

On the record

Nicolette Naylor and Sibongile Ndashe discuss local and global developments on sexual harassment and the role of the law in responding

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Recent local and global developments have turned the spotlight on the role of law in addressing sexual harassment in the workplace. Almost four decades after feminist legal scholars pushed for laws which recognise that sexual harassment constitutes a form of discrimination that is legally actionable, it is important to take stock of the success and limits of the law. In recent times the law has increasingly been accused of complicity in shielding abusers by (mis) applying sexual harassment policies to exonerate the perpetrators, or failing to hold institutions to account over claims that their hands are tied because victims do not want to lay formal complaints. Nicolette Naylor (Director, Ford Foundation for Southern Africa) and Sibongile Ndashe (Executive Director: The Initiative for Strategic Litigation in Africa [ISLA]) discuss the role of the law against the backdrop of the successes of campaigns like the #MeToo movement, which encourage survivors to speak out by unmasking and publicly naming perpetrators. The conversation was originally presented as an ISLA Conversation between Nicolette and Sibongile on 10 July 2018 in Johannesburg.

Sibongile Ndashe (SN): Nicolette, sexual harassment has been in the news a lot recently in South Africa, on the rest of the continent and globally. It is not a new phenomenon, but definitely something has changed, which raises questions about whether the law can be used as a tool to fight the scourge of sexual harassment, or whether the law may well be something that has enabled sexual harassment.

Forty years ago, when sexual harassment was defined as discrimination in the US, especially sexual harassment in the workplace, we thought that was a big step. In South Africa, we were fortunate. Twenty-two years ago, we had a new Constitution and an industrious Parliament. We had courts that had defined themselves as

transformative courts and we had new pieces of legislation. But it does look like it was a sprint and we really didn't get to internalise what was in the law and that's how we find ourselves here. So, what were the big things that came with the advent of the Constitution?

Nicolette Naylor (NN): I think, like you rightly point out, Sibongile, in a way we leapfrogged a lot of what's happened in the rest of the world. When sexual harassment was first coined as a term in the US in 1979 by Katherine McKinnon, they went through a process where they went through many cases to try to establish this as a form of discrimination. They were debating this notion of sexual harassment as sex discrimination under civil rights at the

time – asking *is* sexual harassment a form of sex discrimination? A lot of case law in the US debated this, bringing different cases and different fact patterns that the courts and supreme court had to grapple with.

In South Africa, I think, it was great that we could build off that normative framework and when our Employment Equity Act (EEA) was passed it defined sexual harassment as discrimination. As a result, we didn't need the supreme court to pronounce on it. So, while in the US they used the Civil Rights Act to define sexual harassment as discrimination, for us our EEA was there to try to address the imbalances of the past – to deal with the legacy of apartheid, racial discrimination and sex discrimination, gender discrimination. So, here we faced a similar kind of historical trajectory, and we could start from the premise that this is discrimination. And that has benefited us. What I think has been the problem is whether people around us saw it that way – in other words, whether they understood sexual harassment to be defined as discrimination. We really needed further guidelines around what this meant in practice. How do employers really grapple with this notion of sexual harassment? And that's where we started to define what's called the Code of Good Practice on the Handling of Sexual Harassment¹ to try to give people more guidance.

I don't want us to think that sexual harassment didn't happen in South Africa before the EEA. Women have been harassed and economically disempowered in the workplace for centuries. We just didn't have a name for it, and a legal right and a claim against it.

SN: What happened in South Africa before the EEA? In other countries there may not be an EEA, but people use anti-discrimination laws to deal with sexual harassment. What was the process like in South Africa before the law was passed?

NN: There is a common law duty for employers to keep the workplace safe. We all know, for example, about occupational injuries and workplace safety. But you also have a right not to be abused in the workplace, and you have a right not to be assaulted in the workplace. So, irrespective of the Constitution and the EEA, we have that common law duty to be safe and to be protected. Cases were brought using this framework. South Africa's first case happened in 1989, when someone was dismissed for sexual harassment and the court actually dealt with this under the common law duty of safety in the workplace. With these types of cases you were entitled to claim for damages under the *actio injuria*, in other words, you could claim damages for pain and suffering and the impairment of your privacy and safety.

You could open a criminal case as well for assault, for example, depending on what happened. But very few such cases were being brought at that time and I think this is something we can talk about as feminist lawyers. Many of the cases brought were men who had been dismissed, and who were challenging the grounds for their dismissal. Employers were saying that the reason for these dismissals was that the men in question were treating people badly and harassing women in the workplace. But these cases were not grounded in a notion of equality, nor were they grounded in a power analysis or an analysis of discrimination. Our Constitution gave us that moment, that moment for us to start grounding it in a notion of discrimination. So, you always had a claim, but that 1998 EEA then gave us the right to use the discrimination framework and the impairment of dignity framework.

SN: So why is it important to have it framed as discrimination? Many people may argue that if you can go to court and get what you need, if you can sue, why is the framing so important? Courts also struggle to understand this. We are

seeing cases even from the African Commission coming out saying 'of course something wrong happened to her, but we cannot find the discrimination'. What are the struggles and tensions? The court may have found for you, it may have acknowledged that what happened to you is wrong. But they stop short of saying that this is something that happened to you because you are a woman.

NN: This is exactly what was happening in the US. With a lot of the case law that was being brought around sexual harassment, the courts were grappling with the notion that the harassment happened only because the survivor was a woman. And the problem with this was that it allowed employers to say 'it was only this woman', and the perpetrator would say 'it's not other women ... it's only this woman', which made it difficult to recognise that harassment was targeted at women in general. The US courts grappled with this a lot, arguing that the harassment must be the result of a woman's gender as well as something else ... that this went beyond victimisation on the basis of sex.

In South Africa, we have started from the premise that the problem must be grounded in an inequality analysis. And I think grounding it in a power and inequality analysis is important. With our discrimination framework, you don't have to prove discrimination – we can use the EEA and the Constitution, which recognise that sexual harassment falls within the realm of discrimination. We are saying that this victimisation happens not just on the basis of sex, but on the basis of sex, gender, sexual orientation, class, race and other grounds. We have had to acknowledge that in reality the way that this plays out in the workplace in the South African context is that it is intersectional. And I think it is powerful for us to use that kind of framework.

SN: Let's look at the challenges too. Look at the cases that have come from the labour court and the labour appeals court in the last three years – the *Naspers* case,² *Campbell Scientific Africa v Simmers*,³ *Labe v Legal Aid*,⁴ the *Rustenburg Mines* case.⁵ What is becoming very clear is that, even though we are saying that these cases should be based on a power analysis, legal access actually defines who has got the power and who can exercise the power. The cases that have come through the labour court involve middle-class, white women, in other words, people who are able to go to court and exercise their rights. Much of what we've seen is about sexual harassment in the workplace ... office based, where people have gone away on a business trip and someone has demanded sex in that way.

So, while we say that there is a law that protects everyone, in fact, the law has really not been tested on cases where women are not as empowered. Cases, for example, involving domestic workers or farm workers. There is a group of women that is marginalised, not in the law itself but because they don't have access to the law. The jurisprudence that we have developed has really not been able to surface those challenges. How then do we ensure that when we talk about sexual harassment now, when we look at the law books, that we are not actually talking about the sexual harassment of middle-class women, but that we are talking about sexual harassment in all spheres of life?

NN: I think this is the critical point. It is almost the next frontier that we have to grapple with. When I was involved in drafting the amended Code of Good Practice for the Handling of Sexual Harassment, there was this fear that we were going to open the floodgates to these kinds of cases. But I haven't been able to find this plethora of cases. In fact, we haven't been very litigious and, as we mentioned earlier, many of the cases have been brought by

men challenging their unfair dismissal. What's interesting for me is that the one case we have that involves a black woman in Khayelitsha, a security guard minimum wage worker, was brought by the Women's Legal Centre, a public interest law centre acting on her behalf.⁶ Bringing these cases is expensive: it is financially costly, and it is emotionally costly for women to bring these cases in a context of high unemployment where people just want to keep their jobs. That is something we didn't grapple with. We were so focused on getting the discrimination framework right, getting the Code of Good Practice to lay out the definitions and the formal and informal procedures. But the access question, and how people were actually going to engage with the framework, is something that we missed, and that's our next challenge. The cases brought by middle-class women, wealthy women and women in businesses taking on big companies have developed our jurisprudence. It has developed a framework for us to hold people accountable, and that is not insignificant. But I do think that the biggest problem for us is that the majority of women are not using the system because of their lack of access, and because of the victimisation that people feel going through the system. It is hard going through the system. Are women being believed? I think who gets believed – whether it's in a legal process or in a process within the workplace – is also associated with power and privilege. White women are believed much easier than black women. Hollywood actresses are believed more so than domestic workers.

I've been out of practice for many years, but when I was involved in the *Ntsabo* case I was looking for a case on behalf of farm workers or domestic workers, and I couldn't find one. And I think we really need to bring those types of cases because we could go back to the analysis around the economic power that is involved in sexual harassment. We focus a lot

on the sexualised notion of harassment and we forget the economic and class dimensions of the problem. Some case law on those aspects would be wonderful to see.

SN: Now let us talk about the law itself. Over the past few months we have heard stories, particularly in the public interest or social justice sector in South Africa, that the law has been used, but not to protect women. We have heard about legal and disciplinary processes that have not been used progressively, where disciplinary panels have been improperly constituted, or where the quality of the investigation was questionable. The critique that this raises, is that the law is just a tool like any other – it depends on how you use it. You can use it to build and you can use it to destroy. When it comes to the duties of the employer, one of the problems that we have seen is that these are treated as tick box exercises. They use the code, they have policies that they have passed. But all of these things are just procedures: you cannot actually guarantee that they are going to lead to an effective investigation or that substantively they are going to be fair to the people who are going to use them.

Employers will say that their hands are tied because the complainant doesn't want to proceed with the case, so what can they do? As if there are no positive obligations on an employer to protect their employees. How did it come about that employers feel so powerless to do anything about the workplace when they actually have to take care of the health and safety of their employees, and have to ensure that they are free from bullying and harassment of any kind?

NN: The EEA clearly says there is a duty, a positive duty on employers, to ensure there is no discrimination on the basis of race and gender in the workplace. An employer's hands can therefore never be tied. There has been recent case law⁷ in the labour appeals court

where Liberty Life argued exactly that, that their hands were tied because the complainant didn't want them to act against the perpetrator. The appeals court confirmed that the EEA places a positive duty on the employer to eliminate discrimination, and to make sure that their workplace is safe and free from sexual harassment. So, while you have to respect the complainant's right not to go through a process, to respect their autonomy and not force them to do what they don't want to do, that doesn't mean that employers can sit back and allow a culture of sexual harassment to flourish.

The point about culture is one that I want to emphasise. Procedures will never fix toxic cultures. We can come up with hundreds of procedures (which is the bandwagon that everyone appears to be on in terms of sexual harassment) but you actually need to fix the culture within an organisation to deal with the problem. The *Ntsabo* case showed that if employers fail to act they can be held liable, just as if they were the harasser. In law there is this notion that, if you act in the course and scope of your employment, your employer can be held liable. So, before, employers would always say that the employee was acting on their own volition, and that their contract does not allow them to sexually harass people. But our EEA says that employers have a duty to act against racist or sexist behaviour. The employer can't say that the employee is off on a frolic of their own. There is a duty on employers to eliminate discrimination. That's the piece that we need to utilise more when people say things like 'our hands are tied'. Your hands can never be tied in a context of racism or sexism in your workplace.

SN: Linked to this issue is how employers also want to confuse themselves around the issue of confidentiality ... that they really can't do much because it is also confidential. How is confidentiality actually set out in the legislation? What must remain confidential and

when is confidentiality required? This requires clarification over and over again because it is another shield that employers use to avoid dealing with problems of sexual harassment.

NN: This kind of shielding silences us a lot. The Code of Good Practice on Sexual Harassment lays out that confidentiality is only applicable in two very specific circumstances. The first circumstance it addresses is during the investigation, when you have to protect the identity of the complainant and the perpetrator. Their identities must be kept confidential, but that protection does not extend to the details of the incident itself. In other words, if you say that there is a case between two employees, Mr X and Miss Y, and this is what happened, you're not contravening the code. The second circumstance relates to the process during the inquiry, when management must make sure that only the people that are required to be in the inquiry – the witnesses, the employer and the employees – are present. That's what the code says. But it doesn't prohibit the employer from releasing the finding, despite what employers often say.

There is a nice provision in the code which I think feminist lawyers should take hold of: the third part of the code says that there is a duty on the employer to provide all reasonable information that complainants may need as they are preparing for their case. In other words, you are entitled to get any information that you may need to prepare for your case. This is where you, as the complainant, could say: 'I would like to know whether this company has had other cases of sexual harassment.' You could use that in a discovery process to show a hostile environment, to show this has happened in the past, maybe not with this perpetrator, but with others. I would like to see us use that provision.

There is another problem that we have, but which is not addressed in the Code of Good Practice, about non-disclosure agreements. But

this issue is also different to what the code says about confidentiality.

SN: Let's move on to the non-disclosure agreements. When did settlement agreements become synonymous with non-disclosure agreements? We see that perpetrators, whether they are let off the hook or dishonourably discharged, will use confidentiality agreements to avoid talking about what happened. This means that you can be a serial harasser who is fired from a company and can go next door and continue to do it. And not even the victims or survivors of the harassment can talk about it because there are non-disclosure agreements in place. Of course, there is a global trend against non-disclosure agreements, based on the view that these agreements do more harm than good. But there are reasons in labour law as to why employees want these agreements to form part of the settlement. They ensure that there is a clean break. It makes sense for lawyers and employers to say we leave the facts as they are: you are not conceding to anything and you will get your severance pay and you will leave, and in return we are not going to disclose what happened. The knock-on consequence of non-disclosure agreements, however, is that they have worked as silencers. If a survivor discloses, she may be asked to repay the settlement that was paid to her. Even if survivors hear other people talking about experiences similar to their own, they cannot speak to them about it, or even admit that the same thing happened to them. What is the movement now globally, and what can we learn about what's happening with non-disclosure agreements?

NN: I think that this is something we should really apply our minds to. We should call them secrecy agreements because they really are secrecy agreements. Non-disclosure agreements came about to protect things like employers' intellectual property and copyright. Unfortunately, both here in South Africa and

around the world, it has become a standard term that we put into agreements. I think we shouldn't confuse the issue, though. I am not against people settling. If a woman decides that she does not want to go through the process and would prefer to take an amount of money and settle, then that's a settlement agreement. There is nothing wrong with that. But that clause that prevents her from speaking about it, that's the problem. I think the notion that you could ever have any form of non-disclosure agreement when you are dealing with discrimination should be unacceptable and should be regarded as harmful. Because what is the object and the purpose of a non-disclosure agreement? It is to protect information or secrets like intellectual property, and not to protect someone who has discriminated against people or harmed other people. We need to be turning this practice into a dirty word in the context of sexual harassment and racial discrimination.

Here I think we can thank the #MeToo movement, because it put the spotlight on this issue in the case of Harvey Weinstein. Women were coming to speak out even though when they spoke out they were breaching non-disclosure agreements and risked having to pay back the money. Now there is a movement in some states in the US to have these clauses banned. These clauses have prevented prospective employers from finding out about perpetrators' histories and have prevented women from forming solidarity with other survivors. It is very hard for women to break a non-disclosure agreement when they run the risk of having to pay back money.

So, I would say that what we could be thinking of in our context is having a campaign to put the onus on companies to say no to these agreements rather than putting the onus on women to break the agreements. Let's just say this is unacceptable. Or let us get a group of women to break their non-disclosure

agreements and we take their cases on because it is in the public interest to know perpetrators are causing harm. This is violence against women in the workplace and it is in the public interest to know that this is happening.

SN: There have also been instances where there are no agreements in place, and people are coming out on social media and naming people as perpetrators of sexual harassment in various industries. The risk that these survivors run is defamation – the threat or the fear of defamation suits is actually what stops people from speaking out. So, this silencing is not only limited to instances where there are non-disclosure agreements in place. There is a trend or movement towards fighting against these kinds of defamation suits. In other countries there are funds that have been established to pay for cases where people are sued for speaking out. Unfortunately, in this country we don't have these kinds of funds. But under defamation law there is a defence that is used, which is this is the truth and also in the public interest. I think that sexual harassment is an issue of public interest, and naming perpetrators acts against harmful behaviour. But once again it goes to legal empowerment – whether you are able to understand that sexual harassment is a public interest issue and that you may have a defence in the public interest. We need to develop jurisprudence along these lines.

NN: I think we can learn a lot from what communities are doing in taking on mining companies in the context of extractive industries, where the communities are being hit with SLAPP³ suits, which aim to tie up communities in court processes and demobilise a movement. We need to find ways to support people so that they aren't being derailed by being tied up by massive companies bringing these kinds of suits. Because you can shut down an organisation, you can demobilise a whole movement like this. So, one avenue

is defending these kinds of actions in the courts and getting good judgments. We need public interest lawyers to take on this kind of thing and I think we should start thinking about whistleblowing. We have protected disclosures in South African law under the EEA or under PEPUDA (the Promotion of Equality and Prevention of Unfair Discrimination Act), which allows people to speak out in cases of unfair discrimination without the fear of reprisal. A more common example would be whistleblowing about corruption. The Act can be used for discrimination matters and where the safety of people is affected, but in this respect the first cases were brought by white men challenging affirmative action. We have also had men use the protected disclosures laws to try to prevent sexual harassment hearings. I think we need to start using these provisions where women collectively, in solidarity with each other, make disclosures. We should be arguing that these are protected disclosures, and that these women should not get sued because their disclosure was in the interest of enforcing the duty of employers to make sure that the workplace is safe.

SN: As we talk about these kinds of strategies, one gets the idea that the law can be helpful. But, as we have pointed out, we have a problem with legal empowerment. For people to use all of these strategies that we are suggesting, they have to be legally empowered. The next hurdle, when you know what the law says, is about how to access the law. One of the things that has been encouraging about the issue of sexual harassment is seeing legal tools merging with popular campaigns to be able to really push the frontier. Because we recognise that these are not battles that are going to be won in court only because of the limitations of the law. But what do the #MeToo and #TimesUp movements, which seem to have worked globally, look like in a context like ours? Is such a movement possible for us?

NN: I think there is enormous possibility when you merge the popular solidarity movements that are going out there and naming and shaming, but are similarly recognising the limitations of the law. We should use the law when it is appropriate. But we should also recognise that law is a blunt instrument. It can victimise, it can silence, and it can also empower. Feminists need to reshape the law and be creative about that. We also need people who say: ‘we are not going to put all our hope in the law’ – we are actually going to go out there and do things like #MeToo and #TimesUp.

Despite all the criticism about those movements, they have leapfrogged ahead, while we have waited for a court case, or waited five years or 10 years for the appeal court to do something. The #MeToo movement has got people to talk about non-disclosure agreements and got people to come up with bills to do away with them. I think that’s a model of what we can do in this country, and I think I’m seeing that already. What’s been so courageous about the women coming out and speaking up about what’s happening in the social justice sector is evidenced in the kind of support feminists have given women in that space. It shows that there is power in solidarity; firstly for women to be believed, for that belief to be acted upon and then for the change to happen. You don’t only have to see change happening through the law and through a legal process.

There is a wonderful judgment from a few months ago in 2018 where a judge in the labour court brought #MeToo into the courtroom. I loved the fact that #MeToo has been quite dismissive of the legal process and has said we are going to name and shame. And now we have a progressive judge who has written about how patriarchal and misogynistic the legal process can be, how it can victimise people, how we should be careful about victim blaming

and victim shaming, and how the court needs to take into account the global movement called #MeToo and the scourge against women. I think that is a nice merging of an insider/ outsider approach, where that feminist agitating is coming into our courtrooms. I was recently reading a piece by Katherine McKinnon where she asks how we make sure that #MeToo does what the law can’t do. And I think that in South Africa we have seen the two coming together and that’s thanks to feminist lawyers pushing that boundary. So, let’s do both of those, I think.

Notes

- 1 Department of Labour, *Code of good practice for the handling of sexual harassment*, 2008, <http://www.labour.gov.za/DOL/legislation/codes-of-good-practice/labour-relations/code-of-good-practice-on-handling-sexual-harassment-cases> (accessed 10 September 2018).
- 2 *Media 24 Ltd and Another v Grobler* (301/2004) [2005] ZASCA 64; [2005] 3 All SA 297 (SCA) (1 June 2005).
- 3 *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (CA 14/2014) [2015] ZALCCT 62 (23 October 2015).
- 4 *Labe v Legal Aid South Africa and Others* (JS895/16) [2017] ZALCJHB 248 (20 June 2017).
- 5 *Rustenburg Platinum Mines Limited v UASA obo Pietersen and Others* (JR641/2016) [2018] ZALCJHB 72; (2018) 39 ILJ 1330 (LC) (27 February 2018).
- 6 *Ntsabo v Real Security* (2003) 24 ILJ 2341 (LC).
- 7 *Liberty Group Limited v M* (JA105/2015) [2017] ZALAC 19; (2017) 38 ILJ 1318 (LAC); [2017] 10 BLLR 991 (LAC) (7 March 2017).
- 8 ‘SLAPP suits’ is an acronym for strategic lawsuit against public participation (SLAPP). (See G Pring and P Canan, *SLAPPs: getting sued for speaking out*, Philadelphia: Temple University Press, 1996.) These retaliatory cases are brought with the intention to silence or censor activists and critics by burdening them with a costly defence.