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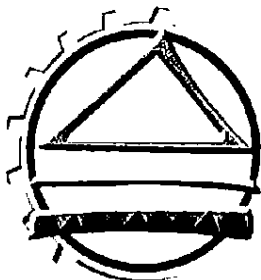
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From :Thabi Mkhize

Subject: Award kndb6029-17



CCMA

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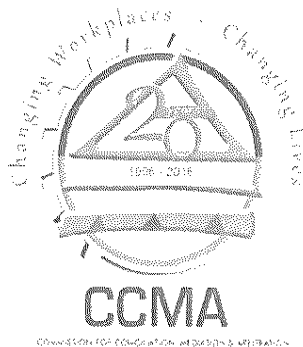
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Arbitration Award Rendered

Case Number: KNDB6029-17

Commissioner: Bess Pillemer

Date of Award: 30-Aug-2018

In the **ARBITRATION** between

PSA obo Ngcobo, P.F.

(Union/Applicant)

and

KZN Department of Education

(Respondent)

Union/Employee's representative: I Mooloo (Union official)

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Details of hearing and representation

[1.1] The arbitration was held at the CCMA Durban on 29 and 30 January 2018, 13, 14 and 15 March 2018, and 14, 15 and 16 August 2018.

[1.2] I Mooloo, a union official of PSA, represented the applicant. Respondent, the KZN Department of Education (the department), was represented by NG Maphumulo, its Director Legal Services.

[1.3] The union is the nominal applicant having brought the application on behalf of Ms. Promise Fikile Ngcobo. Ms. Ngcobo will be referred to in this award as the applicant and the trade union as "the union".

Issues to be decided

[2.1] The matter is referred for the determination of the question as to whether or not the employer is liable in term section 60 of the Employment Equity Act, 1998 ("the EEA") for an alleged contravention of section 6(3) of the EEA, namely sexual harassment in the workplace in respect of which the applicant seeks redress in the form of compensation and/or damages.

[2.2] The applicant is an educator in the Department of Education. She lodged a formal complaint of sexual harassment based on the alleged conduct of the principal of Olwambeni Primary School where she was employed. The principal is a Mr. Sishi. She did this in a letter addressed to Mr. R Mchunu, who is the Hammersdale Circuit Manager employed by the Department of Education. The letter is dated Sunday 6 September 2015 and in it the applicant complained she had been sexually harassed by Mr. Sishi. She stated *inter alia* "Sir, in the month of June 2015 the principal Mr. Sishi started making verbal sexual remarks to me such that I informed him that I don't like those remarks as they are constituting a verbal sexual abuse. Mr. Sishi intensified and advanced his irresponsible behaviour by forcefully touching my thighs, kissing and hugging him".

[2.3] In terms of section 60(2) of the EEA once the alleged conduct was brought to the attention of the Department, the employer became obliged to consult all relevant parties and to take the necessary steps to eliminate the alleged conduct and comply with the provisions of the EEA.

[2.4] Section 60(3) renders the employer liable deeming it to have contravened the provision of the EEA in question if it fails to take the necessary steps referred to in section 60(2) and it is proved that the employee (i.e. in this case Mr. Sishi) contravened the relevant provision.

[2.5] The applicant is aided in establishing her case by section 11 read with section 6(1) and (3) of the EEA which places the burden of proof on an employer in these circumstances to prove, *inter alia*, that the alleged harassment did not take place as alleged. The section was introduced by an amendment to the Act with effect from 1 August 2014 and is applicable to the events in question. It provides: "(1) if unfair discrimination (read harassment which is deemed to be discrimination in terms of section 6(3)) is alleged on a ground listed in section 6(1), the employer against whom the allegation is made must prove, on a balance of probabilities, that such discrimination (read harassment) (a) did not take place as alleged." "Sex" is a listed ground in section 6(1). In this regard see Bandat v De Kock & another (2015) 36 ILJ 979 (LC) at para 10.

[2.6] I mention that Mr. Mooloo in written closing argument (submitted after the hearing was completed) stated that applicant has subsequently been dismissed and asked that she be reinstated. This was not the position at the start of the arbitration and the issues concerning a dismissal claim were not canvassed during the course of the arbitration. The applicant has rights to challenge an alleged unfair dismissal, but that case is not before me and no relief in relation to it can be dealt with in the present arbitration.

[2.7] In summary therefore the substantive issues before me are (a) whether the employer is able to prove on a balance of probabilities that the alleged sexual harassment did not occur, and, if it is not able to discharge that onus, (b) whether it did all that was required of it to consult relevant parties and to take all necessary steps to eliminate the alleged sexual harassment.

Background

[3] Many of the underlying background facts are common cause, or not disputed, and I set them out below:

[3.1] The applicant has experienced mental health problems. It seems that these started following difficulties she experienced after she was promoted to a position at Bhongo Primary School in 2013. Evidently, she became unpopular with her colleagues so much so that on 29 September 2014 the educators held a protest at the school which was directed against the applicant and they locked her out of the school. A list of grievances against her was submitted to Mr. Mchunu, who is the Circuit Manager employed by the Department. As a consequence of the protest the applicant felt intimidated and, at her request, she was transferred from that school by the department.

[3.2] The incident impacted negatively on applicant's mental health and she was incapacitated for some time thereafter. Applicant produced medical documentation that seems to support this, but did not lead the evidence of any of the medical practitioners. Two medical certificates signed by Dr. AT Barret put applicant off work for stress and anxiety, and a further letter from Dr. Colin Levisohn, a psychiatrist, recorded that she was

admitted urgently to St Augustine's Hospital on 3 November for acute agitated depression which seemed to have been associated with occupational stress, that required fairly intensive treatment. The letter further recorded that applicant would be reassessed on 22 December and that applicant had mentioned that she may have to be transferred to a different school which she said might be a long distance from her home. Dr. Levisohn pointed out that as applicant would be on medication, the stress of driving long distances may aggravate her emotional state.

[3.3] Applicant was offered a position at Ingukwini Primary School. She rejected the posting because the school was situated close to Inanda Dam, and she claimed to have a water phobia because she had witnessed a drowning some time before.

[3.4] Applicant was then placed at Olwambeni Primary School. The applicant said that she did not want to accept the position because she claimed that it was bad for her travel so far from home, and because she did not feel safe in that environment as it was too close to Bhongo Primary School. She nonetheless accepted the placement. She started at Olwambeni Primary School on 24 March 2015. She had not worked since she left Bhongo Primary School on 29 September 2014.

[3.5] Applicant complained that Mr. Sishi had not welcomed her at Olwambeni School when she first reported to the school. She had arrived unexpectedly on the version of Mr. Sishi and so he had asked her to leave until he had discussed her appointment with the interested parties, such as the school governing body. He did that and agreed that she should remain and she started working at the school a short time later, on 24 March 2015 when she testified that she was then welcomed at the school. It was a few weeks later that she said the problems in her relationship with Mr. Sishi began.

[3.6] Applicant alleged that during the six-month period that she worked at the school Mr. Sishi 'sexually harassed her' on countless occasions from her arrival at Olwambeni Primary School, on 24 March 2015 until her last day of work on, 4 September 2015. In her evidence she described incidents that occurred at the school or in relation to school related activities which ranged from being forced to have tea with him, and being forced to make tea for him (which applicant latter admitted under cross-examination that she had to instructed another employee whose responsibility she said was to make the tea, to make tea for him), to being the victim of him indecently exposing himself to her when they were in a motor vehicle together. She complained that he had regularly made crude sexual comments and inappropriate sexual suggestions, providing the date and places where this occurred. She also complained that there was inappropriate hugging and touching. She said that he even asked what she would do if he raped her. She also mentioned that he had said that he objected to her union affiliation. She said that she at all times made it clear to him that she was offended by his conduct

and objected to it. The allegations, if true, fall well within what is prohibited under the EEA and clearly amount to sexual harassment in the workplace.

[3.7] The applicant said all this had an effect on her and by 4 September 2015 she was unable to continue to work at school. Much time was spent at the arbitration on the applicant's responsibilities at the school including what her work load should be. She was called to a disciplinary hearing and told on that day that she must teach grade R or grade 1. Applicant testified that she considered this a demotion, i.e. to teach on a full-time basis. After the meeting she claimed that Mr. Sishi told her that that is what happens to people who do not go along with him. She fell sick, according to her, due to the emotional, sexual and psychological abuse and was hospitalised for some time.

[3.8] On 4 September 2015, which turned out to be the applicant's last day that she attended at Olwambeni Primary School, various interested groups took a stand against the applicant and a petition was handed to Mr. Sishi on that day setting out a list of grievances submitted by other educators, the School Management Team (SMT) and the School Governing Body (SGB). The complaints were very similar to those voiced by the educators at Bhongo Primary School in 2014.

[3.9] Subsequent to the events on 4 September 2015 two letters were sent or given to the Circuit Manager Mr. Mchunu on 7 September 2015. One from the applicant (dated the day before) raising two separate complaints; a complaint in respect of the work load; and a second complaint relating to the sexual harassment by Mr. Sishi. I give further detail to the letter in paragraph 3.10 below. The second letter was from Mr. Sishi attaching the grievances he had received from the educators, the SMT and SGC in which he said that the applicant was a very difficult person to work with and requested that for the sake of the learners that the matter be given urgent consideration. Applicant claimed that although she sensed at that time that what had happened at Bhongo Primary School was about to happen at Olwambeni Primary School, that the educators had turned against her, she did not learn about the formal grievances against her until much later. She complained that the complaints were never investigated and she was never given an opportunity to respond to these grievances.

[3.10] The applicant's letter dated Sunday 6 September 2015 set out the following amongst other things:

[a] In the first paragraph she said that she initially received a warm welcome from the school both by management and staff.

[b] In the second paragraph she complained that the principal allocated her half his management duty load and that the principal did not entertain her request to provide her with a teaching load.

[c] Finally in the third paragraph the applicant complains in very general terms that she has been sexually harassed. She stated that the "principal Mr. Sishi started making verbal sexual remarks to me which did not auger well to me such that I informed him that I don't like those remarks as they are constituting a verbal sexual abuse. Mr. Sishi intensified and advanced his irresponsible behaviour by forcefully touching my thighs, kissing and hugging him".

[d] In the fourth paragraph the applicant requests Mr. Mchunu to intervene in the matter as it has affected her family and her work.

[3.11] Applicant fell ill after the events of 4 September 2015. She did not return to work for some time due to a major depressive disorder and a pregnancy with complications. Applicant submitted documents and reports from a gynaecologist, clinical psychologist and specialist psychiatrist relating to her illness, but did not lead the evidence of the various experts in this respect. Again reference was made that applicant be placed in a school near home, to avoid travelling to work as she was not well.

[3.12] Applicant, who was paid all this time, even though she was not working, reported to work at the circuit office on 10 October 2016, a little more than a year later after she had last worked. In a letter to Mr. Mchunu dated 10 October 2016 the Applicant informed him that she did not feel safe to return to Olwambeni Primary School and applicant raised her complaint in respect of the sexual harassment allegation she had submitted to him a little more than a year earlier on 7 September 2015.

[3.13] Applicant met with Mr. Mchunu at the beginning of November 2016. Mr. Mchunu asked applicant whether she wanted to proceed with her grievance informally or formally. She opted for her complaint to be dealt with formally. Applicant did not want Mr. Mchunu to handle the investigation and to that end she met with Mr. V Ngidi the Deputy Director Labour Relations for the Pinetown District. She objected to Mr. Mchunu investigating her complaint for two reasons. The first being that it had taken Mr. Mchunu too long a time to investigate her complaint and secondly, she alleged that Mr. Mchunu had interviewed witnesses while Mr. Sishi was present, which she claimed had intimidated the witnesses. Mr. Mchunu denied these allegations. His evidence was that it had taken time to initiate the investigation because of applicant's illness and her long absence from work. He denied that he had interviewed witnesses in Mr. Sishi's presence, which evidence Mr. Sishi agreed with. Applicant could not dispute this. Applicant nevertheless was given the opportunity to choose a new investigator from a list of three. She chose Mr. Zulu, an acting Circuit Manager, who reported to Mr. Mchunu.

[3.14] In a letter dated 3 February 2017 Mr. Zulu wrote to the applicant informing her that her complaint had been referred to him for investigation. Applicant was invited to the circuit office on 6 February 2017 to present her side of the story. She was told that she was entitled to bring witnesses with her as well as a union representative. She was also told that she was expected to provide a written statement. A similar letter was sent to Mr. Sishi.

[3.15] Both Mr. Sishi and the Applicant prepared and handed in statements.

[3.16] Mr. Sishi in his statement dated 7 February 2018 denied the allegations, and he said that the applicant had tried to push him into a trap of sexual assault but that she had failed. He claimed he said this because of the manner in which she had behaved at school. He elaborated that he had also had to ask the late Mrs. T.P. Dlamini to speak to Applicant because of her eroding behaviour.

[3.17] Applicant in her statement set out a long and detailed list of allegations she made against Mr. Sishi which is dated 3 March 2017, some time after the interviews on 6 February 2017.

[3.18] The applicant complained that Mr. Zulu had not properly put her allegations to Mr. Sishi as she had handed her full statement to Mr. Zulu after he had interviewed and accepted Mr. Sishi's statement from him.

[3.19] Applicant said she had been taken aback at being asked for a written statement by Mr. Zulu, and contrary to Mr. Zulu's evidence applicant said she had drafted her statement without assistance. I found her statement to be remarkably detailed considering it was compiled sometime after the actual events. Almost every incident described was imbedded in a detailed event on that day. She relied heavily on the probative value of the detail which she felt gave credibility to her allegations. Mr. Mooloo stressed this point during the arbitration and in argument.

[3.20] Mr. Zulu produced his findings in a report dated 13 March 2017. He interviewed both the applicant and Mr. Sishi and obtained both their accounts of the events and statements from them. He also interviewed three witnesses, an anonymous witness requested by the applicant, as well as the SADTU chairperson, Mr. Zungu, witnesses to whom applicant had reported the alleged harassment. He also interviewed Mr. Sifiso Ntinga who said he had not witnessed any incidents of sexual assault.

[3.21] Mr. Zulu found that there was no evidence to warrant charges against Mr. Sishi. He recommended that the applicant be placed at another school. Under cross-examination he admitted he had not dealt with the detail of the allegations, had not visited the school, had not sought out witnesses himself, and his decision not

to take the matter further was based on the applicant's inability to produce any evidence or witnesses to corroborate her allegations, and to establish clearly to him what she said had happened.

[3.22] On 15 March 2017, a few days after the finding of Mr. Zulu was released, applicant submitted a further grievance to the department complaining both about the events at Bhongo and Olwambeni Primary Schools, in which she made strong and scathing allegations against both principals at the two schools, and significantly sexual harassment was a very minor element of her litany of complaints. Applicant claimed she only became aware of Mr. Zulu's finding during May 2017.

[3.23] Applicant was offered a position at Rietvlei Primary School in January 2017. She refused to accept the posting because she said that the department had not followed its policies and procedures. Mr. Mchunu testified that applicant had refused the position because she said that she was waiting for the investigation into her complaint to be completed, and after the finding had been made, she refused to accept the position stating that she was not satisfied with the finding.

[3.24] Applicant was paid throughout the period.

Applicant's evidence

[4] Applicant testified on her own behalf. She also led the evidence of her husband, Thulani Ngcobo and a distant relative and friend Mahlezi Mkhoba. Both her supporting witnesses testified that the applicant informed them of various incidents of sexual harassment, and they set out some of the information they said the applicant had relayed to them. Mr. Ngcobo also referred to the impact of the incidents on applicant's mental health.

[4.1.1] The Applicant spent many days of the arbitration enumerating, describing and being cross-examined on the sexual harassment allegations she made, which ranged from being giving no option but to go out for tea with Mr. Sishi to indecent exposure, unwelcome and inappropriate touching and suggestions, touching of thighs, suggestions of rape and what would happen to her if she did not enter into a relationship with him. Applicant made much of the fact that she and Mr. Sishi belonged to different trade unions which she contended also clouded his relationship with her. Mr. Sishi denied this. Applicant claimed she had a good relationship with the staff at the school and maintained that Mr. Sishi had turned them against her because she refused to have a sexual relationship with him.

[4.1.2] At different times during her evidence Applicant offered different explanations for not reporting the sexual harassment to the Department earlier than she had. Her reasons for not doing so were multifold. She

explained that initially the relationship was good. She felt that she could counsel Mr. Sishi (which she said she did every time there was an incident) and speak to him in a polite manner to be more professional (which is why she said she had not alerted her husband to the problem at this stage), and she attempted to do this as she felt it would assist keep her job as she did not want a recurrence of what had happened at Bhongo Primary School. Applicant elaborated that in addition she did not trust Mr. Mchunu for various reasons. He had not assisted her with her complaints at Bhongo. Mr. Sishi, she said, had also told her that he was not afraid of Mr. Mchunu who he said was afraid of him because he knew secrets about him. The applicant said she reported some of the incidents that had occurred to colleagues, friends, relatives and to Mr. Ndlovu the former chairperson of the school governing body, who was now deceased.

[4.1.3] Applicant detailed the effect of the sexual harassment. She explained *inter alia* that she was afraid to get close to men; her self esteem and confidence had been effected; she was afraid of teachers and being in the presence of the principal; she was fearful of the environment and prone to panic attacks and thoughts of suicide; she had been made to feel unwelcome and disliked; her quality of work had been effected; she was forgetful; her relationship with her children and husband had been effected; and she had suffered from anxiety and depression, and the medication she had taken for that had almost resulted in a miscarriage. Applicant also complained that the department did not make an effort to place her in a suitable position. The department's version is this last criticism was that it had placed the applicant but that she would not accept the placements offered to her.

[4.1.4] Applicant complained that she was not given the opportunity during her evidence in chief to fully ventilate her side of what had happened at Bhongo Primary School. She was given this opportunity during cross-examination.

[4.1.5] Applicant also admitted under cross-examination that she had been critical of systems in place at Olwambeni Primary school.

Respondent's evidence

[5] Respondent adduced the evidence of four witnesses, the principals of Bhongo and Olwambeni Primary Schools, Ms. S.T. Nkuku and Mr. L.T. Sishi respectively, Mr. Zulu, a Circuit Manager at the time, and Mr. R. Mchunu, the then Circuit Manager, now retired, all of whom have been referred to extensively above.

[5.1.1] Mr. Sishi denied the allegations of sexual harassment made by the applicant and he refuted her allegations that he had discriminated against her because she belonged to a different union, or that he had

instigated the other teachers against her. He recalled some of the events she referred to and tied to the allegations she made, and took a different view of what had happened, but he denied the allegations.

[5.1.2] Mr. Sishi also raised during his evidence matters that were not put to the applicant by the Department's representative when she testified. He alleged that the applicant had been inappropriate and provocative in her behaviour and dress to the extent he had to ask her, as well as had asked other teachers to approach her, to request her to behave in a more appropriate way in the school. He also contended that the applicant wanted him and staff to view pornographic material on her cell phone. She would compare her husband's private parts to those of her boyfriend who she had said was from Newcastle. Mr. Sishi complained of the applicant's inappropriate behaviour such as entering his office, closing the door and sitting inappropriately. He also testified that she had upset educators, and members of the SMT and the SGB. It had reached a stage that by 7 September 2015 educators had refused to work, and he persuaded them to return to work and to instead submit their complaints in writing, which they did. Members of the SMT and SGB also submitted their complaints in writing. These were handed to Mr. Mchunu on 7 September 2015. The complaints related to high absenteeism, leaving school early, and her treatment of educators.

[5.1.3] Applicant failed to report to school after 4 September 2015 and although she initially submitted medical certificates she soon stopped doing so and dealt with the circuit office directly instead the school.

[5.1.4] Mr. Sishi said that he was taken aback at the number of allegations made by the applicant (some relating to his alleged inappropriate conduct in public areas,) which he vehemently denied and made the point that it was unlikely that such behavior would have taken place in public areas. He could not understand why the applicant had not complained about him much earlier, taking into account the seriousness of the allegations, if what she alleged had any truth to it. He contended that the applicant was fabricating her evidence to demean him and to have him dismissed. He thought it telling that the applicant lodged her complaint at the same time the teachers lodged their grievances against her. Applicant denied the allegations made against her by Mr. Sishi.

[5.2] Ms. Nkuku's evidence did not take the matter much further. Although she said she had a good relationship with the applicant, she confirmed that grievances had been submitted to Mr. Mchunu regarding the applicant, which as far as she was aware of had never been investigated. The grievances *inter alia* related to the manner applicant spoke to her colleagues, and that she insulted them, absenteeism and not following instructions given by her seniors. The allegations were similar to those made at Olwambeni Primary School. Respondents witnesses throughout the arbitration referred to the arrogance displayed by the applicant because she said that she was more educated than them.

[5.3.1] On 3 February 2017 Mr. Zulu was instructed to investigate applicant's complaints. His personal history was that he had attended numerous workshops and seminars on different aspects of labour law such as sexual harassment particularly in respect of relationships between educators and learners. When preparing for a masters degree he wrote a dissertation exploring power dynamics between male managers and female educators in schools. Mr. Zulu claimed because of his background he was sensitive to issues such as sexual harassment and that he took this case, and the allegations, very seriously. It was his responsibility to investigate and decide if there is tangible evidence to support the complaint made. If such evidence is evident then the matter would be referred to a disciplinary hearing

[5.3.2] Mr. Zulu requested statements from the applicant and Mr. Sishi and asked them to secure their witnesses, which he interviewed. He mostly recorded the interviews, but did not if the witness was opposed to that. The applicant attended the interview with a SADTU official, Mr. Zungu, who Mr. Zulu claimed had assisted her prepare her statement. Mr. Zungu confirmed that applicant referred a complaint to the union but she had been told that it could not take her complaint further without concrete evidence. Mr. Zulu interviewed Mr. Ntinga, a member of the school governing body. Mr. Ntinga refused to prepare a written statement and stated he was not aware of nor witness to any of the allegations made by the applicant. Applicant had a witness who wished to remain anonymous and he met her privately in a Pick n' Pay parking lot. This witness also refused to provide him with a written statement or to allow the interview to be recorded. She too had not been witness to any of the incidents, but was aware only of incidents relayed to her by the applicant. Applicant told him that her other witnesses refused to attend the hearing because they were scared, and she agreed he could close the case. At the end of the interview he asked applicant what she wanted. She did not want to return to Olwambeni Primary School and she asked to be based in an office, and not a school. He was not empowered to do that, so he recommended she be transferred to another school. He wrote and submitted his finding and recommendations, which I have set out under the background. In this case he found that there was no tangible evidence to support applicant's claim.

[5.4] Mr. Mchunu gave the following explanation as to why he had not initiated an investigation into the allegations made by the applicant when he received her complaint on 7 September 2015. He explained that after the applicant lodged her complaint she became ill, which was followed by a pregnancy. She was absent for a protracted period and reported to work again on 10 October 2016. He had agreed with her that he would start the investigation when she was better and they agreed the date of 1 November 2016. He had also had to wait for the appointment letter from the Labour Relations Section without which he could not start the investigation. As agreed he started the investigation. He interviewed the applicant as well as other witnesses she had presented. He was about to compile his report when he summoned to the office of the head of

employee relations Pinetown, Mr. Ngidi. The applicant had accused him of not starting his investigation, which was untrue. In the event it was decided to appoint a second investigator and, in the result, he did not compile a report. Mr. Mchunu testified he had been called both to Bhongo and Olwambeni Primary Schools to deal with teachers who had similar grievances against the applicant. On both occasions the applicant was not at the schools at the time he visited.

Argument

[6] Both representatives submitted written argument. I thank them for that assistance and I summarise their arguments very briefly below.

Applicant's argument

[7.1] Mr. Mooloo argued that applicant's evidence must be accepted for the following reasons. Each incident of sexual harassment was related to an event. Mr. Sishi on the other hand failed to remember dates, blankly denied the allegations and failed to submit a plausible explanation for the applicant to fabricate the allegations.

[7.2] Mr. Mooloo complained that the department had delayed the investigation for a protracted period before taking any steps to investigate the complaints.

[7.3] Mr. Mooloo argued that although both Mr. Mchunu and Mr. Zulu had investigated the applicant's complaints they had both failed to make a proper effort to investigate the events and circumstances of the complaints. Mr. Mooloo submitted that the investigation was farcical and did not intend to expose the truth. Mr. Mooloo complained that the department does not have a policy on sexual harassment and that it does not have a guideline for investigations into allegations of sexual harassment.

[7.4] Mr. Mooloo asked that it be found that Mr. Sishi sexually harassed the applicant and that the department failed to properly investigate the applicant's complaints. The applicant sought compensation and or damages.

Respondent's argument

[8.1] Ms. Maphumulo submitted that applicant was unable to support the allegations made against Mr. Sishi in her evidence. Ms. Maphumulo argued that applicant's version should not be accepted. She emphasised that applicant was evasive in the manner in which she answered her questions, and it was "shocking" how she remembered dates. Applicant had only reported the alleged sexual harassment to Mr. Mchunu when the educators at the school had protested against her, and when she was told she had to teach, some time after the alleged sexual harassment had started. Applicant had never wanted to teach at Olwambeni Primary School and had refused other appointments offered to her. Educators at both Bhongo and Olwambeni Primary

School had submitted similar grievances against the applicant. Ms. Maphumulo pointed out that applicant had been diagnosed with depression on her own version some time before being placed at Olwambeni Primary School, and afterwards after she fell pregnant. Ms. Maphumulo contended that on the other hand Mr. Sishi was a credible witness and his evidence should be accepted. He had established that the applicant's main concern was that she did not want to teach at the school.

[8.2] Ms. Maphumulo submitted that the department investigated applicant's complaints appropriately. Both Mr. Mchunu and Mr. Zulu had been appointed to investigate the allegations and both did so but it was found that applicant was unable to provide evidence to support her allegations. Her witnesses too were unable to take the matter further.

[8.3] In conclusion Ms. Maphumulo submitted that the department followed the process in terms of its sexual harassment policy which is to investigate such cases. An investigation was conducted but there was no evidence to support the allegations made by the applicant and to refer the complaints to be dealt with in a hearing. Applicant was placed at a new school.

Motivation and analysis of evidence

[9.1] The Code of Good Practice on the Handling of Sexual Harassment Cases in the workplace defines sexual harassment as unwanted conduct of a sexual nature. Such conduct can take many forms. The allegations made by the applicant fall squarely within the ambit of prohibited harassment of a sexual nature.

[9.2] Getting to the truth in this case is very difficult because in essence there are two conflicting versions, with little or no corroborative evidence or background circumstances on which to determine the probabilities or the credibility of the two protagonists. Obviously one or the other must be lying, but which one is the difficult question to answer. The applicant has a strong personality and came across as someone who when wronged would have no hesitation in complaining and taking it further. The applicant failed to raise complaints when ordinarily one would have thought she might well have done had they been true, failed to inform her husband for some time, and raised the matters once she was experiencing problems generally at the school. There had been a history of this. The detail of the allegations after the passage of so much time was a double-edged sword. It is remarkable how well the applicant was able to remember the circumstances of the incidents and on the one hand that gives rise to some disquiet, but on the other it provides a basis for assessing what she alleged had happened and which had at times the ring of truth about it. The lack of detail in her letters of complaint stands in strong contrast to this. I was unimpressed with the introduction of sexual impropriety on the part of the applicant by Mr. Sishi when he testified because this had not been put to the applicant. Both were reasonable witnesses and their respective demeanours did not help me separate them and decide which

of them was not telling the truth. In the end I have come to the conclusion that I cannot decide one way or the other and the onus must be decisive.

[9.3] I accordingly find that the Department as the employer of Mr. Sishi and the applicant failed to discharge the onus in section 11 of the EEA and that it has not proved that the sexual harassment of the applicant by Mr. Sishi did not occur. So the first leg of section 60(3) of the EEA has been satisfied.

[9.4] The Department on receipt of the complaint by the applicant was obliged in terms of section 60(2) of the EEA to consult all relevant parties. It is implicit in the terms of the section read as a whole that this must be done promptly. In addition the Department had to take all reasonable steps to eliminate the alleged conduct.

[9.5] Mr. Mchunu waited a long time before he consulted with the relevant parties and fell short of what was required of him. The delay because the applicant was off work due to ill-health is not a sound reason for not proceeding with the interview process. The process when it did begin was delayed by the actions of the applicant who stepped in to get Mr. Mchunu removed. The Department then appears to have handled the matter with expedition. The complaint that the investigator subsequently appointed, Mr. Zulu, did not put the applicant's detailed averments to Mr. Sishi appears to have merit, because those allegations were made after the interview and after Mr. Sishi had lodged his response to the initial complaint with the investigator. The report came out soon afterwards and, having regard to the difficulties I had in determining where the truth lay, I have no issue with the outcome set out in the report, but it does appear to me that the process of getting there was too hurried and flawed as a result.

[9.6] I have accordingly concluded that although the Department attempted to comply with the provisions of section 60(2) of the EEA, it nonetheless failed to do all that is required of it under the EEA in the handling of the complaint. Mr. Mchunu should have ensured that the applicant was aware that she would not have to face Mr. Sishi in the workplace and worked out a basis for doing that with her and him, while the investigation took place and, as I have said above this should have been done immediately and not a year later. In addition Mr. Zulu should have put the respective statements to the two protagonists and seen if their responses helped to resolve the matter. I do not fault his decision to transfer the applicant out of the environment even though he had found that he could not determine who was telling the truth in relation to the allegations she had made against Mr. Sishi.

[9.7] In terms of section 48 of the EEA a commissioner of the CCMA "may, in any arbitration proceedings, make any appropriate arbitration award that gives effect to the provisions of the EEA, including payment of compensation by the employer to the employee, payment of damages by the employer to the employee and

making an order directing the employer to take steps to prevent the same unfair discrimination or a similar practice occurring in the future in respect of other employees" (section 48 read with 50 (2) (a)-(c)).

[9.8] It seems that the substantive relief in the workplace has been overtaken by events and I would have approved the decision by the Department that the applicant be transferred to another school. The applicant is also entitled in my view to compensation. I take into account that she has not put in a day's work since September 2015 and been paid and that the factual finding is based on the onus and the deeming provision in the EEA. I also bear in mind that, if true, the conduct of Mr. Sishi was shameful and although there was no admissible medical evidence, the applicant has suffered ill health which is probably related in some way to what was happening at the school and may be caused directly by the sexual harassment to which she was subjected. I have had regard to awards made in other cases which serve merely as a guideline and which are inconsistent. In my view in all the circumstances an amount of R50,000.00 is appropriate in this case.

[9.9] In these circumstances the Applicant is entitled to compensation of R50,000.00.

[9.10] Neither party was legally represented and so I make no order as to costs.

Award

[10] I make the following award:

[a] The respondent, KZN Department of Education, is ordered to pay R50,000.00 (fifty thousand rand) to the applicant, Primrose Fikile Ngcobo, within thirty days of receipt of this award.



Signature: _____

Commissioner: **Bess Pillemer**

Sector: **Public Service (General)**