14 March 2022

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To : **PSA obo Ramolefe M (Applicant)**

To : **Department of Education & Training and Ehlanzeni TVET College (Respondent)**

elrc
EDUCATION LABOUR RELATIONS COUNCIL

Dear Sir/ Madam

RE: ARBITRATION AWARD

CASE NAME: PSA obo RAMOLEFE M /DEPARTMENT OF HIGHER EDUCATION & TRAINING AND EHLANZENI TVET COLLEGE
CASE NUMBER: ELRC398-21/22MP

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

The matter is considered closed by the Council.

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

Kind Regards,

General Secretary
Education Labour Relations Council

14/3/22

OFFICE OF THE GENERAL SECRETARY

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EDUCATION LABOUR RELATIONS COUNCIL

ARBITRATION AWARD

Commissioner: NTATE MABILO
Case No.: ELRC398-21/22MP
Date of Award: 14 March 2022

In the ARBITRATION between:

PSA obo Ramolefe, ML
(Union / Applicant)

and

DHET and Ehlanzeni TVET College
(Respondent)

Union/Applicant's representative: Mr. Flip van der Walt of PSA

Union/Applicant's address: _____

Telephone: _____

Mobile: _____

Respondent's representative: Mr. Mpe Ngcosane

Respondent's address: _____

Telephone: _____

Facsimile: _____

elrc ELRC Building, 261 West Ave Centurion, RSA 0046
AWARD APPROVED,
2022 -03- 14
SENIOR MANAGER: DRS
Signature:.....

DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration hearing of the dismissal dispute between **PSA obo Ramolefe, ML** (Applicant) and **DHET and Ehlanzeni TVET College** (Respondent) was held under the auspices of the Education Labour Relation Council (**"ELRC"**) on 15/11/2021, 21/12/2021 and 01-02/02/2022. The hearings were held at the offices of Ehlanzeni TVET College in Mbombela.

2. The applicant was represented by Mr. Flip van der Walt of PSA while the respondent was represented by Mr. Mpe Ngcosane, an employee of the respondent.

3. The proceedings were conducted in English and were manually and digitally recorded.

PRELIMINARY ISSUES:

4. On 15 December 2021, the applicant party raised a point *in limine* enquiring as to who is the applicant's employer between the DHET and Ehlanzeni TVET College. In order to make a ruling, I asked the parties to make submissions before the next hearing date and they did make their respective submissions. After considering the submissions I made a ruling that both the DHET and Ehlanzeni TVET College are the employer and the ruling was communicated to the parties before the next hearing date of the 21 December 2021.

5. On 2 February 2022, during the cross examination of the applicant Mr Ramolefe ML, I called the respondent's representative to order and ruled that the question asked was irrelevant to the case. He then made an application that I be recused. I adjourned the hearing for about fifteen minutes and considered the application. Thereafter I made a ruling that there was nothing that warranted the recusal of the panelist. The hearing resumed and continued to the end.

ISSUES TO BE DECIDED:

6. I am required to determine the substantive fairness of the dismissal of the applicant, more specifically the reason for the dismissal. Procedural fairness was not challenged at all.

7. The remedy requested was reinstatement.

BACKGROUND TO THE DISPUTE:

8. The applicant was appointed on the 15 July 2019 as a lecturer for the Ehlanzeni TVET College, stationed at Barberton Campus.

9. His latest salary was R24 100.35 per month.

10. He was dismissed on the 05 May 2021 after a disciplinary enquiry.

11. Upon the conclusion of their submissions, both parties were requested to address the panelist in respect of their closing arguments. Both parties did so in writing, and I have considered these in my award below.

SURVEY OF SUBMISSIONS AND ARGUMENTS

THE RESPONDENT`S CASE:

The respondent's first witness, Mr. Francis Roger Sifiso Malinga testified under oath that:

12. He started working at Ehlanzeni TVET College as Assistant Director Human Resources Management on 1 April 2019. Previously he worked for KZN Department of Education and he had 15 years in HR work. His responsibilities included management of performance, recruitment and selection, conditions of employment and HR development.

13. The applicant was initially appointed at the College to assist in a project called Report 191. Report 191 was not led by HR but by lecturers.

14. In April 2019 there was an advertisement issued for appointment of permanent lecturers to replace the Report 191 project. The applicant applied for a lecturer's position and he was appointed.

15. He described the process of appointment as starting with submission of Z83 form, CV and qualifications. Thereafter a long list is compiled, it goes to selection committee for shortlisting, interviews are conducted, recommendation for vetting is done followed by a letter of appointment for successful candidates.

16. The witness took us through Z83 form in the respondent bundle with specific reference to sections B, last but one question that reads: *Have you been convicted of a criminal offence or been dismissed from employment?* and section F. It was pointed out by the witness that while the question on section B was answered, it had two questions and the answer was not clear as to which of the two questions were confirmed, criminal record or prior dismissal. Section F was left uncompleted and written CV attached across the section. In it was a sub-section that asked: *If you were previously employed in the Public Service, indicate whether any condition exist that prevents your re-appointment.* The candidate was to answer by ticking YES or No and it was not ticked by the applicant.

17. When asked what did the employer do regarding the omitted information, the witness said that the CV of the applicant was checked for the missing information and the employer waited to verify with the security check information later.

18. The witness also referred to the integrity form in the respondent's bundle, which form is filled by the candidates before being interviewed. Specific reference was made to items 1.2 and 1.3. The question on 1.2 read as follows: *Have you been subjected to any investigation/ misconduct with your current or previous employer? If yes, what were the circumstances and the outcome?* The applicant answered: *Absconding outcome was dismissal matter on appeal.* In 1.3 it was asked: *Do you have any criminal record or charges against you?* The applicant answered: *Six months suspended sentence but I appealed the matter.*

19. The applicant was appointed because lectures were to start in July 2019. All processes were followed and the applicants were subjected to vetting by MIE after the interviews.

20. The employer became aware of the criminal record in July 2019. The witness referred to MIE report in respondent bundle and stated that when the information came the applicant was already in employment. The appointment was done before the report because the employer was in a hurry for second semester that was about to start. However, there is a clause in the contract about security clearance and vetting and according to this clause, the appointment was conditional. The witness confirmed that the applicant was appointed on or about 15 July 2019.

21. Now being aware of the MIE report the employer considered the report, gave the applicant benefit of the doubt relating to his appeal, more so as he had produced good results. Employer decided to wait for finalization of the case on appeal.

22. Around November 2019 it came to employer's attention that PERSAL system rejected the applicant due to dismissal at Home Affairs. (PERSAL printout date 06/11/2019.) Witness informed the Accounting Officer who in turn wrote to the applicant in January 2020 as the College was closed in December.

23. Reference was made to the Labour Court judgement delivered on 4 June 2015 reviewing a GPSSBC Arbitration Award and declaring the dismissal of the applicant by Department of Home Affairs to have been fair. He stated that the applicant was fully aware when he applied for the lecturer's position that his appeal was finalised and the matter was no longer on appeal.

24. An investigator was appointed and he came up with the recommendation that the applicant be charged. Disciplinary process followed and the applicant was dismissed.

25. As Assistant Director HR, he would have advised management not to finalise the appointment of the applicant, had he been aware of the information.

26. Under cross examination the witness replied that Z83 form is for information about an applicant for employment and that shortlisting is done to check qualifications. He further confirmed that the applicant did meet the requirements for appointment. Criminal record is checked after interviews.

27. It was pointed out that applicant disclosed on Z83 that he had a criminal record and he provided his CV prior to shortlisting. How could employer only become aware in July 2019 while it was stated in Z83? The witness replied that in Z83 there are two questions requiring one answer. The applicant should have elaborated further. He should have given additional information on Integrity Form.

28. Witness conceded that the employer was aware of the entry on Z83. He reiterated the need for further information on integrity form.

29. Verification was done in July 2017 and its outcome came after issuing letter of appointment.

30. When referred to the Public Service Regulations of 2016 on applicant's bundle, the witness admitted that indeed a person dismissed from the public service can be reappointed after completing certain period as per type of misconduct. The relevant period for the applicant was 1 year.

31. The Z83 form of Mr. Wanga Marwanqana was referred to and the witness did not know of him having a criminal record. He further confirmed that the integrity form was completed before the interviews and that the selection committee only focussed on qualifications of applicants.

32. The witness submitted that the employer continued with the appointment before getting all the facts because of the existing relationship with the applicant while the information available was not yet conclusive.

33. In re-examination, the witness replied that the applicant was dismissed for abscondment at Home Affairs. Asked which period was applicable to the applicant in the Public Service Regulations, he replied that it was 61.3 (three years).

34. It was also stated that the employer was not aware of Wanga Marwanqana having a criminal record.

35. Witness was again taken to 1.3 of the Integrity form and he replied that the applicant did not give the required information and therefore the employer was not aware.

The respondent's second witness, Mrs. Maryna Marais testified under oath and stated the following:

36. She was a retired person who worked for the Department of Higher Education and retired in 2018. For the period from 1 May 2018, she joined Ehlanzeni TVET College as Acting Principal until 30 June 2020.

37. The applicant was initially appointed by Campus Manager to offer part-time classes in Project 191.

38. She recommended for the phasing out of the Project 191 programme and appointment of lecturers on a full-time basis. The process of advertising and recruitment of the lecturers was started. The applicant also applied.

39. Regarding the Z83 of the applicant, she said the declaration of '*Yes*' for criminal record in Part B was not a full declaration and it was to be augmented with details in Part F. The purpose of the Integrity Form was to confirm that information was true and correct. Applicant was shortlisted, interviewed and appointed.

40. The second semester was to start in July and recruitment was not finished. Appointment letter was issued on 17 July 2019 with a proviso for vetting. The applicant was appointed in college payroll provisionally. He was given the benefit of doubt. Vetting results were received on 22 July 2019 per MIE report. MIE was the vetting company. The report reflected a criminal record.

41. However, on 8 November PERSAL rejected him. In January 2020 a letter was written to the applicant, requesting him to give reasons why his employment should not be terminated. He replied on 28 February 2020.

42. On 6 March 2020 an independent person was appointed to investigate the matter. On the 30 June 2020 the witness left the college.

43. According to the witness there was no full disclosure by the applicant. She was not aware of any other person with criminal record.

44. Under cross examination the witness stated that she was not part of the recruitment process but she was aware of the Z83 Form. She indicated that part B4 was twofold and backed by part F, which the applicant did not tick. She also stated that the integrity form is completed prior to interviews.

45. When asked why did the employer continue and interview the applicant with the discrepancies in the z83 and integrity form, she replied that it was because the applicant stated that he had appealed.

46. She said the reason vetting took place long after appointment was MIE taking longer time than expected. The witness further stated that she received the MIE report by 22 July 2019.

47. The witness was asked whether the applicant was ever engaged on the issue of appeal and the response was that he was given benefit of doubt. Instead, the employer instituted an investigation.

48. It was put to the witness that by appointing the applicant in July 2019 and only enquiring in January 2020 the employer created expectation that everything is fine. The witness replied that the appointment was not concluded and it was conditional.

49. She was asked about Wanga Marwanqana and she did not know about his alleged criminal record. The witness was told that he did not disclose and he had a criminal record.

50. In re-examination, Wanga Marwanqana's MIE report was read and it showed that he had no previous convictions and the case pending did not constitute a criminal record.

51. The applicant did not state anything about his appeal in his representation letter.

52. When asked why was no action taken immediately after receiving the MIE report in July 2019, she replied that it was because the employer knew the applicant and the issue of appeal, he was given benefit of doubt.

53. Witness was asked to comment on the statement that applicant disclosed his criminal record and she said the applicant said the matter was on appeal.

54. When asked how was the applicant as a worker, she replied that she did not know him well as a worker.

The respondent's third witness, Mr. Elias Mbulana Mbuyane, testified under oath that:

55. He was Deputy Principal: Corporate Services during the period 2019 to June 2020. His duties included HR, Marketing and communication, IT and data management and strategic planning. He became the College Principal on 1 July 2020. He knew the applicant.

56. The College decided to investigate the applicant after they found it difficult to appoint him into the PERSAL system.

57. Prior to his appointment, applicant was offering classes in Project 191 as a part-time lecturer and he was paid by the college.

58. The appointment for fulltime lecturers were done due to pressure despite the fact that verification results were not received yet. However, provision was made in the appointment letter.

59. On receipt of the MIE report, the employer revisited the Z83 form and the Integrity form and it was discovered that applicant did indicate that there were issues but the matter was on appeal. Having

received the MIE report after letter of appointment, the applicant was given benefit of doubt and the employer concluded that the matter was in appeal and there was no verdict. At that time department had backlogs and shortage of staff. Then the system rejected him due to criminal record.

60. The college was not aware that he worked at Department of Home Affairs and the investigation found that he was dismissed for corruption. We also found that the case closed long before his application and it was no longer on appeal. Had this information been known, the applicant would not have been appointed.

61. Applicant was asked to make a representation and it did not assist much. Thus, the investigation which came up with a recommendation to institute disciplinary action.

62. In cross examination, the witness was shown the DHET Recruitment and Selection Policy provision on Employment Verification (section 2.2.4) which reads as follows: *Employment verification will be conducted for all recommended candidates by the responsible HR unit prior to appointment as follows:*

(i) Qualifications with SAQA/or and study verification;

(ii) Personnel suitability check, which will include, criminal record checks, citizenship, financial records checks, previous employment verification;

(iii) Security clearance as per procedure manual; and

(iv) Social media accounts of appropriate candidates (consent or permission must be granted first by candidates).

The witness responded by saying the verification and appointment were done simultaneously.

63. It was again confirmed that the date of appointment letter was 17 July 2019 and the MIE report was received on 22 July 2019.

64. Reference was again made to the Z83 form and the Integrity form. The witness stated that the applicant could not be disqualified on the basis of the lack of full disclosure because he said the matter was on appeal.

65. When asked what was the applicant dismissed for in his previous employment, he said it was for corruption. After been taken through the arbitration award and the Labour Court judgement in the respondent's bundle, it was confirmed that dismissal at Department of Home Affairs was for abscondment and not for corruption.

66. Regarding Wanga Marwanqana, the witness confirmed that he did not disclose on Z83 that he had any criminal record.

67. As regards the applicant's Integrity form, the witness stated that even though the employer was aware of the criminal record and omissions on Z83 and Integrity form prior to the interviews, the employer was misled due to the appeal.

68. The witness was referred to section 61 of Public Service Regulations of 2016 and asked to point out which period was relevant for the applicant to can be accepted back in the public service given his transgression. He replied that it would be after one year, as per 61.3. He also confirmed that according to the appeal outcome the applicant was sanctioned for six months imprisonment. (That was with reference to appeal judgement A72/15 AE).

69. In re-examination the witness selected section 61.1 (b) of the Public Service Regulations of 2016 as the appropriate period for the applicant to can re-join the public service.

70. It was also pointed out that since the appeal judgement outcome was on the 04/01/2016 and the interviews were on 28/06/2019, it means that when the Integrity form was filled the appeal was long concluded.

71. As regards the criminal record of Wanga Marwanqana, the witness stated that it was a driving offence which cannot be treated similar to a corruption record.

72. On the issue of verification having to be done prior appointment the witness stated that the employer was using MIE for verification. The employer relied on their processing and submitting their report.

The respondent closed its case.

THE APPLICANT`S CASE:

The applicant, Mr. Mahlatse Lucky Ramolefe testified under oath that:

73. Since his dismissal by the respondent, he was not working and remained unemployed.

74. He started working for Department of Home Affairs in 2008 on a six months contract. In December 2009 he was appointed as Immigration Officer stationed at Beitbridge. In January 2012 he was suspended for taking a R20.00 from a client and the matter was escalated to the point where he ended up being arrested. After two days he got bail and was suspended from work, and he ended up with a criminal record.

75. He was suspended without pay for three months. On the 14 September, the court process ended with a sentence of two years imprisonment of which one year was suspended for five years. On 1 October 2012 he was supposed to report at work and failed to do so as he was serving a sentence in prison. In January 2013 he was released from prison and he went back to work. He worked till he received notice of hearing in February 2013. He was dismissed for absconding as he failed to report to work between October 2012 and January 2013. He made an appeal and it was unsuccessful. He referred an unfair dismissal case with the GPSSBC and it ended in his favour. (GPSSBC arbitration award was referred to). The case was taken on review and the outcome was in favour of Department of Home Affairs. The review judgement was delivered on 4 June 2015. The dismissal of the applicant from Department of Home Affairs was for abscondment.

76. In January 2017 the applicant was appointed on a six months contract as a lecturer for the respondent. The contract was renewed. In 2018 he got a 12 months contract again from the respondent. In 2019 he was again appointed on a contract from January to June. Around February or March 2019, advertisements for permanent lecturers were published and he applied. He was shortlisted, interviewed and appointed.

77. When asked whether there was any question relating to criminal record in the application forms, applicant replied that there was such a question (Z83, B4) and his answer was, *yes*. Regarding Z83 section F, he said he did not answer because it was stated on the form that *' Ignore if attached CV'* and he had attached a CV. At that time there was no condition preventing him to join the public service.

78. He stated that in terms of the Public Service Regulations, he understood that after one year he was free to re-enter the public service. (Reference was made to Public Service Regulations of 2016, specifically section 61.3).

79. As regards Z83 form section F, where it is required to declare any condition that prevent re-appointment into the Public Service, the applicant said there were no condition preventing him to can be re-appointed and that is why he left it as it was not applicable to him.

80. Regarding the Integrity form, he stated that if the respondent was not satisfied with his answers, they should have disqualified him. However, they condoned what they are complaining about and proceeded with the processes. When he got appointed, he understood that everything was done and he was permanently employed.

81. When asked about MIE verification report, he replied that the employer did not follow own policy and issued letter of appointment before verification was completed. (Reference was made to section 2.2.4 of DHET Recruitment and Selection Policy).

82. He stated that he is being accused of not declaring some information while other colleague, Wanga Marwanqana did not declare that he had a case pending and he is not accused.

83. In January 2020 he was told that PERSAL rejected him due to previous dismissal from previous employer and criminal record. In response he highlighted that his criminal record was already known as he disclosed and his dismissal was on abscondment. The criminal record did not affect his work as a teacher.

84. The witness closed his testimony by stating that all this was the result of the employer disregarding and not following their own policies and procedures.

85. Under cross examination, the witness stated that he did work for Department of Home Affairs on a contract basis and he was a front office clerk at the Civic Section. In January 2012 he was stationed in a tent at Beit Bridge and he was approached by a police officer and said there was a taxi blocking the road. He asked that the driver of that taxi be assisted by stamping his passport and in that passport were receipts and R20.00. The driver did not go through the que and from his passport a R20.00 fell on the desk. The matter was escalated and he was arrested. He was arrested for receipt of a R20.00 from a member of the public and that was what he got convicted for. The sentence was 2 years imprisonment with 1 year suspended for 5 years.

86. The witness was asked several times to confirm that he was convicted for corruption and he kept saying that he was charged and convicted for taking R20.00 from a member of the public. When he was told that he must have known that it was corruption he replied '*according to your understanding*'.

87. It was confirmed that the criminal case judgement was made on 04/01/2016 and the Labour court judgement was delivered on 04 June 2015.

88. Regarding the Z83 B4, the witness pointed out that such information is only taken into account if it directly related to the requirements of the position and in his case, it was not relevant as it was absconding and finance, which were not directly related to teaching students.

89. When asked why did he not answer the question on Z83 section F on whether any condition existed, which could prevent re-appointment in the Public Service, the witness replied that he found it not necessary as it was not relevant to him.

90. Regarding the information in Integrity form it was put to the witness that he stated that there was an appeal while the outcome of the appeal was already known. The answer was that there was no longer

an appeal pending. Again, it was put to him that he did not give the details required and he answered that he could not remember the details.

91. The witness denied that he was dishonest in filling in the Integrity form.

92. When asked why he said during his testimony that the employer was the guilty party, he replied that when the employer realised that there were discrepancies in the integrity form, they could have disqualified him but they condoned those discrepancies, again, by issuing the letter of appointment on 17 July 2019 while MIE report was not yet received, they disregarded their own policy.

93. Regarding the clause in the letter of appointment which stated that *'Please note that security clearance will be done on you, therefore confirmation of appointment will be subject to negative outcome of the security check result. Should it come out positive, your appointment will be withdrawn by the department'* he said the clause was not relevant to him because he stated in the application form that he had a criminal record.

94. The witness was asked about the reason why appointments were made before completion of verification and he replied that while he knew that employer was under pressure and backlog, pressure or no pressure do not give a right to ignore policy. He reiterated the fact that the whole arbitration was caused by the employer ignoring and not following their own policies and procedures.

95. It was put to the witness that it was due to him writing that matter was on appeal that led to him being appointed and he replied that it was because employer appointed before due processes were completed.

96. On the matter of Wanga Marwanqana, he replied that Wanga had a pending case and it was not declared. Again, Wanga said no where he should have said yes and he is not charged. That is inconsistency.

97. In re-examination, the witness confirmed that his dismissal from Department of Home Affairs was for abscondment and that at the time of his application there were no conditions preventing his re-appointment into Public Service.

The applicant closed its case.

ANALYSIS OF EVIDENCE AND ARGUMENTS:

98. The matter was referred as dismissal related to misconduct in terms of section 191(1) [191 (5) (a)] of the Labour Relations Act 66 of 1995. The matter was therefore set down for arbitration.

99. I am required to determine whether the dismissal was substantively fair. Procedure was not in dispute. This is in line with Schedule 8 Items 4 and 7 of the Code of Good Practice: Dismissals.

100. Section 188(2) of the LRA states that any person considering whether or not the reason for dismissal is a fair reason or whether or not a dismissal was effected in accordance with a fair procedure, must take into account any relevant code of good practice issued in terms of the LRA.

101. Again section 192 (1) of LRA provides that in any proceedings concerning any dismissal, the employee must establish the existence of the dismissal. Subsection (2) of the same section provides that if the existence of dismissal is established, the employer must prove that the dismissal is fair.

102. In the current case, there was no dispute about the existence of dismissal. The onus was therefore on the employer to prove on a balance of probabilities that the dismissal was for a fair reason and more specifically regarding the reason for the dismissal.

103. I considered all relevant evidence and arguments raised by the parties and in doing so, I have only referred to evidence and arguments that I regard necessary to substantiate my findings and dispose of the dispute.

104. The applicant was charged for alleged gross dishonesty and/ or misrepresentation, for alleged failure to disclose information relating to his criminal record and dismissal by previous employer. He attended a disciplinary hearing and was dismissed. The alleged failure to disclose emanated from recruitment, selection to appointment. I will therefore analyse the above evidence under the following categories:

Application for Employment Form Z83:

105. Employment in government makes use of Z83 form which applicants need to complete and submit. The form has different sections and questions which applicants are required to answer. Under section B there was a question that read as follows: *Have you been convicted of a criminal offence or been dismissed from employment? Yes or No.* The applicant answered this question by ticking Yes. In section F which deals with work experience, there is a question which reads: *If you were previously employed in the Public Service, indicate whether any condition exists that prevents your re-appointment. Yes or No.* The applicant did not tick any.

106. The respondent's version is that the answer to section B is incomplete because the question was two-fold, it could not be answered with yes or no. Accordingly the disclosure is incomplete. Again, the fact

that the applicant did not tick either Yes or No in the question under section F is seen by the respondent as failure to disclose crucial information.

107. The applicant's version with regard to section B is that the correct answer was ticked which is Yes and therefore a full disclosure was made. The answers provided in the form were yes and no only. Regarding section F, the applicant pointed out a provision that was made that if a CV was attached, there was no need to answer section F. Therefore, he wrote CV attached and ignored the whole of section F.

108. On analyzing the two versions, it becomes clear that it is the form that gave room for different interpretations. In section B, how should two different questions in one question be answered with yes or no? If more was needed why not asked differently for details. With regard to section F, there was a choice for either to complete the section or to attach a CV. It is again what the form required and if indeed CV was attached, I fail to understand why the applicant was expected to fill in the form in addition while the form provided a choice. What the employer wanted was not what the form required. The current Z83 form had been corrected and there are no longer questions with confusing interpretations. It is therefore my finding that the Z83 form used had shortcomings hence it had now been amended, while the applicant completed the then form as required.

Interview Integrity form:

109. The Interview Integrity form is said to be a form that shortlisted applicants are asked to fill in just before they are interviewed. Crucial to this case were two questions, 1.2 and 1,3. Question 1.2 read: *Have you been subjected to any investigation/ misconduct with your current or previous employer? What were the circumstances and the outcome?* The applicant answered as follows: *Absconding outcome was dismissal matter on appeal.* Question 1.3 read as follows: *Do you have any criminal record or charges against you? If yes, what were / are the circumstances of the criminal record or charges?* The answer provided by the applicant was: *Six months suspended sentence but I appealed the matter.*

110. The respondent's version is that both questions were not sufficiently answered by the applicant. In particular the issue of the appeal which was pointed out that it was already concluded at the time of application.

111. The applicant's version is that there may be some inaccuracies or omissions, but it was not hidden that there was misconduct in the previous employment and criminal record.

112. The picture before me is that after the forms were completed, they were not checked. An interview integrity form filled just before interviews should be the first thing to interrogate after introductions in the interview session. All the discrepancies and unclear statements should have been clarified at the interviews. Now it seems the form which is intended to assist selection process is only consulted after security checks, and long after the selection process and the appointment had been completed.

Recruitment and Selection Policy:

113. The DHET Recruitment and Selection Policy was critical to guide the recruitment and selection of suitable candidates. The same policy provide guidance on how the process should unfold. This policy made a crucial provision that reads as follows: *Employment verification will be conducted for all recommended candidates by the responsible HR unit* ***prior*** *to appointment as follows:*

(i) Qualifications with SAQA/or and study verification;

(ii) Personnel suitability check, which will include, criminal record checks, citizenship, financial records checks, previous employment verification;

(iii) Security clearance as per procedure manual; and

(iv) Social media accounts of appropriate candidates (consent or permission must be granted first by candidates).

114. The word **prior** (my emphasis) in the above paragraph means that the above listed processes must be done before appointment is done. This very important provision was ignored and appointment preceded the above checks. Disregard of own policy is suicidal and must not be allowed to continue. Here the employer dropped the bar.

Public Service Regulations:

115. The Public Service Regulations made provision for the reappointment of people who might leave the public service employment due to various misconducts. Section 61 of the regulations stipulate the length of period that must lapse before a person may be reappointed into the public service. The applicant in this case was dismissed for abscondment resulting from a criminal conviction and was sentenced for less than two years. He was therefore prohibited from reappointment in the Public Service for a period of 3 years. By the time he applied for the position in 2019 he was no longer prohibited from joining the Public Service. He was dismissed on 04 June 2015 and applied for the lecturing position in April 2019.

Disclosure of dismissal from the Public Service:

116. It is important to note that in 2012 when the applicant committed a misconduct, two cases were instituted namely the criminal case and an internal disciplinary process. The internal process resulted in the Department of Home Affairs suspending the applicant for three months without pay. When he was to resume duty after the suspension, he could not due to the criminal case. He was then dismissed on abscondment. The applicant appealed the dismissal and was unsuccessful. The applicant referred a case of unfair dismissal to GPSSBC and it was arbitrated. The Department took the award on review and the judgement delivered on 04 June 2015 declared the dismissal to have been fair. It is my finding that the dismissal of the applicant from the Department of Home Affairs was declared in form Z83 section B, when the applicant answered yes to the question that read: Have you been convicted of a criminal offence or been dismissed from employment? Again, I take it that it was included in the CV that was attached because there were no argument that the CV did not provide the information required by section F of the Z83. The dismissal was again disclosed in the Integrity form under 1.2 when the applicant stated that he was dismissed for abscondment. Indeed, there was an appeal, but it took place before the matter was arbitrated and later reviewed in favour of the department. At that time the appeal was no longer relevant. This in my view, do not take away the fact that the dismissal was disclosed as well as the reason for the dismissal. I am therefore convinced that sufficient disclosure was made by the applicant about the dismissal from the Public Service for the employer to make a decision.

Disclosure of criminal Record:

117. The first question on criminal record was on Z83 section B and the applicant answered *Yes* to confirm that he had a criminal record. In the integrity form under 1.3 he declared that he had a criminal record which ended in six months suspended sentence. My findings are that initially, the sentence was for two years of which one year was suspended for five years, and the matter was appealed. The appeal judgement delivered on 04/01/2015 reduced the sentence to six months suspended sentence, which was reported on the Integrity form under section 1.3. It is therefore my finding that the criminal record was sufficiently disclosed for the respondent to proceed and make a decision. The appeal did take place but it was before the final judgement of six months suspended sentence and it actually resulted in that sentence. Regarding the appeal, the applicant got his sequence wrong. However, this cannot override the fact that the record was sufficiently disclosed.

118. Gross dishonesty and or misrepresentation are very serious charges for which an appropriate sanction is dismissal. The act or omission must be closely assessed to ensure that the classification is indeed gross dishonesty and or misrepresentation. In the current case, I am not persuaded to believe that gross dishonesty and or misrepresentation had indeed been committed. In the first place Z83 form used was erroneous in section B and it created an option whether to fill in or provide CV in section F. What the employer is questioning in section F, the form said it can be left out if CV was attached. If CV was not attached and the form was not filled either, I would be persuaded to believe otherwise. The Z83 used in this case was confusing and full of errors. That is why it was corrected and the Z83 currently in use no longer have the challenges stated above. A charge of dishonesty requires proof or evidence that the person acted with intent to deceive and in this case. The respondent failed to discharge its onus of proof in this regard.

119. The phrase 'six *months suspended sentence'* in the Interview Integrity form (answer to question 1.3) should have raised serious questions to those who conducted the screening of the candidates. It was too glaring a disclosure to ignore and continue with the process. Coupled with the disclosure in Z83 section B, the respondent had enough information to dig out the details and failed to do so.

120. It goes without saying that the applicant's job application went through a process which amongst other things included shortlisting as well as interviews. It is either the alleged misconduct escaped those who shortlisted and those who interviewed the applicant or that his application was found to be compliant and even the interview panel did not see anything sinister.

121. It appears that the real problem was the PERSAL rejection. All along, the applicant was not a problem even after MIE report which was received in July 2019. PERSAL rejection in November 2019 triggered the letter from Acting Principal in January 2020, which required the applicant to state why his employment should not be terminated. PERSAL being only a system, should be able to accommodate the provisions of the Public Service Regulations regarding re-appointment into the Public Service.

122. In **Mbanjwa v Shoprite Checkers (Pty) Ltd and others (DA4/11) [2013] ZALAC 29** the court held that the test at all times remains one of balance of probabilities. Reasonable or strong suspicion is not adequate to terminate the employment relationship. In the current case disclosures were made even though not to the satisfaction of the respondent.

123. In **Govan v Skidmore [1952] (1) SA 732 (N)** it was stated that one may, by balancing probabilities select a conclusion which seems to be the more natural, or plausible conclusion from amongst several conceivable ones, even though that conclusion may not be the only reasonable one.

124. While it is common course that procedure is not in dispute, it is noted that the applicant had effectively worked for the respondent since January 2017 although from 2017 to June 2019, he was on short contracts, to May 2021. In total he worked for more than five (5) years. Termination of employment after so long a service for the above reasons which are also not convincing, will be prejudicial and disruptive to the applicant's life.

125. Having considered the parties' submissions and arguments, and based on the balance of probabilities I am persuaded to believe that the onus was not sufficiently discharged and the dismissal is not justified and therefore unfair. To some extend the applicant had discrepancies and he is therefore not completely innocent. However, those discrepancies do not justify the action taken against him. His reinstatement shall therefore not be accompanied by retrospective payment.

Award:

1. The dismissal of Mr Ramolefe ML is substantively unfair.

2. The respondent, DHET and Ehlanzeni TVET College is ordered to reinstate the applicant with effect from 01 April 2022.

3. There is no retrospective compensation.

Ntate Mabilo

ELRC Panelist

elrc ELRC Building, 261 West Ave Centurion, RSA 0046
AWARD APPROVED.
2022 -03- 14
SENIOR MANAGER: DRS
Signature:.....