

# ARBITRATION AWARD

Case Number: GPBC1348/2018

Commissioner: Nowethu Sangqu Ndiki

Date of Award: 24 June 2023

In the **ARBITRATION** between

**PSA obo Gqwarhu N**

(Employee)

and

**Department of Education (DOE)**

(Employer)

## DETAILS OF THE CASE AND REPRESENTATION

1. The matter was scheduled and heard on 14-15 October 2024 as well as 03 June 2025. It was earlier scheduled in 2023 where the matter was postponed due to the applicant's unavailability due to incarceration. In July 2024 when it was scheduled, the matter was postponed because the Respondent was not in attendance and the Representative of the Respondent applied for postponement. In February 2025 when the matter was scheduled by agreement of the parties, the Respondent's representative was sick and there was no interpreter booked to assist in the process, the matter was then postponed.
2. The matter was finally scheduled and heard on 03-04 June 2025. At all material times the Applicant Ms Gqwarhu was represented by Mr Samkelo Mzuku, a union official of a registered trade union PSA. The Respondent was represented by Mr Thando Makina. NA Magwaca was a resource person brought along by the Respondent. Mr Nozulela as well as Mr Mvunguse also made the Respondent's team as observers.

3. On the 14 and 15 October 2024, Ms Thuthula Gwija was appointed as an interpreter and she was present. On 03 June 2025 Mr Tshambule was appointed as an interpreter, accordingly, he was present.
4. The proceedings were held in English interpreted to isiXhosa, handwritten notes were taken and mechanical records were kept.

### **POINT IN LIMINE**

5. At the beginning of the proceedings the Applicant raised appoint in limine which was sent to the council. The Applicant wanted the Respondent to withdraw one of the charges saying that they are one charge as they relate to the borrowing of R10 000 and a bribe of R10 000.
6. The Respondent said that the charges were not any duplicate. Case of misconduct may lead to a different charge even though there was one act of wrongdoing. The Respondent was not willing to do the withdrawal at this stage as the applicant was found guilty on both charges.
7. After careful consideration of the parties' submissions I made a ruling on record and proceeded with the arbitration. It was my ruling that we continue with both charges argue the validity through witnesses and documentation, then I will make my finding based on evidence presented before me.

### **IN THE ARBITRATION**

### **ISSUE TO BE DECIDED**

8. I am called upon to decide whether the dismissal of the applicant Nangamso Gqwarhu was fair or not, if it was not fair, I must decide on the appropriate remedy in line with the Labour Relations Act no 66 of 1996 as amended.

### **BACKGROUND TO THE ISSUE**

9. The Applicant was employed by the Respondent since 2008 and only became Chief administration clerk level 6 in 2013. She was subjected to disciplinary hearing after 4 charges of misconduct were leveled against her. She was found guilty on 2 charges (charge 3 and 4). She was dismissed in June 2018 while the alleged misconduct took place on 08 August 2017. This was almost a year. This is the procedural issue being challenged because the hearing should have been completed within 60 days. The resolution 1 of 2003 in the public service regulating misconduct procedure suggests that the hearing should be completed within 60 days.
10. The issue occurred on 08 August 2017. there was an investigation. Only after forensic investigation, the case started in November 2017. It took some time for the case to be reported to the Department. The hearing took place in November 2017. The sanction was issued in May 2018 by the Department because the Applicant made an appeal. There was no delay in this matter. This is a case where one of the employee's of the Department was reinstated by the arbitration. Ms Gqwarhu knew that the employee was going to be back paid hence she targeted the employee. The employee in question is a special needs employee. She took advantage of the special needs employee by soliciting money from him indicating that she has assisted him to get the money.

## **SURVEY OF EVIDENCE**

### **Respondent's Witness**

11. The witness introduced himself as Stephanus Francois Louw. He testified under oath that he was a police man in the Eastern Cape previously. He then ventured into private investigations. He indicted that the Respondent's bundle contains on page 44 his covering letter.
12. The witness said that he was called upon to investigate the matter that gave rise to this arbitration. He said that Lwando who was the victim in the matter was dismissed by the Department and was later reinstated. He was supposed to get his money for pension and also due to reinstatement he was supposed to receive his back pay following an arbitration award in his favour.
13. During the time that Lwando was waiting for his case while dismissed he used to go to the Department to wash cars for the employees and would get tips from the colleagues.

14. The witness referred the arbitration to page 44 of the Respondent's bundle where he read the document word for word. He was the author of the document. The pages 44 to 45 contained his report on the investigation he conducted. He indicated on the report that he interviewed Lwando Stofela who was a victim. He said that Lwando Stofela's aunt reported the matter of Lwando being taken advantage of by Ms Gqwarhu. It was also his submission that an amount of R20 000.00 was taken from Lwando by Ms Gwarhu claiming that she worked hard in order for Lwando to be paid therefore R10 000.00 for her services and another R10 000.00 was a loan which would be paid back.
15. It was his evidence that the Applicant called Lwando and told him to be at the office on the next day and not come in to the office. This was done in order to go to the bank where an amount of R30 000.00 was withdrawn and the R20 000.00 was kept by the Applicant and the R10 000.00 was kept by Lwando.
16. The witness went on to show a video of the Applicant as well as Lwando at the bank where they went to the ATM, left the ATM and went inside the bank. The video indicated that Lwando and the Applicant went to the teller and the Applicant was talking to the person who appeared to assist them. The video then indicated Lwando giving the money to the Applicant and the Applicant took the money.
17. According to the witness the Applicant appeared to be cheerful while Lwando looked said and confused.
18. The witness explained that he was informed by Lwando during the investigation that the Applicant called him and instructed him to go to the district office and wait for her outside. Lwando then proceeded to the district office and called the Applicant when he got there. Lwando then called the Applicant on his arrival as instructed. After 20 to 45 minutes the Applicant came and met Lwando at the gate. The Applicant and Lwando proceeded to FNB in Bizana where the money was withdrawn.
19. According to the witness Lwando went on to state that on their way to the bank while in the Applicant's car, the Applicant informed Lwando that she had worked hard to get the money paid to him. She then asked that she be given something for that. Lwando said that he would give

her R2 000.00, the Applicant declined such an offer saying that she was not a child. Witness said, Lwando told him that the Applicant demanded that he pay her R10 000.00 and also loan her another R10 000.00.

20. According to the Applicant Lwando appeared terrified of him at first, and after some time, he could see that he gained his trust and was talking and explaining the events leading to the withdrawal of the money and up to the trip to Port Shepstone where the Applicant transported them with the aunt to buy clothing. Lwando also told him that him and his aunt paid for petrol to Port Shopstone.
21. It was Louw's evidence that, during his investigation he went to FNB where he introduced himself to the bank manager. He asked if he could get the footage of the day Lwando made withdrawal inside the bank accompanied by the Applicant. He was told to come and view the footage the next day which he did. While viewing the footage he took a video of what he was watching and such video would be viewed during these proceeding and copies were made available to all parties.

#### **Respondent's 2<sup>nd</sup> Witness**

22. The witness introduced herself as Nomonde Nqambi. She testified under oath that she worked at Nompumalanga Special School. At the time of the arbitration Nqambi was a pensioner. She said that she worked for the school since April 2001.
23. It was her testimony that she had known Lwando since 2003.
24. She acknowledged Lwando as one of the kids who attended at Nompumalanga Special School. She went on to say Lwando was later employed by the same school in 2008. She explained that the children were assessed if they would be capable of working then the school would choose from the children who were from the school to be employed at the school when a posts became available. Those who appeared to be better than others and could work were employed. She explained that mental incapability was dominating at Nompumalanga Special School. Lwando was one of the learners who could work and was chosen and employed to work in the kitchen. While he was supposed to work in the kitchen, Lwando did not perform the kitchen duties as he was leaving with epilepsy and would be a danger to himself if he were to work in the kitchen.

25. When these learners were employed by the school, someone would be required to control their money. There was once a meeting between the school and Lwando's sister where the principal as well as the witness were present. During the meeting it was discussed that Lwando's bank in contact should be created and be administered on his sister's phone. It was also discussed that Lwando was going to receive a lot of money and maybe they could build a house and get him a wife in order to control his money.
26. She also mentioned that Lwando was not capable of going to the ATM by himself because he was mentally unsound.
27. Nqambi explained the school as a special school for children that had special needs and were different from other children who attended mainstream schools.
28. During cross examination she was asked about the level of her education to which she said she had grade 11.
29. She was asked if she was part of people who admit students at the Nompumalanga Special school and responded to the negative.
30. She affirmed that she cooked for the students when asked what she did at school.
31. When asked if she knew the criteria used to admit students, she said she had an idea. She explained that letters from SASSA declaring that the students were disabled would be obtained. Social workers were also involved in the admission of students.
32. She was asked how would she know the difference between a mentally stable and an non mentally stable, she said the learners showed if they could work or not. Through observation they would also see who and who could not work.
33. She was asked how many times had she been to the ATM with Lwando and she said she never went to the ATM with Lwando.
34. When asked how far was the school from town she said it was not that far.

35. She denied to ever been to Town with Lwando
36. When confronted with evidence that Lwando could not use the ATM she said that she was aware of this because she worked with Lwando she was not talking about something she did not know.
37. It was during cross examination when she was asked if any one was appointed to handle Lwando's money, and she said that the principal suggested that Nofika who was Lwando's sister should handle Lwando's money.
38. When asked if she appointed Nofika, she said she was not appointed it was a suggestion by the Principal because Lwando was just reinstated and would be receiving a bulk of money as back pay.
39. When asked to indicate who was present when the principal suggested that Nofika handle the monies, she said the principal, the deputy principal, herself as well as Nofika were present in the meeting.
40. She was asked what money was she referring to when she said there would be a bulk of money, she said it was back pay as he was reinstated.
41. During reexamination she was asked if she could identify the mentally unstable learner, she said that she interacted with the learners on a daily basis as she cooked and fed them. She was familiar with their behaviors. Even though she was not a medical doctor she could identify a slow learner and a mentally unstable learner. She said that Lwando had epilepsy and was not mentally sound hence he was at Nompumalanga Special School.
42. She was asked if she was a doctor that could identify mentally unsound person, she declined being a doctor but said that she worked with the Special learners at Nompumalanga. She explained the admission of such children to include letters from SASSA declaring them as disabled. They were not just like any other learner, they were special needs learners.
43. She further indicated during re examination that she was very familiar with Lwando, even when the Principal was fishing around to find out who could fit in the position that was available to work at the school, the principal asked her who she could recommend and she recommended Lwando

and 2 others. She said that it was not only Lwando that was employed there were three of them and they were all learners at the school. They were recommended because they were better than others and they were very keen to do what was required of them.

44. Responding to the issue of the meeting with the Principal, she explained that the Principal indicated that Lwando was going to receive a bulk of money as he was reinstated. He was then looking at how can Lwando be protected from himself by getting someone who can assist him. The principal suggested Lwando's sister that she should receive in contact for Lwando's money.
45. When asked about Lwando not being able to operate ATM, she said Lwando told her that he was unable to operate an ATM but she never went to the ATM to assist him.
46. She was asked if there was any other person who assisted Lwando, she said only Nofika was supposed to assist him but Lwando refused, no-one else was suggested in the meeting.
47. She reiterated during reexamination that although she was not a medical doctor she was familiar with special needs learners because she worked with them on a daily basis.

### **3<sup>rd</sup> witness of the Respondent**

48. Lwando Stofela took oath and testified as follows:
49. He was working at Nompumalanga Special School. He was a learner at the school before he was employed in 2008.
50. He said that he was employed for kitchen work but he was removed from the kitchen because he was epileptic.
51. He narrated that on 8 August 2017 Nangamso who was the applicant in the matter called him and told him to go to the Department. He should not go inside but call when he was at the gate. He did as he was told. Nangamso told him to bring along his Identity document as well as his bank card.
52. It was his testimony that Nangamso told him that there was money that he should get from work. Lwando went on to say Nangamso asked how much would he give her if she made sure that the



money was made available. His response was that he could give her R2000.00. Nangamso said that it was too little she was not a child.

53. According to the witness, Nangamso told him to give her R10 000.00 and also borrow her R10 000.00.
54. All this conversation happened while Lwando and Nangamso were in the car and also at the bank, so said Lwando. He did not remember getting any in contact from the bank indicating that he had money in his bank.
55. It was Lwando's testimony that when they arrived at the bank, Nangamso operated the ATM because he did not know how to operate ATM. She withdrew R30 000.00 but the machine declined. They then went inside the bank where they withdrew R30 000.00. He gave R20 000.00 to Nangamso and took R10 000.00 for himself. He went to buy a work-suit in Bizana.
56. He also said that two white men visited him at his home at Vum. He and the white man went to the bank to get the camera images of what happened. He told the white man everything when he was asked about the money. He also said that he told the white man about driving to Port Shepstone with Nangamso in her car where he offered to pay for petrol.
57. He explained that he bought himself clothes in Port Shepstone. He went to Port Shepstone with his Aunt and Nangamso.
58. When asked during cross examination if he knew Nangamso, he confirmed. He said that he knew her from office no 6 where he would visit Bhut Zee and Bhut Oscar.
59. He was asked about his level of education at Nompumalanga, he said there was no clear level but they were thought to work with their hands.
60. When asked if he knew Nomonde Nqambi he confirmed.
61. He confirmed that even though he was employed for the kitchen he never worked in the kitchen because of epilepsy.

62. He was asked about the bank in contact, he said in contact would pop up in Nofika's phone. Nofika was his big sister.
63. When asked if he ever went to the bank with Nofika he said no.
64. He was asked about the person who represented him, he said it was Mr Mgxaji of PSA.
65. When asked if Mgxaji told him that he was going to receive money, he confirmed.
66. It was asked if Nangamso called him and he confirmed. He went on to say Nangamso told him to wait at the gate and call her. He did not remember how he got Nangamso's number. He confirmed that he knew Nangamso before the day she called him. He would see her when he went to office number 6.
67. When it was put to him that Nangamso was his friend, he refuted that. He said that when he went to the office he would talk to all of them but Nangamso was not his friend.
68. It was put to him that him and Nangamso would share bank messages and accepted that as true.
69. It was put to him that Nangamso drove him to Port Shepstone because she was his friend, He said Nangamso was not his friend. Nangamso said she was going that direction and gave him a lift.
70. It was further put to him that it was Nangamso who advised him to invest R40 000.00 in Port Shepstone and he said he did not remember that.
71. He declined that the R10 000.00 was paid back saying that Nangamso promised to pay him R1000.00 on every 15<sup>th</sup> day of the month. Three months went by and he did not receive anything. The last time he got money from Nangamso was when he got R300.00 and was told not to go and see her again.
72. When confronted with the pictures he confirmed that it was him accepting the money from the person at the bank. He further said that he took the money and gave to Nangamso who in return gave him R10 000.00.

73. When it was put to him that Nangamso did not ask him for money, he said she did ask for money to thank her. He then offered to pay her R2000.00 and Nangamso said that was too little she wanted R10 000.
74. It was put to him that Nangamso was helping him as a result the referral to the council in 2013 was done through Nangamso. He declined saying that he received papers from Mr Mzozo.
75. When he was re examined he confirmed that he did not remember most of the things but remembers that Nangamso called him and went to the bank with him.

**Respondent's 4<sup>th</sup> witness**

- 76 The witness introduced herself as Nofika Stofela. She testified under oath that Lwando was her brother. He was working at Nompumalanga Special School. She confirmed that she was called by the Principal of the school sometime to tell her about work issues involving Lwando. The Principal called her in the meeting once and spoke about money to be received by Lwando. He said that it was a bulk of money and someone had to help him. He even suggested that as a family they could get him a wife who was going to take care of him and look after his money. It was also the Principal's suggestion that they could also build him a house. The school expressed its opinion of Lwando not being able to make sound decision especially that he was going to receive that money. In that meeting it was agreed that she should activate in contact on her phone so that she would know when the money is available at the bank.
- 77 An amount of R90 000.00 or R95 000.00 popped up on her phone one morning. It was not even an hour before a R30 000.00 was withdrawn from Lwando's account, said Nofika. She said that she called the Principal and told him. After that transaction, nothing was showing from the bank, she did not know if the in contact was deactivated or not. She did not know what happened but did not believe that Lwando would go and deactivate in contact because he could not even operate ATM he needed assistance.
- 78 It was during cross examination when she confirmed that she did not know Nokuzola Hlengwa in person but was aware that Lwando used to reside with Nokuzola Hlengwa. She confirmed that Lwando calls Nokuzola as Aunt.

- 79 When asked about Nomonde Nqambi she said that Lwando referred to Nqambi as a cousin and Lwando once stayed with her.
- 80 She explained during cross examination that Lwando did not just stay in one place. He used to stay with their aunt who died, then moved and she did not know the Bizana places. She confirmed that Lwando once stayed in Vum.
- 81 When asked about the in contact on her phone she said, she and the Principal went to the bank to assist Lwando. They activated the in contact on her phone and that is how she saw the amount of money going into Lwando's account.
- 82 She confirmed that Lwando was made aware that money was coming due to the reinstatement after the dismissal.
- 83 She said that she did not know about the investment of R40 000.00 when she was asked about it. She also did not know who was helping Lwando with his money.
- 84 Nofika explained that Lwando grew up with mental challenges as a result he attended school at Nompumalanga. His mind was restless and always needed assistance. Lwando was epileptic according to Nofika. He could not do his own banking and needed someone to assist him to operate the ATM at the bank.
- 85 Nofika said Lwando was extremely vulnerable especially because of his epileptic problems he had. She felt that Lwando was a laughing stock out there because people were talking about him.

**Applicant's 1<sup>st</sup> witness**

86. Ms Gqwarhu introduced herself as the Applicant in the case. She took oath and testified that she was employed by the Department of Education. She was based in Bizana. Her duties included paying, capturing salary related monies.
87. She confirmed that entry level 5 was not managerial position.

88. She acknowledged page 1 of the Applicant's bundle as a notice to attend a disciplinary hearing she received on 28 November 2017. Document on page 4 was an appeal after dismissal. On 13 June 2018 was when she received the final outcome which was a delay of seven months. All the time she was on suspension at home.
89. It was her testimony that the Respondent should have done the process within 2 months.
90. She confirmed knowing Lwando since 2013. She said that she used to sit next to mama Mlenzana in the office. Lwando used to visit mama Mlenzana and that is how she got to know him. He used to come and enquire about his pending case with the Department.
91. She confirmed that Lwando was working at Nompumalanga Special School. At the time that the witness joined the District office of the department from the school, Lwando was placed at the District office. She said that Lwando was dismissed and challenged his case which he later won and was reinstated. He then went back to his place of work at Nompumalanga Special school.
92. She testified that Lwando was not washing colleague's cars, he was washing Department's cars.
93. The witness went on to say that she knew Lwando very well and took him as her brother. Lwando was a heavy smoker, when he needed a smoke he would go to her. At some stage Lwando's bank account was nearly closed and she helped him with money.
94. She testified that she was being accused of not paying back the money but she paid the money back. She referred to page 25.7 of the Applicant's bundle. She was also not aware of the policy that prohibits a colleague from borrowing another colleague money. She was therefore not guilty of the charges labeled against her.
95. She testified that on 07 August 2017 some Fundi Mafumbatha told her that she had been calling Lwando with no success. Late on the same day the witness said she called Lwando and told him that HR had been trying to get hold of him. On 08 August 2017 Lwando came to the district office to ask her to accompany him to the bank because he was not able to use the machine. They went to the bank in her car.

96. When they checked the ATM the money was available. According to her, Lwando said he wanted to draw money and she told him that he could not withdraw R30 000.00 outside. Lwando asked her to assist. They went inside where Lwando withdrew R30 000.00. After that he gave her R20 000.00 for safe keeping. She then dropped him off to buy the work-suit.
97. Gqwarhu testified that, later on that day Lwando called her to inform her that R10 000.00 was a gift and R10 000.00 was a loan. She then called Xoliswa and told her about that and also told Xoliswa that she told Lwando to invest R40 000.00.
98. According to the witness, Lwando and Xoliswa called her and told her that they did not want to do the investment in Bizana, they wanted to go to Port Shepstone FNB so that he could also buy clothes.
99. She pointed out that Louw who witnessed for the Respondent said nothing was done at the bank but the bank statement indicated that R40 000.00 was invested.
100. she was not involved in any pensions payment. She dealt with salary related monies.
101. According to the witness there was absolutely nothing wrong with Lwando. She did not regard Lwando as a special needs person. She was hearing it for the first time that Lwando was a special needs person. Lwando was employed full time therefore he was not a special needs person.
102. She said that she knew Nompumalanga school and there was no guarantee that every learner there was mentally challenged. All she knew was that when a child is not making it on the mainstream he could be sent to Nompumalanga.
103. During cross examination she was asked to talk about the arbitration being the 2<sup>nd</sup> sitting, she said that the arbitration took place and they got the arbitration award. The Respondent took it on review that is why it is a 2<sup>nd</sup> sitting. The outcome of the first arbitration was reinstatement. The Labour Court reverted the arbitration award back to the council to be hear again by another Commissioner.
104. When asked to explain the delay on the process of her discipline she said that she received the charges on 28 November 2017 and the hearing was concluded in January 2018. She received

the dismissal letter in May 2018 hence she challenged the delay. She did not know when were the closing arguments were submitted.

105. She was asked about the type of court she was referring to when she said Stofela was there, she said it was the criminal court and she was charged in a criminal court about the money of Stofela. She was found guilty because there was a different charge. She did not want to disclose the sentence when she was asked, she said she prefers not to say.
106. It was put to her that the arbitration could not continue because she was incarcerated, she said she did not dispute that she was arrested.
107. When asked about why did Lwando come to her on 08 August 2017, she said Lwando came to her to accompany hi to the bank because the money did not show in his account.
108. She was asked about the bank account that was about to be closed, and she said she did not remember when was that.
109. It was put to her that her actions were planned because she knew that Lwando would receive back pay due to reinstatement. She said that she was just assisting Lwando so that the account was not closed due to insufficient funds.
110. It was put to her that she processed back pay which was awarded to Lwando in arbitration. She said such monies are done at HR and implemented in her section which is salaries.
111. She was asked if it was a coincident that she assisted Lwando with his bank account while Lwando was due to receive his pension and back pay. Her answer was that Lwando asked her because they were friends and he was like a little brother to her.
112. She was asked why did Lwando not go to Ms Mlenzana and chose her. She said that Lwando was more of a brother to her.
113. When asked if Lwando used R30 000.00 that he withdrew, she said Lwando took R10 000.00 and gave her R20 000.00. He said he wanted to buy a work-suit.

114. Following her testimony about Lwando not being a special person, she was asked if she knew Nompumalanga Special School and she admitted knowing it. She was further asked if she knew the types of special schools and she said she did not know.
115. It was put to her that Nompumalanga was a school for intellectual impaired learners and she agreed.
116. She did not agree that Lwando asked her to assist with the ATM because he was special needs person.
117. She did not agree that Lwando is part of people who were vulnerable because he was a special needs person.
118. She did not agree that she took advantage of Lwando.

**Applicant's 2<sup>nd</sup> witness**

119. Ms Mase testified under oath that she worked for the Department of Education in Bizana. She knew Nangamso Gqwarhu because she was supervising her while she was working for the Department.
120. She explained that in her section they worked with salaries but not worked with pension payouts. HR dealt with pensions.
121. She said that she knew Lwando Stofela since she used to visit his shopsteward in my office. He used to visit Mrs Mlenzana and Mr Tshangelanga. She added that when Nangamso arrived she set next to mama Mlenzana. Nangamso then got used to Lwando through those visits. She remembered that Lwando was dismissed. One day Nangamso borrowed money from her so that she could give to Lwando for transport.
122. In cross examination she was asked if she was present at the disciplinary hearing or arbitration, she responded to the negative. When asked the reason for not being present she said she was not asked, she was asked to come and witness only on this day. She said she came to witness how Nangamso worked, how she was doing in the office and that was all.



123. She was asked about the whereabouts of Nangamso on 10 August 2017. She said that she was not sure of the dates but Nangamso had asked to go out and she came back later. She also asked to accompany her friend and she left between 10:00 and 11:00 and she did not return to work afterwards.
124. She was asked if she knew why Nangamso was dismissed, she said she did not know and only heard that she was dismissed for corruption but did not know what corruption was it.
125. She said Nangamso was a great person she conducted herself well, did not commit any misconduct in her office.

### **ANALYSIS OF EVIDENCE AND ARGUMENT**

126. Section 185 of the LRA is very clear on the issue of unfair dismissals. The section provides that “every employee has the right not to be unfairly dismissed”
127. In order for the dismissal to be considered fair, one has to look for guidance from section 188 of the LRA. The section dictates that:

*(1) A dismissal that is not automatically unfair, is unfair if the employer fails to prove-*

*(a) that the reason for dismissal is a fair reason-*

*(i) related to the **employee’s conduct or capacity**; or*

*(ii) based on the employer’s **operational requirements**; and*

*(b) that the dismissal was effected in accordance with a **fair procedure**.*

128. For the Respondent to find itself on the right side of the law, it must always ensure that the dismissal is fair in the eyes of the law.

129. It must be noted that the evidence indicted above is not word to word. However, all evidence presented in this arbitration has been considered including closing arguments that were submitted by the parties to get to the finding below.
130. In this case, it is common cause that the applicant was dismissed for misconduct on. The onus therefore shift to the Respondent to prove the fairness of such dismissal.
131. The charges
- “Charge 3 While on duty, you conducted yourself in an improper, disgraceful and unacceptable manner in that in or about 8 August you took an amount of R10 000.00 as a form of a bribe from Lwando Stofela, an employee working at Nompumalanga Special School. You stated that this money is in compensation of the work that you have done for him that he can receive his pension monies. You further demanded an amount f R10 000.00 from him to borrow you but you refused to pay back.”*
132. *“Charge 4: You contravened any prescribed Code of Conduct for the public service in or about 8 August you took an amount of R10 000.00 as a form of bribe from Lwando Stofela, an employee of Nompumalanga Special School. You stated that this money is in compensation of the work that you have done for him that he can receive his pension monies. You further demanded an amount of R10 000.00 from him to borrow you but you refused to pay it back.”*
133. It is common cause that Lwando and the Applicant went to draw the money on 08 August 2017.
134. It is further common cause that the Applicant got R20 000.00 and Lwando took R10 000.00 on that day.
135. I am going to start with charge 4. This charge starts with “you have contravened any prescribed code of conduct...” When one puts the charge to the other person, the charge must be clear understandable so that the next person can prepare properly to respond to the

allegations. The charge is not clear and it does not refer to any code as it suggests, it would not have been fair for the Applicant to respond to the allegation that it not clear. I find it difficult to say the Applicant was guilty of contravening the code which is not stated. I cannot assume which code is referred to.

136. It was not properly canvased during arbitration. This is the duty of the Respondent to point the arbitration to the correct evidence. I am of the view that this charge is vague and cannot be responded to. It will not be fair to then judge the Applicant on something that is not clear. The Respondent failed to prove that the Applicant contravened the code.
137. Turning to charge 3, the Applicant does not dispute that she got R20 000.00 from Lwando. She however claims that Lwando gave the money to her for safekeeping and he took R10 000.00. Lwando then later called her and told her that the R10 000.00 was for a loan and R10 000 was a gift. She says Lwando was close to her and she took him as her little brother. She disputes that she asked Lwando for R10 000.00 for making sure that the money was paid to him.
138. I find it very difficult to believe that Lwando would just call and say the money is a gift and the other money is for a loan. Lwando explained that there was a conversation between him and Nangamso in the car where R10 000.00 was labeled as loan and another R10 000.00 was for Nangamso making it possible that the money was paid to him. Even though the Applicant is insisting that she did not know that Lwando was going to receive money. This argument is contradicting her own evidence that she was told by Ms Mlenzana who came to her and told her that she could not get hold of Lwando with regards to his money. Conveniently, the Applicant was able to get hold of Lwando.
139. She does not tell the arbitration whether she went back to Ms Mlenzana to report that she got hold of Lwando. The next thing is a trip to the bank and the withdrawal of R30 000.00. Of the

R30 000.00 She receives R20 000.00 for safe keeping and later it becomes a gift and a loan. All along there was no conversation about the money according to her testimony. For these reasons, I believe that the Applicant had a conversation with Lwando about the money and she asked for a loan and money for making it possible for Lwando to get his money.

140. When we unpack the R10 000.00 as a loan, the Applicant suggests that on page 25.7 the loan was paid back. When I turned to page 25.7 it is the chairperson's report suggesting that the Applicant is not guilty and there is nothing attached as proof of payment. The Applicant had an opportunity to present the proof that she paid the loan but she did not. Up to the last day of this arbitration the Applicant had an opportunity to present proof of payment because Lwando testified that he only got R300.00 and was told not to go back to her office. Even if she had paid it back, I will still find the Applicant guilty of improper conduct as charged. I find her guilty because the Applicant chose to borrow R10 000.00 from Lwando who is a special needs person.
141. She claims to be a friend of Lwando. I am sure that if she had the best interest at heart as she said, she could not have allowed Lwando to withdraw R30 000.00 and give him R10 000.00 to buy a work-suit. She could not have borrowed R10 000.00 from Lwando who is not a registered financial services provider. I am saying this because the Applicant worked in finance as such, she is very much aware of the rules of the PFMA, FSR Act, Banks Act as well as the National Credit Act. Having such knowledge one would think twice before approaching another person to borrow so much money. The worst thing is that the person is in the vulnerable group in that he is a special needs person. I have no doubts that the Applicant while on duty, conducted herself in an improper, disgraceful and unacceptable manner by taking an amount of R10 000.00 from Lwando as a loan.
142. Turning to the R10 000.00 as a gift. I am once again referring to the fact that Lwando is a special needs person. It is the Applicant's argument that Lwando is not a special needs person because he is employed permanently. Lwando gave her R10 000.00 as a gift without her asking. For me to believe this, I would have expected Lwando to decide on his own to go and

withdraw the amount of money he needed to and then bring the gift to the Applicant. What raises suspicions in this matter is the actions of the Applicant. She takes Lwando along with her to the bank and does not say anything to Lwando's aunt and or sister. I will assume that it is so because she does not believe that Lwando is a special needs person. She knows that Lwando drinks and smokes in an abnormal way, but continues to give him R10 000.00 cash to buy a work-suit. Lwando gives her R20 000.00 for safe keeping and later tells her one is a gift and one is a loan.

143. The Applicant does not say what she did to deserve the gift. On the other hand Lwando testifies that he did not decide to give R10 000.00 he offered R2000.00 which was refused by the Applicant. The Applicant's version is vague because it is an untrue version. She did not have to accept R10 000.00 gift from a vulnerable person like Lwando. I am persuaded by the Respondent's version through the witnesses that testified about Lwando as a special needs person. If the Applicant was acting in the best interest of Lwando as a little brother as she says, she could not have accepted R10 000.00 as a gift and not explain why she deserved it.
144. I am of the view that the Applicant acted in an unacceptable manner as an employee of the state. Her conduct was improper, disgraceful and unacceptable in that she accepted a gift of R10 000.00 from Lwando who is a special needs person. Her actions were malicious and showed a sense of greediness. She was aware that Lwando was going to receive the money when Ms Mlenzana approached her. She acted promptly by sacrificing time from work and went to withdraw Lwando's money. She then took R20 000.00 to herself and gave him R10 000.00 to buy a work-suit.
145. The Applicant further brags that she assisted Lwando to invest R40 000.00 to soften what she has done to a vulnerable person. I do not believe that she was trying to help because she was not Lwando's financial advisor. In a nutshell All her actions were malicious and unacceptable in the workplace and in the society of vulnerable people.

146. In the premise, the probabilities favour the Respondent. The Respondent had a fair reason to dismiss the Applicant, Ms Gqwarhu.
147. The procedure followed by the Respondent was challenged. The Applicant claims that the Respondent took too long to complete the case. She received notice of disciplinary hearing in November 2017, the case was concluded in January, and she received dismissal letter in May 2018. She, however, does not explain the unfairness.
148. The Applicant was given an opportunity to be heard, represented by a representative of her choice, and she was allowed to cross-examine Respondent's witnesses. I find no reason why the procedure was unfair. If it was unfair, the Applicant did not bother to explain what she has suffered. Contrary, the Respondent explained that there was an investigation, she was charged and was given an opportunity to be heard. I cannot fault the Respondent on the procedure followed.
149. I find the dismissal of the Applicant to be substantively and procedurally fair.

## **AWARD**

150. The dismissal of the Applicant Nangamso Gqwarhu was substantively and procedural fair.
151. The Applicant is not entitled to any relief.

152. I make no cost order.

Signature:



Commissioner:

Nowethu Sangqu Ndiki

Sector:

Public Service