



SOUTH AFRICAN JUDICIAL EDUCATION JOURNAL

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SAJEI
South African Judicial Education
Institute
Enhancing Judicial Excellence



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TRIBUTE TO AKHO NTANJANA



Why should young and promising eagles suddenly perish and be taken away from us forever? I am gutted and unable to understand why.

Akho Ntanjana was on a meteoric rise – he was excelling in his career and slowly transforming into a trailblazer in his own unique way. He was a quiet, focused, forward looking young man and destined to reach great heights.

Akho worked tirelessly on the accreditation of this journal by the Department of Higher Education and Training – a long and arduous process. The receipt of the accreditation letter made him smile – he was relieved and fulfilled when he achieved his objective. He reminded us all that the real work was about to begin to maintain the accreditation.

Akho will be sorely missed by his SAJEI colleagues, the SAJEI Editorial Board members, the authors, the JUTA team and, more specifically, by his mother, wife, and siblings. May his soul rest in peace and rise in glory.

DR GOMOLEMO MOSHOEU

Production editor

Well done, Akho!

You have run your race; now, it is for us to take the baton
and continue on your well-defined route.

Thank you for being our guiding light.

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The Editorial Board invites unsolicited articles on topical issues relating to judicial education and the Judiciary. It may, in its discretion, accept articles that do not strictly deal with judicial education. The Editorial Board reserves the right to edit articles and circulate for double-blind peer review.

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Sexual Harassment in South Africa: A critical analysis of vicarious liability of an employer

by Yondela Ndema

First edition. Juta. 2024

This book provides a detailed account of sexual harassment in the workplace in South Africa. It sets out the legislative framework on sexual harassment within the Constitutional context and establishes the criteria necessary for legal protection in cases of deemed sexual harassment. It defines sexual harassment through a detailed analysis and in a workable manner so that victims may be better able to identify sexual harassment when they experience it. Ndema considers several judicial tests to determine the occurrence of sexual harassment and ultimately proposes a judicial test that is gender-neutral, objectively determined, and coheres with the values enshrined in the Constitution as well as the letter and the spirit of the Employment Equity Act. Importantly, the examination of sexual harassment puts it squarely within the scheme of gender discrimination as it targets women for being women and contributes to the maintenance of gendered hierarchies in the workplace, which in turn entrenches women's economic and political inferiority in society in general. In this way, the author relates the phenomenon of sexual harassment to broader patterns of disadvantage and violation along gendered lines.

The book examines several specific legal remedies and issues relating to sexual harassment. It considers an employer's personal liability within the frame of a breach of a non-delegable duty of care and examines remedies in terms of breach of contract of employment, delict, *actio iniuriarum*, and the constitutional protection of dignity in the Bill of Rights. Notably, the discussion on dignity emphasises its value and importance in constitutional adjudication in South Africa and makes the case for the harm to dignity suffered because of sexual harassment, which infringes on a woman's physical self, personality rights and freedom to choose with whom she intimately associates. Labour law remedies of personal liability and statutory vicarious liability of the employer in terms of the Labour Relations Act and the Employment Equity Act are critically examined. More specifically, Ndema emphasises statutory vicarious liability, as opposed to the common law in dealing with sexual harassment; the Employment Equity Act specifically creates a unique vicarious liability in that it captures an element of deemed personal liability on the part of an employer for failure to take measures to eradicate gender discrimination. This creates an obligation on employers to take positive measures in dealing with sexual harassment. This positive obligation is in line with the 2020 Code of Good Practice on the Handling of Sexual Harassment Cases, which itself places

a proactive obligation on employers to adopt a 'zero tolerance' policy on sexual harassment in the workplace.

Sexual Harassment in South Africa: A critical analysis of vicarious liability of an employer, in addition, engages a comparative analysis in terms of the historical development of vicarious liability in South Africa, the United States, the United Kingdom and Canada to demonstrate the way in which the scope of employment has been broadened to enhance legal protection for victims. Further, Ndema critically explores attempts to exonerate an employer under the jurisdictional defence in terms of the Compensation for Occupational Injuries and Diseases Act. The book provides an expert examination of the scope and application of available remedies for sexual harassment in South African law, a detailed exposition of recent jurisprudence in the Constitutional Court and High Courts and proposes a more comprehensive approach to vicarious liability as it relates to sexual harassment.

It is noteworthy in its scope and depth in engaging the phenomenon of sexual harassment in the workplace. It will be a valuable resource for academics, legal practitioners, students, compliance officers and employers in general. It is accessible and practicable whilst being encompassing in its analysis.

Ultimately, Ndema's book is a timely and invaluable contribution within the context of the scourge of gender-based discrimination and violence. Sexual harassment in the workplace is particularly harmful in its effects of polluting the workplace, driving women out of the workforce, hindering professional development and undermining the fundamental rights of equality, dignity and economic participation. The book is written from the perspective of protecting victims and provides an opportunity to interrogate the isolation, silence, and shame associated with sexual harassment in the workplace.

DR YVONNE JOOSTE

Senior Lecturer, University of Pretoria