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Elisabeth Snyman-Van Deventer & Jaco de Bruin

Sexual harassment in South African and American law

Sexual harassment in the workplace is a grave problem and a significant obstacle to access to many sectors of the labour market. The number of sexual harassment complaints increases dramatically every year, although researchers estimate that 80 to 90% of such cases go unreported. Despite the high figures, few South African court cases and little of the legal literature deals with sexual harassment. The reason for this is that few victims of harassment report it for fear of losing their jobs or being ridiculed. Sexual harassment is an infringement upon a person's personality and thus an *iniurandi*. Negligence never suffices to prove liability. The South African Constitution determines that no-one shall be discriminated against and this provision includes a person's right to work without harassment or discrimination. It is therefore essential that all employers ensure all employees of a safe environment without discrimination. Employers must adopt a policy on sexual harassment, communicate it to all employees and ensure that it is adhered to. If harassment does take place, the procedure and disciplinary process prescribed in the policy must be enforced.

Seksuele teistering in die Suid-Afrikaanse en Amerikaanse reg

Seksuele teistering in die werkplek is 'n ernstige probleem en 'n wesenlike belemmering vir die toeganklikheid van die werksplek. Die aantal klagtes rakende seksuele teistering neem jaarliks drasties toe. Navorsers beraam dat 80 tot 90% van gevalle egter nie gerapporteer word nie. Ten spyte van die groot aantal gevalle word daar relatief min aandag in die literatuur en howe aan seksuele teistering gegee. Die rede is dat min mense wat geteister is die saak aanhangig maak, uit vrees dat hulle hul werk kan verloor of bespot kan word. Seksuele teistering is 'n skending van die persoonlikheidsregte van die individu en dus *iniurandi*. Die Suid-Afrikaanse Grondwet bepaal dat daar nie gediskrimineer mag word teen enige persoon nie, wat 'n persoon se reg om sonder teistering te werk insluit. Dit is derhalwe noodsaaklik dat werkgewers 'n veilige werksomgewing sonder diskriminasie vir alle werknemers verseker. Gevolglik behoort werkgewers 'n beleid rakende seksuele teistering daar te stel en sorg te dra dat dit aan werknemers gekommunikeer word. Indien seksuele teistering wel plaasvind, moet die prosedure en dissiplinêre proses soos uiteengesit in die beleid gevolg word.

Prof E Snyman-Van Deventer, Centre for Business Law, Adv J H de Bruin, Dept of Roman Law, Legal History and Comparative Law, University of the Free State, P O Box 339, Bloemfontein 9300; E-mail: snymane@rd.uovs.ac.za & debruinj@rs.uovs.ac.za

Sexual harassment in the workplace is a grave problem and a significant obstacle to women's entrance into many sectors of the waged labour market. The number of sexual harassment complaints filed annually with the Equal Employment Opportunity Commission (EEOC) more than doubled in the six years up to 1998 (Franke 1998: 1245). It increased from 75 complaints in 1980 to 7 495 in 1991 (Brama 1999: 1486 n 27). From 1985 to 1990 the number of complaints filed with the EEOC in the USA rose from 4 953 to 5 557. Since 1989 the figure increased by 112% each year. Yet researchers estimate that 80 to 90% of sexual harassment cases go unreported. It is also estimated that at any given time at least 15% of working women have been harassed during the year and that 40 to 60% of all working American women suffer harassment at some point in their careers. Even worse is the fact that only 21% of women feel that justice is done in harassment cases (Eisaguirre 1997: 4). That this is not only an American problem as proved by the estimate that 30% of the female workforce in the EU has been harassed (Barratt 1998: 330).

The South African picture looks just as frightening. According to Nel (1993: 244; Dancaster 1991: 449), 76% of all women are exposed to sexual harassment at some time during their careers or professional lives. It is stated in *J v M Ltd* (1989 ILJ 755:757H) that 63% of women in Johannesburg are exposed to sexual harassment. Despite the high figures, few South African court cases and little of the legal literature deals with sexual harassment. The reason for this is that few victims report a case for fear of losing their jobs or being ridiculed. However, it is generally accepted that sexual harassment is a form of discrimination that creates an unfair labour practice (Louw 1990: 180-2; Dancaster 1991: 450).

The traditional view is that men are usually the harassers and women are the victims; the reality is that there has been a move away from the traditional work situation in which men are breadwinners and women homemakers. Today, women fill the same posts and positions as men and a woman can thus also be a harasser (*Goluszek v Smith* 697 F Supp 1452 (ND Ill 1988); *Polly v Houston Lighting & Power Co* 825 F Supp 135 (SD Tex 1993)). Yet, sexual harassment is still generally directed against women. It can also take place between members of the same sex (*Oncale v Sundowner Offshore Services Inc* 118

S Ct 201 (1998); *J v M Ltd* 1989 10 ILJ 755-757l; see also Louw 1990: 185; Dancaster 1991: 449, 459).

The USA leads the field in terms of the law relating to sexual harassment. The stage of legal development in the USA and the cases of sexual harassment, as well as the large amount of literature available, serves as a guideline and comparative system for South African law. It is therefore useful to give an exposition of the situation in the USA before looking at the South African law on sexual harassment.

1. United States of America

1.1 Defining sexual harassment

The EEOC defines sexual harassment as follows:

> Harassment on the basis of sex is a violation of [the law]. Unwelcome sexual advances, requests for sexual favours, and other verbal or physical conduct of a sexual nature constitute sexual harassment when:
>
> 1. Submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment,
>
> 2. Submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such an individual, or
>
> 3. Such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.[1]

It is suggested that in defining sexual harassment, especially in codes of conduct or other guidelines, three basic principles pertain. All guidelines must:

- acknowledge that sexual harassment is gender discrimination and not isolated misconduct;
- include as sexual harassment all actions ranging from subtle innuendo to assault;
- recognise that sexual harassment may involve sexual advances by a person in a position of authority (29 Code of Federal Regulations 1604.11(a); Eisaguirre 1997: 83).

1 Based on the guidelines of the Women Organized Against Sexual Harassment (WOASH) at the University of California at Berkeley, quoted in Labuschagne 2000: 128 n 85.

It is no defence to a complaint of sexual harassment that a person of the opposite gender would have been treated in the same way. The US Supreme Court has stressed that it is irrelevant whether the parties concerned are heterosexual or homosexual and that a harasser must act because of the victim's gender (*Oncale v Sundowner Offshore Services Inc* 118 S Ct 201 (1998) 207; Bible 1999: 117).

Harassment is, according to Brama (1999: 1484), a subset and extension of the original protection against discrimination provided by Title VII. Harassment includes, for instance, unwanted sexual pestering (a hostile work environment) and threats to fire an employee or deny him/her promotion unless he/she responds to sexual advances (*quid pro quo*). It does not matter in the case of *quid pro quo* whether the person threatening the employee acted on the threat or not. *Quid pro quo* is a unique form of gender discrimination resulting in tangible job detriment. By definition, the supervisor uses his/her power over the employee to demand a sexual favour (Brama 1999: 1486). In other words, *quid pro quo* harassment occurs when a supervisor or employer threatens to inflict a work-related disadvantage on an employee if he/she fails to respond positively or invitingly to sexual advances. This means that the employee is threatened, for instance, with failure to hire, demotion, termination, unfavourable transfer, a decrease in responsibilities or some other negative impact (Brama 1999: 1487). Davis (1998: B10) explains this type of harassment as follows:

> The classic example of *quid pro quo* harassment is the threat, uttered by someone with actual or apparent authority, of 'sleep with me or you're fired'.

However, the threat must thus be more serious than a mere inconvenience, if it is to be actionable. Such threats are known as tangible job detriments. The employee must prove either a tangible job detriment or a non-tangible job detriment that negatively affects the terms and conditions of his/her employment (Brama 1999: 1487).

A hostile work environment claim does not involve a tangible job detriment. In this type of harassment, the employee is badgered with unwanted attention from a co-worker or supervisor in such a way that it significantly interferes with his/her work (Brama 1999: 1487).

According to Franke both perpetrators of sexual harassment of women by men and any male witnesses thereof are subject to a regulatory practice that inscribes, enforces, and polices hetero-patriarchal gender norms in men. Men who sexually harass women are teaching both men and women a lesson about gender power (Franke 1998: 1249).

1.2 Determining the occurrence of sexual harassment

The EEOC makes provision for most sexual harassment cases to be resolved by examining all the facts in context:

> In determining whether alleged conduct constitutes sexual harassment, the [EEOC] will look at the record as a whole and at the totality of the circumstances, such as the nature of the sexual advances and the context in which the alleged incidents occurred. The determination of the legality of a particular action will be made from the facts, on a case-by-case basis (29 Code of Federal Regulations 1604. 11(a); Eisaguirre 1997: 83).

Most governmental investigating agencies or courts consider four factors when determining whether sexual harassment has occurred:

- Was the behaviour sexual in nature?
- Was the behaviour unreasonable?
- Was the behaviour severe or pervasive in the workplace?
- Was the behaviour unwelcome? (Eisaguirre 1997: 84).

Behaviour of a sexual nature includes sexual advances, propositions, or attempts to obtain sexual favours from an employee, and hostility towards women employees or a particular female employee, ranging from pranks, threats, and intimidation to highly dangerous physical attacks; sexual or pornographic pictures, language, or jokes that circulate in the workplace, creating an environment that is offensive.

The sexual commentary and humour in such cases need not be directed at the particular employee; she may find the atmosphere intimidating and offensive because it places her at a distinct disadvantage with respect to her male co-workers and is thus discriminatory (Eisaguirre 1997: 84).

Sexual harassment does not need to take the form of overt sexual advances or suggestions. However, it may comprise such actions as verbal abuse if this is sufficiently patterned to constitute a condition and is apparently caused by the gender of the victim (*Delgado v Lehman* 665 F Supp 460 (ED Va 1987) 468; Eisaguirre 1997: 119). In the workplace any harassment or unequal treatment of an employee or group of employees that would not occur except for the gender of the victim or victims, if sufficiently patterned or pervasive, comprises an illegal condition of employment (*McKinney v Dole* 765 F 2d 1129 (DC Cir 1985) 1138).

Sexual insults and demeaning propositions constitute sexual harassment and sex discrimination regardless of whether the plaintiff loses any tangible job benefits as a result thereof (*Bundy v Jackson* 641 F 2d 934 (DDC 1981); Eisaguirre 1997: 118). A bumper sticker reading "No more Mr Nice Guy — get down on your knees, bitch" was adjuded to imply forcible sex with women and the employer was found guilty of sexual harassment of his employees (Carpay 2001: 34).

1.3 Liability of the employer

The question of when and if an employer should be held liable for the torts of its employees has been described as one of the most contested and difficult legal questions in sexual harassment cases (*Katz v Dole* 709 F 2d 251 (4th Cir 1983)), for the reason that the plaintiff-employee is rarely harassed by the employer because that employer is usually an institution or corporation. The harasser is usually either a co-worker or a supervisor, but the victim often wants to sue the employer, either to make that employer take responsibility for the situation and the workplace environment or because the employer has the financial or other means to remedy the situation (Brama 1999: 1483 n 17).

Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 prohibits the employer from:

> discriminat[ing] against any individual with respect to […] terms, conditions or privileges of employment because of some individual's sex.

However, this Act does not expressly ban sexual harassment or define a standard of employer liability. In *Merito Savings Bank, FSB v Vinson*

(477 US 57 (1986)), the Supreme Court stated that its proscription against sex discrimination covers two kinds of harassment, namely "unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature" linked to the granting or denial of an economic *quid pro quo* and conduct that "unreasonably interfer[es] with an individual's work performance or creat[es] an intimidating, hostile, or offensive working environment" (Bible 1999: 116).

In *Harris v Forklift Systems Inc* (510 US 17, 21 (1993)) the Court declared:

> When the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated.

In 1998 the Supreme Court changed the landscape of sexual harassment law by utilising a burden-shifting scheme and by promulgating a unique affirmative defence for employers seeking to avoid liability (Brama 1999: 1483). In *Ellerth v Burlington Industries* (912 F Supp 1101 (ND Ill 1996) 1118; Brama 1999: 1481) the court concluded that a company (or employer) that does not know or have reason to know about the existence of harassment will not be held liable (Brama 1999: 1481). On appeal the Supreme Court found that the complainant must be given an opportunity to state a hostile work environment claim. The employer must prove that it has exercised reasonable care in preventing and correcting harassment and that the complainant unreasonably failed to take advantage of the anti-harassment policies (*Burlington Industries v Ellerth* 118 S.Ct 2257 (1998) 2270-71; Brama 1999: 1481). In *Faragher v City of Boca Raton* (118 S Ct 2275 (1998) 2279; Brama 1999: 1481) the Supreme Court held the city, as employer, vicariously liable for the harassment of a female employee by her supervising male colleagues because it had unreasonably failed to promulgate a policy on the prevention of sexual harassment (Brama 1999: 1481).

The decisions in *Faragher v City of Boca Raton* (118 S Ct 2275 (1998)) and *Ellerth v Burlington Industries v Ellerth* (118 S Ct 2257 (1998)) clearly established a new affirmative defence so divergent from previous lower court approaches that many appellate courts

have remanded sexual harassment cases for more discovery regarding an employer's ability to assert this defence (Brama 1999: 1483).

1.3.1 Examples of employers' liability

A breach of contract is committed if an employer terminates an employment contract because a female employee has refused the sexual advances of her foreman (*Monge v Beebe Rubber Co* 316 A 2d 549 (1974); Eisaguirre 1997: 118). The employer will be liable for compensation based on the breach.

An employer may be liable for an employee's behaviour even in cases where the employer has a policy in place and is unaware of the sexual harassment (*Miller v Bank of America* 600 F 2d 211 (9th Cir. 1979); Eisaguirre 1997: 118). A grievance procedure, even an open-door-policy (*Shrout v Black Clawson Co* 689 F Supp 774 (SD Ohio 1988); Eisaguirre 1997: 120) and a policy against discrimination, even in a case where the employee failed to use the procedure, did not exempt the employer from liability (*Meritor Savings Bank v Vinson* 477 US 57 (1986); Eisaguirre 1997: 119).

An employer may be liable for general and punitive damages under state tort law based on intrusion, assault and battery, and intentional infliction of emotional distress, as in a case where the plaintiff was sexually harassed by her immediate supervisor (*Rogers v Loews L'Enfant Plaza Hotel* 526 F Supp 523 (DDC 1981); Eisaguirre 1997: 119).

A company is liable under the doctrine of *respondeat superior* (see also *Faragher v Boca Raton* 118 S Ct 438 (1997)) as in the instance of the inaction of a supervisor who observed an employee engaging in sexual harassment (*Davis v United States Steel Corp* 779 F 2d 209 (4th Cir 1986); *Shrout v Black Clawson Co* 689 F Supp. 774 (SD Ohio 1988); Eisaguirre 1997: 119). The court perceived a supervisor or foreman as an agent of the employer and therefore held the employer liable for punitive damages for the sexual harassment of co-workers (*Hall v Gus Construction Co* 842 F 2d 1010 (8th Cir 1988); *Davis v United States Steel Corp* 779 F 2d 209 (4th Cir 1986); Eisaguirre 1997: 120), especially where supervisors had both actual and constructive knowledge of the harassment occurring in the workplace (*Broderick v Ruder* 685 F Suoo 1269 (DDC 1988); *Shrout v Black Clawson Co* 689 F Supp. 774 (SD Ohio 1988); Eisaguirre 1997: 120).

1.4 Remedies available to employers

If the employer's response to the harassment is reasonable and calculated to end the harassment, the court will not hold the employer liable (*Paroline v Unisys Corp* 867 F 2d 185 (4th Cir 1989); Eisaguirre 1997: 121). The decisions in *Faragher v City of Boca Raton* (118 S Ct 2275 (1998)) and *Ellerth v Burlington Industries v Ellerth* (118 S Ct 2257 (1998)) included new guidelines for establishing the liability of an employer and allow employers a defence against liability (Bencivenga 1998: 8; Brama 1999: 1483). As has been stated, new affirmative defence is so divergent from previous lower court interpretations that many appellate courts have remanded sexual harassment cases for more discovery concerning an employer's ability to assert it (*Reirhold v Virginia* 151 F 3d 172 (4th Cir 1998) 176; *Alverio v Sam's Warehouse Club* 9 F Supp. 2d 955 (ND Ill 1998); Brama 1999: 1483).

An employer is required to ensure that a policy is in place and that managers or supervisors are able to detect and deal appropriately with potential sexual harassment. For example, managers should note inappropriate sexual comments, jokes, flirting or the use of affectionate terms. This includes workplace discussions of sexual relationships. It is suggested that for employees to develop friendships at work and start to discuss private or confidential details, is a sign that the atmosphere is too relaxed (Gotcher 2000: 113). Managers should also watch out for any physical contact that appears suggestive. Sexually explicit materials in the work area, for instance screensavers, posters and other inappropriate items, must also be removed, and immediately reported to the employer. The best remedy available to employers is to take the necessary steps to prevent possible sexual harassment and thus avoid any litigation.

1.5 Remedies available to harassed persons

The court found that under the National Labor Relations Act freedom from sexual harassment is a working condition concerning which employees may organise protection (*NLRB v Downslope Indus-*

tries Inc 676 F 2d 1114 (6th Cir 1982); Eisaguirre 1997: 119). Harassers could also be criminally liable.

The courts recognise two types of claims based on sexual harassment, namely *quid pro quo* claims and hostile environment claims (Labuschagne 2000: 125; Brama 1999: 1486).

1.5.1 The *quid pro quo* claim

To prove a *prima facie* case of *quid pro quo* harassment, the plaintiff-employee must prove that

- he/she was a member of a protected class;
- he/she was subjected to unwelcome sexual advances;
- the advances were based on gender, and
- submission to the demand was made a condition of receiving job benefits or avoiding job detriments (*Cram v Lamson & Sessions Co* 49 F 3d (8th Cir 1995) 473; *Kauffman v Allied Signal Inc.* 970 F 2d 178 (6th Cir 1991) 186; Brama 1999: 1489 footnote 44; Scalia 1998: 307).

If a plaintiff is an applicant for a job rather than an employee, it must be proved that

- he/she is a member of a protected class;
- he/she was subjected to unwelcome sexual advances to which members of the opposite sex were not subjected;
- he/she applied for the position and was qualified for it;
- the employer was accepting applications for the position;
- he/she was rejected despite his/her qualifications, and
- after this rejection, the position remained open and other applicants with similar qualifications were considered (*Henson v City of Dundee* 682 F 2d 897 (11th Cir 1982) 911; Brama 1999: 1489 n 44).

1.5.2 The hostile work environment claim

A plaintiff establishes a *prima facie* case of a hostile work environment by proving that

- he/she was a member of a protected class;

- he/she was subjected to unwelcome sexual harassment affecting a term, condition, or privilege of employment, and
- the employer knew or should have known about the harassment and failed to take appropriate remedial action (*Henson v City of Dundee* 682 F 2d 897 (11th Cir 1982) 903-5; Brama 1999: 1489 n 45).

1.6 Sexual harassment viewed subjectively from the point of view of the harassed person

In the light of the disproportionate number of women who are victims of rape or sexual assault, women have a stronger incentive to be concerned about sexual behaviour. Women therefore share common concerns which men do not necessarily share. Men may see sexual conduct in a vacuum, as it were, not recognising the social setting or the threat of violence which a woman may perceive in the same situation. Women will be concerned about whether a harasser's action is a prelude to violent sexual assault while men might not experience the same fear (*Ellison v Brady* 924 F 2d 872 (9th Cir 1991) 879).

1.7 Legal intention

While the US Supreme Court determined that sexual harassment is a form of sexual discrimination and therefore illegal, in determining whether sexual harassment has occurred, many courts will focus on the effects of the harassment rather than on the intent of the harassment (Eisaguirre 1997: 20). Lower courts and commentators have advanced three possible explanations as to why sexual harassment is a form of sex discrimination (Abrahms 1998: 1188), namely that

- sexual harassment violates formal equality, because it would not have occurred except for the gender of the victim;
- sexual harassment is sex discrimination because the expression of sexuality is prejudicial to women in the workplace, and
- sexual harassment is sex discrimination because it sexually subordinates women to men (Abrahms 1998: 1188).

Franke (1997: 772) argues that sexual harassment is sexual discrimination because its use and effect police hetero-patriarchal gender norms in the workplace. By contrast, Abrahms (1998: 1169) sees

what is wrong in sexual harassment as its power to preserve male control and entrench masculine norms in the workplace.

It is suggested that to establish in fact whether sexual harassment has taken place, four categories or factors should be acknowledged in assessing the persuasiveness of a particular case (Abrahms 1998: 1178). These factors are:

- Sexual harassment is but one example of the complex set of barriers that women have faced and continue to face in the workplace. These barriers marginalise working women and take control of their fates.
- Although the meanings assigned to sex by women in society are varied, women associate many negative meanings with sex when it occurs in the workplace, including intimidation, objectification and devaluation.
- Sexual harassment produces a range of effects on the working lives of its victims, effects that can alter their conditions of employment, their ability to chart a desired professional path, and their self-esteem.
- Although a particular individual's response to sexual harassment will be conditioned by various factors, including her life experience and commitment to the particular job, her personality, and the professional and personal support network on which she can rely, the victim's response at the time of the harassment is rarely a good indicator of whether the behaviour was problematic or even whether she felt distressed by it (Abrahms 1998: 1178).

1.8 The onus of proof

In *Meritor v Savings Bank*, *FSB v Vinson* (477 US 57 (1986)) the court determined that for sexual harassment to be actionable,

- it must be sufficiently severe or pervasive to alter the conditions of employment of the victim, and
- it must create an abusive working environment (*Meritor v Savings Bank*, *FSB v Vinson* 477 US 57 (1986) 67; Brama 1999: 1487 n 34).

A hostile work environment claim is not actionable unless the plaintiff-employee can show that the harassment is abusive and se-

rious enough to alter working conditions (*Meritor v Savings Bank*, *FSB v Vinson* 477 US 57 (1986) 64-5; Brama 1999: 1487).

In 1991 a "reasonable woman" standard was created by some federal courts (*Andrews v City of Philadephia* 895 F 2d 1469 (3d Cir 1990); *Ellison v Brady* 924 F 2d 872 (9th Cir 1991); *Yates v Avco Corporation* 819 F 2d 630 (6th Cir 1987)) to enable the court to take into consideration the perspectives and experiences of women. The lower courts used this test with varying results. The standard was seen by some authors (Bernstein 1997: 446; Bernstein 1998: 1231; Forell 1994: 798; Chamallas 1992: 122-3) as a good idea and as demonstrating that the courts are open to progress and willing to learn about the experiences of women at work (Bernstein 1998: 1231). However, the standard was never clarified and may not be as efficacious as hoped. It has even been suggested that the standard may reify old stereotypes of gender difference and disadvantage women who seek justice from the courts (Eisaguirre 1997: 5). It should also be noted that not only women are potential victims of sexual harassment. In 1981 the court found a man to have been a victim of sexual harassment when he was fired because he rejected the sexual advances of his male supervisor (*Wright v Methodist Youth Services Inc* 511 F Supp. 307 (ND Ill 1981); Eisaguirre 1997: 118). The reasonable standard should therefore be broad enough to include both women and men.

Some authors suggest that the concept of reasonableness should be replaced by that of respect (Bernstein 1997: 446), but it is not at all clear that respect will be less entangled in gender controversy (Abrahms 1998: 1178). However, reasonableness is the standard that the courts seem committed to using (Abrahms 1998: 1183).

2. South Africa

In South Africa, a person accused of sexual harassment can be held liable delictually and contractually or charged with assault, indecent assault, attempted rape or rape. There are established uses to ascertain liability in criminal offences. On the other hand, in the law of delict, it is uncertain whether the test must be objective or subjective. The argument here is that the test must be a combination. In conclusion, we will consider the possibility of creating a separate new

delict in which delictual liability will be based on such a combination of subjective and objective factors.

2.1 Defining sexual harassment

Sexual harassment is a form of harassment which is defined as "physical, mental or emotional intimidation, badgering or torment" (Barker & Holtzhausen 1996: 64). Harassment of a sexual nature will thus be sexual harassment. Sexual harassment is defined as:

> Unwelcome sexual advances, requests for sexual favours, or verbal or physical conduct of a sexual nature, including instances where such favours or conduct is implicitly or explicitly made a condition of employment, continued employment or promotion (Barker & Holtzhausen 1996: 134).

In *J v M Ltd* (1989 ILJ 755: 757), the court relied on the definition of Mowatt, who defines sexual harassment as follows:

> [I]n its narrowest form sexual harassment occurs when a woman (or 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 (Mowatt 1986: 637; cf also Nel 1993: 246; *J v M Ltd* 757E; *Reddy v University of Natal* [1998] 1 BLLR 29 (LAC): 31H-32A).

The Code of Good Practice on the Handling of Sexual Harassment Cases (GN 1367 in GG 19049 (17 July 1998)) defines sexual harassment as any unwanted physical, verbal or non-verbal conduct of a sexual nature. The word 'unwanted' distinguishes sexual harassment from behaviour that is welcome and mutual (Item 3 of the Code).

In *Pick & Pay Stores Ltd and An Individual*,[2] the court found that clothes and behaviour only occasionally play a role in sexual harassment. Although every one is entitled to wear what he or she wishes, without giving another person the right to infringe upon his or her

2 Independent Mediation Society of South Africa (IMSSA) arbitration (*Digest* vol 3 part 1 Aug-Nov 1993): "While such factors may play some part in exceptional cases when it comes to assessing the sanction to be imposed on the guilty perpetrator in cases of sexual misconduct, they can never, in my view, without more [*sic*] be deemed to constitute the type of 'incitement' which was clearly hinted at in the evidence. The complainant herself put it trenchantly in her evidence: 'Am I allowed to be condemned for what I wear?'."

physical integrity, one should not continue to wear specific clothes that elicit a negative reaction. These may be described as risky clothes. However, it is important to point out that it is difficult to lay down guidelines in respect of clothes or behaviour that could elicit sexual harassment. Judgement differs from case to case (cf also Campanella 1994: 494).

Some authors argue that sexual harassment is dependent upon a relationship of authority; this means that the harasser uses his authority to force the harassed person to yield to his demands (cf also Rademan 1990: 17). However, sexual harassment can also occur between colleagues, where one does not necessarily have more authority than the other. Equally, the harasser may be someone from outside the firm, for example a supplier (Campanella 1990: 491). Sexual harassment can also be perpetrated by someone who is lower of rank than the victim, for example by continuously staring at her or sending her sexually suggestive anonymous letters. Authority can play a role in sexual harassment, but is not a necessary condition.

Sexual harassment thus ranges from sexual allusion, improper suggestions, sexual signals or hints, to, in its most severe form, rape (*J v M Ltd* 757G; Rademan 1990: 16). Item 1 of the Code stipulates that a single incident can constitute sexual harassment (cf also *J v M Ltd* 757G). However, the Code proceeds to list examples of physical conduct, verbal and non-verbal and *quid pro quo* forms of harassment, as follows:

2.1.1 Physical conduct

The definition of sexual harassment includes physical conduct. Item 4 explains physical conduct as conduct of a sexual nature which includes all unwanted physical contact, ranging from touching to sexual assault and rape. It also includes strip-searching by or in the presence of members of the opposite sex (Item 4(1)(a) of the Code).

2.1.2 Verbal forms

Verbal forms of sexual harassment include unwelcome innuendo, suggestions and hints as well as sexual advances, comments with sexual overtones, sex-related jokes or insults or unwelcome graphic comments about a person's body made in their presence or directed

towards them. The item also lists unwelcome and inappropriate enquiries about a person's sex life as a form of verbal sexual harassment (Item 4(1)(b) of the Code).

2.1.3 Non-verbal forms

Non-verbal forms of sexual harassment include any unwelcome gestures, indecent exposure, or the unwelcome display of sexually explicit pictures or objects (Item 4(1)(c) of the Code).

2.1.4 *Quid pro quo* harassment

This occurs where an owner, employer, supervisor, member of management or co-employee undertakes or attempts to influence the process of employment, promotion, training, discipline, dismissal, salary increment or other benefits of an employee or job applicant in exchange for sexual favours (Item 4(1)(d) of the Code).

2.2 Liability of the employer

In *J v M Ltd* (757J-758A) the court stated that it is the employer's duty to ensure that employees are not exposed to sexual harassment. An employer who neglects this duty should be held vicariously liable. Campanella (1994: 498) states that this duty is derived from the common law, according to which it is the employer's duty to ensure that the workplace does not pose a threat to the physical or mental health of the employees.

An employer may be held vicariously liable for sexual harassment committed by an employee if:

- he/she knew that one employee was harassing another and neglected to take steps, or
- the harassment was committed by an employee in the performance of his/her duties and the employer knew or should have known this (Dancaster 1991: 464-5).

According to Dancaster (1991: 462-3), the onus is on the employer to prove that he/she is not liable in cases of sexual harassment. However, we differ from this. In *Stadsraad van Pretoria v Pretoria Pools* (1990 1 SA 1005 T), concerning vicarious liability, the court stated that the onus is on the claimant to prove that the respondent is vica-

riously liable. The court stated that the fact that the employee was in the employment of the employer, probably serves as *prima facie* proof that the employer is vicariously liable, but that the onus of proof still rests with the claimant (*Stadsraad van Pretoria v Pretoria Pools* 1990 1 SA 1005 T:1007H). Furthermore, one of the most important rules of the law of evidence is that he/she who alleges must prove (Schmidt 1993: 31). In view of the above, it cannot be accepted that the onus is on the employer to prove that he/she is not delictually liable.

Section 23(1) of the Constitution of the Republic of South Africa (Act 108/1993) provides that every person has the right to fair labour practices. Since sexual harassment is a form of unfair practice, the constitutional provision confirms that it is the employer's duty to ensure that sexual harassment does not occur in the workplace. Rademan refers to the position in English law, where the employer can raise three possible defences, namely:

- that the action is not sufficient to constitute sexual harassment;
- that the harassment did not take place in the work milieu, or
- that all reasonable steps were taken to avoid unlawful action (Rademan 1990: 17-8).

Another important document is the Code of Good Practice on the Handling of Sexual Harassment Cases (GN 1367 in GG 19049 (17 July 1998)) issued in terms of the Labour Relations Act No 66 of 1995. The objective of the code is to eliminate sexual harassment in the workplace by providing appropriate procedures to deal with the problem and to prevent its recurrence. The code further encourages and promotes the development and implementation of policies and procedures that will lead to the creation of workplaces free of sexual harassment, where employers and employees respect one another's integrity and dignity, privacy, and right to equity in the workplace. The Code is also intended to guide employers and employees on the handling of sexual harassment cases (Item 1).

2.3 Remedies available to victims of sexual harassment

Someone who has been sexually harassed is not likely to lodge a complaint with the police. Such a complaint would offer no compensation for the loss that he/she has suffered, which the victim will rather try

to recover either by approaching the industrial court for legal aid (Nel 1993: 255-6), or by suing the harasser or his/her employer delictually or contractually (Nel 1993: 255).

Suing delictually implies that he/she would sue the harasser or his/her employer *ex delicto* for damages or reparation in order to compensate for damage or loss caused to him/her. The complainant would thus be able to recover any income lost due to the refusal or withholding of promotion, or receive reparation for personal grievance; or be paid damages for psychological harm resulting from harassment, and so on.

Furthermore, the employer can be sued by the aggrieved *ex contractus* due to breach of contract. The relation between employee and employer is a contractual relation, and the employer cannot dismiss the employee without proper reason. If an employee is unlawfully dismissed, he can sue his employer contractually for damages suffered due to breach of contract (Nel 1993: 253).

Lastly, the harassed person can open a criminal case. He/she can accuse the harasser of indecent assault, assault, *crimen injuria* and, in extreme cases, rape. The employer may also be charged as accomplice to the crime if he/she encouraged the crime (Nel 1993: 251-2). Dancaster (1991: 464; cf also Nel 1993: 252) points out that the employer may be charged as accomplice if he knew of harassment of any of the above-mentioned types, and did nothing to stop it, as it is an employer's duty to prevent the action of the harasser.

2.3.1 Testing liability

According to Louw (1990: 185), in both *J v M Ltd* (757-758) and *Jerry Mampuru v PUTCO* (24th September 1989; case NH 11/2/2136, unreported, a subjective test was used, adopting the point of view of the victim. While the harassed person's view of the behaviour of the harasser deserves consideration, this should be only one of the factors addressed in determining liability in cases of sexual harassment.

Nel (1993: 493) is of the opinion that the test must be based on the response of the reasonable woman. If a reasonable woman would experience the action of the person concerned as sexual harassment, delictual liability would be appropriate. Campanella (1994: 493) ar-

gues that negligence is sufficient reason to determine delictual liability. It is important to point out that the test of the reasonable man is used in the law of delict. This test would make negligence sufficient grounds for liability on the basis of sexual harassment. When someone's interests are affected by sexual harassment, his/her personality rights are affected. If he/she suffers damage, this would arise from an infringement of his/her personality rights. In breach of personality, intention must be proven, to constitute liability (see also Dancaster 1991: 464). Therefore negligence would be insufficient grounds for delictual liability.

It must thus be ascertained whether intention or mere negligence is necessary to establish guilt in the case of a delict. According to *Pick & Pay Stores Ltd and An Individual* (IMSSA Arbitration Digest vol 3 part 1 Aug-Nov 1993) and Campanella (1994: 491-500), one must first establish whether the behaviour, as subjectively viewed from the perspective of the person harassed, is unwelcome. Thereafter, one must determine whether the harasser realised that his/her behaviour was unwelcome or not. If so, his/her behaviour will constitute sexual harassment and this will be sufficient grounds. If he/she believed his/her behaviour to be welcome, the element of guilt is not satisfied (Campanella 1994: 494).

A third element for liability may be added, so that the test for delictual liability would require all the following elements:

- first, it must be determined whether the community, on the basis of the *boni mores* test, sees the relevant action as sexual harassment or not;
- secondly, it must be determined whether the harassed person saw the doer's action subjectively as sexual harassment (Campanella 1994: 494), and
- finally, it must be determined whether the doer subjectively foresaw that his/her action would be experienced as harassment or not (Campanella 1994: 494).

2.3.2 The legal opinion of the community

It would be dangerous to test only from the point(s) of view of the harasser and/or the harassed person. If the test is performed only from

the point of view of the harassed person, there is the danger that an action which the community would see as everyday, would be classified as sexual harassment. For example, a sensitive woman would view crude language used in her presence as sexual harassment while the community could see this as normal and inoffensive. If the test is performed from the point of view of the harasser, there is the danger that he could escape blame by alleging that he did not know that his sexual attentions would be unwelcome or that his action would be seen as harassment.

However, it is important to point out that sexual harassment is an extraordinary *iniurandi*. Therefore, as in slander, one should ask whether the reasonable person of normal intelligence and development would see the behaviour as sexual harassment. Should the reasonable person view the behaviour as sexual harassment, it is *prima facie* proof of the unlawfulness of the action.[3]

Intention still remains a requirement and where it is lacking, there is no question of sexual harassment. However, if it is a fact that the reasonable person would see the action as sexual harassment, the suspicion of intentional harassment would arise, as with slander. Consequently, the onus would be on the harasser to refute the suspicion.[4] Section 9 of the Constitution provides that proof of discrimination on any grounds listed in the section is sufficient proof of discrimination unless proven to the contrary (Constitution of the Republic of South Africa 108/1996). The implication of the constitution is discussed below.

3 Neethling *et al* 1992: 334-40: "Die enigste relevante vraag is of volgens die opvatting van die redelike man met normale verstand en ontwikkeling die betrokkene se aansien nadelig getref sal word (dus 'n objektiewe benadering). Indien wel, is die woorde lasterlik en in beginsel (*prima facie*) onregmatig jeens hom." [The only relevant question is whether, in the view of the reasonable man of normal intelligence and development, the esteem of the person involved will be affected (thus an objective approach). If so, the words are slanderous and in principle (*prima facie*) unlawful towards him].

4 Neethling *et al* 1992: 340: "Staan dit vas dat die publikasie lasterlik is en op die eiser betrekking het, dan ontstaan daar — afgesien van die vermoede van onregmatigheid — ook 'n vermoede dat die belastering opsetlik geskied het." [If it is a fact that the publication is slanderous and concerns the claimant, then the suspicion also arises — apart from the suspicion of unlawfulness — that the slander was intentional].

2.3.3 The subjective perspective of the victim

It is also necessary to consider whether the harassed person experiences the behaviour as sexual harassment or not. If the allegedly harassed person does not do so, but welcomes the attentions, there can be no question of sexual harassment. It is important to ask whether, at the time of the alleged harassment, he or she welcomed the attentions or not.

The only way to ascertain whether the allegedly harassed person saw the behaviour as sexual harassment is by asking the person whether he or she indeed experienced it thus.

2.3.4 The subjective perspective of the harasser

As has been mentioned, sexual harassment is an infringement upon a person's personality, and intention must be proven in order to recover moral damages. Thus intention on the part of the harasser must be proven in order to constitute delictual liability.

According to Neethling *et al* (1992: 118), a person acts intentionally if he desires the consequence he unlawfully causes, while being aware of the unlawfulness of his action. Intention thus consists of two elements, namely legal intention and unlawfulness. However, it has been assumed that in cases where it is a fact that the reasonable person would see a particular behaviour as sexual harassment, the suspicion of unlawfulness and of intentional harassment arises. The harasser therefore has to refute the suspicion that his behaviour unlawfully and intentionally infringed upon the personality of the aggrieved person (Dancaster 1991:464).

2.3.4.1 Legal intention

Dolus eventualis will be sufficient to create delictual liability. *Dolus eventualis* occurs when the doer foresees the consequence of his action, and becomes reconciled to that possibility. One must thus consider whether the doer, subjectively speaking, foresees the possibility that he could indeed be harassing the victim. Objective foreseeability can serve as proof. This means that when a harasser alleges that he did not foresee what was reasonably foreseeable, he must demonstrate the facts that make his version reasonably possible (Neethling *et al* 1992: 117-8).

2.3.4.2 Unlawfulness

The harasser must also realise, or at least foresee, the possibility that his/her action is unlawful (Neethling *et al* 1992: 119). One must consider the circumstances of office relationships. Usually office relationships are approached with great caution. They are often kept secret. When a person wishes to enter into a relationship, especially where he/she is in a position of authority over the other person, he/she must approach the relationship with great caution. He/she must not only accept but also make sure that his/her attentions are welcome, and that the person with whom he/she is entering into a relationship does not feel that his/her work will suffer as a consequence.

2.4 Onus of proof

Section 9(4) of the Constitution (Act 108/1996; cf also section 9(3)) provides that nobody may be discriminated against on the basis of race, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture or language.

Section 9(5) provides:

> Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair (Act 108/1996).

Furthermore, section 23(1) provides:

> Everyone has the right to fair labour practices (Act 108/1996).

In view of the above, it is clear that sexual harassment is a form of discrimination on the basis of "sex" and "sexual orientation", which is an unfair labour practice. Thus the burden of proof as set out in section 9(4) (Act 108/1996) should also apply to sexual harassment.

2.5 Remedies

The remedies that the court may grant are, among others:

- damages for loss of income as the result of dismissal or of withheld promotion;
- damages for future damage suffered, and

- moral damages as the result of the infringement upon personality (Nel 1993: 252; cf also *Pretorius v Britz* [1997] 5 BLLR 649 (CCMA): 656C-F).

2.6 Other mechanisms

It is important that a victim of sexual harassment use the internal procedures provided for lodging such complaints. If this fails, the Code of Good Practice on the Handling of Sexual Harassment Cases advises referral to the CCMA for conciliation in accordance with the provisions of section 135 of the Labour Relations Act. Should the dispute remain unresolved, either party has the right to refer it to the Labour Court (Item 7(7); cf also Du Toit *et al* 2000: 444).

2.7 A new delict or crime?

It is clear from the above that dealing with sexual harassment as a pure *iniuria* is unsatisfactory. Labuschagne (1994: 175-6), with reference to German law, mentions that distinct new categories of sexual crime have been created, deriving from (a) "slagofferwilslamlegging" (rape); (b) sexual immaturity; (c) powerless resistance due to mental disability, unconsciousness or otherwise; (d) fraud, and (e) exploitation of authority and power. If we concur with Labuschagne, the creation of a new delict may considerably ameliorate the situation by providing for all forms of sexual discrimination, and for a combination of subjective and objective factors for the use of establishing delictual liability. Chapter 3 of the Constitution lends itself specifically to the creation of such a new delict, in that any form of sexual discrimination is prohibited (see section 9 of Act 108/1996). However, it neglects to determine what remedies are at a victim's disposal. Immediate attention should be paid to this, due to the alarming proportions of sexual harassment and other forms of sexual discrimination.

The creation of such a delict should be tested on the basis of the above-mentioned guidelines, namely (a) the legal opinion of the community, (b) the subjective perspective of the person harassed and (c) the objective perspective of the harasser.

3. Conclusion

It is clear from the above that neither a subjective nor an objective test should be carried out in isolation to determine sexual liability. A combination of subjective and objective aspects must be used. It would be wrong to apply the common-law objective test used to determine liability in cases of infringement upon personality. Although it would be difficult to prove the harasser's intention, the fact that the alleged harasser must refute this suspicion makes it easier to prove liability.

Sexual harassment is an infringement upon a person's personality and thus an *iniurandi*. Negligence does not suffice to prove liability. The position concerning any delict is, however, insufficient due to the difficult burden of proof. A more satisfactory solution would be the creation of a new delict making use of both objective and subjective elements in order to determine liability.

The South African Constitution determines that no person shall be discriminated against.This includes a person's right to work without harassment or discrimination. It is therefore necessary for all employers to ensure a safe, non-discriminatory environment for all employees. Employers must adopt a policy on sexual harassment, communicate it to all employees, and ensure that it is adhered to. If harassment does take place, the procedure and disciplinary process prescribed in the policy must be enforced.

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