

Date: 12 January 2024

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TO: Department of Education (Respondent)

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Dear Colleagues,

RE: ARBITRATION AWARD

CASE NAME: PSA obo MPANDANA N vs DOE-EC
CASE NUMBER: ELRC324-22/23EC

I transmit herewith a copy of the arbitration award for the above-mentioned matter for your attention and information.

The matter is now closed.

We thank you for your co-operation in this regard.

Kind regards

General Secretary
Education Labour Relations Council

OFFICE OF THE GENERAL SECRETARY

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ARBITRATION AWARD

Case Number: ELRC324-22/23EC
Commissioner: Mbulelo Safa
Date of Award: 12 January 2024

In the ARBITRATION between: -



PSA obo MPANDANA NOMABHULU

Applicant

And

DEPARTMENT OF EDUCATION – EASTERN CAPE

Respondent

DETAILS OF THE HEARING AND REPRESENTATION

1. The matter set down as arbitration on the 20 February 2023, 14 April 2023 and 12 to 13 June 2023, 14 and 15 August 2023 and concluded on the 10 November 2023.
2. The Applicant was represented by Mr Gilbert Seakamela from the union PSA and the Respondent by Mr T. V. Liphaphang who is their Labour Relations Officer. Mr Siyabulela Mthembu provided the interpretation service throughout the case.
3. The proceedings were digitally recorded.

ISSUES TO BE DECIDED

4. Whether or not the Respondent acted fairly in dismissing the Applicant on the 01 August 2022 and to make an appropriate award in terms of section 193 of the Labour Relations Act.

BACKGROUND TO THE ISSUE

5. The Applicant was employed by the Respondent as a Deputy Chief Education Specialist: Circuit Manager (EDO) and based in the Alfred Nzo East District.
 6. She was dismissed on the 01 August 2022 after a disciplinary enquiry. At the enquiry she was given a sanction of demotion to Senior Education Specialist. The Respondent appealed the sanction of demotion to the appeal authority, the MEC. The MEC, after requesting the applicant to submit representations, changed the sanction to dismissal, which has since been implemented by the Respondent.
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8. The Applicant referred an unfair dismissal dispute to the ELRC. The dispute was not resolved at conciliation and it was referred to arbitration.
9. She is challenging both procedural and substantive fairness of her dismissal.
10. The relief sought by the Applicant is re-instatement, alternatively, implementation of the original sanction of demotion.

SURVEY OF EVIDENCE AND ARGUMENT

11. The Respondent submitted one bundle of documents and led oral evidence through six witnesses. The Applicant submitted one bundle of documents and led evidence through one witness.
12. At the conclusion of the arbitration the parties suggested to submit written closing arguments, which was granted and the date was set to be the 29 November 2023. Both parties submitted their arguments by that date.

INTERLOCUTORY APPLICATIONS

13. On the 14 August 2023 the Respondent submitted an application (without notice) for a witness to testify virtually as she was unable to come to the venue on that day due to transport problems and other commitments but was going to be available the following day. The Applicant objected to the witness testifying virtually citing the fact that the Respondent should have made transport arrangements. It was ruled that the application was not successful because of problems of connectivity of parties and the unpredictable load shedding. Subsequent to the ruling the matter was stood down for the following day when the witness was to be available.
 14. The following day, on the 15 August 2023, it was expected that the witness was to be available, as promised by the Respondent representative, but again the Respondent applied for virtual testimony saying the witness was held up in another matter in court. A promise was made to send proof that the witness was held up in another matter in court. The proceedings were stood down to wait for the proof before a decision was to be made whether or not to grant the virtual hearing request. After a
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wait of about an hour no proof was provided and the application for virtual hearing was again refused on the same reasons as above. Subsequent to this ruling the Respondent closed their case.

15. On the 10 November 2023 whilst the Applicant was about to be cross examined the Respondent representative submitted an application to re-open their case saying they wanted to bring the witness to rebut some evidence which emerged during the examination-in-chief of the Applicant. He also submitted an application once more for the virtual hearing of the same witness as above saying he or she again was unable to come to the venue. He also said he was even prepared to bring in another witness if the virtual testimony was not allowed. The Applicant opposed the re-opening of the case arguing that the Respondent should not have closed their case as they have always been aware that they needed the witness.
16. Having considered the fact that the date of the arbitration was agreed to by parties as early as August, there was sufficient time for arrangement to be made for the witness to come to the venue, the unfairness of the Respondent having to call a witness just because they want to rebut the piece of evidence of the Applicant as if there was not going to be cross-examination and given the fact that we were in the middle of the examination of a witness, the application to reopen the case at that stage was refused.
17. After the cross-examination of the Applicant there was no further application by the Respondent for the re-opening of the case.
18. In his closing arguments the Respondent representative argued that I was biased and had an interest in favour of the Applicant. However, the Respondent representative did not apply for my recusal, which would have been considered in terms of the ELRC rules.

RESPONDENT'S EVIDENCE AND ARGUMENT

19. The first witness of the Respondent was Nomakhosazana Somaxhama who is employed by the Respondent as Departmental Head at Emgodini Primary School (the school). She testified that she was also the Acting Principal at the school in March 2020 and the Circuit Manager at that time was
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the Applicant. She said she received all the support she needed from the Applicant even though they could not meet as it was during Covid-19.

20. She testified that in 2020 they received protective equipment(PPE) from the Respondent but at the school not all staff members received their share. She said the Applicant called her and advised that the school must top up the shortages by purchasing from their funds. Witness then sought the advice of the Applicant on how to go about procuring the material.
 21. She said the Applicant told her that she (Applicant) was going to buy the PPE for the school and they were in turn going to pay her (Applicant). She (witness) said she understood that this was not the proper way of procuring but at the time things were hectic and procuring the PPE was treated as an emergency.
 22. She said the Applicant told her that she (Applicant) was going to buy the PPE from Durban and send the invoice. When the witness suggested that she needed to convene the meeting of the School Governing Body (SGB) before making the decision the Applicant said she was going to call the Treasurer of the SGB herself. Applicant later called the witness to tell her that the SGB treasurer has agreed. Witness said the Applicant was not supposed to have talked to the members of the SGB. She (witness) later thought that whatever the Applicant was doing in assisting her was acting against the law.
 23. She said the Applicant later bought the PPE and said the total amount was R7 980. She also sent the witness a message with the name and banking details of the person to whom the payment was to be made. Applicant said she gave the banking details of someone else because she did not want her name to be associated with the transaction. The PPE that was to be bought was mainly sanitizer, face masks and face shields.
 24. She said when she (witness) was on suspension the Applicant called her and advised her to say the PPE were bought by the school on its own without her assistance.
 25. The witness said she did not have a chance to immediately deposit the money and the Applicant instructed her to take the cheque to her in Bizana. The witness sent a child with the cheque after the Applicant gave her the details of the car she was going to be driving.
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26. She referred to page thirty-two (32) and said those were the messages they exchanged with the Applicant when they were making arrangements about the payment.
 27. Witness said the Applicant brought the PPE and asked the witness to pick it up from her office. The witness brought the items to the school and asked the school clerk to count if all the items were there. After checking the clerk reported that the invoice did not have the stamp and that the sizes delivered were not the same as they were in the invoice. When told about the shortages the Applicant promised to deliver the outstanding items, but she never delivered them.
 28. Witness said whilst she was still acting as the principal she was called by the Applicant to her office and when there the Applicant suggested that they have some discussion privately.
 29. She said the Applicant showed her a letter which was saying the appointment of the principal at the school was going to proceed as previously the SGB had wanted it to be put on hold.
 30. She said the Applicant showed her (witness) a handwritten master list of people on her phone (picture). She said the Applicant suggested that they look at the list and identify who could be the principal of the school. Witness said she was not going to be able to choose from the list and said she was going to work with anyone who was going to make her the deputy principal. She said the Applicant then showed her (witness) the name of Mr Bonke Mtakasi which was in the middle of the list. Witness said she did not have the problem with the name of Mr Mtakasi.
 31. She said the Applicant promised to call both Mr Mtakasi and the members of the SGB. On Friday that same week the Applicant reported to the witness that she has met with Mr Mtakasi and also with the members of the SGB.
 32. The Applicant further advised that a meeting must be arranged between Mr Mtakasi and members of the SGB and that the witness was to meet Mr Mtakasi so that he can give her money for the transportation of the members of the SGB to the venue of the meeting.
 33. An arrangement was made and the witness met with Mr Mtakasi in the town of Bizana and he gave the witness money, which the witness said she did not count. Witness said she gave the money to
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the treasurer of the SGB, Mrs Gusha, and told her it was coming from Mr Mtakasi. Following that the three members of the SGB approached the witness to give them lift to a place called Magusheni where they were going to catch another transport to the meeting place. Witness suspected that they were going to meet Mr Mtakasi. She said she never received any feedback from this meeting.

34. Sometime later the Applicant informed the school that the interviews were to be held on the 03 July 2021. On the day of the interviews the witness said she was at the venue even though she was not the member of the panel.
 35. After the interviews she was informed that the successful candidate was Mr Mtakasi.
 36. The second witness of the Respondent was Mr Bantubonke Mtakasi who was employed as the principal of the school since 2020 after he applied for the post early in 2020.
 37. He said after he has applied for the post it was quite for a long time until around March 2020 when he received a phone call from the Applicant requesting that they meet concerning the post.
 38. He said they met at her office the following day and the Applicant told him that there was a post at the school and that the person who was targeted by the SGB for appointment has passed away. Applicant went on to say when she looked at the master list she saw his name and thought he could fit into the post. When asked if he was interested in the post the witness said he was and that was why he applied.
 39. Applicant went to tell the witness that she was going to make means for him to get the post by all means. She said the witness was going to be issued with the interview questions by the school clerk and that she has already spoken to the members of the SGB about the arrangement. When the version of the Applicant was put to him that the Applicant did not tell him that he was the chosen person for the post, he insisted that the Applicant said she recommended him for the post as he saw his work at Ubha School.
 40. Applicant then said he needed to pay her R30 000 in order to get the post. The witness said he apologized and said he could not afford the money as he trusted that he met the requirements of the post. They ultimately agreed that Mr Mtakasi was to pay R10 000 in three instalments of R3 500.
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The witness said he knew that it was wrong to agree to pay the money but he felt that if he did not pay someone else was going to be taken in the post. The Applicant also advised that the witness needed to give the members of SGB something. Applicant went further to say she was going to arrange for the witness to meet with the members of the SGB in a place where they were not known like in the KZN.

41. Before they could conclude the meeting the Applicant stated that the witness must not forget Ms Somaxhama as she is the one who recommended him for the post.
42. The witness was then given the cell number of the member of the SGB, Mrs Gusha who he was going to contact regarding the meeting and travelling expenses of the members to the venue.
43. He testified that two weeks later he received a call from Mrs Gusha who said she got his number from the Applicant. They arranged and agreed on the date of the meeting and the venue and how they were going to get the money for travelling. A week after that he received another call from Ms Somaxhama who asked for the money for the travelling expenses of the SGB members. They arranged to meet in town where he gave her R600.
44. On the date of the meeting he received a call from Ms Somaxhama who said she was coming with the members of the SGB. He waited for the members of the SGB at the place called Mantshangase and carried them in his vehicle to a turn off to Mzimkhulu. The three members of the SGB were Mrs Gusha, Mrs Londwa and another lady who later passed away.
45. He said the three members of the SGB said they each must be given R10 000 for the deal. The witness protested that he could not afford that money and at the end they agreed that he was going to give each R3 500 in installments of R1 500 when he gets the post. The SGB members then told him that they were going to arrange for him to get the questions for the interviews from the school clerk.
46. The witness said after this meeting there was a lull again. During the lockdown the Applicant again called the witness and told him not to forget the members of the SGB as they were hungry. Witness then sent R1 500 (R500 each) to the members of the SGB through FNB *e-wallet*. Sending the money by *e-wallet* was the suggestion of the Applicant since at that time it was lockdown and the movement

of people was not allowed. He also said at the time he was excited about getting the post and did not want to be suspected that he could not be trusted.

47. He was later invited to the interviews and before he could get to the interview room he received questions which were sent by *WhatsApp* to him by the school clerk. He said he could not read the questions as they came very late when he was about to get to the interview room. He admitted that the questions did not assist him as they came very late.
 48. When referred to the score sheets and it being pointed to him that members of the SGB who were not part of the meetings with him also scored him high, he conceded that the high scores were due to his performance at the interviews and not the agreement. He however insisted that the Applicant influenced the members of the SGB and that even though other members of the panel did not form part of the meetings but he could not say who said what to whom in the interview room. He further said that the fact that all members of the panel scored him at 24 showed that there was a certain discussion even though he was not there.
 49. He said that at around 16h00 on the day of the interviews when he was already in his home he received the scores from the interviews sent to his cellphone. He also received the recommendation form which was signed by the Applicant. These were followed by a message congratulating him.
 50. He said that after that day the Applicant kept on calling him to remind him about the payment. The witness said he was going to make the payment only after he got the post. He said the Applicant insisted that the witness must give her something even if it is a small amount as she needed it desperately. The other day the Applicant called him and said she was going to collect the money. They met at Nompumelelo School and he gave her R3 500 wrapped on a paper. He said the Applicant suggested that she get the money in cash so that it cannot be traced.
 51. After sometime the Applicant called him and advised that she had his appointment letter. In the call the Applicant said she was together with the members of the SGB at her office and the witness talked to Mrs Gusha on the phone. In the call Mrs Gusha advised the witness that the third member of the SGB who was involved in the deal has passed away and she suggested that the first payment must go her family in order to assist in the funeral arrangements and that the witness was to pay the remaining members at a later stage. The amount of R3 000 was then paid which, in addition to the
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R500 already paid, amounted to R3 500. After that he was introduced to the school as the principal on the 24 August 2020.

52. He said when he assumed duties at the school he found that Ms Somaxhama and the members of the SGB were no longer working in unity.
 53. He said that at some stage the leaves of the cheque book were stolen. On investigation it was discovered that the cheques were stolen by the school clerk on the instruction of some parent members of the SGB. He said they stole the cheques because they were angry that Ms Somaxhama was misusing the school money when she was the acting principal.
 54. He said he compiled a report about the incident and submitted it to the office of the Applicant. He said he later received a letter that he was being suspended because of the manner in which he was appointed as the principal.
 55. He was suspended, later disciplined and given a sanction of a fine of R7 500 and a written warning.
 56. The other witness of the Respondent was Andiswa Gusha who was the treasurer of the SGB testified that she first met the Applicant when she (Applicant) visited the school after the former principal of the school resigned. Applicant again came to the school when the handover was being done to Ms Somaxhama to take over as acting principal at the school.
 57. She said whilst the post of principal was still vacant they were invited by the Applicant to her office. Witness said she went there with Mrs Londwa on the 19 March 2020 and the Applicant advised them that the suggestion from the SGB that the appointment of the principal at the school be put on hold was not acceded to by the Respondent. She said the Applicant further told them that she previously met with Miss Somaxhama about the vacant post of the principal at the school.
 58. She said the Applicant showed them a picture on her phone which was a list with about twenty-two (22) candidates from another school called Maphakathi. She said in the list the Applicant pointed out at the name of Mr Mtakasi who was number five (05) on the list. She said the Applicant said the name was suggested by Ms Somaxhama. Witness said they did not know Mr Mtakasi but the Applicant said he was good at his work.
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59. Witness said they later met the Applicant at the funeral and the Applicant informed them that she has arranged that they meet with Mr Mtakasi the following week. She also gave them the cell number of Mr Mtakasi.
 60. She said the following week they (three members of the SGB) met Mr Mtakasi in Pakade and proceeded to Kokstad where they had the meeting. The transportation costs for attending the meeting were paid for Mr Mtakasi who gave them R600. It was in this meeting where Mr Mtakasi promised them R10 000. She also said that during the covid-19 Mr Mtakasi gave them R1 500. She denied the version of Mr Mtakasi that they asked for the R10 000 and said it was Mr Mtakasi himself who offered to pay them.
 61. She said that sometime towards the end of June 2020 there was a shortlist and Mr Mtakasi was shortlisted for the post of principal and the interviews were to be on 03 July 2020.
 62. When they had the meeting of the SGB to elect the panel they (members of the SGB) had discussions and they told the other members who did not attend the meeting with Applicant that the Applicant had recommended Mr Mtakasi.
 63. She said that before the start of the interviews they (members of the SGB) had arranged with the school clerk to send the interview questions to Mr Mtakasi as the Applicant had suggested that they appoint him. At the interview they gave Mr Mtakasi high scores because he was their preferred candidate. She was not sure if Mr Mtakasi used the questions that were sent to him.
 64. When one of the three SGB members who met Mr Mtakasi passed away the witness went to the Applicant and suggested the first payment be made to her family. Mr Mtakasi made the payment and the witness together with others took the money amounting to R3 500 to the family of the departed member of the SGB.
 65. She said they thought that they were going to get the rest of the money but they did not receive it. She said they thought they were going to be chased away from the school and they decided to cause chaos by instructing the clerk to steal cheques. They cashed one of the cheques in order to expose the wrongdoing at the school and later sent the whole cash to the school. They decided to cause the
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chaos because they could see that they were being sidelined by Mr Mtakasi and were not sure if it was Mr Mtakasi or the Applicant who did not want them to get the money. They also felt that the school funds were not used properly.

66. During the chaos they went to the District Director and informed him about how the principal was appointed at the school and that he was not giving them what he promised them. She said they also informed the ward councilor about what was happening and why they stole the cheques.
 67. With regards to the purchase of the PPE she said she received a phone call from the Applicant saying the PPE that was delivered to the school was short and therefore they needed to order some from the school funds to top up. This was confirmed by Ms Somaxhama (Somaxhama) the following day at school. A few days later she said she received a call from the Applicant saying she (Applicant) was going to buy the PPE for the school and the school was to refund her.
 68. After the call from the Applicant the witness called other members of the SGB and advised them to sign the cheque for R7 980. She said they did not follow the usual procurement process because they were instructed by the person they respected. She said they signed the blank cheque and gave it to Somaxhama. She said what was supposed to be an invoice was just a plain paper with a list of items. If it was a proper invoice it would have reflected the items and the price for each item. She said they were surprised that not all items were delivered.
 69. The other witness of the Respondent was Ms Neliswa Nqwempu (Neliswa) who is employed as the Administrative Clerk at the school.
 70. Neliswa stated that prior to the date of the interviews she was given the cell number of Mr Mtakasi by Ms Gusha (SGB treasurer) and was further advised to provide the interview questions to Mr Mtakasi before the interviews, which she did. She also said at the end of the interviews the Applicant came to her and asked her to take the picture of the signed recommendation form and send it to Mtakasi. This she also did.
 71. She testified that normally the procedure for procuring at the school was that they would ask for quotations and the procurement committee would meet to choose the cheapest service provider if
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the product was quality. She said however during the Covid-19 they did not follow the procurement process.

72. She said she and the treasurer of the SGB received a call from the Applicant informing them that the PPE that was delivered by the Department was not enough. She said even though she did not see the shortage but she suggested to the members of the SGB to sign the cheques since the instruction was coming from a senior person. The members of the SGB ultimately signed a blank cheque to make the payment. He confirmed that the cheque they signed was the one contained on page 31 of the bundle.
73. She said on a certain Monday the Acting Principal came with a small box with few items of PPE. The items in the box did not correlate with the items in the invoice. She also checked the cheque and found that it was written in the name of the person and not the name of the business. She advised the Acting Principal that the cheque should have been made into the name of the business.
74. She also noticed that the 'invoice' did not have the name of the business, registration number and stamp. When the acting principal was advised to bring the proper invoice she said it was the one they had. The invoice was filed but when they were preparing for the case it was no longer in the file. She said she did not ask its whereabouts as it was there when the files were taken by the investigator from Risk office.
75. She said she was asked by the chairperson, treasurer and another member of the SGB who passed away, to tear off cheque (steal) so that it could be revealed how the PPE were bought and how the post of the principal sold. They said they were going to cash the stolen cheques and when the principal (Mtakasi) discovers this they were going to blow the whistle that he did not pay them what he promised.
76. When the witness refused to 'steal' the cheques the three members of the SGB threatened her that they will say she cashed the R12 000 for her own benefit. She said by then the acting principal was also misusing the school funds and when the witness went to report to the Applicant she said they must wait for the new principal. Out of fear of losing her job over the R12 000, because she knew that the procedure was not followed in utilizing it, the witness cooperated with the plan to steal the cheques. She then tore the cheques and gave them to Ms Gusha (treasurer) who cashed one cheque

for R10 000. Ms Gusha then came to the school with the R10 000 cash and said they were going to keep the cash

77. When the principal (Mtakasi) discovered that some cheques and the R10 000 were missing he accused the witness of being involved and together with the SGB they asked the witness to write an admission letter, which she did. Mtakasi took the letter and reported the incident to the Applicant.
78. On the other hand, the SGB went to the District Director to report about the irregular procurement of the PPE, the bribery in the appointment of Mtakasi and the unfulfilled promise of R30 000.
79. She said their plan of exposing the wrong things at the school worked as they were at the arbitration because of the plan.
80. She confirmed that she gave Mtakasi the interview questions just after they were drafted by the interview panel. After the interviews she was also asked by the Applicant to send the results of the interview (signed recommendation) to Mtakasi. She said she took the photo of the signed recommendation form using her phone and sent the picture to Mtakasi.
81. The other witness of the Respondent was Mathukela Londwa who was the chairperson of the SGB in the period from 2020 to 2021.
82. She testified that the PPE was delivered by the Respondent to the school and there was so much of it to the extent that there was even little space to walk in the office. They were informed by Somaxhama that the Applicant called to say some people at the school did not get their share of the PPE. After this Somaxhama said they must sign the cheque for the supply of the PPE. They initially resisted saying they needed to follow the procurement procedures but when the Applicant also called insisting that they sign the cheque they ultimately signed it.
83. She said they later received a small box with few PPE items. There was also a printed paper which the school clerk said it was the invoice but to the witness it did not look like an invoice. She was informed by others that the amount on the paper was R7 980.

84. She said after the post of the principal at the school had been advertised they (witness, Gusha and Sheyi) were called by the Applicant to her office. Applicant told them that Somaxhama was at her office the previous day and had suggested that Mtakasi be appointed to the post of principal.
 85. When they said they did not know Mtakasi the Applicant told them that he was a good and religious person. The Applicant went on to say she was going to facilitate a meeting between them and Mtakasi.
 86. She said they travelled in Somaxhama's car which dropped them at a place called Mantshangase. When Somaxhama dropped them she gave them money wrapped in a piece of paper which she said they were going to use for the transportation expenses to the venue of the meeting. She said they met Mtakasi at a place called Pakade and they travelled in his car to the venue of the meeting.
 87. At the meeting Mtakasi promised to give them R10 000 each in return for him getting the post. He said this offer was coming from his heart. He told them that the Applicant had asked him to provide for them and give them 'tea'. After the meeting he bought them food and took them home. They regarded the provision of meals on that day as the start of greater things.
 88. On the day of the interviews he again called them and said they must each be given R600 to spend the night at the hotel.
 89. She also stated that Mtakasi promised to give each of them R10 000 and of the money they were promised they received only R3 500 which they took to the family of the SGB member (Sheyi) who had passed away. She further said the R1 500 that they received from Mtakasi for Covid-19 was not part of the R10 000 promised.
 90. At the interview venue the Applicant again trained them on how to take down scores and also told them to give more marks to Mtakasi. And indeed they all gave him scores between 4 and 5 because he was their preferred candidate. She said they gave Mtakasi high scores because they were told (by the Applicant) that she was the right candidate and they wanted the right person for the post.
 91. She said that after Mtakasi had assumed duties as the principal he started not to cooperate with them, school funds were misused and their suggestions were ignored. They then came up with the
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plan to steal the cheques. They initially asked the clerk to tear off one cheque and hide it but when it was not noticed by Mtakasi they asked the clerk to tear off three more cheques.

92. She said the tearing of the cheques had nothing to do with Mtakasi but with them protesting about the misuse of school money. They did not see anything wrong in what they did as they were exposing the wrongdoing. She said they wanted to steal the cheques while Somaxhama was still the Acting Principal but she always took the cheque book home.
 93. When Mtakasi noticed that cheques were stolen he called an SGB meeting and they decided that a case be opened with the police. Mtakasi (principal) also called a meeting of stakeholders to investigate the theft. The clerk was identified as the culprit and this was reported to the office of the Applicant.
 94. She said that by that time she and others had gone to the District Director to report that the Applicant was not attending to the problems they report to her. She said the Applicant kept on saying they must wait for the arrival of the new principal (Mtakasi).
 95. The District Director was shocked when they told him the reasons why they stole the cheques. After discussions they deposited R4 000 of the R10 000 back into the school account and kept the R6 000. They only deposited the R6 000 back when the case was being investigated.
 96. The last witness of the Respondent was Siyabonga Jilingana who is employed by the Respondent as the Assistant Director for Risk Management and whose work included conducting investigations on allegations of fraud and to compile reports accordingly.
 97. He said after receiving the allegations against the Applicant the Respondent's Risk Management office tasked him to investigate the allegations.
 98. As part of the investigation he inspected documents on procurement and the appointment process from the school. He also interviewed certain people including Somaxhama, Gusha, Londwa and Mtakasi.
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99. He said that his investigation revealed that there was nothing wrong with the purchasing of PPE but what was wrong was the fact that there were no supporting documents (quotations and invoices). For the expenditure of R7 980 there were no supporting documents except a copy of the cheque in the file. He was informed by Somaxhama that there was a request from the Applicant for the payment of the R7 980.
 100. Referring to page 32 of the bundle he said even though there is no mention of the name of the Applicant, it was established that the message came from her cellphone.
 101. According to the information he received from Somaxhama the payment did not correlate with the amount of PPE delivered. When he interviewed the members of the SGB they informed him that they were instructed by the Applicant to give Mtakasi more marks during the interviews. He was also informed by the school clerk that she provided interview questions to Mtakasi on the instruction of members of the SGB after they interacted with the Applicant where she suggested that they must appoint Mtakasi to the post.
 102. When he interviewed Mtakasi he informed him (witness) that he was called by the Applicant to her office sometime in March 2020 where the Applicant asked if he was interested in the post at the school to which Mtakasi responded in the affirmative. Mtakasi further informed the witness that the Applicant said he was going to facilitate a meeting between Mtakasi and the members of the SGB.
 103. He said that in all the interviews the people said they had nothing against the Applicant and were prepared to testify and also confident that the information they provided was correct.
 104. He said he tried to speak to the Applicant but she initially refused to talk to him but later said she would speak to him when she was ready. She later sent an email responding to the allegations. He held the view that the Applicant was not speaking the truth when she said in her statement she never had no communication with Mtakasi.
 105. He said he never received the invoice for the PPE and never got to know who was the recipient of the R7 980. He however, believed that the person was connected to the Applicant because she is the one who provided the banking details of Ntombikayise Didi to whose account the money was paid. He said he also went to the bank and was informed that the cheque was cashed by Didi.
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106. He also said the Circuit Managers were not allowed to be involved in the procurement for the schools and that it was his first time seeing the Circuit Manager being involved.
107. Referred to page 34 and 35 he said the documents there were directed to his supervisor and did not assist him in getting the supporting documents he wanted.

APPLICANT'S EVIDENCE

108. The Applicant, Nomabhulu Beauty Mpandana, testified that she started to work for the Respondent on 14 March 1991 and at the time of her dismissal she was occupying the post of Deputy Chief Education Specialist: Circuit Manager (Education Development Officer), a position she occupied since January 2009.
 109. She said the last circuit she was placed in was Mbongweni which had Emgodini Primary School as one of its schools.
 110. Referring to page 1 to 4 she said when the previous principal of the school retired she met the three members of the SGB who were active in the school. She was working with them together with the School Management Team (SMT). However, all the communication was done through the then Acting Principal.
 111. When she was at the school in the handover meeting for the then principal who was retiring she noticed that the cheque book counterfoils were blank. She said although there were bank statements she was not happy with the way the cheque book was utilized. In response the then principal who was retiring informed her that he (former principal) was overpowered by the members of the SGB.
 112. She said she never had any direct communication with the members of the SGB as her procedure was to always to communicate with the principal who in turn was to inform the SGB members and other educators.
 113. After the former principal retired an acting principal was appointed but he unfortunately passed away. She then sought the advice of the Human Resource Management (HR) of the Respondent as to who
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at the school qualified to be appointed as the acting principal. The person was identified as Somaxhama and she was duly appointed as acting principal of the school.

114. She said subsequent to the passing on of the acting principal they recommended in writing to the Respondent requesting that the appointment of the principal at the school be put on hold. When the request was turned down by the Respondent she communicated with the acting principal and invited the members of the SGB to meet her at the office.
 115. She said she ultimately met the three members of the SGB; Mrs Gusha and Mrs Londwa at the colleague's office on the 20 March 2023. In the meeting, after voicing her concern that it was not the full complement of the SGB she informed them about the response of the District Director on the request to put the appointment process on hold. She said she showed them the letter from the District Director and further told them that she was going to present the letter personally at the school after the lock down. She said her interaction with the SGB ended there.
 116. With regards to the evidence of the Respondent that she showed the master list to the members of the SGB at the office she said the procedure at the district was that the master list of applicants was only released to the circuit manager once the SGB has been trained and have elected their interview committee (panel). When she met the members of the SGB she did not have the master list and application forms and could therefore not have shown the members the master list.
 117. She denied that she ever made a request for Mtakasi to pay her R10 000. She said she did not know Mtakasi as she was not working directly with him. She said she only saw him for the first time when they were at a memorial service and he was the programme director. She said she also saw his name on the master list when she was checking the names of applicants for the school on the 24 June 2020. She therefore could not have had the master list on her phone before the date of the shortlisting. She said she was surprised that one witness of the Respondent said she showed them the list of Maphakathi School while the other witness said there was no name of school in the master list but there was the name of Mtakasi on the list. She also said the master list of another school would not have been of assistance to them as they would have wanted a master list with the name of Mtakasi.
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118. She denied that she ever asked for money from Mtakasi and that she was ever given money by Mtakasi. She noted that the witnesses of the Respondent testified that it was Mtakasi who offered to give them money.
 119. With regards to the charge about persuading the SGB members she said during the interview there was an observer from SADTU. She said during the process she stepped back and allowed the members to choose their candidate. As a resource person she explained to the members of the panel how to rate candidates and not to influence them on how much marks to allocate. It was the union that was involved with them to ensure fairness.
 120. During the shortlisting meeting she said her role was to be the chairperson of the meeting and resource person of the panel.
 121. She said the interview committee comprised of people other than the three members of the SGB mentioned previously. In addition to them, there were two educators, who also allocated scores.
 122. Referring to page 36 of the bundle she said all members of the interview committee gave Mtakasi 24 marks which at the end gave a total of 120. She said Mtakasi was not at an advantage because he received the interview questions because there was no agreement with the other two members of the panel who were educators.
 123. She said she believed that Mtakasi was shortlisted because he met the requirements of the post. She said after the interviews the panel recommended and signed the recommendation form which was then submitted to the Head of Department.
 124. When told that Mtakasi and Somaxhama were disciplined by the Respondent for their role in the matter she said he should have been given a more serious sanction for having plotted against her. Applicant said she was dismissed for following up on the misuse of school funds by the members of the SGB, Somaxhama and Mtakasi. She said she also wrote letters to the Risk Management office to investigate the school.
 125. With regards to the fifth charge she said she never received any reward or commission from the Respondent. She said the charge was vague and did not state who she received the award from.
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126. Regarding the procurement for the PPE she said the delivery of PPE to schools had shortages and she advised Somaxhama that it was going to take long for the department to deliver the shortages. She then suggested to Somaxhama that they source quotations to procure the shortages. When Somaxhama suggested that there were no suppliers locally Applicant suggested that she use google to search for them.
 127. Later Somaxhama told her (Applicant) that they managed to get quotations and she gave her the name of the person they recommended whose name was Ntombikayise Didi who they said was from Mzimkhulu but was based in Mayville. Applicant said she could not verify if what she was told was true or not since at that time they could not visit schools due to Covid-19.
 128. Witness stated that she intervened and talked to Ntombikayise when there were delays in delivery with Ntombikayise saying they were caused by her being unable to get hold of Somaxhama. After sometime Somaxhama reported that the PPE has arrived and it was as they ordered it. After that Ntombikayise sent the Applicant her banking details which Applicant forwarded to Somaxhama.
 129. Applicant said she did not benefit at all from the sale of the PPE and Somaxhama reported to her that they have paid Ntombikayise. She also said she was not involved in the procurement process of the PPE for the school. Her role was only to oversee the process to ensure that the school has the PPE.
 130. She said the cheque whose copy was on page 31 was payable to Ntombikayise Didi and was signed by members of the SGB. When asked who made the delivery for the PPE she said it was probably the service provider.
 131. She confirmed that she wrote the statement on page 91 to 93 in which she explained that she did not benefit from the purchase of the PPE. She said she had the details of the transaction but did not benefit.
 132. Referring to page 19 of the bundle she said in the representations she made to the MEC she was convincing the MEC that she was approaching the retirement age and was never disciplined before.
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She was also sorting out her personal circumstances which included her epileptic child, sick mother (who had since passed away) and being diagnosed with severe depression.

133. In the representations she also submitted that she was denying the allegations against her and believed the MEC was harsh in imposing the sanction of dismissal. She said she preferred the sanction of demotion as with it her job would have been saved.
134. She said the presiding officer of the disciplinary enquiry listened to the evidence and that is why he imposed the sanction of demotion but the MEC did not.
135. She said the witnesses of the Respondent gave evidence against her because she had ordered an investigation on the theft of cheques and all of them (witnesses) knew that they were going to be implicated. The witnesses all ganged up against her because she was following up on the misuse of funds at the school. Even Mtakasi, who was a month into the post, was not happy that Applicant wanted an investigation to be conducted at the school.
136. With regards to Mr Jilingana she said his investigation was one sided and did not report on the allegations made by the Applicant on financial mismanagement.

PROCEDURE

137. Applicant testified that she received the letter of the sanction as signed by the Head of Department (on the 26 April 2020) on the same day she received the letter of dismissal which was signed by the MEC. The date she received both letters was the 01 August 2020. On the same date she also received another letter advising her that the sanction of dismissal was being implemented on the same date. She then did not have an opportunity to lodge the appeal. She was advised that there was no need to appeal as already there was dismissal¹.
138. Referring to page 14 to 18 she said the document was written by her as a response to request for representation made by the office of the MEC to her after it received an appeal from the Head of Department. She said she received the letter from the MEC requesting representation in May 2022.

¹ Page 28 of Bundle.

139. She said she was never aware that the Acting Head of Department was appealing his own decision. She said she thought the Acting Head of Department should have advised her if there was a change in the sanction of demotion. She admitted that she accepted the sanction of demotion.
140. She said she was surprised that the letter of the sanction (demotion) was signed by the Head of Department on the 11 April 2023, he appealed the sanction on the 26 April 2023 and she was only served the letter together with the outcome of the appeal on the 01 August 2023. She suspected that it shows that there was a lot going on without her knowing.
141. She also said she was surprised that the letter from the MEC had the name of the former and late MEC scratched out and replaced by the name of the current MEC Gade. She said she also suspected that the late MEC may have written the letter before passing away. She even said the signatures on the letter on pages 11 and 97 are not similar.

ANALYSIS OF EVIDENCE AND ARGUMENT

142. This is an unfair dismissal dispute and in terms of section 191 of the Labour Relations Act the Respondent bears the *onus* to prove that the dismissal of the Applicant was fair.
143. At the enquiry the appeal of which led to the ultimate dismissal of the Applicant the charges faced were (1) contravention of section 18(f) of the Employment of Educators Act in that she persuaded the members of the SGB of the school to recommend Mr Bonke Mtakasi for post of the principal of the school, (2) contravention of section 18(1) (g) of the Employment of Educators Act in that she asked Mr Bonke Mtakasi to pay her R10 000 for her role in recommending him for the post of principal at the school, (3) contravention of section 18(1)(q) of the Employment of Educators Act in that she influenced the members of the SGB of the school Mr Bonke Mtakasi, (4) contravention of section (1) (ee) of the Employment of Educators Act in that she committed an irregular act by accessing the list of shortlisted candidates and showing it to the members of the SGB before the interviews, (5) contravention of section 18(1)(n) of the Employment of Educators Act in that she accepted or demanded commission, fee or reward in respect of carrying out her duties without the permission of
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the employer and (6) contravention of section 217 of the Constitution in that she unduly benefitted from the purchase of PPE for the school to an amount of R7 980.

144. At the enquiry and at arbitration the Applicant denied the allegations against her.
145. The evidence of Mr Bonke Mtakasi for the Respondent was consistent to the effect that the Applicant called Mtakasi to her office and suggested to him that she was going to recommend him to the members of the SGB for the post of the principal at the Emgodini Primary School. It was further testified that the Applicant sought a bribe of R30 000 from Mtakasi which was ultimately reduced to R10 000 on agreement between them. The Applicant denied ever meeting Mtakasi at her office.
146. The evidence of the other members of the SGB corroborates the version of Mtakasi in that the events testified of, meeting between Mtakasi and the members of the SGB in Kokstad, sharing of interview questions with Mtakasi, sharing of the scores with Mtakasi, the money Mtakasi gave to the three members of the SGB for covid-19, the money given to the members of the SGB after Mtakasi got the post and the fact that Mtakasi got the post all point to the reliability of the version of Mtakasi with regards to the meeting.
147. At arbitration the Applicant said Mtakasi had a motive to lie about her because she was investigating financial misconduct against the school. The version of the Applicant (on investigating financial misconduct) was not put to Mtakasi when he testified and there was no proof submitted by the Applicant that indeed there was an investigation being conducted. Even when an official from the Risk Office, Mr Jilingana, testified it was never put to him that there was ever an investigation on the misuse of funds at the school. It was the undisputed evidence of the Respondent witnesses that the misuse of school funds started during the tenure of the acting principal Somaxhama and it was common cause that when the incident of the stolen cheques occurred Mtakasi was only a month into the post. It was also the undisputed evidence of the Respondent that it was Mtakasi who initiated the investigation into the lost cheques by involving the SGB and the stakeholders up to the stage he reported the issue to the Applicant. If Mtakasi was not happy about the investigation, he would not have taken the steps he took to report the incident of cheques and to initiate the investigation as he did. The evidence by the Applicant that Mtakasi gave evidence against her because she was investigating the school cannot therefore be sustained. In the circumstances I therefore prefer the

version of Mtakasi. My findings are therefore that the Applicant met Mtakasi and offered to assist him to get the post at the school in return for him paying the Applicant R10 000 in instalments of R3 500. It is also my finding that the Applicant sought and was paid by Mtakasi the initial amount of R3 500 before the whistle blowing by members of the SGB. Asking for and receiving this money amounted to soliciting and receiving a bribe.

- 148.** The other witnesses of the Respondent all corroborated each other about the meeting between the three members of the SGB at the office of the Applicant, that the Applicant suggested the name of Mtakasi to them (members of the SGB and Somaxhama), that she facilitated the meeting between the members of the SGB and Mtakasi and that she facilitated that interview questions be sent to Mtakasi before the interviews. The response of the Applicant to this evidence was a bare denial. She contradicted herself and said her procedure was not to talk directly to members of the SGB but to communicate with them through the principal, but at the same time she invited the three members of the SGB to her office on the 20 March 2020 and talked directly to them.
- 149.** According to her the purpose of inviting the three members was to inform them about the decision of the District Director on their request not to proceed with the appointment of the principal at the school and to show them the letter written by the District Director communicating the decision. According to me the purpose of the meeting did not warrant her to deviate from her 'procedure' as she could even have sent the letter with the response through the acting principal. The probability is therefore that she met them in order to discuss the response as well as the issue of the appointment of Mtakasi.
- 150.** The other defence of the Applicant was that the members of the SGB testified against her because she was initiating investigations against the misuse of funds at the school something the members of the SGB were involved in. The members of the SGB and the clerk corroborated each other that they themselves were not happy with the misuse of school funds and hatched the plan to steal the cheques in order to blow the whistle. They testified that they did not even spend the money they got from cashing one of the stolen cheques instead they returned it to the school bank account. This was not disputed. If the members of the SGB did not want the misuse of school funds to be investigated, as the Applicant testified, they would not have taken the efforts they took up to the stage when they went to report to the District Director and blew the whistle on the misuse of funds, the manner in which Mtakasi was promoted and the role of the Applicant therein.
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151. It needs to be stated that at the disciplinary enquiry the reasons given by the Applicant for the SGB testifying against her were that her name was being dragged in the mud because she was supporting the appointment of another candidate to the position of the District Director. The version of the Applicant cannot then be sustained and falls to be dismissed.
152. The evidence given by the witnesses of the Respondent at arbitration was similar to the evidence they gave at the disciplinary enquiry, according to the disciplinary enquiry report. Their evidence was not shaken at all even at cross-examination. In fact, instead of discrediting their evidence the cross-examination only served to confirm and re-iterate their versions.
153. There were some contradictions in the evidence of the witnesses with regards to the amount agreed to between the members of the SGB and Mtakasi with some testifying that it was R30 000 and some testifying that it was R10 000. There was also a contradiction between the evidence of Mtakasi and that of the members of the SGB with regards to whether it was Mr Mtakasi who offered to pay the R10 000 or the members of the SGB asked for it.
154. These contradictions were not material as the central issue in the charge is whether the SGB members were influenced by the Applicant into recommending the appointment of Mtakasi. Whether Mtakasi initiated the exchange of money or it's the other way round is immaterial. What matters is the fact that the Applicant facilitated the bribery between the two parties.
155. What can be discerned from the description of bribery is that it is an element of corruption. Corruption is defined as², *"Any person who gives or accepts or offers to give or accept any gratification amounting to an unauthorised or improper inducement to act or not to act in a particular manner is guilty of corruption."*
156. It then follows that what the Applicant is found guilty of is bribery which effectively means she is found guilty of corruption.
157. The evidence of all the members of the SGB who testified was that they were shown by the Applicant the list of names with the name of Mtakasi and that the list was in the cellphone of the Applicant. It

² Prevention and Combating of corrupt Activities Act 12 of 2004-Chapter 2.

was not clear from the evidence of the witnesses whether it was just the list or the master list of applicants for the post of which school. The charge (charge 4) alleges that the Applicant committed an act of dishonesty by showing the list to the members of the SGB.

- 158.** In his book, 'Dismissal' (Juta 2010: 188) John Grogan defines dishonesty as, "*Dishonesty can consist of any act or omission which entails deceit. This may include withholding information from the employer, making a false statement or misrepresentation with the intention of deceiving the employer.*"
- 159.** It could not be proved by the Respondent that showing the list (whether it was the master list or any other list) to the members of the SGB amounted to the act of dishonesty as described by Grogan above. No deceit, misinformation or misrepresentation was shown on the part of the Applicant. Thus I cannot find the Applicant guilty of charge 4.
- 160.** The sixth charge was incorrectly formulated in that the Applicant was charged as being in contravention of section 217 of the Constitution. This is against the legal principle which says the Constitution must not be referred to directly unless there is no legislation applicable in that particular aspect or the constitutionality of the legislation is at issue. In this case there is legislation (Code) in the form of the Employment of Educators Act and if there was alleged financial misconduct the other legislation to be referred to was Public Finance Management Act (PFMA). As the arbitrator it is not my duty to charge employees but to determine if based on the information at the disposal of the Respondent the Applicant was involved in misconduct.
- 161.** Based on the manner in which the charge was formulated and even though the Applicant may have been involved in misconduct through interfering with procurement process but I cannot find her guilty of this charge.
- 162.** In conclusion, my findings are that the Applicant is found guilty of charges 1, 2, 3 and 5.

PROCEDURE ON APPEAL

163. At the conclusion of the enquiry the sanction that was imposed by the Presiding Officer of the enquiry was demotion. At the arbitration the Applicant testified that she accepted the demotion when she was consulted by the Respondent.
 164. What led to this dispute is the outcome of the appeal, after an appeal was made by the Head of Department to the MEC.
 165. At the arbitration the Applicant testified that she did not have an opportunity to appeal as she was served with the sanction together with the outcome of appeal.
 166. Clause 4 (1) of Schedule 8 of the Employment of Educators Act provides that, *"after the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision."*
 167. The evidence led at arbitration shows that the disciplinary enquiry was concluded on the 24 November 2021, the final outcome and the letter of the sanction was issued only on the 11 April 2022, which is a delay of about five (05) months. The letter of sanction was not immediately served on the Applicant instead the Head of Department filed an appeal with the MEC on the 26 April 2022. The Applicant only got to know about the existence of the letter of the sanction when the MEC called on her to make representations in May 2022. Even then the Applicant was not served the letter but was made aware of it in the letter from the MEC. In terms of the undisputed evidence of the Applicant she was only served the letter of the sanction together with the outcome of the appeal on the 01 August 2022. On the same day she was also served the letter informing her that the sanction was to be implemented on the same day. By then any appeal by the Applicant would have been academic as the appeal was already dealt with by the MEC and in line with clause 9(6) of Schedule 2 of the Employment of Educators Act the decision had to be implemented immediately. In fact, the undisputed evidence of the Applicant was that when she was served with the letters on the 01 August 2022 she was advised that there was no need to appeal as she was already dismissed subsequent to the decision of the MEC on the appeal by the Head of Department.
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168. In a nutshell then for the disciplinary enquiry that was concluded on the 24 November 2021 the Applicant only got to know the outcome and sanction on the 01 August 2022, after nine months.
169. In her evidence and in argument the Applicant did not complain about the delay, instead complained about the fact that due to the delay and the fact that she was served all the letters pertaining to the disciplinary hearing on the same day, she was not accorded the opportunity to exercise her right to appeal.
170. Being not provided with the opportunity to appeal was prejudicial and procedurally unfair to the Applicant as even if the Head of Department had appealed this did not detach the Applicant from her right to appeal. She would even have made a counter appeal to that of the Head of Department. However, the prejudice was minimized by the fact that she was called upon to make representations, albeit very late.
171. The internal appeal is provided for in the Code³ where it is stated in section 25⁴ that;
- (2) An educator or an employer has a right to appeal to the Minister or the Member of the Executive Council, as the case may be, against the finding by the presiding officer of a disciplinary hearing [that the educator has committed misconduct, as contemplated in section 17 or 18, and against the sanction imposed in terms of section 18(3)(e) to (i)].
- (3) In lodging an appeal, the educator or employer must comply with the procedure laid down in Schedule 2.
172. Clause 9(5) of Schedule 2 of the Employment of Educators Act further provides thus;
- The Member of the Executive Council or the Minister, as the case may be, must consider the appeal, and may –
- (a) uphold the appeal;
- (b) in cases of misconduct contemplated in section 18, amend the sanction; or
- (c) dismiss the appeal.
173. In this dispute the Head of Department was within his rights to appeal to the MEC and the MEC was within his rights to consider the appeal.
174. There is however a peremptory condition on clause 9(2) of Schedule 2 of the Employment of Educators Act where it is stated that,

³ Chapter 5 of the Employment of Educators Act.

⁴ As amended by Education Laws Amendment Act No 1 of 2004.

“The educator or the employer must, within five working days of receiving notice of the final outcome of a disciplinary hearing, submit the appeal form to the Member of the Executive Council or the Minister, as the case may be.”

175. This condition is self-explanatory in that the appeal must be submitted by the appellant to the MEC within five days of the notice of the final outcome(sanction).
176. In this dispute it was testified by the Applicant (and undisputed) that the letter of sanction was signed by the Head of Department on the 11 April 2022 which effectively means the Head of Department became aware of the sanction on the same date as soon as it was signed by him. It was further testified that the letter of appeal was written by the Head of Department on the 26 April 2022. The appeal was late by ten (10) days.
- 177 The Constitutional Court in *Stokwe v MEC for Education- Eastern Cape*⁵ held thus;
- An appeal procedure is a separate facet of the disciplinary procedure and must be conducted with the same degree of alacrity for procedural fairness to be fulfilled.*
- 178 The delays in serving the Applicant the letter of sanction, in submitting the appeal and the failure of the Respondent to accord the Applicant an explicit right to appeal, all point to the procedural defects of the process during the stage of the appeal.
- 179 Having made the finding that the Applicant is found guilty of the charges 1, 2, 3 and 5 and that the procedure on appeal was unfair the next consideration is whether the sanction imposed by the MEC on appeal was appropriate and fair.
- 180 The Constitutional Court in **Sidumo and another v Rustenburg Platinum Mines Ltd & Others(2007) 28 ILJ2405 (CC)**⁶ held thus;
- In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances.*

⁵ At para 67.

⁶ At para 79.

- 181 The dictum above holds that as an arbitrator I am not expected to consider the matter afresh but to determine whether or not the decision of the employer to dismiss was fair and in that consideration I must consider all relevant circumstances.
- 182 The Court in *Sidumo*⁷ went further and held that in approaching the dismissal dispute the commissioner will take into account the importance of the rule that has been breached, the reason the employer imposed the dismissal, the basis of the employee's challenge to the dismissal, harm caused by the employee's conduct, effect of the dismissal on the employee and the long service record.
- 183 In this matter it has been found that the provisions of the code that have been breached relate to corruption, bribery and fraud.
- 184 In his letter of outcome of appeal the MEC stressed that the misconduct the Applicant was found guilty of was serious, resulted in the breakdown in employment relationship and compromised the everyday functioning of the respondent. In conclusion he said, "The seriousness of the misconduct viewed cumulatively cannot be denied."
- 185 In her representations the Applicant did not seem to appreciate the seriousness of the misconduct to the extent of suggesting that if it was serious the presiding officer at the enquiry should have warned her so that she could make an application to be represented by a legal practitioner. She also submitted that the misconduct was not serious hence she was not charged in terms of section 17 of the Employment of Educators Act. She then concluded by arguing that the sanction to be imposed by the MEC must not be disproportionate to the degree of harm.
- 186 The Constitutional Court in ***Glenister v President of the Republic of South Africa and Others*** 2011 (3) SA 347 (CC)⁸ held that "*corruption has become a scourge in our country and it poses a real danger to our developing democracy. It undermines the ability of the government to meet*

⁷ At para 78.

⁸ At para 57.

its commitment to fight poverty and to deliver on other social and economic rights guaranteed in our Bill of Rights.”

- 187 There is no doubt that indeed corruption and fraud are serious offences that compromise the administration and efficiency of the state. Where a deserving employee like Mtakasi is made to pay huge sums of money in order to get a promotion, this is an embarrassment to the Respondent. During the period when the country was ravaged by Covid-19 there were many people who wanted to cash in on the pandemic. As per my findings the Applicant seems to be one of those people.
- 188 There is more harm on the reputation of the Respondent where a senior manager who is occupying the post of the Circuit Manager is found guilty of soliciting and facilitating bribes for senior posts in schools.
- 189 From the evidence led by both the Applicant and the witnesses of the Respondent there was widespread misuse of funds by educators, management and members of the SGB at the school even before the arrival of Mtakazi as the principal of the school. The official of the Respondent who was in the first line to stop this malfeasance and deal with perpetrators was the Applicant. Unfortunately, it was the Applicant herself who got into the middle of the malfeasance.
- 190 The long service of the Applicant (since 1991) without having been charged for misconduct serves more as an aggravating factor than a mitigating factor because of the position of authority the Applicant occupied and the seriousness of the misconduct. In fact, all the witnesses of the Respondent testified that they carried out the unlawful instructions because they were coming from a senior person who they looked up to for guidance.
- 191 My findings are that the decision of the MEC: Education to impose the sanction of dismissal on the Applicant was fair.
- 192 In conclusion the dismissal of the Applicant was substantively fair and procedurally unfair.
- 193 Section 193 of the Labour Relations Act holds that the primary relief for an unfair dismissal is reinstatement unless the dismissal is unfair only because the employer did not follow a fair

procedure. In this dispute the dismissal is unfair because fair procedure was not followed, which effectively means the only relief the Applicant qualifies for is compensation.

194 During arbitration the parties did not address me on the possible compensation if the dismissal was found to be only procedurally unfair. Section 194 of provides that the compensation to be awarded must be just and equitable.

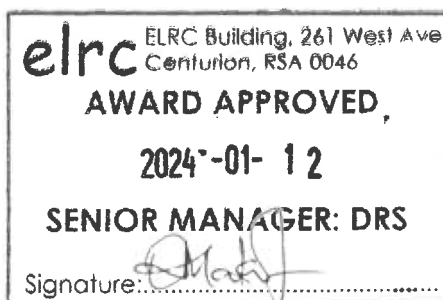
195 Having considered the fact that the misconduct the Applicant is found guilty of is serious and there was no argument stating how the delays prejudiced the Applicant. I believe that the equitable compensation is salary of two (02) months calculated from her last salary notch. The annual salary at the time of dismissal was R918 087⁹ and the monthly salary can be calculated as R918 087 divided by 12 = R76 507. For two months it is going to be R76 507 x 2 = R153 014.

In the circumstances I make the following award;

AWARD

196 The dismissal of the Applicant, Mpandana Nomabhulu by the Respondent, the Provincial Department of Education, Eastern Cape, was substantively fair and procedurally unfair.

197 The Respondent is ordered to pay the Applicant compensation for two (02) months amounting to R153 014. This amount must be paid into the bank account of the Applicant within 30 days from the date of receipt of this award.



Mbulelo Safa: ELRC Panelist
