VICARIOUS LIABILITY FOR SEXUAL HARASSMENT

AT WORK

By

ARTHURNATIOUS MUZUVA

Submitted in partial fulfillment of the requirements for the degree of

MAGISTER LEGUM
(LABOUR LAW)

in the Faculty of Law

at the

Nelson Mandela Metropolitan University

Supervisor: Prof JA Van der Walt

January 2011
ACKNOWLEDGMENTS

I wish to express my sincere gratitude and appreciation towards:

1. My beloved adoptive mother and mentor, Mrs LA Young, and her supportive husband, Mr A Young, who made it possible for me to do this degree and their assistance throughout. This thesis is dedicated to them.

2. My promoter, Professor JA Van der Walt, for his continued patience and assistance throughout the period of this research.

3. The community of believers of the Seventh-Day Adventist Student Movement (SDASM) for their support and prayers.

4. My family for their love, support and tolerance.

5. My two sisters, Lwando Mbabala and Kutala Nkomo, my young brother, Luthando Mtyobile, and my best friends, Yanelisa Makinana and Phatsimo Gabasiane. May God bless you for being there for me.

6. To GOD ALMIGHTY for all the countless blessings, through whose grace and love I have been able to start and complete this research.
TABLE OF CONTENTS

SUMMARY.......................................................................................................................... iii

CHAPTER ONE: INTRODUCTION TO VICARIOUS LIABILITY ........................................... 1
  1.1 Overview of sexual harassment ................................................................. 1
  1.2 Definition of sexual harassment ............................................................... 4

CHAPTER TWO: STATUTORY VICARIOUS LIABILITY ...................................................... 9
  2.1 Introduction to statutory vicarious liability .................................................. 9
  2.2 The Constitution of the Republic of South Africa of 1996 ....................... 10
  2.3 The Employment Equity Act 55 of 1998 .................................................. 12
  2.3.1 Introduction to the Employment Equity Act 55 of 1998 ......................... 12
  2.3.2 Liability in terms of section 60 of the Employment Equity Act 55 of 1998 13
  2.4 *Ntsabo v Real Security CC*........................................................................ 15
  2.5 Liability in terms of section 6 of the Employment Equity Act .................... 19
  2.5.1 The test for unfair discrimination ....................................................... 21
  2.5.2 Appropriate test for sexual harassment ............................................... 23
  2.5.3 An alternative test for unfair discrimination in sexual harassment ......... 24
  2.6 SAWTU obo Finca v Old Mutual Life Insurance Company (SA) Limited and Burger....................................................................................................................... 26
  2.6.1 Liability of Old Mutual for Burger’s remark ........................................ 28
  2.7 Steps the employer may take to avoid liability ........................................... 31
  2.8 Mokoena v Garden Art (Pty) Ltd ............................................................. 32
  2.9 Conclusion ..................................................................................................... 36

CHAPTER THREE: COMMON LAW DIRECT LIABILITY ............................................. 37
  3.1 Introduction to common law direct liability ................................................ 37
  3.2 Background of delictual omissions ............................................................. 38
  3.3 The test for wrongfulness ......................................................................... 39
  3.3.1 *Minister of Safety and Security v Van Duivenboden* ............................ 40
  3.3.2 Carmichele v Minister of Safety and Security (Centre for Applied
      Legal Studies Intervening) ........................................................................... 42
  3.3.3 Media24 v Grobler ................................................................................. 44
  3.4 Common law – vicarious liability ............................................................... 47
  3.4.1 Introduction to common law – vicarious liability ................................... 47
  3.5 Requirements for vicarious liability ........................................................... 50
  3.5.1 Employer-employee relationship ........................................................... 50
  3.5.1.1 Midway Two Engineering & Construction Services v Transnet Bpk .... 51
  3.5.1.2 Stein v Rising Tide Productions .......................................................... 52
  3.5.1.3 The employee has to commit a delict ................................................ 53
  3.5.2 The employee has to act within the course and scope of employment
      when committing the delict ........................................................................ 53
  3.5.2.1 Minister of Police v Rabie ................................................................. 54
  3.5.2.2 *K v Minister of Safety and Security* .................................................. 56
  3.5.2.3 Costa da Oura Restaurant (Pty) Ltd v Reddy ...................................... 57
  3.5.2.4 Bezuidenhout NO v Eskom ................................................................. 58
  3.5.2.5 Grobler v Naspers .............................................................................. 69
  3.6 Conclusion on common law – vicarious liability ........................................ 65
3.7 Conclusion ........................................................................................................ 65

**BIBLIOGRAPHY** ................................................................................................ 69
Books .................................................................................................................... 69
Journals ................................................................................................................. 70
Table of Cases .................................................................................................... 73
Table of Legislation ............................................................................................. 75
SUMMARY

Sexual harassment has been in existence for a long time in the workplace without any attempt to understand, define and effectively combat this rather undesirable and serious form of misconduct. Until fairly recently, the growing problem of sexual harassment and its damaging effect have been given much attention by legal authorities and society at large. The effect of sexual harassment is that it embarrasses or humiliates the victim. The victim may also suffer from trauma which, in turn, affects his/her performance at work.

Numerous definitions have been provided on what constitutes sexual harassment. Sexual harassment takes place when a women’s sexual role overshadows her work role in the eyes of the male, whether it be a supervisor, co-worker, client or customer. In other words, her gender receives more attention than her work. Sexual harassment is also seen as unwanted conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace.¹

The Bill of Rights in the Constitution² entrenches the rights of everyone. Worth mentioning are the “right to equality”, “the right to dignity”, “the right to privacy” and “the right to fair labour practices”. Furthermore, section 6(3) of the Employment Equity Act³ states that “harassment is a form of unfair discrimination” which is prohibited in terms of section 6(1) of the same Act. Section 60 of the Employment Equity Act deals with statutory vicarious liability where the employer is held liable for his acts and/or omission to take measures to against sexual harassment or a failure to put a grievance procedure in place. Where such an employer has done what is reasonably necessary to prevent and to address sexual harassment, he/she will escape liability for the misconduct of the employee. This section also provides for mechanisms that an employer may employ to minimise liability where harassment has taken place.

In addition to statutory vicarious liability is the common law vicarious liability, where the employer is vicariously liable for the delict of the employee. This form of liability is also referred to as “no-fault liability”. The employer will be held liable where the following requirements for vicarious liability in common law are met: firstly, there must be an “employer-employee relationship”, secondly, a “delict must be committed” and thirdly, the “employee must have been acting in the scope or course of employment when the delict was committed”.

Liability can also be directly imputed on the employer. In this instance, it has to be proven that “the employer committed an act or omission; the act or omission was unlawful; the act or omission was culpable, intentional or negligent, and a third party suffered harm; either patrimonial damage or injury to personality; and the act or omission caused that harm”.

CHAPTER ONE
INTRODUCTION TO VICARIOUS LIABILITY

1.1 OVERVIEW OF SEXUAL HARASSMENT

Harassment, and particularly sexual harassment, remains pervasive in workplaces around the world.\(^4\) Unfortunately, there is also no indication that this offensive conduct will be stamped out within the foreseeable future.\(^5\) In an attempt to identify the reasons for this pervasiveness, many academic writers are unanimous in the fact that harassment is about an “abuse of power”.\(^6\) This is particularly true where the harasser is in a supervisory position and thus able to exert ‘real’ economic power over his victim (so-called *quid pro quo* harassment, where the victim faces loss of tangible job benefit such as promotion or salary increase if she does not comply sexually).\(^7\)

Although sexual harassment is not directed at women only, it is accepted that more women than men are victims of sexual harassment.\(^8\) According to Dolkart,\(^9\) whatever form the harassment takes or whoever the victim might be, the effect of harassment is often devastating:

“The effects of sexual harassment on a victim’s job and career can be profound. Many employees will simply leave the job or request a transfer than endure the harassment until they are psychologically destroyed. In one study, 42% of the victims of sexual harassment left their job, and another 24% were fired. Thus, 66% of the victims in the study were driven out of their job by sexual harassment. The costs of leaving a job include not only the obvious ones like loss of income and seniority, but also a disrupted work history, problems with obtaining references for future jobs, loss of confidence in seeking a new job, and loss of career advancement. Even for those who remain in their jobs, there are significant costs, including adverse working conditions and diminished opportunities for advancement. For instance, employees subject to a hostile work environment may not feel welcome as credible colleagues, may feel excluded or


\(5\) Ryder *Devising a Sexual Harassment Policy People Dynamics* (1998) 27.


\(7\) Ibid.

\(8\) *Ntsabo v Real Security CC* (2003) 24 *ILJ* 2341 (LC) 2377A.

There are far-reaching consequences to sexual harassment. Sexual harassment is an unpleasant aspect of the modern working environment such that it erodes the trust necessary in any working relationship and tends to act as a factor blocking the advancement of women in the workplace.\textsuperscript{10} It has become more marked with the recent changes in societal patterns, as more women enter the labour market and has recently received attention with the rise of feminism, particularly in America.\textsuperscript{11} Sexual harassment is in many senses a moral issue, and it should be borne in mind that there is considerable controversy over whether the law should reflect the mores of a society and the extent to which the law should be used to enforce morality.\textsuperscript{12} But sexual harassment is more than a moral issue, for it affects the legitimate interests of female employees.\textsuperscript{13}

It is important to examine sexual harassment in a South African context. Given the pervasiveness of violence against women, it is not surprising that the rate of sexual harassment in South Africa is very high ranging from 35\% to 76\% of women surveyed.\textsuperscript{14}

Gender, class and race structure virtually all social relations within South Africa, although in most societies, few have such institutionalized divisions as South Africa.\textsuperscript{15} When women constitute the majority of workers in a given workplace, but hold what generally have been considered “women’s jobs”, the form of sexual harassment is likely to be “jobs for sex”.\textsuperscript{16} In South Africa, as elsewhere, women are generally in

\begin{flushleft}
\footnotesize
\textsuperscript{10} Mowatt “Sexual Harassment - New Remedy for an Old Wrong” (1986) \textit{ILJ} 652.
\textsuperscript{11} Ibid.
\textsuperscript{12} Hart \textit{Law, Liberty and Morality} (1963) 51.
\textsuperscript{13} Mowatt “Sexual Harassment-Old Remedies for a New Wrong” (1987) \textit{ILJ} 439.
\end{flushleft}
junior positions in relation to the male managers and supervisors, who see sexual favours as part of the job.\textsuperscript{17}

The effects and form that sexual harassment takes vary. Where women are few in number, entering skilled blue-collar or professional occupations traditionally considered to be “men’s work”, harassment will likely be verbal and physical abuse by male co-workers designed to humiliate women and drive them from the workplace.\textsuperscript{18} It is generally agreed that the effect of sexual harassment in the short term is to make the victim “embarrassed, disillusioned or humiliated” and, in some instances her “work performance may suffer”.\textsuperscript{19} In the longer term, however, it appears that career commitment is lowered and many may feel forced to resign or request a transfer.\textsuperscript{20}

The aim of this treatise is to provide a detailed exposition of the extent of the employer’s liability in sexual harassment cases. The treatise aims to establish clear guidelines on the circumstances under which an employer may be fairly and reasonably held liable for the misconduct of the employee. Further, the treatise will also look at the rights of the employee against sexual harassment at work and the prerogative of the employer to put measures in place to prevent harassment. Furthermore, the remedies at the disposal of the employee against an employer who fails to ensure a safe working environment will be addressed. Vicarious liability can be determined in terms of the Constitution and the Employment Equity Act and in terms of the common law. Liability in terms of the common law is two-pronged. Firstly, it can be direct liability and, secondly, vicarious. Therefore, the concepts of statutory and common law vicarious liability will form the greater component of this treatise. Reference will be made to common law and statutory interpretations, as well as case law.

\textsuperscript{17} Halfkenny “Legal and Workplace Solutions to Sexual Harassment in South Africa part 2: The South African Experience” (1996) 213 214.
\textsuperscript{18} Schultz “Telling Stories About Women and Work: Judicial Interpretation of Sex Segregation in the Workplace in the Title in Title VII Cases Raising the Lack of Interest Argument” Harvard Law Review 1749.
\textsuperscript{19} Mowatt “Sexual Harassment-New Remedy for an Old Wrong” (1986) ILJ 638.
\textsuperscript{20} \textit{Ibid}.
In light of the foregoing background and with the objective of determining the extent of the employer’s liability for acts of sexual harassment by employees, the court’s stance of the proper approach to adopt in imputing liability on employers will be discussed. Firstly, in chapter one, the various definitions of sexual harassment and their application in the employment context will be provided. Secondly, in chapter two, a discussion of the statutory vicarious liability in terms of the Constitution of the Republic of South Africa of 1996 and the Employment Equity Act and their application in case law will follow. Thirdly, chapter three will focus on the common law delictual liability of the employer.

The first part of chapter three will discuss whether the employer can be held directly liable for the delict of the employee. Thus to establish direct liability all the elements of a delict will have to be met in order to succeed. These elements are: “Conduct”, “Causation”, “Wrongfulness”, “Damage”, and “Fault”. The second part if this chapter will deal with the concept of vicarious liability. This seeks to ascertain whether and to what extent the employer can be held liable for acts which he is not responsible (no fault liability).

The discussion is subsequently concluded in Chapter 4. Based on research, the author will evaluate vicarious liability relating to sexual harassment.

1.2 DEFINITION OF SEXUAL HARASSMENT

A comprehensive definition of sexual harassment is needed. Sexual harassment was, until recently, “an experience without a name …” \(^2\) and the very scope of the expression “sexual harassment” is one of its difficulties as the concept lacks legal definition. There is a need to describe more precisely, in legal terms, what sexual harassment is. \(^2\) However, before one attempts to define sexual harassment; “[i]n the traditional social context, entering into a sexual union requires one party (normally the male) to take the initiative”. Furthermore, office romances are not uncommon, and there is no reason why a consensual sexual relationship between two people in the same employment environment should not be regarded as normal.

\(^2\) Mowatt “Sexual Harassment-Old Remedies for a New Wrong” 1987 *ILJ* 439 at 442.
\(^2\) *Supra* at 441.
After all, many people have little opportunity of meeting others than in a work situation.\(^\text{23}\)

Prior to the new labour dispensation in 1995, there existed no legislative definition of sexual harassment.\(^\text{24}\) Courts were left to their own devices to find an acceptable definition, often with reference to overseas developments.\(^\text{25}\) Neither the Constitution,\(^\text{26}\) nor the Employment Equity Act,\(^\text{27}\) defines sexual harassment. However, section 9(3) of the Constitution\(^\text{28}\) records an express prohibition on unfair discrimination and that section 10 recognises that “[e]very person shall have the right to respect for and protection of his or her dignity”.

Furthermore, the Code of Good Practice on the Handling of Sexual Harassment Cases (hereinafter referred to as “The Code of Good Practice”),\(^\text{29}\) originating from the terms of section 54 of the Employment Equity Act,\(^\text{30}\) defines sexual harassment as follows:\(^\text{31}\)

```
11 (1) unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.

(2) Sexual attention becomes harassment if: -

(a) the behaviour is persistent;

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

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

\(^\text{27}\) 55 of 1998.
\(^\text{28}\) 108 of 1996.
\(^\text{29}\) Of July 1998. In the Draft Bill on the Elimination of Discrimination against Women (GG14591 of Feb 1993) it was stated that: “Sexual harassment means any conduct where a person makes an unwelcome sexual suggestion to another person …”
\(^\text{30}\) 55 of 1998.
\(^\text{31}\) Employment Equity Act 55 of 1998 (s 3).
In her criticism of this definition, Cooper argues that the definition is “awkwardly written”. One of the problems identified by her is the “and/or” terminology which links the three paragraphs of sub item (2). She argues that as a result of this terminology, each of the three paragraphs could, on its own, constitute sexual harassment. Section 6(3) of the Employment Equity Act plainly defines “harassment” as a form of ‘unfair discrimination’ and states that it is prohibited on any one of the listed grounds in section 6(1) of the Employment Equity Act. These grounds include the following:


(1) No person may unfairly discriminate, directly or indirectly, against an employee,

In the employment policy or practice, on one or more ground, including race, gender, sex, pregnancy …”

The court in J v M defined sexual harassment “unwanted sexual attention in the employment environment”:

“[I]n its narrowest form sexual harassment occurs when a woman (or a man) is expected to engage in sexual activity in order to obtain or keep employment or obtain promotion or other favourable working conditions. In its wider view it is, however, any unwanted sexual behaviour or comment which has a negative effect on the recipient. Conduct which can constitute sexual harassment ranges from innuendo, inappropriate gestures, suggestions or hints or fondling without consent or by force to its worse form, namely rape. It is … also not necessary that the conduct must be repeated. A single act can constitute sexual harassment.

This broad definition of sexual harassment covers both ‘jobs for sex’ and harassment which ‘creates an intimidating, hostile and offensive work environment’.”

In addition, the 2005 Code defines sexual harassment as follows:

---

33 55 of 1998.
34 55 of 1998.
“Sexual harassment is unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account all the following factors:

1.1 whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;

1.2 whether the sexual conduct was unwelcome;

1.3 the nature and extent of the sexual conduct; and

1.4 the impact of the sexual conduct on the employee.”

Section 6(3) of the Employment Equity Act\textsuperscript{37} plainly defines “harassment” as a form of unfair discrimination and states that it is prohibited on any one of the listed grounds in section 6(1). According to Mowatt\textsuperscript{38} sexual harassment occurs when “a women’s sex role overshadows her work role in the eyes of the male, whether it be a supervisor, co- worker, client or customer; in other words, her gender receives more attention than her work”.

The law imposes a duty on the employer. Halfkenny\textsuperscript{39} alludes to the fact that in the \textit{J v M}\textsuperscript{40} case the court placed an affirmative duty on an employer “to ensure that its employees are not subjected to this form of violation within the workplace”. Although it is quite seldom that the employer himself is guilty of sexual harassment, such an employer will almost always be involved in any litigation that may result therefrom.\textsuperscript{41}

Where the employer exploits his more powerful position to impose sexual demands on a female employee, it will amount to sexual harassment. Inherent in this view of sexual harassment are three elements: first, “an abuse of power by the employer”, secondly, the abuse of power amounts to some form of “coercion”, and thirdly, the “purpose of the coercion is to obtain some form of sexual favour from the employee”.\textsuperscript{42} In this context, sexual harassment may be seen as arising from the

\textsuperscript{37} 55 of 1998.
\textsuperscript{38} Nieva & Gutek \textit{Women and Work; A Psychological Perspective} (1981) 63.
\textsuperscript{40} \textit{J v M Ltd} (1989) ILJ 755 (IC).
\textsuperscript{41} Smit & Van Der Nest “When Sisters are Doing it for Themselves: Sexual Harassment Claims in the Workplace” (2004) TSAR 534.
employment relationship; “but it arises essentially out of the personal proclivities of the parties involved”. It is, therefore, “a personal rather than social phenomenon”.43

CHAPTER TWO
STATUTORY VICARIOUS LIABILITY

2.1 INTRODUCTION TO STATUTORY VICARIOUS LIABILITY

Numerous statutory enactments which seek to combat sexual harassment have been promulgated. These include amongst others: the Employment Equity Act (hereinafter EEA),\(^{44}\) the Labour Relations Act (hereinafter LRA),\(^ {45}\) and the Promotion of Equality and Prevention of Unfair Discrimination Act (hereinafter PEPUDA).\(^ {46}\) Sexual harassment is “unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equality in the workplace”.\(^ {47}\) Statutory vicarious liability relates to the employer’s liability “for the sexual harassment committed by an employee against another employee”\(^ {48}\) in terms of the Constitution\(^ {49}\) and the Employment Equity Act\(^ {50}\) in particular.

The above pieces of legislation have to be interpreted in light of the Constitution.\(^ {51}\) In this chapter I shall firstly discuss the rights of individuals entrenched in the Constitution and the right of employers to fair labour practices. Secondly, I will look at the Employment Equity Act with special attention to the definition of sexual harassment and its classification as a form of discrimination. Thereafter the chapter will deal with the courts’ interpretation of sections 6 and 60 in case law and subsequently the measures at the disposal of the employer to avoid liability. Important case law which will be referred to include: \textit{Ntsabo v Real Security},\(^ {52}\) \textit{SATAWU v Old Mutual Insurance Limited and Burger},\(^ {53}\) \textit{Mokoena v Garden Art (Pty) Ltd}.\(^ {54}\)

---

\(^{44}\) 55 of 1998.
\(^{45}\) 66 of 1995.
\(^{47}\) Code of Good Practice on Handling of Sexual Harassment at Work of 2005.
\(^{49}\) 108 of 1996.
\(^{50}\) 55 of 1998.
\(^{53}\) \textit{SATAWU obo Finca v Old Mutual Life Insurance Company (SA) Ltd and Burger} [2006] 8 BLLR 737 (LC).
\(^{54}\) \textit{Mokoena v Garden Art (Pty) Ltd} [2008] BLLR 428 (LC).
2.2 THE CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA OF 1996

The interim Constitution\(^{55}\) guarantees fair labour practices and prohibits discrimination based on “race, gender, sex or sexual orientation”. Consistent with other modern constitutions, the Bill of Rights does not only concern itself with “public power” (for example, state-individual relationships), but in certain instances it also applies to the “exercise of private power” (such as power exercised by a natural or juristic person).\(^{56}\)

According to Le Roux,\(^{57}\) “whenever it is alleged that the conduct of a person infringes the fundamental rights of others, the question must be asked whether the particular fundamental right is capable of application to private relationships”.\(^{58}\) Once a court is satisfied that a provision of the Bill of Rights applies to private relationships, it must determine whether there is legislation giving effect to the fundamental right. If there is such legislation it must be applied.\(^{59}\) If there is no such legislation, the court must consider whether the “common law gives effect to the right”.\(^{60}\) If there is no common law giving effect to the right, the court must develop the common law to give effect to that right.\(^{61}\)

Accordingly, it could be argued that the Constitution\(^{62}\) already imposes on the government an “affirmative obligation to prevent sexual harassment beyond its clear duty not to harass its own employees”.\(^{63}\) Moreover, under the constitutional guarantees of “equality, dignity and security of the person”, arguably there would be a constitutional violation when a government worker is harassed by a supervisor, with corresponding liability for damages.\(^{64}\)

---

\(^{55}\) Interim Constitution of 1993.


\(^{58}\) S 8(3) Constitution 108 of 1996.

\(^{59}\) Hoffman v South African Airways 2001 1 SA 1 (CC).

\(^{60}\) S 8(3) of the Constitution of the Republic of South Africa 108 of 1996.


\(^{62}\) 108 of 1996.


\(^{64}\) There is no question that a discriminatory act by the SA government as an employer, or a provincial and municipal government employer would be covered by chapter 3, which binds all legislative and executive organs of state.
The Constitution also provides a rights framework for interpretation of existing law and the enactment of appropriate legislation to deal with the question of sexual harassment.

The Bill of Rights in the Constitution does not specifically refer to sexual harassment; however, it includes the “right to equality”, more specifically the “right not to be unfairly discriminated against”, and the “right to fair labour practices”. Other relevant fundamental rights include the “right to dignity” (section 10) and the “right to privacy” (section 12), but these rights are most likely to be protected via the common law (the law of delict) or via a development of the common law.

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

Although discrimination (in this case sexual harassment) is dealt with specifically in the EEA and PEPUDA, when interpreting these statutes, particular attention must be paid to the constitutional “right to equality” and the Constitutional Court’s approach to the application of this right. This is also stated in the preamble of the EEA. In this regard, the test for “unfair discrimination and the support of substantive equality,

---

65 108 of 1996.
66 Supra 222.
67 108 of 1996.
69 55 of 1998.
70 4 of 2000.
72 4 of 2000.
73 66 of 1995.
74 55 of 1998.
75 4 of 2000.
77 55 of 1998.
as opposed to formal equality”, are most significant.\textsuperscript{78} Sex is listed as a prohibited ground of discrimination and it is now well established that, despite early resistance in foreign jurisdictions, sexual harassment constitutes a form of discrimination.\textsuperscript{79}

2.3 THE EMPLOYMENT EQUITY ACT 55 OF 1998

2.3.1 INTRODUCTION TO THE EMPLOYMENT EQUITY ACT 55 OF 1998

A discussion of the Employment Equity Act (hereinafter “the EEA”)\textsuperscript{80} with specific regard to statutory liability for discrimination in the form of sexual harassment will be dealt with. Firstly, a brief introduction and aim of the EEA\textsuperscript{81} will be provided, followed by the relevant provision dealing with the liability of the employer. Thereafter, the author shall deal with the issue of sex as discrimination and its regulation in terms of the said Act. Secondly, application of the Act in case law will also be critically evaluated. The most relevant cases which shall be dealt in detail include: \textit{Ntabo v Real Security},\textsuperscript{82} \textit{SATAWU obo Finca v Old Mutual Insurance Limited}\textsuperscript{83} and \textit{Mokoena v Garden Art (Pty) Ltd}.\textsuperscript{84}

The EEA\textsuperscript{85} endeavours to give effect to the fundamental right to equality in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination and the implementation of affirmative action measures to redress the imbalances of the past.\textsuperscript{86} The EEA aims to regulate the relationship between employers and employees on matters relating to “discrimination and affirmative action measures”.\textsuperscript{87} Chapter 2 of the EEA\textsuperscript{88} states that “no person may unfairly discriminate, directly or indirectly, against an employee in any employment policy or practice”. Section 5 states that “every employer must take steps to promote equal opportunity in the workplace by eliminating unfair

\textsuperscript{79} Item 3 of The 2005 Code on Good Practice for the Handling of Sexual Harassment Cases.
\textsuperscript{80} 55 of 1998.
\textsuperscript{81} Ibid.
\textsuperscript{82} \textit{Ntabo v Real Security CC} (2003) 24 ILJ 2431 (LC).
\textsuperscript{83} \textit{SATAWU obo Finca v Old Mutual Life Insurance Company (SA) Ltd and Burger} [2006] 8 BLLR 737 (LC).
\textsuperscript{84} \textit{Mokoena v Garden Art (Pty) Ltd} [2008] BLLR 428 (LC).
\textsuperscript{85} S 2 of Act 55 of 1998.
\textsuperscript{86} S 2 of Act 55 of 1998.
\textsuperscript{88} 55 of 1998 s 4(1).
discrimination in any employment policy or practice”. Therefore, once it has been established that harassment on any of the prohibited ground has taken place, it is unfair and cannot be justified in terms of any general limitation clause. It can therefore be argued that the constitutional jurisprudence on “unfair discrimination” cannot be strictly applied.

However, it must be remembered that the unfair discrimination provision has been shifted to the EEA in an amended form and has been released from the ambit of the unfair labour practice. One can therefore argue for an interpretation of fairness which is unequivocally located within the Constitutional Court’s equality jurisprudence with its focus on the impact of discrimination on the complainant and the violation of dignity. Mukheibir and Ristow argue that “one need to ascertain which perpetrators of harassment the Act seeks to regulate as section 6(3) is silent.”

2.3.2 LIABILITY IN TERMS OF SECTION 60 OF THE EMPLOYMENT EQUITY ACT 55 OF 1998

One of the most important issues in sexual harassment cases is the issue of liability. Liability in the context of an employment relationship is where “the employer can be held responsible or accountable for the unlawful acts of an employee”. In many instances the complainant will want to take action against his or her employer as the employer will generally have greater means and is the only one that would be able to introduce effective measures to eradicate sexual harassment in the workplace.

Section 60 of the Employment Equity Act regulates the employer’s liability where section 60 reads as follows:

55 of 1998 s 5.

Ibid.
55 of 1998.
Ibid.
55 of 1998.
“(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 the 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 the 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.”

The purpose of section 60 is to penalise the employer for failing to address equity in the workplace and it is not intended to remedy harm done in the delictual sense. It is accordingly submitted that section 60 ought to be appropriately regarded as a form of direct liability than as a form of statutory vicarious liability. According to Calitz section 60 of the EEA is often seen as “creating a kind of vicarious liability in terms of which the employer can be held liable for discrimination against his employee by a co-employee”. Before any liability will be imputed on the employer for any harassing conduct of an employee, one needs to consider the responsibilities placed on the employer and the employee-victim of harassment by section 60. It is submitted that this approach is the correct one as it focuses on “preventative measures and education in order to create a workplace that is free of discrimination rather than on simply punishing the employer for the prohibited conduct of its employees.” However Le Roux and others maintain that this section in fact creates direct liability for the employer if he fails to take certain steps.

103 Calitz “The Liability of Employers For The Harassment of Employees By Non-Employees” 407 421.
Basson\textsuperscript{106} submits that section 60 of the Employment Equity Act\textsuperscript{107} gives the impression that it was written on the basis of “some degree of estrangement between an employer and the discriminating employee in the workplace, an impression illustrated by the general requirement that liability will only follow if the employer first knows about the conduct and then does nothing”. A number of cases have applied section 60 of the EEA\textsuperscript{108} as will be discussed below.

\subsection*{2.4 \textit{NTSABO v REAL SECURITY CC}\textsuperscript{109}}

\textit{Ntsabo v Real Security} is a very significant case explaining the development of law relating to employer liability for sexual harassment and the manner in which the courts applied section 60 of the EEA.\textsuperscript{110}

The facts of the case are as follows: the applicant, Bongiwe (Beauty) Ntsabo, who was born in 1970, was employed in September by the respondent, Real Security CC as a security guard. For the greater part of her employment she was stationed at the Khayelitsha Day Hospital in Cape Town, where she generally worked a twelve-hour shift. She continued in this position up until 19 January 2000 when she resigned, and she earned approximately R1000 per month at the time of her resignation.

Once she had resigned from her job, the applicant decided to take her grievance to court. The essence of her allegations was that from the beginning of December 1999 Mr Dlomo, (who served as her immediate supervisor), had regularly harassed her sexually and that he even eventually assaulted her. Ms Ntsabo testified that on different occasions Mr Dlomo “had touched her breasts, thighs, buttocks and genitals”. The final insult occurred when her supervisor “simulated a sexual act on her, resulting in him ejaculating on her skirt”. Mr Dlomo also made sexual proposals to her. Owing to the continued harassment the applicant stated that she had become “very uneasy” in her work environment. In an attempt to remedy the matter, she

\begin{thebibliography}{9}
\bibitem{1998} 55 of 1998.
\bibitem{Ibid} \textit{Ibid}.
\bibitem{Case} \textit{Ntsabo v Real Security CC} (2003) 24 \textit{ILJ} 2431 (LC).
\bibitem{Year} 55 of 1998.
\end{thebibliography}
informed one Mrs Fisher of the alleged harassment. Mrs Fisher was a manager in the employ of the respondent. Furthermore, she alleged that she and her brother, Mr Ntsabo, had informed the respondent of the continued unwanted actions of Mr Dlomo. Her brother had also laid a complaint at the head office about the alleged incident involving simulated sexual intercourse.

Ms Ntsabo alleged that the respondent had done nothing to alleviate the problem, and that she had been unable to continue working in such intolerable conditions prompting her to resign. The applicant also alleged that her original letter of resignation had been destroyed by Mrs Fisher and that a second letter of resignation which Mrs Fisher had dictated to her was accepted on file. The original letter held that the sexual harassment was the reason for her resignation. The second letter made no reference to harassment, but only referred to the applicant’s personal circumstances, mentioning the poor health of her mother. Real Security CC denied that any harassment had occurred, and stated that if such harassment had taken place, it had not been reported to the employer in accordance with the required reporting procedure as set out by the EEA.111

After an evaluation of the evidence presented by the parties the court held that the respondent failed to convince the court with the truthfulness of their witnesses. The court observed that Mr Dlomo was an “untruthful, argumentative and disagreeable witness who contradicted himself on a number of occasions and even lied to the court”.112 Conversely, the testimony of the applicant was “clear and concise,” and she satisfied the court with her account of events.113 The court concluded that, based on the applicant’s testimony, sexual harassment had occurred.114 The respondent further argued that Ms Ntsabo had failed to report the incident of harassment in the prompt manner set out in section 60 of the EEA. The Court refuted this argument stating that prompt reporting does not always mean “immediate” reporting. In addition the court held that the individual circumstances had to be examined in each case, including the “cultural backgrounds of the people involved” and stated:

111 Ibid.
112 Ntsabo 2360C-D.
113 Ntsabo 2368 G-H.
114 Ntsabo 2374B.
“The requirement that the reporting procedure be reported immediately cannot be construed to mean within minutes of the incident complained of. There are circumstances of which one is reminded in such considerations. It is trite that such a requirement is regarded as being complied with when it has been done within a reasonable time in the circumstances. That it has been done in ‘reasonable time’ will of course from case to case and [be] determined by the relevant circumstances which prevail. It must also be remembered that this requirement is underpinned by the notion of giving the recipient of the notice and opportunity to deal with the complaint without any prejudice. To expect her to have dropped everything in the condition she was in is an unreasonable expectation.”

After taking all the relevant circumstances and evidence into account the court issued the following order: firstly, the applicant’s dismissal was found “to be unfair” (in terms of the Labour Relations Act 66 of 1995) and the respondent was ordered to compensate the applicant R12 000 which is the maximum amount prescribed for the unfair dismissal. Secondly, the respondent was ordered in terms of the Employment Equity Act 55 of 1998, to pay damages to the applicant for

(i) future medical costs (R20 000); and
(ii) general damages including contumelia (an amount of R50 000).

In addition, the respondent was ordered to pay costs of application.

In addition, claims were sought in alternative firstly, unfair dismissal in terms of the LRA. Secondly, Ms Ntsabo claimed “patrimonial and non-patrimonial damages” in terms of the EEA. The author shall discuss these claims separately in that respect.

(a) Unfair Dismissal in Terms of the LRA

The significance of unfair dismissal will be discussed as applied by the courts. The court applied section 186(1)(e) of the LRA and stated that the conduct referred to in this section does not “specifically refer to proactive conduct by the employer and

---

115 Ntsabo 2374B-G.  
117 Ibid.
further that a failure to deal with an intolerable situation is just as much contemplated in section 186(1)(e) of the LRA”.  

In arriving at the decision to award compensation for unfair dismissal the court took into account the fact that the applicant informed the respondent of the initial sexual harassment by Mr Dlomo in early December 1999. By the time she had resigned matters had worsened and the incident on 15 December 1999 had not been addressed by the employer to normalise the situation and ensure that “the risk to the applicant was neutralised”. The court also stated that the reluctance to deal with the complaints impacted negatively on Ms Ntsabo that “not only were there patent effects but this was compounded by her feeling that her credibility and integrity was being undermined”. Moreover, the court maintained that the inaction of the respondent was unfair and led to a situation that became an intolerable environment for the applicant to continue discharging her duties. The court submitted that the respondent did, or ought to have foreseen the development of a hostile and intolerable environment in the circumstances. In his defence the respondent averred that it “was not informed of the harassment” and for that reason there was no proof that dismissal was fair. The court asserted that “the dismissal conformed to the situations envisaged in section 186(1)(e) of the LRA”.

(b) Patrimonial and Non-Patrimonial Damages in Terms of the EEA

The court also took into account the awarding of patrimonial and non-patrimonial damages which will be alluded to below. Smit et al“ are of the opinion that the respondent had no procedures in place in Real Security on how to deal with sexual harassment problems. This was the case regardless of the existence of the Code of Good Practice containing several detailed recommendations in this regard. The court, however, held that as the provisions of the Code were merely instructive guidelines as “the respondent could not be penalised for its failure to implement the

---

118 Ntsabo 2374G-1.
121 Published in terms of s 203 of the LRA in GG 190449 GNR 1367 of 17 July 1998.
The Labour Court can invoke section 50(2) of the EEA which provides for “the awarding of compensation as well as damages for conduct constituting unfair discrimination”. The claims of the applicant included: firstly, *contumelia* and secondly, pain and suffering, emotional or psychological trauma, shock and loss of amenities of life. It was the view of the court that “because the claims stem from the same incident, aside from the obvious dilemma of how to apportion the ultimate award, it is in [the judge’s] view convenient and safer to make one award in respect of those two headings”. The court also alluded to the fact that “the spirit of the EEA places an obligatory duty on all employers to protect its employees against offensive conduct and that failure to do so is a disregard for the law.” In addition, the judge conceded that even though he had attempted to be fair to both parties, “the ever present feelings of repugnance at the conduct of Mr Dlomo and the support he received from the respondent over a relatively lengthy period leaves a bitter taste”. Consequently, the judge was rightly compelled to add “punitive measures in the form of financial compensation into the equation – particularly considering the impact the harassment and the failure of the employer to act as a result had on the applicant’s rights”.

It is further submitted that there is “no minimum damage, such as post traumatic stress syndrome, that needs to be suffered before an employer before the employer will be liable”. The issue is simply whether sexual harassment has taken place.

### 2.5 LIABILITY IN TERMS OF SECTION 6 OF THE EMPLOYMENT EQUITY ACT

In this part of the discussion the author will firstly look at discrimination in terms of the section 6 which deals with unfair discrimination and sexual harassment as a form of unfair discrimination. Further down, the test for discrimination will be analysed with specific reference to the case of *Harksen v Lane*. Thereafter, is a proposed way on

---

122 Moropane v Gilbey’s Distillers and Vinters (Pty) [1997] 10 BLLR 1220 (LC).
125 Ibid.
how the test for discrimination can best be tailored to suit the context of sexual harassment.

The EEA\textsuperscript{127} endeavors to give effect to the “fundamental right to equality in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination and the implementation of affirmative action measures to redress the imbalances of the past”.

The focus of this part of the discussion is on unfair discrimination in the workplace; the test for unfair discrimination and the manner the courts have applied section 6 of the EEA in different cases.

While discrimination (in this case sexual harassment) is dealt with primarily in the EEA and PEPUDA,\textsuperscript{128} Mukheibir and Ristow\textsuperscript{129} argue that these statutes “must be interpreted in light of the Constitutional right to equality and the Constitutional Court’s approach to the application of this right”. Section 9(3) of the Constitution\textsuperscript{130} contains an express prohibition on unfair discrimination and section 10 records that “every person shall have the right to respect for and protection of his or her dignity”.

The cornerstone of the prohibition of unfair discrimination in South African workplaces is found in section 6(1); (3) of the EEA\textsuperscript{131} which reads as follows:

“(1) No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including (amongst others) race, gender, and sex.

(3) Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).”

Section 6(3) of the EEA\textsuperscript{132} has been described by Basson\textsuperscript{133} as “a clear message from the legislature about the importance of a link between harassment and

\textsuperscript{127} S 2 of the EEA 55 of 1998.

\textsuperscript{128} 4 of 2000.


\textsuperscript{130} 108 of 1996.

\textsuperscript{131} 55 of 1998.

\textsuperscript{132} 55 of 1998.
discrimination”. The Labour Courts have adopted the Constitutional Court’s method of establishing whether an employee was unfairly discriminated against, notwithstanding the fact that section 6 of the EEA is not completely consistent with section 9 of the Constitution which favours “substantive equality that examines the impact on the victim, rather than assessing the conduct or intent of the perpetrator”.

2.5.1 THE TEST FOR UNFAIR DISCRIMINATION

The test for unfair discrimination was laid down by the Constitutional Court in *Harksen v Lane NO* and consists of three questions namely:

- Does the conduct amount to differentiation and does it amount to discrimination?

- Is the discrimination unfair?

- If yes, can the discrimination be justified?

Differentiation will amount to discrimination if “it violates the right to dignity of persons” and also when it “bears on the attributes or characteristics of persons in question”. Discrimination that is not one of the listed grounds in the Constitution will be tested for unfairness by focusing on the impact of the discrimination on the complainant and other in his or her position. Fault on the part of the employer is not a requirement in an unfair discrimination claim, as it is sufficient that the differentiation can be linked to a ground of discrimination, irrespective of the underlying reason for that differentiation. Garbers submits that “the concept of

135 108 of 1996.
137 *Harksen v Lane NO* 1997 11 BCLR 1489 CC 1511E-I.
harassment as discrimination will be contradictory as long as the test for harassment is determined by the application of fault”.\textsuperscript{142} Therefore, “the extent of the impairment of the fundamental dignity of the complainant will be significant.\textsuperscript{143}

Despite widespread acceptance of the link between harassment and discrimination Basson\textsuperscript{144} contends that

“problems still remain due to fundamental differences that exist between discrimination and harassment as legal phenomena: a claim for sex discrimination (particularly direct discrimination) requires the claimant to show that there was differential treatment on the basis of sex”.

Once a claimant is able to show the causal link between differential treatment and her sex, discrimination on the basis of sex will have been established.\textsuperscript{145} Furthermore, Basson\textsuperscript{146} maintains that this formula is not feasible in sexual harassment particularly in those cases where the victim of sexual harassment is in fact able to show “differential treatment on the basis of sex”. She attributes this to the fact that victims of sexual harassment must, in addition to establishing a certain kind of conduct (the differential treatment for purposes of discrimination), also show that conduct was of a certain degree.\textsuperscript{147} Moreover, she is of the view that “establishing a differential treatment as a precondition for a finding of sex as discrimination is always possible in cases of harassment”.\textsuperscript{148}

According to Garbers:\textsuperscript{149}

“This search for a comparator has caused endless problems in the field of discrimination law – also in the context of harassment. To some extent, this problem has been solved by simply recognising that sexual harassment (or for

\begin{flushright}
\begin{minipage}{0.98\linewidth}
\textsuperscript{141} Garbers “Sexual Harassment as Sex Discrimination: Different Approaches, Persistent Problems” (2002) \textit{SA Merc LJ} 371 398.
\textsuperscript{142} Ibid.
\textsuperscript{143} \textit{Harksen v Lane} NO 1997 11 BCLR 1489 CC 1511E-I.
\textsuperscript{144} Basson “Sexual Harassment in the Workplace: An Overview of Developments” (2007) \textit{Stell LR} 425 441.
\textsuperscript{145} Supra.
\textsuperscript{146} Basson (2007) 3 \textit{Stell LR} 425 441.
\textsuperscript{147} Basson “Sexual Harassment in the Workplace: An Overview of Developments” (2007) \textit{Stell LR} 425 442.
\textsuperscript{149} Garbers “Sexual Harassment as Sex Discrimination: Different Approaches, Persistent Problems” (2002) \textit{SA Merc LJ} 371 374.
\end{minipage}
\end{flushright}
that matter, sexual attention) is inherently sex based (like pregnancy), and in that way, stands to equal sex discrimination. Still, and even given this insight, fundamental problems remain, problems that have shown themselves to be of practical import. To name four: same-sex harassment, the ‘obnoxious employee’ (who treats both sexes equally badly), sexual favouritism, and sexual orientation harassment. They serve as constant reminders of the fallibility of the dogma that sexual harassment equals sex discrimination."

The test established in *Harksen v Lane NO*\(^{150}\) will not be applied in the same manner in as far as harassment is concerned because the wording of the EEA\(^{151}\) suggests a slightly different approach.\(^{152}\) Section 6(3) of the EEA\(^{153}\) explicitly states that harassment constitutes unfair discrimination. Once the existence of the harassment on one or more of the grounds listed in section 6(1) is established, it is unfair and cannot be justified.\(^{154}\) In this regard it is the “employers’ prerogative to prevent sexual harassment from occurring in the first place”.\(^{155}\)

### 2.5.2 APPROPRIATE TEST FOR SEXUAL HARASSMENT

Sexual harassment is established in circumstances which are different from general discrimination. In the author’s view the formulation of an appropriate test for sexual harassment is imperative. In that regard this paragraph will detail a recommended test for sexual harassment and a further alternative test to establish sexual harassment.

Cooper\(^{156}\) recommends that a more appropriate test would be one which takes into consideration the provision of the Act that “harassment is a form of unfair discrimination” and is “located within the constitutional equality jurisprudence where the focus is more centrally on the effect of the conduct on the individual”. He also adds that “standards of reasonableness should not be based on delictual notions of negligence, but on an objective weighing up of all relevant factors for a finding of

---

150 *Harksen v Lane NO* 1997 11 BCLR 1489 CC 1511E-I.
whether the harassing conduct amounts to a violation of the dignity of the person and therefore constitutes a form of unfair discrimination”.

The following elements for testing sexual harassment as a form of unfair discrimination have been proposed by Cooper:

- whether the harassment is on a prohibited ground or grounds;
- whether the recipient has indicated that the conduct is unwelcome;
- the nature and extent of the conduct;
- the impact of the conduct on the individual and whether it amounts to an invasion of the individual’s rights and interests and to an impairment of dignity.

After taking all factors into account, the court has to determine whether the conduct amounts to a form of unfair discrimination. The overall test will be whether the conduct “violates the dignity of the individual, in line with the foregrounding of dignity as fundamental to the achievement of equality in constitutional jurisprudence, and constitute a barrier to equality in the workplace”.

### 2.5.3 AN ALTERNATIVE TEST FOR UNFAIR DISCRIMINATION IN SEXUAL HARASSMENT

A different test for establishing unfair discrimination in sexual harassment is found in the PEPUDA. This Act regulates social relationships in the workplace and covers everyone including those excluded by the EEA. Unlike the EEA, the

---

161 4 of 2000.
PEPUDA\textsuperscript{164} provides for a detailed definition of sexual harassment and it does not locate harassment within the ambit of unfair discrimination.

Harassment is defined as

“Unwanted conduct which is persistent or serious and demeans, humiliates or creates a hostile or intimidating environment or is calculated to induce submission by actual or threatened adverse consequences and which is related to (a) sex, gender or sexual orientation; or (b) a person’s membership or presumed membership of a group identified by one or more of the prohibited grounds.”

The victim has to indicate that the conduct is “unwelcome and the test would in this regard require the conduct to be persistent or a serious single incident and this is an objective test”\textsuperscript{165} The requirement that the conduct should “demean, humiliate or lead to a hostile or intimidating environment, or induce submission by actual or threatened adverse consequences, constitutes two elements, firstly, it focuses on the impact of the conduct on the individual and, secondly, it set standards which the conduct must comply with in order to be considered sexual harassment”.\textsuperscript{166} This provision is “flexible and inclusive as it is adequate conduct to constitute or amount to sexual harassment where he conduct is demeaning or humiliating”\textsuperscript{167} Sexual harassment will not result where the conduct falls short in meeting one of the standards. Cooper\textsuperscript{168} applauds this test for its “clarity and logic”, and also that it focuses on the impact of one individual; that it could be reconciled with the requirements of the EEA\textsuperscript{169}

Once sexual harassment has been established, it is unfair and cannot be justified in terms of any general limitations clause. It is, therefore, submitted that constitutional jurisprudence on unfair discrimination cannot be strictly applied.\textsuperscript{170} Cooper\textsuperscript{171}

\textsuperscript{164} 4 of 2000.
\textsuperscript{165} Cooper “Harassment on the Basis of Sex and Gender: A form of Unfair Discrimination” (2002) 23 ILJ 29 36.
\textsuperscript{166} Supra.
\textsuperscript{167} Cooper (2002) 23 ILJ 29 36.
\textsuperscript{169} 55 of 1998.
submits that sexual harassment is discrimination on the basis of sex in that, “a person’s biological sex may determine his or her selection as the target of the harassment” and it is also discrimination on the grounds of gender in that, “socially constructed perceptions of the roles of the respective sexes can form a basis for the discriminatory conduct”. According to Mukheibir and Ristow, 172 because the unfair discrimination provision has been shifted to the EEA 173 in an amended form and has been released from the ambit of labour practice, it is proper, therefore, to argue for “an interpretation of fairness which is unequivocally located within the Constitutional Court’s equality jurisprudence with its focus on the impact of discrimination on the complainant and the violation of dignity”. 174

Finally, it may be conceded by Cooper 175 that the first test discussed above is not entirely different from the present one, except for the level of the severity of conduct required for harassment. It is argued that using both tests, under the Equality Act 176 and in terms of the EEA 177 would be advantageous in “creating consistency in what is quite a difficult and contested area of law”. 178

2.6 SATAWU OBO FINCA v OLD MUTUAL LIFE INSURANCE COMPANY (SA) LIMITED AND BURGER 179

This case deals with a matter of racial discrimination as shall be discussed below. The case of SATAWU obo Finca v Old Mutual Life Insurance Company, although not dealing with a matter of sexual harassment, is significant because the manner it applies section 60 of the EEA 180 regarding liability of the employer and serves as a relevant comparison.

The facts SATAWU are as follows: during April 2003 an employee (Burger) of Old Mutual made a complaint to her immediate superior about being placed in close

177 55 of 1998.
179 SATAWU obo Finca v Old Mutual Life Insurance Company (SA) Ltd and Burger [2006] 8 BLLR 737 (LC).
proximity to black employees in the office. Finca was one of these black employees. There was some dispute about the words actually uttered by Burger, but Revelas J was satisfied that they included the "k-word". The remark was overheard by another colleague (Jeffries) and she confronted Burger’s superior (Van Zyl).\textsuperscript{181} At this stage Finca was unaware of the remark. Van Zyl did two things: First, she tried to downplay the significance of the remark by claiming that Afrikaans-speaking people do not necessarily use this word in a derogatory sense, and second, clearly sensing that trouble was looming, apparently warned Burger verbally, although the exact nature of the warning, if it was in fact issued, remains vague. Jeffries was not satisfied that the matter had been dealt with correctly and decided to tell Finca about the remark to involve the union.\textsuperscript{182} The Union recommended that Old Mutual should investigate Van Zyl's actions in view of the fact that she was aware that in its disciplinary code the offence was regarded as serious misconduct that may lead to dismissal, and that it should have been subject to a formal disciplinary inquiry. Merely issuing a warning was not the appropriate action, or so the union claimed.\textsuperscript{183}

Further investigation of the facts revealed that despite this request by the union and a later grievance lodged by Finca, Old Mutual declined to take any further action. Only after the employment equity manager and the transformation manager intervened did a disciplinary inquiry ensue. The enquiry took place during October and November 2003, six months after the offending remark was uttered.

After assessing all the evidence the court found Burger guilty of the use of racist language and the chairperson of the disciplinary inquiry, finding that the initial warning was vague, recommended dismissal.\textsuperscript{184} In his decision the chairperson relied upon a judgment of the labour appeal court in \textit{Crown Chickens (Pty) Ltd v Kapp and others}\textsuperscript{185} where the labour appeal court stated clearly that "in the context of employment disputes, it (and the LC) will deal with acts of racism “very firmly” and that such an approach will contribute to the fight for the elimination of racism in the

\textsuperscript{181} \textit{SATAWU obo Finca v Old Mutual Life Insurance Company (SA) Ltd and Burger} [2006] 8 BLLR 737 (LC), par [5].

\textsuperscript{182} \textit{Supra} par [5].

\textsuperscript{183} \textit{SATAWU obo Finca v Old Mutual Life Insurance Company (SA) Limited and Burger} [2006] BLLR (LC) par [17; 29].

\textsuperscript{184} \textit{Supra} para [29].

\textsuperscript{185} \textit{Crown Chickens (Pty) Ltd t/a Rockland Poultry v Kapp and others} [2002] BLLR 493 (LAC).
workplace”. Burger appealed against her dismissal. The appeal was heard by Williamson, one of the most senior persons in Old Mutual. Williamson reinstated Burger while condemning her conduct and the manner in which Van Zyl and others had handled the issue. He contended that the initial warning was not vague; the length of time which had elapsed before the disciplinary enquiry commenced created the impression that the matter had been finalized; thus Old Mutual had been estopped from proceeding with a disciplinary inquiry. Van Zyl J thus found that the disciplinary hearing should have been upheld.

After the outcome of the appeal, the union approached the Labour Court for declarations to the effect that the conduct of Burger and Old Mutual amounted to discrimination; an order setting aside the findings of Williamson; an order for compensation for Finca and a Labour Court directive on steps to be taken to avoid similar conduct in future. Revelas J observed that discrimination had taken place on the part of Burger and Old Mutual and made a compensation order by the employer to Finca, however she upheld Williamson’s decision and declined to issue a Labour Court directive.

2.6.1 LIABILITY OF OLD MUTUAL FOR BURGER’S REMARK

Revelas J in the Old Mutual case concluded that the remark was “clearly racist in nature” and that “Old Mutual’s delay in taking action against Burger and its failure to protect Finca amounted to direct discrimination in terms of section 6(1) of the EEA”. The usual test for discrimination, namely establishing whether the conduct amounted to differentiation on a prohibited ground, was not applied. The court simply accepted that in delaying taking appropriate measures after the racist remark had been made about the employee by a co-employee, Old Mutual itself discriminated against the employee. Old Mutual was not held liable on the basis of

---

186 SATAWU obo Finca v Old Mutual Life Insurance Company (SA) Limited and Burger [2006] BLLR (LC) par [30].
188 SATAWU obo Finca v Old Mutual Life Insurance Company (SA) Limited and Burger [2006] BLLR para [39; 47.3]
189 Supra para [33].

28
“statutory vicarious liability” in terms of section 60 of the Employment Equity Act for unclear reasons, but was held directly liable in terms of section 6. In interpreting this decision Calitz observed that “mere inaction of the employer to act on a complaint about discriminatory conduct thus amounted to discrimination by the employer itself”. Although the judge did not specifically deal with section 60 of the EEA, Le Roux submits that “the judge’s finding is a correct application of section 60(1) - (3) of the EEA”.

If section 60(1) - (3) was applied to the facts of this case Old Mutual failed to consult with all relevant parties and to address Burger’s conduct which was brought to its attention by Jeffries immediately after the remark was uttered and Old Mutual should in that light be held liable. In addition, the conduct of Burger contravened section (6)1 of the EEA and could initiate the application of section 60. This, however, was not considered in the judgment. If an expansive meaning of harassment is observed (considering South Africa’s history of racial oppression, this is likely), it is conceivable that that Burger’s conduct, in the sense that it created a hostile environment (evidenced by Jeffries’ reaction) could be regarded as harassment. This would constitute a contravention of section 6 (3) of the EEA and would trigger the application of section 60.

Regarding subsection 4 Revelas J in SATAWU v Old Mutual Life Insurance Company held that:

“The first respondent led undisputed evidence that it has done much by way of training and other means, to eradicate racism ... The undisputed evidence was that there was no lack of training in this particular area of human relationships within the first respondent. It is the response to such training, which was the problem in this matter. Some mindsets will not respond to training. Swift

190 55 of 1998.
195 Supra.
disciplinary action and damages or compensation as punitive measures, should be imposed when training has failed.¹⁹⁶

Commenting on the above Le Roux¹⁹⁷ was of the view that the Old Mutual had “done everything that it could to ensure that its employees did not misbehave in this regard”. The judge’s refusal to make an order in respect of the applicant’s prayer requesting a Labour Court directive on steps to be taken by Old Mutual to avoid similar conduct in future fortifies this conclusion.¹⁹⁸ Le Roux¹⁹⁹ also contended that Burger’s conduct was the result of her mindset and not the failure of the employer to do all that reasonably practicable to ensure that employees would not act in contravention of the Employment Equity Act.²⁰⁰

Furthermore, it was clear that the employer had failed to respond to Burger’s conduct (in the manner contemplated by subsection 2), the question should have been whether all reasonable practicable steps to prevent discrimination by their employees had been taken by the employer.²⁰¹ The judgment’s failure to apply the statutory provisions and to provide clear guidelines on the meaning of “all reasonably practicable steps” is frustrating. The Old Mutual case is a timeous reminder to employers that racism and other discriminatory conduct in the workplace require immediate and strong disciplinary action by the employer.²⁰²

Section 60 of the EEA,²⁰³ and more specifically employer liability for discrimination by its employees, is not as sweeping as it might appear at first glance. The liability envisaged by it will only arise if a contravention of a provision of the EEA can be established. Isolated conduct by a recalcitrant employee, unless it can be said to be harassment and thus a contravention of section 6(3) of the EEA,²⁰⁴ will fall foul of the requirement in section 6(1) that “discrimination must be in an employment policy or

¹⁹⁶ SATAWU obo Finca v Old Mutual Life Insurance Company (SA) Limited and Burger [2006] BLLR par 44.
¹⁹⁹ Supra.
²⁰⁰ 55 of 1998.
²⁰² Supra.
²⁰⁴ 55 of 1998.
practice”. Although the racist remark itself cannot be seen as an “employment policy or practice” in terms of section 6(1) of the EEA, Old Mutual’s failure to act can be seen as indicative of a policy or practice. It was for this conduct that Old Mutual was held directly liable.

2.7 STEPS THE EMPLOYER MAY TAKE TO AVOID LIABILITY

The employer may take steps in order to escape liability. Section 60 of the Employment Equity Act states the following:

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

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

Section 60(3) of the Employment Equity Act records that:

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

In the Ntsabo case the court imputed liability on the employer for failure to address the complaint which had been lodged by the complainant for six weeks after being informed and turned a blind eye. He was in that regard found liable in terms of section 60(3).

Section 60(4) states that:

---

205 Supra.
206 Supra.
207 Calitz “The Liability of Employers for The Harassment of Employees By Non-Employees” (2009) Stell LR 407 422.
208 55 of 1998.
“Despite subsection (3), an employer is not liable for the conduct of an employee if that employer is able to prove that it did all that was reasonably practicable to ensure that the employee would not act in contravention of this Act.”

The subsection should be understood as absolving the employers from liability when they have put measures in place to ensure that harassment does not occur. The measures contemplated include the implementation of a sexual harassment policy, as well as appropriate information sharing and training which seek to combat harassment in the workplace. The general notion of any defence against a claim in terms of section 60 must take account of the fact the EEA aims to encourage employers to remove obstacles to equality in the workplace.

In light of the *Ntsabo* case it is evident that the employer did not have any policies and structures in place to address harassment and thus fell outside the legal protection provided for in section 60(4) of the EEA. Employees should be made aware of the educational policies instituted by the employer and channels to follow in the event of harassment arising. In addition employees should contribute in the setting up of mechanisms and programmes of combating sexual harassment.

### 2.8 MOKOENA v GARDEN ART (PTY) LTD

Another case which attempts to address the liability of the employer in terms of the EEA is that of *Mokoena v Garden Art (Pty) Ltd*. Firstly, a summary of the facts of the case will be given followed by the judgment.

According to the facts, two women, Mokoena and Mokhethi, instituted a claim against their employer, Garden Art (Pty) Ltd, in terms of section 60 of the EEA. They alleged that they had been harassed by their supervisor, Mohlabane, and that the failure of employer to take steps to prevent, eliminate or prohibit “sexism” and “genderism” being perpetrated at the workplace constituted direct unfair

---

211 55 of 1998.
discrimination. The two women each claimed R100 000 damages from their employer. The employer opposed the claim on the ground that sexual harassment had not been established from the steps it had taken steps to investigate the complaints.

Furthermore, Mokoena alleged that Mohlabane had sexually harassed her when he walked into the female change-room without knocking while she was changing and stood and stared at her while she was in panties and a T-shirt.\(^{217}\) This was the only incident about which she complained. Mokoena reported the incident to her employer three months later and lodged a grievance.\(^{218}\) The grievance was formally dealt with by the employer. Mohlabane was found guilty of invasion of privacy but not guilty of sexual harassment due to lack of evidence. Mohlabane was warned to stay away from the female change-rooms.\(^{219}\)

Mokhethi alleged that while she was collecting her wages from Mohlabane he "grabbed her buttocks and breasts and smiled."\(^{220}\) Mokhethi did not report this incident to management.\(^{221}\) Another incident followed a few months later where Mohlabane "fondled her" in his office and "followed her to the change-rooms".\(^{222}\) When she was naked he told her not to report the incident to anyone.\(^{223}\) She reported the incident to the employer the next day and a hearing was convened. As there were no eyewitnesses to corroborate Mokhethi’s version, the employer found Mohlabane not guilty of sexual harassment. After considering section 60 of the EEA,\(^{224}\) the Labour Court set out seven requirements that must be complied with in order for an employer to be held liable for sexual harassment namely:

- The conduct must be committed by an employee of the employer.

- The conduct must constitute sexual harassment.

\(^{217}\) Mokoena v Garden Art (Pty) Ltd [2008] BLLR 428 (LC) para[5].
\(^{218}\) Supra para [7].
\(^{219}\) Supra para [10].
\(^{220}\) Mokoena v Garden Art (Pty) Ltd [2008] BLLR 428 (LC) para [13].
\(^{221}\) Mokoena v Garden Art (Pty) Ltd [2008] BLLR 428 (LC) para [13].
\(^{222}\) Supra [13].
\(^{223}\) Supra [13].
\(^{224}\) 55 of 1998.
• The sexual harassment must take place at the workplace.

• The sexual harassment must immediately be brought to the attention of the employer.

• The employer must be aware of the sexual harassment.

• The employer must have failed to consult the necessary parties or to take the necessary steps to eliminate the sexual harassment or otherwise comply with the EEA.

• The employer must show that it took all reasonable practical steps to ensure that the employee would not act in contravention of the EEA.225

In light of the above requirements the Labour Court made the following findings: an employer will not escape liability in terms of section 60 of the EEA226 in instances where sexual harassment is immediately brought to the attention of the employer; the employer is aware of the sexual harassment and fails to take steps to eliminate it and a further act of sexual harassment has taken place. An employer cannot be held liable in terms of s60 of the EEA227 for an act of sexual harassment, where there is only one incident of sexual harassment, which is immediately reported to the employer. The term “immediately” has been interpreted by the courts to literally to mean “without delay” as well as to mean “as soon as is reasonably possible”, depending on the context.228 Cooper229 proposes that a more flexible standard of “as soon as is reasonably possible” should be adopted to cater for situations were there is no sexual harassment policy and where the victim is a junior employee, the perpetrator is the supervisor. Furthermore, the need for swift action and justice to the

227 Supra.
228 The different meanings of the word were examined in Msongelwa v Zinc Corporation of SA (1993) 14 ILJ (T) 917.
employer who might be deemed liable must be weighed up against the sensitiveness of the employee in the particular case.\textsuperscript{230}

With respect to liability in terms of s60 of the EEA, the Labour Court observed that

“Section 60 of the EEA really applies where it has been brought to the attention of the employer that sexual harassment has taken place, as a result of the employer’s inaction, a further incident of sexual harassment takes place, which renders the employer liable.”

After applying the seven criteria to the facts of the case, the Labour Court concluded as follows:

- The act complained of by Mokoena was not sexual harassment. The Court found Mokoena to be an unreliable witness who contradicted herself.\textsuperscript{231}
- The incident of Mohlabane fondling Mokhethi in his office and following her to the change-room was sexual harassment.
- The incident of sexual harassment was immediately brought to the employer’s attention.
- The employer did consult with the employees concerned and took steps to prevent Mohlabane’s conduct taking place again.
- The employer took reasonable practical steps to ensure that Mohlabane would not act in contravention of the EEA.\textsuperscript{232}

The court in this respect confirmed the grievance hearing after Mokhethi had reported the incident as both reasonable and sufficient to prevent future acts of sexual harassment. Furthermore, the Court stated that the claim would have succeeded had the employer not taken steps once it had been alerted to prevent

\textsuperscript{230} Ibid.
\textsuperscript{231} Mokoena v Garden Art (Pty) Ltd [2008] BLLR 428 (LC) para [57-58].
\textsuperscript{232} Mokoena v Garden Art (Pty) Ltd [2008] BLLR 428 (LC) para [61].
further sexual harassment taking place. The claim for damages was accordingly dismissed.

From the foregoing judgment it may be submitted that an employer will not be held liable in terms in terms of section 60 of the EEA where an employee commits only one act of sexual harassment. According to Venter liability in terms of section 60 of the EEA will only be imposed where a further act of sexual harassment takes place as a result of the employer’s failure to deal with and take steps to prevent such an act recurring. Moreover, the nature of the reasonable steps would depend largely upon the circumstances of the as well as the seriousness of the allegations of sexual harassment.

In his view of the judgment Venter suggests that a grievance hearing where all parties involved are present and put their versions forward, is “a reasonable step by an employer in preventing sexual harassment from taking place”. She alludes to the fact that “the implementation of a sexual harassment policy in the workplace will be the first step by the employer in the prevention and elimination of sexual harassment in the workplace”. The sexual harassment policy should set out the procedures to be followed by the victim of harassment in bringing it to the attention of the employer and the measures the employer must take to prevent sexual harassment from recurring.

2.9 CONCLUSION

In conclusion, a successful claim for unfair discrimination against an employer places the onus on the employee to show that the conduct complained of was “unwelcome”, that the conduct complained of was based on sex (that it was of a sexual nature) and that the conduct was serious enough (judged against the nature and extent of the conduct) to support a finding of harassment.

---

236 Supra.
237 Supra.
CHAPTER THREE
COMMON LAW DIRECT LIABILITY

3.1 INTRODUCTION TO COMMON LAW DIRECT LIABILITY

Direct liability refers to the circumstances under which an employer will be held liable for unlawful acts caused by their conduct which leads to harm or injury of the employee. In this chapter the author shall firstly, discuss the requirements of a delict necessary for direct liability to arise. Secondly, relevant case law pertaining to the elements necessary for a delict to arise will also be analysed.

The nature of direct liability for sexual harassment based on the common law is examined in terms of the law of delict. The liability will usually arise in terms of the employer’s omission to take positive measures to ensure a harassment free environment. Before the employer can be held directly liable for damage sustained as a result of sexual harassment, it is imperative to establish the following elements of delict with regard to the employer:

- The employer committed an act or omission;
- The act or omission was unlawful;
- The act or omission was culpable, intentional or negligent;
- A third party suffered harm; either patrimonial damage or injury to personality; and the act or omission caused that harm.

[T]he problematic element in succeeding with a delictual claim … is the element of wrongfulness. Although it is not the only requirement, wrongfulness is the primary

240 Ibid.
requirement in the present context aside from negligence, causation and damage.\textsuperscript{243} Wrongfulness usually causes problems in cases where the conduct is an omission or a statement.\textsuperscript{244} Liability often arises from an omission, due to the employer’s failure to take precautions, or to respond to complaints made by the victim.\textsuperscript{245} Mukheibir\textsuperscript{246} submits that “due largely to the laissez-faire concept of liberty, individuals are generally free to mind their own business, even where they might reasonably be expected to avert harm”. The enquiry into wrongfulness often focuses on whether a duty exists, especially in cases where it is not easy to identify a right. This occurs where the defendant is blamed for an omission (failure to prevent harm to another person), for causing financial loss by misstatement or unsound advice, or where breach of a statutory duty is involved.\textsuperscript{247} The wrongfulness of an act basically lies either in the infringement of a subjective right (which of course includes the personality right to physical psychological integrity), or in the breach of a legal duty to prevent damage to another.\textsuperscript{248} In other words, the wrongfulness of an omission is decided on the basis of whether the defendant under the circumstances had a legal duty to prevent the harm from ensuing.\textsuperscript{249}

\section*{3.2 BACKGROUND OF DELICTUAL OMISSIONS}

Liability for an omission involves enquiring whether a duty not to cause harm exists. The question is whether the harm fell within the defendant’s scope of responsibility, so that we regard failure to prevent the harm as wrongful.\textsuperscript{250} Liability for an omission has a long and interesting history which has continued into the constitutional era.\textsuperscript{251} Aquilian liability was essentially limited to culpable conduct in the form of a positive

\begin{footnote}
\textsuperscript{243} Neethling “Delictual Protection of the Right to Bodily Integrity and Security of the Person Against Omissions by the State” (2008) SALJ 572 579.

\textsuperscript{244} Loubser \textit{et al} \textit{The Law of Delict in South Africa} (2010) 137.


\textsuperscript{246} Mukheibir “Juggling the Elements of Delict” (2003) \textit{Obiter} 262 264.


\textsuperscript{248} Neethling \textit{et al} \textit{Law of Delict} (2006) 4\textsuperscript{th} ed 49 35ff, 47, 50ff, 55ff.

\textsuperscript{249} Mukheibir “The Impact of the Constitutional Imperative of the State to Avoid Harm on Delictual Liability for an Omission.” (2003) \textit{Obiter} 498 503.


\textsuperscript{251} Carmichelle \textit{v} Minster of Safety and Security 2001 4 SA 938 (CC).
\end{footnote}
act, causing physical injury to the plaintiff. In other words, it was not available for harm caused by omission.

The development of liability for an omission is marked by a movement away from casuistry, in the form of specific rules like the prior conduct rule, towards a more general formulation, namely that liability will ensue where there was a legal duty upon the defendant to prevent harm to the plaintiff, and “prior conduct”, although not the sole criterion for liability, is one of several factors to which the court will regard in establishing liability. In Halliwel v Johannesburg Municipal Council the court held that liability for an omission could not ensue in the absence of prior conduct on the part of the defendant. The “prior conduct” requirement was rejected by Steyn JA in a minority decision in Silva’s Fishing Corporation (Pty) Ltd v Maweza in favour of the preferred view that “prior conduct” was but one of the several considerations which might indicate the existence of a legal duty.

3.3 THE TEST FOR WRONGFULNESS

It is trite that the basic criterion for determining wrongfulness is the legal convictions of the community (boni mores): whether the defendant unreasonably, or contrary to the boni mores or the legal convictions of the community, failed to prevent harm to the plaintiff. To determine whether or not wrongfulness is present in the case of a particular omission is not a question about the usual “negligence” of the bonus paterfamilias, but rather whether with regard to all the facts there was a legal duty to act reasonably. The general function is to determine whether the affected interest of the plaintiff (judged either on its own or in balance with a conflicting interest of defendant) deserves protection from the defendant’s action or lack of action, so that the burden of bearing the loss should be shifted from plaintiff to defendant. [I]t is important to note that interference with physical-mental integrity through an omission

254 1912 AD 659.
255 1957 2 SA 256 (A) 264-265.
258 Minister van Polisie v Ewels 1975 3 SA 590 (A) 596-597.
is not prima facie wrongful. This conclusion of law depends upon an examination of all the circumstances of the particular case, and a weighing up of, and the striking of a balance between, the interests of the parties (the victim and the state) and that of the community, which entails a proportionality exercise where the interplay of various factors has to be considered. In Media24 v Grobler it was held that “the legal convictions of the require an employer to take reasonable steps to prevent sexual harassment of its employees in the workplace and to be obliged to compensate the victim for harm caused thereby should it negligently fail to do so”.

3.3.1 MINISTER OF SAFETY AND SECURITY v VAN DUIVENBODEN

The case of Minister of Safety and Security v Van Duivenboden deals with omission, which forms part of the wrongfulness requirement, as one of the elements necessary to constitute a delict. The facts of the case are as follows:

The respondent was the neighbour of one Brookes, who had a drinking problem and was inclined towards aggression when under the influence. On the day in question Brookes, who was drunk again, threatened to his wife and two children. His wife, who also had a firearm, sought the respondent’s help, and gave her pistol to him. In the meantime Brookes killed his daughter, and then followed his wife and son and also shot them. In the process of trying to help, the respondent was shot in the ankle and then in the shoulder, before he managed to ward off Brookes by firing the wife’s pistol. In spite of the procedure to declare an individual unfit to be in possession of a firearm being reasonably, this procedure had not been followed notwithstanding its simplicity. Furthermore, despite the police knowing the Brooks’ history of threatening to kill his family when under the influence, the former did no re-possess the firearm from Brooks.

---

262 Media24 v Grobler 2005 6 SA 328 (SCA) para [68].
263 Minister of Safety and Security v Van Duivenboden 2002 6 SA 431 (SCA) para [1].
264 Supra.
265 Supra para [1].
266 Para [4].
Regarding omission the court pointed out that the enquiry under the rubric of wrongfulness is whether “the negligent omission occurred in circumstances that the law regards as sufficient to give rise to a legal duty to avoid negligently causing harm”. Further, it argued that “a negligent omission will only be wrongful if under the circumstances there was a duty to act positively to avoid causing harm”. The court referred to the dictum in the case of Minister van Polisie v Ewels and observed that “a negligent omission would only be regarded as wrongful if it was of such a nature that the legal convictions of the community regarded it as wrongful”. In addition, the court asserted that “the question to be determined is one of legal policy, which must perforce be answered against the background of the norms and values of the particular society in which the principle is sought to be applied”. According to Von Bonde the Constitution serves as the supreme source of the norms and values of South African society. The court further added that a duty to prevent injury will more readily be placed on the state than on an individual because it is “the very business of a public authority of functionary to serve the interests of others”. It was further averred by the court that:

“It must also be kept in mind that in the constitutional dispensation of this country the state (acting through its appointed officials) is not always free to remain passive. The state is obliged by the terms of section 7 of the 1996 Constitution not only to respect but also to ‘protect, promote and fulfill the rights in the Bill of Rights’ and section 2 demands that the obligations imposed by the Constitution must be fulfilled.”

Questions as to whether the defendant could reasonably be expected to have taken any positive measures at all and, if so, what positive measures should reasonably have been taken, form part of the enquiry into negligence. Accordingly, the court endorsed the test for negligence propounded in Kruger v Coetzee, namely whether a reasonable person in the position of the party concerned would not only have foreseen the harm, but would also have acted to avert it.

---

267 At 441F-G.
268 At 442-C-D.
269 Minister of Safety and Security v Van Duivenboden 2002 6 SA 431 (SCA) para [16].
271 Minister of Safety and Security v Van Duivenboden 2002 6 SA 431 (SCA) para [19].
272 Minister of Safety and Security v Van Duivenboden 2002 6 SA 431 (SCA) para [20].
274 Kruger v Coetzee 1966 2 SA 428 (A) 430E-F.
The case of *Carmichelle v Minister of Safety and Security*\(^{276}\) is a landmark ruling detailing the breach of a legal duty by the state to protect its citizens. It is important in determining the matter of omission as part of wrongfulness and to whom delictual liability will be imputed. The pertinent details of the case are as follows:

The plaintiff was attacked by a man who had a history of violent behaviour and indecent assault. He had already been convicted of housebreaking and indecent assault. On the housebreaking charge, he was sentenced to 18 months imprisonment, which was suspended conditionally for four years. He was subsequently charged with the attempted rape and attempted murder of another victim in the area. He was released on his own recognisance and, in the months while the latter two charges were being dealt with he attacked the plaintiff. This was despite the fact that several people had phoned the police to report incidents involving the man. The plaintiff had instituted action for alleged dereliction of duty by the latter persons.

The high court had granted absolution from the instance on the ground that prima facie a duty of care had not been proved. This finding was upheld by the supreme court of appeal.\(^{277}\) After overturning the finding of absolution from instance and referring the matter back to the high court, the court considered the plaintiff’s cause of action to be founded solely on delict arising from a breach of duty owed her by the police and/or the prosecutor, providing a causal link was proved between such breach and injuries suffered. The court proceeded to consider in terms of the common law basis of the legal duty to act and concluded that the duty to act was based on reasonableness, namely whether it would be reasonable to expect a party to have taken positive measures to prevent the injury.

\(^{275}\) *Carmichelle v Minister of Safety and Security* (Centre for Legal Studies Intervening) 2001 10 BCLR 995 (CC); 2001 4 SA 938 9(CC).

\(^{276}\) *Supra.*

\(^{277}\) *Carmichele v Minister of Safety and Security* 2001 1 SA 489 (SCA).
The Cape high court found that in the present case the Minister of Safety and Security had a legal duty to protect the plaintiff against the risk of sexual violence.\textsuperscript{278} The constitutional duty to protect is enshrined in sections 10, 11 and 12, which deal with the right to “dignity, life, and freedom”.\textsuperscript{279} The court considered the plaintiff’s cause of action to be founded solely on delict arising from a breach of a duty owed her by the police and/or the prosecutor, providing a causal link was proved between such breach and the injuries suffered. The Constitutional Court was unambiguous regarding the fact that there was an obligation on all courts to develop the common law and to do so in keeping with the Constitution:

“(U)nner the Constitution there can be no question that the obligation to develop the common law with due regard to the spirit, purport and objects of the Bill of Rights is an obligation which falls on all of our courts including this Court.”\textsuperscript{280}

The court proceeded to consider in terms of the common law the basis of the legal duty to act and concluded that the duty to act was based on reasonableness, namely whether it would be reasonable to expect a party to have taken positive measures to prevent injury.\textsuperscript{281} The Constitution expanded on this test by stating the following:

“[I]n determining whether there was a legal duty on the police officers to act, Hefer JA in Minister of Law and Order v Kadir\textsuperscript{282} referred to weighing and the striking of a balance between the interests of parties and the conflicting interest of the community. This is a proportionality exercise with liability depending upon the interplay of various factors. Proportionality is consistent with the Bill of Rights, but that exercise must now be carried out in accordance with the ‘spirit, purport and objects of the Bill of Rights’ and relevant factors must be weighed in the context of a constitutional state founded on dignity, equality and freedom and in which government has positive duties to promote and uphold such values … (T)he Bill of Rights entrenches the rights to life, human dignity and freedom of security of the person … It follows that there is a duty imposed on the State and all its organs not to perform any act that infringes these rights\textsuperscript{283}”

\textsuperscript{278} At 672B.
\textsuperscript{279} At 671C-D.
\textsuperscript{280} Carmichelle v Minister of Safety (Centre for Applied Legal Studies intervening) 2001 BCLR 995 (CC).
\textsuperscript{282} Minister of Law and Order v Kadir 1995 1 SA 303 (A).
\textsuperscript{283} Carmichelle v Minister of Safety and Security (Centre for Applied Legal Studies intervening) 2001 BCLR 995 (CC).
The breach of the duty to protection could lead to the state being delictually liable; the court proceeded to state that.\textsuperscript{284}

“Fears expressed about the chilling effect such delictual liability might have on the proper exercise of duties by public servants are sufficiently met by the proportionality exercise which must be carried out and also by the requirement of foreseeability and proximity … A public interest immunity excusing respondents from liability that they might otherwise have in the circumstances of the present case, would be inconsistent with our Constitution and its values.”

3.3.3 \textit{MEDIA24 v GROBLER}\textsuperscript{285}

The case of \textit{Media24 v Grobler}\textsuperscript{286} is of relevance because it brings out the requirements for a successful delictual claim. Firstly, I will give a summary of the facts and secondly, the decisions reached by the courts relating to vicarious and subsequently direct liability in that respect.

The facts of the case concerned the appeal of Media24 (the first appellant) against the decision by the Cape High Court to hold it vicariously liable for the sexual harassment at work of Sonia Grobler (the respondent) by Gasant Samuels (the second appellant). The respondent employee had been awarded damages of R776 814,00.\textsuperscript{287} The respondent’s cause of action had been based on her assertion that the first appellant had breached its legal duty to its employees in terms of which it was required to maintain a working environment that protected and respected the dignity and mental well-being of its employees. This would include taking all necessary steps to prevent, or end sexual harassment. The court \emph{a quo} had found the second appellant guilty of sexually harassing the respondent, and had then held first appellant vicariously liable for harassment.

In the Supreme Court of Appeal, the first appellant argued as follows:

\begin{itemize}
\item That the Cape High Court had erred in extending the principles of vicarious liability beyond those recognised in South African law, since the harassment
\end{itemize}

\textsuperscript{284}\textit{Carmichelle v Minister of Safety and Security (Centre for Applied Legal Studies intervening)} 2001 BCLR 995 (CC).

\textsuperscript{285}\textit{Media24 v Grobler} 2005 6 SA 328 (SCA).

\textsuperscript{286}\textit{Supra.}

\textsuperscript{287}\textit{Media24 v Grobler} 2005 6 SA 328 (SCA) para [1].
had not occurred within the course and scope of the second appellant’s employment.

- That the first appellant had not breached its legal duty to maintain a safe working environment, since the respondent had failed to prove that the first appellant had a duty to take positive measures to prevent harm. The first appellant argued that there was no legal basis for such a duty to be imposed, but alternatively, if there was such a duty, that the first appellant had discharged it by implementing a sexual harassment policy and grievance procedure in 1997. The first appellant contended that any legal duty on the first appellant arose from the contract of employment between the parties.

- Thirdly, the first appellant argued that the high court had not had jurisdiction to hear the matter, since it was an issue that fell within the exclusive jurisdiction of the Labour Court.

The respondent contended as follows:

- That the trial court had decided correctly in holding the first appellant vicariously liable for the sexual harassment.

- In the alternative, that even if vicarious liability could not be extended to the first appellant, a legal duty to ensure a safe working existed. The respondent argued that the first appellant had breached this duty by not taking any steps to halt the sexual harassment from occurring.

In its judgment, the court in this instance felt that it was not necessary to examine the matter of vicarious liability, since it held that the respondent had satisfactorily proven that the first appellant could be held directly liable for the sexual harassment. The court made reference to the cases of Van Deventer v Workman’s Compensation Commissioner\(^{288}\) and Vigario v Afrox Ltd\(^{289}\) when reasoning this judgment. In terms of these cases, the court found that our law recognised that an employer owes its

\(^{288}\) Van Deventer v Workman’s Compensation Commissioner 1962 (4) SA 28 (T).
\(^{289}\) Vigario v Afrox Ltd 1996 (3) SA 450 (W).
employees a common law duty of care. It further observed that this duty of care extended not only to the employee’s physical harm, but was also applicable to hold the employer liable for not preventing psychological harm from happening.

The common law legal duty of care is grounded in the convictions of the community, and the court found that this duty of care was applicable to the matter in spite of the existence of the statutory remedy for sexual harassment in terms of section 60 of the EEA. The court further held that the mere fact that a contractual relationship existed between the first appellant and the respondent did not preclude the application of the common law of delict to the matter.

With respect to the matter of jurisdiction the court averred that the matter fell outside the exclusive jurisdiction of the Labour Court. This reasoning was based on interpretation by the court of section 7(6) of the NEDLAC Code of Good Practice on the Handling of Sexual Harassment in the Workplace. According to this section

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

The court stated that the meaning of “sexual assault” could be extended to that of sexual harassment, and that this meant that a “civil charge” could be taken to mean a civil action for damages – as the action of the respondent was a civil action for damages. In addition, it also held that since the matter dealt with the wrongfulness of the first appellant’s conduct, the application of the judgment in the case of Fedlife Assurance Ltd v Wolfaardt was relevant here. In terms if this judgment, the matter is not solely reserved for the jurisdiction of the Labour Court, since the unlawfulness of the employer’s conduct (in this instance the first appellant) would not be a matter requiring the exclusive jurisdiction of the Labour Court as set out in section 157 of the LRA.

---

290 Media24 v Grobler para [64].
291 Media24 v Grobler para [65].
292 Media24 v Grobler 2005 6 SA 328 (SCA) [68-69].
293 Media24 v Grobler2005 6 SA 328 (SCA) [75].
294 Fedlife Assurance v Wolfaardt 2002 1 SA 49 (SCA).
295 Fedlife Assurance Ltd v Wolfaardt 2002 1 SA 49 [26-27].
Lastly, the court examined the respondent’s contention that the first appellant had breached the duty of care it owed its employees to provide a safe working environment. The court held that it was clear that the first appellant had not fulfilled this duty, since the management of the employer, despite being informed of the situation and requested to intervene, did nothing to prevent the harassment from occurring. The court held that this failure on the part of management established the breach of the legal duty of care by the first appellant.\textsuperscript{296}

Mukheibir\textsuperscript{297} translates the \textit{Ewels}\textsuperscript{298} decision, which was referred in this case, as follows:

“It appears as if that stage of development has been reached where an omission may also be regarded as wrongful where the circumstances of the case are such that the omission not only gives rise to moral indignation, but also that the legal convictions of the society expect that the omission ought to be regarded as wrongful and that the damage suffered ought to be compensated by the person who failed to act positively. To determine whether or not wrongfulness is present in the case of a particular omission is thus not a question about the usual ‘negligence’ of the \textit{bonus paterfamilias}, but rather whether with regard to all the facts there was a legal duty to act reasonably.”

3.4 COMMON LAW - VICARIOUS LIABILITY
3.4.1 INTRODUCTION TO COMMON LAW - VICARIOUS LIABILITY

The South African doctrine of vicarious liability is largely based on the position in English law.\textsuperscript{299} The rule as formulated by Salmond\textsuperscript{300} constitutes the basis of the doctrine and it provides that the master is responsible for wrongful acts authorised by him and that:

“[a] master is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes-although improper modes-of doing them. ... On the other hand if the unauthorised and wrongful act is not so connected with the authorized act as to be a mode of doing it, but is an independent act, the master is not

\textsuperscript{296} Media24 v Grobler 2005 6 SA 328 (SCA) par 71.
\textsuperscript{298} Minister van Polisie v Ewels 1975 3 SA 590 (A) 596-597.
\textsuperscript{299} Ayitah Vicarious Liability in the Law of Torts (1967) 175.
\textsuperscript{300} Ayitah at 175.
responsible; for in such a case the servant is not acting in the course of his employment, but has gone outside of it.”

In Mkhize v Martens\(^{301}\) Innes JA stated the following:

“We may, for practical purposes, adopt the principle that a master is answerable for the torts of his servant committed in the course of his employment, bearing in mind that an act done by a servant solely for his own interests and purposes and outside his authority is not done in the course of his employment, even though it may have been done during his employment.”

The objective of this chapter is to discuss the doctrine of vicarious liability and its application in case law. Firstly, a definition of and reasons for vicarious liability will be provided. Thereafter, the requirements for vicarious liability and their application and interpretation in case law will be explored. A conclusion will sum up the chapter.

Vicarious liability is a doctrine of liability without fault in terms of which one person is held for unlawful acts of another.\(^{302}\) It “militates against the basic requirements for delictual liability”: liability will be assigned without the responsible person being at fault or having acted wrongfully.\(^{303}\) In the context of the employment relationship, the employer can be held liable for the unlawful acts of an employee.\(^{304}\) In South African law, vicarious liability is a very real and potentially dangerous threat of which employers must become aware, especially those in labour intensive industries. Vicarious liability can be defined as follows:

“A form of strict liability that arises under the common law where the superior remains liable for the actions (or omissions) of their subordinate, or, in a broader sense, the responsibility of any third party that had the ‘right, ability or duty to control’ the actions of such subordinate, which actions lead to damage.”\(^{305}\)

Vicarious liability, while easy to define, becomes an exceptionally convoluted topic when dealing with real world examples.\(^{306}\) Different reasons have been advanced to

---

\(^{301}\) Mkhize v Martens 1914 (AD) 382.


\(^{304}\) Calitz “Vicarious Liability of Employers: reconsidering risk as the basis for liability” (2005) TSAR 2 216.


\(^{306}\) Duff supra.
justify the existence of this doctrine which runs counter to the general principle of no liability without fault. The main reasons advanced are that the victim should enjoy fair and just compensation (out of the deeper pocket of the employer than the primary wrongdoer); that the employer is better equipped to spread the cost of compensating victims by taking out insurance and price increases and that employers will take to prevent employees from causing damage to third persons if they will be held liable for the acts of their employees. Determining the reasons for vicarious liability is essential in order to ascertain whether the rules are just. Furthermore, knowledge of the justification of the positive legal requirements is necessary for the communication between the lawyer and the ordinary citizen. In addition, the reason for vicarious liability has to be sought in a number of policy considerations, not all of which are equally applicable to the different categories of vicarious liability. Important considerations are the creation of risk by the defendant in pursuit of his own interests and the possibility of loss distribution.

According to Greenberg AJ in *Feldman v Mail* there is no logical basis for vicarious liability,

“but law is not always logical; on the very question underlying this liability, viz the reason why a master should ever be liable for acts of the servant who have committed in disregard of his express instructions, judges and commentators have found difficulty in finding a logically satisfying basis, and the way in which the rule has been applied is probably a compromise between conflicting considerations”.

The theoretical foundation for the vicarious liability of an employer for the delicts of its employee has not received thorough analysis by South African courts. Our courts have accepted that the doctrine was unknown to Roman and Roman Dutch law and

---

314 *Feldman Pty Ltd v Mail* 1945 AD 733 779.
was inherited from English law and the courts therefore concentrated on the application of a set of rules in determining the liability of the employer.\textsuperscript{315}

3.5 REQUIREMENTS FOR VICARIOUS LIABILITY

The requirements for an employer’s vicarious liability as formulated by South African courts are as follows:

- There has to be an employer-employee relationship.
- The employee has to commit a delict.
- The employee has to act within the course and scope of his employment when committing the delict.

In light of the above listed requirements a discussion of the requirements and relevant case law on their interpretation and application shall be explored in detail below.

3.5.1 EMPLOYER-EMPLOYEE RELATIONSHIP

An employer-employee relationship is a relationship in which “any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration”.\textsuperscript{316} This is a primary requirement and its importance emanates from the fact that an employer cannot be vicariously liable for the delictual acts of an independent contractor: the party at fault must be an employee and not an independent contractor.\textsuperscript{317} A central problem in determining the concepts of employer and employee concerns the relationship of those concepts to the contract of service. The use of the same legal terms

\begin{footnotes}
\footnote{316}{66 of 1995 s 213.}
\footnote{317}{Manamela “Employee and Independent Contractor: The Distinction Stands” (2002) \textit{SA Merc LJ} 107 112.}
\end{footnotes}
(employer, employee, master, servant) in the field of vicarious liability and the contract of service indicates that the concepts are identical.\textsuperscript{318} It has, however, been submitted that they are entirely different in that they are entirely different in that the employer-employee relationship could be established even if the parties concluded a contract other than the contract of service.\textsuperscript{319} In short, a contract between employer and employee is not a requirement of liability. But if a contract is present, it must be a contract of service.\textsuperscript{320} As vicarious liability is strict liability, an employer can therefore never be vicariously liable for the delict of an independent contractor.\textsuperscript{321}

3.5.1.1 \textit{MIDWAY TWO ENGINEERING \& CONSTRUCTION SERVICES v TRANSNET BPK}\textsuperscript{322}

The question of the existence of an employment relationship is essential in establishing vicarious liability. I shall discuss the facts and the judgment of the case of \textit{Midway Two Engineering \& Construction Services v Transnet Bpk} which is significant in determining those deemed as employees and non employees for purposes of imputing liability.

According to the facts, the service of a driver was made available to a client by a labour broker. The Supreme Court of Appeal was called upon to determine whether the broker or the client was vicariously liable at common law for damage caused by the driver while driving for the client.

Nienaber J in the above case observed that a multi-faceted test which takes all relevant factors into account in order to establish whether the relationship between the perpetrator and the defendant is an employer-employee relationship, is more appropriate and is useful to determine who, as a matter of policy and fairness, had been more closely associated with the risk-creating act.\textsuperscript{323} It is maintained that when applying this test, the client, and not the labour broker, was more closely associated with the risk-creating act.

\textsuperscript{319} Wicke (1998) \textit{Stell LR} 21 28.
\textsuperscript{320} Wicke (1998) \textit{Stell LR} 21 42.
\textsuperscript{321} Wicke (1998) \textit{Stell LR} 21 41.
\textsuperscript{322} \textit{Midway Two Engineering \& Construction Services v Transnet Bpk} 1998 3 SA 17 (SCA).
\textsuperscript{323} At 231.
with the negligent act and was therefore vicariously liable.\footnote{Le Roux “Vicarious Liability: Revisiting an Old Acquaintance” (2003) 24 ILJ 1879 at 1882.} Although control is an important factor, it is not the most important criterion, as was previously the case.\footnote{Neethling \textit{et al Law of Delict} 5\textsuperscript{th} ed (2006) 340.} Worth noting is the fact that independent contractors do not fall under the definition of employee in the Labour Relations Act (LRA), Basic Conditions of Employment Act 75 of 1997 (BCEA) and Employment Equity Act (EEA).\footnote{55 of 1998.} In addition, the BCEA and the LRA record that a person whose service) is the employee of the labour broker (and not the client).\footnote{BCEA s 82 and LRA s 198.} It is therefore imperative to draw a distinction between an employee and an independent contractor. Previously, common law courts and the Labour Court paid particular attention to the extent to which the employer controlled the employee,\footnote{\textit{Midway Two Engineering & Construction Services v Transnet Bpk} 1998 3 SA 17 (SCA).} but now both the civil courts and the Labour Court favour what is referred to as the “dominant impression test”.\footnote{Brassey “The Nature of Employment” (1990) 11 ILJ 889.}

In conclusion, an employer is liable for the conduct of an independent contractor only if the employer was at fault himself.\footnote{Wicke “Vicarious Liability: Not Simply A Matter of Legal Policy” (1998) \textit{Stell LR} 21 43.}

\section*{3.5.1.2 \textit{STEIN v RISING TIDE PRODUCTIONS}}\footnote{\textit{Stein v Rising Tide Productions} (2002) 23 ILJ 2017 (C).}

An independent contractor is does not fall under the definition of employee and is therefore not an employee as far as vicarious liability is concerned. Firstly, I shall briefly discuss the facts of the case and secondly, the relevance of the case to the requirement of “employer-employee relationship”.

The facts of the case are as follows: a crew was hired to provide technical skills that R did not possess. The crew brought their own equipment and used it without any direction from R and its employer subsequently invoiced R and received payment from R.\footnote{At 2026F-2028I.} The High Court had the task of establishing whether there was vicarious liability of a company (R) for a delict committed by the technical crew hired by R to
assist during a film shoot. The Court relied on the dominant impression test to conclude that the technical crew was not an employee of R.

3.5.1.3 THE EMPLOYEE HAS TO COMMIT A DELICT

For the employer to be held liable for vicarious liability the elements of delict have to be proven. The employer’s liability for the conduct of an employee to a third party will arise if the employee’s conduct satisfies the requirements for a delict. There must therefore be an act or omission on the part of the employee, which was wrongful, which caused the damage or personal injury to the third person, and which was committed “intentionally or negligently.” These elements are necessary in order to establish a delict. The employer may generally raise any defence which is available to the employee. The exception to this pertains to the defences that are not related to the quality of the deed itself or fault in respect thereof but that vest the employee with personal immunity.

3.5.2 THE EMPLOYEE HAS TO ACT WITHIN THE COURSE AND SCOPE OF EMPLOYMENT WHEN COMMITTING THE DELICT

The employee has to act within the scope of his employment when committing the delict. The relevant cases to be discussed which pertain to this requirement and the test for the requirement include Minister of Police v Rabie; K v Minister of Safety and Security; Costa da Oura Restaurant (Pty) Ltd v Reddy; Bezuidenhout NO v Eskom and finally, Grobler v Naspers.

There is no general rule for establishing the liability of an employer that can be applied to all South African cases involving vicarious liability. Broadly speaking, employees are acting in the scope of their employment when they carry out tasks authorised by the employer, even if they carry out the tasks by an unauthorized method. It is accepted that there are three phrases that reflect the requirement in

335 De Welzin v Regering van Kwazulu 1990 2 SA 915 (N).
general terms: the delict must have been committed in the course/scope of the employment, in the exercise of the functions to which he is appointed, or in the duty or employment set to the employee. Gule concurs with the thought that “an aggrieved employee” would be unlikely to prove this, as there is no employee who can be said to be acting within the course and scope of his or her employment when he or she sexually harasses co-employees. The implication of this dictum was that an employer could never be held vicariously liable for the “intentional wrongdoing (frolic of his own)” of an employee since such conduct would be regarded as being outside the scope of employment. The question whether the act falls within or outside the scope of employment has been described as a question of law, but it has also been said that each case will depend on its own facts. However, Watermeyer J in Feldman v Mall admitted that “the dividing line which separates acts within the scope of a servant’s employment from those without is one impossible to draw with certainty.”

3.5.2.1 MINISTER OF POLICE v RABIE

In order to hold a person vicariously liable it is necessary to test whether they meet the requirements for such a test. The test for vicarious liability was formulated in Minister of Police v Rabie as follows:

“It seems clear that an act done by a servant solely for his own interests and purposes, although occasioned by his employment, may fall outside the course or scope of his employment, and that in deciding whether an act of a servant does so fall, some reference is to be made to the servant’s intention. The test in this regard is subjective. On the other hand, if there is nevertheless a sufficiently close link between the servant’s act for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test. And it may be useful to add that “a master is liable even for acts which he has not authorised provided that they are so closely connected with acts which he has authorised that they may be rightly regarded as modes – although improper modes of doing them.”

338 Mkhize v Martens 1914 (AD) 382 389-393.
342 Feldman v Mall supra.
344 Minister of Police v Rabie 1986 1 SA 117 (A).
The subjective element of the test looks at whether the employee exclusively promoted his own interests and if this is indeed the case, the conduct could fall outside the scope of employment. A further objective test has, however, also been undertaken. This test looks at whether, despite the fact that the employee was satisfying his own interests, there was not a “sufficiently close link” between the employee’s own interests and the business of the employer. If there is such a link, the employer may be held vicariously liable.

In *Minister of Police v Rabie* a sergeant, employed by the South African Police Force as a mechanic, wrongfully assaulted and arrested someone against whom he had a personal grudge. The employee was off duty at the relevant time, but he identified himself as a policeman when he arrested the person. The appellate division held the Minister of Police vicariously liable on the basis that the acts of the policeman fell within the risk created by the state. Jansen JA relied on the dictum in *Feldman v Mall*:

“[A] master who does his work by the hand of the 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 that 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”

The court in *Rabie* contended that, even though the sergeant’s work as a mechanic was limited to a time and place, his work as a policeman – which included questioning, arresting, escorting to a police station, and charging a suspect – was not so restricted. In the absence of specific instructions to the contrary, the sergeant could at any time and place perform his functions as a policeman, and it is conceivable that in some instances he might have been called upon to do so in the line of duty. According to the facts, the sergeant had identified himself as a policeman to Rabie when he arrested him, and in the circumstances it seemed reasonable and fair to infer that the sergeant had intended to exercise his authority as a policeman, and was, therefore, acting in the course and scope of

347 *Feldman Pty v Mall* 1945 (AD) 733 741.
349 *Minister of Police v Rabie* 1986 1 SA 117 (A) 133 D-E.
It was put forward that the conduct of the sergeant was completely self-serving and in bad faith. In addition, the sergeant had not been performing any of the functions set out in the Police Act 7 of 1958. Despite such evidence, vicarious liability was imputed on the employer on the basis that “there was a sufficiently close link between the servant’s conduct for his own interests and purposes and the business of his master.”

From the above case it is observed that an employer may not escape liability if the employee acted solely for his own interests and purposes in a situation occasioned by his or her employment. In addition, an employer is liable for acts that he/she did not authorise, provided that these acts are connected to acts that he/she did authorise.

The standard test for vicarious liability has been applied in *K v Minister of Safety and Security*.

### 3.5.2.2 *K v MINISTER OF SAFETY AND SECURITY*

Firstly, the pertinent facts of *K v Minister of Safety and Security* shall be outlined followed by a discussion of its applicability to the requirement in question.

The requirement of scope of employment regarding vicarious liability of the employer was subsequently discussed in this case. The court made reference to this requirement. The facts of the case are as follows: The plaintiff sought damages from the Minister of Safety and Security because she had been raped by three policemen who had given her a lift home in a police vehicle and whilst they were in uniform. The Supreme Court of Appeal Scott JA identified this to be “a deviation case” and stated the following:

“Whether the deviation was of such a degree that it can be said that in doing what he or she did the employee was still exercising the functions to which he or

---

350 At 133G-H.
351 At 133-4.
352 At 134C-E.
354 *K v Minister of Safety and Security* 2005 6 SA 41( CC)
she was appointed or authorised to do or still carrying out some instruction of his or her employer."

He further averred that the court failed to establish a sufficiently close link between the deviant acts of the policeman in pursuit of their own selfish interests and the business of the Minister. This sort of reasoning was based on the notion that deviant conduct of the policemen was solely self-serving and was not authorised by the Minister, even though the wrongful acts were committed whilst working for the Minister.

The Constitutional Court as per O’Regan J submitted that the business of the Minister of Police creates a “foreseeable risk that people would trust policemen”, especially those on duty in uniform, and who are in police vehicle offering assistance to a member of the public. The harm must be foreseeable and there must have been a close connection between the acts of the employee and the risk created by the business of the employer, or the instruction given by the employer in furtherance of the business interests. O’Regan J acknowledged the presence of such a close connection.\(^\text{356}\) When the policemen raped the victim they were on duty, patrolling the area to protect the public from the very act which they had committed. O’Regan pointed out that the courts should not hide beneath semantic discussions of the meanings of “the course and scope” and “mode of conduct” requirements, when imposing vicarious liability. On the contrary, they should rather interpret these principles with the spirit and objects of the Constitution in mind.\(^\text{356}\) This means that courts must consider “the importance of the constitutional role entrusted to the police and the importance of nurturing the confidence and trust of the community in the police, in order to ensure that their role is successfully performed”.\(^\text{357}\)

3.5.2.3 COSTA DA OURA RESTAURANT (PTY) LTD v REDDY\(^\text{358}\)

The following case sheds more light on the application of “scope of employment” requirement. The court in Costa da Oura Restaurant (Pty) Ltd v Reddy was called upon to determine whether the acts committed by the barman were in the course of

\(^{355}\)At para 52.

\(^{356}\)At para 52.

\(^{357}\)At para 52.

\(^{358}\)Costa da Oura (Pty) Ltd t/a Umdloti Bush Tarven v Reddy 2003 4 SA 34 (SCA).
employment in order to establish whether the liability can be imputed on the employer. The facts of the case are as follows: a barman assaulted a patron outside the bar. The assault resulted from the remarks made by Reddy (the patron) about the barman’s (Goldie) efficiency. Reddy afterwards tipped another barman excessively in front of Goldie. Goldie was provoked and followed Reddy when he left the restaurant. He attacked Reddy outside the restaurant. Reddy claimed damages from the restaurant on the grounds of vicarious liability. The court a quo observed that:

“It was not a grudge which Goldie harboured against the plaintiff independently of his work situation. It was a grudge which arose directly out of his work situation. The digression or deviation, if any from what Goldie was employed to do, and what he in fact did was so close in terms of space and time that it can reasonably be held that he was still acting within the course and scope of his employment.”

The Supreme Court of Appeal argued that the restaurant was not vicariously liable on the basis that the assault occurred after the barman had abandoned his duties. The court further averred that:

“It was a personal act of aggression done neither in furtherance of his employer’s interests, nor under his express or implied authority, not as an incident to or in consequence of anything Goldie was employed to do. The reasons for and the circumstances leading to up to the assault may have arisen from the fact that Goldie was employed by the restaurant as a barman, but personal vindictiveness leading to the assaults on patrons does not render the employer liable.”

Le Roux360 recognises the “dual capacity” approach which entails giving recognition to the reality that can serve a dual purpose and be both within and outside scope of employment.

3.5.2.4 BEZUIDEHOUT NO v ESKOM361

Another case which attempts to shed light on the requirement of “scope of employment” is Bezudeinhout NO v Eskom.

359 At 41H.
In *Bezudeinhout NO v Eskom*, Oelofse, an Eskom employee, offered Louis Roux a lift in an Eskom bakkie, despite an express prohibition on giving lifts to members of the public. On their way they were involved in an accident and taken to hospital. Roux suffered severe injuries, and for these his *curator ad litem* (Bezuidenhout) sued Eskom in delict for R2483 307,30 for damages on his behalf. It was argued that Roux was a passenger in the vehicle at the time of the incident and that Oelofse was negligent. The approach employed in determining vicarious liability in this case was that of “dual capacity” which attempts to give recognition to the reality that the “same deed can serve a dual purpose and be both within and outside the scope of employment”. This approach was employed in *Union Government v Hawkins*, where it was observed that the mere fact that an employee whose function is to drive a vehicle and who has been ordered to drive to a given destination disobey his employer’s instructions by deviating from his prescribed route, and that if a collision occurs during this deviation because the employee is negligent, this does not in itself excuse the employer from liability. The employee may still be engaged in the business of his employer whose instructions for the conduct of that business he has disobeyed. This means that even when an employee makes a deviation solely for his own purposes, the employer may remain liable for any negligence committed by the employee while he is on the deviation.

### 3.5.2.5 GROBLER v NASPERS

The case of *Grobler v Naspers* is very important in that, it critically analyses and redefines the concept of vicarious liability on the basis of policy considerations and the Constitution.

The underlying policy of the doctrine of vicarious liability as well as the test for employer liability has recently been re-examined in the context of the vicarious liability of an employer for the sexual harassment of its employee by a supervisor. The challenge faced by the court in this case was that, in the past, courts did not

---

362 Le Roux *supra*.
363 *Union Government v Hawkins* 1944 556 (AD).
provide guidelines on vicarious liability, on the premise that sexual harassment would always be against the employer’s instructions and could not be described as being done in furtherance of the employer’s business and therefore not within the scope of the employee’s appointment.\footnote{Calitz (2005) \textit{TSAR} 224.}

The facts of \textit{Grobler v Naspers} can be summarized as follows: The victim (Grobler) and the harasser (Samuels) had a very close working relationship and worked within the same group of companies, they were also employed by different entities – the victim by Naspers Tydskrifte and the harasser by Naspers Ltd.\footnote{At 443C-D.}

The High Court stated that Grobler had, on a balance of probabilities, proved that Samuels had sexually harassed her.\footnote{At 465G.} The court also observed that Samuels has harassed other employees besides Grobler and that the latter had suffered at least five serious incidents of sexual harassment, one of which occurred away from work.\footnote{At 451E.} The incidents included “fondling of her breasts,\footnote{At 452C.} stolen kisses,\footnote{At 451G and 452 C.} smacking her on the bottom,\footnote{At 453A.} making indecent comments of a sexual nature and calling her names such as Blondie”.\footnote{At 451B-D.} Samuels was also described to be the blue-eyed boy of his manager and this was identified as one of the reasons why the superiors to whom Grobler complained, resisted taking action.\footnote{At 466A.} In addition, Samuels threatened to disclose the fact that Grobler’s husband had a criminal record should she take action.\footnote{At 451J.} The final incident which resulted in Naspers convening a disciplinary hearing, and subsequent dismissal of Samuels, occurred away from work involving “more indecent proposals and pointing a revolver at Grobler”.\footnote{453 C-454C.} Grobler collapsed a week after the disciplinary enquiry and was unable to work since then.

For the employer to be held vicariously liable, the requirement that the offender was actually employed by the employer and committed a delict while acting within the
course and scope of her employment must be met.\textsuperscript{377} It was held that in order to escape liability employers must try to show that, although employed by them, the offender was on a "frolic of his own" at the time he or she committed the delict.\textsuperscript{378} Moreover, this was held to be simply too easy for employers to obtain refuge in the defence of "frolic of their own" or "not within the course and scope of employment" especially when this "frolic" has been as widely defined and "course and scope" has been as narrowly defined as they are in the ratio decidendi of older judgments.\textsuperscript{379} This approach was not followed in \textit{Naspers Case} on the grounds that it "does not recognise the wide occurrence of sexual harassment in the workplace and its far-reaching emotional and psychological consequences".\textsuperscript{380} In addition, it was contended by Nel J in \textit{Grobler v Naspers} that nobody would actually be employed to perform their duties by means of sexual harassment and that such deeds by an employee – even at the workplace – would ordinarily be regarded as "a frolic of his own", thus providing the employer with an almost perfect defence.\textsuperscript{381} To counter this Nel J submitted that, the extent of vicarious liability for sexual harassment against women in the workplace and children in the context of schools, clubs and churches has been broadened in foreign jurisdictions.\textsuperscript{382} He further argued that a case of vicarious liability for sexual harassment is seldom resolved by reference to previous court decisions for the reason that many decisions are based "on stereotyped expressions and generalisations of limited value from which no legal approach can be distilled".\textsuperscript{383}

The justification for the extension of vicarious liability was based on the reasoning that vicarious liability, as in South Africa, "is not a rigid legal principle, but a fluid concept, founded in policy considerations that have the objective of effective compensation and deterrence of future harm, and flexible enough to take account of

\textsuperscript{378} \textit{Feldman (Pty) Ltd v Mall} 1945 733 at 736 and 743 (AD).
\textsuperscript{380} At 494D.
\textsuperscript{381} At 495B-C.
\textsuperscript{382} At 494F-J.
\textsuperscript{383} Calitz "Vicarious Liability of Employers: Reconsidering Risk as the Basis for Liability" (2005) \textit{TSAR} 224.
changing social and economic circumstances as well as the changing nature of employment”.384

In a bid to establish whether vicarious liability ought to be extended in the case of sexual harassment Nel J considered, viz the “supervisor” and “risk of enterprise” tests. The former test entails that the employer would be vicariously liable “if the harasser occupied a position of authority vis-à-vis the victim”.385 According to this approach “vicarious liability would always follow if the harassment resulted in a, detrimental employment action such as the failure to promote, dismissal, and change in conditions of employment”, etc. Where no such detrimental action is associated with the harassment, the employer may escape liability by showing that he/she took reasonable care to prevent sexual harassment and that all forms of harassment were immediately remedied or that the victim unreasonably omitted to follow sexual harassment procedures.386

The “enterprise risk” test requires that there be a significant connection between the creation and enhancement of a risk and the wrong that accrues there-from, even if unrelated to the employer’s desires.387 In light of the above tests, Nel J observed that the relationship between Grobler and Samuels carried the inherent risk of sexual harassment:388 as the secretary/manager relationship is not only a relationship between a superior and a subordinate, but it is normally a very close relationship, in terms of time spent together, duties and physical proximity.389 The essential question when determining liability would be whether, in fairness, the employer could be said to have assumed the specific risk that materialised. This test has, however, been criticised for, firstly, “denying that sexual harassment also occurs, albeit less frequently, in situations that are apparently risky”, and secondly, it is inadequate in its explanation of the employer’s vicarious liability.390

384 At 494F – H and 512J – 513B.
385 At 500H.
386 At 495G-I.
387 At 503I-J.
388 At 513C-I.
It is submitted that the risk enterprise test, which was used in *Minister of Police v Rabie*, \(^391\) was finally rejected in *Minister of Law & Order v Ngcobo*. \(^392\) Le Roux \(^393\) is of the viewpoint that the change of the standard test has resulted in judgments in vicarious liability having to be imputed on employers for the sexual harassment of their employees by their employees, even where the acts of the wrongdoers could almost certainly be described as “frolics” of their own and were expressly forbidden by the employer.

The court concluded that South African law on vicarious liability – vested in policy considerations – is broad enough to hold Naspers vicariously liable in the circumstances. \(^394\) These policy considerations take into account factors such as “the risk of harm to others, fairness and the maintenance of good practice standards by employees, along with financial considerations as rationales for holding an employer vicariously liable.” \(^395\) Nel J in *Grobler v Naspers* refuted the former view and submitted that the High Court had, in terms of s 173 of the Constitution, “inherent power to develop the common law”, which development must, in terms of s39(2) of the Constitution “promote the spirit, purport and object of the Bill of Rights”. \(^396\) The court thereafter concluded that even if policy considerations did not justify holding Naspers vicariously liable, the constitutional duty to “protect the right to dignity and the right to freedom and security”, required that the rules regarding vicarious liability be extended to uphold these rights in the workplace. \(^397\)

Naspers was subsequently found liable and was ordered to pay Grobler R150 000 as general damages, R23 128 in respect of medical expenses, a further R47 348 for past loss of earnings and an amount for future loss of earnings and future medical expenses, subsequently calculated to be R556 338. \(^398\)

\(^{391}\) *Minister of Police v Rabie* 1986 1 SA 117 (A).

\(^{392}\) *Minister of Law & Order v Ngcobo* 1992 (4) SA 822 (A).


\(^{395}\) Loots “Sexual Harassment And Vicarious Liability: A Warning to Political Parties” (2008) *Stell LR* 143 146.

\(^{396}\) At 514C –F.

\(^{397}\) At 514H.

The concept of “course and scope of employment” must be viewed broadly and that the employee’s tasks should not be “dissected into its component activities,” but it could be that there is overemphasis on what the employee is engaged to do and the realities of employment are ignored. Furthermore, employment is regarded as a social activity which goes beyond the mere performance of an employee’s tasks and which also is not performed in isolation. It is imbued with relationships (with colleagues and third parties such as independent contractors, clients, learners, patients) that extend beyond the principal parties to the contract of employment. It is further observed that these relationships arise out of employment and are not merely coincidental to employment. Employees are therefore expected to conduct these relationships within the boundaries of certain norms and exceeding these boundaries would be equivalent to harm caused by negligent driving and an employee causing harm by sexual harassment. Put differently, the test for vicarious liability should not be reduced to the “simple requirement that the wrongful act be committed by an employee” or to an enquiry whether, but for employment, the wrongful act would not have occurred. Le Roux argues that employment relationships have “spatial limits” which will be determined by the courts on a case by case basis. These limits were mentioned by Griesel J in Isaacs v Centre Guards t/a Town Centre Security concerning the vicarious liability for acts forbidden by employers:

“In answering the question in the context of forbidden acts, an important distinction is drawn between a prohibition which limits the sphere of employment, on the one hand, and one which deals with conduct within the sphere of employment, on the other. Ngubetole v Administrator Cape & another 1975 (3) SA 1(A) at 10E and authorities referred to therein. The general rule is that an employee who disregards a prohibition which limits the sphere of his employment is not acting in the course of his employment, but an employee who disregards a prohibition which only deals with his conduct within the sphere of his employment is not acting outside the course of his employment.”

---

399 Bezuidenhout NO v Eskom (2003) 24 ILJ (SCA) 1093E-G.
400 At 1093E-H.
402 At 1904.
403 At 1904.
406 At 673D-F.
3.6 CONCLUSION ON COMMON LAW - VICARIOUS LIABILITY

Having examined different cases and the application of the concept of vicarious liability the author is of the view that the development of common development of the common law vicarious liability in Grobler v Naspers is welcome as it affords more protection to the vulnerable employee who in most instances is held liable when acting within the course of employment. On the other hand employers ought to beware of employees who may abuse this vicarious liability to obtain insurance from their employers even in circumstances were employees were pursuing personal ambitions.

From the foregoing it is submitted that the employer will find it difficult to escape liability in sexual harassment cases. On the other hand, the “potential breadth of possible liability ought not to detract from its existence where it is just and reasonable that it should apply”. For instance, an employer will be held vicariously liable for the harm the negligent driver under his employ despite the fact that the former has educated and trained the driver. Similarly, if the employer conducts sexual harassment awareness programmes and adopts appropriate sexual harassment policies and grievance procedures and an employee, despite this, sexually harasses another, the employer ought to be vicariously liable. This approach, while appearing unfair, serves the policy considerations underpinning vicarious liability and is consistent with the constitutional duties alluded to by Nel J in Grobler v Naspers.

3.7 CONCLUSION

In conclusion, treatise has covered the definition of sexual harassment as recorded in legislation and from courts’ interpretation of cases as well as from academic authors. Furthermore, the circumstances in which an employer can be vicariously liable under statute was explored with reference to firstly, the Constitution and secondly, the Employment Equity Act and the manner these statutes seek to protect employees’ rights against sexual harassment and when liability will be imputed on employers. In

---

408 At 1905.
addition, measures that the employer can take to prevent harassment and consequently escape vicarious liability was looked into. Finally, the treatise discussed the direct liability and vicarious liability of the employer under the common law.

To summarise, definitions on what amounts to sexual harassment were provided. One accepted definition is provided in the Code of Good Practice\textsuperscript{409} which states that “sexual harassment is unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equality in the workplace”. The Employment Equity Act\textsuperscript{410} also provides for the definition of sexual harassment and states that sexual harassment is a “form of discrimination”.

Both statutes and common law provide remedies for the employee who has been harassed in the workplace.\textsuperscript{411} Employees who suffer work-related harassment by fellow employees in circumstances in which the employer does not protect them, can neither institute action against their employer on the basis of vicarious liability, nor in terms of section 60 of the Employment Equity Act (EEA).\textsuperscript{412}

Where harassment has been established, remedy can be sought in terms of common law either directly or vicariously. These are alternative remedies to the employee who has no recourse in terms of statutory provisions. In direct liability, the elements of a delict have to be proven before the employer can be held liable. The main element is that of wrongfulness in the form of “an act or an omission”. In the case of vicarious liability, the employee has to prove all the elements of vicarious liability for liability to be imputed on the employer. Vicarious liability has been defined as “a form of strict liability that arises under the common law where the superior remains liable for the actions (omissions) of their subordinate, or, in a broader sense, the responsibility of any third party that had the ‘right, ability or duty to control’ the actions of such subordinate, which actions lead to damage”.\textsuperscript{413} The requirements for

\textsuperscript{409} Code of Good Practice on Handling of Sexual Harassment Cases at Work of 2005.
\textsuperscript{410} S 6 of the Employment Equity Act 55 of 1998.
\textsuperscript{411} Mukheibir & Ristow (2006) \textit{Obiter} 246.
\textsuperscript{412} 55 of 1998.
vicarious liability have to be met before liability will be imputed. The contentious requirement is that of “course and scope of employment”.414

To conclude, the author observed that sexual harassment continues to affect every employee and employer on a daily basis. This problem has serious negative consequences for the employee more than for the employer. This is so for a number of reasons, namely: the employees lose their jobs which is their source of income and means of survival, continued employment is made virtually impossible in most instances, the employee frequently incurs unbudgeted medical costs, could incur psychological disorders caused by the harassment. As a result, the reputation, dignity and privacy of the employee are infringed.

On the other hand, the employer is more often concerned with preserving the financial gains and reputation of the business. Therefore, the employer will at any cost attempt to distance himself from the delict and crimes committed by the employee. It is the author’s submission that the different imbalance of interests of the employer and employee may be taken as a clear indication of the reluctance of employers to stamp out effectively or remedy the problem of sexual harassment, as this has a potential of adversely affecting the name of the employer and subsequently the profits of the company.

Reluctance by the employer to acknowledge the seriousness of sexual harassment has prompted the legislature to intervene by implementing legislation which recognises the rights of employees. These rights are enshrined in the Constitution:415 Where “the right to dignity, the right to privacy, the right to equality” section is a welcome development and relief for employees in that they can institute action against their employer in the event of harassment. It also affords employers the opportunity to address harassment by setting up grievance procedures. It is the writer’s proposition that the legislature and the employers should enact measures that are preventative more than curative. Sexual harassment should be totally eliminated in the workplace, however, where such harassment has occurred curative measures can be resorted to as a second solution to prevention. In other words, pro-

415 108 of 1996.
active measures are more effective and permanent; whereas reactive measures are temporary short lived and meant to redress the current situation.

Sexual harassment is a significant barrier to the enjoyment of equality, especially for women, as it is a form of discrimination which violates the principle of equal treatment. The court in Grobler v Naspers was prepared to develop assertively the common law in order to assist the victim, whereas in the case of Ntsabo the Labour Court was confined to an order it deemed reasonable with regard to the provisions of the Employment Equity Act. Employers have the prerogative of protecting employees by creating a safe working environment. Where such an environment is hostile because of harassment, the employer should be held liable, in terms of the Constitution and in terms of the Employment Equity Act.

---

417 Grobler v Naspers Bpk en ‘n ander 2004 (4) SA 220 (C).
418 Smit & Van der Nest “When Sisters are Doing it for Themselves: Sexual Harassment Claims in the Workplace” (2004) TSAR 520 542.
419 108 of 1996.
BIBLIOGRAPHY

BOOKS

A
Ayitah “Vicarious Liability in the Law of Torts” (1967) 175

B
Burchell “Principles of Delict” (1993) 10

C

D
Daekin et al “Markesins and Daekin’s Tort Law” (2003) 583
Dupper et al “Essential Employment Discrimination Law” 2004 36

H
Hart “Law, Liberty and Morality” (1963)

L

M
Meer “Black Women-Workers” (1991) at 37-8

N
Nieva & Gutek “Women and Work; A Psychological Perspective” (1981) 63

R
Ryder “Devising a Sexual Harassment Policy” (1998) People Dynamics 27

V
Van der Walt & Midgely Delict: Principles and Cases (1997) 54ff
JOURNALS

B
Basson “Sexual Harassment in the Workplace: An Overview of Developments” (2007) 3 Stell LR 445

Brand “Reflections on Wrongfulness in the Law of Delict” (2006) SALJ 76 77

Brassey “The Nature of Employment” (1990) 11 ILJ 889

C
Calitz “Vicarious Liability of Employers: Reconsidering Risk as the Basis for Liability” (2005) 3 TSAR 216, 226

Calitz “The Liability of Employers For The Harassment of Employees By Non-Employees” (2009) 3 Stell LR 407 421

Cooper, C “Harassment on the Basis of Sex and Gender: A Form of Unfair Discrimination” (2002) 23 ILJ 1

D


G
Garbers “Sexual Harassment as Sex Discrimination: Different Approaches, Persistent Problems” (2002) 14 SA Merc LJ 371 398


H


L
Lawlor “Vicarious and Direct Liability of an Employer for Sexual Harassment” 39


Loots “Sexual Harassment and Vicarious Liability: A Warning to Political Parties” (2008) 1 *Stell LR* 143 146

M
Manamela “Employee and Independent Contractor: The Distinction Stands” (2002) 14 *SA Merc LJ* 107


Mowatt “Sexual Harassment - New Remedy for an Old Wrong” (1986) 7 Part 4 *ILJ* 652

Mowatt “Sexual Harassment-Old Remedies for a New Wrong” (1987) *ILJ* 439


Mukheibir “The Impact of the Constitutional Imperative of the State to Avoid Harm on Delictual Liability for an Omission” (2003) *Obiter* 498 503

N
Neethling “Delictual Protection of the Right to Bodily Integrity and Security of the Person Against Omissions by the State” (2008) *SALJ* 572 579

Nieva & Gutek “*Women and Work; A Psychological Perspective*” (1981) 63

O
Olivier “Delictual Liability of the South African Revenue Service” (2009) 4 *TSAR* 740 741

P

S

V
Venter “Liability for Sexual Harassment” (2000) September *WP* 50 51


# TABLE OF CASES

**B**

Bezuidenhout NO v Eskom (2003) 24 ILJ 1084 (SCA)

**C**

Costa da Oura Restaurant (Pty) Ltd t/a Umdloti Bush Tarven v Reddy 2003 4 SA 34 (SCA)

*Carmichelle v Minister of Safety and Security (Centre for Legal Studies Intervening)*

2001 10 BCLR 995 (CC)

*Crown Chickens (Pty) Ltd t/a Rockland Poultry v Kapp and others* [2002] BLLR 493 (LAC)

**F**

Fedlife Assurance Ltd v Wolfaardt 2002 1 SA 49 (SCA)

Feldman Pty Ltd v Mall 1945 AD 733

**G**

Grobler v Naspers Bpk en ‘n ander 2004 (4) SA 220 (C)

**H**

Halliwel v Johannesburg Municipal Council 1912 AD 659

*Harksen v Lane* 1998 1 SA 300 (CC)

*Hoffman v South African Airways* 2001 1 SA 1 (CC)

**I**

*Isaacs v Centre Guards t/a Town Centre Security* (2004) 25 ILJ 667 (C)

**J**

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

**K**

*K v Minster of Safety and Security* 2005 6 SA 41 (CC)

*Kruger v Coetzee* 1966 2 SA 428 (A)

**M**

Media24 v Grobler 2005 6 SA 328 (SCA)

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

*Minister of Law and Order v Nqcobo* 1992 4 SA 822 (A)

*Minister of Law and Order v Kadir* 1995 1 SA 303 (A)
Minister of Police v Rabie 1986 1 SA 117 (A)

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

Minister of Safety and Security v Van Duivenboden 2002 6 SA 431 (SCA)

Mkhize v Matens 1914 AD 382

Mokoena v Garden Art (Pty) Ltd [2008] BLLR 428 (LC)

Moropane v Gilbey’s Distillers and Vinters (Pty) [1997] 10 BLLR 1220 (LC)

N
Ntsabo v Real Security CC (2003) 24 ILJ 2341 (LC)

P
President of the Republic of South Africa v Hugo 1997 1 SACR 567 (CC)

R
Reddy v University of Natal (1998) 19 ILJ 49 (LAC)

S
SATTAWU obo of Finca v Old Mutual Life Insurance Limited and Burger [2006] 8 BLLR 737 (LC)

Silva’s Fishing Corporation v Maweza 1957 2 SA 256 (A)

Stein v Rising Tide Productions (2002) 23 ILJ 2017 (C)

U
Union Government v Hawkins 1944 556 (AD)

V
Van Deventer v Workman’s Compensation Commissioner 1962 (4) SA 28 (T)

Vigario v Afrox Ltd 1996 3 SA 450 (W)
TABLE OF LEGISLATION

The 2005 Code on Good Practice for the Handling of Sexual Harassment Cases
The Employment Equity Act 55 of 1998
The Interim Constitution of 1993
The Labour Relations Act 66 of 1995
The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000