

IN THE INDUSTRIAL COURT OF ESWATINI

JUDGEMENT

CASE NO. 317/2007

In the matter between:-

JOHN KUNENE

APPLICANT

AND

**THE TEACHING SERVICE COMMISSION
THE UNDER SECRETARY- MINISTRY OF
EDUCATION**

1ST RESPONDENT

2ND RESPONDENT

THE ATTORNEY GENERAL

3RD RESPONDENT

Neutral citation : *John Kunene v The Teaching Service
Commission and 2 Others (317/2007) [2021]
SZIC 42/2021*

CORAM : **DLAMINI J,**
*(Sitting with A.S. Ntiwane & S.P. Mamba
Nominated Members of the Court)*

Last heard : **10 December 2020**

Judgement Delivered : **02 June 2021**

Summary: *Labour law – Unfair Dismissal: Applicant, a former teacher, charged for proposing love to and touching the buttocks of a student. He was taken through a disciplinary hearing which culminated in his dismissal. Applicant thereafter instituted review proceeding at the High Court challenging his dismissal but was unsuccessful. He appealed to the Court of Appeal but was still unsuccessful. Applicant finally approached this Court claiming*

*reinstatement or in the alternative payment of terminal benefits and compensation. Respondents raised defence of **res judicata**. This Court however held that the Applicant could only challenge the substantive fairness of his dismissal and not the procedural fairness. **Held:** Applicant is estopped from still raising such issue before this Court. **Held further:** In respect of the substantive fairness of the Applicant's dismissal, it is a finding of the Court that the Respondents have established on a balance of probabilities that the grounds of the Applicant's dismissal and their adequacy were reasonable and fair in the circumstances of the case. Application accordingly dismissed.*

1. This matter has quite a long and checkered history. It has been to almost all the Courts of this land without finality. The reason for the matter to have dragged for so long lies in the manner the Applicant decided to challenge his dismissal from the very on-set, which is not how the Industrial Relations Act, 2000 (as amended) spelt how employer/employee disputes are to be resolved. Instead the Applicant challenged his dismissal by instituting review proceedings at the High Court. His application was however dismissed by the High Court. Upon dismissal of his review application he then approached the then Court of Appeal to appeal against the dismissal of his review application. The Court of Appeal also dismissed his appeal. The dismissals of his application by the High Court and his subsequent appeal by the Court of Appeal meant that the Applicant could no longer challenge the procedural aspect of his dismissal as it was dealt with by these Courts, the High Court and the Court of Appeal.

2. It was after the dismissal of his appeal by the Court of Appeal that the Applicant only then reported a dispute with the Conciliation Mediation and Arbitration Commission (CMAC) in terms of section 76 of the Industrial Relations Act (as amended). Perhaps the Applicant could have been well advised that he ought to have dealt with his dispute with his employer in terms of the section 76 procedure from the very on-set. Whenever there has been a dismissal of an employee it is advisable that if that particular employee is challenging the dismissal he/she ought to make use of the provisions of Part VIII of the Industrial Relations Act (section 76 procedure) to have his dispute determined. In other words, once there has been a dismissal whether perceived as procedurally or substantively unfair, this Court ultimately retains the exclusive statutory jurisdiction to hear and determine such a matter in terms of the remedial powers it has.
3. Nduma JP, as he then was, had this to say in the matter of ***Phillip Nhlengethwa & Others v Swaziland Electricity Board Unreported IC Case No. 272/2002;***

“The creation of this institution has increased the need for the Industrial Court to enforce strict observance of the dispute resolution procedures under Part VIII of the Act because we now have a more suitable structure

of expeditiously, conveniently and less expensively resolving industrial disputes which otherwise find their way unnecessarily to this Court, and in the process aggravating the back log the court has suffered for a long time.”

4. Indeed the sooner litigants, both employers and employees in this instance, realise that it is only this Court that is statutorily empowered and suited to deal with disputes of unfair dismissal, the more expeditiously, conveniently and less expensively their disputes will be dealt with and determined.
5. In this present matter, the Applicant is a former teacher who was employed by the Teaching Service Commission, the 1st Respondent, in March 1995. Exactly 10 years after continuously working for the 1st Respondent, in March 2005 he was dismissed after a disciplinary enquiry instituted against him found him guilty of immoral conduct involving a female Form 5 student, Nomfundo Mbuli. The acts of misconduct levelled against the Applicant were detailed as proposing love to the female student, inviting the student to come to his house, informing a Cleaner at the school that the student was tempting him, and finally that the Applicant had grabbed the buttocks of the female student.

6. The Applicant denies the allegations against him. He testified at length before this Court detailing how he joined Mbabane Central High School from Mbuluzi High School in the year 2004 after learning that there was a vacancy for a Physics teacher at Mbabane Central High School. Upon joining Mbabane Central he says he became involved in a love relationship with a colleague and fellow teacher, Precious Sihlongonyane. He says Sihlongonyane introduced him to Nomfundo Mbuli, the Form 5 student, and Mary Mpila, the Cleaner.
7. Further evidence by the Applicant was that his love relationship with Sihlongonyane was smooth sailing for a few months before it hit a rough patch around August or September 2004 after she infected him with a sexually transmitted disease. He blames Sihlongonyane for living a promiscuous life and for infecting him with the STI. After this STI incident the Applicant says his love relationship with Sihlongonyane was never the same as she openly cheated on him with a certain man who would come to her house and sleep over night. He eventually broke up with Sihlongonyane. After the breakup he says relations between them were strained to such an extent that she

wanted him transferred from the school because she feared that he would talk about their breakup and the scandal of her promiscuous ways.

8. Thereafter he says accusations about him proposing love to students started flying around. He says these were maliciously peddled by the Principal with whom he did not see eye to eye. He was then summoned to the Principal's office and questioned about the allegations of him proposing love to students at the school. The Principal apparently informed him that Sihlongonyane had been to her office to complain about him proposing love to students. At this meeting he says the Principal informed him that he (Applicant) would go down with the Deputy Principal with whom the Principal also did not see eye to eye. According to the Applicant, the Principal was clouding the allegations against him with the acrimonious relationship he had with her Deputy. As such he says it became difficult for him to engage the Principal on the serious allegations of proposing love to students with her.

9. A week after this meeting he was again summoned to the Principal's office, this time with the Deputy Principal where the Principal informed them that members of the public were complaining about him proposing love to students. At this second meeting the Principal instructed the Applicant to write to the REO (Regional Executive Secretary) to clear his name on these allegations. The Applicant says he, together with the Deputy Principal, immediately approached the REO to enquire about this letter he was supposed to write to exculpate himself but was surprised to find out that the REO knew nothing about the said letter, let alone the allegations of him proposing love to students. The REO further told him that there was no such letter he was supposed to write to him.
10. About 2 weeks after meeting the REO the Applicant says he then received a formal letter from the Schools Manager concerning the allegation of him proposing love to student Nomfundo Mbuli. This letter (exhibit document JK1) was dated 26 October 2004 and listed 5 counts of misconduct against the Applicant. This letter gave the Applicant until 05 November 2004 to write to exculpate himself from the allegations against him. Indeed on the date set as the deadline he

submitted his response to the Schools Manager. Three days later, on 08 November 2004, he was suspended from duty.

11. The Applicant also testified about having gone to Nomfundo's home, which he says was at the instance of Sihlongonyane, to apologise for the allegations against him about having proposed love to her (Nomfundo) and touching her buttocks. He says his intention was to find out if indeed such allegations against him really existed. I will come back to this issue later on in this judgement.
12. About 5 months after he was suspended the Applicant was then invited to a disciplinary hearing before the Teaching Service Commission. However, and much to his dismay and surprise, when he appeared before the TSC he and the Deputy Principal were accused of harassing the Principal. When he informed them that he had come to answer to the allegations against him about proposing love to student Nomfundo Mbuli, the about 10 TSC Commissioners shouted at him simultaneously and threatened to dismiss him. Eventually, he says only charge 5 was read out to him and he entered a plea of not guilty. The Applicant vehemently denies all the charges contained in JK1 and

informed the Court that all the allegations against him were a fabrication and were orchestrated by the Principal and Sihlongonyane who had roped in Nomfundo into their devious scheme.

13. Under cross examination by the Respondents' Counsel, the Applicant admitted that he had asked Nomfundo her age. He informed the Court that the reason he asked her how old she was, was because she was struggling with her academic performance in class. One however wonders what age has to do with academic performance? The Applicant further informed the Court that Nomfundo informed him that she was 20 or 21 years old at the time. He also informed the Court that at the time Nomfundo knew that he was 34 years old since he and Sihlongonyane regarded her as their 'daughter'.
14. Under further cross examination, the Applicant denied that he had inappropriately grabbed Nomfundo's buttocks. In fact he denied that he was ever in Precious' house at the same time as Nomfundo on the day the incident is alleged to have taken place, 05 October 2004. He informed the Court that the food Nomfundo had prepared for her

exams had been shared between him, Sihlongonyane and Nomfundo herself outside the staff room at the school.

15. The Applicant also vehemently denied having proposed love to Nomfundo. He also denied having invited her to his house to watch movies with him, informing the Court that it would have been undesirable for him to have done so, especially because he was sharing his house with another teacher.
16. Under further cross questioning, it emerged that on a certain date the Applicant and Sihlongonyane had both travelled to Nomfundo's home to apologise after the accusations of him proposing love to Nomfundo surfaced. He says he personally did not apologise for the accusations against him but it was Sihlongonyane's idea that they approach Nomfundo's parents to apologise for the false accusations against him. He explained that even though relations between him and Sihlongonyane had soured, she still suggested that they go to Nomfundo's home to apologise for the serious allegations against him. However, later on the Applicant denied that he went to Nomfundo's home to apologise, instead he says he went there to

verify if indeed Nomfundo's parents had complained to the Principal about him proposing love to her.

17. As cross examination intensified, the Applicant was referred to minutes of his disciplinary hearing, marked as exhibit document 'AG1'. These minutes indicate that the Principal testified about how she got to know about the accusations of proposing love and touching student Nomfundo's buttocks by the Applicant. She also testified that Nomfundo's mother came to the school to complain about the Applicant proposing love to her daughter and also about having indecently touched her buttocks. The minutes also reveal that the Applicant apologized to Nomfundo's mother saying there must have been a misunderstanding in the whole issue. He informed the hearing that even though he 'liked' Nomfundo, this was misconstrued to mean that he was proposing love to her. The Applicant confirmed that the minutes correctly captured what had transpired at his hearing, he however insisted that not everything that had transpired at his hearing had been recorded.

18. The Applicant was also questioned about having asked Nomfundo how old she was. He says the reason he questioned her about her age was so that he could determine the cause of her poor academic performance. When questioned on why he found it necessary to inform Nomfundo of his age, he at first denied having informed her of his age. He however later confirmed that he had informed Nomfundo of his age (which was 34 at the time) but justified doing so was meant to get Nomfundo to trust him so that he could assist her improve her academic performance. Interestingly, at the hearing before the TSC the Applicant denied having informed Nomfundo his age.
19. The second witness to testify in support of the Applicant's case was Sipho Dlamini. He was the Deputy Principal at the school. He testified that his involvement in the allegations against the Applicant was when he was summoned to the Principal's office where he found the Applicant. He further informed the Court that the Principal informed him that a certain woman had been to her office to complain about the Applicant proposing love to student Nomfundo Mbuli. When this witness asked where this woman was, he says the Principal informed him that she had left. Since the complainant had left he

wondered what he had been called for and asked to be excused from the matter.

20. Witness Sipho Dlamini further informed the Court that the Principal then requested the Applicant to write a letter in response to the allegations against him. Surprisingly, this witness further informed the Court that he suspected that the Principal was not being truthful that there had been a member of the public who had laid a complaint about the Applicant proposing love to student Nomfundo Mbuli. This was despite that the Applicant himself had informed the Court that Nomfundo's mother had been to the school to complain about him proposing love to her daughter, and that the Principal had summoned him (Applicant) to answer about the accusations against him. In his position as Deputy Principal one would have expected that this witness would have, at the least, first interviewed the student in question to get to the bottom of the allegations, but he did not. Instead he says he went with the Applicant to the REO's office to find out if indeed there were any such complaints about the Applicant. The REO apparently informed them that he was not aware of the matter at the time. It is common cause however that on 26 October 2004, the

Applicant was formally notified of the misconduct allegations against him and given an opportunity to write to and meet with the Schools' Manager to exculpate himself. In that same letter the REO was also notified of the misconduct allegations against the Applicant.

21. Witness Sipho Dlamini further testified about what he called 'very bad/sour' work relationship between him and the Principal and on how the Principal unsuccessfully tried to have him transferred from the school. He also testified that he was once suspended for 12 months without pay by the Teaching Service Commission. Under cross examination he conceded that he did not have good work relations with both the Principal of the school and the TSC and that there was nothing good he could testify about both to the Court.
22. Dlamini was further questioned on why he did not believe that there was a complaint against the Applicant proposing love to student Nomfundo Mbuli and he could not give reasons for his stance. When the Court asked him if he was aware that there had been a meeting between the Applicant, the Principal, the student's mother and the student herself about the accusations against the Applicant, he

nonchalantly informed the Court that he was not aware. Finally, he informed the Court that the Applicant did not call him as his witness at his hearing before the TSC and he is not aware why he opted not to call him in support of his case. That was the case for the Applicant.

23. First to testify in support of the Respondents' case was Nomfundo Mbuli, the former student the Applicant is alleged to have proposed love to. She informed the Court that in the year 2004 she was a student at Mbabane Central High School doing her final year of school, Form 5. That same year, she says the Applicant joined the school as a science teacher and was teaching her class physical science.
24. Nomfundo started off by informing the Court that the Applicant proposed love to her on a number of instances. In the first instance he sent a Form 1 male student to tell her that he (Applicant) wanted to see her in the science laboratory. When she got there, the Applicant sent her to buy some fruits and when she came back he then proposed love to her. On the second occasion, he again sent one of the male students to call her to the laboratory and when she got there the

Applicant instructed her to erase the chalkboard whilst he was seated behind her. On this instance he again proposed love to her. On yet another occasion Nomfundo informed the Court that the Applicant requested that they go to his house to watch movies and when she refused he persisted with the love proposals.

25. On another occasion Nomfundo informed the Court that the Applicant found her with Mrs. Mpila, the lady who was a Cleaner and also sold fruits at the school, and he told her to pick and choose whatever fruits she wanted and he would pay the bill, but she declined the offer. The Applicant then informed Mrs. Mpila that that he wanted to make Nomfundo his wife, promising that he was prepared to go as far as Lomahasha to traditional healers who would ensure that she ended up as his wife.
26. Nomfundo further testified of yet another instance when the Applicant persisted with his love proposals to her. On this occasion she says she was at Ms. Sihlongonyane's house returning cooking utensils she had borrowed from her for a Food and Nutrition practical examination. She says the Applicant found her in the kitchen and touched her

buttocks with both his hands. When she screamed in protest the Applicant questioned why she was screaming because he loved her.

27. This last incident was the last straw for Nomfundo. She decided that she had had enough of the persistent harassment she suffered at the hands of the Applicant. She approached Ms. Sihlongonyane and informed her about the love proposals and the sexual harassment incident in which the Applicant had inappropriately touched her buttocks. When probed further on this incident witness Nomfundo broke down and wept and the Court had to adjourn to give her time to recompose herself. Thereafter she demonstrated to the Court how the Applicant had held both her buttocks with his hands from behind. Ms. Sihlongonyane advised her to report these incidents of harassment and love proposals to her class teacher but she opted to report same to the Principal after she had said if a teacher had proposed love to a student he should be reported to her. The Principal instructed Nomfundo to prepare a report on the incidents which she did. This report is at pages 10 – 12 of exhibit document AG1, dated 18 October 2004 and in it Nomfundo detailed all the incidents in which the Applicant proposed love to her and sexually harassed her.

28. After reporting the matter to the Principal, she (Principal) summoned Nomfundo's mother to the school for a meeting on the accusations against the Applicant. At that meeting there was the Applicant, Nomfundo, the Principal and Nomfundo's mother. Nomfundo informed the Court that at this meeting the Applicant apologized for his conduct, informing the Principal and her mother that he was not aware that Nomfundo did not take kindly to his conduct.
29. A few days after this meeting Nomfundo testified that she then received a call on her cellphone from Ms. Sihlongonyane asking for directions to her homestead, as the Applicant wanted to meet her parents and apologise to them as well. She gave Ms. Sihlongonyane the directions to her home, and indeed the Applicant and Ms. Sihlongonyane arrived at her homestead to meet her guardians, since they were not her real parents. Ms. Sihlongonyane explained their mission and thereafter the Applicant was called into the house. The Applicant profusely apologized for his conduct of harassing and proposing love to Nomfundo. Nomfundo's further evidence was that the Applicant again approached her biological mother at the market place where she worked and apologized to her as well.

30. Then in 2005 Nomfundo testified that she appeared before the TSC together with her mother, Ms. Sihlongonyane, Mrs. Mpila and the Principal to testify in the disciplinary enquiry against the Applicant. At the hearing the Applicant was present and he posed some questions to her after she had delivered her evidence to the Commission.

31. In her further evidence Nomfundo disputed that she used to have lunch together with the Applicant and Ms. Sihlongonyane. She also informed the Court that she was not aware of any romantic relationship between the Applicant and Ms. Sihlongonyane, informing the Court instead that she only knew that they were colleagues. Nomfundo also denied that she was in good terms with the Applicant such that he even regarded her as her 'daughter' because of the alleged romantic relationship he had with Ms. Sihlongonyane. Then regarding the age of the Applicant, this witness informed the Court that he (Applicant) had questioned her about her age and when she told her she was 20 years old, he informed her that he was 34 and that the age gap between them was not too huge for them to be in a love relationship.

32. Under cross examination by the Applicant's Counsel, witness Nomfundo maintained her evidence in chief and she denied that she conspired with Ms. Sihlongonyane and the Principal to fabricate the misconduct cases against the Applicant to have him dismissed. In fact, under intense cross questioning from the Applicant's Counsel which lasted for at least 2 court days, she was unshaken and maintained the evidence she delivered in her examination in chief. In fact, the Court noted that her evidence before this Court and at the disciplinary hearing of the Applicant before the TSC was to a large extent similar. Then in respect of the visit to her homestead by the Applicant and Ms. Sihlongonyane, she maintained that Ms. Sihlongonyane informed her that the visit was instigated by the Applicant so that he could apologise to her parents.
33. The second witness to testify in support of the Respondent's case was Precious Sihlongonyane. She informed the Court under oath that at the time of the incident between the years 2004 and 2005 she was a teacher at Mbabane Central High School, teaching religious education and history. She confirmed that she was a colleague to the Applicant. She vehemently denied being in a romantic relationship with the

Applicant. She also denied ever setting foot at the Applicant's house. She also denied ever engaging in sexual intercourse with the Applicant and wondered how she could have infected him with a sexually transmitted disease when they were not even romantically involved.

34. Sihlongonyane also testified about a time in which she was approached by Nomfundo to complain that the Applicant was proposing love to her. She informed the Court that she advised her to report her complaint to her class teacher. She also testified about incident in which the Applicant is said to have touched Nomfundo's buttocks in her house. The next day she says she was summoned to the Principal's office where she was questioned about the incident and she informed the Principal what she knew.
35. Further testimony from Sihlongonyane was to the effect that after meeting the Principal, on the next day, the Applicant requested that she accompanies him to Nomfundo's homestead so that he could apologise about the incidents of proposing love to Nomfundo and sexually harassing her by touching her buttocks. They indeed travelled

to Nomfundo's homestead in the Applicant's car. At the homestead she first met with Nomfundo's foster parents and explained their mission and they (parents) started crying. The Applicant, who all along was outside in his vehicle, was eventually ushered in and he profusely apologised for inappropriately touching Nomfundo's buttocks and proposing love to her. Nomfundo's guardian parents informed the Applicant that the matter was no longer in their hands since it had been reported to the TSC.

36. Sihlongonyane denied that she had asked the Applicant to apply for a transfer because his work relationship with the Principal had soured. She also denied that she used to share meals with the Applicant and that they treated Nomfundo as their 'daughter'. In fact, she informed the Court that she was romantically involved with someone else and that everyone at the school was aware of the relationship as her boyfriend came to her house most of the time. Sihlongonyane also denied that she conspired with the Principal and Nomfundo to have the Applicant dismissed, informing the Court that she had no reason to.

37. Under cross questioning by the Applicant's Counsel witness Sihlongonyane informed the Court that she actually found it offensive that the Applicant would claim that they were ever romantically involved when that was never the case. She wondered when she could have infected him with an STI when they were not a couple in the first place. In fact, the Court notes that the Applicant only raised the issue of a romantic relationship between him and Sihlongonyane and that of a conspiracy to have him dismissed for the first here in Court. He never raised these issues in his letter to the Schools Manager and at his disciplinary hearing before the TSC.
38. Sihlongonyane further maintained as well that it was the Applicant who requested that she accompanies him to Nomfundo's homestead to apologise to her parents, not that she suggested that they go there. Sihlongongonyane also informed the Court under cross examination that she had previously warned the Applicant about proposing love to student Nomfundo after she (Nomfundo) had complained to her about the Applicant's advances.

39. The third and last witness to testify in support of the Respondents' case was Mary Mpila. She was employed at the school as a Cleaner. Her evidence, to a large extent, corroborated Nomfundo's to the effect that the Applicant was proposing love to the student. She further informed the Court that in one instance she even reprimanded the Applicant to desist from his immoral conduct of proposing love to a student, especially because she says she did not expect such conduct from a teacher. She even confirmed the incident in which the Applicant had threatened to consult a witchdoctor in Lomahasha in his quest to have Nomfundo as his wife. She also confirmed that the Applicant made an offer to Nomfundo to take fruits from her stall, which she (Nomfundo) declined. She finally confirmed that she appeared before the TSC to testify in the disciplinary hearing of the Applicant. Under cross examination this witness maintained her evidence and was unshaken in so doing. She denied that she was involved in a conspiracy together with the Principal, Sihlongonyane and Nomfundo to have the Applicant dismissed. That was the case for the Respondents.

40. In determining this dispute one needs to reiterate that in this Court all cases of alleged unfair dismissal are assessed on the basis of two criteria – namely; substantive and procedural fairness. No dismissal will ever be deemed fair if it cannot be proved by the Employer, that it was initiated following fair procedures [procedural fairness] and for a fair reason [substantive fairness].
41. The substantive fairness of any dismissal is to be determined on the basis of the reasons on which the Employer relies for instituting the disciplinary hearing against the Employee and ultimately terminating his services. The law requires that the Employer must prove that the Employee committed an act of misconduct so severe as to warrant dismissal. So that if an Employer cannot prove that the probabilities of the employee being guilty are greater than the probability that the Employee is not guilty, the dismissal will be deemed to have been substantively unfair.
42. In his closing arguments through his Counsel, the Applicant challenges the fact that the Respondents closed their case without evidence from the Employer on issues of whether there was a proper

investigation before the Applicant was charged, on who charged him and under what circumstances, how his disciplinary hearing at the TSC was conducted etc. In fact, his Counsel submitted that because the Employer was not called to testify before Court, then it means the onus resting on it (Employer) to prove and substantiate compliance with the law and the standards of conducting a proper disciplinary hearing remains unanswered.

43. In answering the concerns raised herein above, the Court will refer to the words of Dunseith JP, as he then was, in a matter involving the same parties, where the learned Judge had this to say;

“15. The fundamental question is whether the issues now before the court were finally disposed of by the High Court and the Court of Appeal. If the issues now before the court were not examined in the previous proceedings, then the court is at liberty to make a determination.

16. The review application before the High Court and the Court of Appeal dealt only with the procedural fairness of the Applicant’s dismissal. Indeed it is always the proceedings of a statutory tribunal that are subject to review, not the merits of its decision.”

44. From the submissions of the Applicant’s Counsel what is obvious to this Court is that the Applicant is still challenging the procedural

aspect of his dismissal which this Court per Dunseith JP, expressly stated that he could no longer do. In this regard the Court stated thus at page 7, paragraph 19 of its judgement;

“19...We do find however that with respect to the question of procedural fairness, the Applicant is estopped from raising such issue because it was finally dealt with by the High Court and the Court of Appeal. To that extent only, the defence of res judicata succeeds, and the Applicant is barred from advancing any claim based on procedural unfairness or irregularity.” (Court’s underlining)

45. As this Court stated from the outset, the problem lay in the manner in which the Applicant initially challenged his dismissal. His very first port of call should have been to report a dispute with CMAC and not run to the High Court. Had he done that, his matter would have long been determined and resolved. With that said, it is a finding of this Court that it is an absolute abuse of the Court process for the Applicant to be still rehashing submissions and arguments challenging the procedural fairness of his dismissal because these were extensively dealt with by both the High Court and Court of Appeal. He certainly cannot and will not be allowed to have the proverbial second bite at the cherry.

46. Then coming to the substantive fairness of the Applicant's dismissal, one should point out that in this matter the Court is faced with two mutually destructive versions between the case of the Applicant and that of the Respondents. Faced with such, the proper approach is for the Court to apply its mind not only to the merits and demerits of both the Applicant's and Respondents' evidence but also to the probabilities thereof. It is only after applying its mind that this Court will then be justified on reaching a conclusion as to whether the dismissal of the Applicant was fair or not.
47. Whatever conclusion the Court will reach, what must be borne in mind is that the conclusion reached has to take into account all the evidence. In this process some of the evidence might be found to be false, some of it might be found to be unreliable, and some of it might be found to be only possibly false or unreliable but none of it may simply be ignored.
48. In the case of *Owen Nxumalo v Standard Bank (Unreported Industrial Court Case No.511/2010)*, this Court, referred to the authority of a South African Supreme Court of Appeal case in which

the Court, set out the “technique” that is generally employed by the Courts when determining disputes in which stories are mutually destructive. That is the case of ***Stellenboch Farmers’ Winery Group Ltd and Another v Martell Et CIE and Others 2003 (1) SA 11 (SCA)***. In this regard Nienaber JA had this to say at paragraphs 14I-15G:

“The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’[s] candour and demeanour in the witness-box; (ii) his bias, latent and blatant; (iii) internal contradictions in his evidence; (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extra curial statements or actions; (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’ reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (vi) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality and integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues. In the light of its assessment of (a),(b) and (c) the court will then, as the final step, determine whether the party burdened with the

onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

49. In the **Owen Nxumalo**, (supra) case, this Court went on to state that;

"Where, however, probabilities are not helpful, a Court can still find in favour of one or the other party on the basis of an 'estimate of relative credibility'. This would relate to matters as mentioned above such as candour and demeanour, blatant bias, self-contradiction or contradiction with the evidence before Court and that of other witnesses who are supposedly presenting the same version as him or her or being in conflict with the case of the party he or she is supposed to support, or contradicting an established fact. The principles of law expounded above also apply to our field of the labour law."

50. Now coming to this present matter, the most consistent and more probable evidence before this Court and at the disciplinary hearing of the Applicant has always been that the Applicant relentlessly pursued student Nomfundo Mbuli over a long period of time. Even after he was reprimanded and warned to desist from such immoral conduct he failed to heed such warnings and reprimands. Even though the Applicant denies that he was proposing love to student Nomfundo, or that he inappropriately touched her buttocks, he admitted that he did

go to meet her parents or guardians and apologized, though he says this was at the instance of Ms. Sihlongonyane, and that his intention of meeting was to find out if indeed the allegations that he was proposing love to Nomfundo and that he had inappropriately touched her buttocks were indeed true.

51. However, according to the evidence of Precious Sihlongonyane, which the Court finds to be more credible and reliable, it was the Applicant who requested that she accompanies him to meet Nomfundo's parents so that he could apologise to them about the incidents. Sihlongonyane further informed the Court that when they eventually met with Nomfundo's parents the Applicant personally apologized for the incidents in question.
52. It therefore cannot be true that when the Applicant requested to meet Nomfundo's parents his intention was to find out if the allegations against him existed or not. This I say because the Applicant conceded before this Court and at his disciplinary hearing before the TSC that he was called to a meeting by the Principal office where he found Nomfundo and her mother and was questioned about the love

proposals and inappropriately touching Nomfundo's buttocks. This is an indication that he was aware that these allegations against him were there.

53. In fact, it is more probable that the version put forth by the Respondents that he went to meet Nomfundo's parents to apologise for the accusations against him is true. The Court accordingly rejects the version of the Applicant as improbable and therefore false. In the eyes of the Applicant Nomfundo was ready to be in a romantic or sexual relationship with him. He even tried to convince her that the gap of 14 years between them was suitable for them to be a couple. It was a moral abomination, and very abhorrent, for the Applicant to propose love to his student, Nomfundo Mbuli.
54. Further compounding issues for the case of the Applicant in this matter is the issue of his sexual assault on student Nomfundo when he held her buttocks in the house of Ms. Sihlongonyane, for which he apologized, first when he met with Nomfundo's mother in the Principal's office and secondly when he went to meet with her (guardian) parents at her homestead. This incident of the Applicant

inappropriately touching Nomfundo's buttocks, although having occurred some 16 years when the matter was finally heard, must have been such a traumatic experience for Nomfundo so much such that she still wept when she recalled and testified about it here in Court.

55. With that said, and in conclusion, it is a finding of this Court that the Respondents in *casu* have established on a balance of probabilities that the grounds for the dismissal of the Applicant, John Kunene, and their adequacy were reasonable and fair in the circumstances. The allegations against the Applicant were very serious and real. They were not a conspiracy orchestrated by the Principal, his colleague Ms. Sihlongonyane, student Nomfundo Mbuli and the Cleaner Mrs. Mpila as he wanted the Court to believe.
56. If anything, it is not surprising that the Applicant only mentions this issue of a conspiracy against him for the first time here in Court. He never mentioned any such conspiracy in his letter of response to the TSC and during his disciplinary hearing. It is also not surprising that he did not call the Deputy Principal as one of his witnesses at his disciplinary hearing. In fact, it is a finding of this Court that the issue

of the conspiracy against the Applicant is nothing but an after thought. The Court therefore accordingly rejects this conspiracy theory as false.

57. Perhaps there is this one issue that needs strong mention by the Court, and it is this; our system of education puts Teachers and Educators in a position of *loco parentis* to pupils and students. This in *loco parentis* position implies that Teachers are regarded as acting in the place of the parent. This principle is embedded in our common law and in many respects confirmed by statutory law. In our context it implies that the teacher is obliged to take care of the physical and mental safety of the student and has a right to maintain proper discipline. In effect, it is meant to bring order to the educative duties of teachers. It is therefore improper, immoral and definitely abominable that a Teacher in the position of the Applicant can relentlessly pursue a love relationship with a student to whom he stands in a position of a parent.


58. Generally, children have a right to education, and coupled with this right is the assurance of a safe and nurturing learning environment

free from sexual harassment and abuse. It is indeed quite unfortunate that at this day in age there are still cases of abuse and sexual harassment of the girl child in our schools. A teacher, in the position of the Applicant, who abuses the trust bestowed upon him by parents of students and society at large certainly does not deserve to be in the education system.

59. In view of the foregoing, the Court accordingly makes orders as follows;

- a) The claims of the Applicant against the Respondents be and are hereby dismissed.**
- b) The Court makes no order as to costs.**

The Members agree.


T. A. DLAMINI
JUDGE – INDUSTRIAL COURT

DELIVERED IN OPEN COURT ON THIS 02ND DAY OF JUNE 2021.

For the Applicant : *Attorney Mr. B.S. Dlamini (B.S. Dlamini Attorneys)*
For the Respondent : *Attorney Mr. N. Dlamini (Attorney General's Chambers)*