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UNFAIR DISCRIMINATION CLAIMS RELATING TO HARRASMENT: THE INTERSECTION BETWEEN STATUTORY OBLIGATIONS UNDER THE EMPLOYMENT EQUITY ACT AND THE OCCUPATIONAL HEALTH AND SAFETY ACT

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The starting point

- The Labour Appeal Court ("**LAC**") in *Campbell Scientific Africa (Pty) Ltd v Simmers and Others*[1] made the following remark –

> "*By its nature such harassment creates an offensive and very often intimidating work environment that undermines the dignity, privacy and integrity of the victim and creates a barrier to substantive equality in the workplace. It is for this reason that this Court has characterized it as "the most heinous misconduct that plagues a workplace*".

1 (2016) 1 BLLR 1 (LAC)

Historical Background on the Harassment Codes in the Workplace

- The 1998 Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace ("**the 1998 Code**"), issued by NEDLAC under section 203(1) of the Labour Relations Act[2] ("**LRA**"), established guidelines to address sexual harassment in the workplace
- It defined sexual harassment as unwanted conduct of a sexual nature and outlined employer responsibilities for prevention and response. The 1998 Code marked the first formal framework for tackling workplace harassment, though it focused solely on sexual harassment
- It emphasized that employers have a duty to take appropriate action if they are aware, or ought reasonably to be aware, of sexual harassment in the workplace

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2 Labour Relations Act 66 of 1995

- a further Code was introduced in 2005 ("**the 2005 Code**") under the Employment Equity Act[3] ("**EEA**") which sought to strengthen employer accountability by clarifying investigation and disciplinary processes while maintaining a focus on sexual harassment. The amendment responded to practical challenges in implementation aimed at improving the protection of employees, supplier employees/independent contract employees against conduct of this nature
- it encouraged employers to adopt a "zero-tolerance" approach to sexual harassment and to proactively foster a workplace culture of dignity and respect
- it further provided more detailed guidance on procedural fairness in handling complaints, including timeframes and confidentiality
- it reinforced the obligation on employers to take steps to ensure that complainants are not victimized or retaliated against for reporting on incidents of sexual harassment

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3 Employment Equity Act 55 of 1998

- the Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace, effective 18 March 2022 ("**the 2022 Code**"), repealed and replaced the earlier Codes. It was introduced under the EEA, broadening the scope of harassment to include harassment generally, including all forms of harassment, and bullying. The 2022 Code emphasizes protecting the dignity of employees and extends these obligations to third parties
- it outlines proactive steps employers must take to eliminate harassment, including conducting risk assessments, adopting harassment prevention plans, and the regular monitoring of workplace culture
- it also introduced a victim centered approach, requiring that complaints be handled with sensitivity, confidentiality, with support mechanisms such as counselling or referrals to professional advisors where appropriate
- the 2022 Code recognizes that multiple forms of unfair discrimination can overlap and compound the impact on the affected employee

Potential for different causes of action

Gcaba v Minister for Safety and Security and Others[4]

- The Constitutional Court ("**CC**") recognised that –

  "….. the same conduct may threaten or violate different constitutional rights and give rise to different causes of action in law…."

- In an example concerning "*aggressive conduct of a sexual nature*", this could constitute –
  - a criminal offence;
  - violation of equity;
  - a breach of health and safety legislation;
  - breach of contract;
  - give raise to *actio iniuriarum* in delict; and
  - an unfair labour practice (constructive dismissal claims)

this could involve different courts and fora

4 2010 (1) SA 238 (CC)

Breach of legal duty by Employer

Media 24 Ltd & Another v Grobler[5]

Introduction

- settled law that an employer owes a common law duty to the employees to take reasonable care of their safety[6]
- section 8 of OHS Act[7] could find application as employer's general duties owed to employees are not confined to physical harm caused by "*physical hazards*" and includes a duty to protect employees from "*psychological harm*"[8]
- the SCA found that legal convictions of the community require that an employer take reasonable steps to prevent sexual harassment at its workplace
- the SCA considered the five incidents of harassment

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5 (2010) 7 BLLR 649 (SCA)

6 *Van Deventer v Worksmens' Compensation Commission* 1962 (4) SA 28 (T) at 31 B – C

7 Occupation Health and Safety Act 85 of 1993

8 *Viagro v Afrox Ltd* 1996 (3) SA 450 (W) at 463 F – 1

What steps did Media 24 take?

- sexual harassment policy had been introduced in 1997 and made known throughout the group
- a copy had been "*speedily*" made available to the Respondent (the affected employee) as soon as she had requested it
- it took disciplinary measures against the errant trainee manager
- Respondent had not made use of the grievance procedure
- Respondent only formally complained after the flat incident (the fifth incident) and the employer said it could not assist her as the incident happened outside of working hours at her flat and not on company premises

What the SCA found

- the Respondent's refusal to invoke the grievance procedure not decisive of "the genuineness" of her complaints
- Van As, another manager, (and other persons), knew of the problem at an early stage and should have escalated it – if the Employer had acted earlier, it could have prevented the harassment particularly the "*fifth incident*" / "*flat incident*" which had caused serious psychological trauma to the Respondent
- not enough for the Employer to deny liability by arguing that the flat incident occurred away from the workplace and outside of its control
- the Employer should have "called out" the conduct of the trainee manager and taken the appropriate disciplinary steps timeously
- the Employer's negligence and the wrongful conduct of the trainee manager obliged them to compensate the Respondent for her proven damages of R776 814.00

Key Takeaways

- Courts have recognized that delictual and contractual claims can arise from the same set of facts[9]
- the duty breached in this case was not dependent on a specific term of the contract of employment
- COIDA[10] had no application as the psychological trauma suffered did not occur in the course and scope of employment – therefore no statutory bar to the Respondent's civil claim
- the Employer failed to protect the Respondent against sexual harassment – no need to consider the issue of vicarious liability

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9 *Lillicrap Wassenaar & Partners v Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 496 D – 1

10 Compensation for Occupational Injuries and Diseases Act 130 of 1993

Recognition of PTSD as a compensatable illness

Urquhart v Compensation Commissioner[11]

Introduction

- an example of post traumatic stress disorder ("**PTSD**") arising out of employment and during course and scope of duties
- Urquhart – a press photographer – covered many violent protests, death, acts of rioting and was physically assaulted whilst on an assignment
- He suffered a nervous breakdown and a claim for compensation was lodged under COIDA

11 (2006) 1 BLLR 96 (E)

Compensation Commissioner

- rejected the claim; PTSD was not a compensable illness under COIDA
- objection by Urquhart failed and he appealed
- the High Court found that the presiding officer's rejection of Urqhart's COIDA claim was based on "*a textbook definition of PTSD*" which was a misdirection- this evidence was never before the Commissioner
- Urquhart's psychiatrist had testified about the severity or Urquhart's condition
- medical condition undoubtedly arose from "*a series of accidents*" which was broad enough to include psychological trauma.
- the Court held "*injury*" includes PTSD and COIDA interpreted too narrowly
- appeal succeeded
- latest amendments to COIDA expressly include PTSD as a compensatable illness

Does Harassment Occur Where the Employee is not Affected?

Gaga v Anglo Platinum Ltd & Others[12]

Facts

- Group HR Manager ("**Gaga**") dismissed for sexually harassing his personal assistant
- harassment occurred over a 24-month period, but she did not lodge any complaint until her exit interview which occurred after she had resigned
- Gaga made increasingly crude and direct propositions to his personal assistant including sending a raft of SMS text messages to her
- the Employer took disciplinary steps on strength of what had emerged in the exit interview which resulted in Gaga's dismissal which he challenged in the CCMA

12 (2012) 3 BLLR 285 (LAC)

Before the CCMA

- the Commissioner had to decide fairness of the dismissal of Gaga and found the Employer had failed to prove that Gaga was guilty of sexual harassment as "*his conduct had not been shown to have been unwelcome or offensive to the complainant*"
- Gaga was awarded reinstatement and 5 months' back pay in compensation

Employer took steps immediately upon becoming aware of the harassment

Before the Labour Court

- even though the complainant had not been offended, Gaga's "*repeated and persistent conduct*" was inappropriate
- he was senior manager responsible for "*people development*"
- Gaga's bare denial of the harassment was "*unconvincing*" and the Court found that the victim had "*no conceivable motive to fabricate her evidence"*
- Gaga's advances had been "*unwelcome and persistent*" and that he had made comments of a sexual nature repeatedly
- it was a decision a reasonable decision-maker could not have reached – the award was overturned. Gaga appealed to the LAC and failed

Fact that the employee took no formal steps not be construed as no harassment having taken place

Before the Labour Appeal Court

- the LAC found it was not a component of the employer's policy or the then 2005 Code that the victim should feel offended before conduct can be said to constitute sexual harassment.
- it was enough that the wording of the Employer's policy required only that elements of harassment were present such as behavior that "*creates or could create an intimidating, hostile or offensive work environment*" or behavior that "*fails to respect the rights of others or interferes* with *work effectiveness and productivity*"

An Employer's inadequate response to harassment claim exacerbating the victim's mental anguish

PE v Ikwezi Municipality & Another[13]

Facts

- civil claim for damages (R4 Million) against Municipality and Xola Jack ("**Jack**")
- Jack did not defend the civil claim
- the plaintiff started had been receiving repeated messages from Jack bearing sexual connotations causing her extreme distress
- a short while later, Jack molested and sexually assaulted her causing her further trauma
- the Municipality Manager and CEO were fully aware of this
- the plaintiff alleged Jack had acted in the course and scope of employment. His behavior forced her resignation

13 (2016) 2 ALL 869 (EGC)

Defence of the Municipality

- Jack was not acting in course and scope so only he could be held liable
- it recognized it had a legal duty to protect the plaintiff's rights and prevent her suffering trauma but asserted it had taken all reasonable steps by –
    - confining Jack to its Klipplaat office and away from her workplace;
    - giving instructions that Jack must not contact the plaintiff;
    - instituting disciplinary proceedings where –
        - Jack was found guilty;
        - received a final warning;
        - counselled;
        - suspended for 2 weeks without pay

No remorse shown – Jack "*denied*" the harassment allegations and said he "*treated them with the contempt they deserved*"

Plaintiff's further steps

- she laid a criminal charge of "*sexual assault*" against Jack
- he pleaded guilty and was sentenced to a suspended term of imprisonment

The Court's finding

- "*the awful irony*" – Jack continued in his employment after serving the period of suspension without pay but Plaintiff was forced to resign due to PTSD.
- "*unfathomable*" that Jack was not dismissed (he even had a previous final warning for theft)
- vicarious liability – the Court referred to the test in *Minister of Police v Rabie* ("***Rabie***")[14]

14 (1986) 1 ALL SA 361 (A)

- Question one - whether the wrongful acts were done for sole purposes of the employee. This requires a subjective consideration of the employee's state of mind

A factual question

- Question two - even if wrongful act was done for sole purposes of the employee, is there a sufficiently close link between the employee's acts for his own interest "*and the purposes and the business of the employer*"

- Question of law - what would constitute "*sufficiently close*" to give rise to vicarious liability? When answering this question, a court should consider the spirit, purpose and objects of the Bill of Rights in the Constitution

Question of fact and law

Vicarious Liability

K v Minister of Safety and Security[15]

Facts

- Ms K, a 20-year-old woman, stranded late at night, accepted a lift from three on-duty uniformed policemen in a SAPS vehicle
- instead of taking her home, the officers abducted and gang-raped her
- they were later convicted of rape and kidnapping and each was sentence to life imprisonment.
- Ms K sued the Minister of Safety and Security for damages relying upon the principle of vicarious liability

High Court and SCA

- Minister not vicariously liable because police officers were on a personal frolic of their own, not in cause and scope of employment.
- both courts relied on the standard test: whether employees were furthering the employer's business at the time

15 (2005) 8 BLLR 749 (CC)

- both courts further held that the policemen deviated completely for purely personal purposes, thus no liability

Appeal to Constitutional Court

- the Applicant raised a constitutional issue under section 39(2) of the Constitution
- the issue was whether constitutional norms can extend the scope of vicarious liability to protect vulnerable citizens from harm by state agents
- the Constitutional Court ("**CC**") questioned the "*traditional course and scope of employment*" test

Constitutional Court

- the CC re-evaluated the common law in light of section 39(2) of the Constitution
- it accepted that the constitutional values, particularly dignity, security and equality must inform how vicarious liability should be applied

- the CC adopted a two-stage test from *Rabie* –
  - a subjective test: was the employee acting in pursuit of personal interests?
  - an objective test: was there a sufficiently close connection between the conduct and the employer's business?
- although the police officers pursued personal aims, they used police resources, status, and uniform to create the opportunity and authority to commit the crime
- the CC found that the risk of abuse was inherent in the nature of police work, and so the employer of these police officers must bear the risk
- their employment created the risk and enabled the harm
- a sufficiently close connection existed between their wrongful conduct and the business of the employer
- the Minister was held vicariously liable due to the enabling context of employment, even where the conduct committed had been of a criminal nature

Employer's failure to protect the employee during a violent protest at workplace

Churchill v Premier of Mpumalanga[16]

Facts

- Ms Catherine Churchill **("Churchill"), ** employed as Chief Director: Policy and Research, was assaulted and harassed by violent protesting NEHAWU members inside the workplace
- Churchill became trapped in the building and faced verbal abuse, threats, physical assault, and ultimately public humiliation
- she was forcibly evicted from the building by the protestors, and the experience left her with physical injuries and later was diagnosed with severe PTSD

16 (2021) JOL 49829 (SCA)

- she sued for emotional shock, medical treatment and loss of income and alleged that the Premier and Director-General had failed to take reasonable steps to ensure her safety despite the foreseeable risk of the protest turning violent
- Employer argued COIDA barred her delictual claim

Legal Turning Point

- the Employer raised a special plea under section 35 of COIDA arguing that Churchill's injury was an "*accident*" arising in the course of employment
- the Employer argued that because it occurred at the workplace, during working hours, it was covered under COIDA thus excluding a civil claim
- the High Court initially agreed barring her civil claim
- Churchill appealed and argued that her harm was not an "*accidental*" workplace injury, but the result of employer's failure to ensure her personal safety when at work

Supreme Court of Appeal

- the SCA rejected the COIDA special plea
- it held that while the protest occurred at work, the nature of the assault was not incidental to Churchill's job function
- the employer failed to act despite knowledge of escalating risk thus breaching a legal duty of care
- importantly, the SCA did not treat the protesters as "employees" of the employer for vicarious liability purposes
- instead, the case centered upon direct negligence. It reaffirmed that employers can be held liable for failing to prevent third-party misconduct, especially in the face of foreseen danger
- the *Rabie* test was mentioned to distinguish situations where misconduct aligns closely enough with duties thereby implicating the employer in the wrongdoing
- the employer was found directly liable, not vicariously liable, in the traditional sense. This reinforces organizational responsibility for workplace safety

Gender-Based Violence and Femicide ("GBVF") in the South African Mining Industry

Guidance Note for the Management of GBVF, Safety and Security Challenges for Women in the South African Mining Industry[17]

- Guidance Note for the Management of GBVF, Safety and Security Challenges for Women in the South African Mining Industry
- the publication of the guidance note increases the responsibility of employers to develop and implement policies and strategies to GBVF, including discrimination and sexual harassment.
- Employers are required to develop and prominently display a sexual harassment policy, implement GBVF action plans, as well as establish and maintain a GBVF database. These measures must be visible and accessible to employees, for example, through display on workplace notice boards and electronically on intranet systems

17 No. 51003 Government Gazette, 2 August 2024

- a dedicated GBVF management structure must be established, and employers are required to report annually on GBVF-related matters. This includes maintaining systems to prevent GBVF, which must be regularly reviewed and assessed in line with a zero-tolerance approach

Gender-Based Violence (“GBV”)

Mtsewu and Anglo American Platinum Mine[18]

Introduction

- the CCMA found the dismissal of an employee, accused of GBV against a fellow Anglo American Platinum employee and romantic partner, to be both procedurally and substantively fair, despite the misconduct having occurred outside the workplace and outside working hours
- the fact that the misconduct took place off-site was deemed irrelevant — it had the effect of “*destroying”* or “*seriously damaging”* the employment relationship
- The employee's actions were a clear contravention of the Respondent’s GBV policy and core values, and the applicant had received training on these policies

18 (2025) 46 ILJ 441 (CCMA)

Key Takeaways

- the applicant’s dismissal was found to be an appropriate sanction as the trust relationship had irretrievably broken down
- the employer's GBV policy applies at all times, both on and off duty, highlighting the importance of having a comprehensive GBV policy in place
- the employer had a legitimate interest in the matter, especially considering the public image concerns of a well-known company committed to a safe and respectful workplace.
- the CCMA reaffirmed that dismissal can be appropriate even for a first-time offender, where the trust relationship has been broken
- the applicant’s defense of being under the influence of alcohol at the time of the incident was found to be *“improbable”*

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