

The background of the slide is a photograph of a large crowd of people, likely at a public event or protest. A large South African flag is prominently displayed in the upper center, waving. The flag features horizontal stripes of red, white, green, and blue, with a black Y-shape in the center. The crowd below is dense, with many people wearing yellow clothing, possibly a symbol of the anti-apartheid struggle. The overall scene is dimly lit, with the flag and the text being the primary focus.

The Application of ILO Convention 190: The Case Study of South Africa

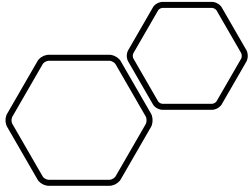
Tanya Venter

Advocate of the High Court, South Africa
CEO of Tokiso Dispute Settlement (Pty) Ltd

South Africa: Fun Facts



- 62 million people – same as California and NY state combined
- SA has 12 official languages
- Run by a coalition government – we vote for a party, not a president
- SA's biggest sports are soccer, rugby and cricket
- Highly urbanised, and formalised economy, well-developed financial, legal, communications, energy, and transport sectors and a stock exchange that is the 15th largest in the world.
- Popular SA food is braai (barbecue), biltong (dried meat) and bunny chow (curry in bread loaf)
- The Johannesburg Urban Forest is the largest man-made forest with 10m trees
- SA is the only country to develop and dismantle its nuclear weapons
- SA has the longest wine route in the world (528 miles)

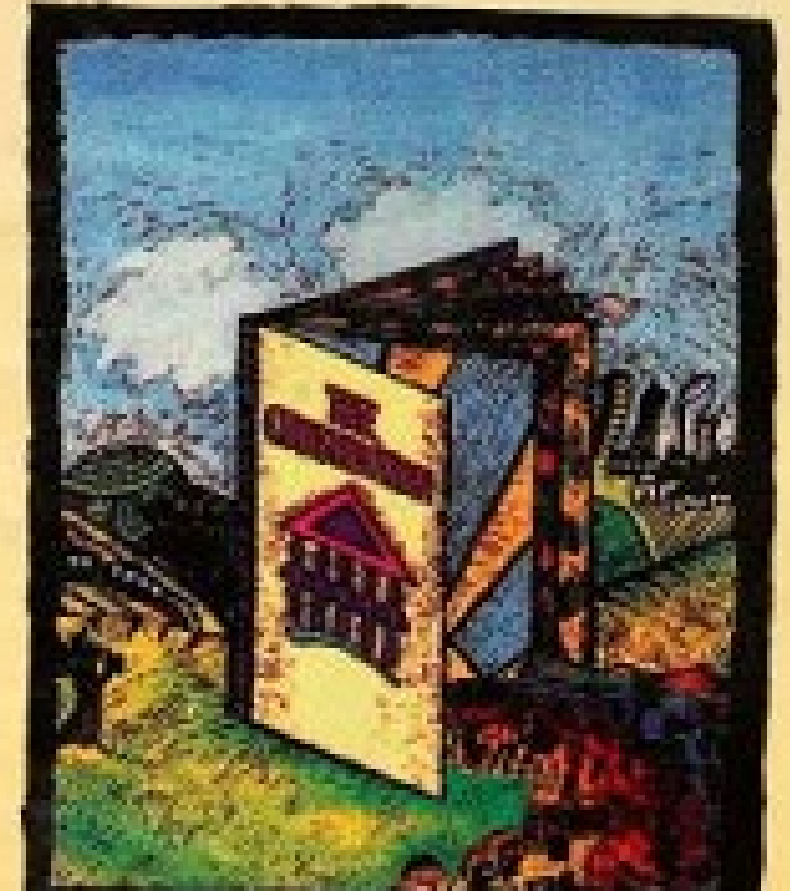


The Constitution of South Africa protects the rights to dignity, equality and fair labour practices.

The prohibition of unfair discrimination is part of upholding the right to equality and human dignity.

The Constitution

of the Republic of South Africa, 1996



A close-up photograph of a person's hand holding a pair of black-rimmed glasses. The person is wearing a white long-sleeved shirt. The background is blurred, showing what appears to be a desk with papers and a laptop.

South Africa and the ILO

- SA was the 10th country and fourth in Africa to ratify Violence and Harassment Convention 190
- SA ratified the ILO Discrimination Convention 111 in 1997
- SA has ratified 28 ILO conventions.



South Africa's Harassment legislation

Frames in the Employment Equity Act 55 of 1998, which in essence:

1. Prohibits discrimination, and harassment
2. Puts in place corrective measures to address our past discrimination laws

Discrimination – listed grounds



6(1) 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, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or on any other arbitrary ground.



**U.S. Equal Employment
Opportunity Commission**

It is illegal to discriminate against someone (applicant or employee) because of that person's race, color, religion, sex (including transgender status, sexual orientation, and pregnancy), national origin, age (40 or older), disability or genetic information. It is also illegal to retaliate against a person because he or she complained about discrimination, filed a charge of discrimination, or participated in an employment discrimination investigation or lawsuit.



Employment Equity Act

Section 6(3) reads:

“Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1).



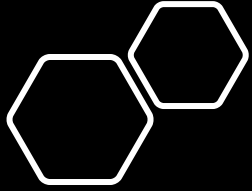
Employment Equity Act - liability

**Section 60 of the Employment
Equity Act deals with the liability of
employers:**

The employer must respond
immediately to an allegation that
they have contravened a provision of
the EEA.

The employer must consult all
relevant parties to eliminate alleged
conduct.

Employer liable if it doesn't take the
necessary steps.



The Code of Good Practice (2022)

14 No. 46056

GOVERNMENT GAZETTE, 18 MARCH 2022

DEPARTMENT OF EMPLOYMENT AND LABOUR

NO. R. 1890

18 March 2022

EMPLOYMENT EQUITY ACT, 1998 (ACT 555 OF 1998 AS AMENDED)

CODE OF GOOD PRACTICE ON THE PREVENTION AND ELIMINATION OF HARASSMENT IN THE WORKPLACE

I Thembelani Waltermade Nxesi, Minister of Employment and Labour, hereby in terms of Section 54 (1) (b) of the Employment Equity Act, 1998 (Act No 55 of 1998), and on the advice of the Commission for Employment Equity (CEE), hereby repeal the Amended Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace, 2005 published under Government Notice No. 1357 in Government Gazette 27865 of 4 August 2005, and replace it with this Code of Good Practice on the Prevention and Elimination of Harassment in the Workplace. This Code will be effective from the date of the publication of this notice.

MR T W NXESI, MP
MINISTER OF EMPLOYMENT AND LABOUR
DATE: 03/03/2022



Harassment

The 2022 Code of Good Practice defines Harassment in Section 4(1) as the:

1. “Unwanted conduct, which impairs dignity;
2. Which creates a hostile or intimidating work environment for one or more employees or is calculated to, or has the effect of, inducing submission by actual or threatened adverse consequences; and
3. Is related to one or more grounds in respect of which discrimination is prohibited in terms of section 6(1) of the EEA.”



South Africa's Forums for workplace harassment and discrimination

- CCMA
- Private forums (Tokiso)
 - Labour Court
 - Labour Appeal Court
 - Constitutional Court

The Code: Types of Harassment

- Physical, verbal & psychological
- Wide range of examples:
 - slandering, maligning, spreading rumours maliciously,
 - humiliating, insulting demeaning
 - Withholding info / incorrect info given (deliberately)
 - Sabotaging or impeding work performance
 - Ostracising
 - Threats
 - Surveillance without knowledge
 - Abuse of disciplinary processes
- Bullying - abuse of coercive power - Intimidation – fear of injury or harm
- Mobbing
- Online harassment



Racial, ethnic or social origin harassment

Unwanted conduct that is harmful, demeaning, humiliating or creates a hostile or intimidating environment.

It can be persistent or a single incident.



Sexual Harassment

The test for Sexual Harassment (5.3.1.) can be summarised as:

1. unwelcome conduct;
2. of a sexual nature;
3. where “the perpetrator knows or ought to know such conduct is unwelcome”; and
4. violates the rights of an employee and constitutes a barrier to equality in the workplace.


How we test for discrimination and harassment

Step 1: What is the conduct and does it impair the dignity of another?

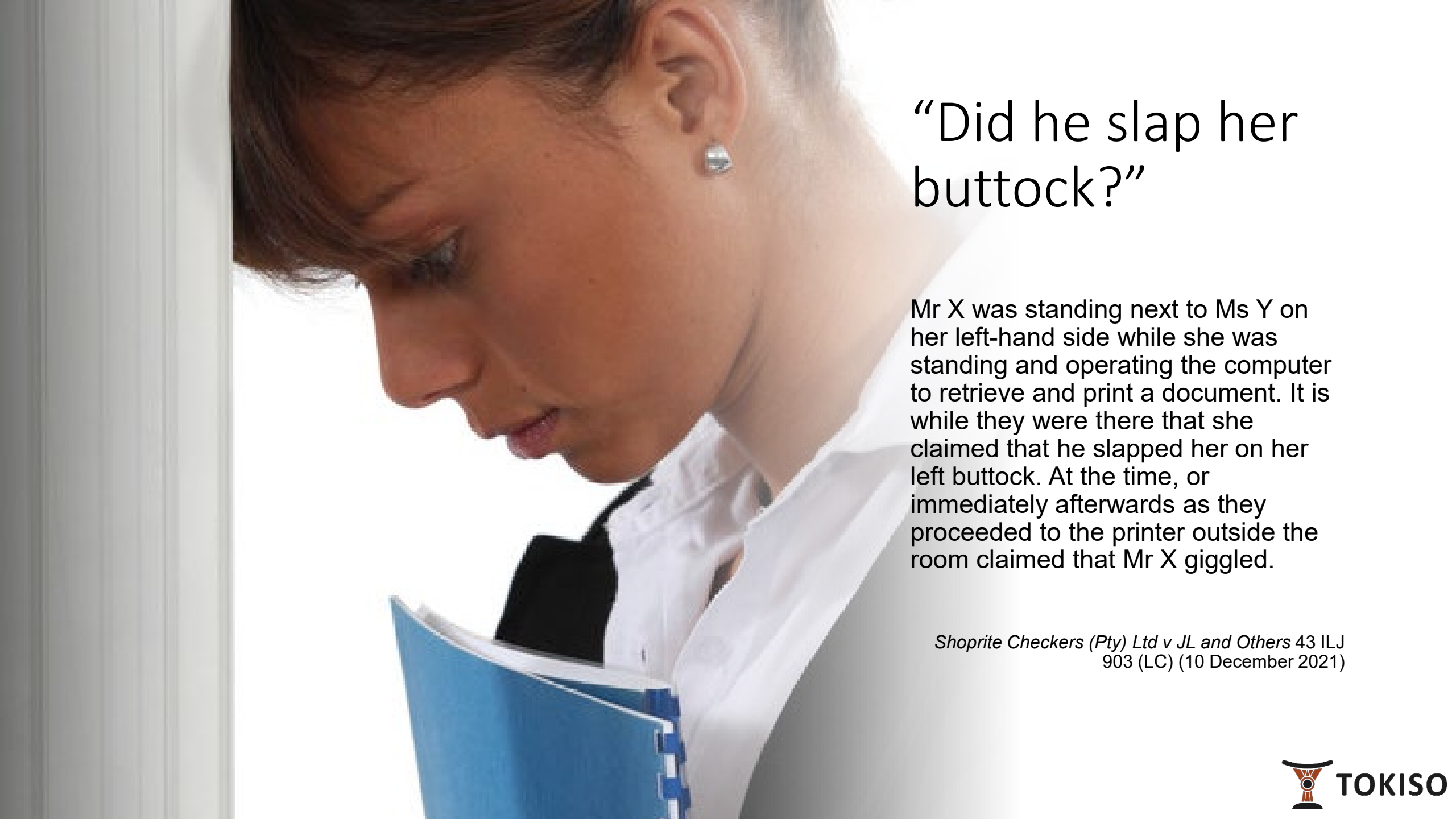
Step 2: Is the conduct being received as unwanted (hostile, intimidating or threatening)?

Step 3: Would a reasonable person received it as unwanted, considering all the factual circumstances of the case?

Step 4: Did the perpetrator know or reasonably ought to know that it would be received as unwanted and what was his intention?

A woman with long, straight grey hair and dark-rimmed glasses is seated at a light-colored wooden desk. She is wearing a dark green, long-sleeved button-down shirt. Her right hand is raised to her forehead, holding the bridge of her glasses, while her left hand rests on the desk. In front of her is an open laptop. To the left of the laptop, there is a glass of dark red liquid. The background is bright and out of focus, showing a large window and a green plant. The overall atmosphere is professional and contemplative.

Four case studies to be used to
demonstrate the test for
harassment and violence in terms
of the Code of Good Practice (and
Convention 190)

A close-up, high-angle shot of a woman with dark hair, wearing a white button-down shirt and a small silver stud earring. She is looking down intently at a blue folder or notebook she is holding. The background is a plain, light-colored wall.

“Did he slap her
buttock?”

Mr X was standing next to Ms Y on her left-hand side while she was standing and operating the computer to retrieve and print a document. It is while they were there that she claimed that he slapped her on her left buttock. At the time, or immediately afterwards as they proceeded to the printer outside the room claimed that Mr X giggled.

*Shoprite Checkers (Pty) Ltd v JL and Others 43 ILJ
903 (LC) (10 December 2021)*



Watch your graffiti....


Numsa on behalf of Prezens and Duferco Steel Processing (Pty) Ltd (2006) 27 ILJ 1282 (BCA)

Extract:

"I agree with the company's conclusion that the applicant's conduct was sexually provocative, undesirable and harassing in nature. I find his conduct to fall within the provisions of sexual harassment as per the company's Code on Sexual Harassment...

Even if I considered the applicant's conduct did not amount to sexual harassment as per the generally accepted norm... it does not detract from the seriousness of the offence. I have no doubt that the applicant was guilty of sexually offensive and derogatory conduct. This I regard to be a serious act of misconduct... Dismissal would be appropriate.

... an employer has a positive duty to create an environment free of harassment and to protect vulnerable, especially female, employees."

A man and a woman are standing in an office, looking at a large desk covered with papers and documents. The man, on the left, is wearing a light blue shirt, dark trousers, and glasses. The woman, on the right, is wearing a dark blazer over a grey top. Both are wearing lanyards with ID badges. They appear to be in a professional discussion. The background shows office shelves and a window with blinds.

“That is how she is”

- Constructive dismissal claim by two employees
- Referred to one teacher as a “screaming queen”
- Shouting at teachers and therapists at a conference who were smoking outside – “you are stupid, you are pathetic, you are a moron...”
- Conjoining rooms, insisted doors remain open and made comments such as “let me see that little bum your boyfriend is a lucky man.”
- Normal for her to strip down to her underwear while talking and change into gym wear
- They met with her - she told them they were disrespectful for not greeting her.
- Called a teacher a goblin, “face that needs makeup”
- Approached her as a team – told they are colluding
- They resigned. Offered to work out notice but chased off the property.

Centre for Autism Research and Education CC v CCMA and Others
(2020) 41 ILJ 2623 (LC)

“Mean Boss or recalcitrant staff?”

- Branch manager, being with the Bank for 23 years.
- Placed on suspension pending an investigation.
- Charged with behaviour relating to the treatment of her subordinates:

“You communicated with your subordinates in a manner that is disrespectful, offensive and childish. You shout at your subordinates using inappropriate words, vulgar language in front of their colleagues and the customers of the bank. You failed to motivate your team and to value the ideas by certain of your subordinates. This has resulted with your subordinates feeling uncomfortable and worthless.”

Makuleni v Standard Bank of South Africa Ltd and Others
(JA125/2021) [2023] ZALAC 4; (2023) 44 ILJ 1005 (LAC)



Concluding remarks

- SA has a clear legislative framework addressing violence and harassment in the workplace, largely in compliance with Convention 190
- Our jurisprudence is expansive and aligns with Convention 190, and provides a clear test for discrimination and harassment (harmful behaviour)
- Our Code of Good Practice provides an informal and formal approach which works well practically.
- Our harassment law is framed under discrimination and doesn't address violence and harassment that is not on the basis of a listed ground. This is dealt with, therefore, as common misconduct.

