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AN EMPLOYER'S LIABILITY IN THE CONTEXT OF SEXUAL HARASSMENT

by

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Master of Laws by Coursework and Research Report

at the University of the Witwatersrand, Johannesburg

Date: 29 February 2024.

DECLARATION

I, **0409741G** (Student number), declare that this Research Report is my own unaided work. It is submitted in partial fulfilment of the requirements for the degree of Master of Laws (by Coursework and Research Report) at the University of the Witwatersrand, Johannesburg. It has not been submitted before for any degree or examination in this or any other university.

I have submitted my final Research Report through TurnItIn and have attached the report to my submission.

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AN EMPLOYER'S LIABILITY IN THE CONTEXT OF SEXUAL HARASSMENT

ABSTRACT

The legal measures taken to prevent and eliminate sexual harassment in the workplace, are all to ensure that there is employment equity and that the rights enshrined in the Constitution of the Republic of South Africa, 1996 ('the Constitution'), are upheld. This paper aims to determine the scope of employers' vicarious liability for acts of sexual harassment. To achieve this goal, the paper will be divided into two separate sections, the first will canvas the historical development of vicarious liability of employers in connection with cases of sexual harassment together with the applicable common law principles. This will be followed by an analysis of the employer's statutory vicarious liability particularly the changes that occurred between the Code of Good Practice on the Handling of Sexual Harassment Cases in Workplaces GEN N 1357 Gazette 27865 dated August 4, 2005 ('the Old Code') and 2022 the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace GN. R1890 Gazette 46056 dated March 18, 2022 ('the New Code'). In this analysis, cases and hypotheticals will be used to illustrate the aspirations of the changes in the Codes together with the practical implications. The key findings of the research are that in reality the aspiration of the New Code will most likely not be achieved from a substantive aspect, as the scope of vicarious liability has not been extended beyond that which it was under the Old Code, because the fundamental principles of vicarious liability which are the cornerstones of the Employment Equity Act in section 60, make it practically impossible to hold an employer liable for acts of persons other than those governed under the Employment Equity Act 55 of 1998 ('EEA'). Regarding the procedural aspect, there appears to be far more onerous obligations placed upon the employer, which would increase liability for employers. In conclusion, the legislature had great intentions concerning the substantive scope, but it was not well executed and needs to go back to the drawing board and possibly develop ways to convert the New Code into binding legislation together with dealing with the treatment of misconduct and discrimination separately but whilst balancing the rights of both parties. Unfortunately, the New Code has failed to achieve the goals we had all hoped for.

LIST OF ACRONYMS AND ABBREVIATIONS

A	Appellant Division
AD	Appellant Division
BCEA	Basic Conditions of Employment Act 75 of 1998
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
EEA	Employment Equity Act 55 of 1998
GG	Government Gazette
GJ	Gauteng Division, Johannesburg
IC	Industrial Court
ILJ	International Law Journal
ILO	International Labour Organization's
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act 66 of 1995
OHSA	Occupational Health and Safety Act 85 of 1993
PEPUDA	Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000
PHA	Protection from Harassment Act 17 of 2011
SALJ	South African Law Journal
SCA	Supreme Court of Appeal
SOA	Sexual Offences and Related Matters Amendment Act 32 of 2007

TABLE OF CONTENT

I. INTRODUCTION 6
(a) Research problem and background. 7
(b) Research question and objective. 7
(c) Research Methodology and Limitations. 7
II. OVERVIEW OF THE HISTORICAL CONTEXT OF THE LEGAL FRAMEWORK ON SEXUAL HARASSMENT 8
III. GENERAL CONCEPT OF EMPLOYER'S LIABILITY 10
(a) Delictual liability 10
(b) The doctrine of vicarious liability 11
IV. COMMON LAW - VICARIOUS LIABILITY 12
(a) The Test for Vicarious Liability 13
(b) Defences 18
V. STATUTORY VICARIOUS LIABILITY 19
(a) The Employment Equality Act ('EEA') 19
(b) The New Code 20
(i) The Substantive Changes in the New Code 21
(ii) The Factors to Establish Sexual Harassment. 22
(iii) Procedural changes in the New Code 25
(iv) Defences 28
VI. COMPENSATION 28
VII. RECOMMENDATIONS AND CONCLUSION 29
VIII. BIBLIOGRAPHY 32
(a) Legislation 32
(b) South African Case Law 32
(c) Foreign Case Law 34
(d) Books 34
(e) Articles 35
(f) Internet Sources 35

I. INTRODUCTION

Sexual harassment, in the last few years, has become a hot topic of debate, particularly in the wake of the '#MeToo' movement in 2017 that went viral, globally. This global movement spawned a social movement and awareness relating to sexual violence, abuse, and acts of sexual harassment,[1] provoked the world into seriously considering, inter alia, the issues surrounding sexual harassment and in particular the legal framework that was in place to prevent, protect, and support victims of sexual harassment whilst also holding those necessary accountable.

At the time of this global awakening, South Africa's legal framework on the topic of sexual harassment and employers' liability was governed by the Constitution, EEA, the Old Code, the common law and the Promotion of Equality and the Prevention of Unfair Discrimination Act 4 of 2000 ('PEPUDA').

As was apparent globally and in South Africa, sexual harassment is rife despite the legislature's best efforts to prevent, protect, prohibit, and punish such conduct. It was further apparent that such conduct was more prevalent in the employment sphere and with almost a decade having lapsed since the Old Code, and with the spotlight now firmly shinning on the topic of sexual harassment, the South African legislature was catapulted into reconsidering whether the Old Code was comprehensive, inclusive, current, and applicable to the modern world settings. It was conclusively apparent from the jurisprudence that it was not and as such in March 2022 the New Code came into operation and replaced the Old Code.

The New Code injected several changes into its guidelines, including broader definitions for, inter alia, 'employees', 'workplace', 'unwanted conduct', and 'sexual harassment' together with extending the obligations placed on the employer concerning prevention, protection, and the support that may be required in the circumstances. These additions and amendments housed in the New Code will be analysed herein. The analysis is to determine whether they directly impact the scope of the employer's statutory vicarious liability in terms of section 60 of the EEA[2] and possibly indirectly in terms of the common law.

[1] https://metoomvmt.org/get-to-know-us/history-inception/.
[2] Rochelle le Roux, Alan Rycroft & Thandi Orleyn (ed) *Harassment in the Workplace: Law, Policies and Processes* (LexisNexis 2005) 75.

A discussion of the requirements for establishing an employer's liability in terms of common law and section 60 of the EEA will be unpacked whilst juxtaposing whether the New Code has impacted the employer's liability in connection with these two forms of liability. The purpose of this analysis is an attempt to answer the ultimate question of whether the scope of the employer's liability will be increased with the introduction of the New Code.

(a) Research problem and background

The liability of employers in cases of sexual harassment has historically been confined to narrow interpretations that were derived from conservative definitions of sexual harassment. This archaic legislation saw many victims being left without recourse. The legislation and principles applicable to sexual harassment in the workplace developed slowly but have more recently given rise to the New Code, which aspires to fill the lacunas and dispel the conservative approach to the topic of sexual harassment. The New Code aspires to provide great protection, prevention, and accountability in cases of workplace sexual harassment.

(b) Research question and objective

The research question is to analyses the current legal framework that governs an employer's vicarious liability for sexual harassment and determine whether the scope is sufficiently proportionate to the balancing of the respective parties' rights whilst achieving protection, prevention, and accountability. The main objective and focus of this paper is on whether the employer's vicarious liability has been increased with the introduction of the New Code and if so, whether is it justifiable.

(c) Research Methodology and limitations

A doctrinal methodology has been used for the exploration of sexual harassment and employers' liability by focusing on the text and legal language and avoiding reliance on extra-legal normative considerations. This paper probes into the multifaceted landscape of sexual harassment within the employment context, analysing the legal obligations and liabilities imposed on employers, by focusing on the legal literature relevant to the topic such as the Constitution, labour legislation, case law, journal articles, books and similar sources.

The doctrinal approach to this topic involves a meticulous examination of relevant statutes, case law, and legal doctrines governing sexual harassment and the employers' responsibilities. By dissecting key judicial decisions and legislative enactments, this method highlights the

evolution of legal standards, the interpretation of statutory provisions, and the application of legal principles in practical scenarios.

Central to this inquiry is the analysis of various legal theories and doctrines relevant to employers' liability for sexual harassment committed by their employees. From the application of vicarious liability principles to the assessment of an employer's duty of care, each aspect is analysed through the doctrinal lens to ascertain the scope of employer accountability and the avenues for legal recourse available to victims.

Moreover, this exploration plunged into scholarly commentary and comparative analyses to enrich the discourse surrounding sexual harassment law and its implications for employers. This process was necessary to set the backdrop against which the common law and New Code could be compared and analysed.

This study is important for gauging whether the New Code suffices to fill in the prior lacunas of the Old Act whilst being practically applicable in achieving the goals of making the workplace a safer harassment-free environment by holding role plays such as the employer accountable.

This study has limitations, namely due to time and space because the vast array of concepts that can be canvassed on the topic it is impossible to include them all in this paper. The study has been limited to an analysis of the primary sources of legal text. All sources outside of the legal text, will not be canvassed in this paper but may be of importance to future studies that deal with their impact on the legal text. Further to this the study is limited to interpretation and impact in South Africa does not discuss, juxtapose, or draw upon foreign jurisprudence.

II. OVERVIEW OF THE HISTORICAL CONTEXT OF THE LEGAL FRAMEWORK ON SEXUAL HARASSMENT

In 1988, *G v K*[3] was the first case in South Africa to address the problem of sex discrimination[4] followed by *J v M,*[5] in which 'the court set important trends in upholding the dismissal'[6] for

[3] *G v K* (1988) 9 *ILJ* 314 (IC).
[4] John Grogan *Workplace Law* 13 ed (2020) 98.
[5] *J v M Ltd* (1989) 10 *ILJ* 755 (IC).
[6] Polly Halfkenny 'Legal and Workplace Solutions to Sexual Harassment in South Africa (Part 2): The South African Experience' (1996) 17 *ILJ* 215.

sexual harassment. These early cases recognised sexual harassment as a form of discrimination and did so on the pretext of common law and criminal law principles. These cases determined the vicarious liability of the employer on the common law principles of delict. During this era, there were no defined statutes or guidelines dealing with the subject matter in the context of employment law. However, these cases paved the way for what became an evolving area of law.

With the introduction of the Constitution in 1996, the developments on the subject were further galvanized with the Constitution including s 9(3), which introduced the prohibition of unfair discrimination 'against any citizen based on sex, gender, and sexual orientation'.[7] With this recognition by the Constitution of unfair discrimination, the promulgation of the EEA and the subsequent Employment Equity Amendment Act 55 of 1998 (EEAA)[8] which followed shortly thereafter rendered 's 9 of the Constitution relevant to the employment realm'.[9]

Despite harassment being 'identified in the EEA as unfair discrimination in s 6(3), it was unfortunately the only reference to harassment in this Act and did not provide any clarity on sexual harassment specifically. No statutory definition or procedures for the handling of such cases were provided, creating the possibility of a victim being left defenceless should a particular case of harassment be misinterpreted or ill-managed.'[10] To fill this lacuna, section 54 was inserted into the EEA which made provision for a 'code of good practice to give effect to the rights granted in terms of those Acts'[11] together with giving a specific definition of sexual harassment. The Old Code,[12] was the initial guideline for identifying and dealing with sexual harassment as a particular form of unfair discrimination.

The EEA in section 60, sets out specific grounds upon which an employer would be vicariously liable for its employees contravening the EEA, this includes sexual harassment as a form of unfair discrimination in terms of s 6(3). Thus, unlike common law which provided for both direct and vicarious liability, the EEA only made provision for vicarious liability.

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[7] Anri Botes 'Identifying Sexual Harassment in the Workplace? Do Not Forget to Remember the Code of Good Practice' (2015) 36 *ILJ* 1719 para 1.
[8] Supra note 7 at para 2.
[9] Supra note 7 at para 1.
[10] ibid.
[11] Supra note 7 at para 3.
[12] The first code of good practice was the Code of Good Practice on Handling of Sexual Harassment Cases of 1998. This Code was read in conjunction with the Old Code until the 1998 code was withdrawn.

The Old Code has since been repealed[13] and replaced with the New Code. What is not certain, because of its infancy, is whether the changes introduced in the New Code will affect the scope of the employers liable given some significant changes.[14] In conjunction with this unanswered question is whether such changes afford the victims greater protection, and if so is it at the employer's expense?

Unlike the common law that provides remedies that are designed and limited to the payment of damages for harm already caused, the purpose of the EEA was not only to ensure and achieve equality within the workplace[15] but to place an obligation on the employer to promote equal opportunities by eradicating unfair discrimination from the work policies.[16]

Currently, the victim of sexual harassment has several claim options at their disposal, depending on the facts of the victim's case, but in summary, the victim can claim compensation in terms of common law, the EEA, and PEPUDA.

III. GENERAL CONCEPT OF EMPLOYER'S LIABILITY

(a) Delictual liability

Direct liability is established by means of proving the element of a delict concerning the employer. It is commonly established that the liability is a result of an omission on the part of the employer. To establish liability for the act or omission of the employer, the victim would need to prove the element of wrongfulness. This element exists if there was a legal duty on the employer to have acted or not act reasonably in preventing the harm. Testing whether such legal duty exists and what it might be, requires the facts being tested against the *boni mores* of society, which determines whether or not the employer was to have done something or not to prevent the harm that occurred.

This form of liability was discussed and considered by the Supreme Court of Appeal ('SCA') in *Media24 v Grobler*[17] wherein the court found the employer directly liable on the principles set out above.

[13] Item 3.3 of the New Code.
[14] Items 8 to 10 of the New Code.
[15] s 2 of the EEA.
[16] s 5(1) of the EEA.
[17] *Media 24 v Grobler* 2005(6) SA 328 (SCA).

This form of claim is usually brought by victims seeking to claim compensation for the harm suffered as a result of the delict and finds favour with victims are not employees, but the perpetrator is because the EEA is not applicable in such circumstances.

(b) The doctrine of vicarious liability

Vicarious liability in general terms 'may be described as the strict liability of one person for the delict of another'.[18] There are various relationships where such liability applies, one being an employment relationship.[19] For the employer to be vicariously liable for the delict of the employee, the following three requirements need to be met: (a) an employer-employee relationship exists; (b) that there was a delict committed by the employee; (c) that the employee acted within the course and scope of his/her employment. What is significant is that there need not be any fault on the part of the employer and thus this has been labelled as a form of 'strict liability'. [20] The damages that the employer becomes liable for arise only where the employee commits a delict whilst acting within the course and scope of his employment.[21] This element has been the subject of debate for several years giving rise to varied outcomes when interpreting the same, particularly in cases involving sexual harassment where there is a set non-conventional fact.

The EEA includes sexual harassment as a form of unfair discrimination,[22] thus some term this as a statutory liability. In respect of the EEA if it can be shown that the grounds set out in section 60 have not been met then the employer will be vicariously liable for its shortcomings. The code acts as guidelines to determine the substantive and procedural aspects of sexual harassment and assist in determining whether the employer is liable in terms of section 60 of the EAA.

The liability of an employer in terms of the EEA has no bearing on the liability that the employer may have under common law. The rationale for this is that the EEA aims to redress discrimination whereas the common law aims to redress unlawful conduct.[23]

[18] J Neethling & JM Potgieter *Law of Delict* (LexisNexis 2022) 444.
[19] ibid.
[20] Supra note 18 445.
[21] Jonathan Burchell *Principles of Delict* (1993) 215-221.
[22] s 6 of the EEA.
[23] Rochelle le Roux, Alan Rycroft & Thandi Orleyn (ed) *Harassment in the Workplace: Law, Policies and Processes* (2010) ch 10.

The liability of the employer in terms of the EEA is limited in application to the circumstances where both the victim and the perpetrator are employees, whereas the common law is far wider in application.

The common law as discussed herein has somewhat contributed to the reworking of the Old Code to give birth to the New Code, which some might say canvasses an ever-changing landscape of the working environment whilst encompassing further protection of those protected and classified as victims.

IV. COMMON LAW - VICARIOUS LIABILITY

In terms of the common law doctrine of vicarious liability, the employer can be liable for 'sexual harassment committed by an employee against another employee or third party'.[24] This liability can be attributed to the employer if the requirements for a delict are met.

The anomaly that exists is that liability can be attributed to the employer even where there is no fault on behalf of the employer, including situations where such acts were prohibited by the employer.[25] The doctrine is justified because the considerations are based on public policy.[26] The fact that a policy is by its very nature a flexible notion can lead to inconsistencies, but this should not be confused with the test for vicarious liability, which remains 'whether the employee committed a delict while in the course and scope of employment'.[27]

The employer can escape being vicariously liable in one of two ways, either it can prove that the perpetrator is not an employee or that the sexual harassment was not committed within the course and scope of the employee's employment.

Concerning the first ground, determining whether a person is an employee, which is usually the point of departure, there has been vast debate and various tests established. The common law and statutory definition of an employee do not always marry up with one another, however, an in-depth discussion surrounding the statutory definition will not form part of this discussion but put simply for this discussion the statutory definition of employee can be found

[24] Le Roux, Rycroft (ed) & Orleyn (ed) op cit note 4 at ch 7.
[25] ibid.
[26] ibid.
[27] ibid.

in the Labour Relations Act 66 of 1995[28] ('LRA') and the Basic Conditions of Employment Act 75 of 1998[29] ('BCEA').

In terms of determining the question at a common law level, originally the civil courts and the Labour Courts relied on what was termed the control test. This 'test assumes that a ventral characteristic of the employment contract is the employer's right to direct the manner in which the employees perform their work, and the employees 'reciprocal obligation to follow the directions of their employers'.[30]This test however led to problems, namely that the degree of control can vary in each case and thus the test renders inconsistent results. Consequently, both courts have graduated to relying on the dominant impression test[31] which provided for a more holistic and flexible approach. The Labour Appeal Court ('LAC') further refined the test in the case of *SA Broadcasting Corporation v McKenzie*[32] wherein it formulated six factors to consider when determining whether a person is an employee or not.

To attribute liability to the employer, the latter ground required in delict, namely that the conduct is carried out 'within the course and scope of employment' needs to be present. The mere fact that someone is employed does not in and of itself make an employer liable. This requirement has been the subject of many local and international judgments, particularly where the employee acts 'contrary to instructions or even commits a crime, ostensibly under the guise of employment'.[33]

(a) The Test for Vicarious Liability

The common law has attempted to develop and formulate a single test over the years to determine vicarious liability. The first test to be formulated was the 'standard test'. This test was formulated in the case of the *Minister of Police v Rabie*[34] ('*Rabie*'), which echoed the international 'Salmond test'.[35] The standard test was made up of both an objective and subjective component. In summary, the subjective aspect of the test was to determine the employee's intention and weigh it up against the objective aspect as to whether there is a benefit to the employer. In essence, this test states the employer will be liable for the employee's acts

[28] s 213 of the LRA.
[29] s 1 of the LRA.
[30] John Grogan *Employment Rights* 2 ed (2014) 19.
[31] Le Roux, Rycroft & Orleyn (ed) op cit note 4 ch 7.
[32] *SA Broadcasting Corporation v McKenzie* 1999 20 *ILJ* 1936 (LAC).
[33] ibid.
[34] *Minister of Police v Rabie* 1986 (1) SA 117 (A) at 134 D-E.
[35] RFV Heusten & RA Buckley *Salmond and Heusten on the Law of Torts* 21 ed (1996) 443.

if they are connected to the acts authorised by the employer and the acts are not deemed as the employee going on a frolic of his/her own.[36] It is only when there is such a deviation by the employee will the employer be relinquished from being liable due to there being no exercise of authorised function.[37]

The standard test however posed various issues such as it did not canvass situations where there were deviations and concerning sexual harassment matters, there was a glaring conundrum, namely that no employer employs an employee to commit acts of harassment. Thus, under the 'standard test', there were loopholes for employers to escape liability[38] when in fact there should be some element of liability based on the facts of the case.

In the *Grobler v Naspers BPK*[39] ('*Grobler*') which involved acts of sexual harassment, the victim and perpetrator were employed by different companies thus section 60 of the EEA was not applicable. The victim as such was only able to rely on the common law doctrine of vicarious liability. The court vacillated on whether to strictly apply the standard test as it would equate to the employer escaping liability due to the actions of the employee being considered as 'a frolic and detour'.[40] According to the court this strict application of the standard test needed to be substituted with a more flexible approach that could be used to access cases, particularly those involving sexual harassment, on a case-by-case basis. In keeping with this idea, the court explored the application to further test from two foreign jurisdictions but ultimately decided against applying them. The first of these rejected tests that the court considered was the 'supervisor test'[41] which was applicable in the United States of America, and the second test was the 'risk of enterprise test'[42] which was 'developed by the Canadian courts.'[43] Both tests, which similar to one another, pose the same unique problem, they both elevate the 'ratio for vicarious liability to the test for vicarious liability'.[44] The court decided

[36] Le Roux, Rycroft (ed) & Orleyn (ed) op cit note 2 at 84.
[37] ibid; *K v Minister of Safety and Security* 2005 (3) SA 179 (SCA).
[38] Benita Whitcher 'Two Roads to an Employer's Vicarious Liability for Sexual Harassment: *S v Grobler v Naspers BDP en 'n Ander and Ntsabo v Real Security CC*' (2004) 25 *ILJ* 1909.
[39] *Grobler v Naspers BPK en 'n ander* (2004) 25 *ILJ* 429 (C).
[40] A term derived from the case of *Feldman v Mall* 1945 AD 733 and later referred to and cautioned about in the case of *Costa da Oura Restaurant (Pty) Ltd t/a Undloti Bush Tarvern v Reddy* (2003) ZASCA 7.
[41] Developed by the Supreme Court of the United States of America in the case of *Faragher v City of Boca Raton* 524 US 775 (1998).
[42] Developed by the Canadian Court in *Brazley v Curry* 1999 2 SCR 534 and *Jacobi v Griffiths* 1999 174 DLR (4th) 71.
[43] Le Roux, Rycroft (ed) & Orleyn (ed) op cit note 2 at 85- 86; B Whitcher 'Two Roads to an Employer's Vicarious Liability for Sexual Harassment: *S v Grobler v Nasper en G Samuals and Ntsabo v Real Security CC'* (2004) 25 *ILJ* 1907; Rochelle le Roux 'Sexual harassment in the Workplace: Reflecting on Grobler v Naspers' (2004) 25 *ILJ* 1987.
[44] Le Roux, Rycroft (ed) & Orleyn (ed) op cit note 2 at 89.

against applying either of these tests as the common approach in both had previously been rejected by the SCA[45] in the cases of *Minister of Law and Order v Ngobo*[46] and *Ess Kay Electronics Pty Ltd and another v First National Bank of South Africa Ltd.*[47] The SCA felt it necessary to interpret the principles of vicarious liability in line with the values enshrined in the Constitution.[48]

The SCA recognised in the appeal[49] of *Grobler;*[50] that the employer has a common law duty to protect its employees against harm, which includes not only physical but also psychological harm caused by sexual harassment.[51] The court also established some ground principles. It identified that where a statute does not protect an employee, there is a need to establish the common law in line with the Constitution to afford such protection. In keeping with that the court found the employer vicariously liable for the sexual harassment because it had been informed of the harassment and had failed to take any steps to protect the employee against it. This later concept comes from the legal convictions of the community as set out in the case *J v M Ltd*,[52] which places a positive duty on an employer to take steps to prevent sexual harassment.

Unlike the United Kingdom[53] and Australia[54] who have been focused on the requirement of the 'close connection' between the authorised act of the employer and that which the employee carried out in a wrongful and unauthorised manner, the South African courts have honed in on the requirement of the act being 'within the course and scope of employment'. Having said this the requirement of 'within the course and scope of employment' implicitly infers the requirement of 'close connect'.[55]

The Constitutional Court in *K v Minister of Safety and Security*[56] ('*K v M*') brought some finality to the applicable test and application of the law when determining vicarious liability.

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[45] ibid.
[46] *Minister of Law and Order v Ngobo* 1992 (4) SA 822 (A) 832C.
[47] *Ess Kay Electronics Pty Ltd and Another v First National Bank of South Africa Ltd* (2001) 22 *ILJ* 1070 (SCA) at 1073 H-I.
[48] s 39(1)(*a*) of the Constitution.
[49] Supra note 17.
[50] Supra note 39.
[51] Supra note 17 para 62.
[52] *J v M Ltd* 1989 10 *ILJ* 755.
[53] Le Roux, Rycroft & Orleyn (ed) op cit note 2 at 90, *Trotman v North Yorkshire Country Council* [1999] LGR 584 and *Lister v Hesley Hall* 2001 UKHL 22.
[54] Le Roux, Rycroft & Orleyn (ed) op cit note 2 at 90; *New South Wales v Lepore*; *Samin v Queensland*; *Rich v Queensland* [2003] HCA 4 para 64 to 75.
[55] Le Roux, Rycroft & Orleyn (ed) op cit note 2 at 90.
[56] *K v Minister of Safety and Security* 2005 6 SA 419 (CC).

The court commenced its evaluation by stating that the objective test formulated in *Rabie* was not dissimilar to the 'close connection' test established in the United Kingdom's case of *Lister v Hesley Hall*[57] and similarly echoed in the Canadian jurisprudence.[58] The court emphasised that this test comprises of two parts, the first being the question of whether there was a delict committed by the employee and the second being was the act conducted in close connection with the employer's business.[59] The court emphasised this approach should be followed in cases of vicarious liability but that the constitutional norms and rights of the Bill of Rights should be infused to ensure it is not just a factual inquiry, but public policy is considered. [60]

This approach expressed in *K v M*[61] was implemented in the subsequent Constitutional Court case of *F v Minister of Safety and Security*[62] (*F v M*') where the court was faced with determining whether the employee had acted within the course and scope of his employment. The Constitutional Court provided the following guidance in respect of the two tests, which it termed the 'standard test' and the 'deviation test':

> 'Two tests apply to the determination of vicarious liability. One applies when an employee commits the delict while going about the employer's business. This I generally regarded as the "standard test". The other test finds application where wrongdoing takes place outside the course and scope of employment. These are known as "deviation cases".'[63]

The facts of that case were that the employee was a police officer, in a police vehicle and was able to place himself on duty at any time when the rape took place, satisfied the apex court that a 'sufficiently close link existed to impose liability'[64] on the employer. The court in application of this approach in that case found the employer vicariously liable despite the police officer (employee) being on standby and off duty when he committed the unlawful act of raping a young woman.

In the preceding case of *Campbell Scientific Africa (Pty) Ltd v Simmers and Others*[65] ('*Campell*') the court dealt with an aspect of deviation. The court had to consider whether the conduct of harassment that occurred away from the traditional workplace and after work hours

[57] *Lister v Hesley Hall* 2001 UKHL 22.
[58] Supra note 56 para 44.
[59] Supra note 56 para 32.
[60] Supra note 56 para 44.
[61] ibid.
[62] *F v Minister of Safety and Security* 2011 3 SA 592 (CC).
[63] Supra note 62 para 41.
[64] Supra note note 62 para 80.
[65] *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 *ILJ* 116 (LAC).

should be considered to hold the employer liable. The court in developing the law, as suggested by the court in *F v M*, found that the employer was indeed liable on the basis that the sexual harassment occurred at a work event and the harassment affected the working relationship. These factors made the conduct of the employee intrinsically linked to the employer and therefor the employer was liable.

After *Campbell*[66] the SCA in *Stallion Security v Van Staden*,[67] again endorsed the approach of *Rabie*[68] and *K v M*[69] when considering whether the risk factors should be considered in determining whether the employer is vicarious liability. In summary, the court expressed the view that:

> 'South African law should be further developed to recognise that the creation of risk of harm by an employer, may in an appropriate case, constitute a relevant consideration in giving rise to a sufficiently close link between the harm caused by the employee and the business of the employer. Whether the employer had created the risk of the harm that materialised must be determined objectively.'[70]

This suggested method was revisited in the 2022 case of *CS v Swanepoel*,[71] in which the victim of a sexual assault approached the High Court for relief under the law of delict. In that case, the court found the employer (the Executive Committee of Education and the School in question) liable for the acts of a teacher (employee) who had sexually assaulted a learner during school hours. The court found that the teacher had acted within the course and scope of his employ when carrying out the assault and that the employer had a legal duty to act positively to prevent harm to others.[72] The court went on to state with reference to the case *Hawekwa Youth Camp & Another v Byrne* [73]and *Minister of Education & Another v Wynkwart NO*[74] that 'teachers owe young children in their care a legal duty to act positively to prevent physical harm being sustained by them.'[75] The court found, with reference to *F v M,*[76] that there was a particular relationship between the parties, and that the act, carried out during school hours,

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[66] ibid.
[67] *Stallion Security v Van Staden* 2020 (1) SA 64 (SCA).
[68] *Minister of Police v Rabie* 1986 (1) SA 117 (A).
[69] ibid.
[70] Supra note 67 headnote.
[71] *CS v Swanepoel* 2022 JDR 0790 (WCC).
[72] Supra note 71 p 16 para 71.
[73] *Hawekwa Youth Camp & Another v Byrne* 2010 (6) SA 83 (SCA) para 22.
[74] *Minister of Education & Another v Wynkwart NO* 2004 (3) SA 577 (C) 580A-C.
[75] Supra note 71 p 16 para 71.
[76] Supra note 62.

was ‘sufficiently close linked’ to the educational business of the employer, meaning that the employer could be held vicariously liable.[77] The court further found that the employer was under a legal duty to vet teachers before appointing them and failing to do so meant it had failed to discharge the positive duty placed upon it. The court found the employer, and perpetrator, were jointly and severally liable for the damages.[78]

These cases indicate the significant development in the common law to recognise that employers will be ‘liable vicariously for acts which have been performed by employees, not only in the course and scope of their employment but also in instances where such acts, although performed solely or primarily for the benefit of the employee, are “sufficiently closely linked” to the business of the employer'.[79]

It could be suggested that the court’s interpretation of the requirement committed ‘with the course and scope of the employee’s employment’ found in the most recent cases on common law vicarious liability, was the inspiration to the drafters of the New Code when it came to wording Item 2.3, which lists the possible work- and work-related situations.

(b) Defences

As shown,the common law provides the employer with a two-tear approach to defending claims of vicarious liability for sexual harassment. The first is the defence against the conduct itself, and the second is against the liability.

Regarding the former, the employer is entitled to raise all defences that are available to the perpetrator. If the alleged act of sexual harassment does not meet the requirements of sexual harassment the employer is not liable. This defence is thus self-explanatory.

In respect of the latter defence, employer can escape vicarious liability on one of two grounds, first the perpetrator is not an employee second the delict was not committed alternatively not committed within the course and scope of his / her employment.

The author, Le Roux poses a very interesting question for debate that has not yet been tested by the courts and that is whether an employer can contract out of common law vicarious liability?[80] In attempting to answer this, it is trite that one cannot contract out of s 60 of the

[77] Supra note 71 p 21 para 86.
[78] The damages are still to be proven and quantified.
[79] LAWSA ‘Vicarious Liability’ para 660; supra note 73.
[80] Le Roux, Rycroft (ed) & Orleyn (ed) op cit note 2 p 94.

EEA, and it seems doubtful that the courts will favour such an approach where there is a common law duty to provide a safe working environment.[81] What Le Roux fails to take into account and what could be proposed as a defence to the legality of such a clause is that public policy justifies the doctrine of vicarious liability and to contract out would be against that which was expressed by the Constitutional Court in *Barkhuizen v Napier*[82] which states that:

> '[P]ublic policy represents the legal convictions of the community; it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now rooted in the values of our Constitution and the values that underlie it…human dignity, equality, and freedom…as given expression by the provisions of the Bill of Rights. Thus, a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable.'[83]

The clause would be contra bonas mores and not enforceable because 'a term in a contract that seeks to deprive a party of judicial redress is prima facie contrary to public policy and is inimical to the values enshrined in our Constitution, even if freely and voluntarily entered into by consenting parties'.[84]

V. STATUTORY VICARIOUS LIABILITY

(a) The Employment Equality Act ('EEA')

The EEA provides for the vicarious liability of an employer in s 60. If there is a form of sexual harassment that takes place in the workplace, then there is a breach of Chapter 2 of the EEA, however, the employer is not automatically liable unless the requirements of section 60 of the EEA are met. It is for this reason that authors Le Roux and others,[85] believe that s 60 of EEA should be considered as a direct liability rather than a vicarious liability. One can understand this point of view because it places an obligation on the employer to act positively to ensure it prevents unfair discrimination and it is only liable if it fails to do so. However, what one needs to remember is there is still a vicarious aspect to be attached because the conduct that gives rise to the liability is not that of the employer but of another. This unique section appears to be compromised of both.

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[81] Le Roux, Rycroft (ed) & Orleyn (ed) op cit note 2 p 94.
[82] *Barkhuizen v Napier* 2007 (5) SA 323 (CC).
[83] Supra note 82 para 28 to 29.
[84] *Naidoo v Birchwood Hotel* 2012 (6) SA 170 (GSJ) para 50.
[85] Le Roux, Roux, Rycroft (ed) & Orleyn (ed) op cit note 2 p 94.

To determine if the employer is vicariously liable for sexual harassment in terms of section 60 of the EEA, there first needs to be an act of sexual harassment, committed by its employee which amounts to unfair discrimination. Although the EEA establishes the framework for the prohibition of sexual harassment as a form of unfair discrimination and attaches liability thereto, the Code of Good Practice on Sexual Harassment (Old and New) contains substantive guidelines on the subject which will assist in establishing to determine if the employer. Section 60(4) provides exclusion of liability for the employer, thus balancing both the employer and employee victim's rights.

(b) The New Code

In 2022 the New Code replaced the 2005 Codes.[86] This overdue facelift has recognised some much-needed changes. The New Code contains various Items that deal not only with sexual harassment but also harassment in general. The discussion contained herein is limited to sexual harassment.

The New Code commences and sets the tone by unequivocally stating that a 'zero-tolerance'[87] approach must be taken by employers to sexual harassment, and in doing so this will ensure that the rights as set out in the Constitution under the Bill of Rights, which are echoed in the EEA are protected.[88] To promote this idea, the following Items underwent restructuring:

- Item 2: Applications.
- Item 5: Sexual harassment (particularly the 5.2 being the factors to establish sexual harassment).
- Item 8, 9, and 10: Procedural aspects on prevention, elimination, and management of harassment; harassment policies and procedures.

These items will now be discussed separately hereunder but only in so far as amendments have been made.

[86] New Code Item 3.3.
[87] New Code Item 8.2.
[88] In saying this, one hopes that the judicial bodies that adjudicate matters of unfair dismissal following alleged misconduct of sexual harassment will support the 'zero tolerance' approach in determining the matters before them, unlike in the case of *Gregory v Russells (Pty) Ltd* (1999) 20 *ILJ* 2145 (CCMA) and *Motsamai v Everite Buildings Products* CCMA February 16, 2005 Case No: GA 25798-94 (unreported), wherein both cases the commissioner had found that there had been sexual harassment but found the dismissal to be too harsh a sanction.

(i) The Substantive Changes in the New Code

Item 2 deals with the application of the Code and has been amended to include:

a. Who is classified as a victim or perpetrator:
   i. Persons in training including interns, apprentices, and persons in leadership.
   ii. Volunteers.
   iii. Customers.
b. The classification of workplace[89] and those related to work, in the formal and informal section,[90] which include but not are limited to:
   i. The public and private spaces in which employees perform their work.
   ii. Places where the employee is paid takes a break or has a meal, uses washing, changing, sanitary, breastfeeding, or medical facilities.
   iii. Work-related travel, training, events, or social activities.
   iv. Work-related communications.
   v. Employer-provided accommodation.
   vi. Transport to or from work provided or controlled by the employer.

These additions to the 'workplace' are to be applauded on one had as forward-thinking when having regard to the events of COVID-19 and the rapid developments in technology. These inclusions have aligned the New Code with the twenty-first century, not only in its scope of protecting employees but also in recognising the new age working environments which canvas a diverse range of spaces that classify as the workplace or related to work. Gone are the days of being confined to the classically defined workplace as was the case in *AA v Neotel (Pty) Ltd*[91] and those situations that were not deemed related to work, which saw employees helpless.

The downside of broad classification of workplace is the inclusions such as 'public space' and 'uses washing, changing and sanitary' facilities, which could lead to some challenging questions around an employer's liability due to its lack of to controllability where such public facilities may not be managed or under the employer's control, but the employee must use such facilities during the course of employment. Likewise, if an employee works remotely in a public space, how is it logical or even plausible for the employer to comply with its obligations in terms of the EEA read with the New Code to prevent any acts of sexual harassment, where it has no control over those environments? Thus, it can be said that there is a directly

[89] Item 2.3 of the New Code.
[90] Item 2.1 of the New Code.
[91] *AA v Neotel (Pty) Ltd* 2019 (1) SA 622 (GJ).

proportional expansion of the employer's scope for liability with the change in the definition of 'employee'[92] and 'workplace' in the New Code.

The New Code's classification of who is a perpetrator and victim does nothing more than create confusion. Although the intentions are well placed, namely to expand the employer's liability and align the New Code with the common law, in doing so the drafters of the New Code lose sight of the fact that an employer in terms of the EEA is only vicariously liable to its employees for the actions of co-employee, as correctly expressed in the case of *Ntsundu and Three Cities Inn on the Square (Pty) Ltd*.[93]

The additions to Item 2 in the New Code that are of any significance relate to the inclusion of 'who' can be classified as an employee and thus in turn be a victim or perpetrator. These do assist broaden the scope of employees and the protection thus afforded under the EEA.

(ii) The Factors to Establish Sexual Harassment.

It appears from Item 5.2 that the drafters of the New Code have been mindful of the various cases that created debate surrounding the determination of whether the conduct in question amounts to sexual harassment thus included the following additional items under Item 5: Sexual Harassment:[94]

a. Unwanted conduct now includes 'that the fact that the complainant does not indicate that the conduct is unwanted does not entail that there has not been sexual harassment if the conduct is such that the harasser/perpetrator ought to have known it could be regarded as unwanted'.[95]
b. The nature and extent of the conduct now includes 'whether expressed directly or indirectly':
    i. 'following, watching, pursuing or accosting of an employer'.[96]
    ii. 'sexual attention, advances or proposals; or other behaviour, whether explicit or implicit, including suggestions, messages, advances, attention or proposals of a sexual nature'.[97]

[92] s 200A of the Labour Relations Act and the Code of Good Practice: Who is an Employee?.
[93] *Ntsundu and Three Cities Inn on the Square (Pty) Ltd* (2016) 37 *ILJ* 749 (CCMA).
[94] Item 5 of the New Code.
[95] Item 5.2.4 of the New Code.
[96] Item 5.2.5.3 of the New Code.
[97] Item 5.2.5.4 of the New Code.

iii. ‘implied or expressed threats of reprisal or actual reprisal to comply with sexually oriented requests, advances, attention or proposals’.[98]

c. Sexual harassment includes ‘sexual favouritism and creating or permitting a hostile working environment (i.e. conduct that creates an intimidating, hostile or humiliating working environment or the recipient).’[99] Such circumstances can include ‘sexual advances, attention or proposal or for complaining about gender-sensitive conduct’. ‘Sexual favouritism is a form of quid pro quo harassment, which occurs where a person in authority in the workplace seeks to utilise this power to reward those respond to his or her sexual advances’.[100]

d. The test for sexual harassment in addition to its original form now includes the 'unwelcome conduct of a sexual nature, whether direct or indirect, that the perpetrator knows or ought not to welcome. Sexual harassment may be offensive to the complainant, make the complainant feel uncomfortable or cause harm or inspire the reasonable belief that the complainant may be harmed. Sexual harassment may interfere with the work of the complainant although it need not necessarily do so’.[101] The additional factors to consider in the test is whether the conduct is ‘unwanted or unacceptable’.[102]

Similarly, to the comments made concerning the additions in Item 2 above, the changes listed above have increased the probability of the employer being vicariously liable. Thus, as will be discussed below, although the New Code may be progressive in substance and application it may be perceived by some as overbearing and transcends beyond what an employer’s liability should be.

Historically, the Old Code made progressive developments by broadening the terms of the 1998 Code when it came to determining ‘unwelcome conduct’ and the other elements of Item 4 of that code. The same can be said for the inclusion of Item 5 of the Old Code which assisted in ‘explaining each of the said elements and highlighting the factors which out to be taken into account when ascertaining the presence of sexual harassment’.[103] It would appear that to avoid some incongruous from occurring the legislature expanded Item 5.3, the ‘Test for Sexual Harassment’, in the New Code, even further to include that unwelcome conduct can now be

[98] Item 5.2.5.5 of the New Code.
[99] Item 5.2.6 of the New Code.
[100] Item 5.2.6.3 of the New Code.
[101] Item 5.3.1 of the New Code.
[102] Item 5.3.2.2 of the New Code.
[103] Botes op cit note 7.

classified as 'direct or indirect', that the perpetrator 'knowns or ought to know is unwelcome' and 'may be inferred with the work of the complaint although it need not necessarily do so'. Although there appears to be good intentions to cover all bases of any type of situation in which sexual harassment may arise one could argue that these elements could create a double side sword and further incongruencies. Simply put how does one test and determine what is 'known or ought to know is unwelcome' together with 'may be offensive to the complainant' or 'make the complainant feel uncomfortable' particularly in a society as diverse and complex as South Africa which has an array of cultures, belief systems, languages, values, and backgrounds. By no means is it being suggested that there should be a one-shoe fits all but the elements to consider are subjective to both the perpetrator and the victim, and to expect a third party to determine the outcome based on these elements seems it could lead to an injustice to one if not both parties.

Some clarity about standard of the test to be applied was solidified in *Amathole District Municipality v Commission for Conciliation, Mediation & Arbitration & Others*[104] ('*Amathole*'), in which the New Code was applied for the first time. The LAC clarified that the test for 'unwanted' conduct, in terms of Item 4[105] of the New Code is an objective one.[106] Thus, proving the conduct is 'unwanted' is sin quo non for the conduct being classified as sexual harassment and this can be done by looking at the factors in Item 5.2 of the New Code. In that case, the evidence, which included a flirtatious text message[107] and emails[108] exchanged between the victim and perpetrator, illustrated that the conduct was mutual and did amount to unwelcome conduct as is required by the New Code. Furthermore, the court went on to state that even if the conduct had been classified as sexual harassment in terms of the New Code, the employer would not be vicariously liability in terms of section 60 as the alleged victim did not report the conduct for nearly three months,[109] thus failing to meet the requirement of bringing it 'immediately'[110] to the attention of the employer which is required in both the New Code in Item 10.1.2 and section 60(1) of the EEA (this latter requirement will be discussed later herein).

[104] *Amathole District Municipality v Commission for Conciliation, Mediation & Arbitration & Others* (2023) 44 *ILJ* 109 (LAC).
[105] Item 4.4.5 of the New Code.
[106] Supra note 104 para 56.
[107] Supra note 104 para 47.
[108] Supra note 104 para 49.
[109] Supra note 104 para 58.
[110] s 60(1) of the EEA.

(iii) Procedural changes in the New Code

The New Code, in summary, has included and amended, inter alia the concerning the procedural issues of harassment:

a. Guiding Principles on the prevention, elimination, and management of harassment.[111]
b. Harassment Policies.[112]
c. Procedures.[113]

The New Code has, unlike its predecessor, indicated unequivocally, under Item 8, states that employers are to impose a 'zero-tolerance' attitude towards harassment'.[114] This imposition comes as no shock, after the apex court in the case of *McGregor v Public Health & Social Development Sectoral Bargaining Council & others*[115] ('*McGregor*') with reference to *Campbell*[116] and *Gaga v Anglo Platinum Ltd & others*[117] stated that:

> '[a] sanction serves an important purpose in that it "sends out an unequivocal message that employees who perpetrate sexual harassment do so at their peril and should more often than not expect to face the harshest penalty". Let a message be sent: "this is the protection which our Constitution affords"'.[118]

The obligation in the New Code applies not only to the traditional role player, the employer but also to trade unions.[119] These obligations include inter alia the traditional positive steps that need to be taken by the role players to educate employees of its policies, and procedures, and to eliminate harassment in the workplace, together with ensuring persons dealing with the business are not subjected to harassment either.

The New Code introduces a new obligation for employers in Item 8.2.4 which is likely to give rise to some controversial jurisprudence. This Item places a positive duty on the employer to 'attempt to ensure that employees in their employ are not subject to harassment by third parties such as clients, customers, supplies or others who have dealings with the employer'.[120]

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[111] Item 8 of the New Code.
[112] Item 9 of the New Code.
[113] Item 10 of the New Code.
[114] Item 8.2 of the New Code.
[115] *McGregor v Public Health & Social Development Sectoral Bargaining Council & others* (2021) 42 *ILJ* 1643 (CC).
[116] Supra note 65.
[117] *Gaga v Anglo Platinum Ltd & others* (2012) 33 *ILJ* 329 (LAC).
[118] Supra note 1115 p 1665 para 49.
[119] Item 8.2 of the New Code.
[120] Item 8.2.4 of the New Code.

In respect of this obligation, it would appear that the legislature has gone far beyond the scope of vicarious liability in its true form, and instead cast the net so wide. On a prima facie reading of the Item the employer will be liable for third parties, over whom the employer has no control. This approach seems to have lost focus in that the EEA is confined to the employer being vicariously liable for its employees only.

To illustrate the difficulty with the application of this obligation by way of example, if the employer is the owner of a supermarket and whilst at work the employee is subjected to sexual harassment by a customer. The employee then brings this act of sexual harassment to the employer's attention immediately. Unfortunately, section 60 of the EEA would not be triggered as the preparator is not an employee. Thus, one can see how the inclusion of obligation is pointless.

Theoretically assuming that s 60 did apply, then the employer will be vicariously liable for the customer's actions unless it can demonstrate by the employer it complied with section 60(2) or (4) of the EEA. This is where the confusion lies. Regarding these sections how would it ever be plausible to protect an employee in these certain circumstances against a customer of the general public, of which could be millions of people who enter the store daily?

The only practical solution for the employer to escape liability in these circumstances is to have a signed board made, not dissimilar to that which you would have for excluding liability to customers (ticket cases), upon which it would contain the policy[121] and standpoint that the business (the employer) holds in respect of sexual harassment.

Clearly the poorly crafted Item has not taken all the interlaced pieces of legislation into account for its practicality. The drafters of the New Code did not consider the purpose and underlying legal principle that governs section 60 of the EEA, namely the doctrine of vicarious liability. Section 60 of the EEA speaks of the employer being liable for 'employees' as defined in section 200A of the LRA read together with the broadened definition in the New Code under Item 2.1. Thus, although it recognises that persons that fall outside this definition can be victims and perpetrators unless the person is an 'employee' in terms of section 60, the employer cannot be held liable. It would thus appear that any reliance on item 8.2.4 will be pointless.

[121] A policy reflecting that which is set out in Item 8.2.5 of the New Code.

The additions in the policy portion of the New Code includes the prohibition of 'tolerating'[122] harassment. The New Code aspires to ensure there is protection from victimisation or retaliation and this is to be afforded to all persons who report harassment, not just victims.[123] This latter addition will most certainly help in curbing sexual harassment where, as seen in many cases, the victim is unwilling or too scared to report the transgression themselves.

A further proactive item is included under Item 9 which places an obligation on the employer to ensure that the employer makes available 'counselling, treatment, care, and support programs for employees'.[124] Previously victims were left to fend for themselves. As seen in many cases, the aftermath, physically and psychologically that a victim undergoes from such sexual harassment can be devastating. Many victims are left helpless without the financial means or know-how to get the necessary support required.

This addition is no surprise following the cases of *McGregor*[125] and *PE v Dr Beyers Naude Local Municipality and Another,*[126] where the courts awarded compensation to assist with the physical and psychological trauma that the victims suffered and continue to suffer long after the horrible ordeal.

The procedure prescribed in Item 10 of the New Code, places a positive duty on the employer to investigate any allegation of harassment that has been brought to its attention and to take steps to prevent a re-occurrence,[127] failing which the employer will be vicariously liable in terms of section 60 of the EEA.[128]

The requirement that the alleged conduct 'must immediately be brought to the attention of the employer' that appears in section 60 (1) of the EEA together with the Old Code has been further refined to minimise further debate. The New Code has specifically referred to the *Liberty Group Ltd v M*[129] ('*Liberty*') case, and endorsed the LAC's approach,[130] by stating that

[122] Item 9.4.3 of the New Code.
[123] Items 9.4.6 of the New Code.
[124] Item 9.6 of the New Code.
[125] Supra Note 115.
[126] *PE v Dr Beyers Naude Local Municipality and Another* 2022 (1) SA 560 (ECG).
[127] Item 10.1.2 of the New Code.
[128] Item 10.3 of the New Code; *Future of SA Workers on behalf of AB & Others v Fedics (Pty) Ltd & another* (2015) 36 *ILJ* 1078 (LC).
[129] *Liberty Group Ltd v M* (2017) 28 *ILJ* 1318(LAC) paras 48-54.
[130] ibid paras 51-53, namely that a sensible meaning be given to the word 'immediately' in the requirements of s 60 and the Old Code.

the allegation must referred within an appropriate time frame and that it is not to be approached technically.[131] It appears that in both the case of *Amathole*[132] and the later decision of *AK v Right to Care NPC*[133] the court was faced with determining whether the requirement of 'immediately' had been complied with in terms of the New Code and section 60 of the EEA. As already mentioned herein, in the *Amathole* Case case there was no explanation for the delay[134] and thus it fell short of the requirement, however in the latter case, the court found that the 10-month delay had a reasonable and justifiable explanation[135] and thus the requirement had been met. As mentioned in the *Amathole*[136] and in *NUMSA and Another v PRASA*[137] this requirement of being made aware/informed of the sexual harassment is the trigger for the vicarious liability of the employer under section 60 and should be determined on a case-by-case basis.

(iv) Defences

Similarly, to position under the common law on vicarious liability, the employer can rely on the same defences as the perpetrator has at its disposal. However, to escape statutory vicarious liability[138] the employer must show that it complied with the requirements of section 60 (2) and (4) of the EEA, failing which it could be liable for unfair discrimination.

On the face of it, the defences available seem reasonable and the scope of liability seems justifiable, however, when one considers these defences more closely and in connection with what has been set out herein, the New Codes additions, particularly the open-ended terms used, the scope of liability seems too broad, leaving the employer to demonstrate that it took steps to prevent the sexual harassment which might prove to be impossible.

VI. COMPENSATION

A victim of sexual harassment may claim in one of two ways. The victim may claim under the EEA[139] and in delict. Compensation in both circumstances has been awarded in various cases

[131] Item 10.1.2 of the New Code.
[132] Supra note 104.
[133] *AK v Right to Care NPC* (2023) 44 *ILJ* 220 (LC).
[134] Supra note 104 p123 para 35-60.
[135] Supra note 133 p 2208 para 35.
[136] Supra note 104 para 60.
[137] *NUMSA and another v PRASA* [2022] 1 BLLR 90 (LC) paras 24-25.
[138] Supra note 104.
[139] s 10 (6)(*aA*)(i) of the EEA. s 48 of the EEA limits Commission for Conciliation, Arbitration and Mediation award to compensation and s 58 allows the Labour Court to award compensation, damages, or both, including giving further direction on steps the employer must take to prevent future discrimination

and while the former is to prevent unfair discrimination[140] the latter is for damages[141] and restitution purposes.

Section 50(2) of the EEA states that just and equitable compensation should be awarded in the event of section 60 being met. In *Liberty*[142] the LAC awarded damages similarly in the High Court in the case of *Mokone v Sahara Computers (Pty) Ltd* and the Constitutional Court in *Mcgregor.*[143]

VII. RECOMMENDATIONS AND CONCLUSION

Under the current legal framework, vicarious liability of employers is recognised equally under the common law and statute and have both seen developments to be in keeping with modern times. The scope of the employer vicarious liability has always been wider in common law than under statutory law due to the latter only being applicable for sexual harassment amongst co-employees. The scope of liability under common law was more recently extended with the recognition of deviation cases together with considering risk factors that intrinsically linked the employer. Thus, in so far as the common law is concerned there appears to be an equal balance of the employer's vicarious liability and the protection of victims' rights.

In so far as the statutory vicarious liability of employers are concerned, section 60 of the EEA, which is the backbone of the legally binding provision, remains untouched. Instead, the legislature has attempted bring about changes, with the introduction of the New Code, which would assist in bring the scope of liability of employers in line with the common law. However as is apparent from this paper it has failed to hit the mark for several reasons as concluded hereunder.

The EEA's amendment to 'who' is defined as an employee, which is echoed in the New Code, is progressive and welcomed. Although it increases employers' vicarious liability because it impacts on who can be a victim and perpetrator, in application is line with the principles of vicarious liability in the common law. Where the New Code gets ahead of itself is in the definition of 'victim' and 'perpetrator' which include persons which do not align with the definitions in the EEA and LRA. This is a downfall because section 60 is only applicable where the victim and perpetrator is an employee. This section should be redrafted to exclude

[140] The EEA allows for uncapped compensation.
[141] s 194 of the LRA, capped compensation.
[142] Supra note 129.
[143] Supra note 115.

these additions that do not align with the definition of 'employee' as they create nothing but confusion. The same can be said for Item 8.2.4 which likewise goes beyond the realms of the vicarious liability envisaged in the EEA.

Similarly, Item 2.3 dealing with the definition of 'workplace' needs to be redrafted as it is too broad. The practical implications need to be considered, as liability is being extended to the employer where it may be practically impossible to yield any control over the 'workplace'. It is recommended that the definition should be in line with the common law concept to be limited to a 'workplace' which the employer exerts some control or influence over. If this section is not reconsidered it will open the flood gates to claims for vicarious liability which could never have been foreseeable or preventable by the employer.

The New Code's objective test although great intentions to want to more balanced test has opened the door to questioning the moral values of the victim against the Constitution values to establish if they are reasonable, which is problematic. It is recommended that the test be redrafted to think of this possible consequence and possibly apply a hybrid test as applied *KO and Kusas Commodities 332 CC t/a Twin Peak Spur Steak Ranch*[144] and later reiterated in *Old Mutual Life Assurance SA (Pty) Ltd v Makanda & Others.*[145] This approach was suggested and supported by authors Collier, Carels[146] and Botes[147] who believed it should translate into future jurisprudence being somewhat uniform, unlike prior courts,[148] resulting in some employers escaping vicarious liability and others being liable where there was an over-sensitive employee.

The EEA and the common law have similar defences, except to say that the EEA has a further exclusion of liability provision that assist the employer to escape if it has complied with procedural aspects mentioned in the EEA read with the New Code. This exclusion in section 60(4) appears to balance out the additional procedural obligations placed on the employer in terms of the EEA read with the Code.

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[144] *KO and Kusas Commodities 332 CC t/a Twin Peak Spur Steak Ranch* (2016) 37 *ILJ* 735 (CCMA).
[145] *Old Mutual Life Assurance SA (Pty) Ltd v Makanda & Others* (2020) 41 *ILJ* 444 (LC).
[146] Debbie Collier and Monique Carels 'Repositioning Sexual Harassment: Integrating and Objectivity as Guiding Principles in ILO Convention 190 and the Draft Code against Violence and Harassment in the World of Work' (2021) 42 *ILJ* 692.
[147] Botes op cit at 7 p 1734, the author with reference to the case of *Motsamai v Everite Building Products* (Pty) Ltd [2001] 2 BLLR 144 (LAC), states that it would be inconceivable to what is said in that case to have a purely objective test and instead there needs to be balance struck between an objective and subjective that should be applied in tandem test when determining if there is sexual harassment.
[148] *Bandat v De Kock & another* (2015) 36 *ILJ* 979 (LC) para 72, *Motsemai v Everite Building Products (Pty) Ltd* [2011] 144 (LAC) para 20, *KB v Nebank* [2020] 2 BALR 138 (CCMA).

From a compensatory point of view, the victim is adequately protected under both forms of vicarious liability although for different reasons, one being for discrimination and the other being the misconduct. This is extremely burdensome on an employer but is justified particularly in s 60(4) to escape if it has complied with its obligations. Due to the limitations of this paper, but should explored in future papers is the following questions:

- Whether these claims made simultaneously be argued as double compensation as they arise from the same cause of action but defamation damages and general damages both could fall under the same heads of damages?
- Does the once and for all rule apply to claims under the different legal avenues?
- Why does the employer owe the employee a great duty of care then the general public when the person the employer is vicariously liable for is its employee in both circumstances?

The fundamental problem with the structure of the statutory legal framework is that the codes have always been guidelines and thus not binding. This in and of itself leads to confusion and inconsistencies in its application and achieving the goals it was intended for. To overcome this is to include the definition for sexual harassment in the EEA as it is the primary text and possibly include a whole chapter in the EEA to deal with sexual harassment and do away with cross referencing with the New Code alternatively elevated the New Code to have the same status as legislation. This latter option is only suggested once New Code refined due to address the issues encompassed in it as highlighted in this paper.

In conclusion, the vicarious liability of employers has significantly accommodated in both the common law and in statute. As suggested that there is room for improvement but as set out suggested herein it would be to reduce the employer's liability and not extend. The aspirations of the New Code have unfortunately not been well executed particularly in line with a balance of the rights of both parties and further protection for victims. It is back to the drawing board!

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