

**QUID PRO QUO AS A FORM OF SEXUAL HARASSMENT IN THE
SOUTH AFRICAN EMPLOYMENT LAW: A CRITICAL REVIEW**

By

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MINI-DISSERTATION

Submitted in partial fulfilment of the requirements for the degree for

MASTER OF LAWS

in

LABOUR LAW

**FACULTY OF MANAGEMENT AND LAW
(School of Law)**

At the

UNIVERSITY OF LIMPOPO

SUPERVISOR: Prof. CI TSHOOSE

2024



DECLARATION

I declare that the mini-dissertation titled "**QUID PRO QUO AS A FORM OF SEXUAL HARASSMENT IN THE SOUTH AFRICAN EMPLOYMENT LAW: A CRITICAL REVIEW**" hereby submitted to the University of Limpopo, for the degree of **MASTER OF LAWS in LABOUR LAW** has not previously been submitted by me for a degree at this or any other university; that it is my work in design and in execution, and that all material contained herein has been duly acknowledged.



HOPYANI TM

Date: **16 August 2023**

ACKNOWLEDGEMENTS

This work is based on the research supported wholly by the National Research Foundation of South Africa (Grant number 141444).

Firstly, I want to express my sincerely gratitude to God for his glory and favour upon my academic life. Without him, I would not have progressed this far. In addition, I want to convey my heartfelt gratitude to my supervisor, Prof. CI Tshoose for his tolerance and guidance. Further, I want to thank my family, in particular my mother for her support. Finally, I extend my sincere gratitude to the National Research Foundation for funding this study.

ABSTRACT

This study examines the effects of the conduct of *quid pro quo* in the workplace by analysing the law applicable, its elements (consent in particular), as well as the extent to which the conduct constitute corruption. *Quid pro quo* is a latin concept which means "something for something". For the purposes of this study, the concept of *quid pro quo* is discussed in context of sexual harassment.

It is not unusual that individuals who are in position of power in the workplace demand sexual gratification in exchange for employment favour. This has a long-standing effect on the relationship of the victim and the harasser. The Code of Good Practice on Sexual Harassment recognises *quid pro quo* as one of the forms of sexual harassment.

Despite being legally recognised, *quid pro quo* is the most ignored form of sexual harassment. While workplace *quid pro quo* harassment is well known, the public ordinarily consider it as an immoral activity rather than as sexual harassment. In circumstances where *quid pro quo* involves sexual penetration, a question of whether it qualifies as rape, or a separate form of sexual offence rises for consideration.

The study found that the consent given in *quid pro quo*, especially one resulting from a threat, is invalid and therefore *quid pro quo* conduct which include sexual penetration is an equivalent of criminal law crime of rape. The validity of consent has been evaluated in consideration of factors influencing consent, including but not limited to the need for employment and power relations.

Further, the study also shows that *quid pro quo* constitutes the crime of corruption, in line with the Prevention and Combating of Corrupt Activities Act 12 of 2004. The study evaluates the legal framework, including the

approach adopted by the legislature and the courts in responding to the effect of *quid pro quo* harassment in the South African employment law.

KEY WORDS: Sexual harassment, *quid pro quo* harassment, rape, employee, employment, consent, corruption.

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CHAPTER 1: INTRODUCTION AND BACKGROUND OF THE STUDY

1.1. Introduction

Sexual harassment may take a form of a physical, verbal, or a non-verbal conduct.¹ The Code of Good Practice on Sexual Harassment² recognises different types of sexual harassment, including sexual favouritism,³ *quid pro quo*,⁴ and victimisation.

Despite efforts put by South Africa and various organisations⁵ in dealing with sexual harassment, it remains a problem in the country's labour industry. Sexual harassment is a serious violation of the constitutional rights⁶ of a person, particularly the right to dignity⁷ and physical integrity.⁸ The Employment Equity Act⁹ recognises sexual harassment as a form of unfair discrimination in the workplace.¹⁰ The implication of this recognition is that sexual harassment also contravenes the right to equality.¹¹

The legislature defines sexual harassment in four ways.¹² Firstly, any sexual attention which is unwelcome, from a person who is aware that such attention is not welcome, or reasonably should know.¹³ Secondly, any

¹ Budeli, M. Germishuys, W. Manamela, ME. Manamela, TE. Tshoose CI. *Labour Law rules* (4th ed. Siber ink 2021) 62-64.

² The Code of Good Practice on the Handling of Sexual Harassment (Gen N 1357 in GG 27865 of 4 August 2005) (hereinafter 'the Code').

³ Item 4(2) of the Code.

⁴ Item 4(1)(d) of the Code.

⁵ E.g.: Shukumisa, Transform Education About Rape and Sexual Abuse, Sonke Gender Justice, and etc.

⁶ The Constitution of the Republic of South Africa, 1996 ('hereinafter the Constitution').

⁷ Section 10 of the Constitution.

⁸ Section 12(2) of the Constitution: The right to psychological and bodily integrity, which include the right for one to make their own choices in relation to reproduction, having security and control over one's body.

⁹ Employment Equity Act 55 of 1998 ('EEA').

¹⁰ Section 6(3) of the EEA.

¹¹ Section 9 of the Constitution.

¹² Protection From Harassment Act 11 of 2011.

¹³ *Ibid*, section 1.

unwelcome explicit or implied behaviour, messages, suggestions, or remarks which are sexual in nature and have effect of humiliating, offending, or intimidating the complainant or related person in circumstances, which would humiliate, offend, or intimidate a reasonable person considering all the circumstances.¹⁴ Thirdly, a promise or reward, made expressly or implied, for submitting to a sexually oriented request.¹⁵ Finally, expressed or implied threat of reprisal or actual reprisal for refusing to comply with a request of sexual nature.¹⁶

Of the aforementioned definitions of sexual harassment, the third and fourth describe *quid pro quo* harassment, which is the focus of this study. The concept of *quid pro quo* exists in various fields of law.¹⁷ In sexual harassment, *quid pro quo* happens when a person (such as supervisor, employer, co-employee, owner, or manager) influences or makes an attempt to influence employment conditions of the employee by coercing or attempting to coerce him or her to submit to sexual request.¹⁸ On one hand, the harasser may promise to influence employment for the victim positively, on another, the harasser may threaten to negatively influence employment against the victim.

With the former, the harasser threatens the employee with a dismissal, demotion, deprivation of employment benefit, salary decrement, unless the employee submits to the harasser's sexual request. With the latter, the harasser promises to promote the employee, increase job-related benefits, salary increment or any other favourable conditions, subject to the employee submitting himself or herself to the sexual requests of the

¹⁴ *Ibid.*

¹⁵ *Ibid.*

¹⁶ *Ibid.*

¹⁷ E.g. Law of contracts, Labour Law, Business law etc.

¹⁸ Item 5.2.3.2 of The EEA Amended code of good practice on handling sexual harassment cases.

harasser. In both instances, the employee is subjected to some form of unfair treatment.

1.2. The research problem

Findings by the International Labour Organisation show that globally, 17.9 percent of employees indicated that they had experienced psychological violence and harassment in their working life, and women were most likely to share their experiences than men (60.7 percent compared to 50.1 percent).¹⁹

While sexual harassment undoubtedly has devastated effects to the victims, it appears that some forms of sexual harassment receive less attention. *Quid pro quo* harassment is one of the sexual harassments which takes place more often in the workplace, although not given as much attention. In most cases, employees have no clear understanding of this type of sexual harassment.

The following are some of the problems, which the study focuses on: Firstly, insufficient understanding of the nature of consequences that the conduct has on the victim and the relationship of employment existing between the harasser and the victim employee. Secondly, the inconsideration of the legitimacy of consent in most *quid pro quo* cases, taking into account the influence of the reward or threat. The harasser can use force emanating from physical power or non-physical power. The non-physical power includes the power that one person has over another because of the relationship that exist between the parties. A good example of this is the power that the employer has over the employee.

¹⁹ International Labour Organisation 'Experiences of Violence and Harassment at Work: A first global survey' 05 December 2022 https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_863177/lang--en/index.htm Accessed 21 January 2023.

It is generally accepted that a victim who submits to sexual acts due to fear of physical harm from the harasser does not give valid consent. It can similarly be submitted that a victim who submit to sexual acts due to fear of non-physical harm²⁰ does not give valid consent. In fact, Snyman²¹ notes that abuse of authority is one of the factors, which invalidate the voluntariness of the consent, in accordance with section 1(3)(b) of the Criminal Law (Sexual offences and related crimes) Amendment Act.²²

The third problem is the plague of corruption. In *NEHAWU obo Mojapelo v SARS*²³ the court described corruption as cancer that is plaguing both public sector and private sector.²⁴

This study attempts to answer several questions aimed at resolving the above-mentioned problems.

1. Are the laws regulating *quid pro quo* harassment effective in combating the conduct in workplaces, as well as its consequences?
2. Is the consent given by the victim in *quid pro quo* a valid one? And if not, what are the implications?
3. To what extent does the conduct of *quid pro quo* harassment constitute corruption?
4. What can be done to reduce the impact of the conduct in employment?

1.3. The aim and objectives

1.3.1. The aim

²⁰ In the context of this study, non-physical harm may include demotion, salary decrement, dismissal etc.

²¹ Snyman, CR. *Criminal Law* (6th ed LexisNexis 2014) 353.

²² 32 of 2007.

²³ (2022) 43 ILJ 1379 (LC).

²⁴ *Ibid*, para 27.

The aim of the study is to contribute to the existing body of knowledge on sexual harassment, particularly *quid pro quo* harassment in workplaces. It recognises that the first step to resolving any issue or problem is to have sufficient knowledge and understanding of the issue. As Forbes Coaches Council has alluded, the first step to resolving any issue is to have its full understanding as well as for its root cause.²⁵

1.3.2. Objectives of the study

The following are the objectives of the study:

- a. Analysis of the effectiveness of existing law in dealing with *quid pro quo* harassment.
- b. Investigation of the approach taken by the courts in dealing with *quid pro quo* harassment cases.
- c. Evaluation of the validity of consent in *quid pro quo* harassment.
- d. Investigation of the corruption elements in *quid pro quo* harassment.
- e. Make recommendations to deal with *quid pro quo* harassment.

1.4. Literature review

The study evaluated existing literature in respect of the meaning of *quid pro quo* harassment, its causes, effects, the typical victims of the harassment as well as the typical harasser, and liability in a case of *quid pro quo* harassment.

1.4.1. The meaning of quid pro quo harassment

²⁵ Forbes Coaches Council, '14 Critical First Steps To Solving A Problem' (16 July 2020) <https://www.forbes.com/sites/forbescoachescouncil/2020/07/16/14-critical-first-steps-to-solving-a-problem/?sh=6b8063f41cc4> Accessed 21 June 2022

Concerning what constitute *quid pro quo* harassment, there seems to be no conflicting scholarly views. Perhaps this is because the Code expressly defines the conduct. Snyman *et al*, in reference to item 4(1)(d) of the Code, avers that *quid pro quo* harassment happens when an employer, owner, supervisor, co-employee, or manager undertakes or tries to influence the employment process, salary increment or decrement, dismissal, training, promotion or other employee's or job applicant's benefits in exchange for granting sexual benefits.²⁶

According to Brama,²⁷ the supervisor uses his power to threaten an employee unless she responds positively to a sexual advance. Brama goes on to state that it is not a requirement that the promise or threat is carried out.²⁸ The fact that there was a promise or threat for sexual exchange, is sufficient.²⁹

The victim should feel like they have something to lose if they do not submit to the sexual advances of the culprit.³⁰ The word 'something to lose' implies that this should be something that the victim is entitled to, these may include a job or any job-related benefits.

An analysis of the above shows two ways in which the conduct can be committed. Firstly, it may take a form of extortion in which a sexual favour is extorted by means of a threat. With this form, the culprit threatens to take away something which already belongs to the employee if the

²⁶ Snyman-Van Deventer, E. de Bruin, J. 'Sexual harassment in South African and American law' (2002) 211. (Snyman Van-Deventer and De Bruin)

²⁷ BRAMA, EM. 'The Changing Burden of Employer Liability for Workplace Discrimination' Minnesota Law Review (1999) 83(5) *Minnesota Law Review* 1481-513.

²⁸ *Ibid.*

²⁹ *Ibid.*

³⁰ Mahlangu, VP. 'Legal Understanding of *Quid pro quo* Sexual Harassment' (2017) 15 *Bulgarian Comparative Education Society* 188-194 (*Mahlangu*).

employee does not submit to the sexual advance of the culprit. These threats may include demotion, termination of employment, decreasing the salary or removing any other benefits from the victim employee.

Secondly, *quid pro quo* harassment can take a form of a bribery, in which the employee is promised something that they do not yet have in exchange for sex. These may include promotion, salary increment, employment contract etc.

1.4.2. The typical harasser and typical victims of quid pro quo harassment

Generally, the typical culprit of *quid pro quo* harassment is someone who exercises authority over the victim, usually supervisors in workplaces, teachers or principal in schools,³¹ etc. According to Naylor, women are most likely to be victims of sexual harassment.³² This view is indirectly supported by Mahlangu,³³ in defining *quid pro quo* harassment at schools. Mahlangu argues that *quid pro quo* harassment happens when a female learner is forced to have sex with her teacher(s) by a threat of failing a subject.³⁴ The use of the words 'female learner' supports the notion that females are most likely to be victims of sexual harassment than males. Again, Bronstein carries the same view that most of the victims of sexual harassment are women, while understanding that cases of men being harassed by women have also been reported.³⁵

³¹ See *Mahlangu*.

³² Naylor, N. *Sexual Harassment and The Amended Code of Good Practice on The Handling of Sexual Harassment in South Africa*. 2010.

³³ *Mahlangu*.

³⁴ *Ibid*, 190.

³⁵ Bronstein, A. *International and Comparative Labour Law: Current Challenges*. 2009 by Palgrave Macmillan. 163.

Snyman-van Deventer and De bruin depart partially from this view.³⁶ While they appreciate that the traditional view is that usual harassers are men and typical victims are women, they contend that there has been a shift from the traditional work situations in which breadwinners are men and homemakers are women.³⁷ This move allowed women to occupy the same positions as men and thus women can be harassers too.³⁸ Despite this departing view, the authors hold that generally, sexual harassment is still mostly directed against women.³⁹

While this view may be correct, it appears to ignore the fact that men do not usually report sexual harassment against women, hence the proportion of female victims to male victims based on reported cases may not reflect the reality. The reason for this is that when men report harassment by women, the male victims are not taken seriously.⁴⁰

Perhaps the safest view for now is that the typical culprits are those who hold the position of power while victims are those who holds inferior positions, regardless of gender. Pina *et al*/calls this an organisational theory of sexual harassment.⁴¹ The dissertation evaluates this view in consideration of the available evidence.

³⁶ Snyman Van-Deventer and De Bruin. 197.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

⁴⁰ Tebele, SM. 'Analysis of Discrimination on The Basis of Sexual Orientation in The Workplace' 2013.

⁴¹ Pina, A. Gannon, T.A. & Saunders, B. 'An Overview of The Literature on Sexual Harassment: Harasser, Theory and Treatment Issues. Aggression And Violent Behaviour' (2009) 14, 126–138

1.4.3. The causes of *quid pro quo* harassment

While sexual harassment may happen without any exercise of power, it is largely based on power, privilege, and control.⁴² In *Campbell Scientific Africa (Pty) Ltd v Simmers and Others*,⁴³ the Labour Appeal Court stated,⁴⁴

“At its core, sexual harassment is concerned with the exercise of power and in the main reflects the power relations that exist both in society generally and specifically within a particular workplace”.

The culprit normally exercises power over the victim. The absence of power means the absence of the ability to influence the employment process and thus unlikely to be *quid pro quo* harassers.⁴⁵ Notably, unprofessionalism is also a significant contributor to sexual harassment. A person who is professional would not attempt to, or even promise to influence the process of employment in exchange of sexual favours.⁴⁶

1.4.4. Liability in a case of *quid pro quo* harassment

⁴² Khumalo P, 'Sexual Harassment is About Power, Privilege and Control' (17 December 2005) <https://genderlinks.org.za/programme-web-menu/sexual-harassment-is-about-power-privilege-and-control-2005-12-17> Accessed 20 January 2023

⁴³ [2015] ZALCCT 62. (*Campbell case*)

⁴⁴ *Campbell case*, para 20.

⁴⁵ At the core of *quid pro quo* harassment is the influence of the process of employment, whether positively or negatively. Those who hold power (e.g. supervisor) influence the process of employment. This means that a person who does not have the power is unable to influence the process of employment, and therefore unlikely to promise the same.

⁴⁶ Ibuzzle 'Understanding and Conducting Professionalism at the Workplace' (10 July 2020) <https://ibuzzle.com/professionalism-in-workplace> Accessed 20 January 2023). At the workplace, the concept of professionalism refers to a person performing his work functions or duties with honesty and preserving professional manners. It leads to logical decision-making which is not bias, and create a good work environment. The conduct of *quid pro quo* harassment is characterised by biased decision making by the harasser, therefore making it an unprofessional conduct.

The discussion of *quid pro quo* harassment cannot be complete without touching into the liability as it relates to the conduct. Obviously, the culprit would be the first to be held liable, the question worth discussing is whether the employer can be liable for the incident. The general rule is that there can be no liability without fault. In *YF / Multichoice Subscriber Management Services (Pty) Ltd t/a MWEB* case, Commissioner Van Staden found that there is no reason why this rule should not apply to sexual harassment.⁴⁷

The liability of the employer is provided for by section 60 of the EEA. The Labour Court has set out certain requirements that need to be present for the employer's liability to arise.⁴⁸ These requirements, among others, include the employer's failure to take all reasonable measures which are practicable to eliminate the contravention of EEA by its employees. In *Liberty Group Ltd v M*,⁴⁹ the Labour Appeal Court found the employer liable for failing to take all the steps necessary to eliminate the cause of complain and failed to do all that was reasonable and practicable under s 60(4) of the EEA.

The employer would not be liable where reasonable steps have been taken to prevent sexual harassment from happening. In *National Transport Movement obo Legodi v Mafoko Security Services (Pty) Ltd*.⁵⁰ The commissioner held that since the employer had acted in response to the allegations of the employees against the supervisor, the employer could not be held liable for *quid pro quo* harassment which was committed by the supervisor against the complainant employee.

⁴⁷ [2008] 11 BALR 1106 (P), para 44.

⁴⁸ *Potgieter v National Commissioner of the South African Police Services and Another* [2009] 2 BLLR 144 (LC).

⁴⁹ (2017) 38 ILJ 1318 (LAC).

⁵⁰ [2019] 1 BALR 55 (CCMA) (*Mafoko Security Services*).

1.4.5. The effects of *quid pro quo* harassment

According to the North American Mental Health Professional Advice Council (NAMHPAC), some of the detrimental effects of sexual harassment (including of *quid pro quo* harassment)⁵¹ include feelings of guilt, changes in appetite and sleep disturbances, inability to focus, which affect the performance and productivity of the victim employee, pervasive feelings of shame and doubt, and it leads to aches and pains due to mental stress.

1.5. Significance of the study

The findings of this study will help in the reduction of the *quid pro quo* harassment in the workplace and will help with the improvement of ways to deal with the same. This will be achieved bringing about a better understanding of the *quid pro quo* harassment, its causes as well as provision of recommendations to deal with it.

1.6. Methodology

The study is a qualitative one.⁵² It relies on existing literature relating to the *quid pro quo* harassment. The study utilised two methods of data collection, namely desktop search and library search. The study primarily takes a form of a doctrinal research,⁵³ while some aspects of non-doctrinal are applied.⁵⁴

⁵¹ NAMHPAC, Detrimental Effects of Sexual Harassment. (5 December 2019) <https://www.namhpac.org/6-detrimental-effects-of-sexual-harassment/> Accessed 20 June 2022.

⁵² For meaning of qualitative research, see Williams-Elegbe, S. Ojomo, E 'Introduction to Legal Research' (2013) [www.yararena.org/uploads/Introduction to Legal Research.pdf](http://www.yararena.org/uploads/Introduction_to_Legal_Research.pdf) Accessed 21 June 2022

⁵³ See Pradeep M. D. 'Legal Research- Descriptive Analysis on Doctrinal Methodology' (2019) 4(2) *International Journal of Management, Technology, and Social Sciences* 2581-6012.

⁵⁴ *Ibid.*

The study attempts to find law that regulate *quid pro quo* harassment at work and further considers the logic and reasoning of the same. On the other hand, it questions the effectiveness of the law in *quid pro quo* harassment by considering social-economic factors.

1.7. Chapter outline

This study comprises of five chapters, as follows;

- a) Chapter 1: This chapter focuses on the background of the study.
- b) Chapter 2: Chapter two examines the legal framework for *quid pro quo* harassment in South Africa.
- c) Chapter 3: This chapter scrutinises the issue of consent and *quid pro quo* harassment.
- d) Chapter 4: This chapter addresses the corruption element of *quid pro quo* harassment.
- e) Chapter 5: This is the last chapter which draws conclusion from the entire study and provides recommendations.

1.8. Ethical considerations

Given the nature of the research, the study did not need to obtain ethical clearance.

1.9. Summary

In summation, the study has sought to bring a better understanding of *quid pro quo* harassment through a critical analysis of existing law and literature. In finding existing law and literature, the study utilised the internet as well as a library at the University of Limpopo and other accessible libraries. Recommendations aimed at reducing the commission of *quid pro quo* harassment and its consequences are provided by the study.

CHAPTER 2: LEGAL FRAMEWORK FOR *QUID PRO QUO* HARASSMENT IN SOUTH AFRICA

2.1. Introduction

Sexual harassment is made of various forms, including *quid pro quo* harassment.⁵⁵ The South African sexual harassment laws do not regulate each form separately, but rather as one with 'sexual harassment' as an umbrella word.⁵⁶ Steps taken by South Africa to curb sexual harassment at work can be traced back to 1989, in the case that became to be commonly known as *J v M*.⁵⁷

The case relates to a senior executive who had been dismissed for his behaviour which was sexually inappropriate. The Industrial Court found such dismissal to be fair. The court found that sexual harassment was a serious offence and required the employer's attention, whether it involves members of the same sex or opposite sex.⁵⁸ Further, the court stated that behaviour of sexual harassment, subject to the form it takes, is a violation of the victim's right to bodily integrity as well as personality integrity.⁵⁹

Following this case, South Africa introduced laws, codes, and policies aimed at dealing with sexual harassment.⁶⁰ Further, the Commission for Conciliation Mediation and Arbitration ('CCMA') and the courts have ruled on matters of sexual harassment.⁶¹ Currently, laws regulating sexual

⁵⁵ Other forms of sexual harassment include physical conduct (e.g. touching, kissing), verbal (e.g. sexual comments), non-verbal (e.g. exposing sexual organs, sending inappropriate sexual photos or videos), victimization and sexual favouritism which is recognised as a form of *quid pro quo* harassment by the Amended Code.

⁵⁶ Put differently, the law regulates sexual harassment in general, rather than providing specific rules for each form. For example, the test for sexual harassment is the same for all forms.

⁵⁷ (1989) 10 ILJ 755 (IC) (*J v M*).

⁵⁸ Para 755H-I.

⁵⁹ *Ibid.*

⁶⁰ Kubjana, LL 'Understanding the Law on Sexual Harassment in the Workplace (through a Case Law Lens): A Classic Fool's Errand' (2020) 41(1) *Nelson Mandela University Law Journal*.

⁶¹ *Ibid.*

harassment include the Constitution,⁶² Employment Equity Act 55 of 1998,⁶³ Labour Relations Act Code of Good Practice on Handling Sexual Harassment in the workplace,⁶⁴ The Employment Equity Act Amended Code of Good Practice on Handling Sexual Harassment Cases,⁶⁵ Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace,⁶⁶ Protection from Harassment Act 17 of 2011,⁶⁷ and the Labour Relations Act 66 of 1995.⁶⁸

2.2. The legislative meaning of *quid pro quo* harassment

According to the Code, *quid pro quo* harassment happens where:⁶⁹

“... 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 benefit of an employee or job applicant, in exchange for sexual favours”.

While the Code is clear that these provide an exhaustive list of people who could commit the misconduct of *quid pro quo* harassment, the Amended Code, in defining *quid pro quo* harassment, suggest that other people except those listed can indeed commit the conduct of *quid pro quo* harassment. The Amended Code defines *quid pro quo* harassment as follows:⁷⁰

“*Quid pro quo* harassment occurs where a person such as an owner, employer, supervisor, member of management or co-employee, influences or

⁶² The Constitution regulate discrimination in its equality clause, section 9.

⁶³ The Act protects employees from unfair discrimination, and also provide for the liability of the employer for discrimination committed in his workplace.

⁶⁴ The Code provides guidelines on handling sexual harassment to employees and the employers.

⁶⁵ The code amends the LRA code on sexual harassment.

⁶⁶ No. 46056 18 March 2022 ('The Code on harassment').

⁶⁷ The Act protects victims of harassment against harassers through protection orders.

⁶⁸ Protect employees against dismissals arising unfair discrimination in a form of sexual harassment.

⁶⁹ Item 4(1)(d) of the Code.

⁷⁰ Item 5.2.3.2 of the Amended Code.

attempts to influence an employee's employment circumstances (for example engagement, promotion, training, discipline, dismissal, salary increments or other benefits) by coercing or attempting to coerce an employee to surrender to sexual advances".

By inclusion of the words "*a person such as...*" the Amended Code makes it clear that the persons listed are simply examples of people who can commit *quid pro quo* harassment, and not a limited list. In extension of the limited list of those areas to be influenced in a conduct of *quid pro quo* harassment, as provided by the Code, the Amended Code makes use of the word "*employee employment circumstances*" which extend the list to include everything that has to do with the employment of the employee.

Notably, while the Code recognised sexual favouritism as a separate form of sexual harassment, the Amended Code includes sexual favouritism as part of *quid pro quo* harassment and not as a self-standing sexual harassment form. The Amended Code effect this by stating, in defining *quid pro quo* harassment,⁷¹

"... This could include sexual favouritism, which occurs where a person in authority in the workplace rewards only those who respond to his or her sexual advances".

Further, the same is supported by the Code on harassment which provides that sexual favouritism is a type of *quid pro quo* harassment and it happens when a person who occupies position of power uses their power to favour those who submit to his or her sexual requests.⁷² The word 'respond' in the description of sexual favouritism can safely be assumed to mean a positive respond, or rather a submission to the sexual advance.⁷³

⁷¹ *Ibid.*

⁷² Section 5.2.6.3 of the Code on harassment.

⁷³ This is founded on the fact that while the word 'respond' may mean both in the affirmative or negatively, the person in authority will reward those that respond in the affirmative.

Furthermore, the Protection from Harassment Act provides several definitions of sexual harassment. Two of these definitions describes *quid pro quo* harassment. Firstly, the Act defines sexual harassments as an implied or expressed promise of reward for complying with a sexually oriented request,⁷⁴ and secondly, an implied or expressed threat of reprisal or actual reprisal for refusal to comply with a sexually oriented request.⁷⁵

2.3. Establishing a *quid pro quo* harassment claim

To establish a claim for *quid pro quo* harassment, the plaintiff may establish the same in two ways. Firstly, that the conduct in question, which gave rise to the claim constitute sexual harassment. Secondly, that such conduct falls specifically within the scope of *quid pro quo* harassment.⁷⁶

2.3.1. Does the conduct in question constitute sexual harassment?

A conduct will constitute sexual harassment if it is an unwelcome conduct which is of sexual nature and encroaches on an employee`s rights and constitute a barrier to workplace equity.⁷⁷ The following are factors to be taken into account when determining whether a conduct amount to sexual harassment:

- i) *Was the harassment on prohibited ground?*⁷⁸

⁷⁴ An example of this is where the harasser promises to promote the victim or increase the salary of the victim on condition that she or he submit to the sexual request.

⁷⁵ An example of this is where the harasser threatens to demote the employee, or even dismiss unless the employee submits to the sexual advance.

⁷⁶ It must be noted that once the plaintiff establish that the conduct constitutes sexual harassment, it has already reached a success level, because even if it does not fall within the scope of *quid pro quo*, it obviously will fall within the scope of one of the forms of sexual harassment. It is questionable that the court can dismiss a case on basis that the case is not one of *quid pro quo*, when it is clearly a case constituting other types of sexual harassment (e.g. victimisation).

⁷⁷ This is the sexual harassment test as provided for by item 4 of the Amended Code.

⁷⁸ Item 5.1 of the Amended Code.

In sexual harassment, the grounds of discrimination are sexual orientation, gender and sex.⁷⁹ Same-sex harassment is also recognised as discrimination on the above listed grounds.⁸⁰

*ii) Whether the sexual conduct was unwelcomed?*⁸¹

An employee can show that the conduct is not welcome in various ways.⁸² Walking away from the harasser or not responding is sufficient to indicate the disapproval of the sexual advance or conduct.⁸³ The fact that the employee has welcomed the sexual conduct in the past does not mean future sexual conducts are welcome.⁸⁴ An employee who finds difficulty in indicating the unwelcomeness of the conduct may seek assistance from another person to indicate the same.⁸⁵

*iii) The nature and extent of sexual conduct*⁸⁶

The nature of the sexual conduct may be physical,⁸⁷ or verbally⁸⁸ and even non-verbal.⁸⁹ A physical conduct is likely to be more serious than a verbal conduct and non-verbal conduct. The Amended Code provides that sexual harassment can be caused by a single incident.⁹⁰

*iv) The impact that the sexual conduct has on the employee*⁹¹

⁷⁹ Item 5.1.1 of the Amended Code.

⁸⁰ Item 5.1.2 of the Amended Code.

⁸¹ Item 5.3 of the Amended Code.

⁸² Item 5.2.1 of the Amended Code.

⁸³ *Ibid.*

⁸⁴ Item 5.2.2 of the Amended Code.

⁸⁵ Item 5.2.3 of the Amended Code.

⁸⁶ Item 5.3 of the Amended Code.

⁸⁷ Item 5.3.1.1 of the Amended Code.

⁸⁸ Item 5.3.1.2 of the Amended Code.

⁸⁹ Item 5.3.1.3 of the Amended Code.

⁹⁰ Item 5.3.3 of the Amended Code.

⁹¹ Item 5.4 of the Amended Code.

A conduct constitutes sexual harassment if it harms the dignity of the employee, having regard to the employee's circumstances⁹² and workplace positions of both the harasser and the employee.⁹³

2.3.2. Does the sexual harassment conduct fall within the scope of quid pro quo harassment?

After establishing that the conduct in question constitute sexual harassment, it must be established that the sexual harassment in question was one of *quid pro quo* harassment. A sexual harassment is considered *quid pro quo* if:⁹⁴

i. There is a request of sexual nature

Generally, the term 'sexual nature' is taken to refer to language, actions or visual materials which explicitly refer to, depict, or contain sexual activity or language.⁹⁵ In *quid pro quo* harassment, this may include request for inappropriate touching, sexual intercourse, oral sex and others.

ii. Existence of a threat or promise of reward

This element will be satisfied in either of the following circumstances:

- The harasser has threatened to remove employment related benefits or substantive rights from the employee, or
- The harasser has promised to reward the employee with employment related benefits or substantive rights.

iii. The said threat or promise of reward should be directed at coercing the employee to submit to the sexual request

⁹² Item 5.4.1 of the Amended Code.

⁹³ Item 5.4.2 of the Amended Code.

⁹⁴ These elements were drawn from a close analysis of the meaning of *quid pro quo* and its nature.

⁹⁵ Advocates for Human Rights 'Sexual Harassment is Conduct Based on Sex or of a Sexual Nature' (8 January 2010) https://www.stopvaw.org/sexual_harassment_is_conduct_based_on_sex_or_of_a_sexualnature Accessed 20 November 2022.

A mere threat or promise of reward would not suffice. The employee needs to establish that such a threat or promise was made to force them into submission. In practice, this element may be easy to establish, as the harasser would usually make it clear that submission to the sexual request is a condition to the award so promised or threat.

iv. A power relationship exists between the harasser and the victim employee

While sexual harassment can be committed by any person at work, *quid pro quo* harassment is more likely to be committed by person who exercise authority over the victim employee or at least the victim employee reasonably believed that power to exist. The power can either be a real employment power⁹⁶ or influential power.⁹⁷ The holder of the real employment power includes the supervisor, manager, director, and the employer himself.⁹⁸ While influential power can be exercised by anyone with the capability of influencing the decisions of those who exercise real power, for example an important client of a business is likely to influence the decisions of the business.⁹⁹

2.4 *Quid pro quo* harassment as a form of unfair discrimination

Harassment (including sexual harassment) is recognised as a form of unfair discrimination on any one of the grounds or combination thereof.¹⁰⁰ This is

⁹⁶ Real employment power refers to that power recognised by employment law (including common law) or in terms of a contract or collective agreement.

⁹⁷ Influential power refers to the power to influence the decisions of those with real power.

⁹⁸ The list is not exhaustive.

⁹⁹ A spouse is one of the typical examples of people who may exercise this illegitimate power.

¹⁰⁰ Section 6(3) of the EEA.

reiterated by item 3 of the Amended Code, which provides that sexual harassment in workplace is a form of unfair discrimination and therefore forbidden on the grounds of gender, sexual orientation and/or sex.¹⁰¹ Grogan avers that while sexual orientation and gender issues may be more complicated from a psychological and physical viewpoint point of view, in employment law, the prohibition of discrimination against transsexuals,¹⁰² lesbians¹⁰³ and gays¹⁰⁴ is absolute.¹⁰⁵

Generally, discrimination is largely prohibited in South Africa.¹⁰⁶ The enactment of the Constitution brought hope of equality for women and black persons. In section 9, the Constitution prohibit discrimination¹⁰⁷ on any person by the state,¹⁰⁸ and by any other person.¹⁰⁹ Unfair discrimination is prohibited even if it is based on the ground not listed by the constitution or the EEA.¹¹⁰ However, discrimination is only automatically presumed unfair only if it is based on one or more of the listed ground¹¹¹

Nearly identical to the above-mentioned provisions of the Constitution is section 6(1) of the EEA, which reads as follows:

“No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility,

¹⁰¹ Gender, sex and sexual orientation are also listed as grounds of unfair discrimination by both the constitution and the EEA.

¹⁰² See *Atkins v Datacentrix (Pty) Ltd* (2010) 31 ILJ 1130 (LC).

¹⁰³ See *Langemaat v Minister of Safety and Security* (1998) 19 ILJ 240 (T).

¹⁰⁴ See *Allpass v Mooikloof equestrian Centre* (2011) 32 ILJ 1637 (LC).

¹⁰⁵ *Workplace Law*, 91.

¹⁰⁶ This is done in attempt to eliminate and correct the imbalances of the past.

¹⁰⁷ The Constitution, together with the EEA, prohibits both direct and indirect unfair discrimination.

¹⁰⁸ Section 9(3) of the Constitution.

¹⁰⁹ Section 9(4) of the Constitution.

¹¹⁰ The listed grounds include gender, race, disability, sex, pregnancy, marital status, ethnicity, age, social origin, colour, sexual orientation, religion, conscience, culture, belief, birth, and language.

¹¹¹ Section 9(5) of the Constitution.

ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth”.

The provision provides three additional grounds, which were not included in the Constitution, namely family responsibility, political opinion and HIV status. In section 6(2), the EEA provides two justifications of discrimination, as follows:

- a. Discrimination is based on affirmative action that complies with the Act.¹¹²
- b. Where the differentiation is for inherent requirements of a job.¹¹³

Notably, neither the Constitution nor the EEA prohibit discrimination, instead, they both prohibit discrimination which is unfair.¹¹⁴ Furthermore, while the Constitution protects all people in general against unfair discrimination, the EEA is directed at the sole protection of employees.

2.5 The employer`s liability on *quid pro quo* harassment claims

The general rule in civil liability is that a person who is at fault holds liability. However, in certain circumstances, liability can be passed to the third party provided that a legal relationship exists between such third party and the defendant.¹¹⁵ In sexual harassment cases, the victim has a choice to either institute a claim for vicarious liability, or section 60 of the EEA or both.¹¹⁶

Section 60 requires that the employer should immediately be notified of allegations of any contravention of any provision of the Act by any employee.¹¹⁷ After such notification, the employer is obliged to consult with

¹¹² Section 6(2)(a) of EEA.

¹¹³ Section 6(2)(b) of EEA.

¹¹⁴ *Essential Labour Law*, 352.

¹¹⁵ Liability of a third party is possible through a common law principle of vicarious liability.

¹¹⁶ *Essential Labour Law*, 365.

¹¹⁷ Section 60(1) of the EEA. The alleged contravention must have occurred while the accused employee was at work, and it include any actions that would amount to a violation of EEA if it was committed by that employee`s employer.

all relevant parties¹¹⁸ and take all necessary measures for elimination of the conduct alleged and to ensure that the EEA is complied with.¹¹⁹ Where it is proven that an employee violated the EEA provision in question and the employer did not take all the necessary measures referred to above, the contravention is deemed to have been committed by the employer.¹²⁰ In *Ntsabo v Real Security CC*,¹²¹ the employer was found to be liable after an allegation of sexual harassment was brought to the attention of the manager, who failed to take the necessary steps to deal with it.

The employee would not be liable if it proves that it did all that was reasonably practicable to prevent the accused employee from contravening the provisions of the EEA.¹²² In *Mokoena & Another v Garden Art Ltd & Another*,¹²³ the court held that responding to sexual harassment by issuing a final warning is sufficient to excuse the employer from liability for damages to the employee, provided that no further incidents are committed. Further, the section 60 employer's liability would not rise if the harasser is not its employee.¹²⁴

The requirements of the employer's liability in cases of sexual harassment were set down in the case of *Potgieter v National Commissioner of the South African Police Services and Another*¹²⁵ as follows:¹²⁶

- a. The harasser is in the employ of the employer.
- b. The sexual harassment is one amounting to unfair discrimination.
- c. The sexual harassment happened at the employer's workplace.

¹¹⁸ Relevant parties may include trade union representatives, the employees involved in the alleged contravention, the victim employee and etc.

¹¹⁹ Section 60(2) of the EEA.

¹²⁰ Section 60(3) of the EEA.

¹²¹ (2008) 29 ILJ 1803 (ARB).

¹²² Section 60(4) of the EEA.

¹²³ [2008] 5 BLLR 428 (LC).

¹²⁴ See for example *Samka v Shoprite Checkers (Pty) Ltd and Others* (2020) 41 (ILJ) 1945 (LAC).

¹²⁵ [2009] 2 BLLR 144 (LC).

¹²⁶ *Ibid*, para 46.

- d. The complainant or any other person immediately notified the employer of the allegation of sexual harassment.
- e. The employer was conscious of the occurrence of the sexual harassment.
- f. There was no consultation with all relevant parties by the employer or the employer failed to take all the steps necessary for elimination of the conduct or otherwise compliance with the EEA.
- g. The employer has failed to take all measures which were reasonably practicably to prevent employees from contravening of the EEA.

The Labour Appeal Court accepted these requirements in *Liberty Group Ltd v M*.¹²⁷

2.6. Remedies available to the victim employee

The victim employee has the following remedies:

2.6.1. Sexual harassment claim

The victim employee can approach the CCMA to lodge a claim for sexual harassment. The process of this claim has already been discussed in paragraph 2.3 above.

2.6.2. A claim for automatically unfair dismissal

In *quid pro quo* harassment, the harasser may threaten to dismiss the employee unless she or he submit to a sexual request.¹²⁸ In cases where the employee refuses to submit to the sexual advance and therefore subsequently dismissed, such an employee can institute a claim for automatically unfair dismissal in terms of section 187(1)(f) of the LRA. The

¹²⁷ (2017) 38 ILJ 1318(LAC).

¹²⁸ This happens where the *quid pro quo* takes a form of a threat.

section provides that a dismissal based on unfair discrimination on any prohibited ground is automatically unfair.¹²⁹

A victim employee who is subjected to dismissal resulting from sexual harassment would base their claim for automatically unfair dismissal on one or combination of gender, sex, or sexual orientation.

2.6.3. Automatically unfair constructive dismissal

Where the employee is a victim of *quid pro quo* harassment, and such an employee finds the continued employment to be intolerable, she or he has an option to resign and claim constructive dismissal. Constructive dismissal must be proven by the employee on balance of probabilities.¹³⁰ Once proved, the employer bears the onus of proving that the resignation was unreasonable.¹³¹

In *Media24 Ltd & another v Grobler*,¹³² a female employee who was harassed by her manager suffered from depression and other trauma. Despite lodging complaints, she was ignored for months by the employer and subsequently she resigned. The court found that employee could submit various claims. Firstly, an unfair discrimination claim in terms of EEA. Secondly, an automatically unfair constructive dismissal claim. Finally, a claim for vicarious liability in common law.¹³³

2.6.4. Unfair labour practices claim

¹²⁹ The section further provide that the grounds include, but not limited to sex, gender, ethnic or social origin, race, age, sexual orientation, disability, colour, religion, political opinion, belief, marital status, language, conscience, culture, or family responsibility.

¹³⁰ *Jooste v Transnet Ltd t/a SA Airways* (1995) 16 ILJ 629 (LAC).

¹³¹ Tshoose CI 'Constructive Dismissal Arising from Work-related Stress: National Health Laboratory Service v Yona & Others' (2017) 42(1) *Journal for Judicial Science* 121.

¹³² (2005) 26 ILJ 1007 (SCA).

¹³³ See Tshoose CI. 'The Employers' Vicarious Liability in Deviation Cases: Some Thoughts from the Judgment of *Stallion Security v Van Staden 2019 40 ILJ 2695 (SCA)*' (2020) 34(1) *Speculum Juris*.

In South Africa, everyone¹³⁴ has a constitutional right to fair labour practices.¹³⁵ This right is given content to by section 185(b) of the LRA, which state that every employee has a right not to be subjected to unfair labour practices.¹³⁶ The LRA defines unfair labour practices as follows:¹³⁷

“An “unfair labour practice” means any unfair act or omission that arises between an employer and an employee involving

- a. unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals for a reason relating to probation) or training of an employee or relating to the provision of benefits to an employee.
- b. the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee.
- c. a failure or refusal by an employer to reinstate or re-employ a former employee in terms of any agreement; and
- d. an occupational detriment, other than dismissal, in contravention of the Protected Disclosures Act [26 of 2000] ... on account of the employee having made a protected disclosure defined in that Act”.

A typical *quid pro quo* harassment case would usually fall within the scope of section 186(2)(a) and (b) of the LRA. The following is a brief description of the same and its relationship with *quid pro quo* harassment.

a) Unfair labour practices relating to promotion

Mokabane *et al*¹³⁸ defines promotion as an act of raising the rank or position of the employee.¹³⁹ Although there is no right to promotion, conduct relating

¹³⁴ The word ‘everyone’ suggest that the constitution protects everyone in the world of work, including employers and workers who are not covered by the LRA as employees.

¹³⁵ Section 23 of the constitution.

¹³⁶ This provision protects employees from unfair labour practices by employers.

¹³⁷ Section 186(2) of the LRA.

¹³⁸ Mokabane MJ, Odeku KO, Nevondwe T. ‘Employer`s failure to adhere to its promotional policy and procedure: Implications for fair labour practices’ (2012) 6(46) *African Journal of Business Management*.

¹³⁹ *Ibid*, 1137.

to promotions must be substantively fair and follow fair procedure.¹⁴⁰ In *quid pro quo* harassment, the harasser may make a request of sexual nature and promise promotion of the employee in exchange. From the face of it, the refusal by the employee to submit to the sexual request automatically disqualifies him or her from the promotion.

b) Unfair labour practices relating to demotion

Demotion refers to the lowering of the rank or position of the employee.¹⁴¹ Demotion should also be substantively fair. Garbers avers that demotion is considered fair only if it is used to avoid dismissal for misconduct.¹⁴² In circumstances where the harasser in *quid pro quo* harassment threatens to demote the employee unless they submit to a sexual advance, such demotion therefore would constitute an unfair labour practice.

c) Probation

The employer may promise to employ the employee who is placed on probation, in exchange for a sexual favour. In such circumstances, the probationary employee is therefore not being given a fair chance to be employed in consideration of their performance during the probation period. An employee then gets an impression that once they say no, they therefore would not be considered for employment.

d) Other benefits

Where the employee is denied benefits, they are entitled to, or where benefits that they already receive are removed because they refused to

¹⁴⁰ *Essential Labour Law*, 326.

¹⁴¹ Mokabane *et al*, 1137.

¹⁴² *Essential Labour Law*, 328.

submit to sexual request of the employer, or any person referred to by the Amended Code. The benefits may include:

- i. Housing allowance.
- ii. Car allowance.
- iii. 13th payment.
- iv. School and training sponsorships.

e) Unfair suspensions

A suspension¹⁴³ has an impact which is detrimental on an employee`s reputation, advancement, fulfilment and job security.¹⁴⁴ Therefore, suspension may only be justified by the presence of a genuine reason to believe that a serious misconduct was committed by the employee.¹⁴⁵ In *Mogothle v Premier of the North West Province & another*,¹⁴⁶ the court found that suspension is equivalent to an `arrest` and thus should only be invoked where there is reasonable belief that the employee would temper with investigations or may present some other threat.

Suspending an employee because he or she refused to give in to a sexual harassment is not justified and therefore amount to an unfair labour practice.

2.7. South African jurisprudence on *quid pro quo* harassment claims: Selected case laws

¹⁴³ A suspension can be preventative in nature or punitive.

¹⁴⁴ *Minister of Home Affairs v Watshenuka* 2004 (4) SA 326 (SCA) para 27.

¹⁴⁵ *MEC for Education: North-West Provincial Government v Gradwell* (2012) 33 ILJ 2033 (LAC).

¹⁴⁶ [2009] 4 BLLR 331 (LC).

In the case of *YF / Multichoice Subscriber Management Services (Pty) Ltd t/a MWEB*,¹⁴⁷ a senior employee (applicant) had induced a trainee (complainant) to perform sexual acts with him, claiming that he influenced the complainant's appointment as part of the learnership group. After the complaint was laid, a disciplinary hearing followed in which the applicant was found not guilty.

Dissatisfied with the findings, the employer instituted second disciplinary proceedings, under a different chairperson, who found the applicant guilty of sexual harassment. The matter was taken on review by the applicant at the CCMA. The CCMA agreed with the second chairperson that the applicant was guilty of sexual harassment, and that his dismissal was both procedurally and substantively fair. This case demonstrates that where the harasser influences the process of employment without the knowledge of the victim, then later demand sexual favours on account of that, an act of *quid pro quo* harassment is committed.

In *Makoti v Jesuit Refugee Service South Africa*,¹⁴⁸ a female employee¹⁴⁹ claimed to have been dismissed for refusing to submit to sexual requests of the national director of the respondent (Shivatu). In her testimony, the applicant submitted that the allegations of sexual harassment involved several incidents that took various forms, which she firmly refused, including sexual utterances,¹⁵⁰ physical attempts to kiss¹⁵¹ and even promises of employment rewards.¹⁵²

¹⁴⁷ [2008] 11 BALR 1106 (P).

¹⁴⁸ (2012) 33 ILJ 1706 (LC).

¹⁴⁹ The employee was employed on a contract, renewable after a period of time through 're-apply' procedure. Because the employer was a non-profit organisation, the renewal of contracts depended on donor funding.

¹⁵⁰ *Makoti case*, paras 8, 9, 11 and 12.

¹⁵¹ *Makoti case*, para 8.

¹⁵² *Makoti case*, para 11. Shivatu promised to promote the applicant, through making her run the 'new project in Limpopo'.

When the time for renewing the applicant`s contract came, it was not renewed on allegation of poor performance.¹⁵³ The applicant denied such an allegation¹⁵⁴ and contended that the allegations of poor performance had no basis.¹⁵⁵

The court held that not renewing the contract of the applicant constituted dismissal falling within section 186(1)(b) of the LRA. On whether such dismissal resulted from the applicant`s refusal to submit to Shivambu`s sexual advances, Lagrange J stated:¹⁵⁶

“Not only was the applicant`s repulse of the director`s sexual advances one of the reasons for her dismissal, but it is also the most probable explanation for the dismissal. It is trite law that so-called *quid pro quo* acts of sexual harassment amount to unfair discrimination...”.

The court reasoned that refusing to submit to sexual advances was the most probable explanation that led to the dismissal of the employee. The court accepted that while one side of the coin in *quid pro quo* harassment is when an employee is granted job benefits in exchange for favours of sexual nature, the other side is when an employee is disadvantaged for not submitting to the advances. Further, the court reasoned that dismissal on this basis is on prohibited ground constituting unfair discrimination in terms of section 187(1)(f) read with section 6(3) of the EEA.

The court in this case correctly found that reprisal of employment benefits (including dismissal) because of the employee failing to submit to sexual advances did amount to *quid pro quo* harassment. Similarly, in the case of

¹⁵³ *Ibid*, para 19.

¹⁵⁴ *Ibid*, para 21.

¹⁵⁵ *Ibid*, para 34.

¹⁵⁶ *Makoti case*, para 53.

Christian v Colliers Properties,¹⁵⁷ an employee who had declined the sexual advances of her senior (Collier) was dismissed on allegation of poor performance.

The court found that the applicant had been dismissed because she declined Collier`s sexual advances. The reasoning of the court was that the alleged poor performance was not complained of prior to the dismissal, and that raising the allegation only after she declined Mr Collier`s sexual advances make it improbable that the allegations of poor performance were genuine. The court ruled that the dismissal was automatically unfair.

In *National Transport Movement obo Legodi / Mafoko Security Services (Pty) Ltd*,¹⁵⁸ a supervisor promised permanent employment to an employee who was employed on fixed term contract, in exchange for sexual favours. The employee agreed and engaged in sexual intercourse with the supervisor. However, the supervisor did not undertake his promise. Aggrieved by this, the employee claimed sexual harassment and contended that the employer should be liable in terms of section 60 of the EEA. The arbitrator confirmed that the employee had been sexually harassed, but rejected the liability of the employer on the basis that the complainant did not inform the employer.

2.8. Summary

The South African law on sexual harassment deals with workplace sexual harassment in two ways. On one hand, the law seeks to prevent sexual harassment from happening. On the other, the law attempts to deal with cases of sexual harassment which has already materialised. With the

¹⁵⁷ (2005) 26 ILJ 234 (LC).

¹⁵⁸ [2019] 1 BALR 55 (CCMA) (*Mafoko Security Services*).

former, the employer is obligated to have measures in the workplace to ensure that it is free from sexual harassment. The employer is obliged to adopt policies of sexual harassment complying with the Code. With the latter, the law provides various remedies to the complainants of sexual harassment, including civil claim.

Despite all the efforts, sexual harassment remains a problem in the South African workplaces.¹⁵⁹ De Vos alleges that not all commissioners or judges seems to appreciate the serious harm suffered by sexually harassed employees.¹⁶⁰ The fact that sexual harassment remains a problem may be an indication of the ineffectiveness of South African laws on sexual harassment.

Perhaps to curb workplace sexual harassment, the legislature should ensure that the conducts are dealt with in all the ways possible. A conduct of sexual harassment has a criminal element and a commercial element. An act of sexual harassment violates both the criminal laws and the commercial laws. By violating the criminal laws, it amounts to a criminal offence and thus the criminal element.¹⁶¹ Similarly, by violating the commercial laws, it amounts to a misconduct and thus the commercial element.¹⁶² In most cases, only commercial elements are pursued, and not the criminal element.¹⁶³ Perhaps ensuring that both criminal elements and commercial elements are pursued may be a solution.

¹⁵⁹ Pierre de Vos 'ConCourt ruling on sexual harassment by George doctor puts spotlight on workplace power relations' (17 June 2021) <https://www.dailymaverick.co.za/article/2021-06-17-concourt-ruling-on-sexual-harassment-by-george-doctor-puts-spotlight-on-workplace-power-relations/> Accessed 24 November 2022.

¹⁶⁰ *Ibid.*

¹⁶¹ An example of criminal law violated by sexual harassment is the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

¹⁶² Examples of commercial laws violated by acts of sexual harassment are Employment Equity Act and the Labour Relations Act.

¹⁶³ Most sexual harassment cases are only pursued at employment level, and no criminal charges are instituted.

The legislature should require all workplace policy guidelines on sexual harassment to clearly indicate the criminal elements of each form of sexual harassment.¹⁶⁴ In addition, the legislature should obligate all employers to, while dealing with acts of sexual harassment as a commercial misconduct, assist all sexual harassment complainants to institute criminal proceedings against the harassers.

¹⁶⁴ For example, physical sexual harassment is an equivalent to a criminal offence of sexual violation.

CHAPTER 3: CONSENT IN RELATION TO THE *QUID PRO QUO* HARASSMENT

3.1. Introduction

While *quid pro quo* harassment can be committed in various ways, this chapter is specifically concerned with a situation where a victim 'gives in'¹⁶⁵ to the sexual advance of the harasser. It analyses whether such 'giving in' amounts to valid consent or a simply coerced submission to the advance.

In the workplace, sexual activity or sexual advances amounts to sexual harassment if they are unwelcome. Where a conduct is welcome, it cannot be sexual harassment.¹⁶⁶ After all, before one can engage in any form of sexual activity with another, a consent is required from each of the parties. The requirement of consent in sexual activities ensures that a person controls the sexual activities they engage in. Having control over the sexual activity that a person engages in is founded at the core of human dignity and autonomy.¹⁶⁷ The protection of a person's dignity and autonomy necessitates that people have the right to choose who gets to touch their body, and to control how such touching should happen.¹⁶⁸

Non-consensual sexual intercourse undermines bodily integrity of a person, their sexual autonomy, and their freedom of sexual choices.¹⁶⁹ In advancement of human dignity and autonomy, non-consensual sexual

¹⁶⁵ According to Meriam-webster, the word 'give-in' means succumbing or ceasing resistance.

¹⁶⁶ *Bandat v De Kock and Another* (2015) 36 ILJ 979 (LC) para 72.

¹⁶⁷ *R v Hutchinson* 2014 SCC 19 (*Hutchinson*).

¹⁶⁸ *Hutchinson*, para 83.

¹⁶⁹ Francke D, 'When 'no' means 'no' - the controversy from misunderstanding the concept of sexual consent' (01 December 2021) <https://www.derebus.org.za/when-no-means-no-thecontroversy-from-misunderstanding-the-concept-of-sexual-consent/> Accessed 16 November 2022.

activities are criminalised¹⁷⁰ and are considered to be a serious misconduct (Sexual harassment).

3.2. Meaning of a sexual consent

Generally, a consent is regarded as permission for something to happen. Hornby notes that consent is given by someone in authority.¹⁷¹ In sexual activities, a consent can only be given by the person who is a direct participant in the sexual practice, as they are the ones who hold authority over their own body.

A sexual consent can be defined as an agreement to participate in sexual activity.¹⁷² A person who gives sexual consent agrees that a sexual activity should take place. A valid consent is a ground upon which the supposed harasser may escape liability.

In a *quid pro quo* harassment case in which the sexual advance is granted, the validity of the consent is questionable. The mere fact that the victim said "yes" to sex is not sufficient to remove the alleged harasser from liability.¹⁷³ The circumstances that surround the agreement by the victim must be considered to determine whether indeed the victim was willing to participate in the said sexual activity. In sexual harassment, consent refers to the welcomeness of the conduct. A consensual conduct is welcome, and the conduct not consented to, is unwelcome.¹⁷⁴

¹⁷⁰ In South Africa, Sexual offences are regulated by the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.

¹⁷¹ Hornby AS, *Oxford Advanced Learner's Dictionary of current English* (8th Ed Oxford 2010) 308.

¹⁷² Planned Parenthood Sexual Consent
<https://www.plannedparenthood.org/learn/relationships/sexual-consent> Accessed 17 November 2022.

¹⁷³ See *Mafoko Security Services* case.

¹⁷⁴ In other words, consensual conduct is a welcomed conduct, while non-consensual conduct is an unwelcome conduct.

3.3. Express and implied consent

When one person makes the sexual advance in *quid pro quo* harassment, the employee can show in two ways that they agree to submit themselves to the sexual advance, namely by express terms or by implication.¹⁷⁵

Express consent happens when an employee, through her own words, voluntarily agrees to the sexual advances. Express consent can be given verbally or in writing. Implied consent¹⁷⁶ is given without utterance of any word but shown by and or through actions.¹⁷⁷

What lies on the other side of both expressed consent and implied consent is that the employee may also indicate that the conduct is unwelcome by express terms or by implication. The employee may tell the harasser that his or her conduct is unwelcome or may show by actions.¹⁷⁸

3.4. Putative consent

One of the problems with implied consent is when a person, on assessment of behaviour of the other towards the sexual requests, presumes that consent is given, when in fact it was not.¹⁷⁹ In rape cases, the accused would escape liability for lacking culpability.¹⁸⁰ In contrast, intention is not a requirement in sexual harassment cases.¹⁸¹ The test is whether a reasonable person in the circumstances would have been aware that the conduct constituted harassment.¹⁸² Therefore, while valid consent can

¹⁷⁵ Item 5.2.1 of the Amended Code shows that the victim employee can show the unwelcome of the conduct through non-verbal acts (e.g., walking away).

¹⁷⁶ Also known as tacit consent.

¹⁷⁷ See the criminal law case of *S v Coko* 2022 (1) SACR 24 (ECG) on implied consent.

¹⁷⁸ Item 5.2.1 of the Amended Code.

¹⁷⁹ The harasser misread the behaviour of the victim and therefore conclude that such behaviour suggest that the employee agrees to engage in intercourse with him.

¹⁸⁰ Hoctor SV, *Snyman`s Criminal Law* (7th Ed LexisNexis 2020) 102.

¹⁸¹ Jordan B, Code Of Good Practice – Workplace Harassment' (13 April 2022) [https://www.labourwise.co.za/labour-articles/code-of-good-practice-workplace-harassment#:~:text=The%20test%20is%20whether%20a%20reasonable%20person%20would,could%20be%20an%20aggravating%20factor%20against%20the%20harasser](https://www.labourwise.co.za/labour-articles/code-of-good-practice-workplace-harassment#:~:text=The%20test%20is%20whether%20a%20reasonable%20person%20would,could%20be%20an%20aggravating%20factor%20against%20the%20harasser.). Accessed 25 November 2022.

¹⁸² *Ibid.*

excuse the alleged harasser from liability, it is questionable that presumed consent can suffice.

3.5. The Validity of consent in *quid pro quo* harassment cases

While consent is a valid defence in other cases of sexual harassment, it appears to be not sufficient in a case of *quid pro quo* harassment.¹⁸³ In *quid pro quo* harassment cases, consent is induced improperly by means of a threat or promise employment reward. This may invalidate the consent.

3.5.1. The requirements of a valid consent

To establish whether the consent given by the victim in a *quid pro quo* harassment case is valid, a discussion of what constitute a valid consent is necessary. The requirements of a valid consent are as follows:

a) Consent must be given by an employee with capacity to consent.

The capacity to give sexual consent in South Africa is determined by age and mental state of a person. The age of sexual consent in South Africa is 16.¹⁸⁴ A harasser may not claim consent as a defence against harassment of an employee who was 15 years at the time of the harassment.¹⁸⁵ Further, people who are mentally ill, drunk, unconscious or asleep cannot give valid sexual consent.¹⁸⁶

b) Full knowledge of what a person is consenting to

¹⁸³ See *Mafoko Security Services* case. The act of *quid pro quo* harassment was found to have been committed despite the fact that the employee had agreed to grant the sexual request in exchange for employment benefit.

¹⁸⁴ Ngubane S, 'All you need to know about sexual consent' (05 December 2021) <https://www.vukuzenzele.gov.za/all-you-need-know-about-sexual-consent> Accessed 03 December 2022.

¹⁸⁵ Notably, in terms of the BCEA, the age of employment is 15 years and above. This therefore means that an employer can legally employ a 15-year-old person, but such an employee cannot give valid consent to sex or sexual activity.

¹⁸⁶ *R v C* 1952 4 SA 117 (O) para 121.

Consent secured by way of fraud or misrepresentation is invalid. This requirement also implies that consent is valid only in respect of the activity to which it was given.¹⁸⁷ Any further conduct beyond the one consented for is unwelcome and therefore constitute sexual harassment.

c) Consent should be given before the sexual activity takes place

Consent works as an approval for sexual activity to happen. Once consent is given, it can be revoked at any given time for an activity that has not yet taken place but cannot be withdrawn after the activity takes place.¹⁸⁸

d) Consent must be given voluntarily¹⁸⁹

Perhaps this is the most controversial requirement concerning consent on *quid pro quo* harassment.¹⁹⁰ While an employee may have capacity to consent and may well be aware of what they are consenting to, it is questionable if such a consent is voluntary, given the circumstances.¹⁹¹

In law, the word '*voluntary*' means that an action is taken or done without compulsion or obligation.¹⁹² According to Meriam-Webster, voluntary means spontaneity and freedom of choice or action without external compulsion.¹⁹³ Further, Meriam-Webster mentions that the word implies the power of free

¹⁸⁷ A person who consents to one thing does not consent to another. If the employee agrees to kiss, such an employee is not agreeing to sexual penetration.

¹⁸⁸ Longhurst AS, 'Your Guide to Sexual Consent' (13 February 2019) <https://www.healthline.com/health/guide-to-consent> Accessed 26 November 2022.

¹⁸⁹ *Ibid.*

¹⁹⁰ The voluntariness of consent in a *quid pro quo* harassment case is at the centre of invalidity of consent on the same.

¹⁹¹ Consent is unduly influenced by a promise of employment reward or threat of employment benefit reprisal.

¹⁹² Dictionary.com 'Voluntary' <https://www.dictionary.com/browse/voluntary> Accessed 28 November 2022.

¹⁹³ <https://www.merriam-webster.com/dictionary/voluntary> Accessed 28 November 2022.

choice.¹⁹⁴ In essence, the voluntary requirement means the consent must be given by an employee who is free from coercion and who is unforced.

Whether consent would have been given voluntarily or not is mostly a question of fact.¹⁹⁵ Where consent is obtained through instilling of fear, use of violence, intimidation or other ways of coercion, such a consent is not voluntary. It must therefore be understood that a mere submission is not consent.¹⁹⁶

In *quid pro quo* harassment, what makes voluntariness of consent questionable is the presence either a threat or promise of reward. A controversial question is whether, the promise of reward or threat to remove a favourable employment condition can amount to coercion that amount to invalidity of consent given?¹⁹⁷

3.5.2. Persuasion v coercion: The effect on validity of subsequent consent

Various cases that involved *quid pro quo* harassment incidents have shown that the harassers usually use *quid pro quo* harassment as a tool to obtain consent which has previous been not granted after the first sexual advance.¹⁹⁸ This means that incidents amounting to *quid pro quo* harassment are usually not the first sexual harassment incidents in a

¹⁹⁴ *Ibid.*

¹⁹⁵ *Snyman 's Criminal Law*, 105.

¹⁹⁶ *R v McCoy* 1953 2 SA 4 (R), para 12.

¹⁹⁷ This question may be answered in consideration of various factors. These factors may include the fear of losing employment, where the employee is given an ultimatum of either submit to the sexual advance or be dismissed. The intricacies related to unemployment must be considered. The other factor may be the fear of being subjected to unfair labour processes or even disciplinary. This may happen where the harasser threatens to subject the employee to disciplinary if the employee does not agree to the sexual advance.

¹⁹⁸ See for example the cases of *Makoti v Jesuit Refugee Service South Africa* (2012) 33 ILJ 1706 (LC), *Rustenburg Platinum Mines Limited v UASA obo Pietersen and Others* (2018) 39 ILJ 1330 (LC).

particular case, they usually follow other incidents. This implies that such incidents are used either as a form of persuasion or simply coercion.

Persuasion should be differentiated from coercion. While persuasion requires understanding, coercion requires only power.¹⁹⁹ On one hand, persuasion means successfully convincing someone to agree to do something usually through reasoning or verbal influence, on the other hand, coercion is a use of force, threat, intimidation in an attempt to make a person act against their will.²⁰⁰

a) The effect of persuasion

Generally, men usually do not back down from convincing a woman to have relations with them after the first 'No'. They tend to want to do more to impress a woman on belief that she may be 'playing hard to get'. In fact, Nuffine states:²⁰¹

"...women are aroused by men 'who persuade a little harder' and why 'outward reluctance to consent' on the part of a woman is not necessarily an assertion of a woman's real sexual desires. It is why what a woman says should not necessarily be taken seriously. The dominant man is the erotic man, and when a woman plays hard to get, she may really be asking for more. Her coyness is 'a deliberate incitement' for him to apply yet more pressure. ... These are the simple, natural 'realities of sexual courtship' (in which all other sexual forms are foreclosed)".

This notion was supported by White J when he stated:²⁰²

¹⁹⁹ Cole K.C 'Persuasion vs. Coercion at the Holiday Table' (21 December 2012) <https://slate.com/technology/2012/12/persuasion-and-coercion-robert-and-frank-oppenheimer-disagreed-about-how-to-control-nuclear-weapons.html> Accessed 28 November 2022'.

²⁰⁰ Wikidiff 'Coerce vs Persuade - What's the difference?' <https://wikidiff.com/coerce/persuade#:~:text=is%20that%20coerce%20is%20to%20restrain%20by%20force%2C,usually%20through%20reasoning%20and%20verbal%20influence%20compare%20sway>. Accessed 30 November 2022.

²⁰¹ Naffine N 'Possession: Erotic love in the law of rape' (1994) 57(1) *Modern Law Review* ` 29.

²⁰² *R v Egan* (1985) 15 ACR 20 para 25-26.

“In the nature of things, men frequently bring some kind of ‘pressure’ to bear to obtain a woman’s consent, ‘pressures’ in the ways of compliments, blandishments... and the like, all of which may legitimately be directed towards securing consent through her sexual arousal. This has always been the case and it seems too obvious to mention”.

This implies that consent obtained through due influence is acceptable. For purposes of workplace harassment, the effect of persuasion can be determined having regard to two circumstances:

i) Where persuasion subsequently led to consent

If persuasion subsequently led to the employee, agreeing to engage in sexual intercourse through understanding, such intercourse therefore is a consensual one thus not amounting to sexual harassment. For example, it would be irrational for an employee to make claim of sexual harassment in respect of the fact that a supervisor asked her out for dinner then proposed sexual intercourse, without denying that such acts led to consensual intercourse.

It should however be noted that in some incidents, the employee may have submitted due to fear instead of understanding. For example, while A persuades B, B then agrees on fear that if she does not agree, she may be victimised considering the power that A possesses. This may be one of the complicated cases because on the side of A, B would have consented subsequent to persuasion, while on the part of B, she would have consented due to fear of possible victimization, despite the fact that A would not show this possibility through his behaviour.

ii) Where consent is denied even after the act of persuasion

If the harasser has made a sexual advance to an employee, and such employee makes it clear that the conduct is unwelcome, subsequent advances by way of persuasion of sexual nature would constitute sexual

harassment. This is because this would be an unwanted conduct of sexual nature, to which the harasser would have been aware that it is unwelcome.

b) The effect of coercion

In law, submission due to coercion is not valid consent or agreement.²⁰³ The rationale for the invalidity is founded on the fact that such a consent was not given in free will.²⁰⁴ Obviously, sexual consent given to because of coercion is a mere submission rather than an actual agreement. After all, it is irrational to reconcile with the fact that sexual consent resulting from coercion can be valid consent. Coercion does not always take a form of physical force,²⁰⁵ as other forms and threats also amount to the same.

This can best be demonstrated by the following hypothetical scenario. A holds a knife against B and tell her that he will stab her if she does not agree to sleep with him. Because of this, she then agrees to sleep with him. In this case, A has used a threat against physical well-being of B to coerce her to grant the sexual consent. It is therefore unacceptable that A can then use such consent to escape liability of rape, because despite the fact that B agreed to have sex with A, such an agreement was not voluntary. Similarly, a supervisor may use dismissal as a weapon to coerce the employee to grant the sexual request. With the latter, a threat is made against the economic well-being of the victim employee.

c) Do quid pro quo harassment acts amount to persuasion or coercion?

²⁰³ Raypole C, 'What Does Sexual Coercion Look Like?' (01 December 2020). <https://www.healthline.com/health/sexual-coercion> Accessed 04 December 2022.

²⁰⁴ *Ibid.*

²⁰⁵ *Ibid.*

To determine this, a difference should be made between two ways in which sexual consent can be obtained in *quid pro quo* harassment. A harasser would either attempt to obtain submission through extortion or bribery.

i) Consent obtained through extortion²⁰⁶

This happens where the harasser uses threats to extort the sexual consent of the employee. These threats may include, but are not limited to dismissal,²⁰⁷ demotion, and salary decrement. In this case, the harasser gives the employee an ultimatum to either submit to sexual advance or be demoted, dismissed or get their salary decreased. To determine if this is persuasion or coercion, one must be conscious of the facts that the harasser would be using dismissal, demotion or salary decrement as a weapon to force the employee into submission.

It is therefore safe to conclude that an employee who submit to sexual advances owing to the threat does not do so voluntarily. It is clear that the threat amount to coercion, and therefore invalidate the consent of the employee. In essence, an employee agreeing to sexual advance subsequent to a threat, does not consent but merely submit.

ii) Consent obtained through bribery²⁰⁸

A typical *quid pro quo* harassment takes a form of bribery, where the harasser promises the employee an employment related reward provided that such an employee submits to his or her sexual advances. The harasser may promise to promote the employee,²⁰⁹ increase their salary, or where

²⁰⁶ In criminal Law, extortion is a punishable crime.

²⁰⁷ Where the harasser threatens to dismiss the employee or threatens to influence the dismissal (where he does not have power to dismiss), it is common for the harasser to make an unfounded allegation of poor work performance.

²⁰⁸ Bribery falls among the many corruption crimes and is also punishable by law.

²⁰⁹ See *Rustenburg Platinum Mines Limited v UASA obo Pietersen and Others* (2018) 39 ILJ 1330 (LC).

the victim is a job applicant, the harasser may promise to appoint such applicant.²¹⁰

Unlike with extortion,²¹¹ the harasser in this form uses something that the victim does not yet possess to influence them to submit to the sexual advance. It is without a doubt that consent obtained through bribery is unduly obtained, and therefore invalid.

A close analysis of *quid pro quo* harassment that takes this form reveals that behind the promise lies a threat. An example is when the promise is one of promotion, such a promise may contain an inevitable threat in that should the employee not submit to the sexual advance, such an employee would not be promoted even if they were the most suitable candidate.²¹² After all, it is difficult to reconcile with the fact that a harasser who was willing to promote the employee in exchange for sex, would follow fair procedure and substance after such an exchange would be declined.²¹³

3.6. Determining whether the conduct was unwelcome: The effect of not reporting the incident within a reasonable time

²¹⁰ According to both the Code and the Amended Code, *quid pro quo* harassment can be committed against job applicants.

²¹¹ With extortion, a threat is made in respect of substantial rights of the employee, which the employee is already entitled to.

²¹² Another example is when a job candidate is promised employment if they sleep with one of the people who are part of the selection Panel, this therefore gives the impression that should such a candidate say No, they may as well 'kiss goodbye' the job. At this stage, the applicant tells himself or herself that 'The fair process of employment has already been tainted, and the applicant has no choice but to submit to the advance in order to get the job, since it is highly unlikely that they may get the Job through the following of the due process. The applicant is therefore, to a certain extent, forced into submission.

²¹³ At this point, the harasser is likely in state of *'bad blood'* against the employee who declined such a request, and therefore will not be objective when it comes to considering such an employee for promotion or such an applicant for the employment.

False accusations are common for sexual related offences, be it criminal offences or sexual harassment. The statistics of false allegations in South Africa are not clear, although some sources suggest that it may be higher than thought to be.²¹⁴ The delay in reporting the case is commonly thought to mean two things, firstly that the sexual activity did not take place or the sexual activity took place but contrary to the victims claim, it was a consensual one. The industrial court in *J v M* found that victims are often compelled to suffer in silence due to the fear of consequences which may follow after complaining to higher authority.²¹⁵

The case of *Rustenburg Platinum Mines Limited v UASA obo Pietersen and Others*²¹⁶ dealt with the issue of delaying to report sexual harassment incidents. The case involved a dismissal of an employee (Petersen) following sexual harassment misconduct against a female employee (Kgole) who held a position inferior to that of Petersen.²¹⁷ The allegation of sexual harassment involved several incidents which took place over the period of 2007 to 20 August 2014.²¹⁸ Two of the said incidents were *quid pro quo* harassment.²¹⁹

After being dismissed, Petersen lodged a claim for unfair dismissal with the CCMA. The Arbitrator found that the failure to report the incident in time indicated that the complainant was encouraging and 'inspired' the harasser to believe that his actions was not opposed by the complainant, and to

²¹⁴ Psychology today 'Rape Allegations: Rape claims, the frequency of false ones, and causes of delayed reporting' (1 October 2018). <https://www.psychologytoday.com/za/blog/finding-new-home/201810/rape-allegations> Accessed 03 December 2022.

²¹⁵ Para 758A-E.

²¹⁶ (2018) 39 ILJ 1330 (LC).

²¹⁷ *Rustenburg Case*, para 1.

²¹⁸ *Rustenburg Case*, para 4.

²¹⁹ The first incident of *quid pro quo* happened when Petersen promised Kgole promotion in exchange for submission - para 59 (d)). In the second incident, Petersen gave Kgole a Memorandum for assisting her in the application for a vacancy, expectation her to agree to his sexual advances – para 59(e).

accordingly keep his hopes alive that eventually she would grant to his sexual requests.²²⁰

On review, The Labour court dismissed this reasoning. Tlhotlhemaje J stated:²²¹

“... This conclusion is patriarchal and misogynistic in the extreme. It denotes a right or entitlement. The message is that the harassers can persist with the unbecoming conduct, with the hope that they will get lucky at some point, as long as the complainant does not report the matter”.

While the court accepted that immediately reporting the incident of sexual harassment is an ideal and desirable situation, it held that the adjudicator must make an objective and deeper assessment as to why sexual harassment incidents are not reported immediately.²²² The court understood that different people react differently to different situations.²²³ Furthermore, the court listed possible reasons why a victim may delay reporting sexual harassment, as follows:²²⁴

- a) The employee is at the ‘frozen’ state. The employee finds it hard to reconcile and believe what she or he is experiencing, and also do not have the human tools for immediate response.²²⁵

²²⁰ *Rustenburg Case*, para 57.

²²¹ *Ibid.*

²²² *Rustenburg Case*, para 50.

²²³ *Ibid.*

²²⁴ *Rustenburg Case*, para 51. These reasons are not exhaustive.

²²⁵ This paralysis state may come with guilt, victimhood, confusion, shame, self-anger, self-blame, unusual calm, victimhood, helplessness, being worried and upset, incapability of expression, or outright panic or fear. This is also known as ‘paralysis mode’ syndrome.

- b) Many victims fear being backlashed for complaining, especially where the harasser and the victim have power relationship. That is, the harasser exercised power over the victim.²²⁶
- c) Victims may fear causing trouble or tension at work due to claims which may not be taken seriously or even believed, particularly where there is no supporting evidence.²²⁷
- d) Fear of being labelled negatively once the victim report the incident.²²⁸
- e) Despite the inexcusable conduct of the harasser, the victim may feel pity for him or her for whatever reason.
- f) The victim may decide to endure the suffering hoping that it will eventually cease, or with believe that that the incident was once off, which will not be repeated,²²⁹ accompanied by sense of guilt for failing to report the incident/s.
- g) Some victims may be faced with fear of publicity, and/or the burden to prove the claims in public proceedings under cross-examination which is harsh and unsympathetic.

In most cases, these reasons require the complainant to attest to them.²³⁰
 This means that the commissioner should not just make an assumption that

²²⁶ The employee may be confronted with is a fear of dismissal or victimisation. Thus, an employee lodging sexual harassment complaint against that 'bright blue-eyed boy/girl' at the office; or against an employee who is a senior or part of the executive, may be taking a move which may end or limit his or her career to be dearly regretted.

²²⁷ In most sexual harassment cases, the harasser chooses one-on-one encounter with the victim. It is unlikely for the harasser to commit sexual harassment misconducts in the presence of other people. The effect therefore is that the common sexual harassment case does not have eyewitnesses who witnesses the incidents.

²²⁸ This fear goes hand in hand with, firstly, the fear that the victim employee might be considered to have 'asked for it', and secondly, the possibility that colleagues may label her as a person of low morals, they may even call her names and shame her.

²²⁹ The 'quit or endure' syndrome.

²³⁰ *Rustenburg Case*, para 52.

the employee delayed because of one of the reasons, without the employee claiming them.

On whether not reporting the incidents in time meant that the conduct was welcome, the honourable Judge noted:

“Silence, no matter how prolonged it may be, as the Commissioner ought to have known, does not amount to consent. A ‘docile’ response to sustained sexual harassment cannot be equated with an invitation....”

Accordingly, this means that the mere fact that a victim delayed in reporting the sexual harassment, does not mean that the conduct was welcomed. This does not mean that this factor must be totally disregarded. Of course, unexplained delay would still have negative effect on the plaintiff’s case.²³¹

3.7. Summary

At this point, various things have been established. Firstly, consent given in *quid pro quo* harassment cases whether resulting from a threat or promise of reward, is invalid. A controversial question may arise therefore that may challenge the invalidity of consent. Why submit to sexual request that you do not want, if you can just let the harasser dismiss, reduce your salary or demote²³² you because you can refer the matter for automatically unfair dismissal or unfair labour practice respectively, to the CCMA.

This question may imply that B in the above scenario may as well let A stab her because she may recover after some few months or weeks, also, that B would be arrested. In reality, a case on the CCMA or Courts would usually take months or even years.²³³ During this period, the employee would be

²³¹ See *Mpumalanga Gambling Board v Commission for Conciliation Mediation and Arbitration and Others* [2014] ZALCJHB 317.

²³² The three consequences (dismissal, salary decrement and demotion) should imply that a harasser can only use them but were simply selected from many consequences to demonstrate the state that makes the employee submit to the sexual harassment instead of the alternative.

²³³ For example, see the case of *PE v Dr Beyers Naude Local Municipality and Another* (2021) 42 ILJ 1545 (ECG).

subjected to unemployment in case of dismissal and to reduced income in case salary decrement or demotion. The employee may see it better to submit to the sexual request instead of being subjected to the undue suffering for months and even years.

Consent resulting from due persuasion²³⁴ is valid. Further, delayed reports should not suggest that the incidents did not happen, or that the incidents happened but they were welcome, provided that such delays are explained. This follows the fact that human nature dictates that people react differently in different situations, and therefore not all victims react to sexual harassment by reporting the incidents immediately, although such reaction is most desirable.

²³⁴ Due persuasion is persuasion which is acceptable, in consideration of morals and public policy.

CHAPTER 4: CORRUPTION ELEMENT IN A TYPICAL *QUID PRO QUO* HARASSMENT CASE

4.1. Introduction

South Africa is a nation with long history of corruption, dating back to as far as 1652 when Jan Van Riebeeck was dismissed for misusing his office to pursue personal financial gain.²³⁵ Unfortunately, corruption has been deeply embedded on how things are done in South Africa, including in the workplace. According to Corruption Watch, corruption in employment contributed 8% in 2021.²³⁶

In the workplace, corruption is a deadly poison to a fair process of employment, be it a process of appointment, promotion, or other employment processes. Typical acts of corruption in the workplace involve a misuse of power by authority to influence the process of employment in exchange for a favour, or on account of '*connections*'.²³⁷ The former may include money favours, sexual favours²³⁸ or other types of favours. The latter may include nepotism,²³⁹ which is also one of the most common corruption acts happening in the workplace.

²³⁵ The Conversation 'How corruption in South Africa is deeply rooted in the country's past and why that matters' (28 August 2020) <https://theconversation.com/how-corruption-in-south-africa-is-deeply-rooted-in-the-countrys-past-and-why-that-matters-144973> Accessed 05 December 2022.

²³⁶ Corruption Watch, 'Annual Report 2021: 10 years pushing for change' <https://www.corruptionwatch.org.za/wp-content/uploads/2022/03/cw-2021-annual-report-10-years-20220330-spreads.pdf> Accessed 05 December 2022.

²³⁷ The word '*connections*' is a common word in South Africa, which relate to the relationship that people have that allows them to give improper favours for each other. For example, A applies for a job in company where B (a friend of A) is a manager, B then uses his power to influence the process of appointment to ensure that A gets the Job.

²³⁸ *Quid pro quo* Harassment.

²³⁹ Nepotism is privilege, position or an advantage granted to friends and/or relatives in a field or an occupation.

From the face of it, *quid pro quo* harassment constitute corruption in that it involves misuse of power to influence the process of employment in exchange for sexual favours. This chapter discusses corruptions constituted by *quid pro quo* harassment.

4.2. Corruption offences in a *quid pro quo* harassment case

The Prevention and Combating of Corrupt Activities Act²⁴⁰ provide various corruption offences in categories. A typical *quid pro quo* harassment case constitutes several of these offences. The below are some of the selected offences which are constituted to by a *quid pro quo* harassment case.

4.2.1. The general offence of corruption²⁴¹

4.2.1.1. The offence

The first offence provided for by the PCCAA is the general offence of corruption. Section 3 provides two ways in which a person commits the offence.

- a. Firstly, when he or she accept, or agree to accept or makes an offer to accept any gratification²⁴² from any other person, whether for his or her own benefit or for another person's benefit.²⁴³
- b. Secondly, when he or she gives, or agrees to give, or offers to give any benefit to any other person, for the benefit of that other person or a third person.²⁴⁴

²⁴⁰ Act 12 of 2004 (PCCAA).

²⁴¹ Section 3 of PCCAA.

²⁴² The Act provides that several things that the 'gratification' means, including, of importance in this discussion:

- i) any office, employment, honour, status, employment contract or contract of services, any agreement to appoint or to render services in any capacity, and holiday or residential accommodation:
- ii) any other advantage, favour or service of any description.
- iii) any kind of benefit or valuable consideration.
- iv) any real or pretended help, consent, vote, abstention from voting or influence.

²⁴³ Section 3(a) of PCCAA.

²⁴⁴ Section 3(b) of PCCAA.

A person is only guilty of corruption offence/s if the purpose of doing the above was to act, personally or through influencing another person to act in one or more of the following manners.

- i. A manner that amounting to the
 - Unauthorised, illegal, dishonest, biased or incomplete: or²⁴⁵
 - selling or misuse of information or material procured during the exercise of power, carrying out of duties, or performance of any functions arising from any constitutional, statutory, contractual or other legal obligations.²⁴⁶
- ii. A manner constituting;
 - abuse of authority:²⁴⁷
 - breaching of trust; or²⁴⁸
 - contravention of rules or legal duties:²⁴⁹
- iii. a manner designed to achieve a result which is unjustified: or²⁵⁰
- iv. a manner amounting to any other improper or unauthorised inducement to act or not to act.²⁵¹

4.2.1.2. Link with *Quid pro quo* harassment

Quid pro quo harassment constitute the general offence of corruption in several ways. When the harasser makes a sexual request, he is actually making an offer to accept a sexual gratification from the victim for his own benefit.²⁵² The words 'offer to accept' imply that it is not always the case

²⁴⁵ Section 3(i)(aa) of the PCCAA.

²⁴⁶ Section 3(i)(bb) of the PCCAA.

²⁴⁷ Section 3(ii)(aa) of the PCCAA.

²⁴⁸ Section 3(ii)(bb) of the PCCAA.

²⁴⁹ Section 3(ii)(cc) of the PCCAA.

²⁵⁰ Section 3(iii) of the PCCAA.

²⁵¹ Section 3(iv) of the PCCAA.

²⁵² The PCCAA criminalises a person even if the gratification is not for his benefit but rather for the benefit of a third person. In a typical *quid pro quo* case, a harasser requests a sexual activity for his own benefit. Perhaps cases also exist where the harasser makes a sexual request for the benefit of a third party, for example, A threatens to dismiss B, unless she sleeps with his son, C. This of course will be

that the giver of the gratification is the one who offered the gratification, instead, the one accepting the gratification can still be the one making an offer. For example, A goes to a job interview where B is part of the selection panel. After the interview, A does not make any offer to give gratification in exchange for the job, instead, B tells A that he can accept sexual intercourse in exchange for a job. In this case, B has made an offer to accept the sexual gratification.

On another side, even though the victim does not make an offer to give a sexual gratification, she agrees to give it at request of the harasser. In some cases, an employee may be the one making an offer of sexual gratification in exchange for a job benefit. This obviously would constitute an offence of corruption; however, it may still need to be decided if it would constitute *quid pro quo* harassment. Currently, *quid pro quo* harassment appears to be one sided in that it is committed when the one in power promises to influence the employee's employment circumstances in exchange for sexual favour.²⁵³

The purpose of the harasser offering to accept a sexual gratification, as well as the purpose of the victim agreeing to give the sexual gratification is the same. The purpose is for the harasser to act, personally²⁵⁴ or by influencing another person²⁵⁵ to influence the process of employment. Influencing the process of employment for sexual favours amounts to:

one of the most complicated cases of sexual harassment. The most obvious controversial question may be whether C will also be guilty of sexual harassment. This will obviously depend on whether C knew of the transactions taking place, that is, B sleeps with him as a condition for her keeping the job, and secondly, whether C is an employee in the workplace in which A and B works. If C is not an employee, he may be liable for sexual harassment outside the workplace.

²⁵³ The definition of *quid pro quo* makes it clear that *quid pro quo* happens when initiated by a person who demands sexual favours and offers employment benefits, not the other way around.

²⁵⁴ Where the harasser carries power to make the final decision.

²⁵⁵ Where the harasser does not possess the power to make a final decision, but his power carries weight of influence. For example, a supervisor usually does not have power to dismiss an employee but have the power to influence such dismissal.

- i) Dishonesty, unauthorised use of power, or biasness²⁵⁶
- ii) Abuse of position of power.²⁵⁷
- iii) Contravention of legal duties or a set of workplace rules.²⁵⁸
- iv) An act designed to achieve unjustified results.²⁵⁹

4.2.2. Offences of receiving or offering of unauthorised gratification by or to a party to an employment relationship²⁶⁰

4.2.2.1. The offence

Section 10 criminalises two persons, as follows:

a) A party to an employment relationship²⁶¹

A person who is a party to a relationship of employment is guilty of the offence if they, whether directly or indirectly:

- i) Accept
- ii) Agrees to accept
- iii) Makes an offer to accept

Any unauthorised benefit from another person for that person's benefit or for another person's benefit, regarding that party doing any act which relate to his or her exercise of power, performance of functions or carrying out of duties within the scope of that party's employment of relationship.

b) Any other person²⁶²

Any other person, whether a member to an employment relationship or not, is guilty of the offence if, whether directly or indirectly, they:

²⁵⁶ In line with section 3(i)(aa) of PCCAA.

²⁵⁷ In line with section 3(ii)(aa) of PCCAA.

²⁵⁸ In line with section 3(ii)(cc) of PCCAA. The employer, supervisor, manager, or any other person in position of power, together with the employees, have the duty to act in good faith and to follow workplace rules relating to promotion, dismissal, salary increment, appointment, etc.

²⁵⁹ In line with section 3(iii) of the PCCAA.

²⁶⁰ Section 10 of the PCCAA.

²⁶¹ Section 10(a) of the PCCAA.

²⁶² Section 10(b).

- i) Give,
- ii) Accept to give, or
- iii) Offers to give

Any unauthorised benefit to a person who is party to a relationship of employment, whether for that party's benefit or for another person, concerning that party doing any act relating to his or her exercise of power, performance of functions or carrying out duties within the scope of that party's employment relationship.

4.2.2.2. Link with quid pro quo harassment

Similarly with the general offence of corruption above, the harasser in this offence offers to accept an unauthorised gratification (sexual activity), while the victim agrees to give the sexual gratification. The gratification is given or accepted to the benefit of the harasser.

The offence only requires one person to be a party to an employment relationship, and such a person must be one to which a gratification is given. In *quid pro quo* harassment, both the victim and the harasser are party to a relationship of employment, even if the victim is the applicant for a job.²⁶³

The sexual gratification is given, or accepted in relation to the performance, exercise or carrying of the harasser's employment duties, functions or powers within the scope of that harasser's relationship of employment.

4.3. Defences against the offence of corruption committed through *quid pro quo* harassment

²⁶³ Applicants for a job are to be considered as employees for purposes of harassment – section 9 of EEA.

Although the Act does not specify the defences that the accused may raise, it specifies what may not be used as a defence.²⁶⁴

The harasser may not be excused from liability for corruption on account that he or she was not entitled to, or lacked power or opportunity to execute or not to execute an act for which the sexual gratification was granted.²⁶⁵ For example, where a supervisor promises to recommend a certain employee for promotion provided the employee have intercourse with the supervisor, however the supervisor is not given the opportunity to recommend an employee for promotion. The supervisor cannot raise this defence against the charge of corruption.

Secondly, the harasser may not raise a defence that he lacked intention to execute or not to execute an act for which the sexual gratification was granted.²⁶⁶ This means that a lack of intention to influence the process of employment, despite the threat or promise made, is not a valid defence for corruption charge. This may happen where a supervisor, while knowing very well that he does not intend to promote the employee, request sexual gratification in exchange for such non-existent promotion.²⁶⁷

Finally, failure to execute or not to execute an act to which the sexual gratification was granted may not be raised as a defence.²⁶⁸ This happens where the harasser fails to perform in a manner promised, despite having the intention to do so. For example, a selection panel member promises an applicant a job in exchange for sex with the intention of convincing the other members to select that particular applicant, however, he fails to convince the other members and subsequently the applicant does not get

²⁶⁴ Section 25 of the PCCAA.

²⁶⁵ Section 25(a) of the PCCAA.

²⁶⁶ Section 25(b) of the PCCAA.

²⁶⁷ In this case, a supervisor has defrauded the employee into sleeping with him.

²⁶⁸ Section 25(c) of the PCCAA.

the job. Such a person may not claim that the applicant did not get the job as promised as a defence for a charge of corruption.

4.4. Reporting corruption in the workplace

4.4.1. The duty to report corruption²⁶⁹

The PCCAA only places a duty to report corruption if it is a transaction involving R100 000.²⁷⁰ Such a duty is only placed on a person who occupies the position of power and who is aware or reasonably ought to be aware of such acts of corruption.²⁷¹ In certain cases, *quid pro quo* harassment may involve monetary employment benefits²⁷² in exchange for submission to a sexual request. Where such amount involved is R100 000 or above, the person in position of power who is aware of the corruption acts or reasonably ought to have known that such transaction may have involved corruption in one way or another, must report the same.

Quid pro quo harassment taking other forms except financial transactions exceeding R100 000 can be reported by any person in the workplace, in line with the Protected Disclosures Act.²⁷³

4.4.2. Protection of quid pro quo harassment corruption reporters²⁷⁴

Act 26 of 2000 enables employees to make disclosures which are protected about irregularities such as corruption and others happening at the workplace without fearing occupational detriment, that is, unfair treatment

²⁶⁹ Section 34 of the PCCAA.

²⁷⁰ Section 34(1) of the PCCAA.

²⁷¹ *Ibid.*

²⁷² These monetary benefits may include salary increment, housing allowance, or car allowance.

²⁷³ Act 26 of 2000.

²⁷⁴ The reporters are also known as whistle blowers.

because of the disclosure.²⁷⁵ This protection serves a purpose of promoting accountability and transparency without fear of victimisation.²⁷⁶

An employee, or a worker with reasonable belief that a *quid pro quo* harassment constituting corruption has been committed may make such a disclosure and may not be exposed to occupational detriment for the disclosure.

For such an employee or worker to claim protection,²⁷⁷ three requirements must be satisfied.²⁷⁸

a) The employee or worker must have made a protected disclosure²⁷⁹

Act 26 of 2000 differentiates between a protected disclosure which are disclosures that are only made to specified person or bodies, and a general protected disclosure, which covers a wide range of disclosures, including disclosures to the media.²⁸⁰ The disclosure must have been made *bona fide*, and the employee had a reasonable belief that the disclosed information was substantially true.²⁸¹

b) The employee or worker should have been subjected to occupational detriment

The occupation detriment happens when an employee is victimised for making a protected disclosure. Act 26 of 2000 mentions various ways in

²⁷⁵ Du Plessis JV, Fouche MA, 'A practical Guide to Labour Law' (9th Ed LexisNexis 2019) 346.

²⁷⁶ Cf McGregor M, Dekker A, Budeli, M. Germishuys, W. Manamela, ME. Manamela, TE. Tshoose CI. "Labour Law rules" (4th ed. Siber ink 2021) 62-63.

²⁷⁷ When an employee has made a protected disclosure and is victimised for the same, they may institute proceedings claiming appropriate relief at any court which have jurisdiction, or alternatively may pursue any other legal process prescribed or allowed by law. The Amended Act provide that where an employee is unable to act for himself or herself, a court process or any other legal process may also be invoked by any person acting on behalf of the employee.

²⁷⁸ *Supra* McGregor *et al.*

²⁷⁹ *Ibid.*

²⁸⁰ Section 9 of the Act of 2000.

²⁸¹ *Ibid.*

which the employee can be so victimised, including disciplinary action, intimidation, dismissal, harassment, demotion, adverse employment conditions and etc.²⁸²

c) There must be a causal link between the protected disclosure and the subsequent occupational detriment

Section 186(2)(d) of the LRA requires that the occupational detriment must be due to a protected disclosure, while section 3 of Act 26 of 2000 requires that the detriment must either be because of, or partly because of the protected disclosure.

4.5. Summary

A *quid pro quo* harassment acts are, on one side, an act of sexual harassment and on another, an act of corruption. These acts constitute the general offence of corruption as well as the offence of offering or receiving an unauthorised gratification by a member of employment relationship.

The fact that the harasser would not have kept their end of the bargain, either because they would have had no intention of keeping it to start with or he just failed to perform as promised, cannot be a valid defence that excuses the harasser from liability for corruption.

If the acts of *quid pro quo* harassment include monetary transactions exceeding R100 000, a person in authority is obliged to report such acts if they are aware or reasonably should be aware that such acts happened. Any person in the workplace, may report these acts of *quid pro quo* constituting corruption to employers, legal advisors, public protector, Auditor general, or members of Cabinet. The employee may also report to other persons not mentioned, in terms of section 9 of Act 26 of 2000. The

²⁸² Section 1(vi) of the Act of 2000.

employee making a disclosure is protected by law and should not be subjected to occupational detriment.

CHAPTER 5: CONCLUSION AND RECOMMENDATIONS

5.1. Introduction

This chapter provide a summary of the entire dissertation, as well as recommendations towards the reduction of *quid pro quo* harassment in the workplace.

The legislature has, through the passing of several laws and regulations, taken steps to curb sexual harassment at work. The most detailed of these laws directed at sexual harassment is the Code on sexual harassment as well as the Amended Code. Notwithstanding the fact that the latter is termed "Amended Code", it does not replace nor supersedes the original Code of 1998.²⁸³

Despite these legal interventions towards the resolution of sexual harassment plague at work, it remains common and underreported in the workplace.²⁸⁴ Among reasons for underreporting of sexual harassment cases, especially that of *quid pro quo* harassment, is that victim employees fear being subjected to victimisation.

5.2. Findings

In chapter one, the study established the following, though a review of existing literature:

- i. *Quid pro quo* harassment takes two forms, where the harasser promises to grant or ensure the granting of employment benefits and where the harasser threatens to reprise or ensure the reprisal of employment benefits in exchange for sexual favours.

²⁸³ *Campbell case*, para 24.

²⁸⁴ Labour Research Service 'How to deal with sexual harassment in the workplace' (24 November 2021) <https://www.lrs.org.za/2021/11/24/how-to-deal-with-sexual-harassment-in-the-workplace/> Accessed 20 March 2023.

- ii. The major causes for sexual harassment are unprofessionalism and the exercise of authority.
- iii. The employer would be held liable and responsible for misconducts of sexual harassment committed by its employees should it fail to take appropriate and reasonable steps to deal with the same after being notified.
- iv. Currently, the typical harassers remain men and the typical victims remain women, especially young females.

In chapter two, several legal instruments which deals with sexual harassment were found, including:

- i. The Labour Relations Act 66 of 1995.
- ii. Protection from Harassment Act 17 of 2011.
- iii. The Employment Equity Act 55 of 1998.
- iv. The EEA Amended Code of Good Practice on Handling Sexual Harassment Cases.
- v. The LRA Code of Good Practice on Handling Sexual Harassment in the Workplace.

Further, it was established that *quid pro quo* harassment constitutes unfair discrimination in line with section 6(3) of the Employment Equity Act.

Furthermore, it was established that a claim for *quid pro quo* harassment is established through a two-question approach.

- Firstly, is the conduct complained of a sexual harassment conduct?
- And secondly, is the sexual harassment conduct falling within the scope of *quid pro quo* harassment?

The following remedies are available to victim employee subjected to *quid pro quo* harassment:

- A claim for automatically unfair discrimination, where the victim was dismissed owing to declining *quid pro quo* sexual advances.
- Automatically unfair constructive dismissal claim, where the employee resigned owing to *quid pro quo* harassment.
- Unfair labour practices claim, including unfair discrimination claim.

In chapter three, it was established that the consent given by the victim in *quid pro quo* harassment is not a valid one, and therefore does not render the conduct welcome. Such consent therefore does not exclude the harasser from being guilty of sexual harassment.

In chapter four, the extent to which the *quid pro quo* harassment constitute corruption in terms of the PCCA was established.

- Firstly, *quid pro quo* harassment constitutes the general offence of corruption in terms of section 3 of the PCCA.
- Secondly, *quid pro quo* harassment constitutes offences of receiving or offering of unauthorised gratification by or to a party to an employment relationship in terms of section 10 of the PCCA.

The study found that there is no obligation to report incidents of *quid pro quo* harassment corruption, unless the transaction involved monetary value of more than R100 000.00, in which only persons in positions of authority will be obliged to report. All those who report are protected in terms of the Protected Disclosures Act.

Further, the study found that the following would not suffice as a defence for the harasser against a charge of corruption involving *quid pro quo* harassment:

- The harasser was not entitled, or lacked the power, or did not get an opportunity to act in a manner promised or threatened.
- They did not have any intention of influencing employment circumstances in a manner promised or threatened.

- They failed to influence the circumstances of employment in a manner promised or threatened.

5.3. Recommendations

The study recommends that employers ought to:

a) Demonstrate each form of sexual harassment in their policy in a clear manner, including quid pro quo harassment

For purposes of *quid pro quo* harassment, the policy should include examples and demonstrations that leave no room for different interpretations. It should clearly state that the conduct of *quid pro quo* despite the fact that the victim might have agreed to the conduct, such agreement is merely a submission rather than an actual valid consent and therefore the conduct still constitute sexual harassment.

b) Establish clear structures of dealing with sexual harassment

Where possible, employers should establish sexual harassment committees which would aim to specifically deal with incidents of sexual harassment. The committee should be tasked with receiving complaints of sexual harassment and with investigation of the same thereof. The panel may be made of senior employees and few junior employees, and at least one sexual harassment expert for the purposes of advising the panel.

c) Assist the victim of sexual harassment with instituting criminal proceedings

By nature, sexual harassment conducts have criminal elements, ranging from sexual assault to rape. This therefore means that the harassers are not only committing a misconduct of sexual harassment, but they are also committing a crime. Perhaps instituting criminal proceedings against harassers may create the necessary deterrence needed to deal with

sexual harassment at work. All employers should be obliged, while dealing with sexual harassment internally via a disciplinary hearing, to also assist the complainant in instituting criminal proceedings.

d) Set aside funds directed at dealing with the effects of sexual harassment on victims

Establish a trust aimed at mitigating the consequences of sexual harassment on the victim employees, including counselling, medical costs etc.

e) Create educational programmes for sexual harassment

The committee referred to in paragraph (b) above should be in charge of the programme. The programme should be directed at educating all employees on what acts constitute sexual harassment, the procedures for reporting sexual harassment, its impact, and how sexual harassers will be dealt with in the workplace. The programme should have clear timelines at which it will take place. For example, there may be at least one sexual harassment workshop per year.

f) Employ the services of an external human resources expert whenever there is a need

The expert should evaluate the performance of each employee, the merits of persons employed vs those not appointed, in case of a promotion, evaluate the merits of the employee promoted against his or her opponent`s merits and performance. Where the expert find that the merits of persons not appointed are much better than of those appointed, the appointing managers should be called to explain their decisions. This would ensure that people are appointed on merits, and not on favours, be it sexual or not.

For this to be possible, the merits of all candidates should be kept in record, that is, whenever a post is available, the applications of all applicants should be kept in record until such evaluation is done.

Alternative to this, before any form of appointment, the employer should send all applications to an external human resources expert for recommendations. In case where the hiring managers deviate from the recommendations of the expert, the same should be accounted for to the employer. Some of the reasons for deviations behaviour, dedication and hard work of the employees, which is not included in the applications but have been observed by the hiring manager over a period.

In the context of public service, the state is required to, among others:

a) Prescribe penalties for certain sexual harassments conduct

The legislature should issue of regulations prescribing penalties for persons found guilty of specific sexual harassment conducts. For example, an employee found guilty of *quid pro quo* harassment involving sexual penetration and/or oral sex should be dismissed, without the need for any warnings. The same should be communicated clearly to all employees.

b) Create an independent tribunal for adjudication of sexual harassment matters

While CCMA, courts, and bargaining councils may still have jurisdiction to adjudicate on matters of sexual harassment, a tribunal specifically dedicated at resolving sexual harassment disputes may be more effective.

c) Create a system of recording sexual harassment offenders

The system is to be a labour system, recording all persons found guilty of sexual harassments at work, and the form of sexual harassment they would be found guilty of. The system should be accessible to all employers, at request. Those who are declared to have been rehabilitated by the tribunal at (b) should be removed from the system. This would allow employers to avoid employing sexual harassers into their workplace. The system should also allow for a '*red flag*' of certain harassers, especially habitual harassers.

Furthermore, employees ought to:

a) Maintain professional relationships

All employees should maintain a work relationship with colleagues and their seniors (supervisors, managers, directors or etc.). They should avoid getting too personal to a point where they call each other with names like hubby, sweetie etc.

b) Report all sexual harassment incidents

All employees should take it upon themselves to guard against sexual harassment. Where any employee witnesses any act of sexual harassment, such employee should report the sexual harassment. Victim employees should also make sure to report any act of sexual harassment.

c) Collectively sympathize with sexual harassment victims

Where an employee is sexually harassed, the other employees should support the victim employee and sympathize with him or her. There are many ways in which the other employees may show support, including visiting the victim at his home, accompanying her to the doctor, therapist etc. Through this, a spirit of togetherness in the workplace is created.

5.4. Conclusion

Without collective effort to dealing with sexual harassment, South African workplaces would remain a place to relieve sexual urges for harassers and a hostile space for victims. The government, employers, employers' organisation, employees and trade unions should collectively direct their efforts towards dealing with sexual harassment.

The collective effort would mean that the state would issue out regulations, the employers would implement such regulations and the employees comply with the same.

Notable, dealing with sexual harassment includes the discipline of those who falsely accuse another of sexual harassment. This would ensure that spiteful employees do not use sexual harassment as a weapon to punish another employee or seniors.

It cannot be disputed that a workplace free of sexual harassment would be a productive one which serves a purpose it is for. It is therefore without a doubt that one way of ensuring that the right candidate is appointed, promoted and that the employee is not deprived of employment benefits without just cause, is to do away with sexual harassment (*quid pro quo* harassment).

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