LABOUR BULLETIN

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1. From the General Secretary's Desk

The ELRC is pleased to provide stakeholders with its March 2023 issue of the *Labour Bulletin*. The *Bulletin* contains articles that are relevant to the education sector.

We hope to both inform and stimulate readers. Some of the issues covered are contentious. It goes without saying that the views are those of the authors alone.

We would encourage an exchange of views on the jurisprudence generated by the courts and by the ELRC because these rulings shape the way the sector operates.

We trust you will find value in these pages.

Ms NO Foca
ELRC, General Secretary

2. Case Law: Sexual Assault

IN THE HIGH COURT OF SOUTH AFRICA EASTERN CAPE DIVISION, GRAHAMSTOWN REPORTABLE Case No.: 828/2011 In the matter between: Plaintiff and DR BEYERS NAUDE LOCAL MUNICIPALITY First Defendant XOLA VINCENT JACK Second Defendant

In this case law, members of the Dispute Prevention Task Team (DPTT) had the opportunity to examine the sexual assault case that was before the High Court in *P-A-E v DR Beyers Naudes Local Municipality and Another* (13 April 2021).

The American poet Robert Frost concluded his narrative poem: *The Road Not Taken* with the lines:

"... Two roads diverged in a wood,
and I — I took the one less travelled by,
And that has made all the difference."

This is a story of a litigant Erasmus embarking on a road rarely travelled by employees who have suffered a wrong at the hands of their employers and the path so chosen would ultimately prove to have far-reaching consequences for both employee and employer.

Erasmus was a 23-year-old woman occupying the post of Registry and Archives Clerk within the Dr Beyers Naude Municipality, to which she had been permanently appointed with effect from 01 January 2010. Jack was her superior and the Corporate Services Manager. After her employer had made her employment intolerable compelling her to resign, rather than pursue the conventional remedy of claiming an unfair constructive dismissal as provided for in the

Labour Relations Act No. 66 of 1995 ("the LRA") 4, the Plaintiff elected to prosecute a claim sourced in the common law and to contend that she had been the victim of a civil wrong, i.e., a delict. The Plaintiff thus challenged the lawfulness not the fairness of the conduct of her employer. Had Erasmus referred an unfair dismissal dispute, the compensation to which she would have been entitled would have been capped and given that the LRA has, as one of its imperatives the expeditious and effective resolution of disputes, any dispute so referred would have been expected to have been finalised with expedition.

When it comes to the calculation of quantum, the High Court was not concerned with compensation limited by a statutory cap; rather quantum is to be ascertained applying the trite principle that a plaintiff is entitled to such damages as he or she may prove. As relief she asked the courts to grant compensation calculated from the date of dismissal until the date of retirement. The court also ruled that relying on COIDA to provide financial relief was unacceptable.

On 16 November 2009, Erasmus was sexually assaulted by Jack. Shortly before the assault, there was some tension in the working relationship when the applicant refused to perform a task requested of her by Jack because she was of the view that the instruction fell outside of her job description. There was also an incident where Jack had conveyed to Erasmus that if they did something together nobody would know. The applicant was uncertain as to what Jack had intended by this comment but stated that whatever his intentions were, she was of the view that they were not good.

"On Monday morning, 16 November, plaintiff was alone in her office when second defendant entered. After greeting her he walked directly to where she was sitting at her desk. As she looked up he bent down with his head over hers and, putting his mouth over hers, attempted to force his tongue into her mouth. She clenched her teeth and tried unsuccessfully to push him away. After a minute or so he desisted, leaving her with a mouthful of his saliva. She immediately wiped the saliva off her mouth. He then also tried to wipe her mouth with his hand but she knocked it away. He then mumbled something which she could not hear and then told her to make copies of certain items from a council agenda. Before leaving her office, he told her that he was going to get a cold sore the next day because he had kissed her."

The assault, and the manner in which it was subsequently addressed internally by the Municipality, culminated in Erasmus resigning from the Municipality with effect from November 2010. She claimed that she was compelled to resign, because of her Post Traumatic Stress Disorder arising out of the assault.

In an attempt to settle the claim, the Municipality was willing to reinstate the employee Erasmus and transfer Jack to another satellite office barring him from entering her premises of employment. The Municipality also undertook to pay her medical bills arising out of the incident for a period of one year.

On 19 November 2009, a letter, was transmitted to Jack affording him an opportunity to make representations as to why he should not be suspended in light of the allegations which had been made against him by Erasmus. On 23 November 2009 Jack replied in a letter offering no basis as to why he should not be suspended other than to baldly deny the allegation, in his ***words "… with the contempt it deserves (sic)."***

More than three months lapsed before Jack was charged on 19 February 2010, with "gross misconduct" in terms of which it was alleged that he had "… forced himself upon a female subordinate Erasmus and attempted to kiss her against her will".
The disciplinary proceedings did not seem to have been a priority for the Municipality and the hearing was eventually held on 11 May 2010, half a year after the assault. He was found guilty of the charge which was preferred against him.

The Presiding Officer found, correctly so, ***that "… the relationship between employer and employee is irretrievably broken down due to the seriousness of the allegations".***

The Presiding Officer then proceeded to mention, in his finding, something about the need to uplift the skills of employees, inexplicably utilising this concern as a basis for not imposing a sanction of dismissal. The Presiding Officer found that a suitable sanction would be for Jack to be suspended without pay for a two-week period. Shockingly, the Presiding Officer recorded that the only reason why he did not give Jack a final written warning (as opposed to the short period of suspension

without pay) was that Jack was already on a final written warning for theft, and in this context the evidence was that Jack had stolen a tank from the Municipality. The decision by the Presiding Officer not to impose a sanction of dismissal was mindboggling given the character of the offence, the circumstance that Jack, the Corporate Services Manager, had abused his position of authority by assaulting a female subordinate who was in a particularly vulnerable position in that she was a temporary employee at the time that the assault occurred. Furthermore, Jack did not demonstrate any remorse, remaining defiant to the end. Where an employee has been found guilty of gross misconduct and fails to take the first step towards rehabilitation by acknowledging his wrongdoing, there can be little scope for corrective or progressive discipline.

The court found that The Municipality, as an Organ of State, was not only entitled, but in fact obliged, given the obligations on it in terms of Section 195 of the Constitution, to have challenged the disciplinary finding which, on the face of it, was indefensible. It was obliged to have done so, inter alia, as part of its duty to maintain the integrity of its organisation, to ensure proper discipline therein and to remedy the injustice suffered by Erasmus. ***In Khumalo and Another v Member of the Executive Council for Education: KwaZulu-Natal*** the Court described the duty as follows:

"Public functionaries, as the arms of the state, are further vested with the responsibility, in terms of section 7(2) of the Constitution, to "respect, protect, promote and fulfil the rights in the Bill of Rights." As bearers of this duty, and in performing their functions in the public interest, public functionaries must, where faced with an irregularity in the public administration, in the context of employment or otherwise, seek to redress it. This is the responsibility carried by those in the public sector as part of the privilege of serving the citizenry who invest their trust and taxes in the public administration."

This duty is to be interpreted in the context of the special overarching obligation on Organs of State to uphold the rule of law. It was observed in Buffalo City Metropolitan Municipality v Asla Construction (Pty) Ltd: "This Court has repeatedly stated that the state or an organ of state is subject to a higher duty to respect the law. As Cameron J put it in Kirland: "***There is a higher duty on the state to respect the law, to fulfil procedural requirements and to tread respectfully when dealing with rights. Government is not an indigent or bewildered litigant, adrift on a sea of litigious uncertainty, to whom the courts must extend a procedure-circumventing lifeline. It is the Constitution's*** primary agent. It must do right, and it must ***do it properly."***

The Municipality did not challenge the decision of the Presiding Officer based on their own legal opinions. The author of the legal advice was seriously mistaken on this count. The assault committed by Jack was not the type of conduct which could have been extinguished or wished away. As Sachs J observed in a matter concerning an application to stay a criminal prosecution: "As the popular saying goes **"Molato ga o bole" (Setswana) or "ical'aliboli" (isiZulu)** – **there are some crimes that do not go away."**

The court found that The Municipality had a duty not only to show courtesy and respect to Erasmus but further to provide her with a safe working environment. It was obliged to have taken steps to protect her from the person who had assaulted her and who remained in the workplace. In a recent decision handed down by the Labour Appeal Court it was held that employers: ***"… have a duty to provide a safe and healthy work environment for their employees and students, including protection from senior employees of predatory disposition."*** The Municipality abdicated its responsibilities to protect Erasmus and adopted a supine approach of bovine resignation.

The court found that Erasmus was thereafter left to fend for herself. The Municipality took no steps to support or empower her. She was offered no counselling or any other assistance. There was no communication to her, from co-employees affirming support for her and condemning the conduct of Jack and no communication recording that conduct of the nature was unacceptable and in future would attract the sanction of dismissal. **Rather, if anything, the message was that victims of sexual assault who were brave enough to come forward would not receive redress. The unrepentant perpetrator, Jack, was allowed to roam free in the workplace with unfettered access to Erasmus.**

The court found that the conduct of the Municipality was truly an illustration of how not to manage sexual assault in the workplace. The

failure by the Municipality to take steps to protect Erasmus had catastrophic consequences for her emotional and psychological well-being and her employment became unendurable. The stance adopted by the Municipality at the trial demonstrated a disturbing lack of appreciation of its legal obligation to have provided Erasmus with a safe working environment. **The Municipality appears to have been under the erroneous impression that conducting a disciplinary hearing amounted to taking steps to eradicate sexual harassment and cheerfully assumed that because it had conducted a disciplinary hearing this was sufficient in the circumstances.**

Erasmus waited 10 years for redress. The court held that a judgment of this nature would not be complete without something being said about the harm suffered by victims of sexual assault. It stated that a sexual assault on a woman is a horrendous act and constitutes a heinous violation of a woman's dignity, privacy and bodily integrity. It damages her reputation. It denies her intrinsic worth, her equality. It dehumanises her. It makes her into an object. The scourge of workplace sexual harassment is more often than not gender specific. A sexual assault by a male superior on a female subordinate is a deplorable abuse of power and is a terrifying vehicle utilised by the superior to sexualise his control over the victim in a show of pernicious patriarchal dominance. What the evidence in this matter has confirmed is that sexual assault is a crime of a different kind given the devastation it leaves in its wake. The damage suffered is internal and unseen. Victims of sexual assault carry their sorrow with them. There are memories that will not decay. Theirs is the pain of which the Athenian dramatist Aeschylus spoke**, "... pain which cannot forget** …"

On 31 March 2016, this Court found the Defendants jointly and severally liable to pay the Plaintiff such damages as she may be able to prove she has suffered in consequence of the sexual assault upon her on 16 November 2009 at the offices of the erstwhile Ikwezi Local Municipality in Jansenville. The Court, referring to the dictum in *Ntsabo v Real Security CC* 2003 24 ILJ 2341 (LC) where it was held that the employer had effectively supported the harasser by not sanctioning him, found that the stance adopted by the Municipality demonstrated a disturbing lack of appreciation of its legal obligation to have provided the plaintiff with a safe working environment. The court found the First and Second Defendants jointly and severally liable, the one paying the other to be absolved, to pay the plaintiff an amount of ***R4 Million in damages***.

WHAT ARE THE LESSONS TO BE LEARNT?

(i) Sexual harassment may give rise to a claim under the EEA, LRA (constructive dismissal), as well as delict.

(ii) An employer cannot rely on COIDA to absolve itself from liability for compensation for its failure to protect its employees from exposure to sexual harassment in the workplace.

(iii) Employers have a duty to show courtesy and respect victims of sexual assault which occur in the workplace or in the course of performing their duties in furtherance of the employer's interests and to provide a safe working environment.

In *McGregor v Department of Health, Western Cape & others* (2021), the LAC held that employers: "*…**have a duty to provide a safe and healthy work environment for their employees and students, including protection from senior employees of predatory disposition.***"**

(iv) Section 5 of the Employment Equity Act 55 of 1998 requires an employer to take steps to eliminate unfair discrimination which would include putting in place a sexual harassment policy. The Code of Good Practice for the Handling of Sexual Harassment Cases encourages and promotes the development and implementation of policies and procedures that will lead to the creation of workplaces that are free of sexual harassment, where employers and employees respect one another's integrity and dignity, their privacy, and their right to equity in the workplace. Item 7.1 requires employers to adopt a sexual harassment policy, which takes cognisance of the provisions of the Code.

Mr. Y Ramcheron
Convenor of the Dispute Prevention Task Team in the Provincial ELRC KwaZulu-Natal Chamber.

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3. Sexual Grooming of Children in Teaching as a Trust Profession in South Africa

Introduction

Referring to South African school sports, Luke Lamprecht, Head of Advocacy: Women and Men Against Child Abuse, argued that although it is difficult to determine the true extent of sexual grooming, it can be said to be "widespread" and "endemic". Court and arbitration cases dealing with educator-on-learner sexual abuse where sexual grooming was present, such as *Le Roux v S, S v RC, SADTU obo Sobantu Maxwell July and Northern Cape Department of Education, Gauteng Department of Education and FD Modiba, and SADTU obo V Ramphal and Gauteng Department of Education*, suggest that the sexual grooming of learners is a noticeable problem in South African schools in general and not only in sports. There is positive movement towards acknowledging the role sexual grooming plays in educator-learner sexual relationships.

In *Gauteng Department of Education and S Rasekhula,* for example, the arbitrator dismissed the educator, relying on section 17(1)(c) of the Employment of Educators Act 76 of 1998, for having a sexual relationship with a learner and determined that the learner was groomed for the relationship. The focus fell completely on sexual grooming in *LJ Davids and Western Cape Department of Education*, when the educator was dismissed in terms of section 18(1)(dd) of the Employment of Educators Act 76 of 1998 for having committed the statutory offence of sexual grooming of children.

Sexual grooming (either online, offline or in an online-offline combination) is arguably a constituent of a great number of sexual acts against children.

This fact is apparent in the above-mentioned cases and was also brought to the fore by the Canadian Centre for Child Protection's country-wide survey to determine the prevalence of sexual misconduct by personnel working in K-12 schools over 20 years (1997-2017). It found that sexual grooming was used in 70% of the 389 non-contact sexual offence cases and 73% of the 321 contact sexual offence cases. In this context one can agree with Ost that criminalising sexual grooming as a separate offence, as many countries have done, could significantly expand the protection of children against sexual abuse. Extending the preceding argument to sexual grooming as a type of educator sexual misconduct, one can argue that targeting and combatting sexual grooming could provide a layer of protection between educator sexual predators and children, prevent offences such as rape and sexual assault, act as a deterrent for potential educator sexual predators, and ultimately reduce educator sexual misconduct in general.

Conceptual clarification

McAlinden (2013) defines sexual grooming as "the preparatory stages of abuse where abusers gain the trust of the child or significant others to both facilitate abuse and subsequently avoid discovery or disclosure."

Promoting sexual grooming entails:

(1) possessing, manufacturing, facilitating manufacturing or distributing any article with the sole intent of facilitating or promoting the commission of a sexual act with or by a child;

(2) possessing, manufacturing, facilitating manufacturing or distributing any article with the intent for it to be used in the promotion or commission of a sexual act with or by a child; (3) supplying or showing of, or exposing a third person to an article, pornography, child pornography or a film with the intent of enabling, inspiring, or convincing that person to engage in a sexual act with a child; (4) facilitating or arranging a meeting or communication between a third party and a child with the intention that the third party will perform a sexual act with the child.

Sexual grooming of a child is defined as:

(1) giving, showing of, or exposing a child to an article, pornography, child pornography or a film with the intention

to encourage, enable, educate or convince the child to perform a sexual act;

(2) committing any act with or in the presence of a child with the intent to encourage or convince the child to: (a) perform a sexual act with the person himself or herself or with a third person; (b) engage in self-masturbation in front of or while the person himself or herself or a third person is watching; (c) observe or be present when an adult or a third party engages in self-masturbation or any other sexual act; (d) look at pornographic or child pornographic material; (e) be used or assist in the creation, making, or production of child pornography; (f) expose his or her body or a portion thereof to the person or a third party in a manner or under circumstance that violates his or her sexual integrity or dignity. This provision covers section 18(2)(b), which was interpreted by Olsen J with Henriques J and Naidoo AJ concurring in the *RC* case, as encompassing both conduct intended to encourage or persuade a child to perform a sexual act and conduct intended to diminish or reduce any resistance or unwillingness on the part of the child to engage in a sexual act;

(3) arranging or facilitating communication with the child, during which the commission of a sexual act is discussed, explained, or described to the child or any image, publication, depiction, description, or sequence of child pornography of himself or herself or any other person is communicated to the child with the intention to commit a sexual act with the child;

(4) arranging or facilitating a meeting with the child with the intention of committing a sexual act with the child;

(5) arranging or facilitating travel for the child or intentionally travelling to meet with the child with the intention of committing a sexual act with the child.

The fact that sexual grooming is a sexual offence and cannot be described as a preparatory offence preceding a "sexual offence" in terms of section 18 highlights another dilemma; namely that of finding a suitable concept to describe the "offence" in which sexual grooming can culminate. Although the author followed the *Sexual Offences Amendment Act* and *RC* case and used the phrase "sexual act", it is clear that this is not a suitable concept.

As already mentioned, at least parts of the sexual grooming process could also constitute a sexual act in the form of a sexual violation. The term "sexual act" refers to "an act of sexual penetration or sexual violation".[18] Touching the child's genital organs, anus or female breasts, kissing a child, and masturbating a child are typical grooming behaviour that constitute sexual violations. In fact, in the *RC* case the judges questioned whether the legislature erred in section 18(2)(b) of the *Sexual Offences Amendment Act* by criminalising the intentional description of "any act", instead of "any sexual act", to diminish or reduce a child's resistance to engage in a sexual act. Perhaps it should be "a sexual act" that culminates in "a penetrative sexual act". This suggestion needs more investigation though.

Another dilemma is the link between sexual grooming and sexual exploitation. Some regard sexual grooming as a type of sexual exploitation, while others directly equate it with sexual exploitation.

The link between sexual grooming and exploitation may be traced back to the initial introduction of sexual grooming as part of the fight against online sexual exploitation. Since 1990, several initiatives in the international human rights arena, including three World Congresses against the Sexual Exploitation of Children (Stockholm in 1996, Yokohama in 2001, and Rio in November 2008) have addressed sexual exploitation. After the Rio Congress the *Rio de Janeiro Declaration and Call for Action to Prevent and Stop Sexual Exploitation of Children and Adolescents* was issued, wherein the call was made for focused action to prevent the use of online technologies to groom children sexually.

Regional instruments followed suit and the Council of Europe's *Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse* (*Lanzarote Convention*) is regarded as the Convention most relevant to child sexual grooming. Article 23 of this Convention deals with the

"solicitation of children for sexual purposes".

Another reason for regarding sexual grooming as a form of or equating it with sexual exploitation is that exploitation is at the heart of sexual grooming. Even though the *Sexual Offences Amendment Act* provides for the sexual exploitation and sexual grooming of children as two separate offences, reference is made in the preamble to new "offences relating to sexual exploitation *or* grooming", implying that the one is an alternative to the other. In his definition of sexual grooming Collings (2020) indicates sexual exploitation as a goal of sexual grooming and the author contends that such an interpretation is correct. Only time will tell how the courts will distinguish between these two offences, but it is evident that a person can in terms of section 17(1) be found guilty of sexual exploitation "in addition to" sexual grooming. If sexual exploitation cannot be proven, a guilty verdict of sexual grooming could attract section 56A(2) of the *Sexual Offences Amendment Act* in terms of which the intention of the groomer to exploit the child for personal benefit, favour or advantage, which is always present in sexual grooming cases, can be regarded as an aggravating factor at sentencing.

Harmfulness of sexual grooming

Sorell (2017) asserts that grooming is harmful in and of itself. Rose LJ alluded to this in the New Zealand Criminal Appeal case in *Re Attorney General's Reference,* stating:

The gravity lay not so much in the nature of the sexual activity in itself but in the grooming of this vulnerable and handicapped boy, over a period of time and the giving of money and other gifts.

Van Zyl (2017) points out that South African criminal case law illustrates a development from failing to appreciate the effects of sexual grooming on a child in the majority judgment of *Marx v S* to following the minority judgment of Cameron J in *Marx v S* and acknowledging the harmful effects of the grooming process in *S v Muller.*

The Supreme Court of Appeal built on these two cases in *S v Mugridge* and incorporated sexual grooming into the jurisprudence. Van Zyl, referring to *S v Van Rooyen*, concluded that the court made promising changes in recognising the harmfulness of sexual grooming, such as recognising that an adult's physical strength as well as the power provided by the adult's status can negate the lack of physical violence as a mitigating factor. However, in *MJM v S,* despite acknowledging that the offender took advantage of the child's vulnerability to break her resistance down and foster compliance, Mushasha J used the child's "compliant actions" resulting from the grooming as a mitigating factor during sentencing.

The declaration of section 18(f) of the *Criminal Procedure Act* 51 of 1997 as unconstitutional will impact on how courts and tribunals will view the harmfulness of sexual grooming. The court *a quo's* view in the *Le Roux* case that the psychological damage caused by grooming is equal and comparable to that experienced by rape victims was rejected on appeal when the court held that, while the harm caused by sexual grooming is serious enough to justify a prison sentence, it cannot be equated with rape. However, in *L v Frankel* the common notion that penetrative sexual offences are necessarily more serious than non-penetrative offences to decide on the extent of a victim's trauma was challenged as unconstitutional because it belittles the harmfulness of non-penetrative sexual offences against children.

Hartford AJ declared section 18(f) of the *Criminal Procedure Act* 51 of 1997 which excludes only penetrative sexual offences from the 20-year prescription period, unconstitutional, irrational and arbitrary.

The Victoria Family and Community Development Committee asserts that treating sexual grooming merely as an aggravating factor during sentencing or when deciding on a sanction does not adequately recognise the harm it causes. Randhawa and Jacobs observed that a child may experience trauma because of grooming, irrespective of whether it is followed by sexual abuse or not. In the *RC* case Olsen J with Henriques J and Naidoo AJ concurring, held that [m]anipulation of a

child's sexual psyche by an adult for his or her own amusement or sexual diversion is harmful conduct which may have far-reaching (sic) consequences for the child, even if the adult has no intention of ultimately performing any overt sexual act with the child.

A similar conclusion can be reached regarding the harm caused by educator-on-learner sexual grooming. In fact, one could argue that the harm caused by sexual grooming in trust professions is even more severe than sexual grooming in general.

Harmfulness of sexual grooming in teaching as a trust profession

Teaching is a trust profession, and as such, a fertile ground for sexual grooming wherein trust is a prerequisite and the abuse thereof an integral part. Three characteristics of what makes sexual offences "abuse of trust offences" in faith settings, namely that victims are young and vulnerable, that the location creates the opportunity and that the adult has a special influence over the child, are equally applicable to schools.

Scholars such as Smit and Du Plessis, judges in cases such as *Gora v Kingswood College, Hawekwa Youth Camp v Byrne* and *Mageni v Minister of Education of the Western Cape Education Department,* and arbitrators in cases such as *Lindani Ncakeni and Gauteng Department of Education* and *TV Waterson and Gauteng Department of Education* describe the educator-learner relationship as an *in loco parentis* relationship. They attribute educators' duty of care, the standard of such care and trust relationship to the fact that educators act *in loco parentis*. On the other hand, scholars such as Coetzee, Neethling and Potgieter, Potgieter and Stuart argue that educators' responsibilities, duties, positions of trust and standard of care should not be defined in terms of *in loco parentis* because those are professionally defined, derived from legislation and the fact that teaching is a profession with public interest at heart.

Teaching is a public trust profession and educators are persons with professional qualifications who are bound by a professional code and entrusted with public power to provide a service in public interest. The public has a legitimate expectation that educators will perform the specific professional functions entrusted to them in a lawful, ethical manner and with devotion and care. Arbitrator Boyce in the *Rasekhula* arbitration commented that educators are different from other employees because society relies on them to mould future leaders and exemplary citizens. The arbitrator describes the uniqueness of teaching as a trust profession as follows:

[p]arents and society at large place their trust on educators and expect of educators to, at all times, act in a manner befitting the position of trust that they are placed in. Educators are accordingly held to higher standards than other professions. As such, even the slightest of betrayal of this trust should not only be frowned upon but should be harshly dealt with.

Betrayal of trust is a key element of sexual grooming, since it includes a process of psychological manipulation of a child to disempower, betray and make the child feel compliant. It is this betrayal that, according to Colton, Roberts and Vanstone, makes the ramifications of sexual grooming for learner victims immeasurable.

Likewise, the Victoria Family and Community Development Committee in its report on *Betrayal of Trust: Inquiry into the Handling of Child Abuse by Religious and Other Non-Government Organisations* remarked that it is the fact that grooming involves a breach of trust that makes it "particularly abhorrent". In *Queensland Teachers' Union v State of Queensland,* the court explains that sexual grooming is a dismissible offence because it involves breaking the trust relationship between the educator and learner.

Betrayal of trust causes trauma, which can have a lasting effect on the child. Honourable Sydney L Robins, a former judge of the Court of Appeal for Ontario, remarked that even a seemingly trivial incident of sexual touching by a trusted adult can have a significant and enduring impact. Betrayal is intensified if the child is not believed, which is where sexual grooming is involved, rather a probability because tactics used to prevent the

learner from being believed on disclosure are to groom the school, parents and community as well and to isolate the child.

Since the trust relationship between educators and learners plays a crucial role in shaping children's worldview and how they form relationships, the betrayal thereof harms children's ability to relate to others and to form meaningful social bonds. The victims in *Strydom v S*, for example, indicated that they experience difficulties with interpersonal relationships because of being groomed by their sports coach. The clinical psychologist's account in the *Steyn* case that his client developed "paranoid ideation and hyper vigilance (sic)", which made him feel threatened, persecuted or conspired against and caused him to constantly question the intentions of others, provides a feasible explanation of why sexual grooming victims struggle to build relationships.

Another trauma-causing factor that a victim of sexual grooming can experience is stigmatisation. Perhaps it should rather be "self-stigmatisation" because it entails self-blame and the development of low self-esteem. This traumatic factor is associated with the grooming behaviour used to establish an apparent consensual relationship, to create the impression that the child was actively involved in decision-making. Desensitisation to sex contributes to the child feeling guilty and believing that he or she has consented. In an attempt to prevent the child from disclosing a groomer will convince the child that his or her body's reaction to sexual stimulation indicates that he or she enjoyed the sexual touching and "wanted it". The child will then feel at fault, start to self-blame, and become convinced that nobody will believe him or her. Spilg J described this in *H v S* as having:

> *… engendered in her a sense of fear and self-loathing by playing on her vulnerability by suggesting that she may be taken from her mother and by holding her responsible for what she was forced to endure.*

That sexual grooming results in self-blame was evident in the case *DP v S*, where the victim, a 10-year-old boy, indicated that he failed to report the many grooming behaviours because he felt ashamed and was not sure whether he was in some way at fault.

Spilg J again emphasised, in *S v Radebe*, the need to consider the emotional and psychological damage to the victim such as personality disorders that incline victims to have inflexible and destructive thoughts. The personality disorders engender or exacerbate self-hate, guilt and feelings of inadequacy, which can culminate in suicidal tendencies.

The invasion of a child's environment, personal space and body creates a sense of powerlessness, which is even worse when the sexual groomer is a trusted authority figure such as an educator. The fact that groomers manipulate their victims to prevent disclosure contributes to the sense of powerlessness. Feeling disempowered intensifies the long-term harm to the child.

Because exploitation is a large part of sexual grooming, it impacts on the child's physical and mental health, emotional and psychological development, and education. Groomers aim to make the child emotionally, financially or academically dependent on them. Because the child's needs are met, he or she may go along with the abuse out of misplaced loyalty or indebtedness to the groomer.

In an interview with McElvaney, a 52-year-old man confessed that although he knew that his abuser harmed and manipulated him, he nevertheless considered him his "benefactor", "substitute parent" and essential to his survival. According to McElvaney, because children are manipulated to want to be with the person who is abusing them, "traumatic bonding" is an important aspect of grooming relationships. Traumatic bonding explains why children who were sexually groomed continue to have positive and even protective feelings toward the abuser. These feelings exacerbate self-stigmatisation.

Sexual groomers ultimately aim to lower the child's sexual inhibitions and normalise adult-child sexual relations, which leads to victims experiencing a sense of having lost their childhood. Indeed, shaping a child's sexuality in a manner that is age and socially inappropriate is identified by Finkelhor and Browne as a trauma-causing

factor. Coetzee's argument that exposing or causing the exposure of a child to child-to-child pornography or pornography distorts the development of the child's sexual identity because the child is not emotionally ready for the experience and creates false perceptions of how sex and sexual relations should be, is equally applicable to sexual grooming. If a child is desensitised to sex, the rate of the child's sexual development will be affected, leaving the child vulnerable to becoming sexually active too early or to remaining sexually active, to misunderstanding where sex fits into affectional relationships or to believing that affection can be obtained only through sex. The victim could also develop a negative connotation to sex, as the victim in the Steyn case describes it: "Die mooi van seks het vir my lelik geword, want dit herinner my aan pyn en hartseer" (The beauty of sex became ugly to me because it reminds me of pain and sadness).

Over and above the harm caused by sexual grooming, sexual abuse in whatever form will always be a violation of the child's human rights. Coetzee argues that any educator-on-learner sexual abuse violates section 28(2) of the South African Constitution because being sexually abused can never be in the best interests of the child. Furthermore, educator-on-learner sexual misconduct will always infringe on the learners' right to be free from degrading and abusive treatment. Wallis JA has described the impact of sexual abuse on children's rights eloquently in *Director of Public Prosecutions, Western Cape v Prins* as:

> *… sexual violence … deprives … children [of] the right to be children; to grow up in innocence and, as they grow older, to awaken to the maturity and joy of full humanity. The rights to dignity and bodily integrity are fundamental to our humanity and should be respected for that reason alone.*

That sexual grooming is grounds for dismissal was confirmed in the *Ncakeni* arbitration, the *Davids* arbitration and the *Rasekhula* arbitration.

Schools as breeding grounds for sexual grooming

McAlinden defines institutional grooming as occurring in the context of a specific institutional environment when unique features of the environment are used for grooming. O'Leary, Koh and Dare list the relationship between the groomer and the victim, the power dynamics in the relationship and the purpose of the institution as common institutional features that groomers would look to utilise. Groomers in school settings further exploit the amount of time that learners spend at school, the inherently hierarchical relationship between school staff and learners and the near-constant access or opportunities to unsupervised access that educators have to learners. Arbitrator Phalane emphasised:

> … *By the nature of their work, educators already have access to children and the grooming, or manipulation of children, or parents and or staff by gaining their trust is easily achievable.*

Educator sexual predators use these features of schools and match their grooming behaviours to resemble typical innocent learner-educator interactions to evade suspicion and detection. Jimenez refers to an example of a learner whose grooming started with a call from the educator across the parking lot praising the learner for his performance during band practice to illustrate how easy grooming behaviours can be seen as exemplary teaching. In this case, the victim recalled how special this praise made him feel and how, as a result, he did not recognise the subsequent grooming behaviours, such as being preferred for an appointment to a senior position in the band and a celebratory lunch and movie as a reward for good grades, for what they truly were. Again, he professed that "I felt like I had a friend for the rest of my life; I felt like this person has my back." It was this groomer's intent that made his behaviour deviant.

Tanner and Brake claim that sexual offenders from trust professions use proximity as a selection tool before using

vulnerability to select a victim from the identified pool of potential victims. Class educators can misuse their ready access to children's personal information to determine vulnerability. Class educators in South African schools must compile learner profiles to identify and address barriers to teaching and learning.[117] This information makes it easy for an educator sexual predator to identify a vulnerable child, to pinpoint the child's needs and to groom the child by preying on those needs. In the *Strydom* case the sports coach acknowledged that he deliberately targeted children with emotional problems, financial needs, unsupportive or uninvolved parents, or that had experienced a traumatic loss. The educator sexual predator with grooming intentions can misuse the information to increase the power imbalance, increase vulnerability and ensure secrecy during the grooming process.

Where other groomers have to work on building a relationship and gaining control over the victim, educators are already in a relationship of trust, care and authority that can further be fostered and there is already a power imbalance based on the adult-child and educator-learner equations. The nature of the educator's profession and the related status provide a ready vehicle for the deception that sexual grooming requires. The expectations associated with the roles of educators and learners enable sexual grooming.

Educators are trusted persons who not only have a duty of care towards learners but are also expected to work closely and build professional relationships with learners. Learners, on the other hand, are expected to be respectful, to be submissive and to follow educators' orders. Educators who intend to groom learners rely on the fact that their professional status encourages an instinctive willingness amongst adults to dismiss allegations.

Educator sexual predators use the authority derived from their professional status as a base to legitimise carefully created identities, reputations and relationships. It is trite that sexual groomers take great care to conceal their motives and create the appearance of innocence and normalcy by presenting themselves as caring, charismatic and always ready to lend a hand and go the extra mile.

The goal is to reduce possible detection and the probability that the child will be believed when he or she discloses. They will offer help with schoolwork, extra classes, music lessons, individual support, motivational sessions after school hours or transport. According to an educator who participated in a study by Colton, Roberts and Vanstone of abusers' accounts of how they groomed their victims, his victims were recommended to him by colleagues and parents because he had established himself as a person who could handle difficult children. Also, Tanner and Brake explained how a carefully created reputation as a sports coach can result in the coach becoming so valued and sought-after that parents will compete to get their children enrolled under his tutelage. This was illustrated in the *Strydom* case, where the high school sports director groomed the boys, their families and the school. He gained everyone's trust by providing the boys with highly sought-after sports bursaries and had motivational sessions in his office, which were extended to visits to his house for braais and movie watching. His actions were never called into question.

The emphasis on parent involvement is another factor that makes schools a breeding ground for sexual grooming. Educators are expected to recognise parents as partners in education and build hospitable, conducive relationships with them. In fact, South African educators will be in violation of the *South African Council for Educators Code of Professional Ethics* if they fail to do so. The sexual grooming of learners commonly includes befriending or establishing an emotional connection with parents. An educator sexual predator could thus easily disguise the forming of friendships with parents as fulfilling his or her professional duties.

Conclusion

Considering that sexual grooming has been foregrounded during the international human rights arena's attempts to address sexual exploitation and the role of technology in such exploitation, the link

between and in some cases the equation of sexual exploitation with online sexual grooming is understandable. Fighting sexual grooming in schools requires it to be regarded as an independent offence and not as a form of sexual exploitation, a less serious, non-contact, preparatory offence that will have to culminate into a "real sexual offence" to become serious. Law and policy makers must consider that sexual grooming may not always begin online or include technology. Although schools should address the dangers that technology could hold and how it can be used to groom learners, the focus should not solely be on that; offline grooming dangers should also be addressed.

Where sexual grooming can be proven, *LJ Davids and Western Cape Department of Education* should be followed, and the educator should be charged with having committed the statutory offence of sexual grooming of children. Even though dismissal is not mandatory for section 18-misconduct, sexual grooming is regarded as serious enough to merit a prison sentence and as a form of misconduct to draw dismissal. It is understandable why educator-on-learner sexual grooming will draw dismissal because in addition to its constituting a violation of several of the learner's human rights, it also results in the loss of childhood innocence. Furthermore, because teaching is a trust profession, sexual grooming results in victims experiencing betrayal, developing an inability to form meaningful social bonds, experiencing a sense of powerlessness and, in the worst cases, developing paranoid ideation, self-stigmatisation and personality disorders.

The following characteristics of schools make them unique breeding grounds for educator predators looking to groom a learner sexually: educators' professional status, the trust relationship between educators and learners, the power dynamics in this relationship, compulsory school attendance and the amount of time that learners spend at school, educators' near-constant access or opportunities for unsupervised access to learners, educators' access to learners' personal information and their access to and obligation to form relationships with parents. Because schools are unique breeding grounds for predators on the prowl to groom learners sexually, they should minimise the opportunities they present for this to take place. Focusing on sexual grooming as part of the sexual predator's journey to committing serious sexual acts adds an extra layer of protection between educator sexual predators and children.

South African schools must accept the responsibility to create safe school environments and prevent sexual abuse or they could open themselves up to be charged with promoting the sexual grooming of children in terms of the *Sexual Offences Amendment Act*. When sexual abuse occurs, schools should not only investigate the individual incident but also look at which cultures and practices at the school could have facilitated sexual grooming. To avoid being held directly or vicariously liable, the Department of Basic Education should compile guidelines on what institutional values, cultures, traditions, and practices could facilitate sexual grooming and should be avoided. The South African Council for Educators should redefine educators *in loco parentis* role and emphasise educators' role in teaching as a trust profession.

A study into the prevalence of sexual grooming in all educator-on-learner sexual misconduct cases similar to the study of the Canadian Centre for Child Protection would be a most valuable study.

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3. Questions & Answers

Dear General Secretary

Question:

Please find my complaint regarding a school in Gauteng.

Learners get suspended from the school without following the procedures of suspension. The principal of the school has issued a code of conduct but has failed to follow it himself together with the learners. The principal uses inappropriate language, swears, body shames learners and parents.

According to their code of conduct learners should get a disciplinary hearing before suspension. However, the learners get suspended and kicked/thrown out of school during school hours.

Anonymous

Dear Anonymous

Kindly contact the Gauteng Department of Education or the South African Council for Educators. The investigation of principals involves SACE and the Department.

Question:

I wish to create a dispute. Please give me steps to follow.

Anonymous

Dear Anonymous

Please use the following link to lodge a dispute: https://iboscloud.co.za/ELRCDMS/Dispute/RegisterDispute

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Question:

I would like to enquire about how can one go about reporting a union member (e.g., Executive Officer) for discrimination and being prejudiced?

Should it be reported to the ELRC, or to the Union Management of the that particular member? And what procedure should be followed?

Anonymous

Dear Anonymous

Kindly refer to the union management as we only deal with matters relating to the employee and employer party. The ELRC would not be able to assist with internal union matters.

Dear Readers

We would like to hear your views on education related queries or disputes. We will respond to questions in the next issue of the Labour Bulletin. Please send any questions relating to labour law to the ELRC Research & Media Manager, Ms Bernice Loxton: BerniceL@elrc.org.za

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