's conventions.[152]

The test for sexual harassment has remained the same as the 2005 Code. The 2022 Code defines sexual harassment as “unwelcome conduct of a sexual nature, whether direct or indirect, that the perpetrator knows or ought to know is not welcome”.[153]

The 2022 Code sets out more detail on each of the factors to be taken into account when testing whether there has been sexual harassment. The first factor is that the conduct must be unwanted which must be indicated to the perpetrator, but it does not have to done verbally or by the victim themselves.[154] Secondly, the nature and

[143] Supra p2085; J Gallop 'Sex and Sexism: Feminism and Harassment Policy' Academe, Vol. 80, no. 5 (Sept/Oct 1994).
[144] Supra p2092.
[145] Supra.
[146] Supra.
[147] Supra.
[148] Supra.
[149] Supra.
[150] Supra.
[151] Supra.
[152] The 2022 Code of Good Practice is specifically guided by the International Labour Organisation (II.O) Convention I90 and its recommendation concerning the elimination of Violence and Harassment in the World of Work. 2019; the Discrimination (Employment and Occupation) Convention 111 of 1958 (Convention 111): and the ILO Convention I5l relating to Occupational Health and Safely.
[153] Section 5.3.1 of the 2022 Code.
[154] Section 5.2 of the 2022 Code.

extent of the conduct must be considered.[155] The conduct may be physical, verbal or non-verbal conduct and it may be expressed directly or indirectly.[156] "*[V]ictimization, quid pro quo harassment, sexual favouritism and creating or permitting a hostile working environment*" must also be considered in the nature and extent of the conduct.[157] Thirdly, and importantly, the impact of the conduct on the employee's dignity must be taken into account considering, the employee's circumstances and the positions of the two employees.[158]

Interestingly, the 2022 Code confirms and enforces the Simmers case. The 2022 Code refers to horizontal harassment which is harassment between employees in the same position or on the same level.[159] The 2022 Code highlights a recent Constitutional Court decision which indicates that the seniority or the perpetrator and the age disparity between the perpetrator and the victim are aggravating factors which must be taken into consideration.[160]

The 2022 Code was promulgated recently and I am not aware of any case law available which indicates how the courts will apply this code to sexual harassment matters. The 2022 Code is a lot more detailed, which provides judges and commissioners a explanation of each factor and will guide them on all the necessary and relevant information which must be taken into account when deciding matters of this nature.

5. COMPARISON TO THE DEVELOPMENT OF THE SEXUAL HARASSMENT DEFINITION USING CASE LAW FROM THE NETHERLANDS

Recent court decisions relating to sexual harassment in the Netherlands are used as a comparison to the way the South African courts are approaching sexual harassment. The Netherlands has been used to compare South African court decisions based on the steps the country has taken since the hashtag movements and the countries proactive approach to curbing sexual violence. As indicated, the various hashtag movements has resulted in more sexual harassment cases being reported in the Netherlands. Since this increase in allegations being reported, the Netherlands has appointed a commissioner to combat sexual violence in the county.[161] The commissioner has developed an action plan to combat the toxic behaviour and will be in office for three years.[162] This movement is changing the way sexual harassment cases are being decided by the Dutch courts. The Dutch court has dealt with sexual harassment cases and harassers with a firm and unsympathetic approach.

The Dutch Occupational Health and Safety Act and the Equal Treatment Act includes the following definition for sexual harassment "*[a]ny form of verbal, non-verbal or physical behaviour with [a] sexual connotation that has the purpose or effect of affecting the dignity of a person, in particular when a threatening, hostile, insulting, humiliating or offensive situation is created*."[163] The definition is similar to the definition used in the 2022 Code

[155] Section 5.2 of the 2022 Code.
[156] Section 5.2.5 of the 2022 Code.
[157] Section 5.2.6 of the 2022 Code.
[158] Section 5.2.8 of the 2022 Code.
[159] Section 4.7.8 of the 2022 Code.
[160] McGregor v Public Health and Social Development Sectoral Bargaining Council and Others [2021] ZACC14.
[161] Supra fn 13.
[162] Diederik Baazil 'World's First MeToo Official Finds a Tougher Job Than She Expected' https://www.bloomberg.com/news/articles/2023-01-08/world-s-first-metoo-official-finds-a-tougher-job-than-she-expected#xj4y7vzkg accessed 30 April 2023.
[163] Article 1(a), par. 3 of the Equal Treatment Act.

as it recognises a variety of different forms of conduct which may be considered sexual harassment and considers the impact on the victims dignity.

In the District Court for Central Netherlands, an employee was summarily dismissed for sexual harassment. The harasser tried to kiss a colleague on the mouth and she resisted the conduct. The harasser kissed the employee's hair. There was no one else in the office building. The employee created an unsafe situation and grossly disregarded the internal measures, including COVID-19 regulations.[164]

The parties disagreed on whether the harasser intended to kiss the employee on the cheek or the mouth and whether his intentions were of a sexual nature. The court held that the intention of the employee did not matter. The court opined that the behavior outlined is objectively a transgression and such behavior does not fit within a work environment. [165] The employer has a right and an interest to guarantee a safe working environment where this type of behavior is not tolerated. [166] Despite the employee's long service, the judge ruled that the personal circumstances did not detract from the legal validity of the dismissal. The summary dismissal was found legally valid. [167]

This matter indicates that the courts in the Netherlands will not tolerate any sexual conduct within the workplace, regardless of the intentions of the perpetrator. Further, the working environment of the employer as a whole was considered, rather than just the effect the conduct had on one person (similar to the court's decision in the Simmers case). This case can be distinguished from the PRASA case where the court placed significant weight on the employee's intention when sending the video which ultimately lead to the court finding that the conduct was not sexual harassment.

In a recent case (Court of Arnhem-Leeuwarden), the harasser offered to help his co-worker carry a heavy box to her car. While in the parking lot, he referred to his co-worker's breasts as "*double airbags*" and then grabbed her breasts, which was confirmed by video footage. [168] The conduct caused the colleague significant psychological consequences and she required treatment. The act also violated the employer's policy on undesirable behaviour, which was clear and accessible, and actively brought to the attention of employees.

The harasser had sent a pornographic images and a video to a supervisor in March 2017, allegedly inadvertently, which was taken into account by the court as the employee had received a formal warning in connection with this transgression and was suspended for one-week. The harasser received a final formal warning due to this conduct and was warned that subsequent conduct would result in dismissal.[169]

The employee was 58 years old and at the time of the hearing and (despite job applications) did not yet have a new job. In addition, he argued that the incident ended his marriage, which may result in him losing his home. The court considered that summary dismissal is a severe punishment. Even taking into account these far-

[164] District Court for Central Netherlands September 17, 2021, par. 2.4 - 2.8
[165] A well-defined definition of (sexually) transgressive behaviour is lacking in both legislation and case law. In assessing this type of conduct both objective factors as subjective elements may play a role.
[166] Supra fn 146 para 4.8 - 4.9
[167] Supra para 4.9 - 4.10
[168] Court of Arnhem-Leeuwarden June 21, 2022 para 3.5 - 3.6
[169] Supra para 3.18

reaching personal issues for the employee, the court ruled that the conduct was serious enough to constitute an urgent reason justifying the immediate dismissal.[170]

Comparing the facts of this matter to the PRASA case, again the Dutch court found that the intention of the employee did not matter. The employee in this case was disciplined for sending a colleague an unsolicited image of a sexual nature. Further, the person he sent them to was his supervisor, therefore, the court did not consider a power disparity to be essential for a sexual harassment claim. However, the outcome of the courts can be distinguished based on the employee's serious misconduct after he received a final written warning. This conduct would be considered serious misconduct in South Africa.

In a matter before the Court of Amsterdam, a managing director was accused of sexual harassment (unwelcome touching of a sexual nature) by an anonymous reporter. After this report, the employer launched an internal investigation into the complaint. This resulted in discovering another report and two witnesses for each report.

The harasser was accused of touching one reporter on her back several times, pinching her buttocks, asking her out to dinner and for her phone number.[171] The second reporter accused the harasser of saying he wished she was older so he could have a relationship with her, putting his hand on her leg and his arm around her shoulder multiple times, even when she asked him to stop.[172]

The employer dismissed the harasser immediately after the investigation.[173] The harasser objected and requested to be reinstated.[174] The harasser believed that there was no compelling reason for his dismissal. For this reason, he claimed fair compensation and compensation for irregular termination and transition compensation.

The court rejected the harasser's contention that he was not dismissed summarily.[175] The judge considered that the employer's investigation was not independent and external. Further, the reporters complained anonymously and the witnesses did not testify from their own observation. The employer also failed to consider alternatives to summary dismissal (e.g. an official warning or suspension). The court found that the termination was not legally valid.[176] However, the court did not award equitable compensation since the employee was to blame for the termination, but did award transitional compensation and a forfeiture of damages for unlawful termination.[177]

This case seems to be an outlier where the Dutch court did not find that the dismissal was valid (or unfair in terms of South African law). However, the decision was based on procedural aspects rather than the sexual harassment and the harasser was not reinstated or compensated for this error by the employer.

The Dutch courts have treated each instance of sexual harassment very seriously. The Dutch court's approach seems to be more victim-centred and focuses on removing harassers from the workplace to ensure a safe

[170] Supra para 3.19 - 3.20
[171] Court of Amsterdam August 25, 2022 para 1.6
[172] Supra para 1.6
[173] Supra para 1.8
[174] Supra para 1.9
[175] Supra para 14
[176] Supra para 14 - 21
[177] Supra para 12 - 27

working environment for all employees. The harasser's intention was not relied on heavily in two of the cases. This can be distinguished from the weight placed on the harasser's intention by the South African courts.

THE PARAMETERS OF THE EMPLOYER'S RESPONSIBILITY IN CURBING THIS PROBLEM

1. COMMON LAW DUTY

Employers have a responsibility to provide employees with a safe working environment. Before the EEA and the Codes, an employer's responsibility was in terms of their common law duty to "*take reasonable care for [employee's] safety*" which included "*a duty to protect them from psychological harm caused*".[178]

2. DUTY IN TERMS OF THE CODES OF GOOD PRACTICE

The Codes indicate that employers *should* develop a policy which takes the contents of the code into consideration.[179] There is no obligation on employers to have such policy in place. However, having this policy in place will be taken into consideration to determine an employer's liability in terms of section 60 of the EEA.[180]

The contents of the policy required in each of the Codes has been similar. Employers should include that sexual harassment will not be tolerated by the employer. Employees must be reminded that sexual harassment is a form of unfair discrimination on listed grounds. Any grievances reported must be investigated by the employer and handled in a confidential manner, using the procedures indicated in the policy. After a thorough investigation the employer must take the appropriate action against the employee, and retaliation or victimisation of an individual who makes a complaint in good faith is a disciplinary offence.[181]

The 2022 Code has broadened the scope of the suggested policy to include all forms of harassment instead of only sexual harassment. In addition, it has provided some clarity on what an employer should do to when handling a complaint of harassment. Therefore, the 2022 Code may be considered more onerous on an employer than the previous Codes as an employer will need to implement all of the steps and obligations in order to comply.

The 2022 Code has set out specific obligations for employers.[182] Employers are obliged to take specific steps when an allegation of harassment has been made.[183] These steps include consulting with the parties involved, addressing the complaint in line with the 2022 Code or the employer's policy and taking steps to eliminate the harassment.[184] The 2022 Code provides that if an employer fails to take adequate steps to eliminate (sexual)

[178] *Media 24 Ltd v Grobler* [2005] 7 BLLR 649 (SCA).
[179] Section 6 of 1998 Code, section 7 of the 2005 Code and section 9 of the 2022 Code.
[180] Supra.
[181] Supra.
[182] Section 10 of the 2022 Code.
[183] Section 10.1 of the 2022 Code.
[184] Supra.

harassment once it has been reported by an employee, it *will* be held vicariously liable in terms of section 60.[185] The 2022 Code further provides that this is the case where the (sexual) harassment is a "*single incident*".[186]

The 2022 Code sets out suggestions on the steps an employer can take but indicates that the steps an employer should take are not limited.[187] These steps include advising the employee of the formal and informal procedure available to address their complaint, offering the employee advice, assistance and counselling, if possible, and handling the compliant in a manner which is substantially and procedurally fair.[188] For sexual harassment complaints, additional emphasis is placed on the assistance and counselling which the employer should provide to the employee. Further, a person other than a manager (if possible) should be appointed who can be approached by complainants.[189]

Again, as the 2022 Code came into force recently, as far as I am aware, case law is not yet available on how the court will deal with the employer's responsibility or their liability.

3. CASE LAW AND THE EMPLOYER'S LIABILITY

The employer's responsibility to curb sexual harassment has been considered by our courts numerous times before. In the matter of *Grobler v Naspers Bpk*,[190] the High Court found that an employer could be held vicariously liable for sexual harassment of an employee in terms of the common law.[191] However, the court found that the employer could escape liability where it could prove that "*it took immediate and effective steps to prevent the harassment*" or where the complainant failed to take advantage of the help offered.[192] In making its decision, the High Court considered whether sexual harassment may be considered an occupational injury in terms of the Compensation for Occupational Injuries and Diseases Act (COIDA).[193] This was a defence raised by Naspers. The court found that sexual harassment did not fall within the ambit of COIDA.[194] The respondent appealed the decision to the Supreme Court of Appeal, which agreed with the finding.[195] In addition, the court found that employees can use the mechanisms created in labour laws and under delict for sexual harassment.[196]

Ntsabo v Real Security CC[197] was the first matter decided in terms of section 60 of the EEA. The employer was found liable because it failed to take any actions for weeks after being notified by an employee of sexual harassment. The court found that the employer is vicariously liable when it fails to take action as this could be seen as allowing or condoning the sexual harassment and they should be held liable for the damages.[198]

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[185] Section 10.3 of the 2022 Code.
[186] Supra.
[187] Section 10.4 of the 2022 Code.
[188] Supra.
[189] Section 10.5 of the 2022 Code.
[190] [2004] 5 BLLR 455 (C).
[191] Supra.
[192] Supra.
[193] 130 of 1993.
[194] Supra.
[195] Supra.
[196] Supra.
[197] [2004] 1 BLLR 58 (LC).
[198] Supra.

Following the same trend, courts have found that employers are not liable for harassment or discrimination in terms of section 60 of the EEA where they have taken steps to curb the conduct immediately.[199]

In the recent labour court matter of *Shoprite Checkers (Pty) Ltd v JL and Others*, the employer was ordered to implement a sexual harassment policy.[200] The court found that the employer was obliged to take action once sexual harassment has been reported.[201] This included consulting the parties involved, taking steps to eliminate sexual harassment in compliance with the EEA and protect the employee.[202]

From the case law, it is clear that one of the employer's responsibilities is to deal with sexual harassment claims when they are made. This should be done as soon as reasonably possible. Where an allegation is made, employer's should handle this in accordance with their policy. If the employer does not have a policy, it should comply with the 2022 Code. It is also clear that employers should make employees aware of their policy. This may assist in curbing sexual harassment as employees will be aware of what actions are prohibited. At the very least, having a sexual harassment policy can assist employers in taking action against employees who contravene the policy. The disciplinary action taken will also more likely be considered fair where the employer can prove that the employee was aware of the policy.

Section 60 has been criticised by the labour appeal court for being unclear.[203] Therefore, the courts have provided additional clarity in their judgments. The parameters of the employers responsibility can be determined by looking at the factors the court set out for determining whether an employer is liable in *Potgieter v National Commissioner of the SAPS & Another*.[204] The factors are as follows:

"*(i) The sexual harassment conduct complained of was committed by another employee.*

(ii) It is sexual harassment constituting unfair discrimination.

(iii) The sexual harassment took place at the workplace.

(iv) The alleged sexual harassment was immediately brought to the attention of the employer.

(v) The employer was aware of the incident of the sexual harassment.

(vi) The employer has failed to consult all relevant parties, or take the necessary steps to eliminate the conduct or otherwise comply with the provisions of the EEA.

(vii) The employer has failed to take all reasonable and practical measures to ensure that employees do not act in contravention of the EEA."[205]

These factors can be used as guidance, however, they are not the only instances where an employer will be liable. The 2022 Code extends the protection of employees to any situation where the employee is working.

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[199] *Potgieter v National Commissioner of the SAPS* [2009] 2 BLLR 144 (LC); *Moatshe v Legend Golf and Safari Resort Operations (Pty) Ltd* [2014] 12 BLLR 1213 (LC).
[200] (C886/17; C627/2018) [2021] ZALCCT 95.
[201] Supra.
[202] Supra.
[203] *Liberty Group Ltd v MM* [2017] 10 BLLR 991 (LAC).
[204] [2009] 2 BLLR 144 (LC).
[205] Supra para 46.

This includes the workplace but does not limit it to only the workplace. It includes work-related social events, employer provided accommodation or transport and even an employee's home when the employee works virtually. Sexual harassment may also occur in some of these settings by a person who is not an employee.

The requirement for the employee to immediately inform the employer has also been expanded. In the matter of *Liberty Group Ltd v MM*,[206] the judgement criticised section 60 as a narrow interpretation will lead to employers only being liable for the sexual harassment after it has already occurred if the employer has failed to take steps timeously and prevent further sexual harassment.[207] The court endorsed the manner in which vicarious liability had been approached previously in a matter relating to racial abuse, where the employer was found vicariously liable as it failed to eliminate the harassment and to prevent it from continuing to occur.[208]

4. SUGGESTED APPROACH FOR EMPLOYERS TO CURB SEXUAL HARASSMENT

Ensuring perpetrators of sexual harassment face consequences is an effective way to curb sexual harassment in a workplace. Meyersfeld suggests that employers should approach sexual harassment cases in a different manner than other disciplinary procedures to achieve this.[209] She makes three proposals.

Firstly, she suggests that the complainant in a sexual harassment matter does not need to be the victim, but can make management aware of the conduct.[210] The reason for this suggestion is to allow the accused a fair opportunity to face and question their accuser without the victim having to appear.[211] She recognises that this is not foolproof, however, it can bring a level of objectivity to the claim of sexual harassment.

Secondly, the testimony given by a victim should be evaluated in light of the sexual harassment.[212] Meyersfeld opines that the common idea of a "good" witness does not work when a witness is testifying about sexual harassment.[213] Typically a good witness is "*judge[d] … with reference to a person's ability to look you in the eye; to be clear and articulate in the wrong they have experienced; to have a perfect recollection of the events that occurred; and to be certain that they have a legitimate right to be in court asking for assistance.*"[214] The nature of sexual harassment makes it difficult for victims or witnesses to testify in this manner.[215]

Thirdly, the person investigating and prosecuting the case should be trained in sexual harassment.[216] Meyersfeld suggests that when the case is heard internally during a disciplinary hearing and when matters are

[206] Supra fn 218.
[207] Supra.
[208] Supra; *Biggar v City of Johannesburg, Emergency Management Services* [2011] 6 BLLR 577 (LC).
[209] B Meyerseld 'Sexual Harassment and Disciplinary Procedures: Never the Twain Shall Meet' 2020 Constitutional Court Review Volume 10, p301–330.
[210] Supra p307.
[211] Supra.
[212] Supra.
[213] Supra fn 224 p319.
[214] Supra
[215] Supra.
[216] Supra p307.

heard at the CCMA or labour court, more specialised skills are required to do so properly.[217] This would be a similar approach to a prosecutor in a criminal law matter.[218]

Meyersfeld's proposals may be difficult to implement in all workplaces. However, if the attitude of employers towards sexual harassment complainants changes, aspects of these proposals can be easily implemented. Employers can undertake a broader investigation into the alleged harasser's conduct within the workplace to confirm if any employees have experienced or witnessed similar conduct. This investigation would assist in determining whether the allegations are true and provide more objective evidence. Where a broader investigation is not possible or inconclusive, the employer should take heed of the complainant's demeanour and be careful to apply conventional methods when assessing their credibility. Lastly, employers should enlist the help of an expert who has dealt with sexual harassment cases before to assist them investigating and arguing the allegations. Applying these principles in the workplace may lead to more harassers being correctly punished for their inappropriate behaviour, which will assist employers to prevent this conduct.

CONCLUSION

The CCMA and the courts have continuously developed the definition of sexual harassment since the first case was heard in 1989. The introduction of the 1998 Code assisted the courts to have a definite definition to apply according to the facts of each matter. The developments made by the legislature to this definition have been essential to keep the definition in line with international standards and up to date in accordance with South Africa’s case law.

Certain factors have been given significant weight by the courts when classifing the conduct as sexual harassment. These include serious or continuing conduct of a sexual nature, a power disparity, and creating a hostile working environment. The effect the conduct has had on the employee has also been debated. Some judges have considered this factor to be important, where others have not fully recognised the effect the conduct had on the victim and the environment in which they have to work.

The court has also been criticised for finding that all sexual conduct in the workplace is sexual harassment. This critique is important to remind us why the concept of sexual harassment exists. Sexual harassment at its core is unfair discrimination based on sex, gender or sexual orientation. Steps need to be taken to eliminate this conduct as it is a barrier of entry for women (and men) to the workplace. Where the sexual conduct does not fit the definition of sexual harassment, it does not mean that an employer has no recourse against the employee. However, the employer should rather take steps to discipline the employee for their misconduct rather than treating it as sexual harassment.

When the South African courts decisions on sexual harassment are compared to those of the Netherlands, there is a clear trend that the Dutch courts find that any sexual conduct which places other employees at the

[217] Supra p327.
[218] Supra

risk of harm or creates a hostile working environment is a dismissible offence and disciplinary action should be taken against the employees.

Case law dealing with employer liability provides what the court believes the parameters are of an employer's responsibility in curbing sexual harassment in a workplace. The common trend is that employers are found liable for the sexual harassment of its employees when they have failed to implement the Codes. The recent court decision of *Shoprite Checkers (Pty) Ltd v JL and Others* further enforces that having a policy in place to deal with sexual harassment is crucial when determining an employer's liability. This obligation can be complied with by implementing a workplace (sexual) harassment policy. The policy should set out how complainants can raise issues with the employer. The implementation of the laws on sexual harassment is more important than the policy itself. Making sexual harassment policies mandatory for employers is unlikely to change the attitude around the enforcement of the laws prohibiting sexual harassment.

To fully comply with this requirement and successfully avoid liability, the employer must not treat the sexual harassment policy as a tick-box exercise. The sexual harassment policy must include a procedure which employees can use to report sexual harassment. This procedure should cover both formal and informal procedures to ensure the employee can raise the concern in a manner which they are comfortable with. Further, the employer must comply with the additional obligations set out in the 2022 Code.

In addition, employers are required to deal with complaints timeously after the conduct has been brought to its attention. Employers should not limit the complaints dealt with to only those raised through formal channels. Every complaint made to the employer should be investigated and handled in the appropriate manner.

The labour court has indicated that CCMA commissioners need to receive training in order to handle sexual harassment cases properly. This could be said for managers and employees as well. Employers should provide training to their employees on what constitutes sexual harassment in the workplace. This training would indicate to the court that the employer has taken steps to eliminate sexual harassment in the workplace and to educate employees on how to act in an appropriate manner. Further, employers should avoid dealing with sexual harassment in the same way as all other allegations of misconduct. A more nuanced approach should be adopted when dealing with the complainant, the investigation and the disciplinary hearing. Employees who have sexually harassed a colleague should face consequences by the employer in an attempt to curb this conduct.

Developing the definition of sexual harassment to include the modern and changing workplace will take more nuances into consideration. The conduct of the harasser will likely no longer include obvious physical forms of sexual harassment. Where the employment tribunals incorrectly apply the definition of sexual harassment or where they fail to apply it all, a greater barrier may be created. This may lead to less victims referring matters under the mistaken belief that the harassment they endure is not serious enough. This is a real concern as the employment tribunals' decisions on sexual harassment are not uniformed or creating a clear definition of what sexual harassment is and what actions constitute sexual harassment. The factors taken into consideration in sexual harassment cases keep changing, even though the tribunals have had the Codes to guide them for over 20 years.

The definition of sexual harassment and the employers responsibility in curbing this conduct will continue to be developed by the South African courts and the legislature. It is important that we continue to develop in line with the changing workplace.

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