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Regulating Incidence of Sexual Harassment in the Workplace- A Focus on Educational Institutions in South Africa

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Abstract

The article discusses issues of sexual harassment in the workplace with an emphasis on educational institutions. As the regulatory instruments are usually institution-specific, the regulatory instruments in two educational institutions in South Africa were chosen for illustrative purposes. Through critical and analytical methods, the paper explores the reporting requirements, the impact of power dynamics on speedy reporting, and the motive for sexual harassment complaints. The extant relevant judicial decisions were judiciously deployed to lend credence to the position adopted by the authors. The paper concludes that the decision-makers should exercise caution so that the innocent are not vilified on a hoax complaint on account of society's justified disdain for the seeming prevalence of sexual harassment incidents in the workplace.

Keywords: *Sexual harassment, workplace, reporting, power dynamics, motive.*

Introduction

Sexual harassment incidents have continued to be a recurring decimal in the workplace and, more importantly, in educational institutions. Learners are known to have gained or deprived academic points for acceding to or declining the request of their teachers for sexual favours. Such conducts by the perpetrators, inimical as they are, have always attracted arduous public sentiments laced with condemnation, and justifiably so, for the perpetrators and sympathy for the recipients. However, it is not unusual for weak and gullible learners, even as young as they may appear, to stage issues of sexual harassment against their teachers and blame them for their poor academic performances, or even as retaliation against such teachers for not acceding to some of their ignoble and, at times, subtle requests, or sexual advances. The courts are alert to such developments as borne by the caution expressed by Tlhotlhalemaje J in *Rustenburg Platinum Mines Limited v UASA obo Steve Pietersen*[1] that there should "be an ability to distinguish between an 'attention-seeker', a 'trouble-maker', 'a scorned employee retaliating in the aftermath of a failed office affair'; and a genuine complaint of sexual harassment." Such a cautionary note is particularly addressed to employers and those who preside over sexual harassment cases in the workplace. There is always that temptation on the employer to tilt the scale *ab initio* in favour of the recipient and for the presiding officer in the investigative inquiry who is remunerated by the employer to toe the line of the employer, but that is exactly what the law says they must abhor. That wisdom is embedded in the untrammeled exhortation by Sethene AJ in *National Lotteries Commission v Mafonjo and Another*[2] that, "Those privileged to preside over disciplinary hearings must know that theirs is to serve justice without fear, favour, bias and prejudice. They must not lower their guards, for justice always needs valorous helpers. For the sake of the rule of law, a chairperson of an internal hearing ought to be fearless. The pursuit of justice needs stout-hearted men and women." It is against this backdrop and guided by the quest for justice for both the recipient and the alleged perpetrator, that this paper explores the rules on sexual harassment in the workplace with a specific focus on educational institutions.

[1] (2018) 39 ILJ 1330 (LC) (27 February 2018) para 52.
[2] (JR 48/2020) [2023] ZALCJHB 184 (23 June 2023) para 34.

What is Sexual Harassment

Educational institutions usually have internal policies that define what they consider to constitute sexual harassment. For instance, in the context of the University of Cape Town, sexual harassment is defined in that institution's Policy on Sexual Misconduct: Sexual Offences and Sexual Harassment ('UCT Policy') as: "unwelcome conduct of a sexual nature that violates the rights of a person and constitutes a barrier to equity in the institution."[3] The University of Kwazulu Natal adopts an explanatory definition of that concept in its Policy on Sexual Harassment ('UKZN Policy') as set down in paragraph 2 as follows:

"Sexual harassment is defined in South African legislation as "unwanted conduct of a sexual nature". The distinguishing characteristics of sexual harassment are that it is conduct with a sexual component, which is unwelcome, unsolicited and unreciprocated.

Sexual attention becomes sexual harassment if:

- The behaviour is persisted in, although a single incident of harassment can constitute sexual harassment, and/ or
- The recipient has made it clear that the behaviour is considered offensive and/or
- The perpetrator should have known that the behaviour is regarded as unacceptable.

It is not only the intention of the alleged harasser that is the issue, but also the complainant's reasonable perception and experience of the alleged harasser's behaviour."

The inference from paragraph 2 of the UKZN Policy is that to constitute sexual harassment, (i) the conduct must be sexual in nature, (ii) the conduct is offensive, unwelcome, unsolicited, and unreciprocated, and (iii) the recipient warned the perpetrator to desist from such conduct, or the perpetrator knows that the conduct is unacceptable. In other words, it does not suffice for the recipient to allege that the perpetrator's conduct was sexual in nature, the recipient must further establish that such conduct is offensive and unwelcome and was brought to the perpetrator's attention or that the perpetrator knows that such conduct is offensive in the circumstances. The decider of facts must be

[3] Taking into account, but not limited, to the following factors: "a) whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation; b) the impact of the sexual conduct on the complainant; c) whether the sexual conduct was unwelcome; d) the nature and extent of the sexual conduct." See UCT Policy para 4.22.

alert to those essential elements and ensure they are duly reflected in the decision to withstand the legal threshold. In setting aside the Commissioner's decision in *University of Venda v Maluleke*[4], Snyman AJ held that "it is clear that when determining the evidence, all he does is to regurgitate the testimony of the complainants, the testimony of the first respondent in answer thereto, and then makes a finding on what the second respondent calls the 'probabilities'. There is simply no consideration or any kind of analysis as to what testimony must be accepted, what must be rejected, and why." In *Gaga v Anglo Platinum Ltd and Others*[5], Murphy AJA held that "the commissioner's lapse in not performing a full assessment of the complainant's credibility …meant that he ignored relevant considerations and failed to apply his mind properly to material evidence and the definitional requirements of sexual harassment in the policy and the code." Those who preside over issues of sexual harassment in workplaces, besides eschewing all vestiges of extraneous influences, would require a fair knowledge of legal principles and judicial practices to adapt to the standard espoused in the above decisions.

The courts have also, through reasoning derived from embedded judicial wisdom and practices, established what could be described as a broadly acceptable definition of the concept of sexual harassment. The South African defunct Industrial Court led the way in *J v M,*[6] and that decision was affirmed by the Labour Court in *Tshivahase Phendla v University of Venda*[7], where Moshoana J held that: "in its narrowest form sexual harassment occurs when a woman (or a man) is expected to engage in sexual activity in order to obtain or keep employment or obtain a promotion or other favourable working conditions. In its wider view, it is, however, any unwanted sexual behaviour or comment, which has a negative effect on the recipient."

The 'narrowest form of sexual harassment' is what the courts have referred to as "*quid pro quo*" harassment. A *quid pro quo* harassment is explained in paragraph 4.22.6 of the UCT Policy as follows:

[4] [2017] ZALCJHB 72; (2017) 38 ILJ 1376 (LC) (28 February 2017) para 90.
[5] [2011] ZALAC 29; [2012] 3 BLLR 285 (LAC) (20 October 2011) para 43.
[6] [1987] 10 ILJ 755 (IC).
[7] [2017] ZALCJHB 491 (12 October 2017) para 50.

"b) *Quid pro quo* harassment occurs when an alleged perpetrator:

i. influences or attempts to influence a person's employment circumstances by coercing or attempting to coerce that person to engage in sexual activities;
ii. influences or attempts to influence the admission of a student to the University or to University residences by coercing or attempting to coerce that person to engage in sexual activities; and also;
iii. influences or attempts to influence the access of a student to training, organizational or funding opportunities, or interferes in grading or evaluation, by coercing or attempting to coerce a student to engage in sexual activities."[8]

This was practically demonstrated by the decision of the Labour Court in *University of Venda v Maluleke*[9], where Snyman AJ held as follows:

> "The allegations in *casu* concern the first respondent offering to all three complainants extra marks in exchange for having intercourse with him or providing sexual favours to him. He suggested to them that he 'wanted them'. Individually, the first respondent conducted himself as follows towards the three complainants: (1) the case of T. he proposed intercourse in exchange for passing a course and pulled her close, grabbed her buttocks and kissed her; (2) in the case of N. he implied sexual favours for a research topic, and when she did not accede to this, she received a zero mark; (3) in the case of N., he asked her out for drinks in the context of suggesting she exchange her body for marks. This kind of conduct would without doubt be sexual in nature, and would also be what is defined as *quid pro quo* harassment in the Code."

This is the more prevalent type of sexual harassment in the workplace, and more specifically, in educational institutions where the perpetrators prey on the weaknesses of the learners to satisfy their inordinate sexual cravings. The recipient should not ordinarily have much difficulty in proving such sexual solicitations laced with promises or deprivations of benefits as many of such conducts are evidence-based, such as the perpetrator refusing to assess the learner's work, failing the learner in a subject for refusing, or even awarding outrageous marks to the learner in exchange for some sexual favour. The recipient need not warn the

[8] See similar provision in para 5 of the UKZN Policy.
[9] [2017] ZALCJHB 72; (2017) 38 ILJ 1376 (LC) (28 February 2017) para 77.

perpetrator to desist in such instances as the perpetrator ought to know that they are indulging in an abhorrent enterprise. Such conduct would ordinarily fall under paragraph 2 of the UKZN Policy and paragraph 4.22.1(d) of the UCT Policy as unwelcome sexual conduct because: "the alleged perpetrator should have known that the behaviour would be unwelcome."

Where the recipient's evidence does not establish such reciprocity, the allegation of sexual harassment would call for greater scrutiny. Snyman AJ did just that in *Bandat v De Kock and Another*[10], and the result demonstrated the essence of such an inquiry as follows:

> "In addition, there was no *quid pro quo* harassment. The applicant was never financially prejudiced pursuant to conduct of a sexual nature. She was never promised advancement or benefits in exchange for sex. She was, in fact, on her own version, given financial assistance by the first respondent in the form of loans when she needed it and was never asked for anything untoward in return. The applicant was certainly not victimised in any way and presented no such evidence."

Where the evidence as presented by the recipient failed to establish sexual harassment from the 'narrower view' as demonstrated in *Bandat's case*, the decider of facts should have recourse to the 'wider view,' which ironically demands a more detailed quantum of evidence to ensure that the recipient is not merely using that concept to achieve other ulterior motives. The recipient must establish two important elements when relying on the 'wider view', namely: that 'the conduct or comment is sexual in nature, and that it is 'offensive', 'unwanted' or 'unwelcome' by the recipient.'[11] Paragraph 2 of the UKZN Policy qualifies the 'unwanted' element by raising the threshold of the 'unwantedness' beyond any equivocation in that it demands that the recipient "has made it clear that the behaviour is considered offensive." The UCT Policy provides a soft landing for the recipient by stating in paragraph 4.22.1(c) that "when a complainant has difficulty indicating to the alleged perpetrator that the conduct is unwelcome, the complainant may seek the assistance and intervention of another person in order to make it clear that the conduct is unwelcome."

[10] [2014] ZALCJHB 342; (2015) 36 ILJ 979 (LC) (2 September 2014) para 84.
[11] Ibid, para 86.

The Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace of 2005 ('the Code') issued in terms of the Employment Equity Act 55 of 1998 provides in Clause 5.2.1 other ways the recipient may indicate that sexual conduct is unwelcome, including non-verbal conduct such as walking away or not responding to the perpetrator. Clause 5.2.3 states, "Where a complainant has difficulty indicating to the perpetrator that the conduct is unwelcome, such complainant may seek the assistance and intervention of another person such as a co-worker, superior, counsellor, human resource official, family member or friend." In *Bandat's case*[12], Snyman AJ held that "[i]n terms of the Code, reporting conduct constituting sexual harassment to a friend is contemplated to be a form of protest. But then, and in terms of the Code, the friend must be asked to intervene and assist." Thus, it is not sufficient for the recipient to testify that they informed a friend(s) of the incident; the recipient's friend must also testify on what they did with the information received from the recipient.

The test for determining when sexual conduct could be said to be 'unwanted' or 'unwelcome' is laid down in paragraph 4.22.1 of the UCT Policy, reflecting both subjective and objective standards in that a conduct is 'unwelcome' if it "is perceived by the complainant as demeaning, compromising, embarrassing, threatening and/or offensive." The reasonability of the perception of the complainant is to be tested in the context of the factors listed in paragraphs a-f of that provision.[13]

The provision aligns with the test set down by Snyman AJ in *Bandat v De Kock and Another*[14] as follows:

> "What is clear from the above provisions of the code is that central to the existence of sexual harassment is conduct that must be 'unwelcome'. If the conduct is not unwelcome, it cannot be sexual harassment. The determination of whether conduct is 'unwelcome' is an objective one,

[12] Ibid, para 90.

[13] "a) the assessment of what is unwelcome should be informed by context, including culture and language; b) previous consensual participation in sexual conduct does not mean that the conduct continues to be welcome; c) when a complainant has difficulty indicating to the alleged perpetrator that the conduct is unwelcome, the complainant may seek the assistance and intervention of another person in order to make it clear that the conduct is unwelcome; d) some forms of sexual harassment are such that the alleged perpetrator should have known that the behaviour would be unwelcome; e) conduct which causes harm or inspires reasonable belief that harm may be caused by the complainant by unreasonably following, watching or accosting the complainant in person or electronically; f) intimidation, where a person is threatened with sexual assault and it inspires a reasonable belief of imminent harm."

[14] *Bandat* (n 10) above, para 72.

> because conduct that may be subjectively unwelcome to one person may not be unwelcome to another."

The court found in that case as follows:[15]

> "In her evidence, the applicant conceded that she never complained to the first respondent about any of his behaviour. She never told him that what he was doing was improper nor did she ask him to desist. In fact, and considering the nature of their relationship, this clearly explains why this was the case, being that it was not unwanted."

There are two-pronged questions a decider of facts should seek answers to, drawing from Snyman AJ's pronouncements in *Bandat's case* as set down above. Firstly, what a reasonable person placed in a similar circumstance as the recipient would have done, and secondly, what the recipient did in that circumstance? A recipient who remained docile and continued to co-relate with the perpetrator could be found to have acquiesced, if not positively promoted, the conduct upon which the complaint is based. Such docility cannot be excused on any inferences or suggestions of power dynamics or power differential between the recipient and the perpetrator. In *Tshivahase Phendla v University of Venda*[16], Moshoana J held as follows:

> "She gets raped; the worst form of harassment, yet she chooses to remain mum and continue to attend dinners, which she knew of its dangers. If this was unwanted, it could not have continued for a period of two years. The applicant was not a lowly employee; she was a Dean of a school. She must have been conscious of her rights. It is highly improbable that a Professor can allow herself to be subjected to such a huge violation of her rights and decide to keep quiet. It is not like the applicant did not know what to do and where to go. At one stage she threatened to report Professor Mbati to the Council. The reasons why she did not do so are very flimsy. That nobody will believe her is flimsy and less convincing. The question remains why should anybody believe her two years later?"

[15] Ibid, para 88.
[16] [2017] ZALCJHB 491 (12 October 2017) paras 52-53.

Reporting Sexual Harassment Incident

Section 60(1) of the Employment Equity Act 55 of 1998 mandates an immediate reporting to the employer of any conduct (including sexual harassment) that contravenes the provisions of the Act. Snyman AJ affirmed the requirement of that provision in *Bandat's case.*[17] The essence of the requirement of 'immediate' reporting is to prevent the intervention of extraneous factors that could neutralise the reason for the recourse, which should ordinarily be the protection of the recipient's sexual dignity.[18] This would also dispel any suggestion that the conduct which the recipient now complains against is never unwanted.

Immediate reporting should not, however, be construed as requiring a spontaneous action by the recipient or debarring any period of 'cooling-off'. If properly explained, a few days or months of delay should be understandable as the recipient ponders over the incident with friends and relatives. Thus, the UCT Policy requires that such incidents be reported to the Office for Inclusivity & Change ('OIC') as soon as is reasonably possible.[19]

A delay of a significant number of months and years could become unreasonable and should call for closer scrutiny of such a report, especially where the complainant remains in the alleged perpetrator's company and continues to enjoy a cordial relationship with the alleged perpetrator while the alleged sexual misconduct subsists.

In *Bandat's case*[20]*,* Snyman AJ refused to accept that the conduct complained against by the complainant was unwanted as evidence revealed that the complainant never warned the perpetrator and did not report the incident timeously as required by law. In that illuminating finding, the judge said:

> "How does one then go about in objectively determining whether the kind of conduct as set out in clause 5 of the Code is unwelcome? In my view, the first question that has to be asked is whether the conduct was ever complained about by the employee. This can be done by the perpetrator being informed that the employee considered the conduct to be

[17] *Bandat* (n 14) above, para 78. Para 6 of the UKZN Policy enjoins the university management to "take appropriate action when instances of sexual harassment which occur within the workplace or during the course of University programmes (regardless of location) are brought to their attention."

[18] Ibid, para 80, *Gaga v Anglo Platinum Ltd and Others* [2011] ZALAC 29; [2012] 3 BLLR 285 (LAC) (20 October 2011) para 42.

[19] See para 7.1 of the UCT Policy.

[20] *Bandat* (n 16) above, paras 74 and 91.

> unwelcome and the perpetrator then being called on to cease the conduct. Or the employee can formally pursue a complaint with more senior management using relevant harassment policies that may be applicable, or raising a grievance. I therefore accept that it is not the be all and end all for an employee to have raised a grievance but at least the employee must make it clear to the perpetrator that what is happening is not acceptable and must stop."
>
> "In short, it is accordingly my view that the conduct the applicant now complains of was never unwanted. It is conduct that would not be untoward in the context of the kind of relationship the applicant had with the first respondent. The applicant also never complained about any of this conduct to the first respondent, and simply has no reasonable and plausible explanation for not doing so. Accordingly, there simply cannot be any reasonable inference to the effect that the applicant was indeed sexually harassed. Quite the contrary, I simply do not accept that the applicant was sexually harassed."

In *University of Venda v Maluleke*[21] the court was impressed by the fact that "the three complainants immediately came forward and complained about what happened to them." In *Gaga v Anglo Platinum Ltd and Others*[22], the appeal failed following the finding by the appellate court that the respondent had informed the appellant both orally and by SMS that she did not like the sexual conduct, but the appellant persisted with the same conduct. In *Rustenburg Platinum Mines Limited v UASA obo Steve Pietersen*[23] Tlhotlhalemaje J summarised the factual basis, which indicates a persistent soliciting of sexual favour by the perpetrator from the complainant, which the complainant had consistently told the perpetrator to stop the conduct; had also reported the incidents to her friends and colleagues, and to her husband. On the contrary, in *Tshivahase Phendla v University of Venda*[24], Moshoana J was not impressed that it took the complainant two years to report sexual harassment on a flimsy reason that nobody would believe her, and only after the employer had dismissed her on a charge of serious misconduct.

These cases reflect the dynamics of judicial attitude dealing with each case based on its own peculiarities. The inference from all those

[21] [2017] ZALCJHB 72; (2017) 38 ILJ 1376 (LC) (28 February 2017) para 100.
[22] [2011] ZALAC 29; [2012] 3 BLLR 285 (LAC) (20 October 2011).
[23] (2018) 39 ILJ 1330 (LC) (27 February 2018) paras 54 and 60.
[24] [2017] ZALCJHB 491 (12 October 2017) para 53.

decisions is that the recipient of unwanted sexual conduct cannot simply remain docile. If it is persistent conduct, the recipient should at least warn the perpetrator or express some level of discomfort by whatever means would make the perpetrator understand that the conduct is unwanted. If it is an isolated conduct, the recipient should at least inform their friends, family members, or colleagues in the workplace and seek their intervention if the recipient cannot warn the perpetrator.

There are provisions in both the UCT and UKZN Policies, respectively, aimed at ensuring speedy reporting and guaranteeing protection for the recipient. Paragraph 5.1.2.2 provides various supporting measures for the complainant; the UKZN provision in paragraph 6 guarantees the complainant's confidentiality in all respects.

A formal report of the incident should comply with the details as required by the provisions in the relevant policy. Those details are essential in ascertaining whether the alleged misconduct falls within the employer's workplace rules for which the employer can exercise jurisdiction. In *Real Time Investments 158 t/a Civil Works v Commission for Conciliation, Mediation and Arbitration and Others*[25], the court held that an employer does not have jurisdiction over an incident that occurred outside the workplace after working hours and which did not have any impact on the employer's business. The UCT Policy provides in paragraph 2.5.1 that the complainant would receive only support services from the institution where the complainant was engaged in official services outside the institution when the incident occurred.

Those details are also important in ensuring transparency in the handling by the employer of any incident of that nature, as the alleged perpetrator ought to be notified in unambiguous terms of the misconduct to be able to respond. This is one of the requirements of fairness in an administrative action. Section 33(1) of the 1996 Constitution demands that an administrative process be fair to all the parties concerned. In *MEC Department of Finance, Economic Affairs and Tourism: Northern Province v Mahumani*[26], the Supreme Court of Appeal held that section 3(1) of the Promotion of Administrative Justice Act 3 of 2000 (PAJA), which provides that "administrative action which materially and adversely affects the rights or legitimate expectations of any person must be procedurally fair" corresponds with the common law in respect

[25] [2022] 6 BLLR 524 (LAC) paras 17.
[26] [2005] 2 All SA 479 (SCA) para 11.

of disciplinary proceedings. In *Trend Finance (Pty) Ltd and Another v Commissioner for SARS and Another*[27], Van Reenen J held that:

> "Content is given to the concept "procedurally fair administrative action" by section 3(2)(b) of PAJA which provides as follows -
>
> "(b) In order to give effect to the right to procedurally fair administrative action, an administrator, subject to subsection (4), must give a person referred to in subsection (1) –
> 1. adequate notice of the nature and purpose of the proposed administrative action;
> 2. a reasonable opportunity to make representations;
> 3. a clear statement of the administrative action;
> 4. adequate notice of any right of review or internal appeal, where applicable; and
> 5. adequate notice of the right to request reasons in terms of section 5."[28]

Moran indicates that adequate notice of the nature and purpose of the administrative action,

> "means more than just informing a person that an administrative action is being planned. You must give the person enough time to respond to the planned administrative action. The person also needs to have enough information to be able to work out how to respond to the proposed action. They need to know the nature of the action (what is being proposed) and the purpose (why the action is being proposed)."[29]

Similarly, in *Mkhwanazi v S*[30], Malungana AJ, speaking from a criminal law perspective, emphasised that "the purpose of setting out the essential elements of an offence and the alleged misconduct of the accused person is to enable the accused to be armed with sufficient information to make a decision concerning the conduct of his/her defence."

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[27] [2005] 4 All SA 657 (C) para 77.
[28] See also s 188 of the Labour Relations Act No 66 of 1995 and Regulation 4 of the Code of Good Practice.
[29] Greg Moran, *A Practical Guide to Administrative Justice 1st ed*, (2002) available at chrome-extension://efaidnbmnnnibpcajpcglclefindmkaj/https://www.justice.gov.za/paja/docs/2002%20aug_admin%20guide.pdf accessed 17 October 2023.
[30] [2022] ZAGPPHC 862 (7 November 2022) para 16.

Those requirements, as contained in the policy, statute, and judicial decisions for a fair administrative process, are not satisfied by the complainant merely stating in the complaint that the alleged incident of sexual harassment occurred in a specific year or even month. A date is not synonymous with a year or month. A 'date' is "a particular day of the month, sometimes in a particular year, given in numbers and words."[31] In legal parlance, a date is "Part of a document or writing expressing the day of the month and year in which it was made or given."[32] A date is, as such, a combination of the day, month, and year of an incident. An omission of any of those three aspects would not satisfy the requirement of a 'date'. In *Bandat v De Kock and Another*[33], Snyman AJ, while expressing doubt on the veracity of the applicant's testimony, held: "I find it inexplicable that for such a serious issue, the applicant is so vague on the date when it happened. The best I could finally get from her evidence was sometime in the latter half of 2012." Suffices to re-emphasise that including sufficient details in the reporting process guarantees the alleged perpetrator's right to a fair hearing and ensures a fair administrative process. Acting to the contrary would stand the risk of the process being reviewed and could be branded by the court as a trial by an ambush, which the law detests.[34]

Power Dynamics in Sexual Harassment Cases

The peculiarities of a workplace where there are always seniors and juniors, supervisors and subordinates, and in educational institutions, where there are learners and teachers, would inevitably create power dynamics. Such dynamics usually manifest in the relationships among the various individuals' categories in their personal and official interactions. Ordinarily, a junior is expected to respect the senior, just as the learner respects the teacher. Those workplace-embedded principles, sometimes explicitly expressed in the workplace rules, define the official relationships of the employer and the employees. However, workplace rules rarely prohibit interpersonal and unofficial relationships among workers, especially where such relationships do not pose any risk to the

[31] AS Hornby, *Oxford Advanced Learner's Dictionary 8th ed* (Oxford University Press, 2010) p 370.
[32] 2 Bl. Comm. 304; Tomlins.
[33] [2014] ZALCJHB 342; (2015) 36 ILJ 979 (LC) (2 September 2014) para 92.
[34] See *Real Time Investments 158 t/a Civil Works v Commission for Conciliation, Mediation and Arbitration and Others* [2022] 6 BLLR 524 (LAC) paras 25 and 26 per Coppin JA; *S v Sebusi and Another* [2012] ZANCHC 22 (13 April 2012) para 19 per Hughes-Madondo AJ.

employer's work. Where such a relationship evolves between consenting adults, the dynamics of their interactions would automatically be redefined both within and outside the workplace, and the law does not frown on such a relationship.

The courts usually consider all those dynamics of relationships at the official and personal levels when deciding whether a conduct is unwanted and why there is a delay in reporting or nonreporting of an incident. This was the view of the court in *University of Venda v Maluleke*[35], where Snyman AJ held: "Another important consideration in deciding whether conduct is unwelcome is the actual dynamic and nature of the relationship between the perpetrator and the complainant. This dynamic must not only be considered within the context of the employment relationship, but also at a personal level." In *Gaga v Anglo Platinum Ltd and Others*[36], Murphy AJA observed that:

> "The failure by the complainant to take formal steps against the appellant should be construed likewise in the light of the personal and power dynamic in the relationship, which probably operated to inhibit the complainant;… It would be unfair to the employer were the appellant to be allowed to avoid liability for sexual harassment on the basis of the ignorance of his victim of the steps required to be taken in the policy and her hesitation in taking them. The complainant's evidence looked at as a whole suggests that she was uncertain about how to deal with the situation. Her conspicuous vacillation was an understandable response in a youthful and junior employee. She was placed in the invidious position of being compelled to balance her sexual dignity and integrity with her duty to respect her superior; which obligation no doubt was appreciably compromised by his behaviour."

While the peculiarities of the facts in *Gaga's case* have a significant impact in excusing the delayed reporting and even the seeming ignorance of the recipient, similar excuses were not accepted by the court in *Tshivahase Phendla v University of Venda*[37], where Moshoana J held as follows:

> "One wonders why the applicant did not mention this to anyone. I do not accept her version that she found Professor Mbati to be powerful. Three years before the ordeal commenced, the applicant was a Councilor at the respondent. Surely she knew most if not all the Councilors during the

[35] [2017] ZALCJHB 72; (2017) 38 ILJ 1376 (LC) (28 February 2017) para 69.
[36] [2011] ZALAC 29; [2012] 3 BLLR 285 (LAC) (20 October 2011) para 42.
[37] [2017] ZALCJHB 491 (12 October 2017) paras 52-53.

> period she underwent the ordeal. She gets raped; the worst form of harassment, yet she chooses to remain mum and continue to attend dinners, which she knew of its dangers. If this was unwanted, it could not have continued for a period of two years. The applicant was not a lowly employee; she was a Dean of a school. She must have been conscious of her rights. It is highly improbable that a Professor can allow herself to be subjected to such a huge violation of her rights and decide to keep quiet. It is not like the applicant did not know what to do and where to go. At one stage she threatened to report Professor Mbati to the Council. The reasons why she did not do so are very flimsy. That nobody will believe her is flimsy and less convincing. The question remains why should anybody believe her two years later?"

The seemingly contrasting views in *Gaga* and *Phandla cases,* respectively, are reflections of commendable judicial aptitude in scrutinising facts and giving credence to the minute details of evidence as led by the parties, especially by the complainant in cases of that nature. A similar judicial approach was demonstrated in *Bandat v De Kock and Another*[38]*,* where Snyman AJ held:

> "I also cannot fathom how the applicant can allege that she is afraid to tell the first respondent that his conduct is not acceptable in circumstances where she basically shared all the intimate details of her life with him. The applicant also said she was afraid to lose her job, but did not provide any evidence to show that her job was ever threatened or that the first respondent conducted himself in any way so as to indicate to her that her job was at risk."

The findings of fact by the judge indicate, among others, that the applicant and the first respondent were close friends, that the applicant and the first respondent regularly and continuously shared intimate details of one another's lives with one another, that the applicant and the first respondent were comfortable and familiar in the presence of one another and behaved; accordingly, that the applicant and the first respondent shared jest of a sexual nature. The applicant, for example, conceded an incident where she took some condoms and made a sexual joke about her husband and his alleged sexual escapades to the first respondent. With the above facts so conclusively established by evidence, Snyman AJ justifiably concluded that the dynamics of the relationship between the applicant and the first respondent showed that "nothing of what the first

[38] [2014] ZALCJHB 342; (2015) 36 ILJ 979 (LC) (2 September 2014) para 89.

respondent did was unwanted. It only became unwanted after the fact, once the applicant had left and sought to sue the respondents."[39]

These contrasting findings of the courts in the decisions discussed above reflect the dynamics of relationships that could exist in workplaces, and even in educational institutions. It is never a straightforward issue of superior/subordinate or teacher/learner relationship where the person who, officially or even seemingly, is bestowed with the superior authority over the other must always be held accountable whenever the subordinate alleges sexual misconduct. The facts, if closely scrutinised, could reveal that personal relationships have since trumped the official dynamics and which should be respected, so long as such a relationship does not compromise the employer's workplace standard.

Motive in Sexual Harassment Cases

The reporting of sexual harassment incidents could be prompted by a variety of motives. Where there is a *quid pro quo* type of sexual harassment, the plausible motive should be the quest by the complainant to retrieve the lost opportunity or, in rare cases, to return an undeserved reward. Where there is no *quid pro quo* harassment, the reporting should ordinarily be galvanized by the quest to protect the recipient's sexual dignity. Murphy AJA alluded to this in *Gaga's case,* where he held that the complainant "was placed in the invidious position of being compelled to balance her sexual dignity and integrity with her duty to respect her superior."[40]

The word 'dignity' is derived from the Latin term *dignitas*, which concerns the individual's own sense of self-worth. It extends to various personal rights, such as the right to privacy under the common law.[41] The constitutional threshold extends the value of human dignity beyond an individual's sense of self-worth to an affirmation of the worth of human beings in society. It includes the intrinsic worth of human beings shared by all people and the individual reputation of each person built upon

[39] Ibid, para 87.

[40] *Gaga v Anglo Platinum Ltd and Others* [2011] ZALAC 29; [2012] 3 BLLR 285 (LAC) (20 October 2011) para 42.

[41] See GC Nwafor, "Protection of the Right to Healthcare of People Infected with Ebola Virus Disease (EVD): A Human Rights-Based Approach" LLM Dissertation submitted to the University of Venda (2015) 20.

their own achievements.[42] In the context of this article, unwanted sexual advances, especially when it assumes repeated occurrences despite persistent resistance, certainly infringe on the recipient's dignity. The recipient is, as such, entitled to seek redress through the appropriate employer's internal mechanisms.

However, sexual harassment, even in the most heinous of cases, must not be used as an instrument of blackmail[43] or retaliation against the perpetrator. This is implicit in the observation made by Tlhotlhalemaje J in *Rustenburg Platinum Mines Limited v UASA obo Steve Pietersen*[44] where the judge stated that there should "be an ability to distinguish between an 'attention-seeker', a 'trouble-maker', 'a scorned employee retaliating in the aftermath of a failed office affair'; and a genuine complaint of sexual harassment." Workplace relationships, especially at the personal level, could blossom into sweet olives or degenerate into bitter pills. The latter could result in criminations and recriminations as the aggrieved fights back with every available weapon, including complaints of sexual harassment. Thus, employers should be on their guard whenever a report of sexual harassment emanates from a recipient who is shown to have previously enjoyed a cordial relationship with the alleged perpetrator.

In *University of Venda v Maluleke*[45], the court considered the existence of an inappropriate motive as a factor that could vitiate an allegation of sexual harassment but found that no such motive was established in that case. In *Tshivahase Phendla v University of Venda*[46], Moshoana J held, "It does appear to me that after her dismissal, the applicant created events, which may have been consensual and turned them into coerced events." Thus, an inappropriate motive was established, and the case was dismissed. Similarly, in *Maepe v Commissioner for Conciliation, Mediation and*

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[42] Drucilla Cornell et al, *The Dignity Jurisprudence of the Constitutional Court of South Africa Vol II* (New York: Fordham University Press, 2013) 553; see also Drucilla Cornell et al, *The Dignity Jurisprudence of the Constitutional Court of South Africa Vol I* (New York: Fordham University Press, 2013) 78 where dignity is defined as respect for the intrinsic worth of every person, meaning that individuals are not to be perceived or treated merely as instruments or objects of the will of others.

[43] Anja Hofmeyr and Pieter Conradie, "'Dirty dozen" tactics' (2017) *Litigation* available at https://www.withoutprejudice.co.za/free/article/5239/view accessed 27 /09/2023 emphasized that "one cannot threaten to lay criminal charges against someone for an act irrelevant to the damages suffered… as this would constitute blackmail."

[44] (2018) 39 ILJ 1330 (LC) (27 February 2018) para 52.

[45] [2017] ZALCJHB 72; (2017) 38 ILJ 1376 (LC) (28 February 2017) para 93. See also *Gaga v Anglo Platinum Ltd and Others* [2011] ZALAC 29; [2012] 3 BLLR 285 (LAC) (20 October 2011) para 36.

[46] [2017] ZALCJHB 491 (12 October 2017) paras 57.

Arbitration[47]*,* Zondo JP (as he then was) found that the sexual advances made to the receptionist by the appellant "did not constitute sexual harassment because the receptionist had no objection to it and, indeed, seems by her conduct to have encouraged the appellant's advances until the issue of her performance appraisal arose and she found out that the appellant had said something negative to the Registrar of the first respondent in the Eastern Cape about her work performance." In *Bandat's case*[48]*,* Snyman AJ dismissed sexual harassment allegation where evidence revealed that cordial relationship had existed between the parties and that the conduct "only became unwanted after the fact, once the applicant had left and sought to sue the respondents."

These cases also demonstrate the need for diligent reporting of incidents of sexual harassment. Inordinate delays could lead to the intervention of extraneous factors that could create a new motive, even if unintended, or distort the existing real motive for the complaint. Once such extraneous motives are revealed by evidence, the decision-maker must consider them to ensure fairness in the administrative process. In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[49]*,* Ngcobo J emphasised in a minority decision that:

> "It follows therefore that where a commissioner fails to have regard to material facts, the arbitration proceedings cannot in principle be said to be fair because the commissioner fails to perform his or her mandate. In so doing, in the words of Ellis, the commissioner's action prevents the aggrieved party from having its case fully and fairly determined. This constitutes a gross irregularity in the conduct of the arbitration proceedings as contemplated in section 145(2)(a)(ii) of the LRA. And the ensuing award falls to be set aside not because the result is wrong but because the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings."

Such gross irregularity would be avoided by adhering to the caution espoused by Sethene AJ in *National Lotteries Commission v Mafonjo and*

[47] [2017] ZALCJHB 491 (12 October 2017) paras 57.
[48] *Bandat v De Kock and Another* [2014] ZALCJHB 342; (2015) 36 ILJ 979 (LC) (2 September 2014) para 89.
[49] [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) (5 October 2007) para 268.

Another[50] as follows: "Lest we forget, chairpersons of internal hearings perform administrative action and in that capacity they have to ensure that their decisions are legally sound so as to avoid burdening this court with employment disputes that in fairness ought to have been finalised at the hearing stage."

Conclusion

The recurring incidents of sexual harassment in the workplace, especially in educational institutions, are denounced by every right-thinking member of society. However, in dealing with such issues, the employer is enjoined to adhere to the rules of their engagement. The recipient should always ensure that such an incident is reported to the appropriate institutional authority if the conduct is unwanted, using appropriate tools provided by the workplace rules of engagement. Although the extant power dynamics may delay or even prevent reporting of such incidents, the employer must ensure that the reason proffered by the recipient for such delay is justifiable in the circumstances. This would guarantee that the sexual harassment, as reported by the recipient, is prompted by the right motive, not as a blackmail or retaliation against the alleged perpetrator. The scrutiny of the motive of the recipient becomes extremely essential when both the recipient and the alleged perpetrator are shown to have enjoyed a cordial relationship over a long period. Whichever way the pendulum tilts in each case should be guided by the peculiarities of the facts as revealed in evidence and the relevant regulatory instrument.

[50] [2023] ZALCJHB 184 (23 June 2023) para 2.