



## **IN THE EDUCATION LABOUR RELATIONS COUNCIL HELD IN CAPE TOWN**

Case No PSES 125-07/08WC

*In the matter between*

**KLAAS ISAACS**

Applicant

and

**WESTERN CAPE EDUCATION DEPARTMENT**

Respondent

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**ARBITRATOR:** Bella Goldman

**HEARD:** 26 October 2007, 18, 19 and 20 December 2007 and 27 and 28  
February 2008 and 10 and 11 April 2008

**DELIVERED:** 25 May 2008

**SUMMARY:** *Labour Relations Act 66 of 1995 – Section 188(1) and 191(1) - unfair dismissal  
relating to misconduct*

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**ARBITRATION AWARD**

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## **PARTICULARS OF PROCEEDINGS AND REPRESENTATION**

1. The matter was set down for a conciliation arbitration hearing under the auspices of the council at the respondent's Cape Town office 27 October 2007. The dispute was not resolved at conciliation and I issued a certificate to reflect the same and proceeded to arbitrate the dispute. The arbitration was part heard and was continued on 18, 19 and 20 December 2007, at Meiring Primary School Riebeck Kasteel and at the respondent's Malmesbury office on 27 and 28 February 2008 and 10 and 11 April 2008. Mr Eben Simon attorney of Britz Dreyer attorneys represented the applicant. Ms Lee-Ann Bathgate, Senior Labour Relations Officer represented the respondent. The parties agreed that Mr William Williamson, Labour Relations Officer act as interpreter and Mr Wilkinson was sworn in as interpreter. The parties agreed at the end of the proceedings that closing argument would be submitted in writing. The proceedings were recorded onto cassettes.

## **THE ISSUES IN DISPUTE**

2. I have to decide whether or not the applicant's dismissal was substantively and procedurally fair in terms of the Labour Relations Act 1995 as amended (LRA).

## **THE BACKGROUND TO THE DISPUTE**

3. The respondent employed the applicant as an educator at post level 1 in 1997 on a fixed term contract which was renewed until 2000 when he was permanently employed at Meiring Primary School in Riebeck Kasteel. The applicant was dismissed on 3 November 2006 for misconduct. The applicant appealed his dismissal and the appeal hearing confirmed his dismissal. The applicant was paid until 15 March 2007. At the time of his dismissal the applicant was earning R9, 200.00 per month.
4. On 4 August 2006 the applicant was suspended on full pay pending an investigation. On 12 September 2006 the applicant was issued with notice to attend a disciplinary hearing on 2 October 2007 (the hearing was postponed and heard on 9 October 2006), the applicant was charged with:

*Charge 1: misconduct in terms of article 17(1) (b) of the Educators Act 1998 in that on or about 17 March 2006 you indecently assaulted Zelmarie Filander a learner at Meiring Primary School; you put her hand on your penis and or touched her breast.*

*Alternative to Charge 1: misconduct in terms of section 18(1)(a) of the same act in that you on or about 17 March 2006 whilst on duty behaved in an improper / unacceptable manner by putting the hand of Zelmarie Filander a learner at Meiring Primary School on your penis and or that you touched her breast.*

It was agreed that the alleged incident if it took place could not have taken place on 17 March 2006 and that it could only have taken place on 10 March 2006.

5. The applicant claimed that his dismissal was unfair in that he was not guilty as charged. The applicant is asking for retrospective reinstatement in terms of relief.

### **SUMMARY OF EVIDENCE AND ARGUMENT**

6. I have considered all the evidence and argument, but because the LRA (section 138(7)) requires an award to be issued with brief reasons for the findings, I have only referred to the evidence and argument that I regard as necessary to substantiate my findings and the determination of the dispute.

### **Documentary Evidence**

7. The applicant and respondent each submitted a bundle of documents in evidence which were agreed as being what they purported to be except where indicated below. The applicant's bundle was marked 'A' and was numbered to 1 to 40. The respondent's bundle was marked 'B' and was numbered 1 to 51.

### **Evidence on behalf of respondent**

The respondent called four witnesses all of who gave evidence under oath. The witnesses were Zelmarie Filander, learner and complainant, Denver Philip Cupido, Educator and Head of Department. Ella Filander, mother of the complainant and Sarel Heynse Principal. The following is a summary of their testimonies.

**Zelmarie Filander**

8. At the time of the incident the witness was in grade 9 and was 15 years old and the applicant was her class teacher and her Mathematics and Natural Science teacher. On the 9 March 2006 the applicant called the witness to the front of the class and asked her where he could buy Hannepoort grapes. The witness could not remember if her mother at the time worked at the Konstantia or if she had previously worked there but the witness knew that Konstantia farm grew Hannepoort grapes and the witness told the applicant that she would go and enquire at the Konstantia farm if the applicant could purchase grapes and how much they were. The applicant instructed the witness to order a case of grapes for him. After school the witness went to the farm, she spoke to the owner Bass Boettie and ordered a case of grapes for the applicant; she could not remember the price of the grapes.
9. The next day the applicant called the witness to his desk, he asked the witness if she had ordered the grapes. The witness said that she had and the applicant asked her if she would accompany him in his car to the farm after school as he did not know the way to the farm. After school the witness waited for the applicant who told the witness that if Mr Heynes, the Principal asked her where she was going she was to tell him that they were going to her home to conduct a house visit with the witness's mother. The witness explained that a house visit was when a teacher goes to see the parents of a pupil in order to discuss the progress of a pupil. The witness said that she was not aware of any house visit that the applicant had arranged with her mother and that she did not know why the applicant told her to say that they were going on a house visit.
10. When they got to the farm the witness introduced the applicant to Baas Boettie as being the teacher for who she ordered grapes the previous day. A boy who the applicant did not know placed the grapes in the boot of the witness's car and the applicant paid Baas Boettie for the grapes.
11. They then drove away, when they got to the orange trees, the applicant started to drive slowly; he asked the witness if there were any girls from school on the farm where she lived. Zelmarie told the applicant that there were no girls from school on her farm but that there were a few who lived at Konstantia farm. The witness was looking out of the window and did not notice that the applicant whilst he was driving had loosened his belt and had undone the zip of his trousers. The applicant then took the applicant's right hand and placed it on his exposed penis and at the same time he told the applicant that it was nice to have sex. The witness was very upset and she pushed the applicant away and told

him to desist from what he was doing. A short while later the applicant took his left hand and placed it on her right breast the witness told him to stop and told him that she was going to tell her mother what had taken place. Just before the applicant got to the gravel road leading onto the main road the applicant stopped, he said that he had to do his zip and belt up 'otherwise people could see'. The witness denied seeing a car parked on the side of the road on the way to the farm where she lived which is Zongausdrift or hearing or seeing the applicant hoot at the car and waive at the occupants.

12. The applicant then dropped the witness at the gate of her farm and told the witness that he would come and collect the applicant and her friend Suzette one Friday evening. The witness said that Suzette used to be a pupil at the school and that the applicant had taught Suzette. The witness told the applicant that she did not stay at the farm over the weekend. The applicant then told the witness not to tell anyone about what had taken place. The witness did not tell her mother as she was scared that her mother would be angry and accuse her of initiating the incident.
13. The incident upset the applicant as the witness was her teacher and she knew that teachers were not supposed to do and say the things he had done. The only person the applicant told initially was her friend Chrissie to who she recounted the incident on the following Monday. Chrissie told the applicant that she should report the incident to a teacher. The applicant was scared to do this as the applicant told her not to tell anyone about the incident.
14. Some time later the Principal, Mr Heynse addressed the girls in her grade with regard to unwanted sexual advances made to learners and he told them that should a learner experience such advances these should be reported to an educator. On the basis of Heynse's talk and the advice of her friends Chrissie and Judie the witness related the incident to Mr Cupido another educator at the school about two weeks after the incident. The applicant confided in Cupido as he was an educator who she trusted and felt comfortable with.
15. The witness said that the only time she travelled in the applicant's car was on the day of the incident. The witness was asked if the applicant had ever discussed the standard of her school work. The witness said that the applicant had on she believed two occasions told her that the standard of her work was very poor but she believed that this was before the incident took place.

16. The witness denied that the applicant ever gave her a letter to give to her mother in which he complained about her school work or in which he asked for a home visit with her mother. The only letter her mother received was one the applicant gave to Alrich another learner in her class to give to her mother. Alrich told the witness on the bus that he had a letter from the applicant for her mother and that he was told to give the letter himself to her mother. The letter was in an envelope. The witness never read that letter but her mother told her that it was about the witness's poor school work. The witness could not remember if the applicant gave Alrich the letter before or after the incident. When the mother read the letter Alrich gave to her she was a little upset with the witness but did not shout at her, she just told the applicant that she must take her books and study.
17. The witness was referred to a proforma letter dated 26 July 2006 which was the letter the applicant allegedly gave Alrich to give to the witness's mother. The letter informs a parent of the absence of a learner from school and the parent is asked to provide reasons for the learner's absence a space is provided for the parent to complete and the parent is asked to return the proforma letter to the school duly completed. The applicant was referred to a handwritten note which the applicant alleged was completed by the witness's mother and signed by her. In that note the writer states that her daughter was absent when she menstruated and did not have sanitary pads. The writer also said that she was alone and has many problems which resulted in her daughter staying at home. The witness was asked if the handwriting was that of her mother. The witness said that she did not know if the handwriting was that of her mother but that her mother writes in a similar way.
18. The applicant said that she often missed lessons. The reason she missed lesson was that her mother had told her that if she gets a chance to slip away from school she must go and assist her grandmother who looked after her sister. The witness's grandmother is old and lives near to the school.
19. In cross examination the applicant's representative put it to the applicant that he listened to the recording of the hearing and at the hearing the witness admitted that the applicant gave her two letters to give to her mother and at this arbitration hearing she is denying receiving any letters. The witness was asked to comment on the alleged contradiction, the witness said that she could not remember what she said at the hearing but the applicant never gave her any letters.

20. Under cross examination the witness said she told Suzette on the day following the incident that the applicant dropped her at home the previous day and that he wanted to pick her and Suzette up on a Friday night. The witness told Suzette that she told the applicant that she does not stay on the farm on weekends. Suzette told the witness that if the applicant came to pick her up she would tell her father. The witness said that she did not relate the actual incident to Suzette as Suzette cannot keep a secret and would have told everyone.
21. It was put to the witness that in her evidence in chief she said that she recounted the incident to Cupido a couple of weeks after it took place which was after the talk Heynse gave the girls but that Heynse's talk took place on 2 August 2006. The witness said she could not remember what the time frames were.
22. The witness was asked to recount the events around the 'stink bomb incident' which took place on 31 July 2006. The witness said that Beverly a learner brought a stink bomb to school which was let off in class. The applicant asked who was responsible for the stink bomb. The witness said she did not know and the applicant asked her to stay behind after school and see him. The applicant stayed behind after school but asked her friends Beverly and Chrissie to wait outside the classroom for her. The applicant then allowed the witness to go.
23. It was put to the witness that Chrissie and Grivenia Manuel will state that the witness is lying and the reason the witness made the allegations she did against the applicant was to prevent the applicant from seeing her mother. The applicant denied lying and stated that Chrissie was the one who advised her to report the incident.
24. The witness was referred to two incidents which indicate that the witness could not have been scared of the applicant after the alleged incident in March 20006. The first was a rugby match which took place in May / June 2006 which the applicant, the witness and her friend Suzette attended. It was put to the witness that at that match there was a problem with the referee and both the witness and Suzette asked the applicant why he did not take over the function of referee. The witness could not recall the applicant being at the match.

25. The second incident allegedly took place in June 2006, the applicant was talking to grade 8 boys about swimming, and the witness joined the discussions and said that she dived into the river between Zongausdrift farm where she lives and the adjoining Konstantia farm. The witness said she did swim in that river but that she did not dive off a tree into the river and she could not remember joining in the conversation.
26. It was put to the witness that a learner Joniver Neero will give evidence and state that he was at the rugby match and he saw the witness hanging onto the applicant and that he told her that it was inappropriate to do so. The applicant stuck to her version that the applicant was not at the match. It was also put to the witness that Joniver will say that the witness recently told him that she never wanted this matter to go this far. The witness denied ever discussing the matter with Joniver.
27. It was put to the witness that the applicant would say that he saw her on one occasion hanging onto a boy; the applicant asked her if that person was her boyfriend and she said that it was Alrich's boyfriend. The witness denied hanging onto a boy or saying that. It was put to the witness that the reason that she missed classes was to see her boyfriend who worked on a construction site in Aslan a suburb close to where she lived. The witness denied this.
28. It was put to the witness that two learners Julian and Jacqueline will testify and relate to an incident which took place at a social venue called "Bricks" where the witness admitted that she invented the allegations against the applicant as she did not want the applicant to tell her mother about her absences from school and her poor school work. The applicant denied that she discussed the incident with either Jacqueline or Julian. It was also put to the witness that another person, Magdalena will testify that she overheard this conversation between the witness and Jacqueline, the witness said she does not know a person called Magdalena.
29. It was put to the witness that between the 10 March and 5 May 2006 the applicant had overheard the witness and Grivenia discussing their respective sex lives and that the applicant told them that he was going to report their conversations to their parents her and that is another the reason the applicant believed that the witness prevented the meeting he arranged with the witness's mother for 5 May 2006 taking place. The witness said that she did not discuss her sex life with Grivenia and denied there was any meeting arranged for 5 May 2006.



### Denver Philip Cupido

30. The witness is an Educator and Head of the Intermediate Phase Department. He teaches Arts, Crafts and English to learners in different grades and has taught Zelmarie. At the beginning of August 2006, Zelmarie, Judie Flink and Chrissie Damon came to see the witness; he was busy and told them to return later which they did. Zelmarie spoke first, she told the witness about an incident that had taken place with the applicant on Konstantia farm. The witness recounted what Zelmarie told him took place which corroborated Zelmarie's testimony relating to the alleged incident.
31. Chrissie then told the witness about an incident when the applicant asked her during school hours if she wanted to clean his house for R100.00. The applicant also asked Chrissie if she would meet him at the Church later in the day, he told her to tell her mother that she was going to the shop. Chrissie said that she told the applicant that she will not lie to her mother and that she won't meet him at the church.
32. The witness recorded the conversation he had with the three learners on his cell phone and then compiled a report to the principal relating to his meeting with the three girls and what they told him. The Principal then started the disciplinary process against the applicant.
33. The witness said that the three girls came to see the witness just after a talk the Principal had with the girls regarding a number of issues including inappropriate sexual advances made to them and he told them that they should report such incidents. The witness said that he was there for part of the talk but that he could not remember if the applicant attended the talk. The witness said that he was not specifically invited to the talk but walked in on meeting and was asked to stay.
34. The witness said that there were a number of similar allegations made against the applicant in the past and that he was dismissed then reinstated for a similar offence, the witness was not aware of the details of the incidents.
35. The witness when asked to describe Zelmarie, he described her as a quiet non disruptive pupil. He said that the standard of her English was low but that he did not consider that he should talk to her mother about it.

### Sarel Heynse

36. The witness was referred to a number of letters submitted by the applicant which are listed below, the number indicates the number in bundle 'A' and the status of the letter is indicated in italics:

- Undated letter from the witness to the applicant which the applicant said he received in about 2005 in which the applicant was told that he had been found guilty of serious misconduct which if he repeated would result in his dismissal (number 1) *Mr Heynse said that the signature on the letter appears to be his but he denies that he wrote the letter.*
- Handwritten letter from the applicant to Mrs Filander dated 23 February 2006 in which the applicant thanks Mrs Filander for agreeing to see him to discuss Zelmarie's poor academic performance her poor attendance from school and the fact that she sometimes runs away from school (2) *Mrs Filander denied receiving such a letter, see below and Heynse said that he has never seen letter before*
- Report from the applicant to Mr Heynse and senior management dated 13 March 2006 in which the applicant reported that the meeting which the applicant told Mr Heynse about on 9 March he was to have with Mrs Filander on 10 March 2006 regarding Zelmarie's poor academic performance and unacceptable behaviour did not take place as Mrs Filander was not at home on 10 March 2006 as arranged. The report states that on 10 March he took the applicant in his car as per Mr Heynse's instructions, he was going to travel to Zelmarie's home by driving behinds the school bus. The applicant in that letter asked Mr Heynse to return the report to the applicant duly signed and to keep a copy of it in Zelmarie's profile (3) *Heynse said that it appears that the signature confirming receipt of the letter is his but that he never wrote the letter, signed it or has seen it before.*
- Handwritten letter from the applicant to Mrs Filander dated 19 April 2006 in which the applicant thanks Mrs Filander for agreeing to meet him on 10 May 2006 to discuss Zelmarie's academic performance and other unacceptable behaviour (4) *Mrs Filander denied receiving such a letter, see below and Heynse said that he has never seen the letter before.*

- Minutes of meeting that took place on 4 May 2006 between the applicant and Mr Heynse. The minutes reflect that the meeting concerned seven learners in grade 9 of which Zelmarie was one. The minute reflect that the applicant told Mr Heynse that the meeting with Mrs Filander for 10 March 2006 never took place and that he has another meeting with Mrs Filander scheduled for 5 May 2006 and that Mr Heynse undertook to contact the farmer of Zongausdrift to confirm the appointment (6) *Mr Heynse stated that the signature on the minute confirming receipt of the minute appears to be his but that he has never seen the minute before and he did not place his signature on the minute, Heynse remembers having such a meeting with the applicant but does not remember the details relating to Mrs Filander being discussed.*
- Letter dated 8 May 2006 to the principal and senior management in which the applicant reported that the meeting he scheduled with Mrs Filander did not take place as Mrs Filander did not keep the appointment. In that letter the applicant reminded Mr Heynse that on 4 May 2006 he promised to confirm the appointment. The applicant asked Mr Heynse to intervene and attempt to make contact with Mrs Filander. The applicant asked Mr Heynse to return the letter to the applicant duly signed and to keep a copy of it in Zelmarie's profile (7) *Heynse said that it appears that the signature confirming receipt of the letter is his but that he never wrote, signed the letter or has seen it before.*
- Undated letter from Mr Heynse to Mrs Filander in which Heynse informs Mrs Filander that he was informed by the applicant on 8 May 2006 that the applicant tried unsuccessfully to make contact with her for the second time on 5 May 2006 and that it was imperative that she make contact with the school to discuss Zelmarie's poor academic performance (8) *Heynse said that the signature of the letter appears to be his but he denied writing, signing or seeing such a letter before.*
- Letter dated 1 June 2006 from Mr Heynse to Mrs Filander in which Heynse informs Mrs Filander that the applicant asked if she had contacted the school further to the letter dated 10 May 2006 which he sent her in this regard again asking Mrs Filander to contact the school (9) *Heynse said that the signature of the letter appears to be his but he denied writing, signing or seeing such letter before.*

- Minutes of a meeting held on 8 June 2006 between the applicant and Mr Heynse. The minutes relate to a meeting regarding the Science exam (10) *Heynse stated that the signature on the minute confirming receipt of the minute appears to be his but that he never had such a meeting with the applicant. He never seen the minute before and he did not place his signature on the minute.*

37. The witness has been at the school since 1992, he was appointed a principal in 1998. The witness supported the permanent appointment of the applicant. The witness said that until 2000 he had a very good relationship with the applicant and used to socialise with him. In 2000 the applicant was accused of sexual misconduct he was dismissed and later re-instated, the incident placed a strain on their relationship but they eventually rebuilt it.
38. In 2005 there was another allegation of sexual misconduct against the applicant which again strained their relationship. The witness submitted a report to the Department and was informed to deal with the matter internally in terms of progressive discipline. The complainant in that case withdrew her allegations and the matter went no further. The relationship between the witness and the applicant deteriorated after that incident. The applicant denied writing the letter no 1 referred to above. He stated that he would never write such a letter. The applicant stated that what appears to be his signature is on a number of letters and documents submitted by the applicant but that he did not place his signature on the letters and documents and has no idea as to how what appears to be his signature was placed on those documents.
39. The witness referred to document number 1 referred to above and said he did not write that letter and would not have written such a letter, it is not his style of writing and in any event that matter never proceeded as the complainant withdrew the charges.
40. The witness stated that the letters which the applicant submitted in evidence and which were purported to be written by the witness and appear to have his signature are not written in the style he uses and the date is not written in the format he uses.

41. On 31 July 2006 just before the witness became aware of the Zelmarie incident, Chrissie, a learner came to see the principal, she complained that the applicant using words of a sexual nature in class. The witness confronted the applicant who told him that his choice of words was necessary as he was teaching the process of sexual reproduction. The witness advised the applicant to be careful in his choice of words when teaching.
42. At the beginning of August 2006 Mr Cupido came to see the witness he asked him to listen to a conversation recorded on his cell phone with three learners who came to see him. The witness's testimony regarding what was on the tape corroborated Zelmarie's testimony in this regard. Zelmarie confirmed the incident when he spoke to her.
43. The witness recalled that the applicant had in March told him that he was going to pay Mrs Filander a house visit to discuss Zelmarie's poor academic performance. The witness had no problem with the applicant making such a house visit. The witness denied that he told the applicant not to follow the school bus home and to let Zelmarie travel in his car. The witness said that after the incidents concerning the applicant he made it clear to the applicant specifically and to all educators that they should not place themselves at risk and be alone with learners. The applicant later told the witness that he not able to make contact with Mrs Filander and the witness heard nothing further of the matter until August 2006.
44. After Mr Cupido reported the incident, the witness contacted Mrs Filander and asked her to come to the school she was not able to do so and so he and Mr Louw his deputy went to see Mrs Filander at Konstantia farm where she worked, he informed her of the allegations relating to Zelmarie. The witness said that he never had problems seeing parents who lived or worked at either Konstantia farm or at Zongausdrift farm. The farmers of both those farms always allow educators access to the farm if they want to speak to parents.
45. Mrs Filander told the witness that the applicant had never contacted her by letter or otherwise with regard to Zelmarie's academic performance or her behaviour.
46. The witness said that on the day before Zelmarie reported the incident to Mr Cupido the witness addressed grade 9 girls. The reason for the meeting was that a cleaner told him that girls were leaving

sanitary pads lying around and in the light of Chrissie's recent complaint with regard to the applicant he used the opportunity to inform the learners of what constitutes unacceptable sexual advances. The girls asked a lot of questions with regard to what was inappropriate behaviour, but Zelmarie kept quiet. The witness said that he did not think the applicant attended the meeting he had with the learners but that he did not make any attempt to exclude him.

47. It was put to the witness that the applicant would call Joniver a learner who would say that Zelmarie told him that she made up the allegation and told him that she wanted to withdraw the allegation but that the witness insisted that she pursue the case and that the witness bought Zelmarie a cool drink in order to persuade her to pursue the matter. The witness denied this allegation.
48. It was put to the witness that the applicant will say that in November 2007 the witness went to the applicant's house and told the applicant that he had instructed the applicant to take Zelmarie in his car on 10 March 2006 in the hope that an allegation such as the one Zelmarie made would be made and that Magdalena will give evidence that she overheard the conversation. The witness denied that he ever went to the applicant's home or that he said any such thing.
49. It was put to the witness that about 23 October 2006 the applicant gave Jacqueline a lift and told her that her evidence and that of Julian's would not assist the applicant in his disciplinary hearing and even if he was to be re-instated the witness would declare him to be in excess. The witness denied giving Jacqueline a lift or saying what was alleged.
50. The witness said that he taught Zelmarie Social Sciences. The witness knew Zelmarie to be a quiet girl who struggled with her school work and had poor school attendance.

#### **Ella Filander**

51. The witness said that in 2006 she worked at the Konstantia farm during the grape harvest. She was referred to her daughter's poor school attendance record in 2006. The witness said that she was a single parent and that she at times asked her daughter to stay at home and assist with the housework and to look after her sibling who was two years old in 2006. The witness said that she could not leave the child with her mother every day as the witness's mother is old and not in good health.

52. The witness was asked if anyone from the school ever spoke to her about Zelmarie's poor school work or her poor attendance. The witness said that no one ever spoke to her but that she did on one occasion receive a letter from the applicant which Alrich delivered to her. In that letter the applicant referred to Zelmarie's poor school work and poor attendance record. The witness said that the applicant never made an arrangement to pay her a house visit with regard to these issues or any other issue. The witness was referred to the letter dated 26 July 2006 which was allegedly the one Alrich delivered to her. The witness said that it could have been the letter but she stated that she did not write the hand written note at the bottom. The witness said that had the applicant wanted to pay her a house visit to discuss Zelmarie's school work she would have been happy to meet with him.
53. The witness said that in 2006 she lived on Zongausdrift farm on the other side of the road to where the farm workers lived and that there was never a problem in anyone visiting her. If anyone wanted to contact her they could phone the farm and leave a message for her which she would receive.
54. The witness said that in August 2006 Zelmarie told her about an incident which took place at Konstantia farm in March 2006. The witness recounted the incident which substantiated Zelmarie's testimony. Zelmarie told the witness about the incident after she reported the incident to Mr Cupido. The witness was very distressed about what her daughter told her as she trusted the school to look after her child. She cried and prayed with her daughter. The witness told Zelmarie to tell the principal about the incident, to concentrate on her school work and to stay away from the applicant. A short while thereafter Mr Heynse the principal visited her and asked her permission to conduct an investigation into the incident which she gave.
55. The witness said she had been to meetings at the school to discuss her daughter's progress; she did not see the applicant but was told by other educators that the standard of Zelmarie's school work was poor. The witness described her daughter as being a quiet nervous child who she had no problem with except for the standard of her school work. The witness said that she was strict with Zelmarie and this could have been why Zelmarie did not tell her about the incident when it took place. The witness said that she did not believe that Zelmarie would have been afraid of the applicant paying the witness a visit to discuss her poor school work as she often acknowledged to Zelmarie that by asking Zelmarie to stay at home she was causing her to get behind with her school work.

56. The witness was asked if she told Zelmarie to slip away from school to assist Zelmarie's grandmother. The witness said that she did not. The witness said that her sister once told her that she saw Zelmarie out when she should have been school and the witness then reprimanded Zelmarie. The witness said that she was not aware that Zelmarie would often leave school for periods of time.
57. The witness said that people could buy grapes from Konstantia farm. She said that Zelmarie during the 2006 harvest period told her that the applicant wanted to buy grapes from Konstantia. The witness told Zelmarie that she could get the grapes but that the farmer charged the workers more for the grapes so it was better if Zelmarie went to see the farmer herself which is what Zelmarie did. Zelmarie did not tell the witness if she or the applicant collected the grapes or anything further about the grapes or the applicant until August 2006.
58. Both Mr Simons and Ms Bathgate said that they had interviewed Bass Boettie who could not recall if Mr Isaacs bought grapes on 10 March 2006.

#### **Evidence on behalf of applicant**

**The applicant Klaas Isaacs gave evidence and called four witnesses. All gave evidence under oath. The witnesses were Hilton Carolus, Julian Andrew Charles, Jacqueline Joubert and Grivenia Manuel. The following is a summary of their testimonies**

#### **Klaas Isaacs**

59. The applicant was Zelmarie's class teacher in 2006, he also taught her Maths and Natural Science. At the beginning of the year he conducted diagnostic tests with the learners as he normally did. As a result of the tests Zelmarie was identified as an 'at risk' learner who would benefit from remedial intervention. In order for a learner to participate in a remedial programme the written consent of the parent must be obtained. The applicant gave Zelmarie a proforma letter to give to her mother which her mother was required to return having signed that she consented to Zelmarie being part of the program. The letter was returned and was not completed.
60. The applicant said in his experience many parents do not understand the nature of a remedial programme and hence he decided to write to Mrs Filander and asking her to meet with him. He gave the letter to Zelmarie who the following day gave the applicant a message saying that her mother would



meet with him on 10 March 2006 so that the applicant could explain the remedial programme. On 23 February the applicant wrote to Mrs Filander and thanked her for agreeing to meet with him on 10 March 2006 and informing Mrs Filander of the problems with regard to Zelmarie's poor school work and poor attendance. During cross examination it was put to the applicant that at his disciplinary hearing he submitted a letter he allegedly sent to Mrs Filander dated 23 February 2006 in which he does not mention the meeting of 10 March 2006 and further that there appear to be two letter sent on 23 February 2006, one that he submitted at his disciplinary hearing which is included in the respondent's bundle, bundle 'B' and one which is in his bundle, bundle 'A'. The applicant stated that that letter in the respondent's bundle must be a draft of the letter he sent to Mrs Filander on 13 February 2006 and which is in his bundle. He said that the date on both should be 13 February 2006. The applicant stated that he always keeps draft letters on file and the one in the respondent's bundle must be the draft letter. The difference between the letters is that the one in bundle 'A' confirms the date of 10 March 2006 as being the date arranged for a house visit and that the one in 'B' does not mention the date of 10 March 2006 and asks Mrs Filander to contact the applicant.

61. On 9 March 2006 the applicant told Mr Heynse that he had arranged to have a house visit with Mrs Filander the following day and that he was going to drive behind the school bus. Mr Heynse suggested that he take Zelmarie in the car with him. The following day after school he and Zelmarie drove to her home on Zongausdrift farm. The applicant denied that he ever asked Zelmarie about grapes or that they went to collect grapes from Konstantia farm. The only reference to grapes was when they passed Konstantia farm and Zelmarie told him that one can order grapes from Konstantia. The applicant denied that he ever asked Zelmarie or any other learner to buy or order grapes for him. He would have no need to as he grew up on a grape farm and his mother still lives at the same farm. The only time that he ever visited Konstantia farm was when he and his attorney Mr Simon visited the farm prior to the arbitration hearing.
62. On the way to Zongausdrift he noticed a friend of his, Hilton Carolus parked on the side of the road about 200 metres before the Konstantia turn off. Hilton was standing outside his vehicle. On his way back from Zongausdrift he stopped and asked Hilton if there was a problem with his vehicle. Hilton said there was no problem he and his girlfriend just stopped to have something to eat. It was put to the applicant that in his grounds for appeal the applicant referred to the fact that he saw Carolus on 5 May

2006 and now he states that he saw him on 10 March 2006. The witness said that he had made a mistake with the dates in his grounds for appeal submission.

63. When the applicant and Zelmarie arrived at the farm, Zelmarie told the applicant that strangers were not allowed on the farm and that she will see if her mother is at home. A few minutes later Zelmarie came back and told the applicant that her mother was not at home. The applicant grew up on a farm and hence he knew that some farmers do not allow visitors on the farm who have not obtained permission and he thus respected rule. The applicant stated that in retrospect he should have at that point sought the farmer's permission but did not. The applicant said he did not believe that Zelmarie's mother was not at home he believed that Zelmarie was trying to prevent him from speaking to her mother.
64. On 13 March 2006 he wrote to the Principal and senior management in that letter he informed them that he took Zelmarie in his car to see Mrs Filander as arranged and that Mrs Filander did not keep her appointment. The applicant in that letter stated that he is writing this report as he has in past been accused of sexual misconduct. Zelmarie later told the applicant that her mother would see her on 5 May and so on 19 April 2006 the applicant wrote to Mrs Filander confirming appointment of 5 May 2006, he gave the letter to Zelmarie to give to her mother. On 4 May 2006 the applicant told Mr Heynse that the meeting he was supposed to have with Mrs Filander did not take place in March but that he had made another appointment to see her on 5 May 2006. As Mr Heynse has contact with farmers he asked Mr Heynse to obtain the farmer's permission for the visit. Mr Heynse agreed to do so. Mr Heynse did not inform the applicant as to whether he made contact with the farmer.
65. The applicant stated that by May 2006 he not only wanted to discuss with Mrs Filander Zelmarie's poor work and poor attendance but the fact that she was talking about sex in class. One morning after 10 March 2006 Zelmarie was sitting in class with her head on the desk. He kept asking her to sit up. Whilst he had his back to Zelmarie and had his back to her he heard her telling Cravinia that she is tired as she spent the whole weekend having sex. At break he asked both Zelmarie and Cravinia to stay behind and told them that he heard their conversation about having sex and that it was his duty to report them to the principal. On another occasion he heard Zelmarie tell Cravinia that she skipped two lessons to be with her boyfriend. The applicant was asked why he did not relate Zelmarie's sexual indiscretions at

the disciplinary hearing. He said that he touched on the subject to but told by the chairperson that the evidence was not relevant.

66. On the 5 May 2006 the applicant drove with Zelmarie to the farm. Again he waited whilst Zelmarie went to see if her mother was home and again Zelmarie returned and said her mother was not home. On 8 May the applicant told Heynse what happened on 5 May vis a vis the planned home visit. Heynse then wrote to Mrs Filander on 10 May and gave the applicant a copy of that letter, the letter admonished Mrs Filander for not keeping to the arrangements she made with the applicant and asked Mrs Filander to contact the applicant. Mrs Filander did not reply and so Heynse again write to the Mrs Filander on 1 June 2006 and gave the applicant a copy of that letter. Heynse denied writing either of these letters.
67. On 26 July 2006 the applicant decided to send another letter to Mrs Filander but in this instance he gave it to another learner, Alrich to give to Mrs Filander as he now realised that Zelmarie was probably not giving the earlier letters to her mother. The letter was a proforma letter, referring to Zelmarie's absences from school and requesting a reason for them. The applicant said that Zelmarie returned the letter and it appeared to have been completed by Mrs Filander.
68. The applicant referred to the stink bomb incident which took place on 31 July 2006 and which was put to Zelmarie. He stated that he may in retrospect have been to harsh on the girls including Zelmarie as he suspected them of being responsible for the incident and that that she may have gone to Heynse about that incident and Heynse may have then orchestrated the talk to the girls and pressurised Zelmarie to fabricate the allegations and coached her with respect to the allegations.
69. The applicant then gave lengthy evidence about his relationship with Heynse and referred to a number of incidents that took place to substantiate this claim which I am not going to recount in detail. The applicant confirmed that his relationship with Heynse and his wife had initially been very good and that it was soured by the allegation of sexual misconduct against him in 2000 and also by the fact that the applicant felt that the Heynses were taking advantage of him as they were continually seeking financial assistance from him. The applicant said that Heynse used to victimise members of staff and that the applicant eventually became one of his victims. He referred to an incident when he once found Heynse in an amorous embrace with another educator. The applicant said that in November 2007 Heynse came to his house, at that point Heynse was suspended from his duties and that Heynse told the

applicant that if he, Heynse losses his job it will be his own fault but if the applicant loses his job it would be as a result of Heynse's actions and that this conversation was overheard by Magdalena who will testify.

70. The applicant stated that the applicant could not have been scared of him after 10 March 2006 and he referred to the rugby match event and the discussion about swimming which was put to Zelmarie as evidence of the fact that she was comfortable with him.
71. The applicant was asked where he obtained the letters in his possession from; he said that after his disciplinary hearing, a learner Julian told him what he heard and that Zelmarie had told him that she had fabricated the allegations and that he wanted to assist the applicant. The applicant then asked Julian to bring him the documents relating to Zelmarie which he knew were in a cupboard in his classroom.

#### **Hilton Carolus**

72. The witness stated that he has known the applicant since 1999 when they were both involved in the formation of a rugby club, he does not socialise with him apart from Rugby. On 10 March 2006 he was on his way to Saron which his girlfriend and baby when they stopped on the road on which the entrances to the Zongausdrift and Konstantia farms are situated. The witness got out of the car and was had his back to Meiring school, he saw the applicant drive by with a girl in a school uniform. He saw them drive past Konstantia farm in the direction of Zongausdrift farm; they did not drive into Konstantia. Then a few minutes later the applicant returned on the same road on his own and stopped to ask the witness if he had broken down and need assistance.
73. It was put to the witness that the applicant said he drove down that road on 10 March and on 5 May 2006 with a female learner and the witness was asked how he knew he was on that road on 10 March and not on 5 May. He said that he was sure as he had diarised the trip to Saron and that his diary reflected that he went to Saron on 10 March but he has since mislaid the diary.

#### **Julian Andrew Charles**

74. At the time of the incident the witness was a grade 9 learner with Zelmarie at Meiring Primary School but was in a different class. In about August / September 2006 he was looking for his friend Jacqueline

who had just had a baby. He saw Jacqueline go into a shibeen called Bricks; he did not follow her in as he was underage. He went to the fence at the back of the shibeen to see if he could get Jacqueline's attention. As he was about to call her he noticed that Jacqueline was talking to Zelmarie, he heard Zelmarie tell Jacqueline that the allegations she made against Zelmarie were not true and that she had fabricated them as she was scared that the applicant would speak to her mother. Jacqueline did not respond and then Zelmarie and Jacqueline discussed Jacqueline's baby. The applicant said that he has known Zelmarie all his life and was very disappointed in her.

75. About a week later on a Friday as the witness was on his way home Zelmarie called out to him and told the witness that she had something to tell him. She told the witness that she had fabricated the allegations against the applicant as she was scared that the applicant would tell her mother about her school work. The same evening the witness saw Zelmarie again and he asked why she spread rumours about the applicant which were not true. Zelmarie again said that it was because she was scared that the applicant would tell her mother about her school work. The witness told the applicant that he was disappointed in her and Zelmarie kept quiet. The witness did not confront Zelmarie about what she had done.
76. The following week the witness phoned the applicant and told him that he wanted to testify at the applicant's disciplinary hearing, the applicant did not ask him what he was going to say and he did not tell him. Just before the hearing the applicant's representative asked him what he was going to say and the witness told him.
77. The witness said that the applicant had asked him to look in a cupboard in his classroom and give him the documents in the cupboard. The witness looked in the cupboard and found a lever arch file with the applicant's name on it. In the lever arch file were plastic sleeves in which there were documents. He randomly took documents out of the sleeves and gave them to the applicant he did not read the documents.
78. The witness said that he, Zelmarie and Jacqueline were best friends at school and were naughty but that he did not expect Zelmarie to do what she had done. The witness said that Zelmarie was always scared of her mother as her mother was very strict and would sometimes hit her.

**Jacqueline Joubert**

79. The witness said that one Saturday after the applicant was suspended she went to Bricks with her baby where she saw Zelmarie. The witness asked Zelmarie if her allegations against the applicant were true, Zelmarie put her finger to her lips to indicate to the witness that they must not speak loudly, she then told the witness that she had made up the allegations against the applicant as she was scared that the applicant would tell her mother about her school work and the fact that she spoke about sex at school and they then chatted about the witness's baby. The witness was asked in cross examination why she did not mention the sex talk at school at the disciplinary hearing. The witness said that she must have forgotten to mention it.
80. The following day the applicant bumped into Zelmarie and asked her if she really made up the allegations against the applicant the applicant confirmed that she did make them up. The reason the witness asked the applicant again if she made up the allegations was in case Zelmarie was drunk the previous day. The witness did not confront the applicant about her actions.
81. In about June 2007 the witness was hitch hiking when Mr Heynse drove past, normally Mr Heynse would never stop to give her a lift but this time he did. He told her that the evidence that she and Julian gave at the disciplinary hearing did not mean a thing and even if the applicant were re-instated he would have the applicant declared in excess and that the applicant would not get another job.
82. The witness said the applicant's mother lived on the same farm as she used to and when the applicant came to see his mother one day she told him what Zelmarie told her and that she wanted to give evidence at his hearing.
83. The witness said that when she was still at school she went to Mrs Heynse to get a sanitary pad and that Mrs Heynse had asked her if she would say that when the applicant came to see his mother, he had touched her and had spoken to her about sex. The witness did not answer and left the room.
84. The witness said that she and Zelmarie were and are still good friends but what Zelmarie did does not surprise her as whenever Zelmarie is in trouble she tries to get out of it by blaming someone else. The witness said that Zelmarie is scared of her mother and that she has seen Mrs Filander hitting Zelmarie on the steps of the school.

85. In cross examination the witness was asked if the applicant had bribed her to testify in his favour. It was put to the witness that the applicant was seen delivering groceries to her house. The witness said that the father of her child lives on the same farm as the applicant's mother and that he sometimes gave the applicant money and groceries to deliver to her when the applicant visits his sister who lives near the witness. The witness was asked if she was related to the applicant, the witness said that the applicant was related to the father of her child.

### **Grivenia Manuels**

86. The witness was in Zelmarie's class in 2006. The witness said that she and Zelmarie were both sexually active in that year and both had boyfriends in Aslan and both slept over at their boyfriends' houses. On one occasion they were discussing sex whilst the applicant was writing on the board. The applicant confronted the witness and Zelmarie and told them that he was going to write to their parents and he gave them each a letter. Neither the witness nor Zelmarie gave the letter to their mother. The witness said that letters said that their school work was behind and that they were talking about sex at school.

87. The witness said Zelmarie told her that the applicant had arranged a meeting with the Mrs Filander and that the applicant and Zelmarie went to see Mrs Filander but that Zelmarie told the applicant that her mother was not home. The only thing Zelmarie told the witness about the drive with the applicant was that he played nice music. The witness said that the applicant had asked Zelmarie to bring him some grapes and then Zelmarie told the applicant that they could collect the grapes the following day when he came to see her mother. The witness said that the applicant at times asked pupils to buy grapes for them.

88. The witness said that Zelmarie was wild and a bit of a tom boy and that she would steal from her mother and grandmother, the witness and Zelmarie would at times smoke dagga together. The witness said that one weekend last year when they were in Aslan she asked Zelmarie if the allegations she made against the applicant were true. Zelmarie said that they were not true and that she had made them up as she at the time suspected that she might be pregnant and was scared of what the applicant would tell her mother. The witness said she decided to testify on behalf of the applicant at the arbitration hearing but that Mrs Filander and her sister tried to bribe her to testify on behalf of the

Zelmarie. The witness said that she saw Zelmarie the previous month and that Zelmarie told her that it would not matter what she said as she was going to win the case.

89. The parties submitted written argument in support of their respective cases which I will refer to where necessary in my analyses.

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

90. In a case where an applicant is dismissed for misconduct the applicant must prove that the dismissal was fair. Schedule 8 of the LRA requires the dismissal to be substantively and procedurally fair. In terms of procedural fairness the applicant in his grounds of appeal stated that he was not given an opportunity to call all his witnesses but this point was not pursued at the arbitration hearing and there was no led evidence of any procedural unfairness, hence I find that the applicant's dismissal was procedurally fair. In order for the dismissal to be substantively fair the respondent must prove that:

- There was a rule;
- The rule was reasonable;
- The rule was known or should have been known to the applicant;
- The rule was broken by the applicant and that
- Dismissal was the appropriate sanction for the dismissal

91. In this case the only issue I have to decide is whether the applicant broke the rule that is whether the applicant did indecently assault Zelmarie Filander by placing her hand on his penis and placing his hand on her breast. It was not disputed that this behaviour would amount to breach of a rule for which dismissal would be an appropriate sanction.

92. I found the complainant Zelmarie Filander to be a very consistent and credible witness. Her evidence with respect to what took place on 10 March 2006 did not deviate from that she gave at the disciplinary hearing and her evidence remained consistent despite rigorous cross examination. On the other hand the applicant's evidence and that of his witnesses was riddled with inconsistencies of which I will give some examples of below. It was put to the complainant and to Heynse that various witnesses would be



called to give evidence relating to statements the complainant and Heynse were supposed to have made yet the applicant did not call those witnesses. The witnesses in question were Magdalena, Joniver and Chrissie. The applicant as he was giving evidence appears to have been fabricating things as he went along for the reasons stated below. The applicant's evidence was at times vague and difficult to follow. Further the four witnesses he called appeared to have been coached by him for reasons which I will refer to below.

93. The applicant relied heavily on various letters which either he was supposed to have written to Mrs Filander or that the Principal, Heynse was supposed to have written to indicate that since February 2006 he was concerned about Zelmarie's poor school work and wanted the permission of Mrs Filander to allow Zelmarie to participate in a remedial programme, yet in none of these letters did he refer to the remedial programme. Further there are two letters which are dated 23 February 2006 that he wrote to Mrs Filander both of which apparently should have been dated 13 February 2006. The letter which was in the respondent's bundle does not make mention of the alleged appointment of 10 March 2006 and appears to be asking Mrs Filander to agree to a meeting whilst the one in the applicant's bundle is confirming the meeting of 10 March 2006. The applicant's submission that the one in the respondent's bundle was a draft and that he always keeps draft is nothing short of preposterous. What would be the point of keeping a draft letter in a file of which the content bears little resemblance to the actual letter sent.
  
94. The applicant stated in his evidence that in retrospect he should have sought the permission of the farmer at Zongausdrift farm to visit the farm but did not. He then said that he asked Heynse to get permission for him and he referred to an alleged minute of a meeting he had with Heynse on 4 May 2006 in which Heynse allegedly undertook to contact the farm owner to get permission for the applicant to visit the farm the next day. The next day the applicant said that he and Zelmarie again went to Zongausdrift to keep an appointment he had with Mrs Filander but the applicant did not check that Heynse had sought the permission and thus could have just gone onto the farm the following day as he had no reason to believe that Heynse had not sought and obtained permission. When Zelmarie told him that her mother was not at home he left without going to check for himself even though he did not believe her.

95. I asked the applicant why he had not after 10 March 2006 phoned Mrs Filander or posted her a letter. The applicant said that the school does not pay for stamps or phone calls easily. This answer is not logical as it would have been cheaper for him to bear the cost of a phone call or a stamp which would be less than the cost of the petrol he used to drive to Zongausdrift.
96. The applicant in his grounds for appeal submission stated that he wanted to call a witness who saw him travel to Zongausdrift with Zelmarie on 5 May 2006. When Carolus testified he said that he saw the applicant and Zelmarie drive past him on 10 March 2006, when asked to prove he saw the applicant and Zelmarie drive past on 10 March and not 5 May 2006 Carolus said that he had diarised the journey as being on 10 March 2006 but that he has since lost this diary. This appears to be rather a convenient loss. The applicant said that he had mistakenly referred to 5 May instead of 10 March 2006 in his appeal submission.
97. The applicant stated that he never asked Zelmarie or any other pupils to buy him grapes or to enquire about buying grapes, yet Grivenia stated that he did on occasion ask learners to buy him grapes and that he did ask Zelmarie to buy him grapes.
98. The applicant and his witnesses made much of the fact that one of the main reasons that Zelmarie did not want the applicant to see her mother was that he heard her and Grivenia discussing their sex lives. Grivenia said that the applicant gave both she and Zelmarie letters to give to their parents relating to their inappropriate discussions about sex, yet the applicant never referred to any such letters.
99. The applicant made much of the fact that Heynse was out to get him and that Heynse had orchestrated Zelmarie's allegations. I am left confused as to what the applicant believed were the motives for Zelmarie's alleged fabrication. Was it Heynse's vendetta or was it the fact that Zelmarie did not want her mother to find out that her school work and attendance were poor or was it because she did not want her mother to know she was sexually active or was it all three? The applicant appeared to be clutching at straws. In any event Zelmarie's mother said that she was aware of her daughter's poor attendance record at school as she asked her to stay at home and she also knew that this had a bearing on Zelmarie's school work. The applicant appeared to use the classical defence to a case of sexual misconduct allegation which is to imply that the complainant has loose sexual morals.

100. Julian's evidence relating to him obtaining the documents for the applicant from a cupboard also appeared to be contrived. The chances of randomly choosing documents from a lever arch file which related to a number of learners being those relating to Zelmarie are slim.
101. Zelmarie allegedly told three of the applicant's four witnesses that she fabricated the allegations against the applicant as she was scared of her mother. All three were apparently good friends of the applicant yet none confronted her about her behaviour and both asked her twice about her allegations. It is also quite a coincidence that Julian just happened to overhear Zelmarie telling Jacqueline of her fabrication at Bricks.
102. Heynse denied being the author of the majority of the letters which were in the applicant's bundle and which bore his signature he also denied that he placed his signature on letters which the applicant wrote although he said that the signature on the documents appeared to be his. The documents which were in the applicant's bundle were all photocopies and as the documents are in dispute the original of the documents should have been produced. I find in the light of the above that it is conceivable that the applicant could have placed the signature on the documents using photocopies.
103. Much was made of the time lapse between the incident and when the applicant reported the incident to Mr Cupido. The respondent's representative referred to the case of **R v Valentine** (no citation provided) where the judge stated that *Victims of sexual male or females, often need time to tell what has been done to them.....other may find it quite impossible to tell their parents or family members*'. It has been widely documented that in these type of cases the victim and especially if the victim is a child feels guilty about the incident and that he or she was responsibility for it and hence the time span is not unusual.
104. There are other examples of inconsistencies that I can refer to but I believe that the above is enough to indicate the non credibility of the applicant's and his witnesses' evidence and that on a balance of probabilities Zelmarie's version of what took place on 10 March 2006 is more probable than that of the applicant and that the applicant is on a balance of probabilities guilty of both the first charge and the alternate charge.

**AWARD**

105. For the reasons stated above I find that the applicant's dismissal was procedurally and substantively fair and the applicant's referral is dismissed.

106. There is no order as to costs.

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**Arbitrator/Panellist: Bella Goldman ELRC**