



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

Case No PSES 148-06/07WC

*In the matter between*

**J I Julius**

Applicant

and

**WESTERN CAPE EDUCATION DEPARTMENT**

Respondent

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**ARBITRATOR:**

**L Matshaka**

**HEARD:**

**28/08 & 31/8/06, 11&12/12/06 & 02/02/07**

**DELIVERED:**

**26 February 2007**

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**ARBITRATION AWARD**

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**Summary: Labour Relations Act 66 of 1995 – Alleged Unfair Dismissal relating to section 17(1)(b) of the Employment of Educators Act, 1998.**

**PARTICULARS OF PROCEEDINGS AND REPRESENTATION**

The matter was set down for arbitration hearing on 2 February 2007 at the offices of the Respondent in Cape Town at 09h00. On the following dates the proceedings had had to be adjourned due to lack of time: 28 & 31 August 2006, 11 & 12 December 2006. Advocate

Gregory Rodger Papier represented the Applicant, Mr. Joshua Isaac Julius and in turn Mr. Colin Arendse, Labour Relations Officer attached to the Department, represented the Respondent.

The parties were afforded an opportunity to initially have the matter conciliated in terms of set down process. This was no avail.

The Applicant party raised a point *in limine* in relation to the appearance of Mr. Arendse as the Respondent's representative. This was on the basis that Mr. Arendse consulted with the Applicant and even gave advice 9 (nine) months prior to the charges brought against the latter. It is the Applicant's view that he is privy to certain information that relates to the employee's defence in so far as the charge is concerned. In response Mr. Arendse made the following submissions:

1. The Applicant approached him on the basis of rumours to the effect that he had sexually molested the school secretary.
2. The Applicant consulted with him prior to the charge laid against him.
3. In turn he advised the Applicant that at that time he was not aware of any complaint and none had been received in that regard. He was also not aware of the fact that the Applicant had already made a court appearance. He further pointed out that his discussions with the Applicant lasted only for about 10 (ten) minutes. He further made it clear to the Applicant nothing could be done on the basis of rumours.
4. Mr. Arendse further submitted that enquires are received from time to time and as his call he has to serve educators in all respects. Whatever advice was given to the Applicant, this was done in the execution of his duties, as it is the case on daily basis.

It is common cause that at the time when the Applicant approached Mr. Arendse in his official capacity as the Department's Labour Relations Officer, no charges had been levelled against him. He approached Mr. Arendse purely on the basis of rumours. I have little or no difficulty in preferring the Mr. Arendse's version. The Applicant was only concerned about rumours and as such he sought advice in that regard. No advice could be forthcoming because no complaint had been received at that stage yet. For all intents and purposes the discussion between the two ended on that note. I am therefore not convinced that Mr. Arendse can be barred from representing the Respondent. In the absence of any tangible or concrete evidence I have to accept that as the initiator of these proceedings from the internal disciplinary hearing, he is duly mandated and has every right to represent the Respondent in these proceedings. I do not see it as even necessary for me to comment on the Applicant's suggestion as to who should represent the Respondent in Mr. Arendse's place.

The Respondent's representation remains unchanged.

The proceedings were mechanically recorded.

### **ISSUE TO BE DECIDED**

Whether the Applicant's dismissal was both substantively and procedurally fair.

### **BACKGROUND TO THE ISSUE**

The Applicant was employed as an educator on 1 January 1988 at post level 1 (one). At the termination of his services on 18 November 2005 he held the position of principalship at level 4 (four) at Kerria Primary School.

On 5 October the Applicant was charged of misconduct in terms of section 17(1)(b) of the Employment of Educators Act, 1998, for allegedly sexually assaulting the school secretary, Ms Shireen Cornelius. Following a hearing held on 20 and 21 October 2005, he was found guilty and the mandatory sanction of dismissal imposed. On appeal the sanction was upheld.

The Applicant is contesting both the substantive and procedural fairness of his dismissal. As a relief he is seeking re-instatement back to his post.

On the other hand the Respondent maintains that it had complied with all the requirements of fairness as prescribed by the LRA.

## **SURVEY OF EVIDENCE AND ARGUMENTS**

### **Evidence on behalf of Respondent**

The first Respondent's witness, Mr. Ahmed, testified as follows:

He holds the position of a Labour Relations Practitioner. He represents the Department of Education as well as chairing disciplinary hearings. He was appointed to chair the disciplinary enquiry whereat the Applicant was charged for sexually molesting the school secretary, Ms Shireen Cornelius.

At the hearing the SADTU Regional Secretary, Ms J Titus, represented the Applicant. Her rights were fully explained. The contents of section relating to the offence in question as well as the mandatory sanction were full explained to the Applicant. As a presiding officer he saw this as his responsibility to inform the Applicant accordingly. In his defence the Applicant only presented bare denial. He regarded himself as a victim of vindictiveness. It was his assertion that the complainant had a motive to fabricate the allegations because he had previously remanded her for revealing dress sense. In relation to the language issue of the proceedings, he had made it clear to the Applicant to stop the proceedings whenever he needed interpreting services to the language he preferred. Neither the Applicant nor his representative raised any difficulty during the entire sessions of the proceedings. At the conclusion of the hearing, he requested both parties to submit heads of argument. He made his finding on 18 November 2005.

Mr Ahmed further testified that during the proceedings he received a telephone call from his wife regarding an electricity situation at home. He had indicated before hand that he was expecting such a call.

In cross-examination Mr. Ahmed denied that telephone calls interrupted the proceedings. However, he conceded that he had to attend to one telephone call from his wife regarding electricity problem at home. He further denied that due to his personal problem, he could not apply his mind on the matter. Mr. Ahmed insisted that due to an emergency situation, he had to adjourn the proceedings.

Mr. Ahmed further denied that he had continuously informed the Applicant during the proceedings that he would be dismissed. He merely drew the Applicant's attention to the provisions of section 17 of Employment of Educators Act 76 of 1998 that stipulates that the ultimate sanction was dismissal. Further, the use of the English language during the entire

proceedings was never an issue. Mr. Ahmed conceded that some witnesses present did testify in Afrikaans and or English.

The second Respondent's witness, Ms Shireen Felicity Cornelius, testified as follows:

She has been working as Kerria Primary School as a Secretary for almost 20 years. She knows the Applicant as the Principal of the same institution. Before being appointed as a Principal, he was an ordinary educator.

On 9 March 2004 the Applicant asked her to type a school prospectus. After finishing it, she handed it back to the Applicant in his office. The latter from behind in her office touched her breast and kissed her in the neck. All this behaviour shocked her. She then asked what he was doing and why. She immediately pushed him away and made it clear that she was not a prostitute. She further informed the Applicant that he was married man. As a born again Christian she did not believe in having an affair with a married man. Besides she never gave him a permission to kiss her. At about or between 16h15 and 16h30 she had to connect the bus to Mitchell Plain from Atlantis.

Ms Cornelius further testified that after the incident she felt emotionally disturbed, distressed and very disappointed. She could not understand why the Applicant had sexually molested her. In the end the Applicant gave her a lift and dropped her at the bus stop. Before parting ways the Applicant uttered words to the fact that he was stupid for what he did because he could loose his job. She only slammed the door and left without saying a word. Because she was crying fellow passengers realized that there must have been something unusual that had happened to her. At home her sister called in. She immediately enquired as to why she appeared upset.

On 10 March 2004 the Applicant called her in his office and closed the door. He informed her that he was in deep trouble and might loose his job. Without saying much the Applicant only made reference to a TV Mabuza talk show on sexual harassment. He only stressed the point that she must remember that he has a family to support. He was sorry for what has happened. He further stated that he knew that what he did was wrong. He was asking for forgiveness. She in turn responded in the same gesture as well. From the Applicant's office even though he had apologized, she went straight to the toilet and cried. She met there Mrs Harris, a member of the cleaning staff, and soon thereafter Mrs Saunders also came. She laid bare of everything that happened on the late afternoon of 9 March 2004.

Ms Cornelius further testified that the matter was only reported to the Department in March 2005.

In November 2004 Ms Makka, a member of a non-teaching staff of a nearby school, came to see Mr. Isaacs, the Financial Clerk of the Kerria Primary School. She also had the opportunity to tell her as well as to what the Applicant did to her on 9 March 2004.

Ms Cornelius further testified that she could not remember whether she spoke to Mrs Saunders or not, one of the teaching staff members who met her in the toilet.

Subsequently thereafter a circular was issued to the fact that her office should have no contact with other members of staff. Further, she was instructed to have her door remained locked. Although the alarm was in place, on the day of the incident she could not press the emergency button, as she did not have the access code.

Ms Cornelius further testified that the Applicant does not normally return to the office if he had taken his wife home. She would then normally make use of a taxi. But from 16h00 these were no longer available. Between 14 and 19 August 2006 she attended clinic for post-traumatic disorders. At night she experiences nightmares. Her personality has changed drastically, as she was now forgetting simple things ever since the incident.

In cross-examination Ms Cornelius confirmed that she has applied for a transfer to other schools near her place of abode. She has had to rely on public transport. She further confirmed that she has been to interviews at two schools. The Principals of the respective schools have already indicated her nominations. She was now awaiting her appointment to either of the two posts.

She further confirmed that she only reported the incident to the Department in March 2005. She also laid a charge with the police. She particularly felt let down when she reported a similar matter to the Applicant. When put to Ms Cornelius that her story could not be believed, she stood by her statement.

In response to an issue of the missing school funds, Ms Cornelius averred that she had always been required to pay back the funds. She had no particular recollection of an incident relating to a missing amount of R50-00 (fifty rand). Regarding the Applicant's version that if she did not give back the missing amount she would have been charged and appeared in a disciplinary hearing. She denied that the Applicant ever threatened her with a disciplinary action if she did not pay back the money. She further denied that the Applicant had asked to type the prospectus on 10 March 2004 and still stood by her version that this was done on 9 March 2006.

Ms Cornelius further disputed the Applicant's version that when he took his wife home, he did not lock the front door. She further asserted that if she had not pushed the Applicant away something else would have happened. She was against having relationship with a married man. She further stood by her version that security system at the school would not have been assistance to her because she was not aware of the code number.

Ms Cornelius further confirmed that her sister, Dr. Cornelius, visited her and brought her son's birthday gift after he had arrived from work. On the first occasion she broke down. She could only manage to narrate what had happened to her when she came back later. Her sister advised her to report the matter to the police and Department of Education. In her response she in turn informed her that she could not report to the police in her area because the incident happened in Atlantis and not Mitchells Plain. Further, she was scared to report it to the Department. It was further put to Ms Cornelius that the Applicant would deny all the allegations.

Ms Cornelius further confirmed that Mrs Harris, a member of the non-teaching, came in when she was in the toilet. She further confirmed the presence of another staff member, Mrs Saunders. She had actually phoned the latter in the evening of the 9<sup>th</sup> March 2004, i.e. day of the incident. Mrs Saunders was bit concerned and even asked her, what she intended to do about the matter. Ms Cornelius confirmed that it was her advice that she must not leave it like that. On the other hand Mrs Harris made fun of the incident.

Ms Cornelius further confirmed that the Applicant asked her to type a circular to the effect that everybody should keep away from her office at all times. She further confirmed that one Ms Makka, from a nearby institution, visited the school for an in-service training. She informed her everything about the incident. In March 2005 she called Mr. Arendse, an official of the Department. The latter advised her to contact the counsellors of the Department. She also reported the matter to the police. As to why it took so long for her to report the matter, a threat

that she could lose her job hanging over her head. In fact the whole incident had traumatised her to the extent.

In re-examination Ms Cornelius confirmed that the Department has a final say in transfers of staff. This was therefore outside the realm of the Principal of the school and the Governing Body. She further confirmed that Mr. Beja was not working for the Western Cape Education Department. His involvement with the school related only with his duties as a member of the Governing Body. She further confirmed that Mr. Isaacs was the only financial clerk of the school. She only acted as a responsible officer in his absence.

Ms Cornelius further confirmed the following:

- She was certain of the 9<sup>th</sup> March 2004 because it was her son's birthday
- She was shocked at the time of the incident and even thought the Applicant was intending to rape her.
- The door and the security gates were locked hence she could not run away.
- The alarm always had a problem. The Applicant was well aware of that
- Only Mr. Isaacs, the Applicant, Mrs Farmer and Mr. Amstrand were responsible for the functioning of the alarm
- On the morning of 10 March 2004 the Applicant called her in his office and asked her to sit down.
- The circular made it clear that her door had to be locked at all times, as lot of things were taken away from her office. The said circulars were kept in the Applicant's office.
- The Applicant threatened her several occasions between March 2004 and March 2005.
- The Applicant had been the Principal of the school for 2 (two) years. On the other hand she has been at the school for 18 years.

The third Respondent's witness, Dr Cornelius, testified as follows:

On the 9<sup>th</sup> March 2004 or a day after her son's birthday's when she visited Ms Cornelius, she looked very distressed and even cried. She left her for a while and came back afterwards. On enquiring as to what actually happened she informed her as follows:

After finishing some typing work and handed the same to the Principal (Applicant) in his office, the latter followed her to her office adjacent to his. From behind he touched her breast. She immediately asked what he was doing and pushed him away. After that he noticed that the Applicant was shivering.

Dr Cornelius further testified that Ms Cornelius while narrating the whole incident, she was very upset and even got an asthmatic attack. On enquiring as to what she intended doing about the matter, she responded by saying that she would see in due course. Dr Cornelius then advised to report it to the Department and even to the Police. After making a follow-up some time afterwards, she informed her that she was afraid because the Applicant had threatened her that she would walk against the sole of her shoes and that he had best friends in high places.

Dr Cornelius further testified that she was of the opinion that it was not her duty to report the matter, but could only give advice. On the night in question, she was merely concerned as a sister, but she could not counsel her because she is a family member. She believed her story because she cried and even had an asthmatic attack in her presence.

In cross-examination Dr Cornelius confirmed the following:

- They are close to each other.
- Ms Cornelius suffered for a year before reporting the incident and she stood by her word.
- She was aware that Ms Cornelius had applied for a transfer without success and that she has only been successful recently.
- The Beja incident was brought to her attention but she was not interested in its details because Ms Cornelius was crying over the Applicant's incident.

At this point the proceedings were adjourned and resumed on 11 December 2006.

On the said date the same parties appeared as before. The Respondent's witness, Mrs Harris, testified as follows:

She is cleaner at the school with 21 years of experience. She was not the last person to leave the school premises on the day in question. The caretaker, his wife and Ms Cornelius were still there. The latter had informed her that she would be leaving late as she had some typing to do.

Until the next the morning she did not hear anything. She was aware that Ms Cornelius went to the Principal's office at about 08h00. At about 08h45 she went to the toilet crying. On enquiring as to what had happened Ms Cornelius did not respond. On the 3<sup>rd</sup> day Mr. Isaacs, Mrs Saunders and herself were in Ms Cornelius' office. She informed them that Mr Julius (Applicant) came into her office and pushed her (breast) against will. They were all surprised that something like that had happened.

Mrs Harris further testified that Mr. Isaacs and herself made an appointment to see the Applicant because they were concerned about the image of the school. They were then able to ask whether the said allegations were true or not. The Applicant responded by stating that Ms Cornelius would always come to him about her problems seeking his sympathy or hug. They then left his office. The Applicant then called Ms Cornelius in. When she came out of the Applicant's office, she confronted them (Mrs Harris and Mr. Isaacs) accusing them of backstabbing her yet they were converted Christians.

Mrs Harris further testified that they in turn further confronted her to find out whether what she informed them was true or not. Her response was the change of her attitude for the whole week. She went on with her duties otherwise she would have been under a stress the whole week.

In cross-examination Mrs Harris confirmed the following:

- She has known Ms Cornelius for a very long time.
- She would always tell her first anything that has happened to her.
- The incident happened in March 2004.
- Ms Cornelius only informed Peter, an auditor at the school who worked for the Western Cape Education Department, of the incident the same evening.
- Mr. Isaacs and herself made an appointment to see the Applicant to confirm whether the incident did take place or not.
- She could not believe Ms Cornelius because if a man comes in the room, she is the first one to hug'
- Mrs Harris denied that she ever made jokes regarding the incident.
- She did not think the incident was true as she always hugs a man.
- She has only taken this view at this arbitration hearing.

- She further could not say that the Applicant had threaten Ms Cornelius as everything seemed normal with her at the time.
- Ms Cornelius would come to her with her problems, but one would have to get the story out of her.

At the end of cross-examination the Respondent's representative applied that Mr. Harris be declared a hostile witness. In pursuance of that the following issues were raised with her:

- Why did she not say things she did not say about Ms Cornelius' character earlier on? Her response was that Mr. Arendse had indicated to her to say not more than what she was supposed to say. Further, she was only responding to questions put her now. Further, she denied that she had been influenced to present the evidence she has now led.

The fifth Respondent's witness, Mrs Saunders, testified as follows:

She holds the Head of the Department's position. She has been with the school since 1992 and knew Ms Cornelius as the secretary of the school.

During March 2004 following an incident that happened at the school, Ms Cornelius made certain allegations against the Applicant (Mr. Julius). In the evening of 9 March 2004 at about 23h00 Ms Cornelius phoned her. She sensed that she was very upset. She could not make much sense of what she said, as she was crying at the same time. She could only hear the mention of the fact that the Applicant had sexually molested or harassed her. In the end she asked her to meet her the following morning so that she could be able to explain better and in detail. The following day i.e. 10 March 2004 she arrived early at school and went immediately straight to her office. She could see her eyes were very red. She asked her to tell what had happened. As Ms Cornelius had to see the Applicant first, she could not say anything.

Mrs Saunders further testified that she then proceeded to the personnel room. Thereafter all educators went to the classes to start the day. After a while later somebody came to her and summoned her to go the secretary's office because Ms Cornelius was crying. On her arrival she was not there. On hearing somebody crying, she saw Mrs Harris together Mrs Jephta in the toilet. Ms Cornelius was in one of the cubicles. Although the door was closed, other people were in front of the toilet. At that stage Mrs Jephta At that stage confirmed that she had called her because Ms Cornelius was crying. Then Mrs Jephta left, as she was too long out of her class. Though she was not certain, Mrs Harris also left as well. Ms Cornelius then came out of the cubicle. She then narrated the whole incident starting from when she was given typing work to do after 16h00 when everybody had already left until he came from behind and put his arms around her touching her breasts and kissing her in the neck as well.

Mrs Saunders further testified that the Applicant the next morning apologized on the basis of SABC TV Shelly Mabuza show he watched in the previous evening.

On enquiring what she intended to do, Mrs Saunders testified that the Applicant had threatened her if she reported it to anybody, she would see what would happen to her. Mrs Saunders further testified that she did go to the Applicant and advised him that they must sort out the matter. In response the Applicant asked her to put her advice in writing. She refused on the basis that Ms Cornelius had informed her everything in confidence. Further, on the same day the Applicant also phoned Ms Makka to put in writing all what she had heard about the incident.



She was not certain whether Ms Makka complied or not, as she had to leave the office at that moment.

Mrs Saunders further testified that the Applicant had on one occasion in staff meeting informed staff that stories pertaining to an incident of an alleged sexual molestation of Ms Cornelius had come to his attention. What the Applicant confirmed was the typing work done by Ms Cornelius and on completion of the same he gave her a hug. One of the educators, Mrs Farmer, warned the Applicant to be careful of what he had said, because he might shoot himself in the foot. In response to another question, the Applicant confirmed that it was an innocent hug and never came to a rape.

Mrs Saunders further testified that one week or two after the incident a new or revised code of conduct was issued. It stipulated that nobody was allowed to go and chat in Ms Cornelius' office. Then female educators came together and took a stand that all educators should not be allowed as well as in Mr. Isaacs' office. Following this development in a staff meeting the same issue was raised. This led to an amendment of the said circular to the effect that nobody was allowed in the admin offices during breaks.

In cross-examination Mrs Saunders confirm the following:

- Ms Cornelius and Mrs Harris had a mother and daughter relationship.
- She would find it strange that Mrs Harris would or does not believe Ms Cornelius, because they were always together talking and telling each other stories.
- She denied that that Ms Cornelius was such a type of person who would start crying because she wanted to go home early.
- She was not aware that Ms Cornelius would share her personal feelings in order to seek sympathies.
- She was aware that there were couple of people Ms Cornelius would kiss because they were all reborn Christians.
- She insisted that Ms Cornelius would not hug everybody.
- The Applicant would talk about Ms Cornelius in front of other staff members stating that she was making her private life a school matter.
- Ms Cornelius had stated that she was not happy at work.
- After the issuance of the code of conduct Ms Cornelius regarded herself as being totally cut off from the rest of the staff.
- Mrs Saunders did not agree that the code was put in place because school funds and cell phones were missing.

The sixth Respondent's witness, Mrs Farmer, testified as follows:

She knew Ms Cornelius well. When she joined Kerria Primary School. Ms Cornelius was already there. She became aware of the incident in question when the Applicant expressed concern about the stories going around pertaining sexual harassment. The Applicant explained that following certain tasks that Ms Cornelius had done, he gave her an innocent hug. Her reaction was to the fact that if he had given her an innocent hug then it would not be taken out of proportion. She further testified that Ms Cornelius was not the kind of person who would cry if she wanted to go home.

Mrs Farmer was further aware of the code of conduct that came into existence after the incident. In general colleagues felt that it had to apply to all offices and not only to Ms Cornelius' office.

Staff was concerned that she was specifically targeted because Mr. Isaacs' name was not mentioned. Thereafter the code was amended accordingly.

Mrs Farmer further testified that she did not believe that Ms Cornelius would tell lies. As a born again Christian it does not suite her character.

The seventh Respondent's witness, Mrs Jephta, testified as follows:

She knew Ms Cornelius well. She has been at the school for 19 years. The first time she heard about the incident was when the Applicant (Mr. Julius) informed the staff about sexual harassment attributed to him on Ms Cornelius. On clarifying as to what exactly happened he explained that he only gave the Applicant a hug to say thank you after she had finished doing some typing work. He further stressed that the hug was innocent and did not go as far as rape.

Mrs Jephta further testified that after the Morning Prayer she went to the toilet. Ms Cornelius came in crying terribly. As she had to go to her class she sent for Mrs Saunders so that the latter could speak to Ms Cornelius. A long while after the incident Ms Cornelius informed her as to what exactly happened. The Applicant locked the gate after releasing the caretaker early. When Ms Cornelius enquired as to why the Applicant was locking the gate, he responded by saying that she should only finish typing the work at hand. Afterwards the Applicant touched her breasts. She then had to go home, as it was already late.

In cross-examination Mrs Jephta confirmed that she only heard about the incident after the morning prayer of 10 March 2004. Ms Cornelius informed her in a school outing trip.

### **Evidence on behalf of the Applicant**

In his own evidence the Applicant testified as follows:

He has been attached to the school for 18 years. In 2003 he was appointed in an acting capacity as the Principal and permanently appointed in October 2003. He has known Ms Cornelius for 18 years as well. She has been responsible for secretarial work and typing. His only contact with her was at the school, as she was living in Mitchell's Plain. His relationship with any member of staff including Ms Cornelius was and has always been professional.

The Applicant further testified that he approached Ms Cornelius regarding the typing of the school prospectus that had to be done after hours in time for submission to the School Governing Body. She agreed on condition that she is taken to the bus stop (AMC Classic) to enable her to connect the bus to Mitchell's Plain before 17h00. She then continued with the typing in his office. Since it had a lot of typing errors, he was forced to proofread it. This in turn extended the typing process. After proofreading the document, he gave it back to her to correct the errors. She did the corrections in his office until he had to take his wife home. At that stage the cleaning personnel had already left the school premises. He then locked the front door and the gate, since Ms Cornelius was left alone at the school. When he came back, it was almost time for her to catch the bus. He then proofread two or three pages. On giving her the said pages, he informed her that they had to stop otherwise she would miss her bus. As promised he gave her lift to catch the bus. On the way he thanked her for her willingness and sacrifice for that day. Ms Cornelius had also promised to come early the next day to finish the typing.

The Applicant further testified that the only time he used the key was when he had to unlock the gate he had locked on his way out. On his return Ms Cornelius was in his office just about 15

minutes, as she had to catch the bus. He denied that he ever touched her breast and kissed her in the neck. The next morning on his arrival at the school, Ms Cornelius was already there. After morning prayers she gave her the pages that had to be corrected.

The Applicant further testified that he first heard about the allegation when Mrs Harris and Mr Isaacs came to his office in 2004. It came to his attention that Ms Cornelius together with other secretaries from other schools was defaming his name at union meetings of non-educating staff. It was being alleged that he had created opportunity to get Ms Cornelius alone in the office and in that instance he had even tried to rape her.

The second time was when the police contacted him in September or November 2005. He then appeared in court and despite his attendance his case was not on the roll. The third occasion was when the circuit manager gave him the notice in relation to sexual harassment charge and to appear before a disciplinary hearing. Prior to this he made contact with Mr Arendse, the representative of the Labour Relations – Western Cape Education Department, to find out whether he was likely to face a charge in that regard. The latter informed him that there was none. As to whether he should institute a disciplinary action against Ms Cornelius for defaming his name as the principal of the school, Mr. Arendse advised him 'not to wake the sleeping dogs'. In June 2006 after disciplinary hearing he received a fax from the Western Cape Education Department to vacate the post immediately.

The Applicant further testified that the proceedings were conducted in English and Afrikaans. Some witnesses were led in English with no interpreting services available, even though his mother is Afrikaans. This led to some difficulty on his part in following some issues.

In his defence the Applicant denied the sexual allegations levelled against him in that he ever touched Ms Cornelius's breast or made himself guilty of that. He further denied that he called her to his office the morning of the 10<sup>th</sup> March 2004. All that he did was to enquire as to how far she had gone with the typing of the prospectus.

The Applicant further testified that he knew about the Beja incident. Mr. Beja had come to the school to attend an emergency meeting of the School Governing Body. After the meeting Mr. Beja left the school premises. Ms Cornelius came to his office to report that Mr. Beja had touched her breast and kissed her on the neck. Because Mr. Beja had already left, he asked her as to why she waited until Mr Beja had left. His attempts to get hold of Mr Beja were unsuccessful. In the meantime Ms Cornelius stormed out of her office crying emotionally and went to the toilet. He prevailed on female educators to help and calm her down. Afterwards he recommended that she lays a charge of sexual harassment against Mr. Beja. On discussing the matter with Mr Beja the following day, the latter denied the allegations. On his own the Applicant checked with the local police as to whether there was a charge against Mr. Beja. This actually led him to find out that he was facing the same charge arising from the incident that allegedly took place in March 2004.

In relation to the code of conduct the Applicant felt that it was necessary, as the educators were required to meet in the staff room. The management team of the school compiled a preliminary code of conduct that the rest of the staff approved. Because it was a proposed code, it was also open to changes. When in the end it was accepted by all educators, they had to sign that they will abide by it.

The Applicant further testified that the reason why Ms Cornelius' name was mentioned was because school funds as well as a cell phone had disappeared from her office. As an

administrative officer and secretary of the school, she also worked with confidential documents. It was therefore the feeling of the management team that when children, educators or private persons were in Ms Cornelius's office, it could damage the image of the school since this was the first place where the visitors report. After some discussions with the rest of the personnel, a motion was accepted that it would apply to the rest of the administrative offices. In the final document Ms Cornelius was removed.

At one stage he had threatened to lay a charge of defamation against Ms Cornelius if she did not stop making defamatory statements behind his back. In an emotional state Ms Cornelius immediately apologized and asked forgiveness. Due also to tremendous personal problems he decided not to continue with the charge against her. At one stage Ms Cornelius disregarded prescripts relating to receiving or placing money in the safe. In consequence therefore a sum of R50-00 went missing. Ms Cornelius was given a choice either she pays back the money or the matter would be reported to the Department.

The Applicant further denied that he ever discussed the matter with Mrs Saunders or that there was a staff meeting whereat he confirmed giving a hug to Ms Cornelius. He further denied that he would belittle Ms Cornelius in front of other staff members. Instead he would call her to his office if the need arose. He was of the view that certain staff members who did not agree with management style of the school misused Ms Cornelius.

In cross-examination the Applicant confirmed the following:

- He did not receive a fair hearing at the disciplinary hearing as spelt out in the referral.
- The presiding officer had made aware on a continuous basis that if he were found guilty he would be dismissed.
- Ms Cornelius had to type prospectus on 10 March 2004 and finalised the next the day.
- Neither did he touch, nor kiss Ms Cornelius for the past 18 years.
- He denied that he ever said that she had a nice pair of legs and well built because he knew what the consequences would be.
- He did not remember when the code of conduct came to light.
- He confirmed that Ms Cornelius laid a charge of sexual harassment against Mr. Beja and himself
- He denied that he ever spoke in staff meeting to the effect that he only hugged Ms Cornelius. He only spoke to Mr. Isaacs and Mrs Harris and that was the first time he heard about the incident.
- He did not know that he could raise the language issue during the internal proceedings, as he had full trust in his representative, Ms Titus. He conceded that the latter gave him a paper to write down if there was something he did not understand.
- As to why he did not challenge Mrs Harris' version regarding the fact that he called Ms Cornelius after the day of the incident. He insisted that he called Ms Cornelius after the assembly
- Further, as to why the code focused on Ms Cornelius and not on other administrative staff. He attributed the disappearance of school funds and cell phone to people being let into her office, which also kept confidential information.
- He conceded that he did not see the need to follow prescript because the Applicant was given an option to pay back the missing amount.
- He further conceded that he did not call Mr. Beja to testify at the internal hearing because he only thought of himself

The first Applicant's witness, Mr. Beja testified as follows:

He knew the Applicant as well as Ms Cornelius. When arriving at the school Ms Cornelius came to hug him. He expressed displeasure. On the occasion of an election of a new member of the School Governing Body, Ms Cornelius hugged him for the second time. This was in the spirit of welcoming him as new member. In cross-examination Mr. Beja confirmed that he did not report the matter on a cultural basis.

The second Applicant's witness, Mr. Jan Braaf, testified as follows:

He knew the Applicant for the past 10 years both as parent and a member of the Governing Body. He also knew Ms Cornelius as a school secretary for the same period as well. On one occasion the Applicant asked him to drive Ms Cornelius home because father had taken ill. According to Mrs Harris Ms Cornelius' father had suffered heart attack. He was surprised when he saw him as in his job as an ambulance assistant he always been involved with heart attacks and asthmatic cases. In cross-examination he confirmed that he was not qualified to determine the various stages of a heart case.

The third Applicant's witness, Mr Phillip David Alexander, testified as follows:

He has been the educator at the school for the past 18 years. He occupies the Deputy Principal's position. He has known the Applicant for the past 18 years. He heard about the incident from Mr. Johnson, the Chairperson of the School Governing Body, in October 2005. The Applicant had also mentioned the incident briefly in one prayer service. All staff members other than those on school patrol attended.

## ANALYSIS OF EVIDENCE AND ARGUMENTS

As point of departure, common to any inquiry into fairness or otherwise of all forms of dismissal are three issues: whether the termination of the employment relationship amounted to a dismissal; if so, whether there was a fair reason for the dismissal and whether the employer followed a fair procedure before taking the decision to dismiss the employee. Dismissals that are not for a fair reason are referred to as substantively unfair; dismissals not in accordance with a fair procedure are termed procedurally unfair.

Further, section 188 of the Labour Relations Act No. 66 of 1995 makes it clear that procedural fairness and substantive fairness are independent requirements for a fair dismissal. It may therefore be that a dismissal is found to be for a fair reason, but that it is nevertheless unfair because the employer failed to follow a fair procedure. It may also be that a dismissal that is both procedurally and substantively unfair.

Grogan in his book, **Dismissal, Discrimination & Unfair Labour Practice**, 1<sup>st</sup> Ed, 2005, page 178 further makes the point that the division of the requirements of a fair dismissal into substantive and procedural dimensions means, essentially, that employers must be able to prove that their decision to dismiss the employee was reasonable, and that it was reached after following a fair procedure. He goes on to say that 'Reasonableness' in this context means essentially that the decision to dismiss is *defensible*.

Turning to the present case, it is common cause that the Applicant faced the following main charge that led to his dismissal:

## Charge 1

*It is alleged that you are guilty of misconduct in terms of Section 17(1)(b) of the Employment of Educators Act, 76 of 1998, in that, on or about 9 March 2004, you committed an act of assault on Ms S Cornelius, the secretary at Kerria Primary School by touching her breast and or kissing her in the neck.*

## Alternative to Charge 1

*It is alleged that you are guilty of misconduct in terms of Section 18(1)(q) of the Act, in that on or about 9 March 2004, while on duty, you conducted yourself in an improper, disgraceful or unacceptable manner by committing an act of sexual assault by touching the breast or kissing in the neck of Ms S Cornelius, the secretary at Kerria Primary School.*

The Applicant contests the fairness of his dismissal both substantively and procedurally. As a relief he seeks reinstatement and further asks that he be granted costs of his application. On the other hand the Respondent respectfully submits that the Applicant is indeed guilty on a balance of probabilities and therefore requests that the Applicant's request for reinstatement be denied.

Before going into the evidence led by both parties, as a guide one needs to look at the Amended Code of Good Practice on the Handling of Sexual Harassment. It defines sexual harassment as follows:

**“Sexual harassment is unwelcome conduct of a sexual nature that violets the rights of an employee and constitutes a barrier to equity in the workplace, taking into account the following:**

- (1) whether the harassment is on the prohibited grounds of sex and/or gender and/or sexual orientation;**
- (2) whether the sexual conduct was unwelcome;**
- (3) the nature and extent of sexual conduct; and**
- (4) the impact of the sexual conduct on the employee.”**

Grogan supports the view that sexual harassment may be described as persistent, unsolicited and unwanted sexual advances by one person to another. He goes on to mention that in English law ‘persistent and unwanted amorous advances by an employer to a female member of staff’ have been held to provide a basis for constructive dismissal if the employee abandons her employment as a result. So too in American law where sexual harassment is a form of discrimination. He goes on further and states that both English and United States courts have held that a duty rests on employers to protect their employees from harassment by other employees and by customers.

In Grogan's view in South Africa, the courts have taken a similar view. In the first reported case of its nature, **J v M (1989) 10 ILJ 755 (IC)**, the industrial court upheld the dismissal of a senior executive for amorous habits. It was held that sexual harassment, between members of opposite sex or same sex, is a serious matter requiring attention of employers. The court also pointed out that, whatever form it takes, sexual harassment violates the victim's right to integrity of the body and personality, and is aggravated in the employment context by the fact the victims are sometimes afraid to complain because to do so could lead to a loss of opportunities, or even to dismissal.

In considering the above it is useful to start with the notion that sexual harassment is unwelcome conduct of a sexual nature that detrimentally affects the work environment and attacks the dignity and self-respect of the victim both as an employee and as a human being. In assessing whether or not sexual harassment has occurred, one needs to ask whether the conduct was unwelcome, what the nature and extent of the sexual conduct is and the impact on the complainant.

In essence the evidence led in the present case reveals that an encounter between the Applicant and the complainant, one Ms Cornelius, arising from a work related issue, allegedly had undesirable consequences. On the one hand the Respondent avers that it received serious allegations of misconduct and after investigations summonsed the Applicant to a disciplinary hearing to face charges outlined above. He was found guilty and a mandatory sanction of dismissal was imposed on him. The subsequent appeal to the Minister of Education: Western Cape was unsuccessful. This is the matter before this hearing for determining whether the dismissal was both substantively and procedurally fair.

The Respondent relied on 7 (seven) witnesses in its evidence, namely: Ms Cornelius, Dr Cornelius, Mrs Saunders, Mr. Ahmed, Mrs Jeptha, Mrs Harris and Mrs Farmer. The complainant, Ms Cornelius, went to hand over a document she had typed to the Applicant. The latter approached her from behind touched her breasts and kissed her in the neck. She was shocked as something like this has never happened to her. She pushed him away after having told the Applicant that she was not a prostitute. In the end the Applicant took her to the bus stop.

At home her sister Dr Cornelius, who had paid her a visit at the time, was there. She told her what had happened. According to Ms Cornelius the following morning the Applicant made an urgent contact with her with an express purpose of mending his ways and as well as making an apology. He told her that he was in deep trouble and might lose his job. He asked her to forgive him. Ms Cornelius felt that she had no option but to forgive him as he told her that if anybody should know about incident, he would know what to do to her. Ms Cornelius also made a telephonic contact with Mrs Saunders on the night of the incident. On the latter's account they agreed to meet the following morning.

What actually happened only came out when Mrs Saunders was called to attend to Ms Cornelius at the time crying in the toilet. Mrs Harris and Mrs Jeptha had also availed themselves. Mrs Harris also confirmed that she did hear Ms Cornelius crying in the passage as she moved towards the toilet. According to Mrs Harris Ms Cornelius was upset when she came out of the Applicant's office on the morning of 10 March 2004. In the same breath Mrs Harris did not believe that the incident happened, because Ms Cornelius went on with her day-to-day activities as if nothing had happened. She furthermore also did not believe that the Applicant threatened Ms Cornelius. I find it difficult to accept Mrs Harris as a credible witness either for the Respondent or the Applicant. That she has deemed fit to change her evidence in these proceedings and in the same vein contradicts herself leaves her testimony in tatters and not to be relied on. In the end I am only left with a view that she was attempting to please both parties, an impossible task indeed.

Further, the Beja incident, in my own view is only important and significant in so far as it served as a springboard for the present case. I am unable to read anything else from it other than that.

In the Respondent's view the presiding officer, Mr Ahmed, of the internal hearing gave the Applicant a fair opportunity to raise anything if he did not understand, as well as bringing the same to the attention of his representative, Ms Titus from SADTU. The Applicant never objected

to when Mr. Ahmed addressed matters in English. The Applicant never objected when he received a call from his wife regarding the electricity that was cut off.

On the other hand the Applicant submits that he indicated that his home language is Afrikaans and that he could not follow the proceedings when issues were addressed in English and/or witnesses were testifying in English. He further indicated he was not happy with this situation, but he did not know that he could raise an objection in the circumstances.

I find it hard to believe the Applicant's submission in this regard. The situation was explained upfront and the Applicant's representative at the hearing seemed to have accepted it. That the Applicant did not know that he could raise an objection even through his representative seems to be just an after thought view. In his own words the Applicant had full trust in his representative. At no stage of the proceedings was this trust even shaken. That the Applicant was given a paper to write anything he did not understand, takes more credence over anything else. The fact of the matter is that there is no mention that he ever wrote anything.

Further, The Applicant is of the view that the presiding officer was biased in the outcome of the matter because it appeared that he already decided that he would dismiss him when he throughout the proceedings continuously reminded him of his imminent dismissal. This must be viewed against the background of **Section 17(1)(b)** under **Serious Misconduct** that provides as follows:

**“(1) An educator must be dismissed if he or she is found guilty of – (b) committing an act of sexual assault on a learner, student or other employee.”**

The Applicant's allegation in the above regard is not substantiated by concrete evidence in terms of the transcript record of the proceedings. On the other hand the presiding officer made it clear in his testimony that the mandatory sanction highlighted above obliged him to explain the seriousness of the charge at the commencement of the proceedings. This is acceptable and normal in offences of this nature.

In relation to the telephone calls that the presiding officer received from his wife, I noted that even before the commencement of the proceedings he had explained to the parties that he was expecting such a telephone call and that he would temporarily stop the proceedings for that purpose. A mention is only made of one call and not continuous calls that would obviously and unacceptably disrupt the proceedings.

I gather that the Applicant still stand by his version that his encounter with the Applicant took place on 10 March 2004 in accordance with date reflected on the computer and on the advice of his representative. Overwhelming evidence led show beyond reasonable doubt that the incident took place on 9 March 2004. Further, the Applicant denies that during the 18 years he has worked with Ms Cornelius he ever kissed her in the neck or touched her breast. On the day of alleged incident he had merely asked her to work late on the prospectus. He further denies that he had locked any of the school gates whilst he and Mrs Cornelius were in the school building. The following morning, he called her into his office because the prospectus was not finished. He did not notice whether anything was wrong with her. He only heard about the allegations of Ms Cornelius when Mrs Harris and Mr Isaacs came to him in November 2004, and informed him that Ms Cornelius was accusing him of sexually molesting her. He immediately confronted Ms Cornelius about these allegations, whereupon she apologised for the same and she would stop these rumours. He then left the issue at that. He further remembers Ms Cornelius coming to him during March 2005, and informed him that Mr Beja kissed her in the neck and touched her



breast. He further advised to go to the police. He later learned that Ms Cornelius went to the police and also laid a charge against him.

The Applicant further submits that Ms Cornelius made allegations against him because she desperately wanted a transfer from Atlantis to Mitchell's Plain, because he constantly criticised her about her sloppy typing, because he took away privileges she enjoyed under the previous Principal and because he also took away her telephone privileges.

I am not convinced that the above reasons hold water in this case. That the Ms Cornelius desperately wanted transfer cannot be denied. She is a single parent with one child and the distance between her place of abode and the work situation was a compelling factor. In the same breath the Applicant was in no position to enable the transfer to happen sooner or at any given time. Surely the processes that have to be followed are not in the hands of the Applicant exclusively. In fact the Respondent's evidence made it clear that this is outside both the Principal and School Governing Body's powers. It further does not make sense that somebody with more than 18 years of service could still be criticized for sloppy typing. Understandably, the question of privileges between or among management members will always be influenced or determined by personalities or operational needs of the workplace in most instances. Taking away such privileges, in my view, cannot of necessity or be lightly assumed that will or must lead to allegations in question. Surely a lot more must be forthcoming to substantiate this conclusion.

Of further significance, although the Applicant refers to the inclusion of Ms Cornelius in the prospectus, the "Code of Conduct" that came into existence after the incident adds some substance to the incident if viewed against its background. Why would her name be singled out until female members of staff voiced their concerns? Its purpose makes a lot sense, but the timing of it calls a lot into question relating to the incident.

Further, the Applicant denies that there was any staff meeting ever held relating to the incident where he only admitted to giving Ms Cornelius an innocent hug in thanking her for the work she did. That two of the Respondent's witnesses unambiguously confirmed this meeting and what the Applicant stated, leaves me in no doubt in accepting the credibility of their evidence. It is further quite interesting and revealing that one of the Applicant's witnesses, Mr. Phillip Alexander, does confirm a staff meeting where the Applicant informed the staff about Ms Cornelius' allegations against him. It would be strange and unusual that the Applicant would not have given some details about incident, at least putting his own version. It is in that regard that I have to accept the Respondent's version as opposed to the Applicant's version. I also have to attach some weight to one other Respondent's witness, Mrs Saunders, in relation to the visit she paid to the Applicant on this matter. That she refused to put in writing what she knew about the incident is understandable. It is unlikely that she could have agreed to such a serious commitment when she was also informed in confidence.

I have further noted that Ms Cornelius only brought the matter to the attention of the authorities a year later i.e. in March 2005. As a guide Section 60 of the Employment Equity Act 55 of 1998 provides as follows:

**"If it is alleged that an employee, while at work, contravened a provision of this Act, or engaged in conduct that, if engaged in by that employee's employer, would constitute a contravention of a provision of this Act, the alleged conduct must immediately be brought to the attention of the employer."**

The Labour Court in the case of **Ntsabo v Real Security CC (2003) 24 ILJ 2341 (LC)** found in this regard that “**immediately**” should be interpreted to mean: “**as soon as is reasonably possible bearing in mind the context of sexual harassment.**” And does not necessarily mean within minutes of the alleged incident. This has further been reinforced by addition in the Amended Code where Section 8.1.2 now provides as follows:

**“In instances of sexual harassment, the word “immediately” shall mean as soon as is reasonably possible in the circumstances and without undue delay, taking into account the nature of sexual harassment, including that it is a sensitive issue, that the complainant may fear reprisals and the relative positions of the complainant and the alleged perpetrator in the workplace.”**

In the light of the evidence that has been presented, I can only see and accept the delay in bringing the incident to the attention of the Respondent, the employer, against the background of the authorities cited above. The very close relationship between the Applicant by virtue of his position as the Principal of the school and Ms Cornelius, as its secretary, as well as the Applicant’s threats, explain why the incident was not reported immediately after its occurrence.

On a balance of probabilities taking the evidence led by both parties into consideration, I am inclined to accept the Respondent’s version as more probable, reasonable and acceptable as opposed or contrary to the Applicant’s version of the events. I am therefore convinced that the Respondent has discharged its onus of proving that the dismissal was fair in all respects.

## **AWARD**

In the premises I make the following finding:

1. The Applicant’s dismissal was substantively and procedurally fair in accordance with Section 17(1)(b) of the Employment of Educators Act 76 of 1998. The matter is hereby dismissed.
2. Order for the Applicant’s request for costs is hereby refused.

**Lungile Matshaka**

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**Conciliator/Arbitrator/Panelist: ELRC**