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SW/ - 50288598

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Dear Mr Stansfield

**APPEAL: MR BB ISAACS (CASE NO: 50288598)**

We refer to the above matter and the appeal submitted in respect thereof.

**DETAILS OF HEARING**

1. The Appellant was charged with various charges of misconduct, the details of which are set out below. An independent presiding officer was appointed to hear the matter, Adv Justice Nedzamba ("the Presiding Officer").
2. The findings on the charges were handed down on 6 May 2016. The sanction finding is dated 1 June 2016.
3. The Presiding Officer dismissed the employee.
4. The relevant Disciplinary Code and Procedures are set out in Schedule 2 of the Employment of Educator's Act 76 of 1998.
5. In terms of Section 9(1) of Schedule 2, the employee is entitled to appeal to the Member of the Executive Council. The grounds of appeal are set out in a letter dated 8 June 2016 from the Appellant's attorney, Mr Gavin Stansfield of Cliffe Dekker Hofmeyr Inc ("Stansfield").

6. In deciding this appeal I have had regard to the record and consulted with my legal advisors on questions of law which arose. This advice has been taken into consideration in giving the reasons which follow.

### THE CHARGES

7. The Appellant is the principal of the South Peninsula High School ("the School") and he has been employed in that position for the past 32 years.
8. The first two charges of which he was found guilty concern allegations of insolent behaviour towards persons in authority over the Appellant. These charges read as follows:

#### **"Charge 1**

*It is alleged that you are guilty of misconduct in terms of Section 18(1) (t) of the Employment of Educator Act, 76 of 1998 (hereinafter referred to as the Act), in that on or about 21 September 2015 you displayed disrespect towards Mr. Naidoo, CTM, in the workplace or demonstrated abusive or insolent behaviour towards him in the presence of learners, educators and school clients by:*

- (a) going off on a tirade about Mr Naidoo's role as a messenger for the WCED and not representing educators; and/or*
- (b) Saying that "Mr. Naidoo is not doing his work"; and/or*
- (c) Shouting at Mr. Naidoo "leave my school"; and/or*
- (d) Calling him a "spineless creature and spineless bureaucrat"; and/or*
- (e) Telling him "charge me, charge me"; and/or*
- (f) Blocking his pathway to the school building and/or office of Ms Bezuidenhout; and/or*
- (g) Shouting at the top of your voice to Ms. Bezuidenhout: "don't take it, don't take it" and/or*
- (h) Screaming at Mr. Naidoo that "you were appointed to get rid of me".*

#### **Charge 2**

*It is alleged that you are guilty of misconduct in terms of Section 18(1) (t) of the Act, in that on or about 21 September 2015, you displayed disrespect towards others in the workplace or demonstrated abusive or insolent behaviour by calling Mr. Stander the "henchman" of M. Naidoo. "*

9. The parts of Charges 4 and 5 that remain relevant in these appeal proceedings concerned the contents of letters which the Appellant has caused to have published in the Cape Argus Newspaper. Charge 4 alleged that he had brought the employer's name into disrepute by, *inter alia*, stating in a letter to the Cape Argus Newspaper that the Education Department uses children to attack teachers. Charge 5 states in essence that he had brought the employer's name into disrepute by causing a letter to be published in the Cape Argus on 2 November 2015 in which he had said that the department is the cause of ill-discipline in schools and that he had experienced the rudeness and smugness of departmental officials and presiding officers who need to win cases otherwise they will be taken off the payroll.
10. For the sake of analysis it would be convenient to deal with the charges regarding the incident at the School on 21 September 2015 under the heading of "the insolence

charges" and the charges relating to the newspaper articles as "the bringing into disrepute charges".

## **THE INSOLENT CHARGES**

### **The Presiding Officer's finding**

11. The core facts relating to this incident are summarised by the Presiding Officer when dealing with the evidence of the then circuit team manager (CTM), Dhanan Naidoo ("Naidoo"). In paragraphs 31 to 36 he provides the following summary of the employer's version :

- "31. On 18 September 2015 [Naidoo] telephonically contacted Ms Bezuidenhout, the School's Secretary (Bezuidenhout) and informed her of his intention to deliver a notice of disciplinary charges against her. She told him that Isaacs did not want her to receive the notice.
32. On Monday, 21 September 2015 Mr. Stander (Stander), the current Circuit Manager, accompanied him to the school to serve the disciplinary notice to Bezuidenhout. Stander remained in the car when Naidoo went to the school's offices. Courteously, he first went to Isaacs to inform him that he was there to serve the disciplinary notice Bezuidenhout. Isaacs invited Baker, the deputy principal, to join them.
33. At that meeting, Isaacs asked him why the notice was not served by the Director, Mr. Van Harte. His response was that he was just delivering the notice. Isaacs then slammed his fist on the table and said to him 'leave my school; there will be no serving of the notice in my school'. He then told Isaacs that the school was not Isaacs' and that he, Naidoo, had no right to be there. He told Isaacs that he was obstructing him from delivering the notice to Bezuidenhout.
34. Isaacs referred to him as a 'spineless creature' and said 'charge me'. Isaacs went on to say this to him 'you spineless bureaucrat, you testified against Mr. George of Plumstead High School'. He then left Isaacs' office.
35. On his way to the car, he noticed Bezuidenhout and went to her. He told Bezuidenhout that he had a disciplinary notice for her. Isaacs came between them and told Bezuidenhout not to take the notice. He then, again said to him to 'leave the school'. At that time the learners were starting to come out of the class. Isaacs continued to tell him to leave the school. He eventually left without serving the notice.
- 36." In his view, he was executing a lawful instruction and Isaacs was supposed to assist him instead of preventing him from serving the notice. It was not up to the principal as to who can and cannot be served with a disciplinary notice. Bezuidenhout was facing charges relating to assault of a learner. Charges of assault are directly reported to the WCED and that there is no mediation."

12. The Presiding Officer notes that it was common cause that the Appellant had instructed or ordered Naidoo to leave the school and the Appellant had claimed that there was nothing wrong with him telling his superior to leave the school. This excuse was rejected by the Presiding Officer finding that Naidoo was executing a lawful duty at the School and had every right to be there as the circuit manager responsible for that school. In the view of the Presiding Officer, Mr Isaacs' conduct "was a display of disrespect towards Naidoo". He added the following:

*"Evidence shows that Isaacs did not only tell Naidoo to leave. He did not dispute that he also banged his fist on the desk before telling Naidoo that he was not going to allow Naidoo to execute his duty and instead to tell Naidoo to take the notice [i.e. the charge sheet to be handed to Bezuidenhout] back to the Director". This, in my view was insolent and disrespectful towards Naidoo's lawful authority."*<sup>1</sup>

13. In addition, he found that when Naidoo had left Isaacs' office, Appellant had followed him and physically prevented him from executing his duties in front of junior staff and learners. At para 79 he said:

*"I find Isaacs' behaviour not only to have been disrespectful and also offensive and insolent."*

14. There was some dispute as to whether he had also called Naidoo a "spineless bureaucrat". The Presiding Officer found on balance that Isaacs had called him a "spineless creature".
15. As regards the charge that he had called Stander the "henchman" of Naidoo it was recorded that this allegation was not disputed by the Appellant. Naidoo had testified that because the department had expected that Mrs Bezuidenhout might refuse to accept service of the charge sheet or acknowledge receipt of it, it would be necessary for there to be a witness to witness service of that document and for that reason Stander had accompanied Naidoo. At the time of the altercation with Isaacs, Stander had been sitting in the vehicle. When he witnessed the difficulties being experienced by Naidoo, he had got out of the car and approached the parties at which point Isaacs had called him one of Naidoo's henchmen. The Presiding Officer found that that term is a derogatory term meaning a faithful follower, especially one prepared to engage in crime or violence to serve their leader.

#### **THE GROUNDS OF APPEAL AGAINST THE INSOLENT FINDING**

16. No reasons are advanced by Stansfield as to why the factual findings which were made were incorrect. He does not explain why I should reverse the Presiding Officer's findings of fact and I can see no reason to do so.
17. Instead Stansfield submits that these charges are no more than a proverbial storm in a teacup in a case where the real substance of the matter concerns the opinion pieces published in the Cape Argus and he adds that the insolence charges were probably added merely to bolster the charge sheet.

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<sup>1</sup> Para 78.

18. I will address the contention that the findings on this charge are insignificant as they do not concern an issue or an event that is particularly serious in due course.
19. Under this heading it suffices to note that I have been presented with a detailed analysis by the Presiding Officer justifying his findings, whereas I have not been presented with any reasons by the Appellant motivating why that finding is wrong. In the circumstances the appeal on this leg of the case is dismissed.

#### **THE PRESIDING OFFICER'S FINDING ON THE BRINGING INTO DISREPUTE CHARGES**

20. The Appellant did not dispute that he was the author of the articles. Nor did he claim that teachers and principals are generally entitled to openly criticise their employer in the press.
21. Instead, the essence of his defence was that when you are a person of strong principle and something needs to be said and someone needs to stand up to say it, then that person must stand up and be counted irrespective of the consequences to themselves. He claimed in his evidence that because his complaints about these issues had fallen on deaf ears, it had become essential for him to go public.
22. In paragraph 91, the Presiding Officer refers to the Public Service Regulations which provide that an employee in his official capacity shall not irresponsibly criticise government policy in a publication. He also refers to the Departmental Circular 0087/2002 which provides that staff may not liaise with the press and/or other public media directly and that such liaison shall be through the Director of Communications. The Presiding Officer found that although these policies had been deliberately breached by the Appellant, this is not what he had been charged with. What he had been charged with was not the fact of publication but the content of these opinion pieces.
23. On the first charge that the contents of these articles had demonstrated disrespect, abuse or insolence towards the employer, he found the Appellant not guilty. On the alternative charge that these articles brought the employer's name into disrepute he says the following:
- "Isaacs goes as far as accusing the WCED as being the cause of ill-discipline in school and of using children to attack teachers. In my view, anyone reading the contents of these articles would think that WCED does not respect the law, that it does not care about its teachers and that it uses children as pawns in a war between the employer and its employees... the publication seeks to unduly reflect the teachers as 'the good', the learners as 'the bad' and the employer as 'the ugly'. I find this irresponsible and damaging to the reputation of the employer."*<sup>2</sup>
24. Although the Appellant is a shop steward, the Presiding Officer noted that he had not claimed that he had written these articles in that capacity. If his object had been to attract the attention of the Premier and the Minister, then this could have been done

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<sup>2</sup> At paras 96 and 97



through the Union's platform instead of "going on a public rant" in his capacity as the principal of the School. These articles thus brought WCED's name into disrepute.<sup>3</sup>

#### **BRINGING INTO DISREPUTE CHARGES – GROUNDS OF APPEAL**

25. In respect of the second category of charges, Stansfield, in the grounds of appeal set out in his letter of 8 June 2016, argues that the employer was required by the charges to prove two components:
  - 25.1 That the statements contained in the articles were in fact false; and
  - 25.2 As a consequence of having made such statements, the name of the employer had been brought into disrepute.<sup>4</sup>
26. In paragraph 15, Stansfield avers that the Presiding Officer has entirely confused the onus which rests on an employer in disciplinary proceedings with the onus applicable to parties in civil defamation proceedings. Where an employer has charged an employee in disciplinary proceedings with having made false statements, and thereby having brought the name of the employer into disrepute, it is the employer who must prove the falseness of such statements. He goes on to submit that, as appears from the finding, the employer failed to lead any evidence to establish the falseness of the charges and it must accordingly fail in the discharge of its onus in relation to the truth component.
27. In paragraph 17 Stansfield submits that the employee could not have known that he was required to lead evidence to establish the truth of these allegations and he only learnt of this requirement "*as it existed in the mind of the presiding officer*" when he read the finding. He then submits that "*the prejudice to our client under the circumstances is material and irremediable*".

#### **BRINGING AN EMPLOYER INTO DISREPUTE – THE LAW**

28. This form of misconduct is a breach of the employee's duty to uphold the employer's good name and reputation; or the duty to promote the employer's enterprise. Because the relationship is fiduciary relationship, the employee is obliged to not work against the employer's interest.<sup>5</sup> I agree with the appellant that where the employer alleges that one of the reasons why a statement made in the public domain brought the employer into disrepute was that it was untrue, then it cannot be that the truth or otherwise of that statement is irrelevant.

#### **BRINGING THE EMPLOYER INTO DISREPUTE – ANALYSIS**

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<sup>3</sup> Paras 100 - 101

<sup>4</sup> At para 12

<sup>5</sup> For a useful discussion on charges for breach of the employee's duty to uphold the employer's good name and reputation see Rycroft, *Bringing the Employer into Disrepute* (2008) 29 ILJ 1605.

29. As this is an appeal it is my task to determine whether the finding that the conduct brought the employer into disrepute was correctly made or not. It is not my task to set aside the finding if I simply disagree with part of the reasoning process used by the presiding officer.
30. A reading of the record shows that it is not correct to say that no evidence was led on the falseness of the central allegations made in op-eds.
31. To my mind the questions that need to be answered are whether the employer produced sufficient evidence at the hearing to show that one or more of the following statements were untrue:
- A: the education department uses children to attack teachers;
  - B: the education department persistently disobeys the law and is thus a law unto itself;
  - C: the education department uses rude and smug officials who need to win cases otherwise they will be taken off the payroll;
  - D: the presiding officers who are brought in to hear these cases need to find in favour of the employer (which is presumably what is meant by "need to win cases") otherwise they will be taken off the payroll; in other words they are corrupt.
32. I realise there are more statements than these which were referred to in the charge sheet which were alleged to be untrue but I do not think it is necessary to examine every aspect of each article to see whether the crux of the charge, namely bringing into disrepute with the publication of untrue matter, was sustained.
33. I will assume in favour of the appellant that it was the employer that needed to prove that the statements were untrue.
34. Several witnesses testified to this effect on behalf of the employer. Accordingly, Isaacs was well aware that the truth of the statements was in issue. His representative then cross-examined the employer's witnesses and Isaacs then testified in response. Stansfield's submission - that Isaacs could not have known that he was required to lead evidence to establish the truth of these allegations and he only learnt of this requirement "*as it existed in the mind of the presiding officer*" when he read the finding - is accordingly not correct.
35. Naidoo testified that the statements were false. It was not put to him in cross-examination that they were true. This is not surprising as the line of cross examination was more to the effect that freedom of speech is protected under the Constitution, and that frustration after grievances had fallen on deaf ears might serve to explain or justify the making of militant public statements.
36. Paddy Attwell, Director of Communications for the WCED, was called. He said that for the department to incite children to attack teachers would go against everything that the department stood for. The allegation simply made no sense. So too the statement that the department was seeking to tarnish the reputation of all teachers by charging some with misconduct. The suggestion that presiding officers

were paid to rule in a certain way in order to stay on the payroll was false and cast aspersions on their integrity. It was not put to Attwell that these allegations were true.

37. Jason Fry, the Deputy Director for Advisory Services in the Directorate of Employee Relations, was also called, in particular about the statements directed at his department. He denied that schoolchildren were being abused to get at teachers as part of a witch-hunt. In the course of his testimony the presiding officer in fact asked Mr Allie, representing the employer, whether the employer was seeking a finding on whether the statements were true or not, and Mr Allie said that a finding to this effect was indeed being sought.
38. Fry summarised the impact of the articles as being a public slap in the face for the employer.
39. Isaacs said these utterances needed to be located in the context of a "*bruising battle being between the Department and teachers*" and that he felt it is his duty to speak truth to power, no matter the cost. He said that during the struggle against apartheid "*we wrote articles in the newspapers [but] we were never charged by the then apartheid system.*" He was asked why he did not leave it up to his trade union to publicly engage with the employer about these issues and to confirm that he indeed wrote these articles in his capacity as a principal. He said he indeed writes them as the principal of the School because "*I believe it comes from me, it comes from my experiences.*"
40. Isaacs was also cross-examined about the truth of the statements.

#### **BRINGING THE EMPLOYER INTO DISREPUTE - CONCLUSION**

41. I am satisfied on the basis of the evidence led that it was shown by the department on a balance of probabilities that the central allegations made in the op-ed as listed in the charge sheet and as set-out above were indeed shown to be untrue. It would in either event not have required a great deal of evidence for this outcome as the more extreme statements are clearly outrageous and intended to shock the readers. I presume this was done to further the cause of drawing attention to the plight of wronged teachers generally, and Isaacs in particular. The effect was however to depict the department in a very negative light through the making of untrue public statements. That the maker of the statement was a principal of the School made the misconduct all the more serious as readers might fairly be entitled to assume that because he is a principal, what he says would be a true reflection of the situation prevailing in schools falling under the department.

#### **SANCTION – THE FINDING**

42. The presiding officer, while noting that Isaacs deserved recognition and that he should be applauded for the 32 years of his service as the School principal, long service and good results of the School, could not be the only determining factor. The fact that somebody may have made a valuable contribution can never be used as an excuse to justify blatant misconduct.



43. In paragraph 29, the presiding officer said the following:

"29. Throughout the disciplinary proceedings, it was clear from Isaacs' evidence and that of his witnesses that he has no intention to take responsibility for his misconduct. In respect of charge 1 and 2, he blames Naidoo and Stander for his insolent and disrespectful behavior; he does not believe he has done anything wrong. In finding Isaacs guilty on charges 1 and 2 I have found that Isaacs was not provoked. This indicates that Isaacs will repeat the misconduct if Naidoo and Stander attempt to perform their duties by serving notices on staff members. This is evident from when Isaacs again told Stander to leave the school and come back once he had made the appointment when Stander was attending to the incident regarding the learners who were put out of the School by Isaacs. That incident happened after Isaacs was already charged. Having regard to this, the impression I get from Isaacs' attitude is that Naidoo and Stander will not be able to exercise their duties at SPHS without being disrespected and abused by Isaacs. I do not see how any employer should be expected to tolerate this".

44. In paragraphs 37 to 41, the presiding officer found as follows:

"37. Furthermore, the applicant testified during the hearing that he was previously found guilty of assault<sup>6</sup> of a learner. Although the assault conviction is not similar to the charges that I have found Isaacs guilty of, it indicates a pattern of unrepentant misconducts on the part of Isaacs. Isaacs considers the employer's attempts to correct him 'witch-hunt' against him; there are no attempts from his side to reflect and redeem himself.

38. The employee's duties to the employer include the careful execution of his work. There is an implied term in contracts of employment that an employee will act in the best interest of the employer. Evidence shows that even after the commencement of these proceedings, Isaacs continued to bring the employer's name into disrepute by continuing to publish defamatory remarks against his employer.

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41. Furthermore, in the newspaper articles, Isaacs leveled (sic) many accusations against the WCED, his employer. The utterances do not specify any individuals; they are directed at the Labour Relations Department and the policy makers. It is clear that he does not trust the whole department."

<sup>6</sup> The presiding officer also added this comment: "There is further evidence that the applicant has again been found guilty of assault. Since the disciplinary proceedings in respect of the recent assault convictions are still pending before another presiding officer, I will not consider that conviction for the purposes of my sanction determination."

45. In paragraph 46 he added:

"46. Furthermore, I have considered Isaacs' behavior (sic) during these proceedings. He made it clear that he does not take instructions or disagreement kindly. His attitude was evident when he blatantly ignored my ruling to proceed with the disciplinary hearing. He blatantly told me that he will leave the proceedings irrespective of what I rule. On one occasion he did not arrive at the hearing even though his representative was present; this was despite the fact that I waited for him for more than an hour. He later gave a message through his Secretary that he was busy. His attitude was that the proceedings were a waste of his time. My impression of him was that he did not respect me or anyone who dares to give him instructions or disagree with him. In my view, I cannot see how Isaacs can be trained to avoid future repetition of misconduct."

#### **SANCTION - THE GROUNDS OF APPEAL**

46. The severity of the sanction is only raised in passing in the argument advanced on appeal. No mention is made of the findings on the insolence charges - presumably because of the earlier argument advanced that the incident was merely a storm in a teacup. In my view the events that took place on that day however go to the heart of the problem. Isaacs is no longer prepared to accept the authority of the department in the School. In his view the department is deserving of this treatment. Due to the way in which, in his view, it has treated him and other teachers it no longer deserves his respect. He will accordingly only obey instructions when he agrees with them. This much is clear. To him this justifies insolence towards his superiors and the publication of ill-conceived and intemperate commentary in the press.
47. In effect, he requires the statutory body which exerts authority over him and hundreds of thousands of pupils to accept that it is subordinate to him in respect of discipline over staff and learners at the School. This seems to be so not only in respect of the disciplining of school teachers, but also when it comes to a secretary like Mrs Bezuidenhout or the suspension of pupils. He says that his stance is required because the department by its conduct towards teachers prevents teachers from being able to maintain discipline in schools. He emphasizes that pupils must strictly obey rules otherwise things will fall apart. As Mr Stansfield puts it *"his views are aimed primarily at emphasising the importance of maintaining a high standard of discipline amongst pupils and learners in an academic environment."* The irony appears to escape him when Isaacs contends that this should not be so in the case of the relationship between teachers and the department, as the latter's lack of flexibility in requiring rule bound obedience from teachers' leads to a breakdown in the system of education. He thus applies a double standard. The principal of a school should be the one setting the example. The kind of example being set by Isaacs is not one which I would like to see replicated in the Department.
48. As was observed in Theewaterskloof Municipality v SA Local Government Bargaining Council (Western Cape Division) & others (2010) 31 ILJ 2475 (LC) an

employee who embarks on recalcitrant or defiant conduct because of an unresolved grievance does so at his or her peril.<sup>7</sup> He chooses to set himself on a collision course with his employer. That case concerned a senior municipal employee with 22 years of service. About his conduct the court had the following to say:

*"He did not act unintentionally or mistakenly. Even if he had, there has been opportunity enough for him to correct what he has done. For the reasons outlined above, it is my view that instead of seizing such opportunity he has elected to hold himself on a confrontational course. There can be very little room for the notion of corrective discipline in this situation. Where an employee refuses to demonstrate any acceptance of wrongdoing, indicates no degree whatsoever of remorse, makes no move to correct what he has done, and stands firm with an attitude of opposition towards his employer, then such employee through his own conduct undercuts the applicability of corrective or progressive discipline. In this case the employer concluded that the point had been reached where the employment of Mr Henn could not be continued. I see no good ground for declaring that it was unfair of it to do so. ...."*<sup>8</sup>

49. Stansfield also contends that dismissing Isaacs would only serve to muzzle the important debate that needs to take place in society about the necessity for the maintenance of discipline in schools; and, how overzealous and unjustifiable discipline of teachers undermines this. Isaacs is not being sanctioned for his views, but for his conduct in his capacity as a principal. There are many others quite capable of publicising the causes that he stands for. His views do not place him above the law or his primary obligation to promote his employer's interests and run a school without insolence towards his superiors and without persisting in conduct calculated to bring his employer into disrepute in the minds of the public. He has made it clear that he regards his conduct as above reproach and that he will not change his ways. Critically important is the finding by the Presiding Officer that the employment relationship has irretrievably broken down. His long career notwithstanding, there is accordingly no prospect of any sanction short of dismissal remedying the situation.
50. In all the circumstances and for the reasons set out above the appeal on both the merits and the sanction is dismissed.



**DEBBIE SCHÄFER, MPP**  
**MINISTER OF EDUCATION, WESTERN CAPE**

**DATE:** 9/9/2016

<sup>7</sup> At para 22.

<sup>8</sup> Paragraph 37. The court also observed that "it must be borne in mind that the employer in this instance is a statutory body operating within a definite statutory environment in order to achieve an important set of statutory objectives."