# Sexual harassment in the workplace: A matter of more questions than answers or do we simply know less the more we find out?

ROCHELLE LE ROUX

*Associate Professor, Institute of Development and Labour Law, University of Cape Town*

## 1 INTRODUCTION

In *Grobler v Naspers*[1] (*Grobler*) the Cape High Court held an employer vicariously liable for sexual harassment perpetrated by one of its employees. The employer (and the perpetrator) appealed and in its judgment reported as *Media 24 Ltd and Another v Grobler*[2] (*Media24*), the Supreme Court of Appeal (SCA) confirmed the liability of the employer, albeit on different grounds.

While the judgments in *Grobler*, and in *Media24* particularly, provide many answers they also highlight many new questions. Does a victim of sexual harassment only qualify for legal protection once a condition as severe as Post Traumatic Stress Syndrome (PTSS) manifests? If the PTSS is the result of an incident arising out of and in the course of the victim's employment, would sections 35 and 65 of the Compensation for Occupational Injuries and Diseases Act (COIDA)[3] apply? What reasonable steps should an employer take in the ordinary course to meet its common law duty to provide a safe working environment free from sexual harassment? Can the employer still be vicariously liable even though it has met this common law duty? What is the appropriate test to determine the employer's vicarious liability for sexual harassment? What, if any, is the synergy between the common law and the Employment Equity Act (EEA)?[4]

To answer the abovementioned questions, I shall first reflect on the salient features of the judgments in *Grobler* and *Media24*. After that, I shall endeavour to answer the questions with reference to existing jurisprudence and legislation.

1 (2004) 25 *ILJ* 439 (C)
2 (2005) 26 *ILJ* 1007 (SCA)
3 130 of 1993
4 55 of 1998.

## 2 THE TRIAL COURT (*GROBLER v NASPERS*)

Grobler was employed by Nasionale Tydskrifte Ltd (Tydskrifte). She alleged that over a period of approximately six months during 1999 she was sexually harassed by Samuels who was employed by Naspers (which later became Media24),[5] but who worked at Tydskrifte as a trainee manager. She worked for Samuels as a secretary. Grobler alleged that at least five incidents of sexual harassment were perpetrated by Samuels. The last and most traumatic of these incidents (the 'flat incident') occurred away from work while Grobler was showing her flat to Samuels, and also involved a firearm.[6] By the time the matter came before the trial court, Tydskrifte had disposed of its undertaking and Grobler was its only remaining employee. Media24, however, accepted liability in respect of any of Tydskrifte's obligations towards Grobler. Hence Media24's liability was alleged on two grounds: First, on the basis of its vicarious liability for Samuels' conduct, and second, on Tydskrifte's failure (for which it assumed liability) to provide a working environment free from sexual harassment. Grobler also claimed that, as a result of the harassment, she suffered from severe psychological trauma manifesting in PTSS. Unsurprisingly, Samuels and Media24 denied almost all of the above allegations and also raised two jurisdictional defences. First, that by virtue of section 35(1) of the COIDA, Grobler was precluded from proceeding against Media24,[7] and, second, that sexual harassment, by virtue of the Labour Relations Act (LRA)[8] (read with item 2(1)(a) of Schedule 7[9] to the LRA and the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace 1998),[10] is a matter in respect of which the Labour Court has exclusive jurisdiction. The jurisdictional defence relating to the COIDA was obviously raised on the assumption that sexual harassment is in one way or another covered by that Act.

The trial court was satisfied that the five alleged incidents of sexual harassment perpetrated by Samuels had in fact occurred[11] and that

5 For purposes of this article Naspers is referred to as Media24 throughout.

6 The incidents that occurred at work included the fondling of her breasts (452C), stolen kisses (451G and 452C), smacking her on the bottom (453A), making indecent comments of a sexual nature (451B–D) and calling her names such as 'Blondie' (451C, 452F–G and 453A).

7 Section 35(1) of the COIDA provides that no action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.

8 Act 66 of 1995. The EEA, which repealed the provisions of Item 2(1)(a) of Schedule 7 to the LRA, came into operation on 9 August 1999.

9 This item defined an unfair labour practice to include 'the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including, but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, political opinion, culture, language, marital status or family responsibility'.

10 Published in terms of the LRA. Note that this was the Code of Good Practice that applied at the time. A more recent code on sexual harassment, published during 2005, and therefore not relevant to Grobler's claim, will be discussed below.

11 465G.

Grobler suffered severe emotional stress as a result of these incidents. Nel J did not decide whether or not Grobler's condition could be classified as PTSS, instead he considered whether Samuels' conduct was responsible for her condition and concluded that it was.[11] On the matter of Media24's vicarious liability for Samuels' conduct, Nel J argued 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 any employer with an almost perfect defence.[13] However, since such an interpretation of vicarious liability does not take cognisance of the wide occurrence of sexual harassment in the workplace and its far-reaching emotional and psychological consequences,[14] Nel J argued that the use of vicarious liability for sexual harassment against women in the workplace and children in the context of schools, clubs and churches ought to be extended. In justification of such development of the South African common law on vicarious liability, the judge relied on recent developments of the common law in foreign jurisdictions,[15] alternatively the constitutional duty to develop the common law[16] and held Media24 vicariously liable for Samuels' conduct.

The two jurisdictional defences were both primarily dismissed on the basis that Grobler was not employed by Media24.[17] In the case of the defence based on the COIDA, it was also held that sexual harassment is not an 'accident' as contemplated by that Act.[18] The trial court did not consider whether PTSS could possibly be a disease covered by the COIDA. In respect of the jurisdictional defence, the court also held that the cause of action was an alleged delict that does not fall within the exclusive jurisdiction of the Labour Court.[19]

## 3 THE APPEAL (*MEDIA 24 LTD AND ANOTHER v GROBLER*)

### 3.1 Factual findings

It is useful to first consider some of the critical factual findings that informed the salient features of the *ratio* of the SCA's decision: Despite some inconsistencies in Grobler's evidence, the court concluded that she was sexually harassed by Samuels. Farlam JA regarded the suggestion that the claim of harassment was fabricated by Grobler at the time of the disciplinary enquiry as unlikely since the uncontested evidence was that she asked for Media24's sexual harassment policy after the first incident (the 'lift incident').[20] The court specifically found that the final incident at her flat did not occur in the course and scope of her employment, but

12 488C-E
13 495B-C
14 494D.
15 514A-B
16 514H
17 516D and 517C
18 516A-D
19 516I
20 Par 50

while she was pursuing a private activity.[21] The court also accepted that none of the four incidents preceding the flat incident was sufficiently severe to result in a psychiatric injury qualifying for legal redress and that only the flat incident had the potential of resulting in damages qualifying for such redress.[22] The court also noted that Van As (a manager at Tydskrifte) whom Grobler advised of the harassment by Samuels at an early stage (a week after the lift incident)[23] and who claimed that he failed to deal with it as a result of her reluctance to pursue the matter, had no reason to disbelieve Grobler's assertions 'and should have realised (even if he actually did not) that her reluctance to take the matter further in no way cast doubt on the genuineness of her complaints'.[24]

## 3.2 Damages

On the question of Grobler's damages, Media24 argued that Grobler failed to establish that she suffered from a recognised psychiatric injury. In this regard heavy reliance was placed on an earlier decision of the SCA (*Barnard v Santam Bpk*)[25] in which it ruled that damages can be recovered for emotional shock ('senuskok') only if it manifests in a recognised psychiatric injury (although the court accepted in *Barnard* that such an injury need not always be the result of emotional shock). Media24 argued that since the trial court declined to find that she was in fact suffering from PTSS, Grobler failed to establish that she suffered from a recognised psychiatric injury.[26]

Farlam JA thus proceeded to consider whether Grobler suffered from PTSS. The court accepted the diagnostic features of PTSS to be as set out in the *Diagnostic and Statistical Manual of Mental Disorders* published by the American Psychiatric Association. It is useful to quote the paragraph relied on by the court:

> The essential feature of Posttraumatic Stress Disorder is the development of characteristic symptoms following exposure to an extreme traumatic stressor involving direct personal experience of an event that involves actual or threatened death or serious injury, or other threat to one's physical integrity; or witnessing an event that involves death, injury, or a threat to the physical integrity of another person; or learning about unexpected or violent death, serious harm, or threat of death or injury experienced by a family member or other close associate (Criterion A1). The person's response to the event must involve intense fear, helplessness, or horror (or in children, the response must involve disorganized or agitated behaviour) (Criterion A2). The characteristic symptoms resulting from the exposure to the extreme trauma include persistent re-experiencing of the traumatic event (Criterion B), persistent avoidance of stimuli associated with the trauma and numbing of general responsiveness (Criterion C), and persistent symptoms of increased arousal (Criterion D). The full symptom picture must be present for more than 1 month (Criterion E), and the disturbance must cause

21 Par 77.
22 Par 60 read with par 22.
23 *Grobler* at 452A.
24 Par 71.
25 1999 (1) SA 202 (SCA) 208J.
26 Par 23.

clinically significant distress or impairment in social, occupational, or other important areas of functioning (Criterion F)."[27]

The parties agreed that Criteria A2 and B to F were present, but it was disputed as to whether Criterion A1 was present. Farlam JA concluded that the flat incident (involving a firearm) was sufficiently traumatic to have complied with A1 and held that Grobler in fact suffered from PTSS and thus a recognised psychiatric injury as contemplated in *Barnard*.[28] While this conclusion confirmed the liability of Samuels, Media24's liability did not necessarily follow, particularly since this incident occurred during a private pursuit.

Nonetheless the court proceeded to confirm Media24's liability, not on the basis of vicarious liability for Samuels' conduct, but on the basis of Tydskrifte's failure to provide a working environment free from sexual harassment by other employees.

## 3.3 Media24's liability

On the basis that it assumed the responsibilities of the now defunct Tydskrifte, and disregarding its possible vicarious liability for Samuels' conduct, Media24's liability depended on whether it could be said that Tydskrifte was in any manner liable to Grobler.

It is settled law that an employer owes a common law duty to its employees to take reasonable care for their safety and this duty, Farlam JA held, also extends to the protection of employees 'from psychological harm caused, for example, by sexual harassment by *co-employees*' (emphasis added).[29] On the face of it and relying on a strict or statutory definition of an employee, this should have been the end of the inquiry, since Samuels was not employed by Tydskrifte and was thus not a co-employee of Grobler. It should, however, be noted that the judge was merely using an example to illustrate the extent of the employer's duty, and this statement should not be interpreted to suggest that employers are excused from observing this duty in the case of sexual harassment by those who are not co-employees of the victim.

Media24 argued that if it owed such a duty, it was founded in contract and not delict and since Grobler's claim was premised on a delictual legal duty, it should fail.[30] Farlam JA made short shrift of this argument and emphasised that this is a common law duty not founded in contract or statute.[31] This confirms that the general assumption by many that this is a contractual duty is wrong. All the South African cases on this issue have in fact proceeded on the basis of delictual liability which also broadens the nature of damages that can be claimed.[32]

27 Quoted at par 56.
28 Pars 58–59.
29 Par 65.
30 Par 26.
31 Par 70.
32 Wallis M *Labour and employment law* 5 Iss (1992) at 3–17 (fn 4). Also see Scott A 'Safety and the standard of care' (1980) 1 *ILJ* 161.

The SCA then considered whether a negligent breach of this duty had been established.[33] Suggesting[34] (with reference to an early judgment of the Industrial Court[35] and also the established law on liability for an omission)[36] that the legal convictions of the community are such that an employer is required to take reasonable steps to prevent sexual harassment, the court held that an employer would be liable to compensate a victim for harm suffered should it negligently fail to provide such protection.

It is in this regard that Van As' failure to deal with Grobler's complaints, despite her reluctance to pursue the harassment, becomes relevant:

> If Van As had acted earlier in the way I have suggested I am satisfied that Wager[37] should (and on the probabilities would) at least have informed the second appellant that his conduct *vis-à-vis* the respondent had not gone unnoticed and have warned him that, if such conduct persisted, not only his ambition of rising to a senior managerial position in the company would come to nought but there was a very real danger of his being dismissed. I think it overwhelmingly probable, knowing what we do about the personality of the second appellant and his relationship with Wager, that such a warning would in all probability have done the trick and prevented the flat incident from taking place. *I have already found that, if the flat incident had not taken place, the respondent would not have suffered the psychological injury on which her claim is based* [emphasis added].[38]

It is also in this context that the doctrine of vicarious liability resurfaces, albeit not in the terms suggested by the trial court. The SCA found that Van As' failure to address Grobler's claim was 'culpable' and held that Tydskrifte 'was clearly vicariously liable for his failure to act in this regard'.[39]

This approach, it is suggested, is rather strained: the employer is held liable in terms of its duty to provide a safe working environment for something that did not happen in the workplace at all on the assumption that the perpetrator would have responded in a certain fashion had the employer reprimanded him for his conduct in the workplace.[40] Perhaps this approach stems from a belief that Grobler ought to be compensated, combined with the court's view that only the flat incident, and not one of the incidents that actually occurred in the workplace, resulted in injury worthy of legal redress. I shall return to this issue below.

## 3.4 Jurisdictional defences

Farlam JA made some interesting *obiter* observations regarding the jurisdictional defences raised by Media24. Media24 argued that because sexual

33 Par 71
34 Par 68.
35 *J v M Ltd* (1989) 10 *ILJ* 755 (IC) at 757G–758D
36 *Minister van Polisie v Ewels* 1975 (3) SA 590 (A) at 597A–B
37 Wager was the senior manager of Tydskrifte under whose direction Samuels worked.
38 Par 72.
39 Par 71
40 For this insight I wish to credit Craig Bosch.

harassment in the workplace has been regulated since 1998 by a Code of Good Practice[41] published in terms of the LRA, and since it came into operation during August 1999, also by the EEA, sexual harassment is a matter in respect of which the Labour Court has exclusive jurisdiction. The EEA was not yet in operation when Samuels perpetrated the harassment, but at the time unfair discrimination in the workplace (of which harassment is a manifestation) was part of the unfair labour practice definition in Schedule 7 to the LRA. This Schedule required such disputes to be adjudicated by the Labour Court. Because section 157(1) of the LRA provides for the exclusive jurisdiction of the Labour Court in respect of matters which in terms of the LRA or any other law are to be determined by the Labour Court, Media24 argued that the High Court was deprived of jurisdiction to adjudicate this matter. Farlam JA rejected this on two grounds: first, the 1998 Code is clear that it does not limit the rights of a victim to proceed with a civil claim for damages,[42] and second, relying on the *dictum* of the SCA in *Fedlife Assurance Ltd v Wolfaardt*,[43] the employer's *unlawful* conduct, whether in a contractual or in a delictual sense, as opposed to its *unfair* conduct, is not the exclusive domain of the Labour Court.[44]

Farlam JA also dismissed Media24's argument that, as PTSS is a disease covered by the provisions of section 65(1)(b) of the COIDA, the matter had to be referred to the Compensation Commissioner. Section 65(1) reads as follows:

> Subject to the provisions of this Chapter, an employee shall be entitled to the compensation provided for and prescribed in this Act if it is proved to the satisfaction of the Director-General –
>
> (a) that the employee has contracted a disease mentioned in the first column of Schedule 3 and that such disease has arisen out of and in the course of his or her employment, or
>
> (b) that the employee has contracted a disease other than a disease contemplated in paragraph (a) and that such disease has arisen out of and in the course of his or her employment

Farlam JA declined to express an opinion on whether PTSS is a disease contemplated by section 65(1)(b), but held that the COIDA did not apply because the incident that resulted in the PTSS occurred during a private pursuit.[45]

## 4 COMMENT

The SCA declined to make a finding regarding the trial court's conclusion on Media24's vicarious liability for Samuels' conduct, but on the basis of *stare decisis* the High Court's judgment remains binding in the Cape

41 The Code of Good Practice on the Handling of Sexual Harassment Cases, 1998. This Code was replaced by a code with the same name published in terms of the EEA. See Government Notice 1357 of 2005 published on 5 August 2005

42 Par 75. See item 7(6) of the 1998 Code

43 (2001) *22 ILJ* 2407 (SCA)

44 Par 76

45 Par 77

Provincial Division. Some aspects of the SCA's judgment, however, certainly invite speculation and debate and provide, perhaps unintentionally, some pointers on the vexed question of vicarious liability for sexual harassment by employees. These will now be considered with the help of the questions stated in the introduction:

1. Does a victim of sexual harassment only qualify for legal protection once a condition as severe as PTSS manifests?
2. If the PTSS (or another recognized psychiatric injury) is the result of an incident arising out of and in the course of the victim's employment, would sections 35 and 65 of the COIDA apply?
3. What reasonable steps should an employer take in the ordinary course to meet its common law duty to provide a safe working environment free from sexual harassment?
4. Can the employer still be vicariously liable even though it has met the above common law duty? What is the appropriate test to determine the employer's vicarious liability for sexual harassment?
5. What, if any, is the synergy between the common law and the EEA?

## 4.1 Does a victim of sexual harassment only qualify for legal protection once a condition as severe as PTSS manifests itself?

### 4.1.1 *The common law*

The SCA confirmed, with reference to *Barnard*, that when considering damages for emotional shock, the only question is whether the victim is suffering from a recognized psychiatric injury. *Barnard*, in turn, relied on *Bester v Commercial Union Versekeringsmaatskappy van SA Bpk*[46] in which it was held that emotional shock resulting in psychiatric injury qualifies for legal redress, provided that it would have been foreseeable by a reasonable person in the position of the perpetrator.[47] Both these cases dealt with so-called 'hearsay' cases; situations where the plaintiff suffered emotional shock because of what happened to another (for example, observing a collision or receiving terrible news). However, in *Media24* it was implied that the principle should be no different if the emotional shock (and the resultant psychiatric injury) is the result of a direct personal experience.

Emotional shock as such, therefore, does not qualify for damages in our law; in any event, not via the delictual route. 'Secondary injuries or illnesses which manifest themselves subsequent to the initial responses to exposure to trauma' are required.[48] Grief, sorrow, fear, horror, anger and anxiety would therefore not qualify for legal redress unless they translate into a psychiatric condition such as PTSS. Other examples of a recognized psychiatric injury include neurosis, psychosis, hysteria, insomnia and

46 1973 (1) SA 769 (A).
47 779H.
48 Mullany N and Handford P *Tort liability for psychiatric damage* (1993) at 30.

schizophrenia.[49] These conditions are severe and statistically manifest themselves rarely after a traumatic event.[50] Unless sexual harassment occurs in circumstances as traumatic as those that prevailed during the flat incident or unless sustained sexual harassment results in one of the other recognized psychiatric injuries, the common law, it appears, does not allow the victim to recover damages from the perpetrator for emotional shock. In *Media24* this is evidenced by the court's very clear statement that the harassment that preceded the flat incident did not result in any 'psychiatric injury qualifying for legal redress' within the rules expounded[51] in *Barnard*.

Statistics elsewhere suggest that, while women are not the exclusive victims of sexual harassment, victims of sexual harassment in the workplace are primarily women.[52] The judgment in *Media24* made it clear that the common law would not have compensated Grobler for her emotional shock if the flat incident had not occurred or if she had been a particularly strong woman able to cope emotionally with the trauma associated with the flat incident. Does the fact that the common law requires such extreme and labelled consequences before it comes to the aid of those harassed not in effect continue to marginalise the position of women? Is this ostensible insensitivity of the common law to the position of women in distress a reflection of the common law's inherently masculine nature?

The Constitution permits development of the common law in order to protect fundamental rights such as the right to equality, the right to dignity and the right to fair labour practices.[53] The Constitution, however, does not allow indiscriminate development of the common law, but only if there is no legislation giving effect to the relevant fundamental rights[54] which many would argue exists in the form of the EEA and Promotion of Equality and Prevention of Unfair Discrimination Act (PEPUDA).[55] The problem is that these statutes only protect the relevant rights in the context of unfair discrimination, whereas sexual harassment, as is evident from *Grobler* and *Media24*, may also constitute a delict. Since the latter is not regulated by legislation, there might well be circumstances, as was suggested by the trial judge in *Grobler*,[56] when the development of the common law of delict is necessary to give effect to these realities. However, in

49 *Ibid* at 30–33. Also see Visser PJ and Potgieter JM *Law of damages* 2 ed (2003) at 445.

50 Mullany and Handford (fn 48 above) 312–313.

51 Par 60.

52 The US Equal Employment Opportunities Committee reports on its website that only 15,1% of sexual harassment charges filed with it during 2004 were made by men. (http://www.eeoc.gov/stats/harass.html accessed on 17 December 2005.)

53 S 8(3) of the Constitution of the Republic of South Africa, 1996 (Constitution).

54 See 'Application' in Cheadle H, Davis D and Haysom N *South African constitutional law. The bill of rights* 2 ed Iss 1 (2005) at 3-16–3-23 and Currie I and De Waal J *The bill of rights handbook* 5 ed (2005) at 227. Also see *Hoffman v South African Airways* 2001(1) SA 1 (CC) at 14E–G, *NAPTOSA and Others v Minister of Education, Western Cape and Others* (2001) 22 *ILJ* 889 (C) at 896D–G, *AMPOLO and Others v MEC, Arts, Culture, Sports and Recreation, Northern Province and Another* (2001) 22 *ILJ* 1975 (T) at 1989G–1992H.

55 4 of 2000.

56 At 514D–G.

a legal system that does not embrace specific delicts,[57] a development to allow damages for emotional shock resulting from sexual harassment (but that cannot be labelled as a 'recognized psychiatric injury'), some would argue, ought to be resisted on the basis that it would create an anomaly. While the approach of the trial court is therefore preferred,[58] it is suggested that, in the absence of such a development of the common law, claimants should endeavour to use existing common law remedies more creatively.

In terms of the common law a victim also has the options of an interdict and a claim based on *iniuria*[59] (which were not pursued in *Media24*). The former will only be of assistance when there is a threat of sustained sexual harassment, and the latter, admittedly, has traditionally yielded comparatively moderate amounts in damages.[60] Nonetheless, the concern that the common law fails to recognize the realities facing women, can perhaps be addressed by claimants making better use of the *actio iniuriarum* and its obvious link with the Constitutional right to dignity and the duty to develop the common law. In this regard, much can be learned from the judgment in *Bremner v Botha*,[61] albeit handed down 50 years ago. In that matter a shop manager, in the privacy of an office, called a shop assistant a 'bloody bitch'.[62] In modern day terms this would certainly be regarded as a form of sexual harassment. In deciding whether the requirements for the *actio iniuriarum* had been met, the court considered whether the conduct of the defendant 'amounted to degrading, humiliating or ignominious treatment of the plaintiff which impaired her dignity'.[63] Most forms of sexual harassment will meet this requirement. The court also made it clear that while intent is an essential element of this form of delict, the nature of the conduct complained of will often imply such intent.

Following this route and spurred by the constitutional right to dignity, the position of the vulnerable employee, it is suggested, can effectively be addressed by awarding substantial damages relying on this action.

### 4.1.2 *The legislation*

Section 6(3) of the EEA provides that harassment is a form of unfair discrimination. Section 60[64] of the same Act renders an employer liable

57 Neethling J, Potgieter JM and Visser PJ *Law of delict* 4 ed (2001) at 4–5.

58 That is, to ask whether Samuels' conduct was responsible for Grobler's condition and not whether she was suffering from PTSS; see *Grobler* at 488C–E.

59 Neethling *et al* (fn 57 above) 13–17 and 256–257.

60 See *Grobler* at 517F. In Neethling J, Potgieter JM and Visser PJ *Neethling's Law of Personality* 2 ed (2005) at 199 it is claimed that *substantial* amounts are usually awarded for the infringement of dignity, but the cases cited reflect modest, rather than substantial damages. In *Bremner v Botha* 1956 (3) SA 257 (T) 262H damages in the sum of £25 were awarded and in *Mamwane v Cecil Nathan, Beattie & Co* 1972 (1) SA 222 (N) at 230H damages in the sum of R150 were ordered.

61 Fn 60 above

62 259A.

63 260H.

64 Section 60 of the EEA provides as follows:

(1) If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in any conduct that, if engaged in by that employee's employer, would

*[continued on next page]*

for sexual harassment of an employee by a co-employee if it can be shown that an employer failed to take certain steps.[65] If this is the case, the Labour Court may, amongst other things, order the employer to pay compensation and damages to the victim-employee, but because of the structure of the EEA, no order can be made against the perpetrator-employee.[66] An award for damages in this context is not dependent on establishing a recognised psychiatric injury (as required by the common law), but rather on whether unfair discrimination (in this case sexual harassment) occurred. This stems from the fact that the common law aims to redress harm caused by a delict while the EEA aims to redress unfair discrimination.[67] Psychiatric injury, in the case of an EEA claim would, it is suggested, be relevant, but only to determine the extent of the damages. For instance, in *Christian v Colliers Properties*,[68] a matter concerning the unfair dismissal of a sexually harassed employee and brought in terms of the LRA and the EEA, payment of damages in terms of section 50 of the EEA was ordered despite the absence of evidence suggesting severe psychological trauma on the part of the victim.[69]

When it is not possible for the victim-employee to rely on the EEA (because the employer has taken the steps required by section 60 or because the perpetrator was not employed by the employer), the only option would be to rely on the common law or to rely on section 11 of the PEPUDA that prohibits harassment. Section 21(2) of PEPUDA enables the equality courts to award damages. It is suggested that these courts will and should, in awarding such damages, follow an approach similar to that followed by the Labour Courts and not require injury in the form of a recognised psychiatric injury before awarding damages.

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constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer.

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

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

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

65 These are, amongst others, that the employer consulted with all relevant parties and took steps to eliminate the harassment and took steps to ensure compliance with the EEA after being notified of the harassment, or the employer did all that was reasonably possible to ensure that its employees would not harass. For a discussion of the employer's liability in terms of s 60 of the EEA see Le Roux R, Orleyn T and Ryroft A *Sexual harassment in the workplace. Law, policies and processes* (2005) at 94–98.

66 The duty to remove unfair discrimination in the workplace is a duty imposed on the employer. See s 6 of the EEA. Furthermore, s 50(2) of the EEA, dealing with the powers of the Labour Court in the case of an unfair discrimination claim, provides for orders against the employer only. It would therefore be futile for one employee to proceed against another employee in terms of the EEA.

67 See discussion in par 4.5. Also see Neethling *et al* (n 57 above) 22.

68 [2005] 5 BLLR 479 (LC).

69 Par 485E–F. Also see *Ntsabo v Real Security CC* (2003) 24 *ILJ* 2341 (LC). In this matter the court emphasized the distressing nature of the harassment, but did not find that the victim was suffering from any psychiatric injury, see 2383A and 2384C.

### 4.2 If the PTSS (or another recognised psychiatric injury) is the result of an incident arising out of and in the course of the victim's employment, would sections 35 and 65 of the COIDA apply?

Media24's defence was that Grobler was by virtue of section 35(1) of the COIDA precluded from proceeding against the employer and the trial court approached this defence on the basis that her condition was an injury resulting from an *accident*.[70] Since the COIDA, so the trial court argued, contemplated a condition that results from a single incident, sustained sexual harassment does not qualify as an accident and hence the defence failed.[71] On appeal the focus shifted to whether Grobler suffered from an occupational disease as contemplated by section 65 of the COIDA. While Farlam JA conceded 'that employees who contract psychiatric disorders as a result of acts of sexual harassment to which they are subjected in the course of the employment'[72] might be entitled to compensation in terms of section 65, he did not decide the point since in Grobler's case the incident that resulted in the PTSS was held to have occurred during a private pursuit and therefore fell outside the scope of the COIDA. What would the position have been if the PTSS had been the result of the incidents that occurred at work?

It is suggested that in the case of section 65(1)(b) of the COIDA the crucial question is not so much the type of disease that is being suffered, but whether it can be said that it had *arisen out of and in the course of employment*. In *Ntsabo v Real Security CC*[73] Pillay AJ seems to suggest that the latter requirement was not met on the basis that sexual harassment 'did not fall within the job description' or the duties of either the perpetrator or the victim:

> The compensation envisaged in the EEA stems from a condition that is caused by a work related phenomenon. It is simply a scenario which is far too remote from the circumstances of this claim. The condition of the applicant was clearly brought on by conduct which fell outside the boundaries *of the duties*, directly and indirectly, of both Mr Dlomo and the applicant. The conduct of which the applicant complained did not fall anywhere within the *job description* of Mr Dlomo nor that of the applicant. Consequently the condition of the applicant does not fall within the confines of the COIDA as it did not involve a condition listed in schedule 3 thereof and *neither did it arise from or in the course and scope of her employment* (nor indeed his) [emphasis added].[74]

If this is indeed what is suggested by the judge, I respectfully disagree. Elsewhere, in the context of vicarious liability, I have argued that it is inappropriate to focus simply on an employee's designated tasks or duties to determine whether conduct falls within the course and scope of employment. It is suggested that the same argument applies to section 65 of

70 *Grobler* at 514F–516D.
71 516A–D.
72 Par 77
73 2380C
74 2380C–D.

the COIDA.[75] To suggest that conduct falls outside the scope of employment simply because it does not fall within a job description or an employee's duties is to refute the complex nature of modern employment and would in any event negate most claims based on either the COIDA or vicarious liability since many of these claims are premised on incidents that would not fall within any job description or duties of the employee.[76]

Reverting to *Media24*, it can also be asked on what basis it can be claimed that Tydskrifte (via Van As) failed in its duty to provide a safe working environment to Grobler, if what she experienced did not somehow arise from her employment

Support for the notion that section 65(1)(b) of the COIDA ought to be interpreted to cover psychiatric conditions can also be found in the Occupational Health and Occupational Health Services Conventions of the International Labour Organisation (ILO).[77] Both Conventions define health to include mental well-being. In addition, the 2004 General Report of the ILO's Committee of Experts on the Application of Conventions and Recommendations noted the trend in some European countries to regard stress, psychological harassment and sexual harassment as new occupational risks.[78]

I have endeavoured to make the point that psychiatric injuries are covered by section 65(1)(b) of the COIDA, but must concede that the conclusion is by no means obvious. Perhaps the time has come for the legislature to provide more clarity on the interface between the COIDA and psychiatric injuries. Furthermore, considering the minimal redress that is usually recovered via the COIDA and the limitation that it places on proceeding against the employer, the question can be asked whether such an interpretation is in the interests of the victim-employee.

While, for the occasional victim-employee it would, potentially, be more lucrative to proceed against a specific employer (as illustrated by *Grobler* and *Media24* where the payment of almost R800 000,00 to Grobler was ordered), it is doubtful whether many employers would be able to survive the payment of such a sum. It is mainly for this reason that the Constitutional Court has held that the certainty of compensation, the elimination of expensive legal procedures and the need to show negligence, justifies the loss of the right to proceed against the employer in delict as contemplated by section 35(1) of the COIDA.[79]

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75 Le Roux *et al* (fn 65 above) 91. Also see the comments of Heher AJA in *Bezuidenhout NO v Eskom* (2003) 24 *ILJ* 1084 (SCA) at pars 19-21

76 Section 1 of the COIDA defines 'accident' to mean an accident *arising out of and in the course* of an employee's employment and resulting in a personal injury, illness or the death of the employee. Such accidents would certainly not be in a job description and yet the COIDA (s 22) provides protection in such a case. There is also nothing to suggest that the phrase *arising out of and in the course* in s 1 should be interpreted any differently in s 65

77 Conventions 155 of 1981 and 161 of 1985

78 See par 22 of the General Report (http://www.ilo.org/ilolex/english/_ceacrrepsq.htm)

79 *Jooste v Score Supermarket Trading (Pty) Ltd (Minister of Labour intervening)* (1999) 20 *ILJ* 525 (CC). Also see Rycroft A and Perumal D 'Compensating the harassed employee' (2004) 25 *ILJ* 1153 at 1168-1169

### 4.3 What reasonable steps should an employer take in the ordinary course to meet its common law duty to provide a safe working environment free from sexual harassment?

In *Media24* the point was made by Farlam JA that the company (via van As) should have realized that Grobler's unwillingness to pursue the matter had nothing to do with the credibility of her claims and that preventative steps were required.[80] Thus, the reluctance of a harassed employee to take formal steps does not absolve the employer from its duty to provide a safe working environment.

This duty, it is suggested, is not only reactive but also proactive. In this regard the employer will to a large extent discharge this duty if it implements a workplace policy in the terms suggested by the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (2005 Code)[81] promulgated in terms of the EEA.[82] The 2005 Code also emphasizes the need for employers to take formal action if there is a significant risk of harm to others in the workplace, despite the complainant's wish not to follow a formal procedure.[83] It should, however, be noted that the 2005 Code supplements the EEA, which aims to eradicate unfair discrimination. The common law duty to provide a safe working environment will often overlap with this aim, but it will not necessarily be the case. For instance, if a complainant is not willing to follow any of the procedures (not even the informal procedure) available in terms of the effectively communicated policy consistent with the 2005 Code, the employer might well escape liability in terms of the EEA, but, as evidenced by *Media24*, not necessarily in terms of the common law. Furthermore, for employer liability to follow in terms of the EEA, section 60(1) of the EEA requires that the workplace sexual harassment must immediately be brought to the attention of the employer. Liability in terms of the common law will, as postulated in *Media24*, depend on whether or not the employer has taken 'reasonable steps to prevent sexual harassment of its employees in the workplace',[84] although, whether the harassment was brought to the attention of the employer by the victim may be a factor to consider.

### 4.4 Can the employer still be vicariously liable even though it has met the above common law duty? What is the appropriate test to determine the employer's vicarious liability for sexual harassment?

In *Media24* the SCA, unlike the trial court, avoided the doctrine of vicarious liability as the basis for Media24's liability. Nonetheless, the question

80 *Media24* at par 71.
81 Government Notice 1357 of 2005 published on 5 August 2005.
82 See Le Roux *et al* (fn 65 above) 41–48 for a discussion of the content and implementation of such a workplace policy.
83 Item 8.7.2 of the 2005 Code
84 *Media24* at 68

can still be asked whether an employer can be held vicariously liable for sexual harassment perpetrated by one of its employees despite the fact that the employer has discharged its duty to provide a safe working environment.

Much has been written about an employer's vicarious liability for sexual harassment.[85] Suffice it to say that the trial court in *Grobler* regarded the tests hitherto applied by South African courts (that the delict must have occurred during the course and scope of employment or, in the case of deviant conduct,[86] that it must be sufficiently linked to the business of the employer)[87] as inadequate because nobody is employed to harass.[88] Thus the development of the common law was considered necessary and Nel J adopted the 'supervisor' and 'risk of enterprise' tests, used in foreign jurisdictions, to hold the employer vicariously liable for the sexual harassment by Samuels.[89]

It is trite that vicarious liability is not a legal rule, but is based upon considerations of public policy, aimed at providing a person wrongfully injured with a "deep pocket" defendant and forcing employers to take responsibility for the risk created by their operations.[90] If these policy considerations are still valid (and there is nothing to suggest that they are not), the fact that an employer has done enough to discharge its duties (for example, the duty to provide a safe working environment) does not negate its potential vicarious liability for the conduct of its employees.

On the matter of the appropriate test for vicarious liability for sexual harassment in the workplace, it is suggested that the traditional test is sufficient to deal with sexual harassment[91] and that the importation of foreign tests into *Grobler* was superfluous.

This much was in any event suggested by the Constitutional Court in *NK v Minister of Safety and Security*[92] when it held that the test applied by the Appellate Division in *Minister of Police v Rabie*[93] was still good law to

85 See the articles listed in fn 2 *Media 24* at par 17.

86 That is, conduct committed during a deviation from the normal performance of the employee's duties; see *NK v Minister of Safety and Security* (2005) 26 *ILJ* 1205 (CC) par 25.

87 In order to establish vicarious liability on the part of the employer the plaintiff must prove that (1) the perpetrator was an employee of the employer; (2) the perpetrator committed a delict against the plaintiff while (3) acting within the course and scope of his employment, see *Isaacs v Centre Guards CC t/a Town Centre Security* (2004) 25 *ILJ* 667 (C) at 669G–H. The requirement that, in the case of deviant conduct, it must be sufficiently linked with the business of the employer is, it is suggested, not a different requirement, but simply an aid to establish whether conduct occurred within the course and scope of employment in uncertain cases.

88 *Grobler* at 495B–C.

89 *Grobler* at 514A–B. The court also relied on the duty to develop the common law in the alternative, see at 514H.

90 *Feldman (Pty) Ltd v Mall* 1945 AD 733 at 741; *Mhlongo and Another NO v Minister of Police* 1978 (2) SA 551 (A) at 567H; *RH Johnson Crane Hire v Grotto Steel Construction* 1992 (3) SA 907(C) at 908F; *Minister of Law and Order v Ngobo* 1992 (4) SA 822 (A) at 833H; *Grobler* at 494F–H.

91 See Le Roux *et al* (fn 65 above) 91–93.

92 (2005) 26 *ILJ* 1205 (CC).

93 1986 (1) SA 117 (A).

determine whether the Minister of Safety and Security ought to be vicariously liable for the rape of a young woman in distress by three on-duty policemen.[94] The Constitutional Court formulated the *Rabie* test (that applies to deviant conduct) in the following terms:

> The approach makes it clear that there are two questions to be asked. The first is whether the wrongful acts were done solely for the purposes of the employee. This question requires a subjective consideration of the employee's state of mind and is a purely factual question. Even if it is answered in the affirmative, however, the employer may nevertheless be liable vicariously if the second question, an objective one, is answered affirmatively. That question is whether, even though the acts done have been done solely for the purpose of the employee, there is nevertheless a sufficiently close link between the employee's acts for his own interests and the purposes and the business of the employer. This question does not raise purely factual questions, but mixed questions of fact and law. The questions of law it raises relate to what is "sufficiently close" to give rise to vicarious liability.[95]

Based on this, and with reference to the facts in *Media24*, it can be asked whether the harassment by Samuels was not sufficiently linked to the business of Media24 to establish vicarious liability. Although the SCA avoided the doctrine of vicarious liability, the route it followed suggests that such a link existed. On what basis, for instance, could Van As (or his manager) have been expected to speak to Samuels (and also dismiss him) about the harassment (as suggested in *Media24*)[96] if they did not have authority over him regarding this conduct? And if they had such authority, does it not suggest that his conduct was sufficiently linked to the employer's business for them to be concerned about it and to exercise their authority? In this regard the following remark by Farlam JA (quoted earlier) is significant

> If Van As had acted earlier in the way I have suggested I am satisfied that Wager should (and on the probabilities would) at least have informed the second appellant that his conduct *vis-à-vis* the respondent had not gone unnoticed and have warned him that, if such conduct persisted, not only his ambition of rising to a senior managerial position in the company would come to nought but there was a very real danger of his being dismissed. I think it overwhelmingly probable, knowing what we do about the personality of the second appellant and his relationship with Wager, that such a warning would in all probability have done the trick and prevented the flat incident from taking place.[97]

The above was said on the assumption that Samuels' conduct constituted deviant conduct and while it probably did, it might not always be clear. Some of the comments in respect of the question discussed in paragraph 4.2 in the context of the COIDA are also relevant here.[98] Vicarious

94 At par 45 O'Regan J remarked that: 'The common-law test for vicarious liability in deviation cases as developed in *Rabie*'s case (*supra*) and further developed earlier in this judgment needs to be applied to new sets of facts in each case in the light of the spirit, purport and objects of our Constitution. As courts determine whether employers are liable in each set of factual circumstances, the rule will be developed.'

95 Par 32.

96 Par 72.

97 *Media24* at par 72

98 See also Le Roux *et al* (fn 65 above) 91.

liability for sexual harassment can, it is suggested, also be resolved by applying the standard test for vicarious liability (did it occur within the course and scope of employment?) if relationships incidental to employment and not only the designated tasks of the employee are regarded as falling within the course and scope of employment. Hence, conducting these relationships improperly (by harassing) may result in the employer's vicarious liability.

A finding of vicarious liability would therefore have been justified, at least in respect of the incidents that occurred in the workplace. The SCA probably followed the 'strained' route it did because the harassment that caused the injury did not occur during the course and scope of employment, neither was it sufficiently linked to the business of the employee, and the harassment that did meet these tests did not, in the view of the court, result in injury that could be redressed by the common law.

But for the fact that the incidents at work did not result in damages, there is enough in *Media24* to suggest that a basis does exist for the employer's vicarious liability for sexual harassment by its employees. However, if it is correct that a disease such as PTSS is covered by section 65(1)(b) of the COIDA, the employer's vicarious liability for sexual harassment perpetrated by one of its employees will arise only if the victim is not employed by that employer. In instances where the perpetrator and the victim are employed by the same employee, the COIDA will apply [99]

## 4.5 What, if any, is the synergy between the common law and the Employment Equity Act?

Assuming that an employer can be liable in terms of section 60 of the EEA for sexual harassment perpetrated by one of its employees on another, and assuming that the employer can also be liable in terms of the common law for the same sexual harassment, either because it failed to provide a working environment free from sexual harassment or because it is, one way or another, vicariously liable, may the victim proceed with both the statutory and common law claims?

The EEA gives effect to a number of fundamental rights aimed at ensuring equality and fairness in the workplace. The aim of the common law is to redress harm caused by a delict and, unlike the COIDA, there is nothing in the EEA to suggest that a claim pursued in terms of the EEA deprives the employee from taking common law action against the same employer. However, should an employee be able to proceed with both claims, by virtue of the Labour Court's exclusive jurisdiction in respect of the EEA and its lack of jurisdiction in respect of the delictual claim, the employee would have to proceed in both the High Court and the Labour Court. Furthermore, the defences of *res judicata* and *lis pendens* would also not be available to the employer since the two claims are founded on different causes of action. [100]

99 That is, assuming that it did arise out of the course of employment.

100 See *Orr and Another v University of South Africa* (2004) 25 ILJ 1484 (C) at par 18.

Can the employee proceed and succeed with both claims? It is suggested that some guidance can be extracted from the judgment of the Labour Court in *Parry v Astral Operations Ltd.*[101] In this matter a retrenched employee claimed damages for the unlawful termination of his employment (contractual damages) as well as compensation for unfair dismissal in terms of section 194 of the LRA. In this matter, by virtue of section 77(3) of the Basic Conditions of Employment Act[102] conferring jurisdiction upon the Labour Court to determine contractual disputes, it had jurisdiction to adjudicate both the contractual and unfair dismissal disputes.[103] The Labour Court, relying on the judgment of the SCA in *Fedlife v Wolfaardt*,[104] held that the LRA does not prevent an employee from enforcing contractual rights and ordered damages for breach of contract as well as compensation for unfair dismissal. The court, however, emphasized that the damages awarded for the breach of contract should be factored into the assessment of the compensation for the unfair dismissal.[105]

While *Parry* concerned unlawful conduct in the context of contract and a statutory claim for unfair dismissal, by analogy the same principle should apply to unlawful conduct in the context of delict and a statutory claim for unfair discrimination. While complicated by the need to litigate in different courts, the employee should, in principle, be able to proceed with both claims, subject to amounts awarded in one matter being considered in the other,[106] and further subject to the victim-employee's common law claim possibly being usurped by the terms of the COIDA. In instances where the victim is not the co-employee of the perpetrator, a similar synergy will exist between the PEPUDA and the common law.

## 5 CONCLUSION

In the past two years, as a result of the combined impact of jurisprudence and legislation, sexual harassment in the workplace has acquired a new significance for employers. This reality, however, does not imply that employers can be certain of the legal implications if sexual harassment occurs in the workplace. There are still many areas of uncertainty in which, unless resolved by judicial pronouncement or legislative intervention, there are simply no clear answers. These include the role of the COIDA, the synergy between the common law and the EEA, the exact extent of the employer's duty to provide a safe working environment, and the parameters of vicarious liability in this context. It is more certain, first, that employer liability for sexual harassment in the workplace, either in terms of the common law or legislation is not simply negated by the fact

101 (2005) 26 ILJ 1479 (LC).
102 75 of 1997
103 Pars 93 98 and par 141
104 (2001) 22 ILJ 2407 (SCA)
105 Par 100
106 Also see the remarks of Farlam JA in Media 24 at par 76 concerning the exclusive jurisdiction of the Labour Court and disputes about unlawfulness as opposed to unfairness.

that nobody is employed to harass and, second, that the common law as it presently stands will not compensate a victim of sexual harassment suffering from emotional shock unless it has developed into a known psychiatric injury. It is in this regard that, it is suggested, a development of the common law is called for. Failing such development, there is a danger that vulnerable employees, particularly women, will continue to be marginalized. However, even failing such development, all is not necessarily lost. For instance, exploring the possible use of forgotten common law remedies and the synergy between the common law and legislation may present unexpected answers.

Sexual harassment in the workplace and elsewhere is a sad reality of our time. By postulating the above questions and exploring possible answers, I have endeavoured to illustrate that sexual harassment is an extremely complex legal phenomenon and that the questions raised by it, more often than not, do not offer obvious answers. There is a lot about sexual harassment that we simply do not know.

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