



**PHSDSBC**

PUBLIC HEALTH AND SOCIAL DEVELOPMENT  
SECTORAL BARGAINING COUNCIL

# ARBITRATION AWARD

Commissioner: **HASSINA DOCRAT**

Case No: **PSHS848-16/17**

Date of award: **29 October 2018**

In the matter between:

PSA obo N METHAPI

(Union/ Applicant)

and

DEPARTMENT OF HEALTH- GAUTENG

(Respondent)

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## **DETAILS OF HEARING AND REPRESENTATION**

- 1) The matter was set down for arbitration on 25 October 2017, 22 November 2017, 09 March 2018, 4 May 2108, 8 June 2018, 7 August 2018 and 5 October 2018. At the hearings, the Applicant appeared in person and with her union official from PSA Mr., Mbatha. Mr. Shange from the Department of Health- Gauteng represented the Respondent.
- 2) Both parties submitted bundles of documents into evidence. Bundles "A" and "A2" were from the Respondent and Bundle "B" was from the Applicant, which both parties used as evidence. Respondent party called 5 (five) witnesses and Applicant called 1 (one) witness. The arbitration hearing was electronically recorded only.
- 3) An Application for legal representation was made which was denied.

## **BACKGROUND TO THE MATTER AND ISSUES TO BE DECIDED**

- 4) The Applicant worked for the Respondent since 1 December 1984 as Deputy Director. The Applicant earned a salary of R49 167-65 per month.
- 5) The Applicant alleges that she was dismissed without good cause whereas the Respondent contends that the applicant was dismissed for Misconduct, in respect of Corruption and Maladministration. (See charge sheet of Applicant's Bundle "B", Pg. 1).
- 6) The Applicant seeks reinstatement as remedy for her unfair dismissal and in the alternative, compensation. It is further common cause that the Respondent is a Government Health Department.
- 7) The Respondent confirms that the Applicant was dismissed.

## **ISSUES IN DISPUTE**

- 8) The issue in dispute is whether or not the Applicants dismissal constitutes a fair dismissal. I am required to decide whether or not the Applicant's dismissal by the Respondent was substantively and/or procedurally fair and determine the appropriate relief if I find that the Applicant's dismissal was either substantively or procedurally unfair or both. I am further enjoined by s138 (7) of the LRA to provide brief reasons for my findings.
- 9) The Applicant is challenging both procedural and substantive fairness of her dismissal.

## **SUMMARY OF EVIDENCE**

### **On behalf of the Respondent**

- 10) The Respondent presented their case through their representative Mr. Shange (hereinafter referred to as Shange).

- 11) The Respondent's first witness is Mr. France Motimane, who testified that he is working at Emergency Medical Services. The witness's job function is to manage administration and human resources, management of recruitment and management of appointment, management of payroll, training, management of leave, the overall management of the administration in human resource, etc.
- 12) The Applicant was the witnesses HR manager, he was reporting to the Applicant. The Applicant would verify all of the recruitment issues. In respect of Ms. Chauke and Mr. Netshiheni appointment, the witness was the chairperson of that panel. The post was advertised with the rank of General Assistance, there was a closing date on the advert. After the closing date of the post a panel was appointed. The witness was the chairperson of the panel. The shortlisted candidates were contacted. There were 63 people who were shortlisted to fill 25 posts.
- 13) After the shortlisting the scribe Ms. Virginia Modiba from HR took all the applications to capture it on the system. The following day Ms. Modiba came to him to enquire about the brown envelope. The brown envelope contained several application forms that was given by the Applicant to add to the 63 candidates shortlisted. The witness confronted the Applicant and asked her if he could include the 18 new applicants and she responded that he should as they are candidates/ veterans from MK (uMkhonto we Sizwe). The 18 new candidates were included to the 63 shortlisted. All these candidates were called for the interview. All the candidates were interviewed except two candidates who were not present on the day, being Ms. Chauke and Ms. Maphanga. This was reported to the Applicant, and it was then that the witness was informed by the Applicant that they could do a telephonic interview. This was done and during the telephonic interview Ms. Maphanga said that the reason she could not attend was because of family problems and Ms. Chauke was ill. Once the telephonic interviews were completed the interviews were finalized. Ms. Modiba then took all of the candidate recommendations from the interview to capture same for the 25 posts for submissions. It was during this period that the Applicant came and took all of the recommendations/ submissions from her.
- 14) The document found in Bundle "A2" is the final submission for final appointments for the 25 General Assistant Level 02 Emergency Medical Services post. The

witness testified that this document was compiled by the Applicant and according to the Respondent this was not a true reflection of what transpired at the interviews and certain parts of the document are disputed. The panel recommended 25 appointments but 32 candidates were appointed as per paragraph 1. However, in paragraph 2.1., it was stated that 31 posts were filled. The witness stated that no agreement was reached on additional candidates to be appointed, the panel was only tasked to appoint 25 candidates.

- 15) Mr. Khumalo who was mentioned under "Purpose" in paragraph 1 was not mentioned under "Background" on Pg. 2 under paragraph 2.4 of Bundle "A2". Mr. Nguqu was mentioned under "Background" under paragraph 2.4 but not mentioned under "Purpose" in paragraph 1. The Applicant mentioned that there were 43 candidates that were shortlisted, this is not correct as 63 candidates were shortlisted and another 18 at the request of the Applicant were added to the shortlist, making it 81 candidates. The witness disputes that any of candidates withdrew from the interview process. On Pg. 3 of Bundle "A2", no Placement under paragraph 6 was ever discussed.
- 16) Pg. 1 of Bundle "A2" stated that 32 candidates be approved for appointment, had the scribe Ms. Modiba compiled it, it would have stated 25 candidates. This is not an authentic document as it was not compiled by the HR scribe Ms. Modiba, but by the Applicant. Once an interview has been completed the HR manager must keep the documents for safe-keeping. The application form for Ms. Chauke is not authentic as it has no reference number and/or further details, it just states "GA", I.D number not completed and no experience was indicated etc. See Pg. 1 of Respondent's Bundle "A". Ms. Chauke completed the acceptance letter but it does not say what post was accepted by her on 11 June 2011 as per Pg. 6 of Bundle "A". It was clear that Ms. Chauke was not aware what position she had applied for. A person cannot apply for a position and be given an appointment if an application form is not correctly completed. The witness stated that it became clear from perusal of Ms. Chauke's application that she did not know which post she had applied for, that is why she could not fill the position in the acceptance letter and/or on her Z83.

- 17) Mr. Netshiheni's Z83 form was completed but he left some crucial information out, i.e. if appointed when he could begin, no reference number was completed for post appointment and whether the candidate had a criminal record. The Z83 Form assists the Respondent in processing the Application Form fairly that is why it is important that all information be completed and submitted. On Pg. 21 of Bundle "A" appears the Appointment Letter of Mr Netshiheni for 1 June 2011. On Pg. 27 of Bundle "A" appears the candidates Certified I.D. Copy of Mr. Netshiheni which was only certified after the appointment was made on 22 June 2011. On Pg. 26 of Bundle "A" appears a non-certified copy of the candidates I.D. Document.
- 18) The approvals of these appointments must be obtained from the CEO and the CEO also signs the appointment letters. In this case the appointment letter for Ms. Chauke was signed by the Acting CEO, Ms. Methapi, and the Applicant. The witness was not sure whether at the time the Applicant was appointed as Acting CEO. The Applicant also signed Mr. Netshiheni's appointment letter on 31 May 2011. However, it is clear from Bundle "A2" that the CEO was on duty on 31 May 2011 as he signed the document that was compiled by the Applicant that was seeking his approval to make the appointments on that day. The witness is not sure why then the Applicant signed the appointment letter. From the irregularities found in the documents it is clear that the appointments of Ms. Chauke and Mr. Netshiheni, was not legally appointed, according to the witness.
- 19) Under cross-examination, the witness stated that he was mandated and appointed by the CEO to interview the candidates and make a recommendation of the candidates. It is not his duty to make any appointments. The function of the panel is to check all documents and applications of the 63 shortlisted. The witness stated that he did not look at the application forms of the additional 18 candidates. Ms. Chauke was not part of his 25 recommended list. In terms of the line of communication, it is his duty to ask the Applicant whether he can include 18 additional candidates as the instruction came from her as she is his superior. The witness stated that he did not report the Applicant's interference to the CEO. The witness conceded that the Z83 document that is before him is not the Z83 that he used to interview Ms. Chauke.

- 20) The witness stated he was outlining the HR clerks checking process and once everything is 100% correct then it is sent to the HR Manager, Corporate Manager and then to CEO.
- 21) The witness stated that before the 25 candidates' submission could be done by Ms. Modiba, it was taken by the Applicant. The witness stated his 25 candidates were appointed. According to the witness, the document on Pg. 1 of Bundle "A" was not used during the shortlisting process. The witness said that had he seen the initial application he would not have shortlisted the candidates. The Applicant's version is that the document on Page 1 of Bundle "A" is a fake document fabricated by the Respondent and the Applicant disputes these documents. The Applicant refutes the Respondent's claim that it is the responsibility of the Applicant to keep all documents safe. It is also coincidental that only certain documents to the applicant's case went missing. The witness disputes this and says that the Applicant is the head of the department and she is responsible for the documents not the supervisor. The Applicant told the witness that the brown envelop candidates was a request from the CEO and that is why the witness did not find it suspicious.
- 22) In terms of the document in Bundle "A2" of Respondent's Bundle, the Applicant's version is that a page from the document is missing between pages 3 and 4. The witness disputes this as he stated that it was never compiled by him and he was never given this document to sign. Placement is the responsibility of the HR Manager who was the Applicant.
- 23) The Applicant took the documents and compiled the submission, the witness testified that he does not know what happened after that. The incident took place in 2011 but the witness is not sure when the irregularity was discovered.
- 24) The trust relationship has been broken between the Applicant and the Respondent and the Respondent feels they cannot trust the Applicant any longer.
- 25) The Applicant was charged and dismissed for Misconduct. It was testified that all processes were followed. Documents in respect of same were submitted during the arbitration.

- 26) The Respondent's representative testified that procedure in respect of Schedule 8 of the Code of Good Practice was followed and the documentary evidence in respect of same was presented. The witness says he cannot comment on why the CEO was able to sign the submission and not be available to sign the appointment letter. The Applicant's version is that the Applicant was on a timeline as interviews were done between 24 and 25 May 2011, approval was done on 31 May 2011 to allow the candidates to start on 11 June 2011. There is nothing peculiar. According to the documentation used on the day the witness chaired the interviews, Ms. Chauke and Mr. Netshiheni were legally appointed.
- 27) Under re-examination, the witness still maintains that Ms. Chauke never applied for any post that is why when she accepted she did not know what post she was appointed for. The Respondent's version is that there is a number of Z83s that someone just completed and applied on behalf of Ms. Chauke and others on short notice. The witness does not know why the applicant overstepped her powers and hijacked the process. The fact that she hijacked the process shows that she had interest in the process. The six appointments that were made is not permitted, the post should have been advertised. The Applicant's instruction was unlawful, yet the witness still carried out the instruction. Telephonic interviews are usually done on scarce skill candidates and those that live very far away, both these did not apply to both candidates but according to the witness he was carrying out the Applicant's instruction. Normally if a Z83 is not fully completed it will not be considered, where it is found that a Z83 is defective, the person that did not vet the document correctly will be charged.
- 28) The Respondent called its second witness, Mr. Lesiba Malotana, the CEO for Gauteng Emergency Medical Services currently. In 2011 the witness was the Director of Corporate Services. The witness would from time to time play a role in recruitment as well as be a signatory for any submissions made to CEO in terms of confirmation of appointments. Following the advertisement, shortlisting, interviews, etc., the witness would sign as well as the CEO. The practice is that when a recruitment process is finalized a detailed file is presented when a signature is to be made. The detailed file is compiled by an HR assistant. There is a chain of personnel from HR to the witness to the CEO who will look at the file. A Z83 of Brenda Chauke that is presented to the witness shows that no post

was applied for yet on Pg. 3 of the Bundle “A” Brenda Chauke was appointed to a General Assistant post. The fact that the Z83 shows no reference it is difficult to make an appointment and yet Ms. Methapi the Applicant signed the appointment letter.

- 29) The witness never saw a letter appointing the Applicant as Acting CEO. The witness is second in command and he usually act as Acting CEO in the absence of the CEO. The scribe in the interview normally compiles the submission that is found on Pg. 1 of Respondent's Bundle A2, but in this case it is clear that the Submission Report was compiled by the Applicant, Ms. Methapi. It would seem that on that day on 31 May 2011, both the witness and the CEO were on duty. The Z83 was incomplete making the appointment difficult to make as well as the shortlisting difficulty. This tends to raise certain legal issues. If there was an emergency and the CEO had to leave he would delegate his duties to the witness. On Page 6 of Bundle “A” it is clear that no post was stated on the Acceptance Position Letter, making it difficult to see what position she applied for, the offer made for which post and what position she was confirming for. Once an appointment is confirmed, it is kept with HR for safe- keeping. There are sensitive documents kept in the safe and there are personnel files that are with HR. Some old files are also kept at other locations. The documents in Bundle “A”, specifically Pg. 1 of Bundle “A” is being disputed by the Respondent’s first witness as not being the original file. The Respondent’s second witness stated that this cannot happen as there can be no other document than the document found in the file.
- 30) The document found on Pg. 1 in Bundle “A2” shows that Mr. Netsheheni and Ms. Chauke were on the submission report for appointment. The appointment letter was once again signed by Ms. Methapi. The submission report was signed by the witness and the CEO so they were on duty yet Ms. Methapi signed the appointment letters. The witness confirmed that all certified documents must be submitted prior to appointment. In Mr. Netsheheni’s case his I.D. Document was only certified on 22 June 2011, which was after he was appointed on 1 June 2011. According to the witness this is not procedurally correct as it’s difficult to confirm an appointment without proper certified documents which makes the appointment defective and unlawful.

- 31) The witness further stated that for the appointments of Ms. Chauke (Bundle "A" Pg., 3 to Pg. 5) and Mr. Netshihheni (Bundle "A" Pg. 21 to Pg. 27), the CEO most probably did not receive these documents as its unlikely that the CEO would approve appointments whereby there is no position applied for, non-certification of documents and the fact that it is unclear how Ms. Methapi was appointed as Acting CEO at that time when she signed the appointment letter. From the evidence it would seem that Ms. Methapi took over the process and signed the submission report instead of allowing the scribe to do it and approved these unlawful appointments. 25 posts were advertised for general assistance and 31 posts were filled, this means the number of people appointed exceeded the number of posts advertised and only 30 people were placed. There are far too many discrepancies in the submission report compiled by Ms. Methapi, it does not seem that it is a true reflection of what has transpired at the interview. It seems candidate Khumalo has been left out. It seems that the appointments made in terms of Chauke and Netshiheni were unlawful. The witness confirmed that he was not aware of candidates being presented in a brown envelope.
- 32) Under cross examination the witness confirmed that he did deal with confirmation of appointments. The witness stated that he had a conversation with the CEO to give MKVA (uMkhonto we Sizwe Veterans Association) an opportunity to entry level posts. It was a principal discussion that as and when MKVA applied for a post it will be encouraged and that is as far as it went. The witness stated he was not aware if the MKVA were part of this recruitment process. This instruction came from the then MEC of Health, Ms. Mekgoe. The witness stated he was not privy to that instruction. The witness confirmed that he signed the submission on 31 May 2011, he was supporting the submission. The witness confirmed that then CEO Dr. M. Mazizi also signed the submission approving the appointments.
- 33) The witness confirmed that the submission comes with a full file with all details of the appointments. The compiler will compile through line managers, supervisor support, HR manager support, Director Corporate Services and CEO. It is not common practice that the Applicant is the compiler, it is usually the scribe's duty. The Applicant was not part of the interview process and it would be wrong for her to compile the submission report. The witness said he committed an error to endorse the submission report by the Applicant, but he was not the author of the

report. The witness confirmed that he cannot confirm what transpired between the then CEO and the Applicant.

- 34) The witness confirmed that the he received the document and signed same.
- 35) The witness cannot comment on the version that the Z83 placed before him, is not the original document used to shortlist Ms. Chauke as testified by the Respondent's witness Mr. F Motimane. The witness stated that he was aware of the new appointees but he was not aware of how they were appointed. Due to shortages in staff, several employees were re-assigned to other duties within head office. The witness stated once an appointment is made, in this case signed by the Applicant, an HR person would issue the Appointment Letter which in this case was issued by Ms. NE Mnaganyi to the successful candidate. There are 10 HR Practitioner employees, it is an open plan office with wall to wall cabinets, with supervisors and managers taking care of the personnel files. Investigation was done by head office and the witness is not aware of who did the investigation.
- 36) Some HR practitioners at the office are Commissioners of Oath and it is the Applicant's version that Ms. Methapi had nothing to do with the certification. The witness confirmed same. The witness confirmed that he did not go through the file document because of the volume. He places his trust on the panel conducting the interviews. The witness confirmed that F. M. Motimane has never been disciplined for any issues surrounding this dispute and the interview process.
- 37) Under re-examination the witness confirmed that he signed the submission report but that does not excuse the Applicant's irregular submissions as she was the author and he opposed the irregular appointments. Procedurally the CEO should have issued a written letter authorizing the Applicant that he had delegated the Applicant as an Acting CEO. If there was no written letter this means there was no verbal instruction or no authorization. If additions were made to the candidate list the approval of the CEO would have been imperative. No one can add candidates as they feel. General Assistance do gardening, repairs and maintenance and any outdoor type of work. Ms. Chauke was given HR duties to perform. Different skill sets are used. HR functions stop with HR managers. If documents are required it will be asked from the HR Managers. The two I.D

copies one certified the other not shows that the certified one was done after the appointment as it could not be used during the interview process. No decision has been taken at the moment to discipline F. Motimane, however new facts are coming to light during this arbitration.

- 38) It is unlikely that the Applicant should have compiled a submission for a recruitment process she had not been part off. This is not regular. It is also not regular on face value that the Applicant signed as acting CEO on the day that both the witness and the CEO were on duty.
- 39) The appointment of Ms. Chauke and Mr. Netesheheni was irregular and unlawful, irregularity of appointment letter, non- certification of I.D Document and no position indicated as reference.
- 40) The third witness to be called is Ms. Masesi Kubheka, employed as an HR manager in Lerato Hospital for the last 10 years and has about 30 years' experience in Human Resources. She is an expert witness in respect of recruitment processes. Her duties are overseeing the service benefits of management, employee health and wellness, labour relations, training and development, diversity management, occupational health and safety and recruitment, etc.
- 41) The witness testified that recruitment follows a certain procedure as set out by the Respondent. When a vacancy becomes available, the post must be advertised, once the advertisement is run and closes, a process of shortlisting then follows. A committee is formed in that department which will be done in conjunction with the HR department. HR will provide a support and advisory role. An HR Practitioner will assist the committee on how the shortlisting process would work. The committee will have to develop a criterion and should be informed by the key responsibility areas of the post. Amongst other things the committee will have to look at the equity issues. A representative from the Employment Equity committee will have to be part of the shortlisting committee. The shortlisting committee must keep records of the shortlisting process and the HR practitioner will have to call candidates that have been shortlisted for the interview. Records

will be kept by the HR Practitioner in HR, i.e. minutes of the meetings, deliberation and specific candidates shortlisted, etc.

- 42) The purpose of the shortlisting procedure is that the candidates that have to be considered should be those that have the competencies as per the key performances area as per the advertised post. The shortlisting committee then embarks on interviewing the candidates shortlisted. The shortlisting committee turns into the interview committee and must develop an interview questionnaire that will be asked to the candidates. The responsibility of the HR Practitioner is to generate the minutes. The CEO is the person that can approve appointments once all processes have been followed and recommendations made unless the CEO delegates otherwise.
- 43) The delegation by the CEO must be done in writing and is binding in nature wherein some things can be done and others not. No person in management is allowed to add candidates after the shortlisting process. The shortlisting committee's main function is to look at all applications and shortlist accordingly. The witness has not seen candidates being added after the shortlisting process and this is one of the reasons the Equity person was there was to observe the process. If an error has occurred and a candidate was left out a similar process to the shortlisting process must be followed again and records and minutes must be kept.
- 44) Shortlisting is a scoring system, the advert will set out the key performance areas of the job, stating specific functions. Candidates who have the knowledge of the key performance areas are allocated points according to their experience and qualifications. Candidates must submit detailed CVs and specific documents are requested as well, i.e. certified copy of Identity Document etc. The advert will dictate what is required.
- 45) In a recruitment process the responsibility of the HR Manager is to make sure that all processes are followed correctly. The HR manager will sign and it confirms that the process was followed according to the procedure dictated by the Respondent. HR Manager must sign before the recommendation goes to the CEO. The scribe will compile the minutes and the HR Manager will check on

everything. All certified documents must be dated prior to closing date as part of the package submitted prior to closing date. If a document is not certified, the HR Practitioner/ Manager will reject the document and or application as it does not comply. HR Department is audited by the Auditor General and therefore needs to comply with all requirements.

- 46) Under cross-examination, the witness conceded that she is an HR Manager. The witness stated that she follows the procedure as dictated by the Respondent when following a recruitment process. The witness stated she was not aware that there was an abnormal recruitment process. In HR everything that they do, is in terms of procedure, circulars etc., they are told what to do. The witness stated she will not allow irregularities in her department as she is answerable. The witness stated that she was never faced with a situation where she added candidates from a MKVA list. Nowhere in the procedure does it talk to this situation.
- 47) In the institution that she is in, the CEO requires a clean audit, hence therefore they follow process accordingly. The witness stated that if she was given such an instruction in respect of the MKVA list she would not have complied as she would look at it as an unlawful instruction. After shortlisting, specific people are called for the interview, the HR practitioner records the minutes, and she is the scribe. The Chairperson will sign the minutes. The HR department must keep the records of the interview process. The manager is accountable for everything in her department. The witness further stated that she would not do anything outside her scope as she would be held responsible. If all parties were aware of the envelope then they would all have endorsed it.
- 48) According to the witness, the CEO agrees with what he is signing. The normal procedure is that the CEO and HR practitioner will sign the shortlisting as well. When the CEO signs the approval document this means those candidates should be appointed.
- 49) According to the witness, it is not possible for a candidate to be interviewed if all documents are not present or correctly certified. An HR manager will not sign if a

candidate has been interviewed and failed to comply with submission of the relevant documentation.

- 50) Under re-examination, the witness stated that even if the MEC considers certain candidates, she must be fair and give HR adequate notice to allow one to have a clean audit and not allow HR to deviate from processes. If the HR practitioner does not submit all of the records and reports this will be irregular as how will we know what took place in the process? The HR manager will be accountable if documents are lost as she is the Head of the department, the scribe, filing clerk must also be investigated. HR Practitioner must oversee the entire process and the HR Manager's job is to make sure that all procedures must be complied with. The CEO always signs after the HR Manager signs, so if there are defects the HR Manager would know of the defects and endorse those defects. If the defects relate to procedure the appointments will be irregular. The HR Manager must take accountability for this defect as she is the custodian of policies and procedures.
- 51) According to the witness, once you become an employee HR will ask the appointee to come with all original documents which will be certified by the HR Department. The first set of documents must be certified by a commissioner prior to appointment for recruitment process. The Second set of certified documents will be certified on day of appointment by the HR Office. An uncertified I.D copy found in a recruitment file does not meet an advert requirement.
- 52) The Fourth witness to be called is Virginia Modiba, employed as HR Clerk, at EMS Midrand since 2011. The witness's responsibility is to do Human Resource work from appointment to termination. Before a post is advertised a vacancy must exist and there must be a budget for it. The post is advertised and candidates apply before the closing date. A spreadsheet of candidates is compiled. The manager in the division that advertised the post will appoint a shortlist committee. A letter is written to the CEO for the approval of the shortlisting committee. Once approval is obtained Confidentiality Agreements are signed and criteria set. The HR Practitioner acts as a scribe, writes down minutes and the candidates are shortlisted according to the criteria. Each and every application is checked by the committee and the committee signs the application. The witness informs all successful and unsuccessful candidates. Dates for

interviews is agreed upon between the committee. The committee conducts the interviews and once all the interviews are done and scoring calculated, the scribe compiles a submission and does regret letters and appointment letters. Once this is done the chairperson is asked to check the submission to see if everything is correct. Then HR Manager must verify that everything is correct and according to procedure, after which she will sign, it is then sent to the Director: Corporate Services and CEO for signature.

- 53) Ms. Brenda Chauke and Mr. Netshiheni were appointed in 2011. The witness was part of the process. According to the witness, these appointments were not done according to the process. The witness testified that at the time she was a new employee. She was the scribe. After the shortlisting process the witness was capturing the names of the successful shortlisted candidates. The witness was approached by the Applicant and she requested that she add the names of the people contained in the envelope. It was 18 candidates. The witness was surprised and she went to the chairperson Mr. Motimane and asked him what to do. He was also surprised but said he will check with the Applicant. Mr Motimane came back and said that she must add these 18 candidates as they are from MKVA.
- 54) The witness added the 18 candidates to the shortlist and they were all called for the interviews. Ms. Chauke and Ms. Mphanga did not come. Ms. Mphanga had a problem at home and Ms. Chauke said she was sick. The chairperson asked the Applicant how they should proceed, the Applicant stated that telephonic interviews must be done. In terms of the policy lower level employees are not called only scarce skill and higher-level employees can be called. The chairperson then interviewed them telephonically. There were 63 candidates interviewed on that day. The following day the witness was compiling her submissions, when the Applicant approached the witness and took all of the documents and began compiling her own submission. The witness went to the chairperson and informed him that the Applicant has taken over the submission despite her not attending the interview. This was irregular. The witness never saw the submission again. The submission was compiled and appointment letters were issued for 01 June 2011 by the Applicant. She called the successful candidates to come and collect the appointment letters.

- 55) The submission never came to the witness, she did not send out the appointment letters. The witness confirmed that the scribe and Chairperson had not signed the documents. The witness does not agree with the submissions, 25 post were advertised and 31 candidates were appointed, but 32 candidates appear to be appointed. Two candidates did not withdraw they did not attend. The submission states 43 candidates were shortlisted but it was actually 63 candidates that were shortlisted. On some pages some candidates' names appear and on other pages the same candidates, don't appear. The number of appointments doesn't correspond as 25 was to be appointed but 30 appointments seem to have been made. The witness confirmed that she did not sign the submission.
- 56) The submission was signed on 31 May 2011 by the CEO, the appointments were for 1 June 2011 start. According to the witness, the time was too short and this did not make sense. Those candidates taken from the envelope were appointed in the HR Department in Midrand to a post they did not apply for.
- 57) When a candidate is informed that they are successful, they must accept the post and state what post they are accepting. Pg. 6 of Bundle A contains Ms. B Chauke's acceptance letter but she did not write what post she is accepting. This implies that she was not aware of what post she had applied for, even her Z83 appears to be completed by someone else. Brenda Chauke was never shortlisted and her name came from the CV's in the brown envelope. No signature of the committee appears on her Z83. This is when a person is being assisted to being employed.
- 58) According to the witness, Mr. Netshihenis I.D copy was not certified and he should not have been appointed. His other I.D copy was certified on 22 June 2011 which was after the appointment date. Appointment date was 1 June 2011.
- 59) The witness testified that the Applicant might have thought that because the witness was new she would delay the process and hence hijacked the process and compile the submission. The Applicant did not have the authority to add candidates after the shortlisting process. The instruction was unlawful. The witness complied because she received the instruction from the chairperson and because they were MKVA. The witness stated that Brenda Chauke admitted that

she did not work in MKVA, others did. The witness stated that the appointments of those listed in the brown envelop were irregular.

- 60) Under cross-examination Ms Modiba stated, she was employed on 1 May 2011. The incident took place on 31 May 2011 and the witness was in her position for about two to three weeks and did not have the necessary experience. This was her first time during this incident that she sat as a scribe in an interview. The witness conceded that she was guided by her seniors. The scribe's duty was to take down the minutes and the HR Practitioner's role on the panel is to also write his/ her own notes / minutes. Sometimes only the scribe takes notes but, in this case, I was new so the HR Practitioner took notes in case she makes any mistakes and they were able to compare notes. At this interview Ms Mangane was the HR Practitioner.
- 61) According to the witness HR had advertised the post and once the advertisement is closed the CEO will appoint the panel members, who do the shortlisting, recruitment and interviews and thereafter letters for approval will be drafted and sent to CEO for approval.
- 62) The witness confirmed that she and other panel members took the Applications to the boardroom. The Applications were signed on the front page at the corner. The Applications were signed by three (3) people who have checked that the set criteria for the shortlisting were met. The witness was asked if there were signatures of the 3 (three) panel members on the Application. The witness responded stating that it does contain the signatures. Those Applications that are checked and signed were given to the witness. This particular application according to the witness was not given to her it came after the shortlisting which came in the brown envelope. The shortlisted employees are recorded on a spreadsheet by the witness.
- 63) The witness testified that the brown envelope came after the shortlisting. The witness was given the brown envelope by the Applicant, the Applicant stated that she must include the applications in the envelope as part of the shortlisting. The witness further testified that she took the brown envelope to Mr. Frans Motimane, the chairperson and told him that she was confused as the shortlisting was

already done and completed. The witness testified that she was already told that whatever happens in the boardroom ends in the boardroom and that's why she felt the Applicant's request was irregular. The Applicant representative disputes this and states that it is the Applicants version that when the envelope was given to the witness she was informed to give it to the panel, but the witness chose to only give it to Mr Frans Motimane. The witness responded that as a scribe if there is anything confusing to her and the panel had already adjourned, she usually approached the chairperson for clarification. The witness discussed the inclusion of the new applications on the spread sheet only with chairperson and not the panel. The witness conceded to same.

- 64) The witness stated that the Chairperson Mr Frans Motimane informed the witness that he would discuss the issue with the Applicant himself. On his return the instruction was that the individual's applications in the envelope must be included as they are part of the MKVA. The witness included them in the spread sheet. The witness requested that the chairperson give her something in writing in respect of the instruction, but he said he did not have a written instruction. The witness confirmed that the instruction, implementation and change of the spread sheet was not given by the panel in the boardroom but done by the witness and the chairperson. The witness confirmed it was done outside the boardroom as it was an instruction from the Applicant, according to the chairperson. The Applicant's representative disputes this version stating that all of these inclusions should have been be done and carried out in the boardroom by the panel and not between the witness and MS Motimane. The witness conceded that it was for the panel to have included, implemented and changed the spreadsheet not the witness and the chairperson. The witness confirmed that both Frans Motimane and her, were never charged for their actions.
- 65) It was the witnesses' version that she did what she did as it was an instruction from the Applicant. Mr L Malotane who was the second witness for the Respondent was the Applicants senior. The witness has forgotten the name of the then acting CEO Mr Mazizi and she had forgotten the previous CEO's name, both of whom were the Applicant's seniors. The Applicants representative disputed this and stated that it's the Applicants version that she got an instruction from her seniors to hand that envelope to the panel. When giving evidence Mr

Malotane conceded that the MKVA issues were discussed at the executive level but he is not at liberty to discuss same any further, hence this instruction of the inclusion of the brown envelope was an instruction from her seniors.

- 66) The witness testified that she was not in a position to refuse carrying out the instruction given to her by Mr Frans Motimane. The Applicants version is similar that the Applicant herself was also not in a position to refuse an instruction given to her by her seniors, i.e. CEO. The witness conceded that she had forgotten the name of the then acting CEO but she remembers the documentation. The Applicants representative finds this very disturbing as she remembers somethings and chooses not to remember other things.
- 67) The witness testified that when the panel convened after the shortlisting was done and the new applications included, the chairperson informed the panel that after the previous sitting a group of individuals from MKVA was included to the shortlisting. The panel wanted to know if there is any proof that these people were from MKVA. The chairperson stated that the inclusion was an instruction and the panel accepted this and continued with the interview process, without taking the brown envelope issue any further.
- 68) The witness conceded that the panel checked the new applications only when the candidate was called, but she in her personal capacity had not checked the applications for the necessary criteria's and conceded that there is nothing she can testify more about the application as she had not perused same.
- 69) The witness conceded after perusing the first page of the Respondents Bundle A, it is that it is clear that the candidate did not even know what position she was being appointed too. Had the panel initially shortlisted Brenda Chaukes Application she would not have made the shortlist as it did not contain the necessary information. The chairperson Mr Frans Motimane testified under oath that procedurally the interview was done correctly and this particular application was not the one used initially at the interview. The witness says she cannot speak to the testimony of the chairperson. The Applicants version is that Brenda Chaukes Application is a fabrication done by the Respondent to dismiss the Applicant.

- 70) The witness conceded that a candidate T.G Netsheheni was appointed without a certified I.D. Once the interviews are done the panel deliberates over the candidates and interviews, a submission is made by the scribe which will be sent to the CEO on the candidates together with appointment letters and regret letters. It was going to be the witnesses first time to prepare the submission.
- 71) The witness did not prepare the submissions immediately as she had finished off late that day. The following day on beginning to prepare the submissions, the Applicant approached the witness and requested all documents and minutes and proceeded to prepare the submission. The submission is usually prepared by the scribe and signed off by the HR Manager, Chairperson and the Scribe. The Applicant disputes the witness's version, her version will be that it was the witness that prepared the submission and not the Applicant and being her first time that is why there were so many mistakes on the submission. The witness testified that some information provided was the information that was given by her to the Applicant. In the minutes the witness testified that she did record that an envelope with new applications were included in the interview.
- 72) The witness testified that it is not procedurally correct for the Applicant to request drafting the submission. The Applicant agrees with the witness and disputes preparing the submission. The witness testified that she reported to the chairperson that the documents were taken from her, he said he will speak to the Applicant. The chairperson did not comeback with further feedback and the matter lay that way with nothing being done. The witness once again confirmed that all of these incidents took place outside the panel attention and outside the boardroom.
- 73) The witness confirmed that she was appointed by the chairperson as the scribe. He called her to the office and informed her that she will be the scribe on this set of interviews. According to the witness the CEO only approves the appointment. The chairperson selects the panel but the CEO approves / appoints the panel selected. The Applicant's version is that as the witness was appointed by the CEO she had the right to report any irregularities to the CEO. The witness agrees but states that in this particular incident she was new and inexperienced and did not have the experience / knowledge but now with the experience she has she

knows what steps to follow. The Applicant's representative refutes this as she failed to report to the CEO but went to the chairperson Mr. Frans Motimane, instead. The Applicants representative stated that the Chairperson was not her senior they were all equal as panelist as the witness was appointed by the CEO. The witness testified that when she reported the irregularities to Mr Frans Motimane she assumed that he would report it to the necessary person.

- 74) The witness testified that the scribe signature is important as it confirms and captures all that transpired at the interviews and the chairperson checks that the compilation is correct and true and attaches his signature. The witness conceded that the Director of Corporate Service before signing will check who compiled the document, who was the chairperson and what the HR Directors comments are, but this it seems is not what happened in this case.
- 75) The Applicants version is that this the reason Mr L Maltona of Corporate Services signed the submission because there was a page which is not part of the document that had reflected the signatures of Scribe and Chairperson, it is clear that after paragraph 6, Pg 3, there should appear another paragraph 7 with another page that most probably holds the signatures of the Scribe and Chairperson as immediately after Paragraph 6 Pg 3 follows Pg 4 with the signatures of the HR Director, the Direct of Corporate Services and the CEO. It is clear a page is lost.
- 76) On Pg 26 Bundle B, Brenda Chaukes Acceptance letter appears, the witness cannot remember who gave Ms Chauke the letter to sign, but normally it's the scribes, responsibility. Ms Manganyi wrote the Appointment letter as the reference is her name. The appointment letter was drafted "through the CEO", which means the appointment was approved through the CEO, signed by the Applicant as PP delegated by the Acting CEO.
- 77) The witness testified that on the candidate's appointment they must bring the original certificates. If an I.D. is not certified after seeing the original the witness will certify it as Mr Netshiheni was done by an HR Clerk on 22 June 2011.

- 78) Once the Applicant took over the process that's when the witness gave up all her responsibility and did not close the process.
- 79) The witness confirmed that her responsibility was to read compile and submit to the Directorate of Human Resource in respect of the interview. Anything that came outside the scope of her mandate she reported same to Mr. Frans Motimane. Dr. Mazizi the CEO, appointed her but she reported to Mr. Frans Motimane as he was the chairperson and senior to her. She could not jump protocol. The Applicant representative disputes this stating that they were all equal on the panel and any discrepancies should have been reported to the CEO Dr. Mazizi.
- 80) The witness confirmed that she failed to complete her work by failing to compile the submission but it was because it was the Applicant who completed the submission at her request. The witness stated that her not completing her work was involuntarily as the Applicant took the documents away from her. The witness stated she does not have an answer as to why she was not charged and disciplined and she does not know why she should be charged for this incident. The witness confirmed that Dr. Mazizi signed the submission so it did reach him. The witness confirmed that she has now worked in the HR office for the last 7 years. The witness confirmed that what has transpired in 2011 has never transpired again whilst she worked in the HR Office.
- 81) The witness was asked if the CEO and Directorate would sign if they don't see the chairperson's report, the witness stated she does not know. The witness confirmed that she did not report any irregularities to the CEO except to Mr. Frans Motimane and that she felt things were done procedurally. She is not sure if Mr. Frans Motimane reported same to the CEO. The Applicant was dismissed in 2016 and the Respondent discovered this issue in 2015. The witness confirmed from 2015 until date that she nor Mr. Frans Motimane (for failing to compile a chairperson's report) were charged. The witness stated that she does not know if Dr. Mazizzi and Mr Malotana were charged for signing the submission. The Applicants version is that the submission was compiled by the witness and Mr. Frans Motimane and when this issue arose, the page bearing Mr. Frans Motimane and the witness's signature conveniently disappeared. The witness

disputes this. Mr. Frans Motimane post was middle manager of HR at the time and yet he failed to submit the chairperson's report. The Applicants version is that the CEO would not have appended his signature without the chairperson's report.

- 82) The witness confirmed that Brenda Chauke was appointed by the panel at Human Resource.
- 83) Under re-examination the witness confirmed that after the interviews were done, she never saw the compilation of the report. The first time she saw it was when she came to the arbitration to testify. The Applicant was the witnesses HR Manager and the reason she did not complete her work was because the Applicant took all the documents away from her. It was then she reported this to the chairperson Mr Frans Motimane as he was the chairperson of the panel as he is accountable. The witness stated that she could not bypass Mr. Frans Motimane and go directly to Dr Mazizi. In terms of the alleged missing page, if it was indeed missing, would it take a full page for Mr. Frans Motimane and the witness's signatures? There were no further points after the last point on page 3 of the submission document. The witness confirmed that she did not sign the submission document. The witness stated that she does not know who takes the decision to charge employees. The witness confirms that the CEO appoints panels to shortlist the applicants to be interviewed and to interview the applicants.
- 84) The witness confirmed that the Applicant brought the brown envelope to the process. The witness stated it would be improper to report the inclusion of the brown envelope to the CEO and that is why she went to Mr Frans Motimane as he was the appointed chairperson.
- 85) The submission was signed by Dr. Mazizi and the appointment letters were signed by the Applicant. The CEO agreed with the submission thus giving, permission that the appointment can be made in this case by the Applicant.
- 86) The witness confirmed that Brenda Chauke was appointed by the Human Resource.

## On behalf of the Applicant

- 87) The Applicant testified on her behalf and called no witness. The Applicant testified that she has worked with the Respondent for 32 years. She was employed as HR Deputy Director- Gauteng Department of Health. The applicant earned a salary of R 49 167-65.
- 88) The Applicant testified that she was dismissed on 28 October 2016. The Applicant stated that she did not appoint Ms Brenda Chauke as she did not have the authority to approve the appointment as that is done by the CEO. According to the Applicants knowledge Ms Chauke applied for a general post. The panel shortlisted and interviewed her in respect of the documents submitted.
- 89) The correct procedure is that all certified documents must be in order when interviewed and appointed. Brenda Chauke disputed the Z83 saying it was not her document that was submitted and completed. On Pg 23 of Bundle Applicant's B shows a letter written by Ms Manganyi after the approval given by the CEO and signed by the Applicant. The CEO signed the submission granting his approval on 31 May 2011 for appointments of General Assistance posts, Brenda Chauke being one of them.
- 90) The witness testified that yes, she signed the appointment letters on behalf of the CEO as she was requested by the CEO to sign on his behalf as it was urgent hence she signed PP next to her signature See Pg. 25 Bundle Applicants B. According to the witness, it was correct to place Ms Chauke at HR based on the fact that Ms Chauke was appointed as a general worker and the submission clearly states on Pg. 52 of Applicants Bundle "at paragraph 6"- Placement is subject to change based on the urgent need. 4 people were placed at HR but the Applicant was only charged with the appointment of Brenda Chauke and not the other 3 people placed.
- 91) A panel was appointed and given a task to check documents, shortlist, interview and make a recommendation. The Applicants job is to support the recommendation. When Mr. Frans Motimane saw that the documents were not

correct he together with the panel should have rejected the applications which means that the documents at the interview stage was correct.

- 92) The Applicant testified that procedurally the submission is completed by the scribe / practitioner after which all of the documents are submitted to the Applicant before she submits it to the CEO. The Applicant disputes that she compiled the submission, this was compiled by the scribe Ms Modiba. The Applicant submitted that there are pages missing in the submission specifically where the signatures of the panel appeared. It was deliberately left out. There is no way that one can sign without a closure page and the panel's signature. Some wrongful action has taken place in respect of this specific submission.
- 93) The Applicant has stated that there was no investigation report, which should have been included as it would have led to the charges being formulated against her. This is also concerning. The Applicants signature appears on Pg. 53 of Applicants Bundle B that shows that procedure was followed and she supports the correctness of the panel and their recommendations before she sends it to the CEO and Director Corporate for signature. It's become subsequently clear that the document has missing pages in respect of the closure paragraph where the practitioner and chairperson must sign, this page is missing.
- 94) The Applicant testified that Ms Brenda Chauke is still working in HR and has never been charged and or disciplined for being appointed to a job she did not apply for.
- 95) The Applicant stated she does not have the authority to appoint unless instructed by the CEO. Mr Mr TJ Nethisene is still in the employ of the Respondents. Mr Nethisene was not called as a witness even though he was appointed with Ms Chauke.
- 96) The Applicant testified that she was never appointed to this particular panel and she had never interfered with the panels work. It would have been unprocedural for her to interfere as the panel was appointed by the CEO. The Applicant was never charged with interfering with the panels work. This matter occurred in May 2011, and the appointees were paid accordingly from June 2011 subsequently to

date. The CEO was available and aware that these new appointees reported to duty on June 2011. Mr Matoloane came and welcomed them in the boardroom. There was no complaint until 2015 and none of these employees have ever been dismissed for being incorrectly appointed.

- 97) The Applicant would like to be reinstated with back pay.
- 98) Under cross -examination the Applicant conceded that she was the HR Manager since 1998. The Applicant agreed that the Respondent is bound by the law of general application. The Applicant confirms that she was accused of corruption. The Respondent stated that under the" Prevention and Combating of Corrupt Activities Act No 12 of 20014 under Chapter 1 defines Gratification amongst other things that it includes employment, contract of employment and any agreement to give employment. According to Chapter 2 any person who directly or indirectly gives or offers to give Gratification whether for the benefit of the other person of the benefit of another person is guilty of the act of corruption.
- 99) An employment of a person goes through a recruitment process and instructions also must be followed. Funds must be available and there must be a need, there must be a post available and an approval to advertise must be required. After the post is advertised there is a closing date a committee is selected which is appointed by the CEO. The committee begins the process of checking documents and begins the process of selecting, shortlisting and interviewing. After the selections and interviews are done the chairperson and the committee would minute the process and discuss issues and a submission / report is compiled by the HR Practitioner signed by chairperson and HR practitioner in terms of recommendations and all documents are submitted to HR manager who will then check that there is compliance and the HR manager will support the recommendation if everything was done in complying with the process. Once this is done the submission will be taken to Director of Corporate manager and then finally taken to the CEO for final approval after looking at all documents. The CEO makes the final appointment. After that all letter of appointments and rejections are done by the HR Practitioner. HR Practitioner will be called in to complete offers and documents with new employees.

- 100) The HR Managers job is not to oversee the process of the selection, but the Applicants duty as an HR Manager is to ensure that there is funding, need and posts available and that the committees complies with the process. It is the committees, job to take care of the recruitment.
- 101) In this case the brown envelope was an instruction from the MEC to the CEO to corporate manager to the Applicant, which was that the MK veterans' names in the brown envelope, must be included/appointed when post are advertised. This instruction came from the office of the MEC to the CEO.
- 102) The Applicant says she did not open the, envelope but she was told that it was names of MK Veterans and when post became available these members must be considered for appointment. The Applicant testified that if she did not comply with this instruction she would be charged with Insubordination. ANC had promised these MK Veterans jobs and that they should be appointed as general workers when post is advertised and become available. These were not ordinary appointments. The Applicant testified that she just followed an instruction. She was not charged in respect of the brown envelope. The witness confirmed that she did not know whose names appeared in the brown envelope as she did not look inside the, envelope. She just followed an instruction that came from the CEO's office. The brown envelope was brought by the PA of the CEO and handed to her.
- 103) The Applicant confirmed that she handed the brown envelope to MS Modiba and instructed her to add the candidates to the selection process. The brown envelope instruction did not follow recruitment process. There were 25 post that were advertised and 31 post were filled. According to the submission, under paragraph 2, under Background Pg 1 of Bundle A2, states that it was agreed that additional candidates will be added on. The CEO signed the submission agreeing and approving the additional candidates.
- 104) The Applicant testified that the submission was compiled by Ms Modiba, the Applicant further stated that she was not in the interview process and would not have had intimate knowledge of what happened in the interview process. Those that compiled the document their names and signature are not included in this

document, there is a page missing and this is not correct. The Applicant stated that she will not say how she received the documentation of A2 but she sourced it to prove her innocence, which conveniently went missing, until she produced same. This document shows that a page is missing which is the page wherein the committee members had signed.

- 105) The document of A2 is signed by the Director Corporate manager and the CEO. They both would not have signed if the submission was not in order and if they did not agree and approve of the submission, yet both their signatures appear on the submission meaning that the submission / appointments was supported.
- 106) The Applicant disputes that she wrote / compiled the submission as she was not part of the committee and she did not take over the process apart from handing MS Modiba the brown envelope. The Respondent disputes this.
- 107) The Applicant disputes that she has any interest in these appointments it was an instruction she followed and she will not disclose how she got the missing document found on A2.
- 108) The Applicant conceded that the MK Veterans were given Gratification, but at the instruction of the CEO. The Applicant disputes that she appointed them as the then CEO signed and approved the appointment and the HR Practitioners effected the appointment. The Respondent disputes this as seen on Pg 8-10 Bundle B. The Applicant confirmed that she signed the appointment letter to inform the candidates of the appointment. The letter was compiled by Ms Mangane and, she the Applicant "PP" and signed on behalf of the CEO. The Applicant does not believe it was gratification but informing the candidate of the appointment. During this time the CEO was working in town and the documents were taken to his office to sign the submission but the CEO orally gave the Applicant permission to sign the appointment letters on the same day so that the candidates could start on the first of the month, which is what she did. The Respondent disputes this saying Mr Molatane testified that this would not be possible.

- 109) On the very day the submission was signed, the appointment letters were also signed and candidates needed to start immediately. The Applicant testified she signed the appointment letters on the instruction of the CEO, she does not know why Mr Molatane was not requested to sign.
- 110) The Respondents version is that the Applicant had vested interest in the process because she knew the brown envelope appointment did not go through the shortlisting process, she knew that the CEO did not sign the appointment letters and finally that the delegation of such authority was not in writing, and therefore she did not bother to advice the CEO to follow the correct procedure.
- 111) The Applicant conceded that all processes were followed but process was not followed in respect of the addition of the MK Veterans. The Applicant conceded that she handed the brown envelope to the selection panel as part of the recruitment process. In respect of how the selection, shortlisting and recruitment took place the Applicant has no knowledge of that process.
- 112) The Applicant confirms that the instruction was never in writing it was a verbal instruction from the MEC and CEOs office.
- 113) Under Re-examination the Applicant stated that the document Bundle A2 with pages missing was never disputed and it was used and accepted in the hearing. The Applicant confirmed that Mr Molatane and the rest of the witnesses never disputed not seeing the document.
- 114) The Respondent's and Applicant's version was verified and collaborated by the documentary evidence presented during cross and re-examination.

## **ANALYSIS OF EVIDENCE**

- 115) Section 186 of the Labor Relations Act, 1995 (LRA) defines a dismissal.
- 116) Section 188 (1) of the LRA states that a dismissal of this nature is unfair if the employer fails to prove that the reason for dismissal is a fair reason and that the dismissal was effected in accordance with a fair procedure. In this matter before

me, only substantive fairness of the dismissal is in dispute as well as the harshness of the sanction.

- 117) The Respondent has failed to prove on a balance of probabilities that the Applicants dismissal was substantively fair in as far as the reason for dismissal is concerned. The Respondent has failed to produce sufficient evidence to justify the reason why the Applicant was dismissed. The Respondent's reason in respect of why the Applicant was dismissed was not for a fair reason and this was in respect of misconduct. The Respondent was unable to establish that it was only the Applicant herself that was responsible for employing the MK Veterans and that she was solely responsible and had a vested interest in employing these individuals.
- 118) The Respondent's witnesses' testimonies were vague and non-committal and, in some instances, contradicted each other. What was most concerning was that the main source of document that was presented as evidence clearly had pages missing from it and the Respondent was unable to respond to these allegations or furnish the hearing with a probable reason why the panel instructed/ mandated to conduct the shortlisting and the interviews process had conveniently not appended their signature to the main document/ submission and it suddenly became the sole responsibility of the Applicant herself despite the signatures of the CEO and Corporate Manager appearing. However, neither Respondent nor the witnesses was able to materially challenge the evidence of the Applicant's case especially the testimony of the Applicant, which was detailed, sincere and concise.
- 119) The CEO who was the key witness was not called by neither party to testify to refute the instruction and or claims. Pursuant to the above, I believe that the fact that the CEO signed and approved the submission supports the Applicants testimony that the appointment letters are administrative work is valid. The bottom line is that the submission was approved and signed by the CEO and Corporate Manager setting the scene for the appointments to be finalised.
- 120) The witness Ms Modiba testified that when the panel convened after the shortlisting was done and the new applications included, the chairperson

informed the panel that after the previous sitting a group of individuals from MKVA was included to the shortlisting. The panel wanted to know if there is any proof that these people were from MKVA. The chairperson stated that the inclusion was an instruction and the panel accepted this and continued with the interview process, without taking the brown envelope issue any further. This means there was agreement to include the MKVA individuals.

- 121) It was common cause that the Applicant failed to demonstrate reasonable care when executing her duties which resulted in her being implicated in the misconduct of appointing the MK Veterans as general workers, however I believe that she was singled out to take the blame for all others also implicated in this misconduct. I don't believe that the Respondent has come to this arbitration with clean hands. There were so many cover-ups in the witness's testimonies that led me to believe that, the Applicant was used as a scape goat to cover up an instruction given from higher up in management to have these MK Veterans appointed as general workers. To date no other person except the Applicant was dismissed. The MK Veterans that were appointed are still in the employ of the Respondent.
- 122) The entire panel involved in the recruitment, shortlisting and interviewing process are still working in the HR department with no disciplinary action taken against them. MS Modiba and Mr. Frans Motimane made insincere and dishonest witnesses, both of whom were part of the recruitment panel, with Mr. Frans Motimane making some serious concessions in respect of the Z83 forms. It was clear that the one presented to us at the arbitration was not the one that was initially received. However, the Respondent's witness made a huge concession in respect of the Z83, I examined the signatures and it seems there is a discrepancy on the Z83 signature and the acceptance letter signature. How is it that records disappear and new documents emerge? It became clear during the arbitration that there was dishonest behavior being conducted amongst the employees in the Human Recourse Department.
- 123) Mr Frans Motimane the Respondent's witness became slightly hostile and was not a very convincing, his version had some serious holes. During her testimony on behalf of the Respondent Ms Modiba conceded that Identity Documents can

be certified after an appointment is made provided the HR Clerk satisfies himself / herself that she has seen the original. Ms Modiba could not provide a sufficient reason why the panel that conducted the interviews had not signed off on the report as well. Ms Modiba was a very poor witness and very unconvincing. It became very clear that the panel as a whole acted irregularly and not in line with their mandate. It also became clear that the panel never reported any irregularities conducted by the Applicant during the interview process to the CEO yet she was dismissed for same. Mr Frans Motimanés, excuse that he did not report the Applicant's behavior as he did not want to jump the line off communication was not a good enough reason.

- 124) The Respondent has failed to prove on a balance of probabilities that the Applicant had a vested interest in these appointments. It was also suspicious that not a single panel members name appeared on the submission as reference to the panel that convened and conducted the shortlisting, recruitment and interviews.
- 125) The Applicant showed remorse and was sincere when giving her evidence. It was common cause that the Applicant had a clean disciplinary record before this and that she had worked for the Respondent for a very long time.
- 126) The Applicant showed on the submission document, which was presented as evidence that the submission was signed and approved by the CEO and that an agreement was reached to extend the number of appointments and that such post was available to be filled.
- 127) The Applicant's representative materially disputed respondent's version in respect of the misconduct and challenged the Respondents case. The Applicant presented her testimony in a clear calm and concise manner and did not attempt to evade responding to the questions asked. The Applicant supported her testimony with documentary evidence that supported her version on a balance of probabilities.
- 128) The documentary evidence presented by both parties clearly illustrated that the chairperson of the disciplinary hearing failed to apply his mind as the charges that

were leveled against the applicant was not the charge for which she was dismissed. The Applicant on a balance of probabilities produced sufficient evidence to refute the Respondent's case. The Respondent failed to place any tangible version before me and failed to corroborate their version by calling any material witnesses, they also failed to materially challenge the Applicant's version.

- 129) The Applicant's representative led strong evidence in respect of challenging the harshness of the sanction as only the Applicant was dismissed and not the others involved in including the brown envelope as part of the interview process and or the MKVA appointees. It became clear that all parties had a role to play in this irregular interview process, but the Applicant was the only one that was dismissed, which leads to inconsistency.
- 130) The evidence presented by the Respondent suggests that the dismissal was substantively unfair in respect of the reason for dismissal. The documentary evidence as well as the testimony of the Respondents representative before me is not sufficient to find that the Respondent has dismissed the Applicant in a substantively fair manner.
- 131) The Respondent was not able to provide this hearing and or the Applicant with a valid and or reasonable explanation, why the Applicant was the only person dismissed. On a balance of probabilities, I find the Applicant's version to be more probable than the Respondent.
- 132) The notice to attend the disciplinary hearing given to the Applicant was contained in the Respondent's bundle.
- 133) I find that the Applicant's dismissal was substantively unfair and therefore the Applicant is entitled to relief as set out in Schedule 8 of the Code of Good Practice.
- 134) The primary relief where dismissal is found to be substantively unfair is reinstatement. S 193 (2) of the LRA reads as follows: (2) The Labour Court or the Arbitrator must require the employer to reinstate or re-employ the employee unless-:

- a. The employee does not wish to be reinstated or re-employed;
- b. The circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
- c. It is not reasonably practicable for the employer to reinstate or re-employ the employee or;
- d. The dismissal is unfair only because the employer did not follow a fair procedure.

135) In the **Duncamec (Pty) Ltd v Gaylard No and Others (CCT 284/17) [2018] ZACC 29 13 September 2018**, this case highlighted an arbitrator's discretion to consider value judgements. According to the CCMA guidelines for misconduct arbitrations per par.93 "an arbitrator should make a value judgement as to the fairness of the employer's decision, taking into account all relevant circumstances". The crucial issue relating to an assessment of the harshness of a sanction, seems to be that factors which may justify a different sanction (as opposed to dismissal) should not be assessed in vacuum. The Applicant's personal circumstances, the nature of the job and the circumstances under which contravention took place may only be assessed within the context of the risk management factors of the employer/ nature of the business

136) Pursuant to the above in terms of my discretion in considering the value judgment I believe that retrospective reinstatement should not be awarded but limited compensation is just and equitable as I believe that both Applicant and Respondent had a role to play in the misconduct. I considered the conduct of the Applicant which was inappropriate and I further paid attention to the context in which the misconduct was committed which was in a highly politicized environment for which the Respondent was to blame.

137) The Applicant must be reinstated to her original position prior to her dismissal.

138) The Applicant will be awarded six (6) months back pay as I believe it's justified in that the Applicant and the other employees were given an unlawful instruction by management to include the MK Veterans in the interview process. This irregular step should not have been followed but reported to the relevant authority. This

was an irregular step by all involved in the appointment of these employees from the CEO who signed the submission report to the panel conducting the interviews, this also includes the Applicant who was the Director of HR and they should all collectively take responsibility for this serious misconduct and not only allocate sole responsibility to the Applicant.

## **AWARD**

139) The dismissal of the Applicant by the Respondent was substantively unfair.

140) The Applicant must be reinstated as from 1 November 2018 on the same terms and conditions prior to her dismissal. The applicant must report for duty on that date.

141) The Applicant is awarded six (6) months back pay, which must be paid to her by the respondent on or before 30 November 2018.

Signature:  \_\_\_\_\_

Commissioner: HASSINA BANU DOORDI.