The Convergence of Sexual Harassment Workplace Claims and Evolving Vicarious Liability Jurisprudence

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ABSTRACT

The recent judgment of Pickering J in PE v Ikwezi Municipality has brought to the fore the inherent difficulties of adjudicating the issues of sexual harassment at the workplace on the one hand, and the imposition of liability on the employer arising from the conduct of one of its employees on the other. The law of sexual harassment, which offered little or no protection to the victim of such act at the workplace, has been rejuvenated by the values of human dignity, equality and freedom entrenched in the Constitution and the Bill of Rights and judicially incorporated into the employer's vicarious liability. This article explores the convergence of the protection offered the victim by the law of sexual harassment and the extended protection offered by the modern law of vicarious liability using the recent Ikwezi Municipality case as a focus point.

1. INTRODUCTION

There are two important aspects of the recent High Court judgment in *PE v Ikwezi Municipality*[1] that require a more detailed attention. Both aspects stem from incidents that took place at the plaintiff's workplace. The plaintiff alleged that she was sexually harassed by the second defendant during the course of his duties at the first defendant's municipal offices. Thus, the first question arising from the encounter is whether the conduct complained of constituted sexual harassment and, if so, whether the second defendant was liable for the alleged sexual assault? The next question that follows the foregoing is whether the first defendant as the employer of the second defendant was vicariously liable for the alleged wrongful conduct of its employee? The

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[1] 2016 (5) SA 114 (ECG)

culmination of the unravelling of the legal tangles implicated in these two issues inevitably necessitates first, ascertaining what sexual harassment really entails or connotes. Once that is done, it becomes necessary, in the second place, to interrogate the existing case law on this fast-developing jurisprudence. It is considered imperative that in discussing these issues, regard must be had to the universal flavour attendant to both sexual harassment and vicarious liability as each branch of the law is experiencing surgical developmental processes not only within South Africa but also in other countries of cognate jurisdiction.

2. WHAT CONSTITUTES SEXUAL HARASSMENT?

In terms of the International Trade Union Confederation's (ITUC) Trade Union Guide, sexual harassment constitutes 'unwanted, unwelcome and unasked-for behaviour of a sexual nature.'[2] It is somewhat of a display of power which is intended to intimidate, coerce or degrade another worker.' The Guide classifies sexual harassment into four categories, being:

(a) Physical - which includes touching, pinching, squeezing, or brushing against someone; leering or ogling; making homophobic comments and sexually suggestive signals, winking; sending un-wanted e-mails, text messages, posting sexually-explicit jokes on an office intranet; unnecessary physical contact and touching, physical assault;

(b) Verbal – comprising making sexual comments or innuendos, telling sexual jokes, or asking about sexual fantasies, making insults based on a person's sex or rating their sexuality, turning work discussions to sexual topics, requests for sexual favours;

(c) Non-verbal - consisting of displaying pictures, calendars, PC desktop wallpaper or other sexually-explicit material, sending anonymous letters, and whistling; and

(d) Other – such as forcing women to work unsociable hours which could make travel to work dangerous.

[2] ITUC, *Stopping Sexual Harassment at the Workplace - A Trade Union Guide*, (Brussels, Belgium, April 2008) 3

In South Africa, both the 1998 Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace,[3] issued by the National Economic Development and Labour Council (NEDLAC) under section 203(1) of the Labour Relations Act (LRA), 66 of 1995, and the subsequent 2005 Amended Code on the Handling of Sexual Harassment Cases in the Workplace, issued by the Minister of Labour in terms of section 54(1)*(b)* of the Employment Equity Act (EEA), 55 of 1998 define sexual harassment. Surprisingly, both the 1998 Code and 2005 Amended Code operate alongside each other; the 1998 Code having not been withdrawn or replaced. Together, the Codes provide that sexual harassment may include not only employees but also clients, suppliers, contractors and others having business dealing with a business.[4] Similarly, they recognize that a single act may constitute sexual harassment.[5] The two Codes are by virtue of section 203(3) of the LRA, 'relevant codes of good practice' which any person interpreting or applying the Act must take into account. However, notwithstanding their similarities, distinctions can be detected with regard to their respective definitions of sexual harassment.

In paragraph 3 of the 1998 Code sexual harassment it is stated that

'(1) Sexual harassment is unwanted conduct of a sexual nature.[6] 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/or

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

[3] GG Notice 1367 of 1998.

[4] Para 2.1, 1998 Code.

[5] Para 3(2) (a), 1998 Code. Compare *Mnyandu v Padayachi* [2016] 4 All SA 110 (KZP); 2017 (1) SA 151 (KZP) para 68 where Moodley J (Ploos Van Amstel J concurring), while interpreting section 1 of the Protection from Harassment Act 17 of 2011, stated that, "in my view the conduct engaged in must necessarily either have a repetitive element which makes it oppressive and unreasonable, thereby tormenting or inculcating serious fear or distress in the victim; alternatively, the conduct must be of such an overwhelmingly oppressive nature that a single act has the same consequences, as in the case of a single protracted incident when the victim is physically stalked."

[6] See for example *Kawonzo v Central Lake Trading 377 (Pty) Ltd t/a Mukuru.com* (2016) 9 BALR 1003 (CCMA) where an employee sent a colleague photograph of his penis after a night of partying while the employee was on leave. It was held that sexual harassment was not proved as the complainant was not offended by the colleague's conduct while communication was largely personal.

(c) The perpetrator should have known that the behaviour is regarded as unacceptable.'

Paragraph 4 of the same Code, on 'forms' of sexual harassment, states that it may 'include unwelcome physical, verbal or non-verbal conduct, but is not limited to the following examples:

(a) Physical conduct of a sexual nature includes all unwanted physical contact, ranging from touching to sexual assault or rape, and includes a strip search by or in the presence of the opposite sex.

(b) Verbal forms of sexual harassment include unwelcome innuendos, suggestions and hints, sexual advances, comments with sexual overtones, sex-related jokes or insults or unwelcome graphic comments about a person's body made in their presence or to them, unwelcome and inappropriate enquiries about a person's sex life, and unwelcome whistling at a person or group of persons. [7]

(c) Non-verbal forms of sexual harassment include unwelcome gestures, indecent exposure, and the unwelcome display of sexually explicit pictures and objects.

(d) *Quid pro quo* harassment occurs where an owner, employer, supervisor, member of management or co-employee undertakes or attempts to influence or influences the process of employment, promotion, training, discipline, dismissal, salary increments or other benefits of an employee or job applicant in exchange for sexual favours.'

Under paragraph 4 of the 2005 Amended Code, sexual harassment is described as an unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all of the following factors:

4.1 Whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;

4.2 Whether the conduct was unwelcome;

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[7] The facts that emerged in the disciplinary proceedings of a male immigrant surgeon by a panel set up by the Newfoundland and Labrador College of Surgeons in Canada and published in the *Punch* (Newspaper) of Wednesday, 28 September 2016 brought forward two classic illustrations of physical and verbal aspects of sexual harassment of patients that come to consult with the doctor in his clinic. First, after a pelvic examination, the doctor hugged the patient and whispered into her ear: "You have a beautiful clit, does your husband tell you that?" Second, during a pelvic examination of another patient, a pregnant woman, the doctor asked her: "Do you like it big or small?" She was, at the time, undressed from waist down and her feet in stirrups, while two female secretaries in the room watched. The disciplinary panel found these comments and touching of the patient by the doctor to be inappropriate showing a lack of respect for their dignity and privacy.

4.3 The nature and extent of the sexual conduct; and

4.4 The impact of the sexual conduct on the employee.[8]

Until recently, the liability of the employer for sexual harassment of an employee in the work place was predicated on section 60 of the EEA which provides as follows:

'(1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.

(2) The employer must consult all relevant parties and must take the necessary steps to eliminate the alleged conduct and comply with the provisions of this Act.

(3) If the employer fails to take the necessary steps referred to in subsection 2, and it is proved that the employee has contravened the relevant provision, the employer must be deemed also to have contravened that provision.

(4) Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.'

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3. SEXUAL HARASSMENT AT THE WORKPLACE

The discussion in this part focusses on the interpretation and application of the legislative framework summarised above to specific fact-situations. Of particular concern and interest are

[8] Compare the difficult case of *Department of Health, Western Cape v Denosa obo Cloete* [2016] 9 BLLR 923 (LC) paras 5, 17, 21 and 60 where the question was whether the conduct complained of amounted to sexual harassment. The sexual harassment policy of the employer was worded in terms similar to items 4.2-4.4 of the Code. The conduct in question was that the employee made unwelcome physical contact of a sexual nature with the complainant (a patient in the hospital) in that he (a male nurse) pulled down the patient's panties and placed his hand on her pubic area; without any prescription and explanations to the complainant, he gave her un-prescribed cream which he required her to rub on her vaginal area whilst being present and which he also applied to her vaginal area. Following an arbitration proceeding, the arbitrator found that the employee had not committed the misconduct alleged hence his dismissal was found to be substantively unfair and his retrospective reinstatement was ordered. On review, the Labour Court, applying the reasonableness test of *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC), came to the conclusion that although the facts of this case raise the inevitable question why the alleged victim would have invented the bizarre facts upon which she relied in evidence, the arbitrator considered the evidence of all the witnesses before him; made findings on their credibility and on the probabilities; and arrived at a finding that was not so unreasonable that no other arbitrator could have come to the same conclusion on the evidence before him. The award was therefore not open to review.

the following issues: (a) sexual harassment as constructive dismissal; (b) sexual harassment as automatically unfair dismissal; and (c) sexual harassment as perpetuating gender inequality. Other matters arising from the question whether a particular conduct constitutes sexual harassment include the question whether the ambivalence of the victim would make any difference in determining whether a particular act or series of acts constitute sexual harassment as well as whether the fact that the victim of sexual harassment failed to report the abuse before leaving employment would, for that reason only, remove the events from constituting sexual harassment.

3. 1 Sexual harassment as constructive dismissal

The problematic issue of sexual harassment by its very nature tends to blur the boundaries of employers' direct liability and the law of vicarious liability. In South Africa, sexual harassment had in the past been encountered in the courts and labour tribunals in connection with unfair dismissals from employment. That was the case in *Ntsabo v Real Security CC,*[9] which was contested on the basis of section 60 of the EEA that imposes an obligation on the employer to take all reasonably practicable steps, as required by section 60(4), to ensure that no act in contravention of the EEA occurred. In *Ntsabo,* the plaintiff had resigned her position in the company as a security guard on the ground that her supervisor had over a period of time sexually harassed her. She claimed that she was constructively dismissed having reported the harassment to the employer but no action was taken. Pillay AJ upheld the constructive dismissal claim since the harassment had created a hostile and intolerable working environment for the plaintiff. The employer was similarly held vicariously liable since the harassment by the supervisor was a clear case falling within the EEA and the Code of Good Practice on the Handling of Sexual Harassment Cases. This case must be contrasted with the decision of the Labour Court in *Mokoena and Another v Garden Art (Pty) Ltd and Another*[10] where it was held that for the applicants to succeed in their claim for sexual harassment, they must prove that the alleged conduct amounted to sexual harassment; that the employer knew about it, and failed to take proper steps to prevent or eliminate or prohibit such conduct; and that it is that failure that makes the employer liable. The court found that the

[9] (2003) 24 *ILJ* 2341 (LC).
[10] (2008) 29 *ILJ* 1196 (LC). See the discussion by M van Jaarsveld, 'Labour Law (2008) *Annual Survey of South African Law* 639 at 660-662

applicants' claim failed to address all the crucial questions arising from the construction of section 60 of the EEA.

A restatement of the obligation of the employer by the court in *Potgieter v National Commissioner of the SA Police Service and Another*,[11] that is, that 'the employer failed to take all reasonable and practical measures to ensure that employees *did not act* in contravention of the EEA", suggests that the employer is expected to be proactive and not merely reactive to further the provisions of the EEA. Savage AJA in the recent decision of the Labour Appeal Court in *Liberty Group Ltd v Masango*[12] emphasised that distinction in the obligation of the employer as follows: "It is noteworthy that in recording the last requirement as to whether the employer failed to take steps to ensure that employees '*did not*' act in contravention of the EEA, *Potgieter* moves away from the words '*would not*' in section 60(4).'[13] The Labour Appeal Court accepted a deviation from the decision in *Mokoena*, observing that that decision placed undue narrow interpretation on section 60 by suggesting that liability of the employer arises only where the harassment is repeated after an initial complaint is lodged and then only where the employer has failed to take reasonable steps to prevent such further harassment.[14] The Court admitted that section 60 of the EEA is not free from ambiguity, but advocated for a liberal and purposive interpretation of the provision. For instance, in relation to the timing of the report in section 60(1), Savage AJA observed:

> 'Although the appellant contends that the conduct was not reported immediately, as required by s 60(1), with a delay of some weeks having elapsed between the sexual harassment and the report…, I am satisfied that the requirement that conduct be reported '*immediately*' must be given a sensible meaning. This is done through considering the provision within its context and in a manner, which ensures an interpretation that does not lead to a glaring absurdity, even where the interpretation given may involve a departure from the plain meaning of the words, used.'[15]

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[11] (2009) 30 *ILJ* 1322 (LC) para 46.
[12] Unreported: JA105/2015 Labour Appeal Court 07 March 2017.
[13] *Liberty Group* para 39. Emphasis his Lordship's.
[14] *Liberty Group* para 36.
[15] *Liberty Group* para 51. Emphasis his Lordship's. See also *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA) para 25.

The courts are known to have always deferred to the legislature by interpreting a legislative instrument in accordance with the express terms of the legislation. But in doing so, the courts also strive to give judicial vent to the legislative purpose. Thus, on those rare occasions where the literal words of the legislation fail to strike at the legislative purpose, it is not unusual for the courts to pursue the purpose rather than the letter of the legislation. The Labour Appeal Court's purposive approach to the interpretation of section 60 of the EEA, strikes more at the legislative purpose than the legalistic or literal approach adopted by the Labour Court in *Mokoena*.

3.2 Sexual harassment as automatically unfair dismissal

The issue of sexual harassment as automatically unfair dismissal was considered by the Labour Court in *Makoti v Jesuit Refugee Service SA.*[16] The complainant/applicant claimed that she was dismissed on account of her not acceding to alleged sexual advances of the respondent's national director. She described, at least, five episodes of the alleged sexual advances: (a) an attempt to kiss her and her pushing him away; (b) he called her by her nickname and said: 'You know Nonke what I want'; (c) asking her to give him a hug after a staff Christmas party; (d) the harasser told her of a former girlfriend, now married, but who kept coming back to him 'for more' because, in bed, he was 'like a tiger'; and (e) when she went to his office to sign certain documents, he said to her that 'she had effect on him', and that she 'turned him on.' She claimed that on each occasion she reacted in a way that would have indicated to any reasonable person that the overture was rejected. This, she alleged, resulted in non-renewal of her fixed-term contract of employment. She had applied for a permanent post, was interviewed but was not shortlisted, and she was not told why she had not been successful. She also indicated that although she was never reported the alleged incidents of harassment, she did tell one or two of her colleagues. She thought that she could handle the problem in her own way, until after until her fixed-term contract was not renewed.[17]

The reason given for the non-renewal of her contract was 'continued non-performance'. She, however, contended that the real reason for her failing to secure the post of project director, as well as the non-renewal of her contract, was her rejection of the sexual advances made by her

[16] (2012) 33 *ILJ* 1706 (LC).
[17] *Makoti* paras 14-16.

supervisor. This led to her being victimised and to a strained working relationship. Non-renewal of her contract was not based on poor performance but the lack of sexual favours.[18] Lagrange J was satisfied that there was sufficient evidence to conclude that the applicant had more than a reasonable basis for believing that her contract would have been renewed as it was in previous years, and that failure to do so amounted to a dismissal within the meaning of section 186(1)*(b)* of the LRA.[19]

Lagrange J further held that not only was the applicant's repulse of the director's sexual advances one of the reasons for her dismissal, but it was also the most probable explanation for the dismissal. Describing the treatment meted to the applicant as unfair discrimination, the trial judge stated that it is trite law that the so-called *quid pro quo*[20] acts of sexual harassment amount to unfair discrimination. The obverse of granting employment benefits in exchange for sexual favours is when an employee is disadvantaged for not granting them. This is an impermissible criterion for differentiating in the treatment of employees and will constitute unfair discrimination. An employee dismissed on such basis is dismissed for an impermissible reason and one that is unfairly discriminatory within the meaning of section 187(1)*(f)* of the LRA read with section 6(3) of the EEA. The former provision forbids dismissal on any unfairly discriminatory ground and the latter provision identifies harassment as a form of unfair discrimination. The mere fact of the applicant not reporting the incidents when they occurred has no such attenuating effect as would blur the link between the refusal of sexual advances made to the applicant by the director and the eventual loss of job by the applicant.

3.3 Sexual harassment as perpetuating gender inequality at the workplace

The constitutional dimension to sexual harassment in the work place is a relatively new but thorny issue in the law of employment as well as vicarious liability. As Savage AJA put it in *Campbell Scientific Africa (Pty) Ltd v Simmers*:[21]

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[18] *Makoti* paras 19 and 24.
[19] *Makoti* para 42.
[20] See para 4(1)*(d)* of the Code of Good Practice on the Handling of Sexual Harassment Cases 1998.
[21] (2016) 37 *ILJ* 116 (LAC) para 18.

> 'Our constitutional democracy is founded on the explicit values of human dignity and the achievement of equality in a non-racial, non-sexist society under the rule of law.[22] Central to the transformative mission of our Constitution is the hope that it will have us re-imagine power relations within society so as to achieve substantive equality, more so for those who were disadvantaged by past unfair discrimination.'[23]

In amplification of the foregoing, modern statutes have created statutory obligations on employers to ensure that this menace is prevented at the workplace and that adequate legislative measures are put in place to protect employees from the scourge of sexual harassment.[24] Thus, it was held in *Campbell Scientific* that the treatment of sexual harassment as a form of unfair discrimination in section 6(3) of the EEA recognizes that such conduct poses a barrier to the achievement of substantive equality in the workplace. This is echoed in the 1998 Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace, issued by NEDLAC under section 203(1) of the LRA, and the subsequent 2005 Amended Code on the Handling of Sexual Harassment Cases in the Workplace, issued by the Minister of Labour in terms of section 54(1)*(b)* of the Employment Equity Act.[25] In his judgment in *Campbell Scientific*, Savage AJA went further to describe sexual harassment as concerned with the exercise of power at its core, and in the main, it reflects the power relations that exist both in society generally and specifically in the workplace. He observed:

> 'While economic power may underlie many instances of harassment, a sexually hostile environment is often "less about the abuse of real economic power, and more about the perceived societal power of men over women. This type of power abuse [is] often exerted by a (typically male) co-worker and not necessarily a supervisor".[26] By its nature, such harassment creates an offensive and very often intimidating work environment that undermines the dignity, privacy and integrity of the victim and creates a barrier to

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[22] Sections 1(a)-(c) of the 1996 SA Constitution.
[23] See also Moseneke DCJ, *SAPS v Solidarity obo Barnard* 2014 (6) SA 123 (CC) paras 28-29 from where the original statements are derived.
[24] Compare the Protection from Harassment Act 1997 (UK).
[25] *Campbell Scientific* para 19.
[26] See A Basson 'Sexual harassment in the workplace: An overview of developments' (2007) 18 (3) *Stell LR* 425 at 425.

substantive equality in the workplace. It is for this reason that this court has characterized it as 'the most heinous misconduct that plagues a workplace.',[27]

3.4 Sexual harassment as impairment of dignity

The question that arose in *Campbell Scientific Africa (Pty) Ltd v Simmers*[28] was whether the advances made by S to Ms M while they stayed at a lodge during a work-related trip that took them and another colleague to Botswana constituted sexual harassment. It was late and during dinner, S had asked M: "Do you need a lover tonight", when she replied in the negative, S advised that she should knock on his door if she changed her mind. It was held by the trial court that there was no dispute that S made advances to Ms M that took the form of unwelcome and unwanted conduct of a sexual nature, but that that does not constitute sexual harassment. Reversing that decision, the Labour Appeal Court (LAC) held that while the Labour Court was right in its finding that the advances were crude and inappropriate, it erred in finding that the advances constituted inappropriate sexual attention and not harassment and that they were not serious and did not impair the dignity of Ms M. On the contrary, the LAC observed that the unwelcome and inappropriate advances were directed by S at a young woman, close to 25 years his junior, whose employment had placed her alone in his company in rural Botswana. Underlying such advances lay a power differential that favoured S due to his age and gender. Ms M's dignity was impaired by the insecurity caused to her by the unwelcome advances and by her clearly expressed feelings of insult coupled with her feeling increasingly nervous given the proximity of the sleeping arrangements at the lodge to the extent that she had to programme the other colleague's number onto her phone "just in case anything happened". [29] The LAC concluded that S's conduct constituted sexual harassment as defined in both Codes: it was unwelcome and unwarranted; it was offensive; it intruded upon Ms M's dignity and integrity; and it caused her to feel both insulted and concerned for her personal safety.[30]

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[27] *Campbell Scientific* paras 20-21. See also *Moatsami v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC) para 20; *Department of Labour v General Public Service Sectoral Bargaining Council* (2010) 31 *ILJ* 1313 (LAC) para 37.
[28] (2016) 37 *ILJ* 116 (LAC).
[29] *Campbell Scientific* para 27.
[30] *Campbell Scientific* para 32.

Notable observations in the unanimous judgment of the LAC in *Campbell Scientific*, delivered by Savage AJA, can be redacted thus:

(a) sexual harassment by older men in position of power has become a scourge in the workplace and that its insidious presence is corrosive of a congenial work environment and productive work relations;[31]

(b) this Court noted similarly that the rule against sexual harassment targets, amongst other things, reprehensible expressions of misplaced authority by superiors towards their subordinates;[32]

(c) the fact that S did not hold an employment position senior to that of Ms M or that they were not co-employees did not have the result that no disparity in power existed between the two. His conduct was as reprehensible as it would have been had it been meted out by a senior employee towards his junior in that it was founded on the pervasive power differential that exists in our society between men and women and, in the circumstances of this case, between older men and younger women;

(d) far from not being serious S capitalised on Ms M's isolation in Botswana to make the unwelcome advances that he did;

(e) the fact that his conduct was not physical, that it occurred during the course of one incident and was not persisted with thereafter, did not negate the fact that it constituted sexual harassment and in this regard the Labour Court erred in treating the conduct as simply an unreciprocated sexual advance in which S was only 'trying his luck'; and

(f) in its approach the Court overlooked that in electing to make the unwelcome advances that he did, S's conduct violated Ms M's right to enjoy substantive equality in the workplace. It caused her to be singled out opportunistically by S to face the unwelcome sexual advances in circumstances in which she was entitled to expect and rely on the fact that within the context of her work this would not occur; and

(g) in treating the conduct as sexual harassment, Ms M, and other women such as her, are assured of their entitlement to engage constructively and on equal basis in the

[31] Referring to Steenkamp J (as he then was), *SA Broadcasting Corporation Ltd v Grogan NO* (2006) 27 *ILJ* 1519 (LC) at 1532A.
[32] *Gaga v Anglo Platinum Ltd* [2012] 3 BLLR 285 (LAC).

> workplace without unwarranted interference upon their dignity and integrity. This is the protection which the Constitution affords.[33]

It is instructive that long before *Campbell Scientific*, the Constitutional Court had recognised the value of human dignity as protected in section 10 of the 1996 Constitution and the fact that the impairment of human dignity could occur at different levels of human existence. In *Dawood v Minister of Home Affairs and Others*[34] O'Regan J observed:

> 'Human dignity is also a constitutional value that is of central significance in the limitations analysis. Section 10, however, makes it plain that dignity is not only a value fundamental to our Constitution, it is a justiciable and enforceable right that must be respected and protected. In many cases, however, where the value of human dignity is offended, the primary constitutional breach occasioned may be of a more specific right such as the right to bodily integrity, the right to equality or the right not to be subjected to slavery, servitude or forced labour.'

Thus, not surprisingly, the LAC in *Campbell Scientific* situated sexual harassment in the realm of the constitutionally protected right to human dignity being an act of interference with bodily integrity.

3.5 The ambivalence of the victim

The body language of the victim of sexual harassment as perceived by the employer may not constitute an exculpating factor in a sexual harassment claim. The determination of whether conduct is unwelcomed, as held by the court, is an objective one, because conduct that may be subjectively unwelcome by one person may not be unwelcome to another.[35] While embarking on such objective assessment, however, the court would give full credence to the views of the victim on how he/she perceives the conduct of the harasser.[36] This was evident in a unanimous decision of the LAC in *Gaga v Anglo Platinum Ltd*,[37] where Murphy AJA held that the fact that the subordinate may present an ambivalent, or even momentarily be flattered by the attention, is no

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[33] *Campbell Scientific* para 33.
[34] 2000 ZACC 8 para 35.
[35] See *Bandat v De Kock and Another* (2015) 36 ILJ 979 para 72.
[36] See *Motsamai v Everite Building Products (Pty) Ltd* [2011] 2 BLLR 144 (LAC) para 20.
[37] [2012] 3 BLLR 285 (LAC).

excuse; particularly where at some stage in an ongoing situation she signals her discomfort. If not the initial behaviour, then, at the very least, the persistence therein is unacceptable.[38] Much depends on the circumstances of each case, with the Court or Commissioner being obliged to have regard to the nature and gravity of the infringement; the impact on the victim; the relationship between the perpetrator and the victim; the position and responsibilities of the perpetrator; and whether or not there is a pattern of behaviour evidenced by prior conduct.[39] The court drew attention to the youthfulness of the employee in this case, finding analogy with what the Industrial Court said some two and a half decades ago that it is not uncommon for employees to resign rather than being subjected to the torture of sexual harassment. This is because the psychological effect 'on sensitive and immature employees, both male and female, can be severe, substantially affecting the emotional well-being of the person involved. Inferiors who are subjected to sexual harassment by their superiors in the employment hierarchy are placed in an invidious position.'[40] On how juniors should cope with sexual harassment, the Industrial Court retorted: 'It is difficult enough for a young girl to deal with advances from a man who is old enough to be her father. When she has to do so in an atmosphere where rejection of advances may lead to dismissal, lost promotions, inadequate pay rises etc. – what is referred to as tangible benefits in American law – her position is unenviable.'[41]

3.6 Delay or failure to report sexual harassment

In a contemporary workplace setting, it is mandatory for an employer to have in place a Sexual Harassment Policy, to ensure a healthy work environment and provide disciplinary mechanisms for employees whose conduct may be reprehensible under the law, as encountered in *Campbell Scientific Africa (Pty) Ltd v Simmers*,[42] and *Gaga v Anglo-Platinum Ltd*.[43] Yet, it is not enough to have policy or mechanisms in place. It is essential that at the workers should not only be made aware of the existence of such, but must also be schooled in the contents thereof. This, it was

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[38] *Gaga* para 41
[39] *Gaga* para 48.
[40] *J v M Ltd* (1989) 10 *ILJ* 755 (IC) at 757G-758D; *Media 24 Ltd v Grobler* (2005) 26 *ILJ* 1007 (SCA) para 67.
[41] *J v M Ltd* at 758A-C. See also *University of Venda v Maluleke* (2017) 38 ILJ 1376 para 75.
[42] (2016) 37 *ILJ* 116 (LAC).
[43] (2012) 33 *ILJ* 329 (LAC).

suggested in *Gaga*, was the responsibility of a Human Resources Department, coincidentally headed by the harasser. The victim of sexual harassment in this case did not report the various incidents over a period of two years ostensibly because she was unaware of the existence of the document and the procedure. Her ordeals with her supervisor comprising suggestive comments and remarks and direct sexual proposition made intermittently by the appellant throughout the two years of her employment as his personal assistant until her resignation only became known when she was asked about her supervisor in her exit interview.[44] In confirming not only the disciplinary action against the supervisor in this case and the penalty of dismissal imposed thereby, the court discountenanced the fact that the complainant did not take formal steps against the appellant during the occurrence of the events. The court held that this should be construed in the light of the 'misplaced authority by superiors towards their subordinates'[45] and 'the personal power dynamic in the relationship' being what sexual harassment brings about in the workplace and which probably operated to inhibit the complainant; keeping in mind that she notably changed her stance at the time of her resignation once she was apprised of the policy.'[46] It would be unfair to the employer, the court held, were the appellant to be allowed to avoid liability for sexual harassment on the basis of ignorance of his victim of the steps to be taken in the policy and her hesitation in taking them. The complainant's evidence looked at as a whole suggests that she was uncertain as to how to deal with the situation. 'Her conspicuous vacillation was an understandable response in a youthful and junior employee. She was placed in the invidious position of being compelled to balance her sexual dignity and integrity with her duty to respect her superior; which obligation no doubt was appreciably compromised by his behaviour.'[47]

The recent decision of the Labour Appeal Court in *Liberty Group*[48] stands as a firm confirmation that delay in reporting sexual harassment within the confines of section 60(1) of the EEA is not fatal to the success of a litigation conducted under that provision. A similar finding was made by the Labour Court but with a caveat in *University of Venda v Maluleke*,[49] where Snyman AJ held that "even if no complaint or grievance is raised, the conduct may still be

[44] *Gaga* para 11
[45] *Gaga* para 18.
[46] *Gaga* para 19.
[47] *Gaga* para 42.
[48] Unreported: JA105/2015 Labour Appeal Court 07 March 2017.
[49] (2017) 38 ILJ 1376 para 66. Emphasis added.

considered to be sexual harassment, *provided a proper explanation is provided by the complainant for not raising the complaint earlier*." It is assumed that there will always be explanations to be made whenever the issue of delay or failure on the part of the complainant is raised at the hearing. Whether the explanations are credible will of course depend on the facts of each case.

4. SEXUAL HARASSMENT BY EMPLOYEE AND VICARIOUS LIABILITY OF THE EMPLOYER

The decision in *PE v Ikwezi Municipality*[50] buttresses an unequivocal judicial acceptance of the constitutional dimension to sexual harassment as witnessed in other arms of delictual wrongs bothering on impairment of bodily integrity. In that case, the plaintiff's duties as Archives Clerk entailed that she and the second defendant, the Corporate Services Manager, her immediate superior, worked closely together, *inter alia*, preparing Council agendas, on occasion late in the evening after the rest of the staff had left. One evening, the plaintiff and second defendant were alone in the Jansenville offices of the first defendant, preparing Council agenda. The second defendant observed that they were alone such that if they did something, nobody would know about it. The plaintiff replied that she did not know what he was talking about and that whatever it was, she was not interested.[51] The main incident, however, took place on Monday, 16 November 2009 at the same Jansenville offices while the plaintiff was alone in her office. The second defendant entered the office. 'After greeting her, he walked directly to where she was sitting at her desk. As she looked up he bent down with his head over hers and, putting his mouth over hers, attempted to force his tongue into her mouth. She clenched her teeth and tried unsuccessfully to push him away. After a minute or so he desisted, leaving her with a mouthful of his saliva. She immediately wiped the saliva off her mouth. He then also tried to wipe her mouth with his hand but she knocked it away. Before leaving her office, he told her that he was going to get a cold sore the next day because he had kissed her.'[52]

The plaintiff found the incident utterly revolting; she was distressed and anxious. She reported the incident to the senior officials of the Municipality who advised her to take some days

[50] 2016 (5) SA 114 (ECG)
[51] *Ikwezi Municipality* paras 8-10.
[52] *Ikwezi Municipality* para 11.

off. When she returned to work on the Friday, on sighting the second defendant, she again became anxious and trembling. She reported to the Acting Municipal Manager that she could not continue to see the second defendant virtually every day in the corridors of the office. The sight of him reduced her to tears. She, however, continued coming across him in the course of her duties to the extent that "she would lock her office door if she heard his voice in the corridors."[53] Whenever she reported to the Acting Municipal Manager, she was promised that they would try to keep the second defendant away from her but that, as a manager, the second defendant had to come to the Jansenville offices in the course of his duties.[54] Meanwhile, the plaintiff was suffering from Post-traumatic Stress Disorder and although she was put on medication by a psychiatrist, she still trembled and cried any time she saw him. She could not sleep and suffered to the extent that she could no longer cope with her work situation and tendered her resignation.[55] The plaintiff brought an action for damages jointly and severally against the first defendant (*Ikwezi Municipality)* and the second defendant (Xola Vincent Jack), arising out of the alleged sexual assault committed upon her by the second defendant during the course of his duties with the first defendant.[56]

The court held that the second defendant, who had pleaded guilty in the magistrate's court to a charge of *crimen injuria*, chose not to enter an appearance to defend this matter, and plaintiff's evidence that he had sexually molested her was therefore not disputed. The conduct of the second defendant was described as "a touch or caress with the lips as a sign of love, affection or greeting",[57] and was deprecated by the court as intolerable, despicable and violent abuse of his position of authority over the plaintiff.[58] He was therefore liable to pay the plaintiff such damages as she might in due course prove she had suffered in consequence of his actions.[59] Having come to that conclusion, the court was left with the determination of the issue of first defendant's liability, if any. The court had to decide whether the common law should be developed to hold an employer vicariously liable in circumstances where one of its employees is subjected to sexual

[53] *Ikwezi Municipality* paras 12-15.
[54] *Ikwezi Municipality* para 16.
[55] *Ikwezi Municipality* para 24.
[56] *Ikwezi Municipality* para 1.
[57] *Ikwezi Municipality* para 36.
[58] *Ikwezi Municipality* para 37.
[59] *Ikwezi Municipality* para 38.

harassment by another employee. In determining the issue, the court had regard to the judgment of the SCA in *City of Cape Town v SANRAL*,[60] where Ponnan JA said:

> 'In addition, s 39(2) of the Constitution makes it plain that, when a court embarks upon a course of developing the common law, it is obliged to "promote the spirit, purport and objects of the Bill of Rights." This ensures that the common law will evolve, within the framework of the Constitution, consistent with the basic norms of the legal order that it establishes. The Constitutional Court has already cautioned against overzealous judicial reform. Thus, if the common law is to be developed, it must occur not only in a way that meets the s 39(2) objectives, but also in a way that is most appropriate for the development of the common law within its own paradigm. Faced with such a task, a court is obliged to undertake a two-stage enquiry. It should ask itself whether, given the objectives of s 39(2), the existing common law should be developed beyond existing precedent – if the answer to that question is a negative one that should be the end of the enquiry. If not, the next enquiry should be how the development should occur and which court should embark on the exercise.'[61]

The court held that in molesting the plaintiff the second defendant was acting solely for his own purposes and was in pursuit of his own prurient objectives. He was not furthering the first defendant's purposes or obligations in any way. However, the incident occurred while the second defendant was purportedly rendering service to first defendant and in the workplace.[62] It was because of the nature of their employment relationship that the opportunity presented itself to the second defendant, in the course of carrying out his duties, during his hours of work, at his employer's facilities, to abuse his authority and to take advantage of the vulnerability of the plaintiff. When the connection between the deviant conduct and the employment was considered, it became clear that the municipality had, by placing the second defendant in a position of trust and authority over the plaintiff, forced the required causal link between the second defendant's position and the wrongful act. The first defendant gave him the authority to control the conditions under which the plaintiff, as his subordinate, did her daily work.[63] By his gross actions, the second

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[60] 2015 (3) SA 386 (SCA).
[61] *City of Cape Town* para 29.
[62] *Ikwezi Municipality* para 72.
[63] *Ikwezi Municipality* paras 73, 76-77.

defendant infringed the plaintiff's right to human dignity[64] and security of the person, including the right to bodily and psychological integrity.[65] These created an offensive and intimidating work environment that undermined the plaintiff's dignity, privacy and integrity.[66] Having regard to the objectives of section 39(2) of the Constitution, constitutional norms dictated that the common law be developed and extended to accommodate the present set of facts and the first defendant accordingly be held vicariously liable for the conduct of the second defendant.[67] Thus, the first and second defendants were jointly and severally liable for such damages as the plaintiff might prove.

The mere fact that the defendant was pursuing a personal objective well at variance with the purposes of his employer is not an exculpating factor. The primary consideration as the basis of vicarious liability is the existence of causal link between the wrongful conduct of the employee and the purpose of the employer. The decision is in tandem with the Constitutional Court's approach in rape cases, which obviously entail a deviation from the employee's responsibilities. In *K v Minister of Safety and Security*,[68] a case involving policemen who raped a girl whom they had offered a lift in a police vehicle. The Minister was held vicariously liable for the conduct of the policemen, O'Regan J explained:

> 'That question is whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee's acts for his own interests and the purposes and business of the employer…. It is in answering this question that a court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights.'[69]

The court held that in committing the crime, the policemen not only did not protect the applicant, they infringed her rights to dignity and security of the person. In so doing, their employer's obligation (and theirs) to prevent crime was not met. There is an intimate connection between the delict committed by the policemen and the purposes of their employer. This close

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64 Section 10, 1996 Constitution.
65 Section 12, 1996 Constitution.
66 *Ikwezi Municipality* para 75.
67 *Ikwezi Municipality* para 80.
68 2005 (6) SA 419 (CC).
69 *K* para 32.

connection renders the respondent liable vicariously to the applicant for the wrongful conduct of the policemen.[70]

The concept of potential risk created by the employer who renders obligations to the public through their employees which was also latched onto by the court in *Ikwezi Municipality* has been recognised by courts as the basis of vicarious liability in South African delictual jurisprudence. In *Feldman (Pty) Ltd v Mall*[71] Watermeyer CJ stated that:

> '[A] master who does his work by the hand of a servant creates a risk of harm to others if the servant should prove to be negligent or inefficient or untrustworthy; that, because he has created this risk for his own ends he is under a duty to ensure that no one is injured by the servant's improper conduct or negligence in carrying on his work and that the mere giving by him of directions or orders to his servant is not a sufficient performance of that duty. It follows that if the servant's acts in doing his master's work or his activities incidental to or connected with it are carried out in a negligent or improper manner so as to cause harm to a third party the master is responsible for that harm.'

Similarly, in *F v Minister of Safety and Security & Others,*[72] Mogoeng J observed that 'Employers could therefore be held to have *created a risk of harm to others should their employees prove to be inefficient or untrustworthy*. That potential risk imposes an obligation on employers to ensure that the employees they hold as the hands through which they would serve or do business with others, would not do the opposite of what they are instructed and obliged to do.'[73] The extension of these principles to the realm of sexual harassment in the work place as was done by the court in *Ikwezi Municipality* heralds the convergence of the law in this area and the evolving principles of vicarious liability in South Africa. Such convergence certainly enhances the protection of employees. The construing of sexual harassment as a constitutional issue affecting the dignity of the employee as protected by the Bill of Rights should ordinarily instill a sense of greater caution in the mind of the employer in guaranteeing the safety and security of the employees in the work place.

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[70] *K* para 57.
[71] (1945) AD 733 p 741.
[72] 2012 (1) SA 536 (CC).
[73] *F* para 45. Emphasis added.

5. CONCLUSION

Sexual harassment in all its ramifications in modern law: as a punishable offence in criminal law; a delict in civil law; or as a ground for dismissal from employment, and the development of the law of vicarious liability generally are two areas of contemporary South African law that have been influenced by the progressive trends built into the Constitution of 1996 and the Bill of Rights, and have been interpreted by the courts accordingly. While laws regulating sexual harassment were to a great extent set to break with the past, the law of vicarious liability was extended to include instances where, in the past such conduct would have been treated as a deviation from the scope and course of employment, hence not attracting liability on the part of the employer. What is required in modern law is to prove that the employee's conduct has a causal link with the employer's business, regardless of whether the conduct was criminal, negligent or intentional. The creation of potential risk is presumed by the court whenever the employer renders services to the public through the instrumentality of the employee. So, where both issues meet, section 39(2) of the Constitution becomes relevant. The courts are empowered under this provision to develop the common law in a manner that promotes the spirit, purport and objects of the Bill of Rights in the Constitution, which is the cornerstone of South Africa's democracy, based on the values of human dignity, equality and freedom.[74] All these issues, ideals and norms are implicated anytime sexual harassment is alleged.

[74] S 7, 1996 Constitution.