

# ARBITRATION AWARD

Case Number: GATW568-22  
Commissioner: Lerato Sikwane  
Date of Award: 1 September 2022

In the Matter between

**BUHLE ZWANE**  
(Union/Applicant)

And

**SITA**  
(Respondent)

**APPROVED**

## DETAILS OF APPLICATION AND REPRESENTATION

- [1] This matter was heard at the offices of the CCMA Tshwane Region at 345 Pretorius Street, Tshwane, at 9:00 AM on 28 Tuesday 2022. The employer party, **State Information Technology Agency (SITA)** (hereinafter referred to as the respondent) was represented by **Mr. Jeff Morifi** in his capacity as its ER Consultant. The employee party, **Ms. Buhle Zwane** (hereinafter referred to as the applicant) was present and was represented by Mr. Johnson Matidza of **PSA**.
- [2] This dispute was referred to the CCMA in terms of section 191 (5) (a) - Dismissal related to misconduct.
- [3] Both parties submitted bundle of documents and the contents thereof were agreed as being what they purport to be. Parties requested to present their closing arguments in writing, and they requested to do so by no later than 22 August 2022.
- [4] The hearing was digitally recorded, and the contents downloaded onto the CCMA's electronic database in Tshwane.

### **ISSUES TO BE DECIDED**

- [4] I am required to determine whether the dismissal of the applicant by the respondent was substantively fair or not. Should I find that his dismissal was unfair, I am required to grant him appropriate relief in accordance with the provisions of the Labour Relations Act 66 of 1995, as amended.

### **BACKGROUND TO THE ISSUE**

- [5] The applicant started working for the respondent as a Project Manager on 13 August 2003 and at the time of her dismissal on 14 December 2021 she was earning R73171.34-00 per month. The applicant sought reinstatement as a relief for what she considered an unfair dismissal.
- [6] The applicant referred a dispute of unfair dismissal to the CCMA Tshwane region on 15 January 2022. The matter was scheduled for a con/arb process that took place on 4 February 2022 but was stood down until 7 February 2022. The dispute on 7 February 2022 could not be resolve by conciliation and I immediately proceeded with the arbitration process. The matter could not be finalized on the day in

question and was postponed to 28,29 and 30 March 2022. The matter was ultimately finalized on 15 July 2022.

## SURVEY OF EVIDENCE AND ARGUMENT

### THE RESPONDENT'S CASE

The respondent called two witnesses to testify on its behalf.

The 1<sup>st</sup> witness, **Adv. Bernard Makhubela** testified under oath as follows:

- [7] He is currently employed by the respondent as Head of Department, and he was the applicant's direct manager at the time of her dismissal. The applicant had a tendency of not attending his meetings on Mondays. The meetings the applicant failed to attend were scheduled to take place as follows: 22/2/21, 8/3/21, 29/3/21, 12/4/21, 26/4/21, 19/4/21, 3/5/21, 24/5/21, 10/5/21, 17/5/21, 24/5/21, 14/6/21, 28/6/21, 5/7/21 and 19/7/21.
- [8] The meetings in question were to monitor the performance of all the projects that were been executed. The applicant was invited in all the meeting in question, but she never attended any of them. The applicant absented herself from the aforesaid meetings without forwarding any apology. The applicant was regularly forwarded the minutes of the cluster weekly meetings clearly showing that she was expected to attend them.
- [9] Both the applicant and Mr. Mphafudi never attended the said meetings, and they never sent their apologies for their nonattendance. The applicant appeared to him as a person who does not respect her job. She was supposed to forward her apologies to the chairperson of the weekly cluster meetings or to the secretariat. The applicant's behavior and conduct were unacceptable to him. He felt that the applicant was undermining him as the Head of Department, and he regarded her conduct as being insubordinate and defiant.
- [10] The respondent's policy on the employment conditions was approved on 19 December 2011 and it was applicable at the time of the applicant's dismissal. Paragraph 9.17 (a) provides that all employees are required to complete their timesheets using the applicable system. The timesheets are important because they specify the hours the employee worked in the week. The applicant's timesheets were

supposed to be approved by Mr. Mphafudi but that never happened. The applicant reported directly to him after Mr. Mphafudi resigned and as such her timesheets were supposed to be approved by him.

- [11] The applicant for the week of 29 March 2021 submitted her timesheet and he did approve it. The applicant was aware that she had to submit her timesheets to him on weekly basis. The applicant did not submit her timesheet for the period from 5-9 April 2021. The applicant violated her employment conditions by failing to submit her timesheets as required. The applicant on 28 July 2021 submitted her timesheet to Mr. Sam Lwazi. The said timesheet was for the period of 26 April 2021 and as such it was very late and was also submitted to a wrong person.
- [12] Failure to submit timesheets as required makes it difficult for him to can account for the hours spend by the employee during the week. He would be unable to tell what the employee did during the week and such conduct is unacceptable. It seems as if the applicant did not want to be managed and to be held accountable. He does not belief that the applicant can be rehabilitated, and she is also remorseful of what she has done. He first became aware that the applicant has approached Mr. Lwazi when she was served with the notice of the disciplinary hearing.
- [13] He did ask Mr. Sam how he can approve the timesheets for an employee who was not reporting to him. Mr. Sam responded by saying that the applicant and Mr. Mphafudi approached him and informed him that the applicant has not been given any work, and they requested him to give her work to do. He was not aware that the applicant was given work by Mr. Sam, she was not allowed to choose where she wanted to work.
- [14] He had projects in his department that needed to be assigned to the employee. The applicant was attached to his department at the time she was allocated work by Mr. Sam. The applicant could have requested to be transferred to another department because she was paid from his department.

**Under cross examination Adv. Makhubele testified as follows:**

- [15] He is the one who preferred the charges against the applicant, but he does not remember the date the notice were served on her. The applicant was reporting to Mr. Mphafudi. She started reporting to him after Mr. Mphafudi has resigned around May 2021. He does not remember the actual date Mr. Mphafudi resigned. He informed the applicant of the weekly cluster meetings when he introduced himself to her. The Monday meetings started in 2020. The aforesaid meetings were compulsory for the applicant as the project manager.

[16] The applicant's timesheets were supposed to be approved by Mr. Mphafudi. Freddy Moremi is a business Analyst, and he is on the same level with the applicant. The Business Process Management project was managed by the applicant. The arrangement with Mr. Mphafudi was that the applicant should attend the BPM meetings on Mondays, but she never attended. The applicant could have requested Mr. Mphafudi to apologize for her.

[17] The applicant uses to receive the minutes for the CBN meetings. The project was failing and that is why they wanted her to attend meetings in order to find out what might be the cause. The project the applicant was working on was from the CBN. The purpose of the Monday meetings was to help the project leaders to excel in what they were doing. The applicant could have seen from the minutes that Mr. Mphafudi was not forwarding her apologies.

[18] It was expected of the applicant to provide feedback on her project. He was never informed of the arrangements between the applicant and Mr. Mphafudi. He only became aware of the applicant's grievance during her interview for a promotional position. The applicant's grievance was investigated and nothing untoward was found against him.

[19] Every employee is expected to submit his/her timesheet on a weekly basis. The applicant was not charged for the period from January to March. Timesheets are captured per project numbers which are created by the project coordinators. He does not know when the applicant started working under Mr. Sam Lwazi. Mr. Sam Lwazi is the Head of Department: Network.

[20] One cannot take a senior person to be deployed somewhere. Project managers are given work by the program managers. The applicant misrepresented the facts by saying that she does not have work to do because there were lot of work to be done. BPM project was one of the projects that was escalated because it was performing poorly.

The 2<sup>nd</sup> witness, **Mr. Sam Lwazi** testified under oath as follows:

[21] On 24 March 2021 whilst on duty he was approached by the applicant with a request that she be assigned work from his department. The applicant informed him that she does not have any work to do in her department. He responded to the applicant by saying that she must bring along her manager with her. On 29 March 2021 the applicant came to him accompanied by her manager, Mr. Mphafudi.

[22] Mr. Mphafudi confirmed to him that the applicant does not have work to do in her department. He gave the applicant work to do based on the confirmation by her manager. The applicant's timesheet for 6 April 2021 was sent to him on 28 July 2021. He approved the said timesheet because it was under his project. He could have not appointed her if he could have known that her HOD was not aware.

**Under cross examination Mr. Sam testified as follows:**

[23] The applicant first came to him on 24 March 2021, and he turned her back. He sent her back because he wanted her manager to confirm that she does not have work in her department. Mr. Mphafudi was the program manager and as such he had the authority to assign work to the applicant. On 29 March 2021 Mr. Mphafudi confirmed that the applicant does not have work to do. He thought the applicant was assigned to him in good faith. It is normal to be approached by the employee to be assigned tasks.

[24] They normally interacted with the program managers and not with the HOD's. The timesheets were sent to him for approval. He was aware of her outputs hence he signed her timesheets. The applicant's colleagues and the client acknowledged her work. The applicant did a lot in his department. He will understand if the timesheets were brought to him late. It is difficult to concentrate on other divisions. The internal timesheets like leaves or unproductive hours were supposed to be captured in her division.

**THE APPLICANT'S CASE**

The applicant, **Ms Buhle Bukisile Zwane** testified under oath as follows:

[25] She agree that she was not able to attend the meetings because she had another meeting to attend every Monday of the week. Mr. Mphafudi allocated her a project that was escalated up to the level of the Executive and the Head of Department. Mr. Mphafudi was the program manager within the NGN Cluster at the time he allocated the said project to her. Mr. Mphafudi took her to the project in question because there was a need.

[26] She was managing the COGTA project at the time Mr. Mphafudi allocated her the CBN project. Mr. Mphafudi removed her from the CBN project in order to salvage the project for the National Treasury. The said project was assigned to her by Mr. Mphafudi in October 2019, and she did manage to salvage it. Adv. Makhubela was aware that she managed to deliver on the BPM project. The BPM project was huge because it was involving 17 Government Departments and the Parliament of the Republic of South Africa as well. The escalation of the PBM project occurred whilst she was still in the Cogta project.

[28] Her movement to the DOD Network division was facilitated by Mr. Mphafudi. She did communicate her absence to Mr. Mphafudi and she once telephonically informed the Adv. Makhubela that she was busy with the National Treasury project. The CBN project's meetings were held every Monday at 9:00 and the PBM ones were held every Mondays at 8:00. She had justifiable reasons for not attending the CBN's Monday meetings. The protocol was that the project managers report to the program manager.

[29] On 24 March 2021 she lodged a formal grievance wherein her proposed solution was that she be moved to another department. The said grievance was however never finalized. She wanted to be moved to another department because she felt that she was being bullied and harassed by Adv. Makhubela. She only contacted Luvoyo Keyise after she was served with the notification of dismissal.

[30] She was invited to the CBN meetings as an optional attendee and as such it was not compulsory for her to attend it. She does not remember seeing the frequency of the submission of the timesheets in the policy. She used the project number 21824 because the project she was doing was falling under the DOD Network.

[31] The email by Adv Makhubela does not show where it came from, and she does not remember receiving it. She started the PBM project on 25 January 2021 and she completed it on 3 March 2021. The PBM projects official proposed that they hold their project meetings on Mondays because they were only available on the day in question. She had to accept their proposal because the said project was already escalated above. The said escalation happened before Adv Makhubela became part of them.

[32] Mr. Mphafudi is the one who removed her from the Cogta project in order for her to can handle the PBM project. She started working under Mr. Sam on 2 April 2021 and it was required of him to approve her timesheets. She delayed in submitting her timesheets to Mr. Sam because it was the beginning of the new financial year, and the other reason was because Mr. Lwazi was off duty for a while due to ill-health.

[33] Some of the things that caused her to capture her timesheets late was because the clients were delaying signing for the projects. The project numbers for the internal projects according to the EPM policy were created by expects not program managers. Whilst at Mr. Sam's division she was booking her productive time using payments in the same environment. The Timesheets from A-O were productive time ones and as such were approved by Mr. Sam.

[34] Her unproductive timesheets were handled by Mr. Mphafudi. There were people whose timesheets were outstanding as well. She started capturing her timesheets on 21 July 2021. Mr. Mphafudi was aware that she was not fully utilized by Adv Makhubela. She started working with Adv Makhubela on 3 December 2020. She has been working in other environments before Adv Makhubela came to join them. On 22 July 2021 she was served with the notice to appear before the disciplinary hearing.

[35] She was told that she can escalate her grievance if she was not happy with the outcome thereof. She did escalate her grievance to the Managing Director. She was dismissed by the respondent on 21 December 2021. Sometimes the employees can escalate their grievances to the Board as well. Some of the matters were resolved by the Board without them been referred to the CCMA. Ms Tuswa, Denga and Matsheke were one of the people who were reinstated by the Board.

**Under cross examination Ms. Zwane testified as follows:**

[36] She lodged her grievance on 24 March 2021. She honestly believes that she was victimized by Adv Makhubela because of the grievance in question. She understands the grievance policy. On 26 June 2021 she received the outcome of her grievance. She cannot confirm that the policy prescribed that she could escalate the grievance to the next level after 5 days from the day she received the outcome thereof.

[37] She wrote the letter dated 16 December 2021 seeking intervention. She was advised by Morifi and Selina to escalate the grievance to the Executive Caretaker. R. Nevhutshena is a manager in the office of the Minister. She was requesting intervention for her dismissal. She copied the office of the Minister because the respondent did not have a Board at that time. She does not know the email written by Mr. Montlhabaki. Her e-mail was never hacked

[38] She did receive the invite for the meetings, but she was invited as an optional. Optional are not compelled to attend the meetings. She did give reasons to the HOD why she cannot attend the Monday meetings. She did receive a phone call from Adv Makhubela asking her why she was not attending the Monday meetings. Adv Makhubela started first by sending her an e-mail asking why she was not attending the said meetings.

[39] The call Adv Makhubela made to her was about the project, he wanted feedback or update about the project. She informed Adv Makhubela that she was concentrating on the proposal because there was already an escalation. She never had a one-on-one meeting with Adv Makhubela. It is true that she did



not attend the meetings. She did receive the invite for the meetings in question. She did submit her reports to Mr. Mphafudi in order for him to submit same during the meetings in question. In January 2021 she did submit her report. They were requested to submit their reports on a weekly basis.

- [40] Reports are based on the progress one has achieved during the week. It was expected of Mr. Mphafudi at table her apology to the meeting. The proposal for the project in question was handed over to the HOD on 29 March 2021. The HOD was forcing her to do things against the policy.
- [41] On 12 April 2021 she was already working for Network division hence she did not attend the meeting. Her manager was aware that she was no longer handling the BCN project. She was required to report under the environment she was handling its project. She did not attend the meetings in question because she was working under DOD. She was never informed that she should report to Adv Makhubela after Mr. Mphafudi resigned. Adv. Makhubela was her direct supervisor in terms of her letter of her placement.
- [42] She does not have any reason not to like Adv. Makhubela. She was receiving the agenda of the Monday meetings whilst she was under Network. Her reports were submitted to Mr. Sama. Internal projects are created by experts. There is no policy that prescribe the timeframe for capturing the timesheets. The policy does not talk of weekly capturing.
- [43] From 5 to 9 April 2021 she had no project to work on. The GNA Cluster project was a non-productive time and was falling under Adv. Makhubela. The timesheet for the first week of April 2021 was captured by Santi but she does not have a copy thereof. The said timesheet was captured on 22 July 2021 due to non-availability of the project number. She only received the project number on 20 July 2021. Her timesheets for April 2021 were never captured in April 2021 and her May 2021 timesheets were never captured in May 2021.
- [44] In March 2021 she did receive the invite for the meeting, but she did not attend it because of the harassment. On 1 February 2021 she did receive the invite for the meeting, but she did not attend it. She did not attend the meeting of the 7<sup>th</sup> of March 2021 because she was wrapping up. She had no work because she had delivered on her project.
- [45] On 24 March 2021 she approached Mr. Lwazi Sam because she had no work to do. Mr. Sam did advise her to bring along her manager, Mr. Mphafudi. She was not required to consult Adv. Makhubela

because communication is always between the line managers. She does not remember the date Mr. Mphafudi resigned.

- [46] She was already allocated project under Mr. Sam at the time Mr. Mphafudi resign. She denies that she was to report to Adv. Makhubela in the absence of Mr. Mphafudi. She was expecting Adv. Makhubela to tell her whom to report to. The relationship between her and Adv. Makhubela was not cordial. She was expecting Mr. Mphafudi to report for her.

The 2<sup>nd</sup> witness, **Mr. Freddy Moremi** testified under oath as follows:

- [47] He remember the email he wrote on 2 September 2021 because he was busy with the Micro Org Design Project. The applicant requested the BPM to assist her with the business mapping project. The officials attached to the BPM project requested to meet with the applicant on Mondays because it was the only day, they could meet with her. The Monday meetings used to be held from 9:30 to 13:00 in Centurion. Mr. Mphafudi was the program manager when the aforesaid project started. He never communicated with Adv. Makhubela during the project in question, they use to communicate with Mr. Mphafudi regarding the National Treasury project.

**Under cross examination Mr. Moremi testified as follows:**

- [48] He was not aware that Mr. Mphafudi resigned. The impression he got from the applicant was that Mr. Mphafudi was worried with the progress over the project. He cannot remember the first meeting the BPM project had a meeting, but it might be in late 2020. He does not have the minutes of the meetings in question. They had regular meetings in February 2021 and March 2021.

The 2<sup>nd</sup> witness, **Mr. Paul Lesang Kgang Montlhabaki** testified under oath as follows:

- [49] He is currently employed by the respondent as a manager at level D3 and he is the Chairperson of PSA in SITA in Gauteng Province. On 14 December 2021 he did forward an e-mail to the Acting Executive, Mr. Luvuyo Keyise. He was not influence by the applicant to write the email in question. On 16 December 2021 he was on leave and went home to Northwest Province. He was shocked and disappointed by the employer for altering and modifying documents.

**Under cross examination Mr. Montlhabaki testified as follows:**

[50] He was not with the applicant when he wrote the email in question. The applicant never instructed him to write the email in question.

The 3<sup>rd</sup> witness, **Mr. Lucky Mphafudi** testified under oath as follows:

[51] He was employed by the respondent as a Programme Manager and the applicant was reporting to him. On 12 May 2021 he resigned from the respondent because of religious reasons. On 25 March 2021 the respondent failed to pay his salary and when he enquired about his salary it was then informed that there are charges pending against him, but they were never served on him. The respondent has 2 types of projects, viz, productive projects and non-productive projects.

[52] Cluster meetings are normally convened by the HOD and are attended by the program managers. The project managers are not compelled to attend the cluster meeting, they attend only when invited. The applicant from February 2021 to March 2021 was assigned to the National Treasury project and she was required to meet with her team on Mondays. The applicant uses to report the progress on her project, and he would submit the said progress to the HOD on Mondays.

[53] On 29 March 2021 he planned with the HOD: Network that the applicant be allocated a project under his environment. He made the aforesaid arrangements because the applicant did not have work to do at that moment. He is the one who wrote the memo that requested the applicant to be allocated a project under Mr. Sam. He indicated to Mr. Sam that the applicant has completed her project and that he does not have any project he can allocate to her.

[54] It was part of his duty to allocate projects to the project managers. The HOD's do not get involve when projects are allocated by the program managers to the project managers. It was his responsibility to see to it that the applicant was productive. It was not necessary for him to inform Adv. Makhubela that he has allocated the applicant a project under Network. Mr. Sam was aware that the applicant was working on the said projects hence he approved her timesheets.

[55] The applicant was already working on the BPM project at the time she was required to attend the cluster meetings. He did not report the applicant's progress to Adv. Makhubela because he had connectivity problem. He did inform Adv Makhubela that he was experiencing connectivity problem. He was required to report the applicant's activities during the Monday meetings. The applicant during the process of drafting the proposal was bullied by Adv. Makhubela and she even wrote a grievance in that regard. He, as a male had to protect the applicant's rights.

**Under cross examination Mr. Mphafudi testified as follows:**

[56] He submitted his letter of his resignation on 12 May 2021. He indicated in his letter of resignation that he was resigning because of stress and depression. He only became aware of the charges after his salary has been stopped by the respondent. He was aware of the Business Cluster's meetings. The applicant did not attend the meetings in question. The applicant uses to report her progress to him a day before the meetings in question so that he can report for her. He did not attend the cluster meetings, and he also did not tender apologies. The HOD was aware that the applicant has other commitments, and it was necessary for her to tender apology.

[57] The HOD expected both the projects manager and the program managers to attend the meetings, but he knew that the applicant was committed elsewhere. The applicant used to submit her weekly reports to him. He uses to submit the applicant's reports to the secretary of the meetings. He did receive the applicant's grievance indicating that she has been bullied. He had to protect the applicant against the bullying by the HOD. The applicant's grievance was never completed.

The 4<sup>th</sup> witness, **Mr. Desmond Somthunzi** testified under oath as follows:

[58] He is currently employed by the respondent as Acting HOD Service Delivery Management. The applicant did work under him in the Internal IT division before she moved to the Local Department to work with Mr. Mphafudi. The timesheets and the booking should be where the project belong. The timesheets for non-productive hours should be booked where the resource/employee is based. The allocation of projects can happen without the involvement of the Executive in that the line manager can request the services. The applicant could not get time to attend the Monday meetings

**Under cross examination Mr. Sam Mthunzi testified as follows:**

[59] The respondent has a central pool of project managers, and they can be utilized anywhere where their services are required. The HOD reports to the Executive. The HOD can be informed as a courtesy when the project manager is allocated a project.

### **ANALYSIS OF SUBMISSIONS AND ARGUMENT**

### **SUBSTANTIVE FAIRNESS**

[62] Section 188(1) of the Act provides as follows "a dismissal that is not automatically unfair is unfair if the employer fails to prove-

- a. That the reason for dismissal is a fair reason-
  - I. Related to the employee's conduct or capacity, or
  - II. Based on the employer's operational requirement, and
- b) That the dismissal was effected in accordance with a fair procedure.

[63] It is clear from the abovementioned section that the onus is upon the respondent to prove that the applicant was dismissed for one of the aforementioned reasons and following a fair procedure. The charges that were levelled against the applicant during the disciplinary hearing were as follows: -

- **Gross insubordination and/ or failure to carry out lawful instruction in that:** on or around the dates mentioned below you were invited by your manager to attend weekly Cluster business management meetings and without a reasonable reason you failed to attend those meetings. The dates are as follows: 22/2/21, 8/3/21, 29/3/21, 12/4/21, 26/4/21, 19/4/21, 3/5/21, 24/5/21, 10/5/21, 17/5/21, 24/5/21, 14/6/21, 28/6/21, 5/7/21 and 19/7/21.
- **Gross insubordination and failure to comply with SITA's Employment Conditions Policy, most particularly clause no 9.17 (a) of the policy, in that on dates as mentioned below and without a reasonable cause, you failed to submit your timesheets on ERP system for approval by your Line Manager:** 9/4/21, 16/4/21, 23/4/21, 30/4/21, 8/5/21, 14/5/21, 21/5/21, 28/5/21, 4/6/21, 11/6/21, 18/6/21, 25/6/21, 2/7/21, 9/7/21 and 16/7/21.
- **Gross dishonesty and or misrepresentation in that:**

3.1 On or about 24 March 2021 you approached Mr. Lwazi Sam and requested to be assigned projects within his department because you were not being assigned any work within Cluster Business Management when you knew or ought to have known at that time that your indication to Mr. Sam that you were not being assigned any work within your environment was not the truth.

3.2 On or around 29 March 2021 you together with your supervisor Mr. Lucky Mphafudi you approached Mr. Lwazi Sam and requested him to assign you projects in the Department: Network-National and DOD with effect from April 2021 and you failed to disclose to Mr. Sam that your request to be

assigned projects within this Department was not approved by your Line Executive or his/her delegated authority.

It is further alleged that as a result of your actions as mentioned in paragraph 3.2 above, Mr. Sam assigned you projects within the Department: Network-National and DOD without any knowledge and/ or approval from your Line Executive or his/her delegated authority

3.3 On or around 28 July 2021 you captured your weekly timesheets on SITA's ERP system under project number 21824-HOD Nat & DOD Net (Prod) 21/22 purporting that you were working within the said project number whereas in truth and/or in actual fact you were not authorised and/or approved by your Line Executive or his/her delegated authority to perform any duties under the said project number (21824).

- [64] The respondent avers that the applicant from 22 February 2021 to 19 July 2021 failed to attend the weekly cluster business meetings which were scheduled to take place on Mondays. It is common cause that the applicant was invited to attend the aforesaid meetings and it is further common cause that she never attended the aforesaid meeting during the period in question.
- [65] The applicant stated in her evidence-in-chief that on 25 January 2021 her supervisor, Mr. Mphafudi assigned her the PBM project. She further stated that she completed the said project on 3 March 2020. The aforesaid version was corroborated in material respects by Mr. Mphafudi. The applicant further testified that she was required to attend the PBM weekly meetings on Mondays, and those meetings were coinciding with the weekly business cluster meetings under Adv Makhubela.
- [66] Mr. Moremi in corroborating the applicant's version in this regard testified that the applicant when she started with the BPM project, she requested the staff to assist her with the business mapping project. The BPM officials were only available on Mondays, and it is them who requested to meet with the applicant on Mondays because it was the only day, they could be able to meet with her.
- [67] The respondent never adduced any evidence in rebuttal of the applicant's version in this regard. There is no evidence before me to suggest that the applicant never worked on the BPM project and that the meetings in question were never held. Mr. Mphafudi testified that the applicant used to report the progress on her project to him and it was expected of him to submit same to the HOD on Mondays.

- [68] The applicant submitted copies of emails to substantiate her allegation in this regard. It is clear that the applicant used to avail her reports to Mr. Mphafudi, the applicant however failed to enquire from Mr. Mphafudi whether her reports were submitted to Adv Makhubela. It is clear that the applicant was consistently provided with the minutes of the cluster meetings clearly showing that her reports were never submitted and that Mr. Mphafudi was also not attending the meetings. I am however mindful of the fact that the applicant was charged for not attending the meetings not for failure to submit her reports.
- [69] Mr. Mphafudi testified that he is the one who planned with the HOD: Network that the applicant be allocated a project under his environment. He further testified that he made the aforesaid arrangements because the applicant had no work to do, and that it was part of his duty to allocate projects to the project managers. Mr. Mphafudi was steadfast in his testimony that normally the HOD's do not get involve in projects allocations. He further testified that it was not necessary for him to inform Adv. Makhubela that he has allocated the applicant a project under Network.
- [70] The respondent's own witness, Mr. Sam corroborated the applicant's version in this regard, he testified that Mr. Mphafudi has the authority to assign work to the applicant, and he further testified that HOD's are normally not involved in the allocation of projects to the project managers. The evidence before me suggests that the applicant from 29 March 2021 was assigned a project under Mr. Sam. Mr. Somthunzi testified that the allocation of projects can happen without the involvement of the HOD. He further testified that the HOD can be informed as a courtesy when the project manager is allocated a project.
- [71] It should be noted that Mr. Sam is the HOD: Networks, Mr. Somthinzi is the Acting HOD: Service Delivery Management. The aforesaid individual are Executives, and they are currently in the employ of the respondent. They both testified that the timesheets for productive hours are approved by the HOD whom the project belongs to. Mr. Sam testified that he did capture the applicant's timesheets because the project she was assigned to belonged to him.
- [72] The evidence against the applicant in as far as count 3 is concern is overwhelming and it is my view that she committed the misconduct in question. Mr. Sam testified that the applicant on 24 March 2021 approached him and requested that she be allocated a project under his environment because she does not have work to do. Mr. Sam advised the applicant to bring along her supervisor in order for him to confirm that she does not have any job to do.

[73] If the applicant was honest and genuine about her unwillingness not to idle, she could have approached her own HOD and enquire about the availability of work. She could have approached Mr. Sam as the alternative after having discuss her situation with her HOD. It is clear that she was willing to do everything in order to get out of Adv Makhubela's environment and that was wrong of her to do. Interestingly, the applicant approached Mr. Sam on the day she lodged her grievance against Adv. Makhubela.

[74] The applicant was complaining about being bullied by Adv. Makhubela. It is clear from her conduct that she wanted to get away from Adv. Makhubela and she had to misled Mr. Sam in order to achieve her goal. Adv. Makhubela stated in his testimony that he had projects that required to be attended to during the period in question. The applicant's averment that she approached Mr. Sam because she had no work to do is found to be false.

[75] It is therefore my finding that the applicant was not guilty of charges 1 and 2 but guilty on charge number 3.

[76] I have taken Item seven (7) of Schedule 8 of the Code of Good Practice into consideration in this regard. The said item provides that any person who is determining whether a dismissal for misconduct is unfair should consider amongst others the following:

- a) Whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
- b) If a rule or standard was contravened, whether or not-
  - i. The rule was a valid or reasonable rule or standard
  - ii. The employee was aware, or could reasonably be expected to have been aware, of the rule or standard
  - iii. The rule or standard has been consistently applied by the employer, and
  - iv. Dismissal was an appropriate sanction for the contravention of the rule or standard.

[78] It is my finding that the applicant contravened a rule or standard regulating conduct in, or of relevance to the workplace. The rule contravened by the applicant was a valid or reasonable rule, and that the applicant was aware, or could reasonably be expected to have been aware, of the rule or standard. The next stage now is to consider the appropriateness of the sanction.



[79] The test pertaining to the appropriateness of the sanction is clearly spelt out in the CCMA's new guidelines: misconduct arbitration. Paragraph 93 of the said guidelines provides as follows-

"The test is whether employer could fairly have imposed the sanction of dismissal in the circumstances, either because the misconduct on its own rendered the continued employment relationship intolerable, or because of the cumulative effect of the misconduct when taken together with other instances of misconduct".

[80] Commissioners are required in terms of the aforesaid guidelines to make a value judgement as to the fairness of the employer's decision, taking into account all relevant circumstances. There are three things the commissioner needs to consider when considering the appropriateness of the sanction meted out on the applicant, and they are as follows-

- The gravity of the contravention of the rule
- The consistency of the application of the rule and sanction.
- The enquiry into factors that may have justified a different sanction

[81] In examining the appropriateness of the sanction that was imposed by the respondent on the applicant, I shall be guided by Authorities in **Sidumo v Rustenburg Platinum Mines 2008(2) BCLR 158 (CC); EDCON LTD v Pillemer (2008) 29 ILJ 616 (LAC) and EDCON LTD v Pillemer NO and others (2010) 1 BLLR (SCA).**

[82] The Constitutional Court in the **Sidumo** case stated that in deciding how Commissioners should approach the task of determining the fairness of a dismissal, it is important to bear in mind that security of employment is a core value of the constitution – which has been given effect to by the LRA. It is the protection afforded employees who are vulnerable. Their vulnerability flows from the inequality that characterizes employment in modern developing economies. The Constitutional Court went further to assert that it is against constitutional norms and against the right to fair labour practices to give pre-eminence to the views of either party to the dispute.

[83] In **Edcon (LAC)** confirmed by the Supreme Court of Appeals: **Edcon (SCA)**], the courts emphasized that the Commissioner should in performing their tasks be guided by the principle of progressive discipline which amongst other things would entail assessing the prospects of correcting behavior and using the incident as a learning process. The attitude and response of the employee when called upon to account for his or her conduct would serve as a useful indicator of the willingness of the employee to

continue with the employment relationship and in particular, he or she is willing to learn from the experience, per **Ngcobo J** in **Sidumo**.

[84] The Code of Good Practice on Dismissal, found in Schedule 8 of the LRA is the most important document for both parties with respect to the management of discipline and dismissal. It states that dismissal is the most serious step an employer can take, and the employer should only have recourse to it in cases where the continuation of the employment relationship becomes intolerable. It is only where the Courts or Arbitrators are convinced that the actions of an employee are such that they have rendered the continuation of the employment relationship impossible, or when the organization is in a position where it cannot be expected to continue employing an employee, that termination would be accepted. The Courts view termination as the most serious sanction that can be meted out to an employee and should accordingly be used only as the last resort.

[85] **The Constitutional Principle of Proportionality as expounded by Prof. Cora Hoexter in Administrative Law in South Africa (2010) should be illuminated in this case. Proportionality according to the learned Author may be defined as the Notion that 'one ought not to use a sledgehammer to crack a nut.'** Its purpose is to avoid the imbalance between the adverse and beneficial effects of an action and to encourage the decision-maker to consider both the need for action and possible use of less drastic and oppressive means to accomplish the desired end. The respondent in this matter had several options to exercise like final written warning, suspension, or demotion rather than to mete out the ultimate sanction.

[86] The applicant at the time of her dismissal has been in the employ of the respondent for 18 years and there is no evidence before me to show that she had a bad disciplinary record. The respondent's witness, Mr. Sam testified that the applicant's colleagues and the client acknowledged her work and that she did a lot in his department. It is clear from Mr. Sam's testimony that the applicant can still contribute positively for the benefit of the respondent.

[87] I am not convinced, having taken all the circumstances of the matter into consideration that the dismissal was the appropriate sanction in this regard. It is therefore my finding that the sanction of a dismissal as meted out on the applicant was too severe. The dismissal of the applicant is therefore found to be substantively unfair.


**AWARD**

- [88] I order the respondent: **SITA** to reinstate the applicant: **Buhle Zwane** with retrospective effect from her date of dismissal on the same terms and conditions that were applicable but for the unfair dismissal.
- [89] The aforesaid reinstatement is without the back-pay because the applicant did not approach the CCMA with clean hands.
- [90] The applicant is ordered to report for duty with effect from the 12 September 2022.

Signature:

Commissioner:

Sector



Lerato Sikwane

State Entity

**APPROVED**