

**An evaluation of the investigation procedures in Eskom into incidents of  
sexual harassment**

**By**

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## **ABSTRACT**

This research is an evaluation of the investigation procedures in Eskom into incidents of sexual harassment.

Eskom has introduced a sexual harassment procedure to deal with incidents of sexual harassment that may occur in the working environment. Although the procedure dictates how incidents of sexual harassment should be dealt with, no investigative guidelines are available in the organisation to guide any person that is required, as per their respective job description, to investigate incidents of sexual harassment.

This study, in pursuit of providing the above-mentioned guidelines, looks at the elements of sexual harassment, the legislation governing this irregularity and the role of evidence in a sexual harassment investigation.

In addition, this study assesses the current Eskom sexual harassment procedure, evaluates it and provides information about the identification and individualisation of the act of sexual harassment.

Key terms used during this research are: investigation, sexual harassment, evidence, chain of evidence, victim, balance of probabilities and burden of proof.

**DEDICATION**

*Through God all things are possible (Phil 4:13)*

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- All my clients who over the years have challenged my knowledge and made me realise that there was always so much more to learn to deliver an effective service.

**DECLARATION OF OWN WORK**

I, GERTRUIDA ETRECIA AIKEN, student number 663 5083, declare that *“an evaluation of the investigation procedures in Eskom into incidents of sexual harassment”* is my own work and that all the sources that I have used or quoted have been indicated and acknowledged by means of complete references.

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GE AIKEN

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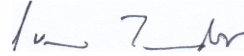
February 2013

**CERTIFICATE BY EDITOR**

I declare that I edited "*an evaluation of the investigation procedures in Eskom into incidents of sexual harassment*" on 8 February 2013.

S. VAN TONDER

NAME



SIGNATURE

## LIST OF ABBREVIATIONS AND ACRONYMS

ACFE	Association of Certified Fraud Examiners
CCMA	Commission for Conciliation, Mediation and Arbitration
CCTV	Closed-circuit Television
CEO	Chief Executive Officer
CJS	Criminal Justice System
COIDA	Compensation for Occupational Injuries and Diseases Act
DNA	Deoxyribonucleic Acid
EAP	Employee Assistance Programme
EEA	Employment Equity Act
EWPs	Employee Wellness Practitioners
HR	Human Resources
IIASA	Institute of Internal Auditors of South Africa
IPA	International Police Association
IR	Industrial Relations
IT	Information Technology
LOE	Letter of Engagement
LRA	Labour Relations Act
OHS	Occupational Health and Safety Act
PA	Performance Appraisal
PDA	Protected Disclosures Act
PEPUDA	Promotion of Equality and Prevention of Unfair Discrimination Act
PFMA	Public Finance Management Act
SAPS	South African Police Service
SMS	short message service

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## **CHAPTER ONE**

### **GENERAL ORIENTATION**

#### **1.1 INTRODUCTION**

Eskom is a state-owned enterprise that plays a leading role in the delivery of energy to millions of customers countrywide, with approximately 42 000 employees nationally. According to Eskom Procedure 32-61 (2006:2), Eskom is obliged to investigate any incidents of sexual harassment within a reasonable time. In addition, the courts have recently concluded that organisations must conduct only a “reasonable investigation,” not a perfect one (Salisbury & Dominick, 2004:3).

The researcher is employed by Eskom as a Senior Advisor in the Forensic and Anti-Corruption Department and has 13 years of service in this department. The researcher is involved in the investigation of white collar crime, such as fraud and corruption, and in the investigation of certain irregularities within Eskom, of which one is sexual harassment. As part of her duties and responsibilities within Eskom, the researcher is in contact with the various role players that may be involved in the investigation and the subsequent disciplinary process of such incidents. The researcher also testifies, when requested to do so in disciplinary hearings that deal with incidents of sexual harassment. Upon request, the researcher presents training to the various Eskom departments on sexual harassment and how to deal with such incidents.

An employee that has been subjected to sexual harassment has a choice of various different role players that he/she can approach to have the matter investigated and the alleged perpetrator’s behaviour rectified through the disciplinary process. No corrective action can be taken against an alleged perpetrator, unless sufficient evidence exists to prove the allegations on a balance of probability.

#### **1.2 PROBLEM STATEMENT**

The fact that an alleged victim has a wide choice of where to go with his/her “problem” necessitates that guidelines for conducting investigations be researched and discussed below, to ensure consistency in action taken against perpetrators.

These role players, as listed in the Eskom Procedure 32-1115 (2011:5) are, the Ethics office, Human resources consultants/managers/practitioners, Union representatives, Employee wellness practitioners, Employee relations practitioners, Industrial relations practitioners, Forensic investigations and Occupational Health Practitioners.

During the fulfilment of her duties, specifically during the investigation of and subsequent testifying in sexual harassment matters, the researcher became aware that there are currently no official approved guidelines to guide the various role players in Eskom on how to conduct sexual harassment investigations; i.e. how to collect the evidence and what support to be given to both parties (alleged victim and perpetrator), among other things. The lack of official guidelines means that currently the different role players each follow different procedures when investigating incidents of this nature. This creates a great deal of confusion during the reporting, investigation and disciplinary hearing.

The researcher further studied dockets from January 2005 to May 2010 in her own environment where incidents of sexual harassment were investigated by her colleagues and noticed that because no official guidelines are available on how to investigate incidents of sexual harassment, there is no consistency in the action taken against the alleged perpetrators. It happens at times that Forensic (Forensic and Anti-Corruption Department) “inherits” a docket which has already been investigated by some of the other role players as mentioned above, in which the different methodologies become clear when the researcher starts working on the docket.

The various unions in Eskom have carte blanche when it comes to the disciplinary hearing because different methodologies are used by the various role players to investigate incidents of sexual harassment. The researcher has personally been subjected to this question while being cross-examined by the representatives of different unions on different matters. An indecisive disciplinary hearing means that perpetrators often resume their harassment of fellow workers without any action being taken against them. This in turn leaves the victim feeling that he/she has wasted his/her time by reporting the matter. A vicious cycle develops in which

other victims are discouraged from reporting incidents of this nature, as they see (or hear) that no action is taken against the offender.

### 1.3 AIM OF THE RESEARCH

The aim of research is usually to establish “facts”, to gather new data and to determine whether there are interesting patterns in the data (Mouton, 1996:103). The aim of this research is to establish facts and gather data regarding investigative guidelines for conducting investigations into incidents of sexual harassment in Eskom.

After analysing the Eskom Procedure 32-1115 (2011), which deals with sexual harassment, the researcher realised that investigative procedures are mentioned in the procedure but that this procedure lacks investigative guidelines.

### 1.4 DEMARCATION

In Eskom, the various role players and departments that are involved in the investigation of incidents of sexual harassment are: Forensic Investigations (now known as the Forensic and Anti-Corruption Department), Industrial Relations (IR), Human Resources (HR), union representatives, Ethics, employee wellness practitioners (EWPs) and occupational health practitioners (Eskom Procedure 32-61, 2006:5). In this research the researcher only focuses on the investigations conducted by Forensic Investigations, HR- and IR practitioners in Gauteng Province.

The researcher isolated herself from any outside influences by working alone on her dissertation in the privacy of a quiet, secluded room. The results of this research was not discussed or shared with anybody and responses received were documented as received from the participants in this study.

According to Du Preez (1996:4), the investigation process consists of the following components:

- Information;
- Recognition;
- Gathering and preservation of information; and

- Evaluation.

This research is limited to the investigation of sexual harassment in Eskom to provide guidelines for investigation regarding:

- Identification of the incidents;
- Individualisation of the incidents; and
- Collection of evidence.

### 1.5 PURPOSE OF THE RESEARCH

According to Denscombe (2002:27), the main driving force behind a piece of research is sometimes the desire to solve a practical problem or to improve procedures. The researcher has described the research problem in this study as being the fact that different procedures are used to investigate sexual harassment incidents in Eskom. She has also outlined the consequences of the different ways in which the role players investigate incidents of sexual harassment. The purpose of the research is to develop good practice through evaluating the current procedures in order to improve them and to arrive at recommendations for good practice that will enhance the performance of Eskom and the role players that investigate incidents of sexual harassment in the organisation. Lastly the researcher intends to empower the various role players in the organisation by assisting them to conduct investigations into incidents of sexual harassment.

For the purpose of this research, sexual harassment is defined as a disciplinary matter or irregularity and not as a crime.

In light of the problem statement presented above, the purpose of this research is to describe, explain and evaluate (Denscombe, 2002:27) the current/existing procedures followed/executed within Eskom when investigating cases of sexual harassment. In order to address the purpose of this research, the following was done:

- The researcher investigated the Eskom procedures/policies relating to incidents of sexual harassment with the specific intention of weighing up their strengths and weaknesses and then recommending how these shortcomings might be improved.

- The researcher conducted a literature study in which she consulted both national and international literature to gather information on best practice.
- The researcher concluded with recommendations for the possible improvement of the Eskom policies and procedures. The implementation of these recommendations will not only enhance the performance of the role players in the various sectors but also address the problem of role players not following a common procedure when investigating incidents of sexual harassment in Eskom. Furthermore the researcher's recommended guidelines will serve the purpose of ensuring that both the offender and victim are treated fairly in such an investigation.
- Through this research the researcher wishes to empower the various role - players with the knowledge that will assist them in conducting investigations into incidents of sexual harassment in a consistent manner.
- Through this research, the researcher provides guidelines to the various role players in Eskom that deal with the investigation of incidents of sexual harassment. These guidelines are expected to assist investigators to conduct a proper and thorough investigation that complies with the regulations of the Employment Equity Act, 1998 (Act 55 of 1998), as mentioned in Walker and Associates (1998:1). This also means that the manner in which internal investigations of this nature are conducted will make the progression from disciplinary to criminal action much easier, as the requirements of the Criminal Procedures Act 55 of 1977 will have been adhered to. Investigations of incidents of sexual harassment will then also flow more smoothly through the Criminal Justice System (CJS).

## 1.6 RESEARCH QUESTIONS UNDER INVESTIGATION

For certain purposes of research, researchers should think ahead to the areas of thematic interest that they envisage addressing (Noaks & Wincup, 2004:122), where the purpose of research is evaluation (as in this research), specific research questions are preferred (Denscombe, 2002:31).

The researcher has focused on the following research questions:

1. What are the legal requirements to prove the elements of sexual harassment?

2. What are the investigative guidelines to be followed in Eskom to identify and individualise sexual harassment?
3. How should evidence be collected to prove the disciplinary offence of sexual harassment?

## 1.7 KEY THEORETICAL CONCEPTS

According to Hofstee (2006:88), this section of a research dissertation makes it absolutely clear to the reader what is meant by a specific concept; the researcher needs to define their terminology and then stick to whatever definition they give throughout your dissertation. According to Castetter and Heisler (cited in Creswell, 1994:106), researchers define terms so that readers can understand the context in which the words are being used or their unusual or restricted meaning. The researcher defines key terms used in this study so that the reader and the researcher have the same understanding of each term.

### 1.7.1 Investigation

Marais and van Rooyen (1994:17) define investigation as “a systematic search for the truth”.

### 1.7.2 Sexual harassment

Walker and Associates (1998:2) define sexual harassment as “unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.”

### 1.7.3 Evidence

Joubert (1999:332) explains that evidence:

“... is the most important means of proving or disproving facts in dispute. It comprises all the information and material submitted to the court by the parties, to enable the presiding officer to judge and settle a dispute. Evidence therefore consists of oral statements, written statements, documents and objects that are produced and received in court.”

### 1.7.4 Competent evidence

Gilbert (2004:59) is of the opinion that competent evidence “is responsible evidence sufficient to prove a fact that has a bearing on the case. Competent evidence can pertain to physical items, documents and people.”



### 1.7.5 Victim

Nel and Bezuidenhout (2003:157) explain that:

“...victims can be defined as persons who, individually or collectively, have suffered harm; including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within a specific country, including laws proscribing criminal abuse of power”.

### 1.7.6 Balance of probabilities

A balance of probabilities “is the method used for deciding guilt or innocence, based on the evidence submitted, in civil matters, whereas ‘reasonable doubt’ is applicable only in criminal cases” (Balance of Probability, 2008).

The employer needs only to lead sufficient evidence during the disciplinary process to show on a balance of probability that the employee is guilty. The employer does not need to lead evidence to prove 100% guilt – only sufficient evidence to show that “he is probably guilty”; 51% is probably sufficient to tip the scale (Balance of Probability, 2008).

‘Sufficient’ would mean enough for the chairperson or presiding officer, after having examined the evidence from both sides, to be able to say “I think he is probably guilty” or “I think he is probably innocent” – that is sufficient, and that is all that is required (Balance of Probability, 2008).

### 1.7.7 Irregularity

An act that amounts to a violation of Eskom’s internal policy that is not necessarily a criminal offense (Eskom Fraud Prevention Policy 32-689, 2013:9).

### 1.7.8 Offence

Unlawful and blameworthy conduct that is defined by law as a crime and for which punishment is prescribed (Joubert, 2010:44).

## 1.8 RESEARCH DESIGN AND APPROACH

Mouton and Marais (1992:32) state that “the aim in research is to align the pursuit of a research goal with the practical considerations and limitations of the project.”

Clearly, research design implies that research is planned. Mouton and Marais (1992:32) goes on to comment that the term “design” actually implies certain decisions which are taken beforehand – to ensure that potential mistakes are eliminated, in this way maintaining the lowest possible cost.

In this research the researcher used empirical research to produce new knowledge based on the experience of the various role players in the field (Maxfield & Babbie, 1995:4). The researcher furthermore sought to answer the research questions by conducting structured interviews with the various role players (Bouma & Atkinson, 1995:16).

Empirical research involves the idea of getting out of the chair, going out of the office and purposefully seeking the necessary information out there (Denscombe, 1998:27). The lack of available literature or set procedures and clear guidelines on how to investigate incidents of sexual harassment within Eskom meant that the researcher adopted a qualitative approach, which involved the researcher travelling to the various Eskom sites in the Gauteng Region to interview the identified role players.

The researcher had to find new information to analyse and evaluate the procedures on how to investigate sexual harassment. The researcher conducted structured face-to-face interviews and examined current Eskom policies and procedures, as well as related legislation. These data collection methods allowed her to collect information by drawing on the experience of the various role players and by integrating available documentation that regulates sexual harassment in practice (Pope, Lovell & Brandt, 2001:369).

As mentioned above, to support this empirical design the researcher followed a qualitative research approach. Mouton and Marais (1992:162) state that this type of approach normally involves using the personal experience of the participants in the field. The researcher is currently involved in the field of forensic investigation and is actively involved in the investigation of incidents of sexual harassment in the workplace at Eskom. Qualitative research is typically used to answer questions about the complex nature of phenomena (such as sexual harassment), often with

the purpose of describing and understanding the phenomena from the participants' point of view (Leedy & Ormrod, 2005:94). Sexual Harassment is a complex phenomenon in that people from different race, class and cultural backgrounds are likely to interpret similar experiences differently (Eskom News, 2005:9). What is a compliment to one woman might be perceived as sexual harassment by another woman.

### 1.9 POPULATION AND SAMPLING

According to Mouton (2001:134), a population is a collection of objects, events or individuals having some common characteristics that the researcher is interested in studying. As the workforce of Eskom amounts to approximately 42 000 employees across Africa, it was not possible for the researcher to travel to all the offices across Africa. As the purpose of the study was to produce a mini-dissertation in a limited amount of time, the research chose to select study participants in the Gauteng Region were selected. This would also thus reduce the costs of travelling to the interview venues.

The target population is the population to which the researcher ideally would like to generalise her results (Welman & Kruger, 2000:122). The target population consisted of two groups. The first group, Sample A, was made up of all 11 investigators that conduct investigations into incidents of alleged sexual harassment in the Eskom workplace in the Gauteng Region. Added to the 11 investigators of Sample A is the one appointed Ethics Officer in Eskom (Gauteng), who deals with incidents of sexual harassment. Owing to the size of the organisation and the fact that it was not possible to determine how many HR practitioners have had experience in handling incidents of sexual harassment, the researcher approached the five Divisional HR managers in Eskom to name the two most experienced HR practitioners from each of the five divisions in Gauteng, who were known to have handled incidents of sexual harassment. Using the same process the researcher requested the Divisional HR managers to identify the IR practitioner per division in Gauteng with the most experience in handling incidents of sexual harassment. The selection process for this sample might have resulted in the sample not being representative of the total population of Eskom (Strydom, 2007:23).

The second group of interviewees, Sample B, consisted of two external experts, who were purposively selected on the basis of their experience and knowledge. The researcher here made use of purposive sampling (Leedy & Ormrod, 2005:206) by selecting and interviewing an advocate in Labour Law, who also works at the Commission for Conciliation, Mediation and Arbitration (CCMA) as a commissioner, and one external expert, based on their knowledge of sexual harassment. Both external experts are viewed as experts in sexual harassment cases. (See below for a full description of the fields of expertise of these external experts.) The experts were handpicked for inclusion in this research based on their expected ability to answer the research questions under investigation (Hoyle, Harris & Judd, 2002:187). Sample B may also not be representative because its members were selected purposively.

The first external expert is a highly talented, knowledgeable and experienced lawyer with a demonstrated track record of providing unmatched legal service. She holds a BA (Law) degree and LLB (Law) degree – both obtained from the University of KwaZulu-Natal and an LLM, Masters in Labour- and Constitutional Law obtained from the University of South Africa. She is an advocate that has worked on several sexual harassment cases and has advised corporate clients in South Africa on sexual harassment policies and the mitigation of risk factors relating to sexual harassment. She has mediated, defended and chaired internal sexual harassment matters both in corporate and government departments. She has also lodged private clients' sexual harassment cases and dealt with them accordingly. This expert is one of the few providers in South Africa that provides training related to sexual harassment incidents in an organisation. She is an expert in all aspects of Employment Law and Corporate Governance and ensures that various departments of a company follow basic corporate compliance requirements, which include corporate structure, procedures, documentation and drafting and analysing agreements with various companies.

The second external expert has been involved in the field of law enforcement for the past 28 years, as a police officer, detective, officer, intelligence handler, commander, investigator and lecturer. He left the South African Police Service (SAPS) in 2001 and established an investigation, training and consultation

business. Since then he has been involved in the field of law enforcement as a specialist investigator, lecturer and consultant. He has attended numerous investigation-related courses during this period and has also conducted a number of investigations that relate to incidents of sexual harassment for a variety of clients in the private, corporate and public sectors. He has been used as a consultant by a number of institutions and companies, providing assistance and advice to these companies on matters such as sexual harassment. He holds a National Diploma in Police Administration, a Certificate in Police Management, both of which he obtained from Technikon SA. He also holds a Certificate in Criminal Justice Education from the University of Virginia (USA).

A total of 29 interviews were conducted for this study.

With regard to the selection of the 10 HR practitioners and the selection of the five IR practitioners, the researcher used a combination of purposive and snowball sampling. Purposive sampling was used when five Division HR managers were approached to identify specifically two members from each division that were the most experienced in handling incidents of sexual harassment in Eskom. The members who were interviewed were selected through snowball sampling in that they were identified by their respective Divisional HR manager and not selected by the researcher (Hoyle, Harris & Judd, 2002:188).

#### 1.10 DATA COLLECTION

A wide range of documentation is available to the researcher for research purposes. Neuman (2000:395) classifies sources as primary and secondary. Primary sources are seen as the original written material of the author's own experiences and observations, while secondary sources consist of material that is derived from someone else as the original source. The researcher used both sources during this research.

"Triangulation" refers to the use of a combination of methods to explore a set of research questions (Mason, 1996:148). The researcher used literature, interviews and documents as data collection methods in an attempt to find the answers to the research questions and to enhance the validity of this research.

The researcher applied the following data collection techniques:

#### 1.10.1 Literature study

A comprehensive search on written sources included books, online South African and overseas journals and South African and overseas Internet sources. The catalogue in the UNISA library was consulted and no available literature on the investigation of sexual harassment in the workplace in South Africa could be found/located. No literature with the same topic was found.

A literature search was conducted on Google and the topic of this research was divided into the key concepts of “investigation of sexual harassment procedures in Eskom”, “investigation procedures in Eskom” and “the investigation of sexual harassment”. No information directly related to these concepts as they applied to Eskom could be found. The reason for this was that sexual harassment is a relatively “new” concept in South Africa, which even The CCMA, for example, only published guidelines in *The Code of Good Practice on Sexual Harassment Cases* as recently as 17 July 1998. Up until this time, very few companies understood the concept of sexual harassment, much less had policies, procedures and/or directives dealing with this phenomenon. Only general information relating to the investigation of sexual harassment was found.

As a result of the lack of specific information that related to Eskom, data was collected through literature studies of national as well as international origin on the topic of investigation of incidents of sexual harassment in general from the library. Data was also collected through conducting interviews. The researcher used books and industry-specific manuals, which comprised extended and well-contextualised in-depth studies on sexual harassment in an effort to answer the research questions. The industry-specific manuals were utilised at the specific industry, i.e. Eskom, a government state-owned enterprise. Internet sites were visited, where more information was analysed and documented. The researcher selected the information that was relevant to the topic and included it in this research.

In summary, the researcher did the following to find relevant information:

- The research topic was used as a guide to find similar literature on the problem. No literature on the specific problem within Eskom could be found at the libraries at tertiary institutions visited or on the Internet and only general information regarding the investigation of sexual harassment was found.
- The research topic and the research questions were clustered under separate concepts: “sexual harassment”, “collection of evidence” and “individualisation and identification of the alleged perpetrator” and literature in this regard was collected and analysed.
- The separate concepts of the topic and research questions: “sexual harassment”, “collection of evidence” and “individualisation and identification of the alleged perpetrator” were also used as keywords in Internet searches in order to find suitable material relating to this research.

The researcher used the above-mentioned approach to search the literature for answers to the research questions.

#### 1.10.2 Interviews

The researcher used structured interviews in order to ensure a greater empathy between the researcher and the participants and secure greater involvement from the participants as this would ensure a better quality of information (Robson, 2000:90). A standard set of questions was compiled that was derived from the research questions of the study. The researcher made use of two interview schedules, with different questions, that consisted of a standard set of closed questions – one that was compiled for Sample A and one that was compiled for Sample B (Leedy & Ormrod, 2005:184). The questions for Sample A and B were thus not the same. The researcher conducted face-to-face structured interviews with both samples. Each participant was interviewed separately.

The structured interviews, consisting of a standard set of closed questions, compiled in advance, were conducted at each participant’s workplace and permission was obtained from each participant to record these interviews (Leedy & Ormrod, 2005:147). The researcher also conducted a pilot study in which the

interview schedules were administered to a very experienced forensic investigator within Eskom and to the researcher's academic supervisor and co-supervisor before commencing with the actual interviews. By carrying out a pilot study the researcher ensured that the questions were clearly worded and fairly consistent with one another (Champion, 1993:138). The three parties involved in the pilot study clearly understood the questions asked without needing any clarification.

Each participant's responses were recorded verbatim on a digital voice recorder and accordingly reported on. Interviews were transcribed for analysis purposes. To ensure the anonymity of the participants they were identified by a number; e.g. "1", "2" and "3". The interviews were treated with the utmost privacy and confidentiality. The data was only used for the stated purpose of this research and the information obtained was not released for any other purposes (Bless & Higson-Smith, 1995:103).

The researcher further followed the guidelines for conducting a productive interview as prescribed by Leedy and Ormrod (2005:147) in this research:

- Identify some questions in advance. The researcher identified all the questions in advance.
- Make sure interviewees are representative of the group. On the basis of the selection techniques used in this research the participants were not representative of the population in this research.
- Find a suitable location. The researcher interviewed the participants at their offices in privacy, where there were no distractions or interruptions.
- Get written permission. The researcher received written permission from the employer of Sample A and from each participant prior to conducting the interviews, after explaining the nature of the research and what the researcher intended to do with the results.
- Establish and maintain rapport. The researcher established and maintained good rapport by being respectful at all times and showing a genuine interest in what the participants had to say.
- Focus on the actual rather than on the abstract or hypothetical. The researcher focused on the actual; namely, the investigation of incidents of sexual harassment as opposed to investigation in general.



- Don't put words in people's mouths. The researcher did not put words in the mouths of the participants and allowed them express their thoughts in their own way.
- Record responses verbatim. The researcher captured the interviews on a digital tape recorder and personally transcribed each interview; this meant that responses of participants were recorded verbatim.
- Keep your reactions to yourself. The researcher showed no reaction in this research to the answers given by the participants and made a point of not showing surprise at or disapproval of the responses of the participants.
- Remember you are not getting the facts. The researcher treated the responses of the participants as perceptions, rather than facts.

### 1.11 DOCUMENTARY STUDIES

During this research the researcher consulted the following documentation:

- Eskom Distribution Group Directive SCS ADABF1. October 2001. *Directive on Fair Management of Sexual Harassment*
- Eskom Forensic Practices and Procedures Manual 2004
- Eskom Audit Charter, 32-653. September 2009
- Eskom Policy 32-250. October 2009. *Whistle-Blowing*
- Eskom Procedure 32-61. September 2006. *Sexual Harassment*
- Eskom Procedure 32-1115. November 2011. *Sexual Harassment*
- Eskom Standard 32-9. June 2005. *Definition of Eskom Documents*

The researcher consulted the above documents, which were Eskom specific and not available to the public or in public libraries, in an attempt to find answers to the research questions and gain a deeper understanding of the company's policies and procedures.

### 1.12 EXPERIENCE

The researcher joined the Eskom Forensic Department on 01 January 1999 as an administrative support official. Owing to her prior SAPS experience and a keen interest in starting a career as an investigator in the corporate environment, she was put on a development programme to achieve this goal.

During the period 1999 to 2003 the researcher was under mentorship and was assigned various investigations that included, among others, cases of sexual harassment in the workplace. During this period the researcher also completed her tertiary qualification and was awarded the Degree Baccalaureus Technologica in Policing. The researcher is a Senior Advisor in the Forensic and Anti-Corruption Department and has investigated in excess of 200 cases, which have included sexual harassment matters.

The researcher has testified in South African courts, in disciplinary hearings and before the CCMA and has secured convictions and sanctions relating to incidents of sexual harassment. The researcher is considered by her colleagues to be an expert on sexual harassment investigations and has an undisputed track record in these investigations. The researcher further presents training on sexual harassment to the organisation and its subsidiaries, when requested to do so.

The researcher has accumulated many skills required to conduct investigations into incidents of sexual harassment, by being exposed to various training courses on the matter and through experience gained over the years. The researcher has a vast network of associations with experts in the field of auditing, cyber-crime, computer forensic, truth verification, forensic criminology, crime intelligence and the CJS.

The researcher is a member of the following professional bodies:

- ACFE
- IPA
- IIASA

### 1.13 DATA ANALYSIS

According to Singleton and Straits (1999:455), data analysis takes place whenever theory and data are compared.

Qualitative data analysis entails a search for general statements about relationships among categories of data and therefore the researcher started

analysing the data obtained very early in the research process using the data analysis spiral of Creswell (1998:143).

- The researcher organised the data on a spread sheet that allowed a breakdown of large bodies of text into smaller units.
- The researcher examined the information several times to get a sense of what it contains contained as a whole.
- Possible categories arose from this and the data was classified according to these potential categories.
- Data received from the various role players was integrated and summarised for the benefit of the reader (Leedy & Ormrod, 2005:150-151).

An analysis of the historical data obtained from the participants from Samples A and B revealed the following:

- 18 were males and 11 females.
- In terms of qualifications the participants between them had one Master's Degree each in Social Science, Conflict Management and Social Work; one LLB degree; two LLB/LLM degrees; two B.Proc degrees; one BA: Police Administration degree; one B.Tech: Policing degree; two B.Tech: Forensic Investigation degrees; two general BA degrees; one BA: Marketing; two BA: Honours in Industrial Psychology degrees; one NDIP: Accounting; one NDIP: Policing; one DIP: Policing; one Matric qualification; one BCom degree; two BCur Nursing degrees; one Master's Degree in Social Work; one B Tech: Public Relations degree; one BA Honours degree; two Diplomas in Advanced Labour Law; one MPhil in Conflict Management degree; one MCom in Labour Relations Degree.
- Eleven participants indicated that the investigation of fraud, corruption and irregularities, such as sexual harassment, was one of their core output functions. Sixteen participants stated that the responsibilities of their respective job descriptions stipulated that they dealt with incidents of sexual harassment, when requested to do so. Two participants confirmed that they were involved with these types of investigations upon request/instruction from their clients.
- Eleven participants had had experience in dealing with incidents of sexual harassment.

- Nine participants had undergone training pertaining specifically to the handling of incidents of sexual harassment.

#### 1.14 METHODS TAKEN TO ENSURE VALIDITY

In a research study “validity concerns the accuracy of questions asked, the data collected and the explanations offered. Generally it relates to the interviews that were conducted to support the literature study that was conducted” (Denscombe, 2002:100). The instruments the researcher used to conduct this research – national and international literature, as well as interviews conducted with experts in the field – ensured the validity of this research as they allowed the researcher to collect accurate and relevant data. The researcher took measures to ensure that the interview schedule met the requirements for validity by only asking questions that are related to the research questions.

The researcher further ensured validity in this research, by:

- Including and making use of a good sample selection; 29 people were selected;
- Compiling research questions in relation to the topic being researched and asking the same set of questions to each participant in the same sample. A schedule for each sample was compiled;
- Ensuring that the interview schedule was edited for language purposes;
- Ensuring that the participants understood the questions that were asked;
- Not deviating from the interview schedules that had been compiled in advance;
- Reflecting and indicating the answers of the participants without altering them, or omitting anything;
- Not influencing the participants in any way.

In terms of the validity of the data:

- The data from the literature consulted can be considered to be valid because the interview schedules were used as a framework for collecting data from the literature;
- The data collection techniques used in this research were applied taking into consideration the guidelines by research methodology authors, such as

Robson (2000); Leedy and Ormrod (2005); Champion (1993); Bless and Higson-Smith (1995);

- The researcher considers the way in which data was analysed as valid as she made use of the data analysis spiral (Creswell, 1998) and guidelines given by different authors, such as Singleton and Straits (1999); Creswell (1998) and Leedy and Ormrod (2005).

By using triangulation the researcher enhanced validity in the sense that the researcher presented data from both literature and structured face-to-face interviews conducted in order to answer the research questions (Mason, 1996:148).

The researcher ensured that the interviews were administered in a consistent fashion by following guidelines from different authors, such as Leedy and Ormrod (2005); Singleton and Straits (1999) and Creswell (1998).

#### 1.15 METHODS TAKEN TO ENSURE RELIABILITY

According to Denscombe (2002:100), reliability relates to the methods of data collection and the concerns that they should be consistent and not distract the findings by focussing on the research questions. Generally it entails an evaluation of the methods and techniques used to collect data.

The researcher did all in her power to ensure reliability (Denscombe, 2002:100):

- Sampling – the participants that were selected included all personnel concerned with investigation and/or the handling of incidents of sexual harassment, which is the topic of this research. The respective people are all experts in their fields, which makes the research reliable.
- Data collected – the sources accessed were books of national and international origin, all written by well-known writers who were all experts in their own respective fields, with specific reference to investigation and sexual harassment. This information was integrated and acknowledged in this study.

- Data analysis – the researcher did not simply include all data that she found on the topic or its concepts but analysed the available information carefully and included only the relevant information in the research.

By taking the above-mentioned steps, the researcher was able to report the study findings accurately without distortion.

#### 1.16 ETHICAL CONSIDERATIONS

According to Leedy and Ormrod (2005:101), ethical issues in research entail:

- Protection from harm: The researcher did not expose research participants to undue physical or psychological harm. Participants were interviewed at their offices, where they were not exposed to any undue harm.
- Informed consent: Research participants were informed of the nature of the study to be conducted and given the choice of either participating or not participating. They were told that if they agreed to participate they had the right to withdraw from the study at any time. Any participation in this study was strictly voluntary. The choice of whether to participate or not was set out in writing on the cover pages of the interview schedules. The participants gave their written consent by signing in the designated area on their respective interview schedules. The researcher obtained written consent from the then Managing Director of Eskom's Corporate Service Division to conduct this study (attached as Annexure A).
- Right of privacy: This research study respected participants' right to privacy. Under no circumstances was the dissertation, either oral or written, presented in such a way that others became aware of how a particular participant responded or behaved. In general, the researcher kept the nature and quality of participants' performance strictly confidential. The names of the participants were omitted and they were referred to by numbers; i.e. "Participant 1", Participant 2" and so forth.
- Honesty with professional colleagues: The researcher reported her findings in a complete and honest fashion, without misrepresenting what had been done or intentionally misleading others about the nature of her findings. The researcher did not fabricate data to support a particular conclusion, no matter how seemingly "noble" that conclusion might have been.

Appropriate credit was given where it was due. Any use of another person's ideas or words received full acknowledgement; otherwise it would constitute plagiarism and documentary theft. Full acknowledgement of all material belonging to another person is mandatory. The researcher also refrained from subjective interpretation of the information received and did not deviate from the interview schedule when the participants were interviewed.

All information obtained was reflected as received and this research is the researcher's own work. The researcher is aware of the ethics of own conduct and the researcher also adhered to Unisa's code of conduct for researchers (*Guidelines for Ethics in Research and UNISA 2005:1-2*). As stipulated in this document, the ethical principles and guidelines for research were developed for the following purposes:

- (a) To sensitise and protect Unisa researchers, who are often under pressures from various quarters/forces while undertaking research;
- (b) To preserve and promote the autonomy of Unisa research through the observance of ethics, ethical values and ethical self-regulation;
- (c) To protect and promote the human rights of participants and to sensitise and encourage Unisa researchers to respect participants' rights and needs;
- (d) To promote quality, legitimacy and credibility of Unisa's research endeavours;
- (e) To make ethics an integral part of the planning and methodology of research, and to enable Unisa researchers to develop appropriate mechanisms for ethical self-regulation.

#### 1.17 RESEARCH STRUCTURE (CHAPTERS AND LAYOUT)

This research is divided into different chapters to address each of the particular research questions.

Chapter 1 consists of the general orientation to this research. A brief overview is given of the investigative procedures into incidents of sexual harassment in Eskom. This leads to the rationale for this research, as well as the problem statement, the aim and purpose of the research, key theoretical concepts and the

value of the research. The preliminary literature study, the research methodology (consisting of the research approach and design), the target population and sampling, the data collection and the method of data analysis are also explained. Finally the methods taken to ensure validity and reliability and the ethical considerations are noted.

Chapter 2 begins by defining and describing the concepts of investigation of crime and criminal investigation. Importantly the chapter deals with the concept “sexual harassment” and what it means. As part of this meaning the chapter deals with the term “sexual harassment” as defined by law, the common workplace description of sexual harassment, the legislation that governs sexual harassment and the elements of sexual harassment. This chapter also discusses what constitutes evidence and lists the different types of evidence. Clarity is also given to the concepts “chain of evidence” and “burden of proof”. Lastly the mandate to investigate incidents of sexual harassment in Eskom is discussed.

Chapter 3 deals with the current sexual harassment procedure in Eskom and suggests investigative guidelines for Eskom investigators when dealing with incidents of sexual harassment. The term “identification of the crime” is also discussed here along with the individualisation of the suspect to link him/her to the crime.

Chapter 4 discusses with the process of investigation, the crime scene and possible methods of searching such scenes. This chapter also looks at the importance and admissibility of evidence and how to collect such evidence.

Chapter 5 details what the researcher found during the research. It presents various recommendations on how best to conduct a sexual harassment investigation that will ensure greater success and disciplinary action to correct the offensive behaviour.



## CHAPTER TWO

### LEGAL REQUIREMENTS FOR A SEXUAL HARASSMENT INVESTIGATION

#### 2.1 INTRODUCTION

Sexual harassment is a major concern in today's work environment. Employee sexual harassment complaints have increased substantially year after year. Le Roux, Orleyn and Rycroft (2005:7) comment that there are no reliable statistics available on the prevalence of sexual harassment in the workplace in South Africa. But, based on statistics collected elsewhere, it is fair to assume that its prevalence in the workplace is not insignificant. By relying on the awards and judgements on sexual harassment cases that have been formally reported in South Africa from publications and databases since 1989, Le Roux, Orleyn and Rycroft (2005:7) furthermore comment that while these cases do not resemble the proportionate number of sexual harassment cases that are, for instance, reported in the USA, it is fair to assume that very few sexual harassment cases are actually reported beyond the workplace. The implication is that sexual harassment is also a pressing reality in the South African workplace (Le Roux, Orleyn & Rycroft, 2005:7). It is imperative that companies understand the definition and causes of sexual harassment, before they devise preventative measures toward stopping it from occurring (Colquitt & Kleiner, 1996:12). An article in the "Eskom News" of 2005 (Eskom News, 2005:8) reports that, with some 30 000 employees coming into daily contact at Eskom, the danger of sexual harassment is ever-present. Women currently comprise some 30% of the Eskom workforce.

It is important to understand what constitutes sexual harassment. For those interested in preventing harassment in the workplace, there are five key steps they need to take (Smolensky & Kleiner, 2003:59):

- Understanding what sexual harassment is and why it happens;
- Evaluating the present work environment;
- Educating staff;
- Choosing the right resource person; and
- Following through.

Having accomplished these steps, a manager can be reasonably assured that incidents will be kept to a minimum (Smolensky & Kleiner, 2003:59).

## 2.2 INVESTIGATION

According to Van Rooyen (2008:13), the investigation of crime is a systematic, organised search for the truth. It entails observation and enquiry for the purpose of gathering objective and subjective evidence about an alleged crime or incident. Marais and Van Rooyen (1994:17) define investigation as “a systematic search for the truth”.

### 2.2.1 Criminal investigation

Criminal investigation is a logical, objective, legal inquiry into a matter involving a possible criminal activity (Gilbert, 2004:7). Du Preez (1996:2) points out that criminal investigation is a systematic, planned process, consisting, in fact, of the following components: information, recognition, gathering and preservation of information, and evaluation. Criminal investigation is, according to Caldwell (1965:317), a police activity that is directed towards the identification and apprehension of alleged criminals and the accumulation, preservation, and presentation of evidence regarding their alleged crimes.

To the question: “What is criminal investigation?” the participants from Sample A responded as follows:

- One participant stated that it entails interviewing and interrogating of suspects first, and then going back to forensic evidence, such as deoxyribonucleic acid (DNA) and fingerprints.
- Three participants replied that it involves the investigation of the basic elements of crime.
- Fifteen participants replied that these types of investigation use Criminal Law as their basis and thus only focus on criminal activities and the committing of a crime.
- One participant indicated that he did not know what the concept meant.
- Three participants stated that it is exactly the same as forensic investigation.

- One participant felt that these types of investigations are used in public courts and that a record would appear next to someone's name once they had been the object of such an investigation.
- One participant stated that there is a link to forensic investigation, but that forensic investigations are much more specialised.
- One participant replied that there was an overlap between forensic- and criminal investigation as a lot of internal matters do go the criminal route.
- One participant stated that criminal investigation is broader than forensic, but that forensic investigation can be part of criminal investigation.

The participants provided various explanations as to what criminal investigation is and this may be because most corporate entities have named their in-house forensic capability using the word "forensic" somewhere in the title. This has left most of the role players with the perception that the term "forensic" is only related to internal matters and that everything investigated externally relates to criminal matters.

Fifteen of the 27 participants of Sample A were in agreement with the viewpoints of the Caldwell (1965:317) and Gilbert (2004:7) in the discussion above, as these participants felt that criminal investigation only relates to criminal matters.

To the question: "What is criminal investigation?" the participants from Sample B responded as follows:

- Both participants stated that these types of investigation use the Criminal Law as their basis and thus only focus on criminal activities and the committing of a crime.

Both participants from Sample B were also in agreement with the viewpoints of Caldwell (1965:317) and Gilbert (2004:7) in the discussion above, as these participants felt that criminal investigation only relates to criminal matters.

The researcher, based on her years of experience, agrees with the viewpoint of Du Preez (1996:2) that criminal investigation is a systematic, planned process that consists of the following components: information, recognition, gathering and

preservation of information and evaluation. When conducting an investigation, whether it is a criminal investigation or for internal purposes in an organisation, the approach remains the same. As an investigator one would still gather the information once recognised, and preserve and evaluate it. The researcher, based on her experience, agrees with Caldwell's (1965:317) statement that criminal investigation is a police activity that is directed towards the identification and apprehension of alleged criminals. The researcher is of the opinion that the action of identification should be supported by individualisation, which is based on scientific methods and techniques, before an arrest is made and a prosecution activated. The researcher agrees with the viewpoint of Gilbert (2004:7) when he confirms that this type of investigation is linked to some kind of police activity.

### 2.3 SEXUAL HARASSMENT

Le Roux, Orleyn and Rycroft (2005:11) draw attention to the fact that although sexual harassment is a global issue, the legal and legislative responses to it are not universal. In South Africa, the basis for the regulation of sexual harassment, particularly in the workplace, is founded on a number of statutes, which address discrimination in general. These include the:

- Constitution of the Republic of South Africa Act 108 of 1996 (Constitution);
- Labour Relations Act 66 of 1995 (LRA);
- Employment Equity Act 55 of 1998 (EEA); and
- Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (PEPUDA).

Le Roux, Orleyn and Rycroft (2005:11-12) comment that, in addition to these, other statutes, while not designed to regulate unfair discrimination *per se*, may in one way or another have relevance in the context of sexual harassment. These include the:

- Occupational Health and Safety Act 85 of 1993 (OHS);
- Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA); and
- Protected Disclosures Act 26 of 2000 (PDA).

When dealing with incidents of sexual harassment, a person should keep in mind that a relationship exists between the statutes mentioned above and the relevant Codes of Good Practice as discussed.

Le Roux, Orleyn and Rycroft (2005:6-7) state that the legislature opted not to define harassment in the EEA, but an attempt at definition has been made, first in the 1998 “Code of Good Practice on the Handling of Sexual Harassment Cases” (South Africa, 1998), published in terms of the Labour Relations Act and, more recently, in the amended “2005 Code of Good Practice on the Handling of Sexual Harassment Cases”. The 2005 Code deals extensively with the prevention and management of workplace sexual harassment and endeavours to give clear guidelines and direction to employers in dealing with this sensitive subject.

According to the Department of Labour (South Africa, 1998), sexual harassment is “unwanted conduct of a sexual nature”. Owing to controversy surrounding this definition, the amended 2005 Code defines sexual harassment as “unwelcome conduct of a sexual nature”. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.

The 1998 Code (South Africa, 1998) explains that sexual attention becomes sexual harassment if:

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

The objective of the 1998 Code (South Africa, 1998) was to eliminate sexual harassment in the workplace and to provide appropriate procedures for dealing with the problem and for preventing its recurrence. Le Roux, Orleyn and Rycroft (2005:41) state that the guiding principles in the 1998 Code simply suggest the importance of managing harassment.

The Eskom Procedure 32-61 (2006:4) compares favourably with the 1998 and Amended 2005 Code (South Africa, 1998) in that it defines sexual harassment as:

- (a) Any unwelcome or unwanted conduct of a sexual nature, occurring in the workplace, that causes discomfort, humiliation and thereby interferes with the victim's ability to perform their work; and
- (b) The conduct may be verbal, visual, physical, or any form of harassment.

When compared to the 1998 Code (South Africa, 1998), the "Eskom Distribution Group Directive on the Fair Management of Sexual Harassment SCS ADABF1" (2001:3) has opted to copy the definition of sexual harassment verbatim from the 1998 Code, with the exception of adding the following note: "A single incident of unwanted conduct of a sexual nature would immediately constitute an act of sexual harassment and no prior 'warning' from the recipient is required."

Both Eskom documents as mentioned above go on to define the different forms of sexual harassment; i.e. physical, verbal, non-verbal, quid pro quo, and sexual favouritism. A note has been added to the "Eskom Distribution Group Directive on the Fair Management of Sexual Harassment SCS ADABF1" (2001:4), which stipulates that:

"it is not a requirement for sexual harassment to take place on the premises or during working hours for it to constitute misconduct. The guiding principle is whether such conduct directly or indirectly relates to or ensues from a party's employment, association, engagement or duties with Eskom."

Apart from this note, these two Eskom documents are very much in line with the 1998 Code (South Africa, 1998), which makes the same distinctions between the various forms of sexual harassment.

The researcher is in agreement with the above-mentioned Eskom documents, as well as the 1998 and amended 2005 Code with regard to their definition of sexual harassment as any unwelcome or unwanted conduct of a sexual nature, which occurs in the workplace and which causes discomfort and humiliation and in this way interferes with the victim's ability to perform their work. She also supports the

distinction between the various types of sexual harassment – verbal, visual, physical, or any form of harassment.

The researcher posed the question: “What is the workplace definition of sexual harassment?” to Sample A. The responses from Sample A were as follows:

- Eleven participants indicated that the workplace definition was unwanted conduct of a sexual nature, in the workplace, that made the recipient thereof feel uncomfortable; e.g. verbal, physical, and gestures.
- Thirteen participants replied that the workforce only saw it as physical touching.
- One participant stated that even for professionals it was not an easy concept to grasp as the definition was too wide and broad.
- Two participants did not know what sexual harassment in the workplace is.

The views of 13 of the participants of Sample A were not in agreement with the 1998 Code (South Africa, 1998) and the amended 2005 Code, as the participants were of the opinion that sexual harassment in the workplace only entails physical touching, where, in fact, the definition is much broader. Although all the participants were involved with the investigation of incidents of sexual harassment, the above responses could be related to a lack of training and to limited experience in this field of investigation. From the historical data, it appears that only seven of the participants of Sample A had been exposed to formal training that specifically focused on sexual harassment and its various forms. Although the investigation of incidents of sexual harassment did fall within the responsibilities of all the participants of Sample A, only six participants had practical experience in investigating such incidents.

The question relating to the workplace definition of sexual harassment was not posed to Sample B because these parties were external to Eskom. This question focused specifically on the Eskom workforce and was thus asked only to Sample A.

The researcher posed the question: “What is the legal definition of sexual harassment?” to Samples A and B. The responses from Sample A were as follows:

- Eleven participants stated that sexual harassment was any unwelcome or unwanted conduct of a sexual nature, occurring in the workplace, that causes discomfort, humiliation and interferes with the victim’s ability to perform their work. These participants also indicated that there are various forms of sexual harassment, such as verbal, visual, physical, or any form of harassment.
- Eleven participants did not know that the definition embodied in the Eskom Procedure is the exact same definition as that embodied in the 2005 Code.
- One participant was of the opinion that the legal definition is very vague, but she did not elaborate on her answer.
- One participant stated that it is uninvited gestures, verbal or physical.
- One participant stated that it is all actions of a sexual nature.
- One participant stated that the definition was very wide and she could not remember the entire definition.
- One participant stated that it is any contact, physical or verbal, that makes a person uncomfortable.

The researcher posed the question: “What is the legal definition of sexual harassment?” to the participants from Sample B. They responded as follows:

- Both participants agreed with the legal definition of sexual harassment as specified by the literature in that it is any unwelcome or unwanted conduct of a sexual nature that occurs in the workplace, and causes discomfort and humiliation and thereby interferes with the victim’s ability to perform their work. Sexual harassment has various forms, such as: verbal, visual, physical, or any other form of harassment.

The definitions provided by both participants from Sample B conformed to the definitions provided in the legislation that sexual harassment is unwanted conduct of a sexual nature that can take on various forms, such as physical, verbal, non-verbal, quid pro quo, as well as sexual favouritism.



According to the amended 2005 Code (South Africa, 2005), sexual harassment is any unwelcome or unwanted conduct of a sexual nature, occurring in the workplace, that causes discomfort, humiliation and thereby interferes with the victim's ability to perform their work. The conduct may be verbal, visual, physical, or any form of harassment. This definition means that the views of 16 participants of Sample A are not correct.

#### 2.4 LEGISLATION GOVERNING SEXUAL HARASSMENT

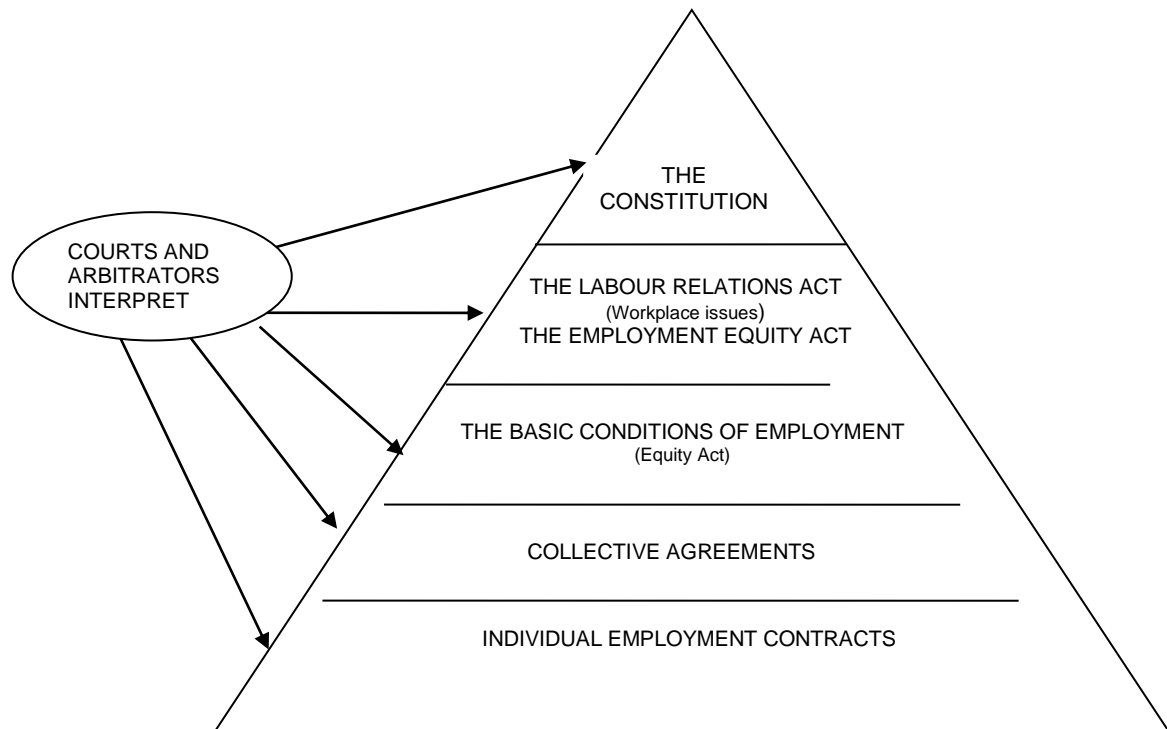
The 1998 Code (South Africa, 1998) advises that there are two options to resolve a problem relating to sexual harassment. Either an attempt can be made to resolve the problem in an informal way or a formal procedure can be embarked on. The employee (victim) should be under no duress to accept one or the other option.

The 1998 Code (South Africa, 1998) states that, "should a complaint of sexual harassment not be satisfactorily resolved by the internal procedures mentioned above, either party may, within 30 days of the dispute having arisen, refer the matter to the CCMA for conciliation in accordance with the provisions of section 135 of the Act. Should the dispute remain unresolved, either party may refer the dispute to the Labour Court within 30 days of receipt of the certificate issued by the commissioner in terms of section 135 (5)." The 1998 Code further states under paragraph 6 that a "victim of sexual assault has the right to press separate criminal and/or civil charges against an alleged perpetrator, and the legal rights of the victim are in no way limited by this code."

Although employees normally follow the disciplinary route when it comes to the reporting of incidents of sexual harassment, they can also decide to go the criminal and/or civil route. The question now comes to mind which legislation would be applicable when an employee decides to follow the criminal route.

For ease of reference the researcher has adapted a graph as offered in the delegate's manual of CBA Training cc (2005:13-14), which offers the reader a synopsis of the hierarchy of the applicable legislation in an easily readable format.

Figure 1: The hierarchy of legislation



(Source: CBA Training cc. 2005: 14)

The following is a brief summary of each of the levels of the triangle presented in Figure 1 above (CBA Training cc., 2005:13), beginning with the bottom level:

- The individual employment contract sets out the terms and conditions of the employment relationship agreed to between the employer and employee.
- “Collective agreements” refers to an agreement between the employer, in this case Eskom, and a trade union, in which both parties agree on matters that affect the trade union members, the trade union, and/or the relationship between Eskom and the trade union and its members.
- The Equity- and Employment Equity Act is aimed at eliminating unfair discrimination such as sexual harassment in the workplace.
- The Labour Relations Act regulates the relationship between employers and organised labour and contains dispute-resolution mechanisms to deal with disputes that may arise between them (i.e. dismissals or unfair labour practices).

- The Constitution contains the Bill of Rights and the standards against which all other laws and action in the country are judged.

As stated by Coetzee (2009), in his letter addressed to Eskom (see Annexure B): he is of the opinion that the disciplinary offence of “sexual harassment” or a breach of the Code does not constitute a criminal offence in itself. To be able to follow the criminal route, the type of harassment that has been experienced by the victim would have to fall within the parameters of the Criminal Law, as explained below by Coetzee (2009):

- In all circumstances where a person complains of sexual harassment in the workplace, criminal proceedings will result only where the behaviour complained of falls within the parameters of a defined offence and formal charges may be brought against the perpetrator.
- It is therefore important to note that the elements of a criminal offence must be present in the behaviour complained of for criminal charges to be laid. For example, the offence of *crimen injuria* renders the impairment of dignity – a crime where such impairment is very serious. One of the elements of this offence that must be alleged and proved is that the complainant’s dignity was actually impaired, both subjectively in that the complainant’s self-esteem was impaired and objectively in that a person of ordinary sensibilities would have regarded the conduct as offensive. Coetzee further states that Johnathan Burchell, a noted expert in Criminal Law, submits in *Principles of Criminal Law, 3<sup>rd</sup> ed*, that *crimen injuria* will play a significant role in punishing sexual harassment.

On the basis of her experience of 13 years in the investigation of incidents of sexual harassment, the researcher agrees with the view of Burchell, as sexual harassment does not necessarily have to be physical conduct but can also fall within the category of verbal conduct. These various forms of sexual harassment, of which one form is physical conduct, are also confirmed in the Code (South Africa, 1998) and in the “Eskom Procedure 32-61” (2006).

Coetzee states that although the CCMA has reported some cases in which the behaviour of an employee *could* constitute a sexual offence, there do not appear to be many criminal cases in this regard. Nevertheless, the case of *S v Banana*

2000 (2) SACR 1 (ZS) is an appeal by the former non-executive President of Zimbabwe, who was convicted of sodomy, indecent assault, common assault and committing an unnatural offence as a result of behaviour perpetrated by him in the workplace (Coetzee, 2009).

Coetzee comments on applicable legislation and precedent as follows (Coetzee, 2009):

- Once a person files a complaint with the SAPS, an investigation will be launched. The police will then decide whether or not to charge the person against whom the complaint was made with an offence. If that person is charged then, based on the evidence uncovered by the investigation, the National Prosecuting Authority will decide whether or not to prosecute.
- In the event that a decision is made to prosecute, the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007 (“the Sexual Offences Act”) and the Criminal Procedure Act 51 of 1997 are the primary pieces of legislation that will apply.
- The precedents developed through case law with regard to defined offences, such as rape, indecent assault and *crimen injuria*, will apply insofar as they have not been superseded by the Sexual Offences Act. For example, before this Act was promulgated, rape was a Common Law offence and had a very narrow definition. Now, it is a statutory offence by virtue of its inclusion in this Act and has been given a much wider definition. It is conceivable that forms of sexual harassment may give rise to charges of rape.

Coetzee (2009) further comments on sexual harassment and the Sexual Offences Act:

- The “Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace” (South Africa, 1998) states that “physical conduct, as a form of sexual harassment, includes all unwanted physical contact, ranging from touching to sexual assault and rape, and includes a strip search conducted by, or in the presence of, the opposite sex.” Therefore, any

*physical conduct* which falls within the definitions of rape and sexual assault will additionally constitute sexual harassment where the conduct occurs in an employment context. For example, if a strip search is conducted on an employee by a member of the opposite sex, and the employee is touched in a manner that amounts to sexual assault, the person performing the search will be guilty of sexual harassment and a criminal offence.

- “Sexual assault” is a new offence created by the Sexual Offences Act. This offence criminalises acts of “sexual violation”, which are defined in the Act to include various acts of touching, but which exclude penetration.
- The Act criminalises the exposure or display of *child pornography* to persons who are 18 years of age and older. The Code includes “the unwelcome display of sexually explicit pictures and objects” as sexual harassment in the form of non-verbal conduct. Therefore, if an employee were to circulate unwelcome displays of child pornography among other employees, she or he would be guilty of sexual harassment and an offence in terms of the Act.
- From the definitions above, it would appear that the unwelcome distribution of adult pornography would amount only to sexual harassment in a non-verbal form. The employee would not be guilty of an offence and the distribution of adult pornography among persons of 18 years and older is not an offence in terms of the Act.
- The Sexual Offences Act additionally renders as an offence behaviour that is colloquially known as “flashing”. The Code includes “indecent exposure” as a non-verbal form of sexual harassment. Therefore, any employee who perpetrates such behaviour will be guilty of sexual harassment and a criminal offence.
- The Act provides for further sexual offences against children and the mentally disabled. As with the preceding offences, the commission of such offences will constitute sexual harassment where the behaviour that gave rise to the commission of the offence occurs in an employment context and falls within the forms of sexual harassment outlined in the Code.

The researcher supports Coetzee's statements on the various Acts/legislation that could be valuable when an employee is considering laying criminal charges against an alleged offender. The researcher is also of the opinion that sexual harassment and the Domestic Violence Act 116 of 1998 as published in the Government Gazette of 02 December 1998 (South Africa, Department of Labour, 1998) could similarly be compared and successful criminal action could be instituted against the alleged offender using the Domestic Violence Act. As per the definition of sexual harassment, which has been broadly explained earlier in this chapter (Section 2.3), sexual harassment, just like domestic violence, does not have to be only physical, but can include verbal harassment too.

The researcher posed the question as to which legislation pertaining to sexual harassment can be used to support the investigator whilst investigating incidents of sexual harassment to Sample A. The responses from Sample A were as follows:

- Seven participants replied that the investigator could use the Labour Relations Act, the Code of Good Practice in the Handling of Sexual Harassment, the Employment Equity Act and the Constitution.
- Ten participants were not aware of any legislation that would apply to sexual harassment.
- Nine participants stated that sexual harassment should fall under the same offences as rape and sexual offences.
- One participant indicated that sexual harassment could be assisted by the Domestic Violence Act and the Bill of Rights.

The participants supported various viewpoints on this matter and this could be due to the fact that most of the participants had no SAPS background and had thus not been exposed to incidents of this nature in the criminal arena. Most participants were only involved in the corporate environment and had not been exposed to training outside this environment.

To the same question the participants from Sample B responded as follows:

- One participant replied that the investigator could use the Labour Relations Act, the Code of Good Practice in the Handling of Sexual Harassment, the Employment Equity Act as well as the Constitution.
- One participant stated that sexual harassment should fall under the same offences as rape and sexual offences.

The different answers given by the participants of Sample B could relate to their different backgrounds, as well as the extent of their qualifications. One participant has extensive knowledge in the field of Labour Law and is consistently embroiled in matters of this nature, whereas the other participant has an SAPS background and his qualifications do not extend to Labour Law. Furthermore he is involved in the investigation of incidents of sexual harassment as and when his clients specifically request such from him.

## 2.5 ELEMENTS OF SEXUAL HARASSMENT

Joubert (2001:47) states that a crime is unlawful and culpable behaviour (conduct) described by the legislator as a crime to which a penalty/punishment is linked.

From the above-mentioned definition the following four general elements of a crime can thus be identified:

- Legality;
- Conduct;
- Unlawfulness; and
- Culpability.

### 2.5.1 Legality

The term “legality” implies that the behaviour/conduct is punishable by law and is described as such. This term stipulates that a specific penalty/punishment be linked to the specific behaviour/conduct (Joubert, 2001:48).

The Code of Good Practice on the Handling of Sexual Harassment Cases (South Africa, 1998) and the amended 2005 Code of Good Practice clearly describe the type of behaviour that would constitute sexual harassment. Furthermore, the same Code of Good Practice stipulates that an “*employer’s sexual harassment policy should specify the range of disciplinary sanctions that may be imposed on a*

*perpetrator. The sanctions must be proportionate to the seriousness of the sexual harassment in question.”*

Eskom Procedure 32-1115 (2011:06) confirms that “*sexual harassment is viewed as a serious misconduct, which, if proven, may lead to the termination of service.*”

The Code of Good Practice regulating dismissal, which is contained in Schedule 8 of the Labour Relations Act, reinforces the provisions of Chapter VIII of this Act and provides that an employee may be dismissed for serious misconduct or repeated offences. Serious incidents of sexual harassment or continued harassment after warnings are dismissible offences (Le Roux, Orleyn & Rycroft, 2005:138).

In order to prove this element the researcher, or investigator needs to dissect the behaviour of the suspect to prove that the conduct falls within the ambit of the definition of sexual harassment; i.e. the behaviour is unwanted, unwelcome conduct of a sexual nature.

### 2.5.2 Conduct

The legal terms “behaviour” and ”conduct” refer to physical conduct or behaviour that has certain prohibited consequences.

The Code of Good Practice on the Handling of Sexual Harassment Cases (South Africa, 1998) and the amended 2005 Code of Good Practice confirm that sexual harassment conduct causes discomfort or humiliation and in this way interferes with the victim’s ability to perform their work. This stance is mirrored by the Eskom Procedure 32-1115 (2011:04).

To be able to prove this specific element, the researcher, as investigator of sexual harassment incidents, will rely (when applicable) on oral testimony, witness statements, sick leave records and/or reports from medical specialists. Another useful tool that may come in handy to prove the element of conduct is the affected employee’s performance appraisal (PA). The PA will give a clear indication of whether the employee is meeting his/her targets or not. A victim that is affected by the acts of sexual harassment will in all probability not perform as he/she should.



### 2.5.3 Unlawfulness

“Unlawfulness” indicates that the specific behaviour/conduct is unjustified or uncalled for.

The Eskom Procedure 32-1115 (2011:4) confirms that the conduct should be unwelcome or unwanted and of a sexual nature for it to be considered sexual harassment. The Code of Good Practice on the Handling of Sexual Harassment Cases (South Africa, 1998) confirms that the *“unwanted nature of sexual harassment distinguishes it from behaviour that is mutually welcome and acceptable.”*

Several ways exist in which an employee may indicate that sexual conduct is unwelcome. These include non-verbal conduct, such as walking away or not responding to the perpetrator (Le Roux, Orleyn & Rycroft, 2005:32). This statement is confirmed by the 2005 Draft Code of Good Practice on the Handling of Sexual Harassment Cases (South Africa, 1998).

The way in which to prove this element depends on the type of harassment that the victim has suffered. Le Roux, Orleyn and Rycroft (2005:32) caution that the harassment may, however, consist of a single incident and there may be no opportunity to communicate that the conduct is unwelcome.

### 2.5.4 Culpability

Joubert (2001:48) indicates that culpability implies that, first; the suspect must be accountable for the prohibited behaviour/conduct. Secondly, the suspect has to satisfy the requirements for culpability, such as intention or negligence.

The Code of Good Practice on the Handling of Sexual Harassment Cases (South Africa, 1998) states that 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.

## 2.6 THE ROLE OF LAW OF EVIDENCE IN INVESTIGATION

Once the more in-depth investigation has been initiated, the investigator cannot proceed aimlessly, but must be guided by a basic working knowledge of the rules of evidence (Van Rooyen, 2008:105). If no positive verdict results from the investigation, because of inadequate or unreasonable evidence accumulated and a lack of preparation, the case, and the work performance of the investigator, may be considered tainted.

According to Van Rooyen (2008:105), one of the responsibilities of the investigator is to identify admissible court evidence, or as the case may be in the corporate environment, such as Eskom, admissible disciplinary evidence. Once the identification has been accomplished, the particular evidentiary items must be linked with the elements of the crime/irregularity and must link the alleged suspect with the crime/irregularity. Although the prosecutor/Eskom case presenter (company representative) is accountable for the interpretation and presentation of evidence, the justification for the original gathering of the evidence is the responsibility of the forensic investigator. Justification pertains not only to the reliability of the evidence but also to the means by which it came into the possession of the investigator. The investigator must be fully aware that the acceptance of evidence and its subsequent admissibility are dependent on the manner in which it was obtained, preserved, and identified. The primary function of the Law of Evidence is to prescribe what evidence may be placed before a court in order to prove a fact, as well as how and by whom the presentation should be made (Van Rooyen, 2008:105).

## 2.7 EVIDENCE

Joubert (2001:345) states that evidence indicates that there are grounds on which a verdict can be made with regard to a fact in dispute. Evidence is the most important means of supplying proof. In its normal meaning it comprises all the information which is presented to a court/hearing, in order to enable the court or chairperson of the hearing to decide a factual issue. This includes written and oral

statements of witnesses, documents and objects which are presented to be examined or inspected (Van Rooyen, 2008:106).

Joubert (1999:332) explains that evidence is the most important means of proving or disproving facts in dispute. It comprises all the information and material submitted to the court by the parties – the offender and victim - to enable the presiding officer to judge and settle a dispute. Evidence therefore consists of oral statements, written statements, documents and objects that are produced and received in court.

Travers (2005:173) puts it in this way, “evidence is proof that exists in support of a fact.” It is that which reveals, makes clear, or enables the court to learn the truth of the very fact or point in issue, either on one side or the other. It supplies proof.

To the question: “What is evidence?” the participants of Sample A answered as follows:

- Twenty-five participants responded that it is anything that can assist to prove/refute a case; e.g. witnesses, documents, and polygraph reports.
- Two participants did not know what evidence is.

To the same question the participants from Sample B answered as follows:

- Both participants responded that it is anything that can assist to prove/refute a case; e.g. witnesses, documents, and polygraph reports.

From the 27 responses received (25 from Sample A and both of the Sample B participants), it is clear that these participants hold the same views as Joubert (1999:332) and Van Rooyen (2008:106) that evidence is anything that can be used to prove a case.

Two participants from Sample A did not know what evidence is, as they had not received the appropriate training that would enable them to understand this concept.

For the purpose of this research, evidence can thus be defined as all the information that is presented to a court or a hearing that will enable the court or the chairperson of the hearing to decide a factual issue. There is thus no difference in evidence that is presented to a criminal court or a disciplinary hearing. In both instances evidence refers to proof that exists in support of a fact.

### 2.7.1 What constitutes evidence?

Van Rooyen (2008:107-108) confirms that:

- Evidence is simply that which enables an investigator to get to the truth of a matter under investigation.
- All types of factual information are potential sources of evidence.
- Legally, evidence is any relevant information or object admissible in a court of law that has a material bearing on the outcome of the case.
- The word “evidence” is usually associated with trial proceedings.
- Evidence is legally communicated information intended to support in the mind of the person who receives it a belief in the existence of an asserted fact, idea or proposition, or in the non-existence of it.
- Evidence signifies that which demonstrates, makes clear or ascertains the truth of the very fact or point in issue, either on the one side or the other.
- Only admissible evidence can affect the outcome of a trial.
- Evidence exists in the facts of an occurrence, a civil dispute, a criminal act, a disciplinary hearing or whatever is under investigation.

Van Rooyen (2008:108) states that there are four primary sources of evidence:

- People: witnesses, victims, complainants, contacts, informers, clients, litigants, suspects, police and any other person with relevant information who can testify to any evidence the circumstances and their personal knowledge determine;
- Documents: public and private records, and relevant documents, which include all types of writings as defined in the rules of evidence, which the investigator may obtain from government or private sources, and present as material documentary evidence;

- Things: the many forms of real evidence, which include material objects, substances, impressions, prints, stains, marks, transfer evidence, liquids, secretions and the like;
- Personal observations: knowledge obtained from the investigator's own personal efforts, which involves what he has seen, discovered, learned and observed. In presenting relevant information he will often employ varied forms of demonstrative evidence such as sketches, diagrams, casts of impressions, objects and photographs or moving pictures (videos), which help a client or judge or magistrate to visualise the evidence the investigator has discovered or observed.

Saharay and Saharay (2008:1) state that the word "evidence" signifies only the instruments by means of which relevant facts are brought before the court; namely, witnesses and documents. By means of these instruments the court may consider whether certain facts are proved or not. Van Rooyen (2008) and Saharay and Saharay (2008) thus share the view that evidence may be defined as that which demonstrates, makes clear or ascertains the truth of the very fact or point in issue.

### 2.7.2 Different types of evidence

Joubert (2001:357-373) refers to different types of evidence that an investigator may come into contact with:

- Verbal evidence by way of people testifying, such as a person who may have witnessed an act of sexual harassment in the working environment; e.g. a manager touching an employee on her breast;
- Real evidence by means of objects; i.e. the murder weapon;
- Documents; e.g. public and private documents, such as letters containing explicit pictures or photographs that an offender has given to the victim;
- Computer-analysed documents, such as electronic email communiqués that have been sent to the victim by the offender, using an Eskom asset; i.e. his or her laptop or desktop computer;
- Video- and audio recordings, such as offenders sending victims offending material either via email or by utilising their Eskom subsidised cell phone. At some Eskom premises closed-circuit television (CCTV) cameras have

been installed; footage obtained from these cameras may be valuable evidence to confirm or refute the allegations of sexual harassment;

- Photos and movies, which are often sent via electronic means to the victims; e.g. through their cell phone or laptop computer.

In *S v Mpumlo* 1986 (3) SA 485 (E) the court ruled that video film is not a document and that video- and tape recordings constitute real evidence.

Saharay and Saharay (2008:2) classify evidence as direct, indirect and real evidence. "Direct evidence" means the existence of a given thing or fact, which is proved either by its actual production or by the testimony or admissible declaration of someone who has perceived it. "Indirect evidence" is evidence which is used to prove other facts or from which the existence of a given fact may be logically inferred.

Hoffmann and Zeffertt (c1988:588) state that direct evidence of a fact can be given by the assertion of a person who claims to have perceived it with his or her own senses. The authors comment that direct evidence is sometimes also used to distinguish the assertions of the witness who is testifying from hearsay. Real evidence consists of things which are examined by the court as means of proof (Hoffmann & Zeffertt, 1988:404).

Adams, Caddell and Krutsinger (2004:4) identify real evidence as physical evidence. Lee and Harris (2000:4) point out that anything as small as a pollen particle or as large as a train, which is significant in the investigation of crime, or can be tendered as evidence in court, is regarded as physical evidence.

Saharay and Saharay (2008) and Hoffmann and Zeffertt (1988) are thus in agreement when they confirm that direct evidence means the testimony of a person who claims to have experienced or perceived a fact with his or her own senses. Saharay and Sahary (2008) also express the same view as Hoffmann and Zeffertt (1988) when they confirm that real evidence is one of the categories of evidence: all three types of evidence can be used successfully in both criminal and disciplinary hearings to prove a given fact.

## 2.8 CHAIN OF EVIDENCE

Van Rooyen (2008:22) states that continuity of possession is also called “chain of possession”. Van Heerden (in Van Rooyen, 2008:22) states that:

“the continuous safekeeping and identification of physical evidence are of cardinal importance in crime investigation. If the investigator is negligent regarding the proper identification of physical evidence or fails to maintain continuity of possession, the value of laboratory analysis is reduced to a minimum.”

The Oxford Dictionary of Law Enforcement (2007) identifies chain of evidence as that which establishes the continuity of an exhibit between seizure and production in court. Gernant (2010:2-3) explains that chain of evidence:

“can technically be defined as the movement and location of real evidence from the time it is obtained to the time it is presented in court. In practical terms, a chain of custody is the documentation and testimony that proves that the result or conclusion that the State seeks to prove is based on the evaluation of evidence that has not been altered or tampered with in any way since it was obtained. This is necessary both to ensure its admissibility in a judicial proceeding and its probative value in any subsequent investigation.”

The terms “chain of evidence” and “chain of custody” are often used interchangeably.

Continuity of possession begins as soon as the physical evidence has been found at the scene of the crime and persists until the article is produced as evidence or proof in court. Even if the physical evidence has been handled in accordance with all the general rules, any doubt that arises concerning the people who have handled it during the process of investigation will call the integrity of the evidence into serious question (Van Rooyen, 2008:22).

In *S v Nkuna 2009 JDR 0806 (GPN)* the accused, a 41-year-old male, was convicted of charges of culpable homicide and, secondly, of contravening the provisions of section 65 (5) (2) of the National Road Traffic Act 93 of 1996

(excessive amount of alcohol on breath). The accused was sentenced on 30 July 2008 to pay a fine of R10 000 or two years imprisonment on Count 1. On Count 2 the accused was sentenced to pay a fine of R20 000 or three years imprisonment. The accused conducted his own defence.

The case was sent on review, and afterwards the High Court requested the magistrate to provide reasons for the judgement. The case was forwarded to the Director of Public Prosecutions for comment. It was submitted by the state advocate, "... that there was no evidence tendered by the prosecution in respect of the concentration of alcohol in any specimen of breath by the accused."

The evidence tendered was in respect of driving with an excessive concentration of alcohol in the blood, being 0.14 grams per 100 millilitres. The state submitted further "... that the proceedings are clearly in accordance with broad justice." In terms of section 88 of the Criminal Procedures Act 51 of 1977 the defect in the charge will in any event be cured by evidence at the trial providing the matter which should have been averred. The accused disputed the chain of evidence in respect of the sample. He clearly conducted his defence with the knowledge that the state was alleging that he drove the vehicle while the concentration of alcohol in his blood exceeded the legal minimum and that for record purposes the conviction on Count 2 could safely be substituted with one of contravention of section 65 (2) of National Road Traffic Act 93 of 1996.

Gilbert (2004:105) states that when evidence is found at the scene, the investigator must be able to account for it. Accounting responsibilities begin when the item is first located and do not end until the evidence reaches the courtroom. Being able to account for the location and possession of evidence is known as "maintaining the chain of custody". The accountability procedure is very important; if a break in the chain occurs, the item will not be admitted as evidence in court.

To the question: "What is the chain of evidence?" the participants of Sample A responded as follows:

- Twelve participants indicated that they did not know what this term refers to.



- Twelve participants responded that this refers to the process of keeping the integrity of the evidence intact and admissible during the investigation. It entails certain processes to make sure that the evidence is secured at all times and not tampered with from collection to presentation in court.
- One participant stated that it refers to the investigator's planning phase in which they need to cover the aspects that they want to investigate to prove/disprove the allegation.
- One participant stated that the term implies how the evidence links with one another; i.e. what took place, when and where.
- One participant replied that this refers to the events as they unfold.

To the same question the participants from Sample B responded as follows:

- Both participants responded that this term refers to the process of keeping the integrity of the evidence intact and admissible during the investigation. It entails certain processes to make sure that the evidence is secured at all times and not tampered with from collection to presentation in court.

Fourteen of the participants (12 from Sample A and two from Sample B) held a similar belief to Gilbert (2004:105) when stating that the integrity of the evidence needs to be kept intact to ensure that the evidence is admissible in a court of law. It is clear from this research that 15 of the participants (Sample A) did not have any knowledge, or experience or exposure to training regarding the Law of Evidence and thus could not provide the correct answer to this question.

Of the total sample of 29 participants only 11 participants had had experience in dealing with incidents of sexual harassment and only nine participants had undergone training pertaining specifically to the handling of incidents of sexual harassment.

## 2.9 BURDEN OF PROOF

The burden of proof is the result or effect of evidence. No person in a criminal case can be convicted without the burden of proof. This responsibility lies with the prosecution, which must prove three facts in order to convict a person: the act charged was carried out or omitted; it was carried out by criminal means; and it

was carried out by the accused. The proof in a criminal matter must always be beyond reasonable doubt (Travers, 2005:179).

Gilbert (2010:55) came to the conclusion that burden of proof involves “a continuous demonstration of guilt, or a proving of each element of a crime, against the accused”. Gilbert states that it is the prosecution that must bear the burden of proof in a criminal case. Joubert (2001:35) states that during hearings of a criminal nature, the state institutes an action against the accused. The state thus has to prove beyond all reasonable doubt that the accused should be held criminally liable for his/her actions, prior to the court finding such a person guilty. In the case *R v Ndhlovu, 1945 AD*, as mentioned by Joubert (2001:35), it was decided that the burden of proof rests on those who make the allegation to prove their case (Joubert 2001:35). Joubert (2001:35) also states that during civil action, the claimant, in other words the person who alleges the misconduct, only has to prove the allegation on a balance of probabilities. If the claimant’s response seems more probable than that of the offender, then the claimant’s claim will be upheld.

The burden or onus of proof in its ordinary sense is a metaphorical expression for the duty which one or other of the parties has of finally satisfying the court that he or she is entitled to succeed in their claim or defence, which ever it may be (Zeffertt, Paizes & Hoffmann, 2009:45). Zeffertt et al. (2009:45) confirm that this is as stated by Davis AJA in *Pillay v Krishna 1946 AD* the “true and original sense of the notion”. In other words, the incidence of the onus tells us who must satisfy the court; but that is not all that we need to know. The degree or standard of satisfaction – the quantum of proof – that is required by the court in order to be satisfied must necessarily be provided by the party who bears the onus.

To the question: “What is the burden of proof?” the participants of Sample A responded as follows:

- Eighteen participants responded that this refers to the onus of proof and refers to the person who must prove a fact or valid point; i.e. the person who alleges the crime must prove it.
- Seven participants indicated that they did not know what this term refers to.

- One participant stated that this term refers to the facts in a case that the investigator must be able to balance.
- One participant replied that this refers to the concept of beyond reasonable doubt.

To the same question the participants from Sample B responded as follows:

- Both participants responded that this refers to the concept of “he who alleges must prove”.

Twenty of the participants (18 from Sample A and two from Sample B) expressed views similar to Gilbert (2010:55), Joubert (2001:35) and Travers (2005:179) when they stated that the person who alleges must prove what he/she alleges. It is clear in this research that nine of the participants (Sample A) did not have a clear understanding of what is meant by this concept. Their answers can be related to their poor experience or training in the field of forensic investigation, which prevented them from providing the correct answer to this question. Of the 29 participants only 11 participants had had experience in dealing with incidents of sexual harassment and only nine participants had undergone training pertaining specifically to the handling of incidents of sexual harassment.

## 2.10 MANDATE TO INVESTIGATE

The SAPS is mandated in terms of section 205 of the Constitution of the Republic of South Africa (South Africa, 1996) to combat and investigate all crimes. It is a widely held view that the SAPS is unable to investigate all crimes owing to HR constraints, particularly in cases that require specialist knowledge and skills. For this reason various government agencies and parastatals, such as Eskom, Telkom and Transnet, have set up their own internal investigation units (see *S v Botha en andere (1) 1995 (2) SACR 598 (W)*).

In *S v Botha and others (1) 1995 (2) SACR 598 (W) A*, the majority of the investigation was conducted by the Eskom corporate investigators. The accused argued that his right to a fair trial was jeopardised because of this. The court held that the SAPS does not have the sole mandate to investigate crime and that

private and corporate institutions conduct their own investigations before handing them over to the SAPS to institute criminal proceedings.

According to the Eskom Audit Charter 32-653 (2009:1), the Assurance and Forensic Department (previously known as Corporate Audit) comprises the Corporate Audit, Corporate Technical Audit, Corporate Technical Investigations and Forensic and Anti-Corruption departments. This same Charter confirms that the General Manager, Assurance and Forensic and his/her staff have the responsibility to, among other things, “perform investigations of all major incidents which occur on any Eskom network or at any Eskom plant (Eskom Audit Charter, 2009:4). For this reason unrestricted access to all functions, records, property and personnel is given to the various sections.

The Eskom Forensic Practices and Procedures Manual (2004:3) clarify the authority, accountability and scope of the forensic investigations function in Eskom. It also projects accepted standards and provides clear and proper guidelines and procedures for the forensic investigations capability. “Senior management (E-band and higher) has the authority to request and mandate an investigation in person” (Eskom, 2004:14). In these circumstances the manager will approach Forensic Investigations direct and request an investigation. In all instances where a senior manager is implicated, the “one-up principle” is applicable and the mandate should be negotiated at the higher level.

Furthermore, Forensic Investigations is mandated to assist Eskom and its alliances in achieving good corporate governance, by providing strategic crime prevention, detection and investigative direction and services, which support the strategic intent and business objectives (Eskom, 2004:54, 58). The manual also stipulates that the mandate for forensic assignments shall be agreed on between Forensic Investigations and the relevant line function manager (representing the relevant managing director), before the commencement of such assignments. This mandate shall be reduced to writing, in order to ensure no misunderstandings arise in respect of forensic assignments. Mandates may be extended and/or changed during the course of the assignment due to procedures performed; these

amendments shall also be in writing. Line management shall be a part of this process throughout.

To the question, “What mandate do you have to investigate incidents of sexual harassment?” the participants from Sample A responded as follows:

- Seven participants stated that they did not know.
- Three participants were of the view that the Eskom Board extended a mandate for investigation.
- Three participants indicated that a blanket mandate had been issued by the chief executive officer (CEO) of Eskom.
- Three participants stated that the complainant in a sexual harassment matter gave the investigator a mandate to investigate.
- Two participants stated that the mandate was given by the forensic manual.
- Three participants stated that no document existed and that it all stemmed from ethics.
- Six participants stated that the mandate was inherent to their respective job descriptions.

This question relating to the mandate to investigate incidents of sexual harassment was not posed to Sample B because these parties are external to Eskom. This question focused specifically on the Eskom role players and was thus only posed to Sample A.

None of the participants knew that the mandate to investigate is, first, embodied in the Eskom Audit Charter (2009:4) and, secondly, in the Eskom Forensic Practices and Procedures Manual (2004:54). This can be attributed to the fact that no formal training is given specifically to the Eskom Forensic and Anti-Corruption Department and on-the-job training is given preference. Of the 27 Sample A participants only 11 participants had had experience in dealing with incidents of sexual harassment and only nine participants had undergone internal training pertaining specifically to the handling of incidents of sexual harassment.

Two of the participants were correct when they stated that the mandate to investigate is issued by the forensic manual. The six participants who stated that the mandate to investigate is inherent in their job description are also partly

correct. However, a mandate needs to be signed by the respective client as well before an investigation commences (Eskom, 2004:58).

## 2.11 SUMMARY

This chapter defined the concepts “criminal investigation and “sexual harassment” and listed appropriate legislation that can be used to assist the investigator when dealing with incidents of sexual harassment. The origin of the mandate to investigate incidents of sexual harassment in Eskom was also discussed.

Many proactive companies are taking steps towards reducing harassment altogether. Understanding the definition of sexual harassment is left to the courts; individual interpretations are given by the employees in the companies themselves (Colquitt & Kleiner, 1996:17).

This chapter also presented results of research into the role of the Law of Evidence and what constitutes evidence as well as the different types of evidence. The concepts “chain of evidence” and “burden of proof” were also discussed.

Evidence is not relevant if it does not illuminate the issues to be decided, including the elements of proof (Salisbury & Dominick, 2004:120).

## CHAPTER THREE

### INVESTIGATIVE GUIDELINES TO INDIVIDUALISE SEXUAL HARASSMENT

#### 3.1 INTRODUCTION

In this chapter the researcher begins by examining the current sexual harassment procedure in Eskom to identify whether any guidelines exist that can assist the various role players in dealing with incidents of sexual harassment in a consistent manner. The researcher also discusses the identification and investigation of sexual harassment incidents and where these incidents can be reported. Lastly the researcher discusses the individualisation of the crime.

#### 3.2 SEXUAL HARASSMENT PROCEDURE

On the basis of her years of experience in conducting investigations into incidents of sexual harassment in Eskom, and from the feedback received from the participants in this study, it became clear to the researcher that it is very important to provide a set of guidelines that will assist the role players to conduct a proper and thorough investigation into incidents of sexual harassment. Although the Eskom Procedure 32-1115 (2011:5) states that if an employee feels too embarrassed to approach his/her manager or supervisor for assistance and advice, he/she may approach various other role players, such as HR consultants/managers, Employee Relations practitioners, IR practitioners or Forensic Investigations, to name but a few, a set of guidelines is nevertheless necessary. For most of the participants in this study, the handling of incidents of sexual harassment is not their first line of work and, although the participants have tertiary qualifications, these qualifications do not necessarily relate to the field of investigation.

Guidelines for the investigation of incidents of sexual harassment are very important to ensure consistency when dealing with these incidents in Eskom. If all parties follow the same guidelines there will be less room for error during the investigation phase and the unions that represent the perpetrators/harassers will not be able to use inconsistency during the investigation of these incidents as mitigating circumstances. This is especially relevant when incidents of sexual harassment culminate in a formal disciplinary hearing or are escalated to the CCMA or even the Labour Court.

At the onset of this research the Eskom Procedure 32-61 (2006) was in place and this research was based on this specific procedure. Towards the end of 2011 the above-mentioned procedure was revised, however, and, as there are no major differences in the contents of these two procedures, the researcher refers to both these procedures during this research. Both these procedures stipulate the routes that may be followed when a report of sexual harassment has been received; i.e. the formal and informal routes. Both the 2006 and 2011 Eskom sexual harassment procedures do not present guidelines on how a formal investigation into incidents of sexual harassment in Eskom should be conducted.

The Eskom Sexual Harassment Procedure 32-1115 (2011:3) presents “Eskom’s stance in terms of Sexual Harassment in the organisation. Eskom believes that Sexual Harassment impacts the working environment and can have severe effects on productivity, work attendance, working relationships, morale health (physical and psychological), confidence and Eskom’s reputation.” The Eskom Procedure 32-1115 (2011) only deals with what constitutes sexual harassment and where to lodge such complaints. The 2006 and 2011 documents indicate that management should follow either a formal or an informal route. There are, however, no guidelines to assist the various role players on how to investigate incidents of sexual harassment whatever route they choose.

Any employer has a duty to ensure that the workplace is an environment free of sexual harassment. Eskom should thus create and maintain a working environment in which the dignity of employees is respected, irrespective of race or gender. This means that a climate in the workplace should be created and maintained in which complainants of sexual harassment do not feel that their grievances are ignored or trivialised or in which they fear reprisals. In order to achieve this, the employer, in this case Eskom, must appropriately communicate to its employees that sexual harassment will not be tolerated. This means that Eskom would, where necessary, educate and counsel employees with regard to the workplace policies on sexual harassment.



Various other means are available for employees to report incidents of sexual harassment (Eskom Policy 32-250, 2009:3), for example:

- Directly to the responsible line manager,
- Eskom's toll-free hotline (0800 11 27 22),
- Forensic and Anti-corruption website,
- Forensic and Anti-corruption investigator on standby,
- Email (investigate@eskom.co.za),
- Dead letter drop; that is, internal mailing system, direct walk-in, etc.
- Executive Manager of Forensic and Anti-Corruption Department,
- Ethics Office (011 800 2791/3187),
- PFMA Office,
- IR advisers,
- Security practitioners.

To the question: "Which procedure in Eskom needs to be followed when conducting investigations into incidents of sexual harassment?" The participants of Sample A responded as follows:

- One participant stated that the procedure would be to inform the manager of department so that the parties could be separated should they be working together, so that the harassment could stop.
- Another participant stated: "Once you have identified the client, you will formally engage with him/her after appraising him/her of the whole matter, how it was reported and then of course you will get to the details where you will indicate to him or her how you will go about doing the investigation time frames etc."
- One participant stated that because of the sensitivity involved and because of the nature of the offence itself, the investigator will not get "a whole wad of papers" to prove the case, or documents or affidavits to prove the case. First the investigator needs to have in place a responsible person, somebody who is adequately trained so that when a matter like this reaches their table they automatically know that the person who is dealing with this is the best person for the job. This person should not necessarily just conduct the investigation but also identify whether the report is malicious, whether it is something that needs to be investigated, whether it is

something the investigator can express his or her opinion on prior to even embarking on a lengthy investigation, and whether the opinion can be used as an expert opinion. This will save time and money before embarking on an investigation. Moreover sexual harassment will not be contained if a person doesn't set up a specific process to deal with it. Eskom needs to have somebody up front that is able to establish what is malicious and what is not. Eskom also needs that person to be able to conduct an investigation according to a certain process, whether it is interviewing the victim or suspect, interviewing people that were close by, writing first reports, making a decision about whether external intervention such as by experts is needed. All of this is necessary because Eskom needs to show employees who have been involved in these cases that they will be supported.

- Nine participants did not know what procedure to follow.
- One participant stated: "Firstly you have to engage with the suspect or manager and victim and you could refer them to the Eskom Assistance Programme before speaking to them."
- One participant stated that sexual harassment investigations need to be a matter of priority and sensitivity and the investigator has to work within the perimeters of the Labour Relations Act.
- One participant stated that the investigator will look at the procedures laid down in the Forensic Investigations Manual for other investigations and apply them to this type of investigation. The investigator will also look at the current sexual harassment procedure and other interventions applicable to the particular case to guide them.
- Two participants stated that it is necessary to identify the relevant E Band manager (Senior Manager) for both the complainant and the suspect. The manager of the complainant should then be informed that a complaint of sexual harassment has been received, which will be investigated. The formal engagement will then follow. A formal engagement entails a type of a "contract" with the client outlining the methodology to be used, terms of reference, scope of the investigation as well as time lines for progress of the investigation. Only one engagement is used, which is sent to the complainant's manager and the suspect's manager is copied.

- Three participants stated that it is necessary first to bring the complaint to the attention of the senior managers of both parties. Then, based on what you have i.e. the facts of the case - refer it to “Forensic”, i.e. the researcher.
- One participant stated that it is necessary to obtain statements from the victim, harasser and witnesses. Then the case should be referred to “Forensic”.
- Four participants indicated that they did not know of any specific procedure, other than that specified in the notes in the current sexual harassment procedure, which stated that the victim will decide if the incident will go the formal/informal route.
- Two participants indicated that the investigator should inform the manager of the suspect and the manager of the victim and then start investigating. These participants were of the opinion that they would not need permission from anyone to start the investigation, as it forms part of these participants’ job responsibilities.

The participants in this study expressed different views on which guidelines should be followed when dealing with incidents of sexual harassment. Their answers indicated that they had limited knowledge of the existing procedure. Although an Eskom sexual harassment procedure is in place, there are currently no specific guidelines to assist investigators/role players when investigating such incidents in Eskom.

It should also be noted that neither the 2006 Eskom sexual harassment procedure nor the 2011 Eskom sexual harassment procedures address the specific guidelines that need to be followed when investigating incidents of sexual harassment. These documents speak to procedure and no guidelines are referred to in the documents. Guidelines for investigating sexual harassment incidents are discussed later in this chapter.

### 3.3 INVESTIGATION GUIDELINES FOR ESKOM

Chapter 2 defines and describes sexual harassment (see Section 2.3), as well as the elements of sexual harassment (see Section 2.5).

In an attempt to address the aim of this research; namely, to research investigative guidelines for conducting investigations into incidents of sexual harassment in Eskom, the researcher combined her experience with that of Salisbury and Dominick (2004).

According to Salisbury and Dominick (2004:71), the duty to investigate arises when:

- A complainant is “known” to the employer;
- The employer should have known of a complaint; or
- The employer has constructive knowledge of a complaint.

This means that whenever an employee raises an issue about behaviour that may violate the harassment or discrimination policy, an investigation must be conducted. The reader should bear in mind that the complaint may be formal or informal. It is best to avoid creating barriers to complaint resolution by requiring that a complaint be in writing or formalised prior to initiating an investigation. The goal is to resolve problems, not to ignore them until formalities are completed (Salisbury & Dominick, 2004:71).

A duty to investigate is triggered regardless of the source of the complaint. The complaint can come from any Eskom employee or any other person who has an association, engagement or duties with Eskom and who falls victim to an act of sexual harassment (Eskom Distribution Group Directive SCS ADABF, 2001:3). An investigation should thus be conducted when the employer *first* learns of the alleged inappropriate conduct. The Eskom Distribution Group Directive SCS ADABF (2001) clarifies that sexual harassment is not required to take place on the premises or during working hours for it to constitute misconduct. The guiding principle is whether such conduct directly or indirectly relates to or ensues from a party’s employment, association, engagement or duties with Eskom (Eskom Distribution Group Directive SCS ADABF, 2001:4).

Prior to a complaint being filed, the employer must set up an efficient system for receiving complaints. In the policy the employer should identify who can receive complaints (Salisbury & Dominick, 2004:73). According to Eskom Procedure 32-61

(2006:4, 5), employees should report incidents of sexual harassment to their managers or supervisors. Should an employee feel embarrassed about approaching his or her manager or supervisor for assistance and advice, he/she may approach: "The Ethics Office, human resources consultants/managers, union representatives, employee wellness practitioners, employee relations practitioners, industrial relations practitioners, forensic investigations and occupational health practitioners" (Eskom Procedure 32-61, 2006:4-5).

Salisbury and Dominick (2004:73) suggest that organisations should train their managers to forward complaints to the appropriate person so that an investigator can be assigned to the complaint. The researcher supports this suggestion. However, the provision made in Eskom Procedure 32-61 (2006:4) that employees may report to various parties across different divisions, with no central register kept of these allegations for investigation, means that in the researcher's opinion, and based on her experience, there are too many reporting mechanisms for incidents of sexual harassment. This creates confusion among employees wishing to report sexual harassment.

From the feedback received from the participants in this study, it is clear that not all the parties mentioned in the Eskom Procedure 32-1115 (2011:7) have the ability to investigate incidents of this nature. In the procedure Eskom encourages harassed employees initially to attempt to resolve a problem of harassment informally or formally in private. The harassed employee has the option of utilising the informal or the formal process.

The same procedure states that should an aggrieved employee feel embarrassed about approaching his or her manager, he or she may approach any of the persons listed in paragraph 3.5.3 of the said procedure, which are the parties mentioned under Section 1.4 in this dissertation. The researcher analysed the above-mentioned procedure and could not find any guidelines that give direction to the role players on how to investigate any incidents of sexual harassment in Eskom as far as the identification of the crime and the individualisation of the crime are concerned.

### 3.4 IDENTIFICATION

According to Fischer (2004:5), “identification” means that the items share a common source and can be classified or placed into groups with all other items having the same properties. The identification stage of an investigation is, according to Owen (2001:26), when the first clues are evaluated and the initial impressions formed concerning the nature of the crime and the identity of the perpetrator(s) or possible witnesses. Lee and Harris (2000:27) explain identification as a process, which takes advantage of class characteristics and results in classifying an object, substance or material within a group of related objects of crime. The opinion of Marais (1992:1) is that crime investigation is a process of identification of people and physical objects from the time the crime is committed until the guilt of the perpetrator is either proved or disproved in court.

Du Preez (1996:6) is of the opinion that the word “identification” suggests that the thing being identified belongs to a specific group or category. Fischer (2004:5) points out that the majority of physical evidence found at crime scenes can only be identified. Identification means that the items share a common source. Van Rooyen (2008:20-21) arrived at a similar conclusion, noting that identification rests on the theory that everything in the universe is unique in that it has certain distinctive, individual and class characteristics. The various sciences mutually differ concerning the concept of identification but generally it is applied by these sciences to place objects into specified groups; that is, to pinpoint an object as belonging to a specific group of objects.

To the question: “What is identification?” The participants from Sample A responded as follows:

- Twenty participants stated that they did not know what this concept meant.
- Two participants replied that the concept refers to the identification of evidence; i.e. a fingerprint or a pen.
- Five participants responded that this term refers to the person that committed the offence.

None of the views of the participants supported the viewpoints of authors such as Fischer (2004:5), Owen (2001:26), Lee and Harris (2000:27) and Marais (1992:1), mentioned above. The reason for this might be that the participants were not all knowledgeable about the concept of investigation. Although their qualifications might be relevant to the field of study, they may not have had the required experience. Most of the incidents of sexual harassment are referred to the role player that has had the most exposure to that type of incident. This would mean that the role players would not all have the practical experience that would allow them the opportunity to learn. Also some of the role players have had either no or very limited exposure to Criminal and Procedural Law.

The historical data obtained from the participants, as mentioned in Section 1.13, confirmed that only nine of the participants of sample A had been exposed to dealing with incidents of sexual harassment. Also, only seven of the participants had undergone training pertaining specifically to the handling of incidents of sexual harassment.

To the question: "What is identification?" the participants of Sample B stated that "identification" refers to things that have a common source and can be identified together with other items that are the same, such as fingerprints and hair. Both participants supported the view of Fischer (2004:5) and Du Preez (1996:6) when they stated that things are identified as belonging to a common source.

For the purpose of this study, identification is taken to refer not only to the type of crime/irregularity that has been committed, i.e. sexual harassment, but also to the kind of information or clues that can possibly be collected. The information and facts gathered must therefore confirm that an act (such as sexual harassment), judged by the specific elements of sexual harassment, has taken place.

Van Heerden (1986:195-199) and Du Preez (1996:6) specify the following important categories of identification:

- Situational identification,
- Witness identification,
- Action identification,

- Culprit identification,
- Victim identification,
- Imprint identification,
- Origin identification,
- Cumulative identification.

This research is limited to the investigation of sexual harassment in Eskom to provide guidelines for investigation, which include:

- Identification of the crime; and
- Individualisation of the crime.

#### 3.4.1 Identification of the crime

Van Heerden (1977:13) argues that the collection of facts begins as early as the identification of the crime situation. The investigator must identify sexual harassment with an open mind by not only keeping in mind the elements of sexual harassment but also relying on the observations made during the preliminary investigation. Every incident of sexual harassment should unfailingly be approached without reservation and preconceived theories.

The term “identification” has already been extensively discussed in Section 3.4. The researcher supports the view of Marais (1992:1) that crime investigation is a process of identification of people and physical objects from the time it is committed until the guilt of the perpetrator is either proved or disproved in court. Van Heerden (1977:195) notes that by formulating an investigation hypothesis a crime situation can be identified and evaluated. Basically this would mean that the investigator, based on his or her knowledge and experience of crime facts, will highlight the factors that can clarify the specific crime situation. The hypothesis is an acceptance of the fact that a crime has probably been committed, but that it has not been proven as yet. By utilising the different identification categories – as mentioned in Section 3.4 – the investigator will be able to confirm the investigation hypothesis.

In order to identify the crime (sexual harassment) correctly, it is important to clarify the allegations first. Salisbury and Dominick (2004:78) state that one of the first



interviews will be with the complainant to gather information that will assist in refining the investigative plan. The following steps should be taken:

- Identify all the complainant's issues by asking appropriate, non-leading questions.
- Document what you think the complainant is alleging. If you are unsure, then have the complainant review, confirm, or correct your recollections.
- Determine how far back in time the claim goes; i.e. incidents that are very old may provide background information that could show a pattern of behaviour.
- Decide whether you may have multiple complainants or targets. Investigate all complainants and all targets to determine the full scope of the issue.

From experience gained, the researcher suggests that appropriate, non-leading questions be asked about the allegations made. Never assume; ask clarifying questions to confirm or correct your recollections. For various reasons, at times, a complainant's claims of sexual harassment relate to incidents that occurred far back in time and it is necessary to gain background information that may lead to other possible victims that will indicate a pattern of behaviour. The researcher suggests that all parties mentioned in the original complaint, as well as parties identified by the perpetrator, be interviewed to determine the full scope of the issues and obtain all the necessary evidence. Selective interviewing in the interest of saving time is not advisable as it can pave the way for allegations of bias and unfair treatment.

According to the researcher, to be able to identify the conduct of the perpetrator as sexual harassment, it is important that the investigator know what elements of the sexual harassment incident would identify the behaviour as sexual harassment. The elements of sexual harassment are (Le Roux, Orleyn & Rycroft, 2005:32-39):

- Unwanted or unwelcome conduct  
Was the conduct welcomed by both parties; in other words, was it mutually agreed on?
- Conduct of a sexual nature  
Keeping in mind that there are different types of sexual harassment, the unwelcome or unwanted conduct has to be sexual in nature. For instance,

merely consistently asking someone on a date is not sexual in nature. But, if a harasser, for instance, makes sexual comments about a person's body that would be considered as sexual harassment (Le Roux, Orleyn & Rycroft, 2005:32-39).

- Violating the rights of an employee

This unwelcome conduct of a sexual nature must violate the rights of the complaining employee (victim). The rights that will most often be violated when it comes to sexual harassment are: (i) the right not to be discriminated against on the basis of sex or gender; (ii) the right to dignity; (iii) the right to a safe working environment; and (iv) the right to freedom and security of person.

- This type of conduct constitutes a barrier to equity in the workplace

"Equity" is a short-hand term to describe a variety of (often different) factors, such as no unfair discrimination, affirmative action, equal opportunity, the removal of institutional barriers, equal pay for equal work, workplace fairness, and so on. The requirement that the sexual harassment must also constitute a barrier to equity in the workplace tends to shift the focus away from the nature or seriousness of the conduct to a consideration of whether there is material, negative change in the employment status of the victim.

- Factors to be taken into account to enable the identification of the conduct as sexual harassment

Certain factors need to be taken into account when assessing the definitional elements: unwelcomeness, conduct of a sexual nature, a violation of the rights and a barrier to workplace equity. These factors are:

- Whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;
- Whether the sexual conduct was unwelcome;
- The nature and extent of the sexual conduct; and
- The impact of the sexual conduct on the employee. Based on her experience and knowledge the researcher believes that the effects of sexual harassment on a victim, in the Eskom environment, are also considered as an aggravating circumstance during disciplinary hearings.

### 3.4.2 Individualisation of the crime

Individualisation means that an item of evidence comes from a unique source and can be shown to be directly associated with a specific individual source (Fisher, 2004:5). A broken piece of plastic physically fitted to reconstruct an item is an example of individualisation.

Van Rooyen (2008:21) is of the opinion that individualisation is only possible if it is preceded by a series of identifications. Individualisation is based on, and takes place through, comparison. "... it refers to the demonstration that a particular sample is unique even among members of the same class." Individualisation indicates further that a disputed object found on a crime scene and the objects used as standards of comparison are of the same origin.

A standard of comparison is an authentic specimen of known origin; i.e. a comparable specific object that is derived from the crime scene, objects, vehicles or people directly or probably involved in the crime. Van Rooyen (2008) further suggests that individualisation in a murder investigation, as a process, begins at the crime scene and ends with the giving of evidence and the positive determination of the deceased's identity. It usually entails a series of identifications and comparisons with a two-fold aim: first, it is intended to individualise positively the different disputed objects and, secondly, it is intended to indicate adequately the involvement of the object or person that provides the standard of comparison.

Fisher (2004:5) and Lee and Harris (2000:184) declare that individualisation means that an item of evidence emanates from a unique source. The item in question is therefore individualised when the examiner is able to "match" the set of individual characteristics found in the questioned item to the same set of the characteristics in the known sample.

Identification and individualisation in investigation are two inseparable concepts. One follows the other and they are complementary. Identification without eventual individualisation has no evidential value but serves rather as a direction-giving aid in the investigation of crime.

By using witness identification the unlawfulness of the conduct/behaviour in question and the general nature of the events that occurred; i.e. sexual harassment, are confirmed by taking witness statements (Van Heerden, 1977:196). By taking statements from the complainant and witnesses where they describe the situation, the alleged suspect can be individualised.

Salisbury and Dominick (2004:78) point out that “useful sources of information include time cards, telephone logs, emails and personal observation”. On the basis of her experience, the researcher can add that short message service (sms) messages or emails, CCTV footage and the cloning of an alleged suspect’s computer can assist in individualising a suspect.

The researcher has successfully made use of the following ways of positively linking, for instance, an unwelcome sms to a specific perpetrator. The victim normally has a copy of the offending sms on her cell phone with the sender’s cell phone number displayed. One way of identifying the perpetrator would be to look at Eskom’s Outlook address book, which has the cell phone numbers of individuals listed. In this manner the investigator can link the perpetrator as the sender of the message. Another way would be to check on Eskom’s internal HR system (Zenzele), where basic information, such as cell phone numbers, can be obtained and compared. An employee’s HR file can also yield positive results. During a specific investigation the perpetrator can be sent an electronic communiqué requesting him/her to confirm, for instance, an interview appointment. The perpetrator is likely to send a return email, with his/her electronic signature that includes contact details such as cell phone numbers. After an interview has taken place, the different parties often exchange business cards, or the researcher could ask the perpetrator for his/her business card, where the cell phone details would also be displayed. Another way of confirming the perpetrator’s cell phone number would be to ask him/her for the number when obtaining their statement, as the first page of the statement includes personal details such as cell phone number. Finally, should the matter be criminal in nature, such as rape or attempted rape, the investigator would follow the route of requesting a 205 subpoena to obtain the information from the relevant service provider.

These same guidelines can be used in a case of an offensive email. In this case the investigator can go further and, after consultation with the client, arrange that the suspect's computer be cloned by a reputable organisation (expert) that has full knowledge of how to collect computer evidence within the Law of Evidence. Following the cloning of the computer, this expert witness supplies the investigator with a report that supports the fact that the offending email was indeed sent from the suspect's computer. It is often useful to obtain the services of Eskom's in-house Information Technology (IT) company, which can provide a cache of the suspect's mailbox. This mailbox is likely not only to include the offending email but also to give the investigator an indication that the suspect may have harassed other employees in a similar manner.

As Eskom employees use swipe cards to enter/exit the buildings, in the same manner it can be useful to obtain the electronic time and attendance of the suspect as this will prove that the suspect was indeed on the specific site on the day in question. This will, however, depend on the site visited, as some sites now also have fingerprint identification that is used by employees to gain access to the building. Other useful sources for individualising a perpetrator may be the footage obtained from the various CCTV cameras in the buildings, or at the gates. Although the CCTV, in some instances, may not be able to show the actual sexual harassment taking place – for instance where the sexual harassment occurs in a lift – this footage will be able to support the complainant's version that the suspect entered the lift with her and that they were alone. The specific perpetrator can then successfully be placed at the scene.

Another category of identification that might come in handy is action identification. This identification category relates to the human conduct/behaviour that is directly linked to the crime or, in this case, sexual harassment (Van Heerden, 1977:198). This category comes into play where, for instance, "unwanted, unwelcome conduct of a sexual nature" represents the core of the crime of sexual harassment. The emphasis of this type of identification concerns the type of conduct and whether the suspect should have reasonably known that his conduct was unacceptable or offensive.

Similarly, “culprit identification” refers to the positive identification of the suspect, rather than the identification of the suspect’s unlawful conduct. Van Heerden (1977:198) points out that this type of identification typically would include identification techniques, such as descriptions of people, drawings, identification parades and coincidental identifications. Normally in sexual harassment matters, the complainant and witnesses will identify the alleged suspect.

In the experience of the researcher, the best way in which to individualise a specific perpetrator, when looking at culprit identification, would be via personal identification from the complainant and/or witness.

### 3.5 SUMMARY

This chapter discussed Eskom’s current sexual harassment procedure and offered investigative guidelines to the various role players for investigating incidents of sexual harassment. The researcher also described how to identify that conduct is indeed sexual harassment and how to link a specific suspect to this behaviour positively.

## **CHAPTER FOUR**

### **COLLECTION OF EVIDENCE**

#### **4.1 INTRODUCTION**

If investigators obtain evidence in a manner that violates rights and is not justified by legislation or the Common Law, their conduct will be unconstitutional (Joubert, 2010:276). Evidence obtained in such a manner will be deemed inadmissible and can lead to charges being dropped against perpetrators because the evidence was tainted through incorrect collection methods and has thus no value in proving the matter under investigation.

For the purpose of this research, sexual harassment is defined as a disciplinary matter and not as a crime.

This chapter begins with a discussion of the process of investigation, the crime scene and the various crime scene search methods that can be used for specific types of scenes. The researcher then evaluates why evidence plays such an important role in the investigation process. Finally, the researcher focuses on the different types of evidence that exist and how to collect them.

#### **4.2 PROCESS OF INVESTIGATION**

The process of investigation must be highly structured and flawlessly executed. To be effective the investigation must unfold incrementally and progressively in distinct steps (Van Rooyen, 2008:87) as outlined below. What happens at Eskom is indicated for each step:

- Receipt of assignment or allegation. The role player to whom the victim chooses to report the allegation of sexual harassment in Eskom will receive the complaint.
- Agreement. Depending on which route the victim chooses to take in a matter of sexual harassment, some kind of agreement will be set up; i.e. a mandate or formal letter of engagement (LOE) about the way to proceed regarding the complaint. A formal LOE will only be instituted if the victim chooses to follow the formal investigative route. No formal LOE will be set up should the victim choose the informal route but an agreement will be

reached between the victim and the party to whom he/she chooses to report the matter on how best to resolve the issue.

- Preparation and planning. The responsible role player (investigator) will undertake the necessary preparation and planning for dealing with the specific incident.
- Information gathering. All the necessary information will be gathered by the responsible investigator.
- Verification and analysis. Upon receipt of the investigation, the investigator will verify that the alleged sexual harassment reported by the victim does in fact fall within the ambit of the definition of sexual harassment. This is achieved by analysing the original report or statement made by the victim.
- Documenting evidence. As the investigation progresses, the investigator will document evidence as and when it is received. This practice will greatly assist the investigator when it comes to testifying at the disciplinary hearing and will also assist in maintaining the chain of evidence.
- Legal proceedings. A legal opinion is obtained from Eskom's legal department to advise on the way forward.
- Determination and disbursement of disciplinary or corrective action. Management, upon receipt of the final report from "Forensic", will in conjunction with IR take the necessary steps to arrange a disciplinary hearing.
- Prevention. Training workshops held in the various regions include a short presentation on sexual harassment.
- Application of human behavioural knowledge. Lessons learnt from previous sexual harassment investigations are also shared with the employees during training sessions.

#### 4.3 SCENE OF INCIDENT

Osterburg and Ward (1992:159) are of the opinion that "the crime scene encompasses all areas over which the actors – victim, criminal and eyewitnesses – move during the commission of a crime."



Van Heerden (1986:13) quotes O'Hara and Osterburg, who describe the scene of a crime as a field laboratory where disputed objects can be located for laboratory tests at a later stage (see also Prinsloo, 1996:20).

O'Hara and O'Hara (2003:47) point out that many kinds of crime do not have a "scene" in the sense of an area where traces are usually found. This would apply in a sexual harassment case in Eskom where there is no crime scene as is the case in common crime categories, such as murder and rape. Crime scenes such as murder or rape scene usually have traces such as blood, semen, DNA evidence etc. which is not the case at a typical sexual harassment scene, unless the type of sexual harassment amounted to rape or sexual assault. In such a case the matter would be reported for criminal prosecution.

Sexual harassment focuses more on the type of conduct and its effects than the analysis of the scene of the crime.

#### 4.3.1 Crime scene searching methods

O'Hara and O'Hara (2003:47) argue that the searching of the scene of a crime is, in certain types of offences, the most important part of the investigation.

A crime scene search is defined as a systematic, methodical search for any physical evidence at a crime scene (Ogle, 2012:57). O'Hara and O'Hara (2003:50) emphasise that "method, rather than intuition should guide the basic search."

Certain search methods can be combined to complement one another (Prinsloo, 1996:25-26):

- **The wheel method** – investigators start at the central point of the scene and then move methodically further and further away from the point of departure.
- **The spiral method** – the investigators start at the outlying point and proceed methodically to the central point of the scene while a pattern similar to that of a spiral decreasing in size is followed.

- **The zone method** – the scene of the crime is sectioned and every investigator is allocated an area to be searched.
- **The strip method** – the search is confined to rectangular areas by one or more investigators, who, according to circumstances, proceed in a parallel manner from one boundary to the other.
- **The grid method** – this is in effect a modification of the above-mentioned method. The search of the rectangular areas now takes place not only horizontally but also vertically.

From the experience that the researcher has gained over the past 11 years whilst investigating incidents of sexual harassment in the corporate environment, it is very seldom that the “scene” of the incident, in addition to e.g. collection computer-, cell phone-and CCTV evidence, needs to be searched using the above-mentioned search methods. In a disciplinary hearing, the burden of proof rests on a balance of probability and the evidence already obtained via computer, cell phone etc. is often sufficient to prove the case. It is however important to know about these methods on the odd occasion that a search for hidden evidence, e.g. hard drives, cameras etc. is required.

On the odd occasion when the researcher had to search the office of the suspect, it was done in the presence of the suspect and an independent witness. All evidence collected was noted, marked, sealed and signed and dated by both all the parties present. From here on the chain of evidence was maintained until presentation at the actual hearing.

#### 4.4 THE IMPORTANCE OF EVIDENCE

Van Rooyen (2008:106-107) indicates that the importance of evidence lies in the following:

- Evidence is the basis for both investigative and judicial decisions.
- Evidence is the essence of the arguments of both sides during a trial proceeding. The researcher, based on her experience, is of the view that the same applies for a disciplinary hearing.
- Evidence lies at the heart of all investigations because it is the means by which investigators arrive at the truth of whatever they are investigating.

- Evidence is the means of proving or disproving facts or issues on trial in a court of law and/or disciplinary hearing.
- The search for evidence, as well as the outcome of the case, is crucial for the investigator's career.
- Evidence is indispensable in all litigations, prosecutions and investigations.
- True facts cannot be known without evidence; cases have been dismissed for lack of evidence and investigations have been fruitless because of a failure to turn up any evidence.
- A basic axiom of civil and criminal law, put bluntly, states: no evidence, no case.
- The effectiveness of the prosecutor – or in disciplinary hearings, the case presenter or company representative – and attorney/advocate in the courtroom is primarily determined by the evidence at his or her disposal.
- Fact finders in a case, a judge or a magistrate can render a just verdict only on the merits of adequate accurate evidence.
- The evidential findings of an investigator may make an out-of-court settlement the better part of wisdom.
- Proof is produced by a preponderance of evidence (civil)/on a balance of probability or by evidence beyond reasonable doubt (criminal cases), but proof is separate from the evidence that produces it.

The ultimate objective of an internal forensic capability is to assist the organisation in providing assurance of support and governance (Eskom, 2004:3). Forensic Investigations, now called the Forensic and Anti-Corruption Department, was established to assist in achieving this objective through the following:

- Provision of reporting mechanisms for crimes and irregularities (e.g. sexual harassment);
- Investigation of such crimes and irregularities with a view to corrective action;
- Implementation of crime prevention and detection strategies throughout the organisation; and
- Provision of assistance and advice to management as and when required.

#### 4.4.1 The admissibility of evidence

Joubert (2001:346) confirms that evidence will never be admissible in court if it is not relevant. Evidence is only relevant if it supports one or more facts in the issue under dispute. If a party thus presents evidence that does not support, in one way or the other, the facts in dispute then this evidence will be inadmissible in court. Joubert further states that not all relevant evidence is necessarily admissible in court. If the evidence has not been collected in the prescribed manner, or has been collected in an unconstitutional manner, it will also be inadmissible in court.

Travers (2005:178-179) came to the conclusion that tests of admissibility are applied to all evidence. Three principal tests for admissibility must be met before testimony or physical evidence is allowed into evidence:

- Relevancy. In a sexual harassment investigation this will be the relation between the evidence and the fact that has to be proved. For instance, from the evidence collected – e.g. witness statements – did the conduct occur in the workplace – fact to be proven.
- Materiality. In a sexual harassment investigation the evidence must be related to the case that needs to be proved but it must also combine the fact with the issue of the law; e.g. testimony that is material to the case.
- Competency. This would relate to evidence that is qualified, reliable and suitable for the case in point. For instance, does the evidence have the ability to withstand the truth?

#### 4.5 COLLECTION OF EVIDENCE

The collection of physical evidence is a two-step procedure. The investigator first searches for and collects all large, obvious items. Following this initial collection, the smaller items of physical evidence are collected (Gilbert, 2004:106). Corporate investigators do not necessarily involve themselves with real evidence, such as liquids and fingerprints (Gilbert, 2004:106). In disciplinary matters, investigators rely mostly on people and documents to prove their cases.

According to Gilbert (2004:106), after an item of evidence is located and recorded in field notes, it must be properly marked. Bennett and Hess (2004:93) confirm that how evidence is collected directly influences its later value. The investigator

needs to collect and identify all objects that are or may be considered to be evidence, leaving the final decision regarding the relevance of the objects to the prosecutor. In a disciplinary hearing the Eskom case presenter fulfils the role of the prosecutor and the final decision regarding what is used as evidence resides with him/her. Furthermore, collecting evidence requires judgement and care.

Should an investigator fail to identify or safe keep evidence properly, the value of laboratory analysis is reduced to a minimum (Van Rooyen, 2001:590). It is important for the investigator to ensure that evidence is properly packaged for its safekeeping and preservation (Lee & Harris, 2000:269). Marais (1992:13-14) explains that preservation implies maintaining evidence without altering, tampering, contamination, loss or injury. Prinsloo (1996:42) contends that the importance of maintaining physical and evidential integrity of samples at all times is generally acknowledged, and the practice is closely observed by the defence.

It is legally required that the location and condition of evidence at the time it was collected is described, to assist in establishing that from the time of its collection until its presentation in court, the evidence was continuously kept in proper safekeeping (Dempsey, 2003:64).

Careful packaging maintains the evidence in its original state, preventing damage or contamination. Each item needs to be packaged separately in a durable container for the integrity of evidence to be maintained (Bennett & Hess, 2004:94).

To the question: "How should evidence be collected in investigations of sexual harassment?" the participants from Sample A responded as follows:

- Thirteen participants responded that they did not know how to collect evidence in investigations into incidents of sexual harassment.
- Seven participants indicated that evidence should be collected by adhering to the rules of the Law of Evidence and within the framework of the Constitution.
- Two participants responded that the investigator should collect such evidence carefully.

- Two participants indicated that the investigator should not contaminate the evidence when collecting it.
- One participant responded that the investigator should conduct interviews to ascertain what occurred.
- One participant responded that the investigator should collect the evidence in such a manner that it is admissible in court.
- One participant responded that the investigator should collect evidence in line with the Constitution by respecting people's rights.

The question was not presented to the participants from Sample B as this question focused on the role players employed by Eskom.

Thirteen of the 27 participants from Sample A did not know how to collect evidence in investigations that relate to incidents of sexual harassment. This can be ascribed to the fact that although these individuals are highly qualified, their qualifications do not necessarily relate to the field of investigation. Fourteen of the 27 participants from Sample A mentioned at least one method of collecting evidence, which was in line with the comments of researchers such as Dempsey, Lee and Harris, Marais and Van Rooyen. Although the Eskom procedures stipulate that various role players in Eskom can deal with incidents of sexual harassment, the participants from Sample A have very limited exposure to these types of incidents.

#### 4.6 TYPES OF EVIDENCE

An investigator may come into contact with different types of evidence during the investigation of a crime (Joubert, 2001:357-373). In the following section some of the types of evidence that an investigator may need to collect in the investigation of incidents of sexual harassment are presented.

##### 4.6.1 People (statements/oral testimony)

One type of evidence is verbal evidence of people testifying. This may include a person who may have witnessed an act of sexual harassment in the working environment; e.g. a manager touching an employee's breasts (Joubert, 2001:357).

This view is supported by Van Rooyen (2008:108), who argues that people are one of the four primary sources of evidence.

Olivier indicates that when obtaining evidence from people it is usually in the form of statements. The investigator should ensure that all the elements of the crime (sexual harassment) are covered in the statement. There are specific standards to test the body of a statement. These standards are: accuracy, completeness, conciseness, honesty and objectivity (Olivier, 2012:61-62).

Joubert (2001:342) explains that oral evidence is usually presented under oath, orally and is subjected to examination. The oral testimony of a witness is the best known type of evidence given by witnesses in court under oath (Adams et al., 2004:4).

The researcher (investigator) would obtain sworn statements from the witnesses to corroborate/refute the statement of the complainant/victim. These statements will be obtained in a private area where there are no interruptions. It becomes clear in this research that it is important not to ask a witness leading questions that will "force" the witness to give the answer that the researcher would want. These indiscrepancies can be used by the union representative of the suspect during the disciplinary hearing to the advantage of the suspect. It is best to let the witness speak freely and to record their responses accurately.

From experience the researcher found that often whilst interviewing various witnesses in the office, other complainants would at times surface relaying their ordeals with the suspect. These statements will also act as evidence to strengthen the case of the victim / complainant.

When interviewing the suspect and obtaining his/her statement, in an effort to be fair and to treat the suspect with dignity and respect, the researcher would inform the suspect well in advance that she will be interviewing him/her with regards to the allegations against him / her. The suspect will be informed that he/she has the right to representation in the form of either a union representative or a fellow employee, should he/she so wish. The researcher would further inform the

suspect that this interview/statement will be his/her opportunity to state their side of the case. The researcher also makes it clear to the suspect that their chosen representation will not be allowed to speak on their behalf, but will merely act as “support” to the suspect and as witness that the suspect was treated fairly.

Experience has taught the researcher to always have a member of the opposite sex, of the same race as the suspect present when obtaining a sworn statement from the suspect. The role of the witness investigator would be to testify to the process followed during the interview and this investigator can play a vital role in for instances cases where language might be a barrier. The mentioned information is all captured in a sworn statement given by the witness investigator to be used as evidence at the disciplinary hearing, if the facts are disputed by the suspect.

In cases where the suspect waives his/her right to representation, it is important to record this in the sworn statement of the suspect and the witness investigator will bear testimony to this, as well as the fact that the suspect chose this route of his/her own will and was not forced by the researcher to do such. If this waiver is not recorded properly in the sworn statement of the suspect, he/she would try to use this fact as evidence at the disciplinary hearing that the researcher (investigator) did not inform the suspect of their right to representation.

In the unlikely event that a complainant/victim has fabricated facts, the witness statements can also serve the purpose of confirming the general demeanour between the complainant and the suspect in the office environment. These witnesses are very often able to testify that both parties have engaged in similar behaviour previously and neither party were uncomfortable with such then. The same statements can also prove valuable as evidence with regards to the behaviour of the suspect or victim towards other employees in the office e.g. perhaps an employee has worked for years with for instance the suspect, and he/she has never experienced sexual harassment by the suspect, even when alone in their presence.



#### 4.6.2 Real evidence/things

Real evidence comprises objects; e.g. the murder weapon (Joubert, 2001:357). This is not applicable in the working environment, unless the crime committed is an attempted rape or sexual assault, which would then become a criminal matter for investigation by the SAPS. Van Rooyen (2008:108) points out that there are many forms of real evidence, which include material objects, substances, impressions, prints, stains, marks, transfer evidence, liquids, secretions and the like.

Should the victim employee have experienced a rape or attempted rape incident (which would fall under the category of sexual harassment called physical harassment), the investigator would firstly obtain medical assistance and accompany the employee to the nearest hospital to try and minimise the trauma associated with these types of incidents. In an effort to streamline the process of reporting such an incident to the SAPS, the researcher would contact the relevant police station beforehand to enquire which is the closest hospital that does have a rape kit available to collect the evidence. Victims often don't report such an incident immediately; especially in the workplace; and by the time of reporting, the physical evidence might not be available anymore. The researcher would also obtain a sworn statement from the victim, in a private enclosed area. Based on her own experience, the researcher has found that the victim is less traumatised by dealing with one person continuously, instead of having to relive the trauma over and over again by repeating the incident to different strangers i.e. SAPS officer, district surgeon, Forensic and much later the Eskom councillors from EAP. The employee will then be offered EAP assistance and the researcher will facilitate this service.

#### 4.6.3 Documents

Documents are public and private records, and relevant documents, and include all types of writings as defined in the rules of evidence, which the investigator may obtain from government or private sources and present as material documentary evidence (Van Rooyen, 2008:108). Joubert (2001:357-373) argues that documents are another type of evidence that an investigator may come across;

e.g. public and private documents such as letters containing explicit pictures or photos that an offender has given to a victim of sexual harassment.

Three basic rules must be followed before a court can rely on documentary evidence (Schwikkard, Skeen, Van der Merwe, De Vos, Terblanche & Van der Berg, 1997:260):

- The authenticity of the documents must be proved. In a sexual harassment investigation this would indicate the genuineness of the document; i.e. was this document tampered with?
- The original document must be available for perusal. Where a suspect has sent an explicit photograph of him/herself to the victim using the email facility, although a print-out of the photograph will be available, at the same time, a cloned copy of the hard drive of the suspect would be available should the chairperson wish to view the offending photograph from the suspect's computer.
- The contents of the documents must be relevant to the facts. If, for instance, an explicit photograph was sent to the victim, this would be relevant to a charge of sexual harassment.

Furthermore, in *S v Ramgobin 1986 (4) SA 117 (17)* it was ruled that both video- and audio tapes are documentary evidence. CCTV footage falls within the category of video recordings.

The admission requirements for CCTV footage play an important role in the investigation of sexual harassment as well as the disciplinary hearing that follows. For CCTV footage to be admissible in court it must have been obtained legally and procedurally and have been managed correctly (Gilbert, 2004:58).

At some Eskom premises CCTV cameras have been installed, where the footage obtained may be valuable evidence to confirm or refute the allegations of sexual harassment. On the basis of her own experience in the field, when conducting a sexual harassment investigation, the researcher would approach the relevant custodian at Protective Services /Crime Risk Services within Eskom to obtain a copy of the required footage. A sworn statement was then taken from this

custodian confirming that they were the only person that had access to the footage and that nobody had had the opportunity to tamper with the evidence. Furthermore, once a copy of the footage is obtained, the investigator would maintain the chain of custody and keep the evidence locked in her standing safe until such time that it was used at the disciplinary hearing.

#### 4.6.4 Computer-generated evidence

The most significant function of a computer is to process and store information. The product of this stored information is usually a printout in documentary form (De Villiers, 2008:8). De Villiers states that computer printouts are copies of the original documents which are stored in electronic format. The researcher's experience and knowledge indicate that perpetrators in Eskom normally send offensive/suggestive emails, photographs and sms messages to the victims of sexual harassment. Copies of these emails, photographs and sms messages are then presented as evidence in the disciplinary hearing.

Drawing on her own experience, there is normally two ways in which computer-generated evidence can be collected within Eskom:

- Externally by utilising a contracted service provider, or
- Internally, by utilising a dedicated person in-house employed by Eskom's Information Technology (IT) provider

If the client does have budget availability to contract an external service provider, the investigator would facilitate the cloning of the suspect computer at the relevant Eskom offices. Suspects are not warned beforehand if a cloning exercise is going to take place. The researcher would liaise with the relevant line manager beforehand to ensure that the suspect employee will be at work on the date in question. The investigator as well as the suspect employee would be present when the cloning exercise is done, and as the process unfolds, the external expert would explain to the suspect what is taking place and answer any possible questions that he/she might have. The expert would normally ask the suspect employee to verify the serial numbers of the brand new external hard drives that are used for the cloning and the suspect employee will after verification, sign the relevant declaration where this information is captured on. It is important that the

seals on these hard drives be broken in the presence of the suspect employee. By following this procedure no room is left for the suspect employee to later allege that evidence was planted on the hard drives.

The above-mentioned process takes minimal time, depending on the amount of information on the cloned hard-drive, and it works well especially in the case of computers that are vital to the running of the business and that cannot be removed from the Eskom premises.

The computer expert will after the cloning exercise seal one hard-drive immediately in the presence of the suspect, and the other will be used as a "working copy". The computer experts are ex-SAPS computer forensic experts and they are well trained on how to deal with these two hard drives. One hard-drive is kept in a safe, to which only the computer expert has access and will be used, if need be, at the disciplinary hearing, should the suspect employee question any evidence found on the hard drive. By analysing the evidence found on the second cloned hard-drive, the computer expert will furnish Forensic with a report detailing all the evidence found, including detail such as dates sent and received, times sent and received etc. The computer expert is then later called as an expert witness to testify at the disciplinary hearing.

Although it is advisable to conduct the cloning exercise on the Eskom premises in the presence of the suspect employee, if circumstances dictate such, the computer can be removed from the premises to be cloned at the office of the expert. This practise would normally prevail if the suspect is very hostile and tries to interfere with the expert fulfilling his duties. A computer is often also removed from the Eskom office to be cloned elsewhere in an effort to minimise reputational damage to the suspect employee and to keep the investigation highly confidential. If this is the case, an independent witness should be called i.e. the local crime risk officer or manager of the suspect employee, to witness the sealing of the computer. The researcher would also take photographs of the condition in which the computer was received, ensuring to photograph all serial numbers, as well as all visible ports. The researcher would then by using paper and packaging tape, seal the computer completely, ensuring that all the ports are covered. The

researcher as well as the independent witness would then sign on the tape and record the date and time of the collection. A sworn statement will also be obtained from the witness confirming the above, and if necessary, this witness will be called to testify in the disciplinary hearing.

When handing the sealed computer over to the expert for cloning, the expert will repeat the same process as mentioned above, recording in a sworn statement the date and time when he received the computer as well as the condition it was received in.

#### 4.6.5 Photographs and films

Photographs are presented to prove what has been recorded by the camera (De Villiers, 2008:6). Also, a photograph, similar to a piece of paper, is sometimes regarded as real evidence. Murphy (1999:387) contends that a photograph introduced as identification evidence does not constitute hearsay evidence but real evidence. The researcher can confirm that, based on her knowledge and experience, there have been cases in Eskom where the perpetrator has delivered nude photographs of himself to the victim.

Joubert (2001:357-373) confirms that photographs and films are another type of evidence that an investigator may collect. These types of evidence are often sent via electronic means to the victims; e.g. via cell phone or laptop. This also applies to video- and audio recordings of offending material that offenders send to their victims either via email or by using their Eskom subsidised cell phone.

Van Rooyen (2008:108) notes that personal observations, which are made up of knowledge obtained from the investigator's own personal efforts involving what he has seen, discovered, learned and observed, can be seen as a primary source of evidence. In presenting relevant information the investigator often employs varied forms of demonstrative evidence such as sketches, diagrams, casts of impressions, objects and photographs or moving pictures (videos), which help a client or judge or magistrate to visualise the evidence the investigator has discovered or observed.

The corporate investigator, however, depending on the type of sexual harassment that has occurred, generally relies on people, documents, computer-generated evidence, photographs, films and sms messages to assist in proving/disproving the sexual harassment under investigation.

Based on her own experience, the researcher will collect sms evidence in one of two ways:

1. If the victim's cell phone is compatible – these would normally be the older model cell phones - a copy is made on the photocopier of the offending message, with the time, date and the identifying cell phone number clearly visible. These copies are then attached to a sworn statement from the victim employee and are all dated and signed by the victim employee as well as the investigator
2. The newer cell phones however, does not allow for the screen to be copied. The researcher would either advise the victim employee to forward the offending messages to her own email address or to visit her specific cell phone provider to give her a print-out of the offending messages / photos received. Whichever route the victim follows, the evidence is attached to a sworn statement taken from the victim and is used later in the disciplinary hearing.

It is also an option to request from the suspect employee his cell phone printout, but the researcher has never experienced a suspect employee that is willing to provide such information.

#### 4.7 SUMMARY

This chapter dealt with the investigation process, what a crime scene is and the different types of search methods that can be used when processing a crime scene. This chapter also dealt with the concept “evidence” and with the importance of evidence and how to collect it. Lastly, the chapter examined the different types of evidence and identified the types that may be applicable to the investigation of an incident of sexual harassment.

## **CHAPTER FIVE**

### **FINDINGS AND RECOMMENDATIONS**

#### **5.1 INTRODUCTION**

The aim of this study, which was to research guidelines for conducting investigations into incidents of sexual harassment in Eskom, was achieved.

The following research purposes were achieved:

- Investigation of Eskom procedures/policies relating to incidents of sexual harassment, with the specific intention of weighing up their strengths and weaknesses;
- Conducting a literature review of both national and international studies to gather information on best practice;
- Concluding with recommendations for the possible improvement of the Eskom policies and procedures;
- Providing guidelines to empower the various role players with the knowledge that will assist them in conducting investigations into incidents of sexual harassment in a consistent manner.

The following research questions were formulated and addressed in this study:

1. What are the legal requirements to prove the elements of sexual harassment?
2. What are the investigative guidelines to be followed in Eskom to identify and individualise sexual harassment?
3. How should evidence be collected to prove the disciplinary offence of sexual harassment?

Primary findings as noted below address the research questions and aims directly, whereas secondary findings have relevance to the primary findings.

#### **5.2 FINDINGS**

The findings are based on information that was obtained from international and national sources and from the responses received from the participants interviewed for this study.

## 5.2.1 RESEARCH QUESTION 1

### LEGAL REQUIREMENTS TO PROVE THE ELEMENTS OF SEXUAL HARASSMENT

#### 5.2.1.1 PRIMARY FINDING

- Evidence should be first identified and then collected, marked, packed and preserved in such a manner that there is no opportunity for anyone to tamper with or contaminate the evidence. Only relevant evidence should be collected and presented in incidents of sexual harassment.
- None of participants from Sample A knew what the legal requirements were to prove the elements of sexual harassment whereas the participants from Sample B were aware of the legal requirements.

#### 5.2.1.2 SECONDARY FINDINGS

##### 5.2.1.2.1 CRIMINAL INVESTIGATION

- Criminal investigation is a methodical, calculated process that consists of certain components, such as information, recognition, gathering and preservation of information and its evaluation (Caldwell, 1965; Du Preez, 1996; Gilbert, 2004).
- Of Sample A, 56% knew what criminal investigation was and the rest of the sample (44%) did not know. There is thus no agreement concerning the definition between all the participants from Sample A.
- All of Sample B knew what criminal investigation was.

##### 5.2.1.2.2 WORKPLACE DEFINITION OF SEXUAL HARASSMENT

- The Eskom Procedures 32-61 (2006:4) and 32-1115 (2011:4) compare favourably with the 1998 and Amended 2005 Code (South Africa,1998) in that they define sexual harassment as “Any unwelcome or unwanted conduct of a sexual nature, occurring in the workplace, that causes discomfort, humiliation and thereby interferes with the victim’s ability to perform their work”.



- This question was only posed to Sample A and 41% knew this definition. Of the participants 59% did not know what sexual harassment was and had different opinions on its definition.

#### 5.2.1.2.3 LEGAL DEFINITION OF SEXUAL HARASSMENT

- The 1998 and Amended 2005 Code (South Africa, 1998) defines sexual harassment as “any unwelcome or unwanted conduct of a sexual nature, occurring in the workplace, that causes discomfort, humiliation and thereby interferes with the victim’s ability to perform their work”.
- A total of 41% of the participants from Sample A knew what sexual harassment was. The other 59% were either very vague in their responses or were only aware of one or two parts of the definition of sexual harassment.
- Both participants from Sample B agreed with the legal definition of sexual harassment as specified by the literature.

#### 5.2.1.2.4 LEGISLATION GOVERNING SEXUAL HARASSMENT

- Sexual harassment is governed by the Constitution of the Republic of South Africa Act, the Labour Relations Act, the Employment Equity Act and the Promotion of Equality and Prevention of Unfair Discrimination Act. Most important is the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace (South Africa, 1998).
- Only 26% of the participants from Sample A were aware of the above-mentioned legislation whereas 74% of the participants were either not aware of any legislation that would apply to sexual harassment or could only name one or two of the Acts mentioned above. There was thus no agreement between the majority of Sample A on the legislation.
- Some 50% of Sample B was aware of all the legislation and 50% was not aware of it.

#### 5.2.1.2.5 EVIDENCE

- Evidence is all the information that is presented to a court or a hearing to enable the court or the chairperson of the hearing to decide on a factual issue (Joubert, 2010; Travers, 2005; Van Rooyen, 2008).

- Of the participants from Sample A, 93% were well aware of what evidence is. Only 7% of the Sample A participants did not know what constitutes evidence.
- Both participants from Sample B knew what evidence is.

#### 5.2.1.2.6 CHAIN OF EVIDENCE

- A chain of evidence is used to keep the integrity of the evidence intact to ensure admissibility in court (Gernant, 2010; Van Heerden, 1976, Van Rooyen, 2008).
- Only 44% of Sample A participants knew what a chain of evidence was. Thus, the majority of the participants (56%) did not know what a chain of evidence was.
- All participants from Sample B knew what a chain of evidence was.

#### 5.2.1.2.7 BURDEN OF PROOF

- According to the literature (Gilbert, 2004; Joubert, 2010; Travers, 2005), the “burden of proof” is a metaphorical expression for the duty which one or other of the parties has of finally satisfying the court that he/she is entitled to succeed in his claim or defence.
- A total of 67% of Sample A participants supported the viewpoints of the literature reviewed, when stating that the person who alleges must prove what he/she alleges. Some 33% of Sample A participants did not know what burden of proof is.
- Both Sample B participants knew the meaning of burden of proof.

### 5.2.2 RESEARCH QUESTION 2

#### INVESTIGATIVE GUIDELINES TO IDENTIFY AND INDIVIDUALISE SEXUAL HARASSMENT

##### 5.2.2.1 PRIMARY FINDING

- None of the Eskom sexual harassment procedures give guidelines to the role players on how to investigate any incidents of sexual harassment in Eskom as far as the identification and individualisation of the crime is concerned, as well as the collection of evidence.

- There was confusion among all the participants from Sample A with regard to the investigation of incidents of sexual harassment and only 26% of this sample understood what was meant by identification of the crime. None of the participants from Sample A knew how to individualise the suspect in a sexual harassment investigation.

## 5.2.2.2 SECONDARY FINDINGS

### 5.2.2.2.1 PROCEDURES TO BE FOLLOWED WHEN INVESTIGATING INCIDENTS OF SEXUAL HARASSMENT IN ESKOM

- According to both of Eskom's sexual harassment procedures, employees should report incidents of sexual harassment to their manager or supervisor. Should an employee feel embarrassed about approaching the manager or supervisor for assistance and advice, they may approach: the Ethics Office, HR consultants/managers, union representatives, employee wellness practitioners, employee relations practitioners, IR practitioners, Forensic Investigations and occupational health practitioners. Mention is made in the procedures of a formal and informal process that can be followed when dealing with such incidents.
- There was no consensus between the participants from Sample A and none of them knew what procedure to follow during the investigation of incidents of sexual harassment.

### 5.2.2.2.2 IDENTIFICATION

- Identification of items of evidence means that the items share a common source and can be classified or placed into groups with all other items having the same properties. This means that these items belong to the same group or category (Fischer, 2004; Du Preez, 1996).
- Only 26% of the Sample A participants knew the meaning of "identification", which meant that 74% did not know what identification was.

### 5.2.3 RESEARCH QUESTION 3

#### HOW SHOULD EVIDENCE BE COLLECTED TO PROVE THE DISCIPLINARY OFFENCE OF SEXUAL HARASSMENT?

##### 5.2.3.1 PRIMARY FINDING

###### 5.2.3.1.1 COLLECTION OF EVIDENCE

- Evidence should be collected in the prescribed manner. Evidence should be identified as relevant to the sexual harassment incident under investigation; it should be collected in such a manner that there is no opportunity for tampering, altering or contamination. Evidence such as video footage, email/sms messages must be preserved in a safe that only the investigator has access to. The evidence must be clearly marked with a case number and details of investigating officer. The crime category must be listed, with the date, time place of collection and the division in Eskom where the irregularity took place. The type of packaging used for a specific piece of evidence depends on the type of evidence collected. Computer hard drives, for instance, must be packaged in brown envelopes to prevent condensation or damp and be kept away from any electronic equipment that can damage the evidence. This information on the collection of evidence was based on the viewpoints of Bennett and Hess (2004), Gilbert (2004) and Van Rooyen (2008).
- None of the participants from Sample A knew how to collect, mark and preserve evidence. This question was not posed to the participants of Sample B as it related to the internal investigation of incidents of sexual harassment in Eskom.

### 5.3 RECOMMENDATIONS

#### 5.3.1 RESEARCH QUESTION 1

##### 5.3.1.1 LEGAL REQUIREMENTS TO PROVE ELEMENTS OF SEXUAL HARASSMENT

- It is recommended that the various role players are familiarised with and more exposed to the concept of investigation, including forensic

investigation and criminal investigation, as an essential requirement for successful prosecutions, or in this case disciplinary hearings.

- It is also recommended that role players should be frequently made aware of their responsibility to be conversant with and well informed regarding Eskom's sexual harassment procedure to be able to fulfil their duties and responsibilities in an exemplary way through continuous training.
- It is recommended that the different role players gain sufficient knowledge and experience through training and practical exposure regarding the handling of incidents of sexual harassment, from the reporting stage to the presentation of evidence and ultimately successful prosecution.
- It is recommended that those individuals that are mandated to deal with this very serious and sensitive matter receive sufficient training and exposure based on a well-developed training curriculum to ensure consistency in the handling of incidents of sexual harassment that would in due course lead to consistency in disciplinary action being taken against perpetrators.
- It is recommended that role players that are mandated to deal with incidents of sexual harassment not only possess "people skills" but also forensic skills and knowledge. This should include knowledge of how to collect evidence to ensure that it is not inadmissible in a disciplinary hearing and what concepts such as the chain of evidence and burden of proof mean. The neglect of "small details" can seriously jeopardise such an investigation, which may result in perpetrators getting off "scott-free" due to a technicality such as evidence not being collected and preserved correctly. Role players should thus be further developed by attending relevant training courses/workshops that will strengthen these skills and knowledge.

### 5.3.2 RESEARCH QUESTION 2

#### 5.3.2.1 INVESTIGATIVE GUIDELINES TO IDENTIFY AND INDIVIDUALISE SEXUAL HARASSMENT

- It is recommended that Eskom issues guidelines for the various role players on how to deal with incidents of sexual harassment so that all parties are on par with the guidance given to deal with this serious matter.

- It is recommended that the various role players meet on a quarterly basis to share information and lessons learnt. During these meetings gaps in the skills of the role players can be identified and further training suggested, so that all parties receive the same training.
- It is further recommended that role players identify and attend courses at institutions such as the University of Pretoria on identification and individualisation.

### 5.3.3 RESEARCH QUESTION 3

- It is recommended that less knowledgeable role players follow more experienced role players and in this manner gain valuable knowledge and practical experience on how to collect and preserve evidence correctly. There are also various short courses advertised on the internet with regard to this important concept.
- In adhering to this recommendation, role players will be exposed to the importance of collecting and preserving evidence correctly in the investigation of incidents of sexual harassment.
- There should be a constant search on how to collect evidence. Role-players should analyse previous cases of sexual harassment that was investigated in an effort to learn how this evidence was collected in the past.

## 5.4 CONCLUSION

Employers are obliged to deal with sexual harassment complaints promptly and properly or face liability for damages claimed by the harassed employee even if the perpetrator is dismissed.

It is evident from the findings of this research that the participants of the research have various shortcomings when it comes to dealing with incidents of sexual harassment. It is of the utmost importance that role players know what sexual harassment is, and how these matters should be dealt with. These individuals should have extensive knowledge of Eskom's sexual harassment procedures as well as the Code of Good Conduct as embodied in the Labour Relations Act.

This study attempts to provide guidelines to role players that can be followed to identify and individualise sexual harassment. Following the correct guidelines consistently will go a long way to preventing employees from bringing civil actions before the court, when they litigate against employers who fail to deal with cases of reported sexual harassment. By following the same guidelines inconsistencies in action taken against perpetrators will also decrease.

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## **ANNEXURE C**

### **TOPIC: AN EVALUATION OF THE INVESTIGATION PROCEDURES IN ESKOM INTO INCIDENTS OF SEXUAL HARASSMENT**

#### Permission

**The researcher has obtained permission to conduct this research from Dr Steve Lennon, the then Managing Director, Corporate Services Division, Eskom Megawatt Park.**

#### Aim of the research

The aim of this research is to research the procedure in Eskom that needs to be followed when conducting investigations into incidents of sexual harassment within the admissibility rules.

Through this research, the researcher strives to present information that will provide guidelines to the various role-players in Eskom that deals with the investigation of incidents of sexual harassment, that will assist him/her to conduct a proper and thorough investigation, that will comply with the regulations of the Employment Equity Act, 1988 (Act 55 of 1998). This would then also mean that the manner in which internal investigations of this nature is conducted, will automatically make the progression from disciplinary to criminal action much easier, as the requirements of the Criminal Procedures Act would already have been adhered to. Investigations of incidents of sexual harassment would then also flow more smoothly through the Criminal Justice System (CJS).

Therefore, the researcher has focused on the following research questions:

1. What are the legal requirements to prove the elements of sexual harassment
2. What are the investigative guidelines to be followed in Eskom to identify and individualise sexual harassment
3. How should evidence be collected to prove the disciplinary offence of sexual harassment

**TOPIC: AN EVALUATION OF THE INVESTIGATION PROCEDURES IN ESKOM INTO INCIDENTS OF SEXUAL HARASSMENT**

**SAMPLE A**

Date : .....

Respondent no: .....

Name & Surname (if applicable): .....

Department: .....

I, ..... hereby consent to this interview.

.....

Signature

**A. HISTORIC INFORMATION**

1. What is your gender?
2. In which division of Eskom are you working?
3. What type of work are you doing in Eskom?
4. How are you involved in the investigation of incidents of sexual harassment in Eskom?
5. What is your experience in the field of sexual harassment?
6. Did you receive / undergo any training in the investigation of incidents of sexual harassment? If so, elaborate as to when you received the training, who presented it and what type of training it was.

**B. LEGAL REQUIREMENTS FOR A SEXUAL HARASSMENT INVESTIGATION**

7. What is Criminal investigation?
8. What is the workplace definition of sexual harassment?
9. What is the legal definition of sexual harassment?
10. Name any legislation pertaining to sexual harassment that can support the investigator whilst investigating incidents of sexual harassment?
11. What is evidence?
12. What is the "*chain of evidence*?"
13. What is the meaning of the term "*burden of proof*?"
14. What mandate do you have to investigate incidents of sexual harassment?

### C. GUIDELINES FOR THE INVESTIGATIVE PROCESS

15. Which procedure in Eskom needs to be followed when conducting investigations into incidents of sexual harassment?
16. What is identification?
17. How should one collect evidence when investigating incidents of sexual harassment?

- ENDS -



**TOPIC: AN EVALUATION OF THE INVESTIGATION PROCEDURES IN ESKOM  
INTO INCIDENTS OF SEXUAL HARASSMENT**

Permission

**The researcher has obtained permission to conduct this research from Dr Steve Lennon, the then Managing Director, Corporate Services Division, Eskom Megawatt Park.**

Aim of the research

The aim of this research is to research the procedure in Eskom that needs to be followed when conducting investigations into incidents of sexual harassment within the admissibility rules and the needs of the victim. This would apply to all the various role-players.

Through this research, the researcher strives to present information that will provide guidelines to the various role-players in Eskom that deals with the investigation of incidents of sexual harassment, that will assist him/her to conduct a proper and thorough investigation, that will comply with the regulations of the Employment Equity Act, 1988 (Act 55 of 1998). This would then also mean that the manner in which internal investigations of this nature is conducted, will automatically make the progression from disciplinary to criminal action much easier, as the requirements of the Criminal Procedures Act would already have been adhered to. Investigations of incidents of sexual harassment would then also flow more smoothly through the Criminal Justice System (CJS).

Therefore, the researcher has focused on the following research questions:

- What are the legal requirements to prove the elements of sexual harassment
- What are the investigative guidelines to be followed in Eskom to identify and individualise sexual harassment
- How should evidence be collected to prove the disciplinary offence of sexual harassment

**TOPIC: AN EVALUATION OF THE INVESTIGATION PROCEDURES IN ESKOM INTO INCIDENTS OF SEXUAL HARASSMENT**

**SAMPLE B**

Date : .....

Respondent no: .....

Name & Surname (if applicable): .....

Department / Section : .....

I, ..... hereby consent to this interview.

.....

Signature

**A. HISTORIC INFORMATION**

18. What is your gender?

19. Where are you working at present?

20. What type of work are you doing?

21. How are you involved in cases of sexual harassment?

22. What is your experience in the field of sexual harassment?

23. Did you receive / undergo any training pertaining to sexual harassment? If so, elaborate as to when you received the training, who presented it and what type of training it was.

**B. LEGAL REQUIREMENTS FOR A SEXUAL HARASSMENT INVESTIGATION**

24. What is criminal investigation?

25. What is the legal definition of sexual harassment?

26. Name any legislation pertaining to sexual harassment that can support the investigator whilst investigating incidents of sexual harassment?

27. What is evidence?

28. What is the "*chain of evidence*?"

29. What is the meaning of the term "*burden of proof*?"

**C. GUIDELINES FOR THE INVESTIGATIVE PROCESS**

30. What is identification?