

Date: 20 April 2021

Enquiries:

Name: Sonja Xulu
Tel: 012 663 7446
Fax: 012 643 1601
Email: SonjaX@elrc.org.za

TO: PSA obo Dlala N (Applicants)
Tel: 082 903 6804
Email: gilbert.seakamela@psa.co.za

TO: Department of Education - EC
Labour Relations:
Mr Thando Makina
Email: Thando.Makina@ecdoe.gov.za

Dear Colleagues,

RE: ARBITRATION AWARD


CASE NAME: PSA obo DLALA N vs DOE-EC
CASE NUMBER: ELRC713-19/20EC


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

 20/4/21



OFFICE OF THE GENERAL SECRETARY

All correspondence should be addressed to:

The General Secretary
ELRC
Private Bag X126
Centurion
0046
Gauteng
RSA

Enquiries:

Foca N.O

Tel: 012 663 7446

Fax: 012 663 9604

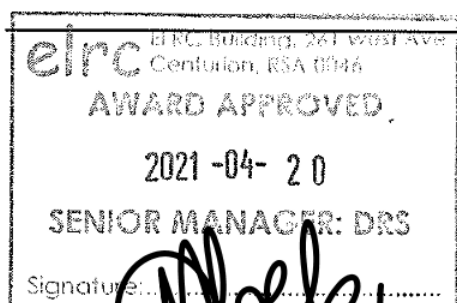
E-mail: cindyfoca@elrc.org.za

Website: www.elrc.org.za

Physical Address:

ELRC Building
261 West Avenue
Centurion
0046
Gauteng
RSA

ARBITRATION AWARD



Case Number: ELRC713-19/20 EC

Panelists: Malusi Mbuli

Date of Award: 20-04-2021

In the **ARBITRATION** between

PSA obo NOKUZOLA DLALA

(Applicant)

And

DEPARTMENT OF EDUCATION – EASTERN CAPE

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration hearing was held under the auspices of the ELRC as a dismissal dispute for misconduct under section 191 (5) (a) of the Labour Relations Act 66 of 1995 as amended. The hearing took place on the 03rd of March 2021 and the 29th & 30th of March 2021 at 09:00 at the PSA offices at Sanlam Building in Umtata.
2. The applicant Mrs. Nokuzola Dlala was present at the hearing and was represented by Mr. Gilbert Seakamela an official of the applicant's trade union PSA. The respondent, Department of Education – Eastern Cape was also present at the hearing and was represented by Mr. Kwezi Dalasile, an official of the respondent.
3. The arbitration hearing proceeded on the said dates and was finalized on the 30th of March 2021. The parties requested to deliver their closing arguments in writing not later than the 09th of April 2021 and both parties delivered their arguments.

ISSUE TO BE DECIDED

4. I am required to determine whether or not the applicants dismissal was unfair and if so, the appropriate relief in accordance with Sections 193 and 194 of the Labour Relations Act No 66 of 1995, as amended.

BACKGROUND TO THE ISSUE

5. The applicant was employed by the respondent as an Educator / H.O.D and was based in the respondent's district area of Libode - at Mthwani S.S.S. The applicant was charge 4 charges and was dismissed by the respondent in on the 01st October 2019 after she was found guilty at the disciplinary hearing on the charges 3 charges i.e charge 2, charge 3 and charge 4.
6. For the purposes of this dispute I am going to focus and deal with charges 2, 3 and 4 because the applicant was found not guilty in respect of charge 1.

7. Charge 2

- That the applicant contravened section 18 (1) (i) of Employment of Educators Act 76 of 1998, in that the applicant failed carry out a lawful order or routine instructions without just or reasonable cause given to her by her supervisor Mr. Socikwa to refund R250 collected from average learners at Mthweni SSS.

8. Charge 3

- That the applicant contravened section 18 (1) (ee) of the Employment of Educators Act 76 of 1998, in that in that the applicant committed an act of dishonest by appointing a service provider to clean toilets without the knowledge of the SGB.

9. Charge 4

- That the applicant contravened section 18 (1) (b) of the Employment of Educators Act 76 of 1998 in that the applicant willfully mismanaged finances of the school in that she misled the SGB to buy 2 cds at a cost of R20 000,00 under the pretext that they were buying 20 laptops.
- That the applicant failed to comply with procurements procedures by failing to advise the SGB to the appointment of financial management i.e. finance committee and procurement committee.
- Acquiring the services of service providers without following procurements procedures.

10. The applicant disputes the allegations leveled against her and argue that her dismissal was substantively unfair. The applicant also disputes the procedural fairness of his dismissal and argues that she was not given an opportunity to mitigate sanction.

11. The applicant then referred a dismissal dispute to the ELRC alleging that the respondent has unfairly dismissed him and the matter was later set down for arbitration hearing and was finalized on the 30th of March 2021.

SURVEY OF EVIDENCE

Submissions by the respondent

12. The 1st respondent's witness, Mr. Monwabisi Socikwa testified that he works for the respondent as a Circuit Manager – Circuit 14 and has about 22 public schools that he is overseeing together with 3 private schools and that Mthweni S.S.S. fell within his jurisdiction.
13. He stated that he know the applicant because he was an HOD at Mthweni S.S.S. and at some stage before her dismissal she was an acting Principal. He stated that whilst the applicant was acting as a Principal at Mthweni S.S.S. there were problems at that school and the applicant was subjected to a disciplinary hearing and dismissed.
14. He averred that the department became aware of the problems at the Mthweni S.S.S. when the department received anonymous call stating that they were students that were charged fees at Mthweni S.S.S when the school was non fee paying school.
15. He averred that he then went to the school together with Mr. Ngamlana where they met the Acting Principal and the School Management Team (SMT) and that the Acting Principal and SMT admitted that yes there were students who were paying fee in the amount of R250, 00 per year. They then advised the school is a no fee paying school and were not entitled to charge the students fees.
16. He testified that he was told that this was a decision of the parents and they then asked the applicant to tell the SGB that that this was dangerous and illegal and that they must return the money back to the students who have been charged such fee.
17. He testified that the applicant promised that she was going to do that but that was never done and the subsequent investigation revealed that the money paid was never returned back to the parents and the applicant never came back to him to say that she was encountering problems or difficulties in returning that money.
18. He averred that the department later received a complaint from a service provider by the name of Mr. Mangcotywa who said that he has performed a type of work – cleaning the toilets but was never paid for the job that he has performed. He stated that the matter investigated and the finding was that there was no job performed by Mr. Mangcotywa on the cleaning of toilets and he refused to pay the service provider.

19. He confirmed that when they enquired also the Chairperson of the SGB Mr. Mkhondombi and he confirmed that the job was done and when he asked him to go to the Acting Principal to do something in writing the Principal refused. He said it was difficult to establish whether the job was done or not.
20. He stated that the Principal is the accounting officer at the school and has a responsibility to guide the SGB, give direction in an attempt to protect the funds and assets of the school. He averred that he reported the matter to Joseph who is the District Director and was of the view that the service provider should be paid if he has performed some work.
21. He confirmed that he was aware about the dispute or complaint about the appointment of the Principal in that school and that there were different views and preferences in the candidates others for the applicant and others against the applicant appointment.
22. The 2nd witness of the employer was Mrs. Nomangesi Nongwende who testified that she currently works for respondent as a Deputy Principal at the Mthweni S.S.S. She confirmed that she know the applicant and that whilst the applicant was acting as a Principal at the school the SGB and parents took a decision that over age learners should pay an amount of R250, 00 per year because they were not funded by the Department of Education.
23. She averred that at the beginning the Department was not aware about this arrangement or decision and when they became aware at a later stage Mr. Socikwa and Mr. Ngamlana visited the school and addressed the Principal and the SMT to convey a message that the decision was wrong because the school is a non fee paying school.
24. She stated that the Principal was instructed to get the money paid through the SGB and is not aware of any money that was paid back the affected parents. She averred that the applicant advised that this issue should be left like that because it could cause problems in the school.
25. She testified that in 2019 a service provider by the name of Mr. Mangcotywa came to complain that he has cleaned the toilets but he was not paid an amount of R24 000, 00 for a period of about a year. She averred that she was not aware of the toilets that were cleaned or sucked. The matter was then reported to Mr. Socikwa and that there was no evidence of the toilets being cleaned or sucked and there was no eye witness and no smell when the toilets were sucked.

26. She testified that the truck was supposed to be visible and there was no one who knew about the job that was performed. She confirmed that she was part of the decision to buy laptops from an Indian man and that they agreed together with the members of the SGB to buy them because they thought it was a bargain. She further stated that those laptops were never delivered.
27. The 3rd witness of the respondent was Mr. Loyiso Mashwayi who testified that he works for the respondent and was a presiding officer / chairperson in the disciplinary hearing that led to the dismissal of the applicant. He stated that department was represented by Mr. Mfundo Tshobe whilst the applicant was represented by Mr. Gilbert Seakamela.
28. He stated that the disciplinary hearing proceeded and at the end the parties were not ready to deliver closing arguments and they all agreed that the closing arguments together with mitigation and aggravating circumstances will be filled in writing later before he can issue the sanction and the parties agreed on a date.
29. He averred that both the employer and employee representative failed to deliver those arguments and he had to remind them as a matter of courtesy and both of them later filed those arguments but the employees arguments did not include the mitigating circumstances.
30. He stated that the applicant has never objected to this arrangement of dealing with mitigation and have done it like this before. The record of the event of that last day at the disciplinary hearing was played and introduced as evidence in the arbitration hearing and this record confirmed that there was an arrangement or agreement between the parties to file the closing arguments and mitigation not later than the 22nd of July 2019.
31. The 4th and last witness of the respondent was Mrs. Nosakhiwo Mzondi who testified that she was the treasurer of the SGB 2012 – 2018 at the time of the incidents and she knows the applicant was working in their school and also an Acting Principal and she lives closer to the school Mthweni S.S.S.
32. She confirmed that she knew about the decision on the procurement or buying of computers and that she was called by the applicant together with the Principal and there was a presentation by a gentleman who wanted to sell them laptops at a reasonable amount of R1000, 00 each.

33. She stated that the Indian gentleman showed them invoices and proof of payment by a neighboring school Port St John's High School for 40 laptops and the applicant called the Principal of that school. She confirmed that they have purchased the laptops for the amount of R20 000, 00 but they have never been delivered.
34. She confirmed that she signed the cheque to pay the gentleman for the laptops together with the chairperson for the purchase of this laptop and were tricked, coerced or forced to sign the cheque.
35. She averred that there was no budget for purchasing of these laptops but because they felt it was a bargain they decided to purchase the laptops and paid the Indian gentleman the money for that sale. She said there was no procurement meeting for that and the SGB did not authorize that purchase.
36. She confirmed that when they paid for those laptops they haven't seen them and were never delivered even though they paid for them and that she did not know anything about the 2 cds that were stated in the charge related to this issue.
37. She averred that she does not know anything about the cleaning and sucking of the toilets by the service provider but confirmed that the school has been looking for the service provider but the ones that they were getting were too high and the last time the toilets were sucked was in 2017.
38. She testified that if the service provider had performed this job there was going to be a noticeable bad smell and that should have seen them because she is staying closer to the school.
39. She reiterated that no one knew about the sucking or cleaning of the toilets and she didn't know about the service provider that has to be paid and that she did not know if the chairperson knew about the service provider and the sucking of the toilets.
40. She stated that they requested the Chairperson Mr. Mkhondombi to approach the municipality for the sucking of the toilets and that she left the SGB in April 2018 and that Dumeko and Hintsho were not present in the meeting when they met Mr. Hassan about the purchase of the computers.

Submissions by the applicant

41. The applicant Mrs. Nokuzola Dlala testified that she used to work for the respondent as an HOD and was an Acting Principal at Mthweni S.S.S. and was dismissed by the respondent on the 01st of October 2019 following a disciplinary hearing after she was found guilty at the disciplinary hearing on 3 charges.
42. She stated that the parents at Mthweni S.S.S. took a decision that learners who were over age should pay an amount of R250,00 per year because they were not funded by the department so that they can get meals like other learners and some other benefits.
43. A few weeks after she had assumed acting duties she together with the SMT were approached by Mr. Socikwa who told them that they were not supposed to charge any fee from the learners because that was a non fee paying school.
44. They were further asked to convey that to the SGB and they convened a meeting with the SGB and the affected parents to inform them about that instruction and the parents together with the Chief discussed this and decided to pay. Mr. Socikwa stated that then as long as the parents agree they can continue with the contribution.
45. She averred that she was never instructed by Mr. Socikwa to refund the money paid by parents for the learners and the last time she spoke to Mr. Socikwa was when he said it was ok if the parents agree to make contribution for the over age learners.
46. She averred that she was not aware of any prescripts or prohibitions governing this part as she was still new and acting in the Principal role. She again disputed that there was an instruction given to her for the refund of that money and stated that if that instruction was given it was supposed to be in writing and they were going to carry it out.
47. She stated that Mr. Socikwa and Mr. Ngamlana just visited their school because they were on their way and wanted them to sign so that they can claim travelling but could not say why they would not use the signatures from the schools they were going to because it was beyond that direction. She reiterated that they did not come to their school for a meeting.
48. In relation to charge 3 the applicant testified that the decision to look for the service provider to clean and suck toilets was taken by the members of the SGB with her as an acting chairperson and the members

who were present were herself, Mkhondombi – Chairperson, Mzondi – Treasurer, Dumeko & Mazomba as secretaries, Matyholo & Nombuya as additional members.

49. She stated that the school toilets were full and this is the reason why the SGB took a decision that they must be cleaned and sucked and that she must look for a service provider that has a reasonable quotation.
50. She testified that notices were put in strategic areas inviting service providers to make quotations and this is when Mr. Mangcotywa called showing interest and had the most reasonable quote at the amount of R24 000, 00 around November 2017.
51. She stated that the SGB together with Mrs. Mzondi were happy with the quotation and she arranged for Mr. Mangcotywa to come and perform his duties and indeed he came and was received by Mr. Zozi the SGB clerk. She said the decision to appoint Mr. Mangcotywa was also appointed by the SGB because he could wait for them to organize some money and pay him the following year January 2018.
52. She stated that the toilets were sucked / cleaned before the opening of the schools in January and the chairperson of the SGB Mr. Mkhondombi was at school on the first day when Mr. Mangcotywa stated doing the job and she came to the school together with Mr. Duntlane the following day.
53. She stated that the job was done and everyone at school was happy when the schools reopened and she went to look at the toilets with some of the teachers who were happy with what they saw including the learners. She said there was no complaint about the work of the service provider.
54. The witness testified further that in September 2017 a gentleman by the name of Hassan came to their school and stated that he was working with the department of education and she told him that she can't listen to him alone and that she must come in the following day and the following day the gentleman came in for presentation.
55. She stated that she called the members of the SGB so that they can listen to the gentleman and take a decision and in that meeting the people present were, herself, Mr. Hintsho, Mr. Dumeko, Mr. Mkhondombi and Guzwana. She testified that Mr. Hassan made a presentation and stated that she was going to sell the laptops at R1000, 00 each and he also showed them cheques that were paid by Port St John's High School for the purchase of 40 laptops.

56. She stated that the committee decided that she must call the principal of Port St John's – Mr. Ashante who confirmed that their school had purchased those laptops but had not been delivered yet. On the basis of that information they agreed to by the laptops and a cheque was then signed by chairperson and the treasurer to pay Hassan.
57. She confirmed that the laptops were never delivered and that Mr. Ashante was also not charged and that when they took the decision they did not know that this was a scam. She stated that she does not know about the 2 cds purchased from Hassan.
58. She averred that she was the chased away by the members of the community and she was traumatized and no one was on her side. She state that there was no procurement committee at the school but all decisions related to procurement were taken openly and transparently in the presence of the school SMT and SGB members.
59. She stated that even though the school had a budget there is money that is reserved for special cases and emergencies. She stated that that Mrs. Nongwende came to testify against her because she did not like her because she was not appointed to act and has always been insubordinate since she started acting and she can say anything against her.
60. She stated that that all this happened when she just started acting and she was not supported but everything was done with the approval of the school governing body. She further stated that after she was not appointed the SGB was divided because some wanted her appointed and some members did not want her appointed.
61. The 2nd applicants witness was Mr. Zolisile Andile Duntlane who testified that he used to work for the respondent as an Educator at Mthweni S.S.S. and one day he was called by Mrs. Dlala and she asked him to accompany her and drive her to school.
62. He stated that when they got to school they saw the trick coming out and also found people who were cutting grass and the others who were cleaning toilets carrying cleaning materials. He stated that Mrs. Mzondi came in and inspected the toilets and was happy about the work that had been done and this was close to schools opening.

63. When the schools open the applicant reported this in the presence of staff members and after they had seen the toilets the staff and learners were happy with the work that had been done on the cleaning and sucking of the toilets.
64. He stated that also the members of the community were happy about the cleaning of the toilets and there was bad smell when they visited the school on the day work was done confirming that the toilets were sucked. When they were there at school it was the applicant, himself, Mrs. Mzondi and the security officer.
65. He averred that Mrs. Nongwende present when the cleaning of the toilets was reported to the teachers and also Mr. Dumeko know about the toilets that were cleaned. He confirmed that the applicant and Mrs. Nongwende did not have a good working relationship as Mrs. Nongwende did not want be managed by Mrs. Nongwende because she felt she was a senior educator.
66. He confirmed that the applicant was not appointed as a Principal and instead the SGB recommended Mr Erasmus because it was said that the school needed a male as a Principal and the SGB was then divided on the appointment during and after.
67. The 3rd applicants witness was Mr. Robert Mphunyezwa Mkhondombi who stated that he was the chairperson of the SGB and confirmed that the SGB and the parents took a decision that the learners who were over age will pay R250, 00 per annum because they were not funded by the department.
68. He averred that this was a decision that was taken by the SGB and the parents after a meeting was held by the department at Ndamase S.S.S. and a decision was taken that the department was no longer going to fund the over age learners anymore.
69. The witness averred that he does not know about the instruction that was given by Mr. Socikwa to stop the R250, 00 contributions or to refund that money.
70. He stated that he can confirm that the toilets were cleaned and sucked by the service provider and this was a response to the decision that was taken by the SGB that the school must look for a service provider to clean and suck the toilets at a reasonable price because the school had no money. He was also asked to approach the municipality to look for assistance and the advise that they were given was that they must source the services of the service provider.

71. Mr. Mangcotywa responded and he had quoted a reasonable price of R24 000, 00 compared to the other service providers and there was even negotiation and subsequent agreement that he will be paid in January. He testified that the service provider Mr. Mangcotywa came to the school for cleaning and sucking of the toilets on the 12th & 13th of January 2018.
72. He confirmed that all the other members of the community and staff were happy about the cleaning of the toilets. He averred that he there at school when the service provider came on the 12th January 2018 and he called the applicant and the applicant could not come in on the 12th of January 2018 because she had a commitment and came to the school the following day on the 13th of January 2018. He confirmed that Mrs. Mzondi was also present at the school when the toilets were cleaned and sucked together with the security.
73. He stated that the decision to buy 20 laptops from Hassan – the Indian gentlemen was not taken by the applicant alone but was taken by the members of the SGB forming a quorum and this decision was taken because what was presented to them by Mr. Hassan looked like a bargain and no one knew that it was scam.
74. He narrated how they were deceived by Mr. Hassan and that they were convinced about the fact that he said he had sold 40 laptops to Port St John's High School and they called the Principal Mr. Asante and he confirmed the purchase but that also did not get delivery of those laptops.
75. He reiterated that this was a decision of the SGB and the check for the payment of Mr. Hassan was signed by him in his capacity as the Chairperson and Mrs. Mzondi as the treasurer. He stated that the 2 cds were going to be the manual but nothing was delivered by Mr. Hassan and no one knew that this was a scam and that this was a mistake on their part.
76. She confirmed that the applicant had just started acting and she did not mislead into signing for a scam or something that was wrong because also everybody was convinced that this was a bargain and the best deal for the school.
77. He confirmed that Mr. Duntlane and the applicant were there at school on the 13th of January 2018 and that the service provider also suggested that that the toilets be removed because they were in a damp sport. He confirmed that the service provider was not paid.

78. He stated that Mzondi is not telling the truth because of the divisions in the SGB as other members did not want the applicant and the others wanted her and he confirmed again that the toilets were cleaned.
79. The applicant's representative then closed their case.

ANALYSIS OF EVIDENCE AND ARGUMENT

80. Section 185 of the Act provides:-

'Every employee has the right not to be:

(a) Unfairly dismissed.

81. The Act recognizes three grounds for termination of the employment relationship between parties. These grounds are the conduct of the employee, the capacity of the employee and the operational requirements of the employers business. The employer has the onus to prove that the dismissal of the applicant was procedurally and substantively fair.

82. According to my recollection the procedural fairness of the applicant's dismissal was placed in dispute by the applicant in respect of one issue. i.e. not being given an opportunity to present mitigating circumstances.

- In this regard both the record and the evidence of the chairperson confirm that there was an arrangement to file closing arguments and mitigation & aggravating circumstances not later than the 22nd of September 2019.
- The applicant was therefore given an opportunity to present mitigating circumstances but decided to waive her right when she failed to file those mitigating circumstances.

83. My approach is like this because in *Avril Elizabeth Home for the Mentally Handicapped v/s Commission for Conciliation Mediation and Arbitration & others (2006) 27 ILJ 1644 (LC)* the court makes a point that the act never expected or intended technical compliance with the procedural aspect of a dismissal dispute. What is required is that an opportunity must be given by the employer to an employee to state his case in response to any allegations made against that employee, which need not be a formal

enquiry, it means no more than that there should be dialogue and an opportunity for reflection before any decision is taken to dismiss.

84. This is what happened with the applicant's dismissal, the applicant was called into a disciplinary hearing, given enough time to prepare his case, clear charges were put to him as I have argued above, was given an opportunity to state his case and to dispute the employer's case and was given an opportunity to mitigate sanction in case a severe penalty is considered by the chairperson.
85. The applicant's dismissal as argued above was therefore procedurally fair.
86. On the substantive issue the applicant denies that she was guilty of all the 3 charges she was found guilty of and summarized in the topic dealing with the background to the issue above and this is an element of substantive fairness or unfairness of a dismissal which talks to whether the applicant has in fact broken the rule. The details of these charges appear in this award in the topic dealing with the background to the issue in paragraph 7 – 9 as indicated.
87. The employer's case against the applicant is that the applicant has committed the transgressions listed above but this is disputed by the applicant. In order to prove that the applicant has committed these types of misconduct the respondent called 4 witnesses whose evidence is summarized above.
88. I must further mention that in terms of section 192 (2) the respondent bares onus to prove that the dismissal of the applicant was substantively fair. Both representatives are experienced representatives and should have known that the evidence of all relevant witnesses is important for disposing off of this matter but decided not to call all the relevant witnesses.
89. Without mentioning names that I don't know witnesses from the following categories were relevant, students, additional teachers and further members of the SGB, parents and community. This is so because corroborative evidence is very much important especially when confronted with word against word types of evidence.
90. I shall therefore deal with and evaluate the evidence on the versions of the parties in consideration of this background because in *Tshishonga v/s Ministry of Justice and Constitutional Development & other (2007) 28 ILJ 195 (LC)* the court said that an adverse inference must be drawn if a party fails to testify or place evidence of a witness who is available and able to elucidate the facts as this failure leads naturally

to the inference that he fears that such evidence will expose facts unfavorable to him or even damage his case.

91. I then propose to deal with these charges individually but briefly.

92. Charge 2

- *That the applicant contravened section 18 (1) (i) of Employment of Educators Act 76 of 1998, in that the applicant failed carry out a lawful order or routine instructions without just or reasonable cause given to her by her supervisor Mr. Socikwa to refund R250 collected from average learners at Mthweni SSS.*

93. In relation to this charge I note the evidence of Mr. Socikwa that she instructed the applicant to inform the SGB and parents that the collection of fees from this category of learners is illegal and not according to department of education prescripts. This is disputed by the applicant and it is not clear how this communication was made as there is no instruction in writing from Mr. Socikwa to this effect.

94. The decision to get the over aged learners to pay an amount of R250, 00 was not taken by the applicant but by the parents. In as much as the applicant is the accounting officer it is important to note that the SGB has some power in taking this type of a decision and in this instance the SGB and parents for that matter own this decision.

95. The applicant was new in the Acting position of the Principal and has not done anything to benefit her but her together with SGB and parents collectively took a decision that is in the best interest of the school.

96. The charge however is specific to failure to carry out a lawful order or routine instruction without just or reasonable cause to refund R250, 00 as if this is the applicant's decision. The applicant is not the custodian or owner of this decision but the SGB and parents and if this decision was to be reversed it was supposed to be reversed by the SGB and parents.

97. The applicant also denies that there was such instruction and even if this was a reasonable or lawful instruction to the applicant I am not satisfied that the respondent has proved that this instruction was given to the applicant. This is where the importance of the corroborative evidence comes in because Mr. Ngamlana was not called by the respondent and the instruction was not in writing.

98. Charge 3

- That the applicant contravened section 18 (1) (ee) of the Employment of Educators Act 76 of 1998, in that in that the applicant committed an act of dishonest by appointing a service provider to clean toilets without the knowledge of the SGB.

99. The evidence summarized above from both the employer and employee witnesses indicate that there was consensus that the toilets were due to be cleaned and sucked and there was a long debate on how this can be executed including who can to this job.

100. It is also clear that the school was looking for a service provider who can perform this task at a reasonable price because the school had no money. The sourcing of the service provider although executed by the applicant was a decision of the SGB and I must say that the cleaning and sucking of such toilets was a reasonable decision.

101. The applicant led evidence of 3 witnesses the applicant herself, Mr. Dontlane and Mr. Mkhondombi who led corroborative evidence to the effect that the schools were cleaned and the toilets were sucked on specific dates being the 12th & 13th of January 2018.

102. There is no convincing evidence from the employer side that the job was not performed and at this stage it must be noted that the onus is on the employer to prove on a balance of probabilities that the applicant was guilty of this charge. The applicant did not take a decision to appoint the service provider and never acted in a dishonest manner.

103. Charge 4

- *That the applicant contravened section 18 (1) (b) of the Employment of Educators Act 76 of 1998 in that the applicant willfully mismanaged finances of the school in that she misled the SGB to buy 2 cds at a cost of R20 000,00 under the pretext that they were buying 20 laptops.*
- *That the applicant failed to comply with procurements procedures by failing to advise the SGB to the appointment of financial management i.e. finance committee and procurement committee.*
- *Acquiring the services of service providers without following procurements procedures.*

104. When we dealing with this charge it is very much important to look at the intentions of the people who took a decision to purchase 20 laptops and again here this was not the applicant's decision. Here the all those SGB members who were present and took this decision were doing this and took the decision in good faith and in furthering the interest of the school.
105. It was just unfortunate that the SGB was deceived by this Indian gentleman to buy laptops thinking that it was a bargain and was paid in advance. When this man arrived the applicant did the right thing by calling the SGB to discuss this matter but it was unfortunate that they could not pick up that this was a scam and this cannot be blamed on the applicant.
106. The applicant did not mismanage the finances of the school and it must also be stated here that the cheque for the purchase of these laptops was signed by Mr. Mkhondombi and Mrs. Mzondi – Chairperson and Treasurer of the SGB.
107. It cannot be correct to accuse the applicant of mismanagement of school funds. Again a point must be made here that the applicant was still new in this acting Principal position she is allowed to make mistakes if there was any mistake on her part.
108. There is absolutely no evidence that the applicant was part of this scam or in fact knew this gentleman. In fact when this man said he has sold the laptops to Port St John's S.S.S the applicant verified that and everybody was convinced that this was legitimate and genuine.
109. In as far as procurement procedures are concerned the applicant cannot be treated like a seasoned Principal as she had just started acting and what is important here is the intention at the time of execution of this decision and the applicant has to be given a benefit of doubt.
110. In deciding whether the applicant is guilty of these charges the question that this award has to answer is whether the applicants deliberate and calculated to act in a manner that mal fide against the respondent.
111. I cannot accept the respondent's argument I compare this argument to the clear and coherent testimony of the applicant and her witnesses to the effect that no rule has been broken. Even though the test is one of a balance of probabilities it does not mean that the employee will just be guilty of a transgression, there must be clear evidence linking the applicant according to his responsibilities and those of the employer to the commission of such a transgression.

112. There is no or not supposed to be any breakdown in employment relationship as I have discussed above in this matter. The point is that in order for a dismissal to be fair there must be a valid reason for dismissal at the time of the disciplinary hearing leading to the dismissal of the employee because of the serious nature of the transgression and the fact that the employee has committed such transgression.
113. In this dispute I cannot find any of the two and I reject the employer's version that the employee has committed a transgression that is of a serious nature as to warrant a dismissal or any action for that matter.
114. For the reasons mentioned above I found that there was no valid reason for the dismissal of the applicant by the respondent. The Constitutional Court in **NEHAWU v/s University of Cape Town (2003) CC** reiterated the point that the arbitrator has to weigh the interest of both the employer and the employee in coming to a decision whether the dismissal of the employee was fair or not. In this dispute the interests of the applicant far outweigh the interests of the respondent because I have already said that he has not committed any transgression.
115. **In Marapula & others v/s Consteen (Pty) Ltd {1999} 8 BLLR 829 (LAC) at 837 C** the court said "The onus is on the respondent to prove that the dismissal was fair on a preponderance of probability". In my opinion, the onus is discharged if the respondent can show, by credible evidence that its version is the most probable and acceptable version.
116. From the evidence and argument summarized above I am not satisfied that the respondent has discharged its onus and that the applicant has presented a credible, coherent and acceptable version to dispute the employer's version. As already indicated above the applicants dismissal was procedurally fair.
117. The employer has failed to discharge its onus in terms of section 192 (2) of the act in so far as the substantive issue is concerned and this means that the applicant's dismissal was procedurally fair but substantively unfair.
118. Having found that the dismissal of the applicant was procedurally fair but substantively unfair the only issue that is left for me to decide is the relief to be granted to the applicant. The applicant has indicated that he would like to be re – instated and paid back pay. I cannot find any reason why the applicant should not be re – instated and be paid full back pay.

119. In the circumstances I therefore make the following award.

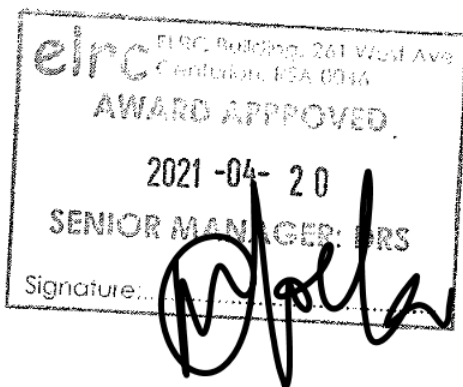
AWARD

120. The dismissal of the applicant was procedurally fair but substantively unfair.

121. The respondent, Department of Education – Eastern Cape is ordered to re-instate the applicant Mrs. Nokuzola Dlala in its employ on the same terms and conditions of employment as those that prevailed prior to the applicant's dismissal on the 01st of October 2019.

122. The respondent will reinstate the applicant retrospectively with effect from the 01st of October 2019 and will pay back pay to the applicant in the amount of **R599 991, 50** which is an amount equivalent to 19 months remuneration calculated at R31 578, 50 which was the rate of pay of the applicant per month as at the date of his dismissal.

123. The applicant will report for duty on the **01st of May 2021** and the amount referred to in the paragraph 122 above will be paid to the applicant not later than the **20th of May 2021**.



Signature:

Commissioner: Malusi Mbali