



AWARD

Panelist: KESHREE KEMI _____
Case No.: GPBC 1677/2024 _____
Date of Award: 04 MAY 2026 _____

In the ARBITRATION between:

PSA OBO J KISTASAMI _____
(Union / Applicant)

and

DEPARTMENT OF AGRICULTURE AND RURAL DEVELOPMENT _____
(Respondent)

Union/Applicant's representative: Mr M Mbanjwa _____
Union/Applicant's address: _____

Telephone: _____
Telefax: _____

Respondent's representative: Mr M L Shubalala _____
Respondent's address: _____

Telephone: _____
Telefax: _____

DETAILS OF HEARING AND REPRESENTATION

1. This matter was set down for an Arbitration hearing in terms of Section 191(5)(a) of the Labour Relations Act 66 of 1995, as amended, (LRA), on the 03rd April 2025, 30th and 31st July 2025, 19 and 20th November 2025 and 07th April 2026 at 09:00am at the Respondent's premises, 1 Cedara Road, Cedara.
2. The Applicant was represented by Mr M Mbanjwa, a union official from PSA and the Respondent was represented by Mr M L Shubalala, Senior Labour Relations Officer.
3. The hearing proceeded on the all the dates and was finalised on the 07th April 2026.
4. The parties agreed to file written closing arguments by the 20th April 2026.
5. The process was manually and digitally recorded.

ISSUE TO BE DECIDED

6. Whether the Respondent has committed an unfair labour practice in respect of the Applicant.

BACKGROUND TO THE ISSUE

7. The Applicant maintained that the Respondent committed an unfair labour practice in respect of him, in respect of Section 186(2)(b) of the LRA, which the Respondent disputed.

8. Following a disciplinary hearing the Applicant was found guilty of the following charge:

“Be advised that you, Mr Justin Kistasami, duly appointed by the KwaZulu-Natal Department of Agriculture and Rural Development as a General Admin Clerk, stationed at Cedara Head office, hereby charged with misconduct in terms of PSCBC Resolution 1 of 2023, as follows:

COUNT 1

It is alleged that, on the 24 May 2021 around 15h21 you fraudulently filled +/- 200 litres of diesel into a drum loaded into Agricultural Research Council vehicle (Nissan, BV41GS GP) instead of 50 litres that was requested.

9. The Applicant was found guilty of the charge and dismissed. The sanction was reduced by the Appeals committee to a three (3) month suspension without pay and a final written warning.
10. Both sanctions had been implemented. The final written warning was valid for six (6) months, from August 2024 to January 2025.
11. The Applicant maintained that he was not guilty of the charge.

12. **COMMON CAUSE FACTS:**

- 12.1. The Applicant dispensed the diesel.
- 12.2. The diesel pump was faulty and obsolete.
- 12.3. The pumps were giving the wrong readings.
- 12.4. The faulty issues were reported to farm managers.

13. It was placed on record on the 20th November 2024 that it was common cause that:

- 13.1. The pumps were not working at the time of the incident reflected in the charge, the 24th May 2021 and that they were replaced thereafter.

14. FACTS IN DISPUTE

- 14.1. The amount of diesel that was dispensed on the 24th May 2021.
 - 14.2. The Chairpersons verdict and the imposed sanction.
15. The relief sought was that the sanction of 3 months without pay be withdrawn, that the 3 months salary be reimbursed (R25676, 50 X3) and that the final written warning be withdrawn.
16. A common bundle of documents and pre-arbitration minutes were handed in and marked A and B respectively. The Respondent presented video evidence, a copy of which was handed in and marked C. During the cross-examination of the Respondent's first witness clear blank copies of the documents on pages 27 and 28 were submitted and marked 27.1, 27.2, 28.1 and 28.2 of A).

THE APPLICANT'S OPENING STATEMENT

17. The Applicant's representative submitted as follows:
- 17.1. They believed that the charges against the Applicant were fabricated because he was a Whistleblower, reporting the wrongdoing within the Department by certain officials because they were Managers. They colluded in fabricating these charges against him, as a way of revenge to make him to be dismissed.
 - 17.2. They had a disciplinary hearing where he was found guilty by the presiding chairperson.
 - 17.3. The Appeals committee decided to reduce the sanction from dismissal to short of dismissal after they appealed and put in submissions.
 - 17.4. They had referred the matter to the Council as an unfair labour practice, Section 186(2)(b), because they believed that the Applicant is not guilty.

THE RESPONDENT'S OPENING STATEMENT

18. The Respondent's representative submitted as follows:
- 18.1. The Respondent will prove that they never committed any unfair labour practice when the Applicant was found guilty, when he committed the act of misconduct on the date of 24th May 2021, related to fraudulently filling 200 litres into a drum, instead of what was requested, which was 50 litres.
 - 18.2. The Respondent will prove that the sanction that was pronounced, the dismissal, it deemed it fit, for the act of misconduct that was conducted by the Applicant, using all the evidence that will be brought by the chairperson.
 - 18.3. The Respondent is disputing that it has committed an unfair labour practice against the Applicant, as alleged by the Applicant, is saying that the Applicant is guilty of the charge and that the first sanction of the chairperson of the disciplinary hearing was fit and correct.

SURVEY OF EVIDENCE AND ARGUMENT

19. The process was digitally recorded and as such all the evidence will not be captured verbatim. The relevant evidence that is of importance to this case is summarized below.
20. The parties agreed that the Respondent will begin with their evidence.

THE RESPONDENT'S EVIDENCE

21. The Respondent's first witness, ALISTAIR KENT, testified as follows:
- 21.1. He is employed by the Respondent and his responsibilities with the farm section is the Farm Manager.
 - 21.2. The Applicant worked at Cedara Farm Services, where he had also worked and he supervised the Applicant for a number of years

- 21.3. He was responsible for maintaining the land on the research station, production of feed and fodder and maintaining the tractor and farm implement fleet. They also looked after stocks of various materials, including fuel and lubricants.
- 21.4. With reference to A, page 11, the charge against the Applicant and his responsibilities, one of his responsibilities at that stage was the issuing of fuel and lubricants for departmental vehicles, that's tractors and lawn mowers.
- 21.5. He was aware of that incident. It was brought to his attention that something had gone wrong on that day and that an employee of Agricultural Research Council (ARC), had requested 50 litres of fuel and 200 litres were issued. That was brought to their attention by a Security Guard at the gate, "their" meaning him and their Deputy Director at that time, Mr Johan van Rensburg.
- 21.6. They thereafter viewed the video footage to verify her claims and on viewing the video footage they concluded that a misconduct had taken place.
- 21.7. With reference to page 27, read in conjunction with page 28, page 27 was the standard request form for the issuing of fuels. What normally happens is when one of the sections requests or needs fuel to conduct their duties they fill in the request form and there is a column for each. Whatever they were requesting must go into a portable container or directly into the vehicle. The columns were "fuel, requesting section, type of vehicle, vehicle registration/barcode, portable container (yes/no), estimated quantity required, bowser reading before dispensing, bowser reading after dispensing, quantity actually dispensed (must not exceed the estimate)".
- 21.8. The last column was the final amount that was dispensed, which the person who was dispensing writes. The Applicant was the person who wrote the final amount, according to that document.
- 21.9. He was asked how exactly should the Applicant ensure that this is the correct amount of fuel that has been dispensed and his response was that you would normally use the meter reading on the pump.
- 21.10. With reference to whether the meter reading at the pump was working correctly, he has been told that there was a problem with that but he hasn't been able to confirm that.
- 21.11. He confirmed that it has been alleged that a drum was used.
- 21.12. He was asked, if he had been told that the fuel pump was not working properly, what was the proper method that the Applicant could use to ensure that he issued the correct fuel, as per request and his response was that you would normally put the fuel into a container with the known volume or capacity. In this case 50 litres were requested. The easiest way of checking that was to put it into two drums of 25 litres each.
- 21.13. With reference to whether it was proper for an ARC official to come with a drum with a capacity of 200 litres, while requesting 50 litres, it will be irregular because to dispense out of a 200 litre drum is heavy, it's difficult to do, it's easier to dispense out of a 25 litre container.
- 21.14. They also had an instruction for petrol, that no more than 25 litres per section, per week will be issued. He was asked if that also applied to diesel and his response was that he doesn't think it's in the Standard Operating Procedure (SOP), he thinks its diesel only.
- 21.15. With reference to how long it can take to fill either 25 litres or 50 litres, if the nozzle is opened fully, it won't take more than 30 seconds to fill a 25 litre container and for 50 litres it will be twice that, so 30 times 2 is one minute,
- 21.16. With reference to page 28, that was a gate pass to allow people to exit the farm if they are taking materials or products with them, in this case it's fuel. The person who exited would be "Thembinkosi Mkhize", who worked for "ARC – AP CRFU, Vehicle Reg. BY41GS GP, Make: Nissan". He left with 200 litres diesel. It had the person leaving the farm, his signature, that's been approved by the Farm Foreman who was present and it's signed by the Security Guard at the gate.
- 21.17. With reference to page 27, the name and the vehicle, he confirmed that the person exiting the gate is the same person and it's the same vehicle.
- 21.18. Fifty (50) litres were requested and dispensed and 200 litres were written on the gate pass.
- 21.19. More diesel left the gate that was requested or dispensed, according to the documentation.
- 21.20. The Respondent would then be correct to say that the Applicant fraudulently filled + or - 200 litres into a drum, instead of 50 litres as requested.
- 21.21. With reference to page 33, that was the SOP for issuing of fuels.
- 21.22. Clause 3.6. stated "The actual quantity of fuel issued must not exceed the approved estimate as per the request form.
- 21.23. Clause 3.7. stated "The quantity of the fuels must be recorded as per the actual amount issued (refer to 3.6 above).
- 21.24. What happens there is that if an official requests an amount of fuel he cannot exceed that amount on his request form.
- 21.25. With reference to pages 18 to 22, that was photographs of the fuel dispensing pumps at the Cedara farm yard, farm services. The vehicle that belonged to ARC with the drum on the back, was next to it.

- 21.26. He was asked if the Applicant had filled 50 litres in the drum and the Security official came and checked by virtue of shaking it, will it move or will it shake, what will happen. His response was that if the 50 litres was put into a 200 litre drum, the 200 litre drum will only be one quarter full, which means if you shook it, the fuel will slosh around it, you will be able to move it and the fuel will slosh around. If it was full to capacity it will be very difficult to move by hand.
- 21.27. A video recording was played and it was placed on record that it was common cause that it was video footage of the incident that occurred on that particular day from the farm section.
- 21.28. He confirmed that he had seen this before. It was two minutes altogether. The time the Applicant started to dispense the fuel was 15:21:09 and the time he stopped dispensing was 15:25:24. The date was "24-05-2021".
- 21.29. With reference to what we have observed through this video footage, we have seen in the beginning that the vehicle from ARC drove in at 15h21, we saw the employee of ARC, Mr Thembinkosi Mkhize, come out of the vehicle, the Admin Building, the form being filled in or something being written on the form by Mr Thembinkosi Mkhize, we saw them dispensing diesel into a drum that was loaded in the back of the ARC vehicle, a 200 litre drum, the duration of the dispensing was just over four minutes, the Applicant was dispensing the fuel into the drum, as the drum started to get full he climbed onto the vehicle to continue dispensing, it appears that to get the drum filled to the top.
- 21.30. With reference to his evidence that he saw the ARC official with some document and page 33, "Department of Agriculture and Rural Development, Control measures/notes to be read in conjunction with SOP's for the issuing, recording and control of fuels (weekdays, weekends & public holidays)", he confirmed that SOP's is the process that the employee was supposed to follow.
- 21.31. Clause 3.2. stated "The request form is checked by the official on duty for compliance and signatures (refer to specimen signatures of approving officials.)"
- 21.32. He hadn't seen the Applicant checking the compliance on the request form, during his observation. He needed to check the request form. The reason to check it will be to ensure that what is on the request form ties up with the fuel that is issued, the requested amount and the issued amount are the same. It will also be used to check that the form has been signed by the requesting official and the approving official. If the official omits that step they will not be in a position to dispense the accurate requested fuel.
- 21.33. With reference to the video, it started at 15:26:42. The vehicle parked, until it left at 15:31:55.
- 21.34. With reference to the last section of the video, we saw the Security Guard come out, she went to the back of the vehicle, she was then testing the drum for fullness, you could see her pushing against the drum to test for fullness, you saw her getting onto the back of the vehicle and open the lid to look into the drum and you could see her then push against the drum to test fullness. You then saw the Applicant come out of the office and talking to the other two, that's the Security Guard and the requesting official, Mr Mkhize. We also saw Mr Mshengu, the Farm Foreman come and get water from the tap, next to the pump.
- 21.35. With reference to his evidence that he saw the Security Guard testing the drum, it was put to him that the Respondent's representative's understanding was that the volume of the drum was 200 plus and if the dispensed fuel to the drum was 50 litres, which is quarter full of the drum, while the Security was pushing it to test it, what exactly would have happened if it was 50 litres full on the date. His response was that if the drum was quarter full, she should have been able to tilt that drum to an angle and the fuel inside should have been moving. It didn't move, from what we saw in the video footage, during that testing period. He was saying that that the dispensed fuel exceeded 50 litres.
- 21.36. With reference to page 17, that was a "Summary of visual notes made from security camera recordings during issuing of diesel on 24th May 2021 at Cedara farm services office complex". With reference to where it originated from, as far as he knows its Mr Van Rensburg. He read the contents into the record. There was an objection that this was hearsay evidence. The Respondent's representative stated that he might be coming and the evidence was provisionally accepted.
- 21.37. The Security Guard that we saw in the video is the same Security Guard that brought this to his attention and the video we watched is the video he watched after she brought this to his attention.
22. Under cross-examination he stated as follows:
- 22.1. He was not the Applicant's Supervisor in 2021, when these allegations emanated because he wasn't at Farm Services at that time. He was on a precautionary transfer to Grassland Science because of unfounded allegations.
- 22.2. It was put to him that the Applicant's version is that he was precautionary transferred because the Applicant was a Whistleblower against him, allegations of misrepresentation of the state resources by the farm section, where he is a Manager and his response was that the allegations were not founded.

- 22.3. It was put to him that he said that he got the information from the Security Guard and was asked if the Security Guard came to him, because he said he was in Grass Services. His response was that the Applicant was supervised by Mr Van Rensburg, who was the Deputy Director at that time. The Security Guard would have gone to Mr Van Rensburg. He confirmed that that the Security Guard did not come to him.
- 22.4. He confirmed that he was not involved in the operation of the farm during that period. He got involved because he was asked by Mr Van Rensburg to view the evidence, that is the video footage, to give his opinion on it, as he was familiar with the normal functioning of Farm Services.
- 22.5. It was put to him that they dispute that and their version is that he had hate for the Applicant and he colluded with his friends to fabricate the incident against him, to get back to him, which he disputed.
- 22.6. He confirmed that he was not physically there on the day of the incident and that he did not witness how much diesel was there in the drum with his naked eyes. He witnessed it on the video that was shown to him, which was the same video that all of us watched the previous day.
- 22.7. It was put to him that in his evidence he mentioned the usage of 25 litre containers and was asked if the Department or Farm Services made provisions of 25 litre containers to use for dispensing the diesel, while there was a problem with the pumps there. His response was that the usual protocol is that the sections requesting fuel will arrive with their own portable container of 25 litres, it is not up to Farm Services to provide that container.
- 22.8. He was asked why would he think that the Applicant will have those containers there when it's not provided to him, that he testified about the use of 25 litre containers, that 2 X 25 litre containers should have been used and where was the Applicant supposed to get these containers from if the Department did not supply them and his response was that usually the requesting section comes with their own container.
- 22.9. He was asked if the Applicant has control over the requesting section to bring in the container equivalent to what he is saying and his response was that he can insist that they bring the correct container.
- 22.10. He was aware that that happened in the midst of COVID 19.
- 22.11. It was put to him that there were no containers for the Applicant from the Farm Section and the Applicant's representative won't be commenting on the requesting section because they are not part of the Respondent and his response was that he would agree that the Applicant would not have access to a farm services 25 litre provided container.
- 22.12. He was asked in terms of the requesting section, is it disallowed for them to come through with a drum, is it allowed or not, either for the dispensing of diesel or fuel and his response was that the usual is for them to arrive with their own 25 litre container, it is unusual for them to arrive with the drum.
- 22.13. It was put to him that on the video he mentioned that the drum was full and the Security Guard couldn't push the drum and was asked if he also captured the moment when she was given a phone light to use, to see the amount of diesel inside because if the diesel was full she was not going to use the light to see and his response was that he saw her peeping into the drum.
- 22.14. With reference to A, page 61, (Disciplinary enquiry report), Employee case, "The Accused employee was the first witness to deliver the evidence in his defence... He stated that it is normal to use the drum for the diesel..." it was put to him that the Applicant also conceded that its normal to use the drum. His response was that it was unusual to use the drum, he was not saying it was impossible, the drum is usually used for sections that are filling diesel for standing operations.
- 22.15. He was a witness at the internal disciplinary hearing.
- 22.16. The period of his precautionary transfer was from September 2019 to September 2023.
- 22.17. He was asked if he was aware that the pumps were faulty before he was precautionary transferred to Grassland Science and his response was that before he was precautionary transferred the pumps were functioning.
- 22.18. It was put to him that the Applicant's representative was disputing that but was going to lead evidence on that because their version is that the Applicant always tells him about the pumps, which he disputed.
- 22.19. He was asked if he was aware that there was a Technician, Engineer, that was appointed to change the pumps because they were giving wrong readings, they were faulty and sometimes they didn't dispense diesel, they dispensed air. His response was yes, the new diesel system was installed, tanks were cleaned and inspected and new pumps were installed. It was sometime during his absence, around the 2022 period.
- 22.20. It was put to him that its because they were faulty and his response was that they were replaced because they needed to be replaced.
- 22.21. With reference to page 17, "Summary of visual notes from security camera...", it is his assumption that this was compiled by Mr Van Rensburg but there is no signature on it. He confirmed that he did not know who the author of it is.
- 22.22. He disputed that dispensing of diesel was not part of the Applicant's job function but he was assisting with this because there was nobody who was allocated to dispense diesel.

- 22.23. It was put to him that their version is that it was not part of his job description (JD) to dispense diesel, which he disputed.
- 22.24. With reference to page 27, Request form for fuels, the requesting official requests the fuel, so he writes it and gets it approved by the Supervisor.
- 22.25. In terms of who writes on the gate pass, it will normally be the person issuing the fuel or the other product. It was put to him that the Applicant was disputing that.
- 22.26. With reference to page 26, that was a clearer copy of page 27.
- 22.27. With reference to page 28.2, Cedara Farm Services: Gate Pass, which stated : “*Note: A receiving or an issuing official cannot sign a “Pass Out”, it was put to him that their version is that the Applicant was issuing this, he was never completing this because the procedure doesn’t allow him to complete this form. His response was that he thinks its quite clear here, it says “cannot sign”, in other words approve.
- 22.28. It was put to him that their version is that the Applicant was always being told by him that he’s not supposed to complete that form and he’s kept it that way up until today. His response was that he disputes that, he can complete the form, he just can’t approve by his own signature, that’s all.
- 22.29. With reference to whether he knows the Applicant’s handwriting as a Supervisor, mostly he can recognize it. With reference to page 28, it doesn’t look like his handwriting and with reference to whether he agreed with the Applicant’s representative that it was not the Applicant that completed this form, he will say somebody else completed this form.
- 22.30. With reference to page 26, he was asked who changed the quantity there, the actual quantity dispensed, the last block, it’s handwritten over, is he able to answer this and his response was that he is unable to answer.
- 22.31. With reference to page 28, he was asked if he is able to answer who altered the diesel litres because it’s also written over, does he know who changed that and his response was no.
- 22.32. It was put to him that this written over is part of the plan to get rid of the Applicant, which he disputed.
- 22.33. With reference to page 13, Investigation report into alleged misconduct against Mr J Kistasami and others (pages 13 to 16), it was put to him that this is Mr Tshobeni’s investigation report and his name is mentioned on 3.1, part of management and was asked if he has been interviewed by the Investigating Officer. His response was that he doesn’t know him, he might have interviewed him but the person he has been dealing with is Mr Shubalala on this case, this is dated the 20 September 2021, which is nearly four years ago.
- 22.34. He did not know who was representing the Respondent at the internal disciplinary hearing. He was only called in as a witness.
- 22.35. With reference to page 13, 3.1, which stated “Management, Messrs A Kent and J Van Rensburg gave me an understanding that the department supplies fuel to various sections for their daily activities....”, it was put to him that he has met Mr Tshobeni during the investigation and he also met the Applicant during the hearing, where he was an evidence leader. His response was that the person he has been dealing with internally is Mr Shubalala, who did come with somebody else from the Department of Health. He confirmed that it is possible that that was Mr Tshobeni and that he interviewed him, where he spoke to the management
- 22.36. With reference to page 16, 4.9, which stated “Management had also raised an issue that Kistasami was failing to record the reading of the fuel pump before and after filling of fuel. Mshengu indicated that the pumps were very old and they were not giving the correct reading, he stated that he had raised that issue with Johan many times. Mshengu stated that at times they would fill up a tractor but the pump would only show that they dispensed two litres”, it was put to him that this is an official document of the Investigating Officer. He had no comment.
- 22.37. With reference to page 16, 5. Recommendations, which stated “5.2. Progressive disciplinary actions should be instituted against BP Mwelase, AN Mswazi and T Zuma for approving their own requisitions during the period 01 January 2021 to 30 June 2021”, he was asked if he knows of any progressive discipline that was initiated by the Respondent against the employees and his response was that he doesn’t know if disciplinary action was taken against them, they are not his employees, they never fell under him and never reported to him.
- 22.38. It was put to him that these officials were never subjected to any disciplinary action because the aim here was to get the Applicant. He had no comment.
- 22.39. It was put to him that under Recommendations, the Applicant must be subjected to a disciplinary hearing. He had no comment.
- 22.40. With reference to page 16, 4.10. which stated “I am of the view that it is the responsibility of the employer to ensure that the systems in place are efficient for everyone to be able to fulfill their mandate. I also requested pump records which would confirm the exact amount of litres that were dispensed and their times on the 24 May 2021. I was told that the department did not have that system, everything was being recorded manually. I therefore find it difficult to hold Kistasami responsible for failing to record pumps reading before and after filling because I was made to believe that the system was not accurate which meant that even if the numbers could

be recorded they would be misleading the department”, it was put to him that these are recommendations of the Investigation report, KwaZulu-Natal Province Health. His response was that that’s the opinion of the Investigating Officer, it’s an opinion, so no comment.

- 22.41. With reference to page 44, it was put to him that this is the Job Description (JD) of the Applicant, (pages 44 to 47), reporting to Senior/Control Farm Manager. With reference to whether that is him, he was at one stage Senior Farm Manager. He later became Control Farm Manager. He confirmed that it is correct and that is the JD of the Applicant.
- 22.42. He was asked to take us through that, if it says he must dispense diesel because he said it was his duty to dispense diesel, is it there and his response was it is here, page 45, part number 5, “Appointed Transport Officer: Render transversal (across sections’) transport support services...”. It was put to him that the Applicant is disputing that, that is not dispensing diesel.
- 22.43. He confirmed that that was his signature on each page of the JD and on page 47.
- 22.44. He was asked how his relationship with the Applicant is and his response was currently it’s not a good relationship.
- 22.45. He had stopped supervising him in December 2024. He confirmed that when he returned from his precautionary suspension he was supervising him.

23. The Respondent’s second witness, LINDOKUHLE CONNESIUS MSHENGU, testified as follows:

- 23.1. He is employed by the Respondent and is a Farm Foreman at Cedara Farm Services.
- 23.2. His responsibility is to do the production. He also assists with the signing of the gate passes. With reference to what he is mostly signing out, it was the signing, like if somebody is issuing the fuel, petrol or diesel, they have to have the gate pass for that and if someone is borrowing the fertilizer they have to write the pass out for that before it goes out of the gate.
- 23.3. It was put to him that the Applicant has been accused of committing a misconduct, with reference to A, page 11 and was asked if he recalled this incident. His response was yes, he remembers the incident but its been a long time here.
- 23.4. In relation to this day, the role that he played was that he signed the pass out. Before you sign the pass out you need to check the amount of those things that they sign at the gate about, if it’s a fertilizer how many, if its diesel, they have to see how many litres.
- 23.5. With reference to page 27, that was a Request form for fuels and 50 litres was requested.
- 23.6. He was asked if there’s 50 litres that is requested, what are the responsibilities now for the officials that’s going to be dispensing the fuel, once you have received this request form and its been noted there is 50 litres and his response was yes, it’s the estimated quantity requested, he has to dispense those 50 litres.
- 23.7. With reference to what is requested in terms of this, the estimated request for fuel was 50 litres and on the other side, the first block on the page, that amount is the exact amount that is dispensed. If it exceeds the amount that is dispensed, the one that is dispensing the fuel has to write it and according to this document, the Applicant was dispensing the fuel.
- 23.8. With reference to page 28, that is a gate pass, which he is responsible to sign and which he signed. He checked the fuels before he signed. With reference to what he established is there, he checked, the drum was not full and on the fuel on the bowser was 50 litres. The drum was half full, he thinks it was half full because “you can shake it, you can push it with the hand, it was not full”.
- 23.9. He was asked if he is telling us the drum was not full, the amount that was dispensed, did it collaborate with the amount that was estimated and the one that was dispensed. His response was that based on the reading for the bowser, it was 50 litres but on the drum maybe was more than 50 litres.
- 23.10. The Security wrote “200L” on page 28, it was not him.
- 23.11. It was put to him that he indicated that the drum was not full but it was half full and his response was yes, about half full but it was not full.
- 23.12. He understood the volume of the drum. It can take 210 litres.
- 23.13. He was asked if he said the drum was half full and it can take 210 litres, how many litres could it be if it was half full and his response was maybe 100 or 90, if it was half full, plus or minus 100. He confirmed that plus or minus 100 exceeds what was requested.
- 23.14. It was put to him that we had a witness here, he told us that the bowsers can be faulty and was asked if that was correct and his response was yes.
- 23.15. He was asked if he can tell us when the bowser was reported to the Seniors, that they are faulty, a date, year or month and his response was that he thinks the year, about 2020. They were having problems from 2020, sometimes they were jamming the belt for the motor that was running.

- 23.16. With reference to page 11, (charges of misconduct), he confirmed that as from 2020 the Applicant was responsible to dispense the fuel, until the date of the incident. He was the one who was in charge of dispensing the fuels but they were also helping when he was not around.
- 23.17. He was asked, so if the bowser was faulty as from that date, what are the measures would be ensured that whoever's responsible dispensed the accurate fuel, without relying on the meter readings. His response was maybe you can use the container for the same amount that the person that was requesting, maybe that was the only solution to be used.
- 23.18. With reference to page 33, "Control measures/notes to be read in conjunction with SOP's for the issuing, recording and control of fuels (weekdays, weekends & public holidays), he was familiar with that document. It is the SOP's. The purpose of it was for the fuels but he didn't read everything on the document because the problem that was there was a Director, Van Rensburg wanted them to sign this document but they couldn't sign it because the bowsers are not working properly. They must sort out the bowser first before they can sign it.
- 23.19. He confirmed that he has never appended his signature to this document because of the bowsers.
- 23.20. With reference to Clause 3. "Receive approved fuel request forms for the issuing of fuel" and Clause 3.6 which stated "The actual quantity of fuel issued must not exceed the approved estimate as per the request form", he was asked, as a person who is dealing with fuel, what does this mean. His response was that as he said, they didn't sign this document because if they signed it, on the request form there is an estimated request and an actual amount, if they sign SOP's that means that they agreed upon all the information that is written on the SOP's, but they couldn't sign the SOP's because other things were here on the SOP's were binding them while the machinery, the bowsers were not working properly, so if they agreed on these things, the SOP's but the Seniors haven't sorted out the bowsers, who will be liable for, because if you're dispensing, like you're dispensing 50 litres and the reading on the bowser is 50 litres, then you write according to the bowser, so they wanted to implement these SOP's while they hadn't sorted about the other problems.
- 23.21. With reference to page 28, he was asked if he has signed this pass out, what is the amount of the fuel that he is endorsing, that is actually the correct amount and his response was as he said, the drum was about half full, it was plus or minus 100. There is an alteration there on the form, on the form you see the "200".
- 23.22. He was asked, so if there is an alteration, when was the alteration, after he signed or before he signed it and his response was after he signed it.
- 23.23. The Respondent's representative confirmed that he did not have the original form and this is the only copy, the filled one. With reference to where the original is, he stated that it's with the documents in Farm Section because this document is supposed to be kept by them. It was placed on record that I wanted to see the original document to see if it was altered and the Respondent's representative stated that he will check with the Farm Section, if they are able to get this document for us.
- 23.24. He was asked, when he signed the document what was written there in front of litres and his response was it was a "100".
- 23.25. It was put to him that he had a request form for requesting 50 litres, which he confirmed.
- 23.26. It was put to him that on the other column is 50 litres of fuel, the actual fuel that was dispensed, we come back to page 28, he has told us the drum was not full, it was half full when he was checking it and when he signed this document, as much as he is saying there is a discrepancy in terms of this actual amount, when he sees these two don't collaborate, what is his role or responsibility. His response was that his role was to sign the pass out and then check how much was taken out of the gate.
- 23.27. He was asked, so if there is a discrepancy and something was issued outside of what was requested, he doesn't report those matters and his response was like he said before, that as the bowser was having a problem, he thinks the Applicant wrote according to the reading on the bowser and he writes the pass out based only on something that he saw, as he said it was half full, he wrote based on the amount that was on the container.
- 23.28. With reference to how he saw that it was half full, the drum has got lines on it, the line on the centre of the drum, that is the half of the drum. He was asked, so what did he see and his response was he thinks the fuel was about up to that line. He confirmed that that was the centre line.
24. Under cross-examination he stated as follows:
- 24.1. It was put to him that the Applicant's version is that these charges against him were fabricated by Farm Management because the Applicant was a Whistleblower, when Mr Kent was precautionary suspended from the Farm Section and placed in another section with serious allegations of misuse and abuse of the State's resources by the Farm section. He had no comment.
- 24.2. It was put to him that he also mentioned in his evidence in chief that he also saw the reading was 50 litres on the pumps, which he confirmed.

- 24.3. With reference to page 28, he confirmed that these allegations emanated on the 24th May. It was put to him that the Applicant's representative sees there that he had written Lindokuhle Mshengu, he signed there but he wrote "21" and was asked what happened, why did he write "21" and then on the bottom of the page is "24" and also on the charge itself its written "24". His response was maybe it was a misprint. He did not declare that he might have a misprint, the "21" there, to the employer, to the Investigating Officer. They didn't ask him about it.
- 24.4. He wasn't aware of why they never asked him about it. It was put to him that the reason the employer did not ask him about the "21" is that he was part of the plan to get the Applicant dismissed, which he disputed.
- 24.5. He was asked to explain why he wrote "21" there because the charge is "24" and what's written at the bottom is "24" and his response was because when he checked there on the calendar, the "21" is on Friday and "24" is on Monday, so maybe there is another request form because the fuel is taken now and then, so he can't say that, because the date falls on the working day, both of them.
- 24.6. With reference to page 28, he was asked, according to him, when did he sign this form and his response was based on the form, its 21st, so its 21st.
- 24.7. He was not sure which day of the week this diesel was dispensed, Monday or Friday, its been a long time.
- 24.8. He confirmed that it means that he checked the diesel on the 21st, according to the form.
- 24.9. It was put to him, so it means diesel was dispensed on the 21st, because he was there, and his response was its been a long time, it was dispensed on the 21st, based on what is written there.
- 24.10. It was put to him, so it means that these charges that have been captured here are wrongly captured since it says it happened on the 24th, yet he signed the gate pass on the 21st and he says that the diesel was dispensed on the 21st and his response was yes, he can say that, according to the gate pass the diesel was dispensed on the 21st.
- 24.11. He was asked, so does he agree with the Applicant's representative when he's putting their version again to him, to say this was fabricated against the Applicant because this is the employers bundle, they brought all of this to them, does he agree with him that these charges were fabricated. He had no comment.
- 24.12. With reference to the number of litres, page 27, it was put to him that they both agree that 50 litres were requested according to the form, which he confirmed.
- 24.13. With reference to page 28, it was put to him that the diesel that left the farm, according to this form is "200L", so in his evidence in chief he said it was "100" and the Applicant's representative disagrees with him because if you look at that there, the first "0" in the "200L", you can see that there is a number underneath there, that number was "5" and they wrote "0" over "5" and they put in the front to put "200", does he agree, that is what we see here, does he agree with him that the number under "0" there is not "1", it might be "5", it might be another number, there is not "1", their version is that its "5". He had no comment.
- 24.14. With reference to page 28, after he has checked and verified, it was taken at the same time.
- 24.15. He confirmed that there are no occasions where you request the diesel today and somebody will come after three days to take it.
- 24.16. He was asked, so what did he make of this, that he signs on the 21st, to confirm the diesel or the fuel and underneath there, its signed "24" by whoever has signed there and his response was as he said, it might be a different form for this pass out, the request is different from this one that is attached. With reference to what he meant when he said different forms, he means the Request form.
- 24.17. He was asked how is it that is different because the employer has charged the Applicant based on this form, so he is saying that there might be another form that is correct and his response was maybe this pass out doesn't go with this request form.
- 24.18. He was asked, so would he agree with the Applicant's representative again that this information is fabricated because he is saying here that this information that is attached doesn't go with this form and his response was based on the form, the date is not corresponding, he can say there is something that is, the form doesn't correspond with the pass out, based on the date.
- 24.19. He has been a Farm Foreman there for nine 9 years. This has not happened before, that a request form and the gate pass contain different information. It has not happened since he is there, that you request on the 19th and the person comes to collect on another day.
- 24.20. He confirmed that he is a part of the Management as a Farm Foreman. They had discussed the issues of the faulty pumps there with the top Management, Mr Van Rensburg only, because he was the one who was in charge. Mr Kent was not there, he was suspended to another section.
- 24.21. With reference to who was more senior between Mr Kent and Mr Van Rensburg, Van Rensburg was the Senior and Mr Kent was reporting to him.
- 24.22. With reference to page 13, Investigation report, he confirmed that he was interviewed by the Investigating Officer, Mr LZ Tshobeni.

- 24.23. With reference to page 13, 3.5, which stated "LC Mshengu was employed as Farm Forman with effect from 01 May 2015 but had total of 12 years continued service with the department. Mshengu indicated that he was the one who signed gate pass for Mkhize on the 24 May 2021, he also confirmed that Mkhize had taken 200L's of diesel with a drum loaded in a bakkie", he was asked what is it that is here because it contradicts his evidence, because according to this investigating report, he said 200 litres diesel with the drum loaded in the bakkie and was asked so he is disputing what is written here in the report. His response was yes, he signed the pass out but he didn't say that the drum was full of diesel.
- 24.24. With reference to "He also confirmed that Mkhize had taken 200L's of diesel with a drum loaded in a bakkie", he did not say that. With reference to what he said to the Investigating Officer, he said that Mkhize had a 210 container or a drum.
- 24.25. He confirmed that he was disputing that he said Mr Mkhize left with the drum that had 200 litres inside,
- 24.26. With reference to page 14, 3.6. which stated "Mshengu stated that he did not see Mkhize's request form, he only signed a gate-pass document based on what was in front of him which was a drum full of diesel", as he said before, the diesel was on the drum container but he didn't say the drum was full of diesel and yes, he signed the pass out.
- 24.27. With reference to whether he said what is captured in 3.6 to the Investigating Officer, he said yes, he didn't see the request form and he did sign the gate pass. The only person who saw the request form was the one that was issuing. He confirmed that he was disputing that part of "drum full of diesel".
- 24.28. With reference to page 14, 3.7. which stated "Mshengu indicated that their main problem was that the fuel pump readings were not working and had brought that issue to the Johan's attention several times. He believed the pumps needed to be changed so that there could be a system where everything could be recorded electronically", he confirmed what was captured there.
- 24.29. With reference to his evidence when he was asked what might be the solution if the pumps were not working, there weren't any containers there that the Applicant could use to assist him to measure the amount of diesel.
- 24.30. With reference to page 15, 4. Analysis and finding, 4.1. which stated "I was appointed to investigate allegations of misconduct against J Kistasami and others. Management presented a video footage showing Kistasami filling fuel (diesel) into a drum that was loaded into a Nissan bakkie. The requisition was for 50L of diesel, the gate pass was issued by LC Mshengu and it was for 200L even though it looked to have been overwritten but he confirmed that he was the one who issued it and he satisfied himself that the diesel was 200L as the drum was full", his comment on that was that as he said, on page 14, the drum was 200 litre but he didn't say that the drum was full of diesel, it might have a misunderstanding of the drum and diesel, "the drum full of diesel".
- 24.31. He confirmed that he was saying that the capturing of that information was completely wrong, that the drum was full of 200 litres.
- 24.32. With reference to page 16, 4.9. which stated "Management had also raised an issue that Kistasami was failing to record the reading of the fuel pump before and after filling of fuel. Mshengu indicated that the pumps were very old and they were not giving the correct reading, he stated that he had raised that issue with Johan many times. Mshengu stated that at times they would fill up a tractor but the pump would only show that they dispensed two litres", he did not say the last sentence.
- 24.33. With reference to page 16, 5, Recommendations, 5.1. and 5.2, he was asked if he sees that the target was the Applicant here, there were other people that committed misconduct but progressive disciplinary actions was recommended for them. He had no comment.
- 24.34. With reference to 5.5. which stated "Management need to improve or upgrade the fuel pumps", it was put to him so it confirms that the pumps were not working and it needed to be replaced and his response was yes, the pumps were old. He agreed with this recommendation.
- 24.35. The pumps have been replaced. He could not remember when but they were replaced after this incident.
- 24.36. He was asked how did he measure the diesel in the drums, did he use his naked eye or had an instrument to measure the diesel in the drums and his response was that he used his eyes.
- 24.37. It was put to him because he said it was plus minus 90 or 100, which he confirmed.
- 24.38. It was put to him that they are disputing that because as far as the Applicant's representative understands, his eyes does not have any instrument to measure any fuel inside the drum. His response was that he doesn't have any comment because he hears what the Applicant's representative is saying.
- 24.39. It was put to him that their version is that the diesel inside the drum might be more than 50, it might be plus minus 50 litres inside, because of the wrong readings the pumps were giving. He had no comment. He was asked but he is not disputing their version and his response was no.
- 24.40. He was not aware that dispensing of diesel was not one of the Applicant's duties, according to his JD and that he was requested by the Management of the farm, Mr Kent and Mr Johan Van Rensburg to assist in dispensing of diesel.

- 24.41. It was put to him that it is also their version that the Management requested the Applicant to dispense diesel because they wanted to catch him and they knew that the pumps were giving wrong readings. He had no comment.
25. The Respondent's third witness, SIBONGILE MCHUNU, testified as follows:
- 25.1. She is currently the Director of the Agricultural Training Institute but when they sat for the case she was the Head of Ministry, Director of the Colleges.
- 25.2. There was a session or appeals meeting in relation to the appeal that was declared by the Applicant and her role was the Chairperson of the sitting.
- 25.3. The role of the appeals committee was briefly when cases have been heard and a sanction has been imposed, a person who has been found guilty has liberty or has the right to appeal to that particular body, internally in the department, so that is what they were doing. That body has a right to uphold or to reduce the sentence, taking into cognizance the factors or the evidence that has been brought forward. It has jurisdiction to uphold the sanction, to reduce the sanction or dismiss the sanction.
- 25.4. It was placed on record that there were no minutes of the appeal hearing in the bundle of documents.
- 25.5. She was asked if she could highlight the reasons for her finding and any decision that was taken. Her response was that the case that was put in front of them was for the Applicant. It was regarding the fuel, diesel, that was requested for 50 litres, if she recalls, but more than that was put in the drum that they used. They went through the testimony from the witnesses, there were also photographs that were shown and there was also a video because you could see that that these photographs were taken off the CCTV and you would see two people, the drum and the vehicle, which were evident in the pictures.
- 25.6. The witnesses were all pointing to the fact that it was either 200 litres or more than that 210, others will say it's 100. It was the Security, the one that has to write, that is 50 litres, the one that is dispensed and has to go through the gate. She thinks the dispensing part, the one that has to grant access, the one that has to take the stuff, something was written 50, in what she has read, changed the 50 to 200, because of checking that number, this may not be the 50 litres, so it's those things that enabled them to also say there was misconduct, there was fraudulent filling of fuel.
- 25.7. They also read the analysis of the Presiding Officer at that time, Mr Zwane. If you go through the witnesses, the Supervisors that were there, even they pointed to that. What was also intriguing for them to establish was on the part of the employee who has committed such, was no remorse, even after engagements with the Supervisors. What was also established was that there were no fuel recordings, then how do you account for what has been utilized or requested.
- 25.8. She was making an example to say if you are given responsibility for this, you are dispensing stationery, they get pens, boxes, hundreds of them, if she requested 20, a record should be made to that effect as an Administrator, to be able to account as a responsible person, so in this instance there were indications but this would be people saying different things but there was establishment that the pumps were giving incorrect readings, which was established by the Applicant. It was something that he mentioned on one of the submissions he made.
- 25.9. Taking that into consideration, they then felt that the sanction was a bit too harsh if it's a complete dismissal. What was given to them and they also realised that he has a family and their aim, she believes was just consequence management but as much as a person mitigates and whatever a person is saying, it follows a place in your head, you do want a person to learn from his mistake hence they speak of consequence management in a workplace.
- 25.10. The sanction was dismissal but as that committee, they reduced it to three months suspension without pay because of the factors that she had mentioned but that does not take away from the fact that there was a misconduct. The sanction was harsh but that was not to say that there was no misconduct.
- 25.11. She thinks there were about five or six people on their committee. They established that there was fraudulent filling of fuel, regardless of them reducing the sanction.
- 25.12. She was asked, since they have actually reduced the sanction from dismissal to three months suspension, was the Presiding Officer of the hearing wrong to find the Applicant guilty as his finding, with reference to Mr Zwane and her response was no, he was not, in fact if there is such, whether intentionally or unintentionally, so stealing or misappropriating anything from work is a dismissible offence.
- 25.13. She confirmed that she was saying that the sanction was reduced in consideration of the submission that was made by the Applicant. It was based on those factors and also a human element amongst themselves, that at his age, where is he going to be employed. Their aim was not to make people unemployable but they want people to learn that from any wrongdoing there was a consequence.

26. Under cross-examination she stated as follows:
- 26.1. She was not aware that the fuel pumps were faulty and that there was a fraudulent filling of fuel. She got that from the documents that were presented to them.
 - 26.2. With reference to page 58, she confirmed that that was the report of Mr Zwane in relation to the Applicant's disciplinary hearing.
 - 26.3. She was asked if this report had been properly captured and her response was that the key issues had been captured.
 - 26.4. It was put to her that the Applicant's representative disputes that because if you look at this report, the Presiding Officer's capturing of evidence and his conclusions, the conclusion of evidence and the conclusion of the Chairperson is not properly captured here, because he only captured the employer's evidence, there were other witnesses for the employee, which has not been captured here. Her response was that she will not answer on that document when she was not there when it was written or consolidated and they will not be privy to the witnesses that were not reflected on the report because they were not party.
 - 26.5. It was put to her that her committee might have made a wrong conclusion because the documents provided to them were incomplete and her response was that for them, the information was there, which was pointing to a wrong doing, because the photos were there, the video was there, because it was a 2021 case.
 - 26.6. She was asked if they heard both sides of the story in this report for them to make an informed decision and her response was that the evidence they had, presented both sides, they did not need to call more witnesses.
 - 26.7. With reference to page 28, she confirmed that she and her committee looked at this because it was part of the evidence. With reference to what did she notice on this one, the inconsistencies that are here, there is an amendment on the litres that were filled.
 - 26.8. It was put to her that with reference to this document, she and her committee might have omitted to spot or might have disregarded it, that the dates were not corresponding. Her response was that it might have been a misprint. She disputed that the document is fraudulent and disputed this version.
 - 26.9. It was put to her that the Applicant's version with reference to page 28 is that this form was tampered with by Management because they wanted to put the employee into trouble, which she disputed.
 - 26.10. It was put to her that it is the Applicant's version that the Applicant was a Whistleblower when the Farm Manager was abusing the staff there and also abusing the departmental resources there, because Mr Kent was suspended, that was precautionary suspension, because the Department wanted to investigate the allegations of him being racist, abusing the resources of the Department and giving unreasonable instructions to employees, so he was moved from Farm Section and he was angry when he was moved there, he was moved to another section for about two years or some sort but when he came back they appointed the Applicant to assist with the dispensing of diesel, knowing the pumps were faulty, that was not part of his duties, they had his JD here, because he wanted to assist, he accepted the request from Management, so they are like a group, that group of White people, so if you took one, you took the other, so they collaborated to fabricate the charges against the Applicant, that is why you find this date not corresponding, there is amendment of things, all of that.
 - 26.11. It was put to her that the Applicant's representative wanted to find out from the Appeals committee, when they were making their decision, were they aware of such crucial information because it seems as if they did not have all the information, they were just presented the case and they made a decision. She was asked if she knows anything about the version that was put to her and her response was no, she doesn't know that version hence she's not discussing it but a lot of things can happen in a workplace.

THE APPLICANT'S EVIDENCE

27. The Applicant, JUSTIN KISTASAMI, testified as follows:
- 27.1. He is currently employed by the Respondent, based at Cedara Farm Services section. His current job title is Senior Administration Clerk, as per his JD and he was appointed by the Department, at Cedara, in July 2009.
 - 27.2. With reference to what exactly happened, he was going to go back a couple of years before the incident actually transpired. It was the time when Mr Kent (the Respondent's first witness) actually came to the Section, Farm Services. Everything was going smoothly before that, according to his JD's and Key Result Areas (KRA's). He was responsible for overseeing administration duties, supervising certain sections within farm services and supervising a couple of staff members, who were mandated to and delegated to do duties within his component.

There was no Farm Manager and Deputy Director at that time. Farm Services was run on basically a skeleton staff.

- 27.3. After the appointment of Mr Kent, in maybe 2013 or 2014, from the very first day that Mr Kent stepped foot in Farm Services, he noted that there was a bad energy and there was some attitude that was shown to him, that he was there to take control of him. As time passed, there were disputes with many things that Mr Kent was making decisions on, which he disputed and he became a Whistleblower.
- 27.4. When he realized that they were doing things that were not proper, not only did he note it, but the staff also noted it. There was a time where Mr Kent was a Farm Manager and he was insisting on a post that needed to be filled in the workshop, a Chief Artisan post, a level 9 and as a Farm Manager he was a level 9, so level 9 cannot supervise a level 9, so in some way they moved his level to level 10, as a Control Farm Manager, he can supervise a Chief Artisan whose a level 9. He was insisting on the Chief Artisan post to be advertised and filled, which he disputed because the right thing at that time was to fill up posts that were more critical than that and at that time the Chief Artisan post was not critical. Even though they disputed, to stop that post from being filled, they, Management, went against it and still filled that post, so he can move up to Control Farm Manager, level 10, to supervise a Chief Artisan on a level 9, "they" meaning Management.
- 27.5. There were then a lot of disputes within Farm Section. The staff were having problems with Mr Kent and they wanted him to be removed from Farm Section. He, being a loyal shop steward from PSA, representing members of PSA, he was therefore seen by Mr Kent as Instigator, to get him out of Farm Services section, which was not true. There were remarks that were made, that he was teaching the staff to get rid of him, which was not true.
- 27.6. Mr Kent was precautionary suspended from Farm section after a while and moved to Grassland Science section and they were instructed to carry on with their duties for the period that he was there. During that period when these disputes were happening, Mr Raymond Marie, who was in charge of dispensing fuel and issuing of oil lubricants to sections, went on retirement.
- 27.7. When Mr Marie retired, around 2011, he requested for assistance, to fill that post because there was nobody else. He asked Management, Mr Kent for the post to be filled and it was declined. They informed him that that post was not on the structure. That's when the dispute of the Chief Artisan arose because Mr Kent asked to fill that post. The duties of Mr Marie was to issue fuel and oil lubricants and keep a record of all that was issued accordingly, fuel, petrol, oil, whatever it was, he kept a record of it, whatever he's dispensing. They were noted on fuel request forms.
- 27.8. When he asked for that post to be filled and it was declined, he decided to inform Management that service delivery still has to go on and they informed him that he should help them to dispense and issue fuels and oils. Management requested him, including Mr Kent and at that moment he accepted, on conditions, that he gets proper assistance and that post will be filled.
- 27.9. He assisted for many years with intervention from farm Foremen, who were also delegated to issue fuel because fuel was used on weekends, public holidays and whenever they needed because he doesn't work on weekends and public holidays, so the bowser keys was amongst all of them, the Supervisors in the Farm section.
- 27.10. After some time, Mr Van Rensburg was appointed as a Deputy Director for Research Stations, which they oversaw. When he was appointed a lot of changes took place at Farm Section. Mr Kent went ahead and appointed the Chief Artisan.
- 27.11. Years have passed and he's been carrying on with his duties, as per his JD and as time went many of his tasks were taken away from him.
- 27.12. Mr Kent was not at Farm Services section at the time of the incident
- 27.13. With reference to A, page 11, the charge and what happened on that day, it was Friday morning and he was carrying on with his normal duties. The date was the 24th May 2021. As he started his duties as normal in the morning, the date would have been the 21st May 2021, the Friday, the camera pictures on their evidence is showing the 24th May 2021, so he doesn't know how the dates are mixed up here, because it happened on the Friday.
- 27.14. COVID rules were still being intensely observed at that time and they were still following the COVID protocols. They were supposed to be working half a day in that period and he was busy with his duties, which were not office bound but moving around the farm. At about 3h00 that afternoon, he was busy locking up when Mr Mkhize, who was employed by the Agricultural Research Council (ARC) spotted him and came to him, informing him that he came to his section earlier and he was not available. He then showed him the Request form for fuel that he came earlier on to fill up, when he was not available.
- 27.15. He then informed Mr Mkhize that he's locking up everything and he needs to leave because most of them had already left. Mr Mkhize informed him to please assist because he needs to work over the weekend and he

needs diesel. He informed Mr Mkhize, "let's do this quickly" because he needs to leave. Mr Mkhize also then informed him that he has this drum in the back of the van because he picked it up from the other section because he was going onto the farm.

- 27.16. He picked the container up from another section, had it in his van and was going onto the farm when he spotted him and came onto his section. Mr Mkhize informed him that he's got this drum, 210 litre, which he can fill diesel in there, must please assist him to fill it in there because he left his containers that he originally came with earlier, at his section.
- 27.17. He even said to Mr Mkhize, "Because you bringing this big drum here, you are looking for trouble, why can't you bring the containers?". Mr Mkhize said it's fine, he can still use this thing to put the fuel in. He then proceeded to issue the diesel, then signed off the request, then proceeded to his office and continued to lock up.
- 27.18. He knew nothing about the pass outs or anything else. On his request it was 50 litres and that is what he issued, according to the bowser reading.
- 27.19. At that moment, not only at that moment, prior to that, months or years ago, they reported that these bowsers were faulty. Over the years, he requested for maintenance and service of these machines, these pumps which was done by reputable companies and they also advised them that these pumps were obsolete and needed to be replaced. The conditions of the pumps were very bad, in terms of the pump readings. It gave wrong readings. The pump sometimes stops and pumps, stops and pumps, it stops and goes. Sometimes he will be holding the nozzle and no fuel will be going in, it will be pumping but no fuel coming through the nozzles.
- 27.20. The drum was not full of diesel on the day of the alleged incident.
- 27.21. He was asked how many litres might have been inside the drum and his response was that he dispensed the fuel, he doesn't know if there was any in there, he dispensed what was required by Mr Mkhize.
- 27.22. It was put to him but there was diesel in the drum and his response was that he can't say "yes" or "no", possibly, he doesn't know.
- 27.23. He confirmed that he dispensed the diesel via the pumps that's got some problems.
- 27.24. He was asked, then what did he rely on to make sure he dispensed the diesel that was requested and his response was the readings on the pump.
- 27.25. With reference to what the reading on the pump was, before he started, he zeroed and when he reached the amount that was requested, he stopped at that amount, which was 50.
- 27.26. It is normal for a person that is requesting to come with the drum.
- 27.27. With reference to the video that showed him looking inside the drum, he was asked how much diesel was inside. His response was that he's not sure, it can be an undisclosed amount.
- 27.28. He does not know how much was inside. He was asked, why he said he doesn't know and his response was that he didn't fill any diesel in there prior to that, he could have come with diesel in there, Mr Mkhize.
- 27.29. The diesel that was dispensed by him was 50 litres. He confirmed that he relied on the pumps.
- 27.30. He was asked, so because the pump was faulty and reported several times, does he think it might be little bit more than 50 or little bit less than 50, since it was faulty and not dispensing and his response was yes.
- 27.31. The drum was not full. He was asked if it was half and his response was no, possible, he doesn't know because what he put in there, it was not full.
- 27.32. It was put to him, so he agreed with the other witness that it might be 100 or half or something of that sort and his response was but he didn't fill half a drum, he only filled what was requested.
- 27.33. The Respondent did not assist him with an instrument to dip inside the drum to measure how much diesel was in the drum and he did not have any containers that were going to assist him in dispensing diesel that he could maybe use to measure the diesel. He was only left with the faulty pump.
- 27.34. With reference to page 13, the Investigating Officer's report, the Investigator did not interview him.
- 27.35. With reference to page 15, 4.1, it was not fair for the Investigating Officer investigating this, knowing that he is the one that dispensed the diesel, not to speak to him. All the other employees involved were given an opportunity to be interviewed.
- 27.36. With reference to 5.1 and 5.2, it was not fair for the Investigating Officer to make recommendations that he must be subjected to a hearing, without fully and thoroughly investigating and speaking to him and the others that were there on that day.
- 27.37. With reference to page 33, he did not sign that SOP because these SOP's were designed after telling Mr Van Rensburg and Mr Kent that these fuel pumps were not working 100%, so how do you expect him to follow out SOP'S when the tools were not right, it didn't balance, so he refused to sign.
- 27.38. He did not get involved with the gate pass out, did not sign it or look at it and did not have any dealings with the pass out.
- 27.39. With reference to the person that was tasked with the passport on page 28, it states the people that were tasked with signing of that pass out, which were the Finance Admin Clerk, Farm Foreman, Chief Artisan and

Farm Manager. Only the Farm Manager signed on that form because either one can sign and therefore it gets verified at the end but there's a received, whose receiving the fuel. He will put his information and sign at the top of the document, "Name" and he will sign. The second part was signed by the four delegates, one of them can sign and then the Security verifies the bottom. That was all he knew about that. He didn't have any dealings with the pass out when he was issuing it. There was nothing for him to sign there.

- 27.40. He did not know who the custodian of that form was, who kept it after the fuel had been dispensed and everything had been filled.
 - 27.41. It was put to him that on the form it looked like "0" was overridden by another number and he confirmed that he saw that. He did not override that number. He didn't have any dealings with that form and never saw it on that day. He only saw the request form.
 - 27.42. It was put to him that on page 27 there was a request for 50 litres and all of them signed on that form, including him, the "24th" and was asked what was happening because on page 28, was the 24th and 21st, that there was no consistency and it looked like that. His response was that he can't seem to understand how all of them signed on the 24th there.
 - 27.43. With reference to page 27, that was the Request form for fuels and that was his signature at the bottom, where it said his name.
 - 27.44. With reference to page 26, that was a fuel request similar to page 27 but for another date. On that day the same gentleman, Mr Mkhize came for fuel with four 25 litre containers and requested for 80 litres of diesel and before he filled it, he told Mr Mkhize to change it to 100 litres because if he fills four 25 litre containers it will come to 100 litres, which was why he changed it.
 - 27.45. Mr Kent and Mr Van Rensburg were not there on the day of the alleged incident. He, the requester and the Security were there.
28. Under cross-examination he stated as follows:
- 28.1. He confirmed that he was entrusted with a supervisory role and had been supervising someone in the fuel section.
 - 28.2. He was asked if it was possible that he can be the Supervisor for a particular person at the fuel position and not understand how it operates and his response was yes.
 - 28.3. It was put to him, so in that manner it means that the Department was wrong to trust him in that particular section and his response was no.
 - 28.4. It was put to him that if he is saying no, then he agrees that he was entrusted to ensure efficiency of that fuel section and his response was that he needs to elaborate on it, he is neutral on that.
 - 28.5. He was asked, so as a person who was entrusted in that section, how had he ensured particularly the efficiency, in terms of dispensing the fuel, as well as the accuracy of the amount that has been dispensed to all the clients. His response was that he has had meetings with management in doing improvements in that section but he was ignored many times, so in terms of efficiency and improving the section he has discussed his proposals to Management and nothing has been done. When he said Management, he was referring to Mr Kent and Mr Van Rensburg.
 - 28.6. It was put to him that when somebody comes from the Farm Section they are clients and his response was that they offer a service.
 - 28.7. It was put to him that when ARC came to request fuel and after he dispensed, the Department, Agriculture needs to charge or bill ARC for that particular fuel, which he confirmed.
 - 28.8. He confirmed that if the Department billed them, it will not be proper to charge them more than what they requested.
 - 28.9. With reference to whether he was asked to dispense fuel, he was asked to assist. It was put to him that he agreed to assist and his response was on certain conditions.
 - 28.10. He agreed that since he was requested, he was entrusted to ensure that he dispensed the amount of fuel that was requested.
 - 28.11. With reference to the day Mr Mkhize came with the drum, he confirmed that he told him he was looking for trouble. He said that because he's coming with a big container.
 - 28.12. He was asked, so if he is saying he was coming with a big container, was a big container not allowed and his response not that it is not allowed, it's the fuel that he was requesting was a less amount to be put in that container.
 - 28.13. He understood what accuracy was.
 - 28.14. He was asked, so if he came with a big container and he understands the accuracy, why didn't he send him back to come back with a relevant amount of container. His response was that he was locking up at that time when he came and it was COVID time, they were following the protocol, then what happened was that Mr

Mkhize noticed him there, came there and said he wanted 50 litres of fuel. He said no problem, he will do it for him. Then, when he noted he had a drum in the back of his van, he said why did you come with such a big container, where is your container and he then he mentioned to him that he pushed up the container from somebody from another section and he was going onto the Farm when he saw him and he came straight to him to request the fuel. He came up to him and asked him to please assist him to issue him the fuel.

- 28.15. The drum was not transparent.
- 28.16. It was put to him that it's common cause that before the incident the fuel pump was faulty, which he confirmed.
- 28.17. It was put to him that he had told us that he came with a drum, of which he indicated through his evidence in chief, that the drum was 210 litres, which meant it's over and above the amount of fuel that was requested and his response was yes, the size of the drum.
- 28.18. It was put to him that we have agreed that it is common cause during his time, its been reported countless of times and its coming from other witnesses, that the fuel pump was faulty, which he confirmed.
- 28.19. He agreed that despite them being faulty, it was dispensing the fuel. The pump was working.
- 28.20. It was put to him to assist us, he has a drum that was not transparent, it's above what was requested, he himself has been working with the fuel pump, understanding that it's faulty, which he confirmed.
- 28.21. He was asked now how exactly is he going to ensure the accuracy while he's dispensing the fuel and his response was by the reading.
- 28.22. It was put to him now he is going to trust something that is faulty and was asked if that was what he was saying. His response was that he has requested numerous times for Management to assist to sort out the problem, either by restoring, repairing or installing new pumps but these requests were denied. It never materialized, he's been telling them on many occasions that these things were faulty and nothing was done, until they fabricated all of this, this incident and tried to accuse him of all of this now, knowing it is faulty, he reported it.
- 28.23. He was asked if it was always faulty, meaning for a long time, every time he used it, was it faulty and his response was no. He confirmed that there were times that it was not faulty.
- 28.24. It was put to him that he said he was going to trust the bowser readings, knowing that it was faulty, he reported it, and was asked how in that particular moment of the incident he trusts something, knowing it is faulty. His response was that he's asked Management not to work on these issuing of fuel because its not his job and he doesn't want to take the responsibility of keeping figures when these pumps are not working properly, so for him to move to execute his duties, which the issuing of fuel is not his job, whereas the Manager, Mr Kent has instructed to him that it is his job, he must do it and he told him it's not in his JD, why does he want him to do this job, by him asking him, that he's trusting something that is faulty, he's complaining to Management and Management is not doing anything.
- 28.25. The amount of fuel that was requested for that day was 50 and according to him, the amount of fuel he dispensed was 50.
- 28.26. It was put to him that the Respondent's representative wants to put this version to him because during his testimony he keeps saying he is not sure how much of fuel was there, which means there was no accuracy in the amount of fuel that was there, in that note there are a lot of people that come with a request to his section, which he confirmed.
- 28.27. It was put to him that the fuel pump situation has always been there and his response was not always been there, its been reported numerous times, when they did servicing of this, the guys said please replace this.
- 28.28. He was asked if he is saying that the Department has been dispensing plus or minus what was requested to the requesters, since we cannot have an accuracy and his response was that he can't answer that.
- 28.29. With reference to page 26, it was put to him that he made a comment on this, which meant he still remembers vividly what happened on that day and his response was yes.
- 28.30. He could not remember who came to request the fuel on that day. He was asked if he did not say during his evidence in chief that the same guy came to collect the fuel the same day and his response was it could be the same guy, he's not too sure, he only commented on that, on the 100 litres, he never mentioned anything else, why it was made in that way, the alteration on the 100, which would have been made on the day.
- 28.31. It was put to him that in his testimony he said he came with four 25 litre containers, because he cannot give the accuracy he must change it to 100 and was asked if that is what he said, can he remember saying that. His response was the reason being he told him that, he came with four 25 litre containers, yes, normally if he comes to purchase 80 litres, he comes with 20 litre containers.
- 28.32. It was put to him that he told him that he must change it because as an entrusted person and as a devoted person, as the Department, the official came with four 25 litre, he wanted to make sure that he filled it accurately hence he told him to change this amount and his response was yes.

- 28.33. With reference to page 27, the Request form for fuels, he confirmed that 50 litres were requested and 50 litres were dispensed, dated 24th May 2021. He did not see any changes on the Request form, in terms of the litres, 50 litres.
- 28.34. He was asked why are there no changes here while on page 26 there were changes and his response was that there are no changes on page 27.
- 28.35. It was put to him but on page 26 there were changes, that he said he changed it because he wanted to ensure accuracy and that a reason being that he came with four 25 litres and four 25 litres are 100 litres, which he confirmed.
- 28.36. It was put to him that the Respondent's representative's question comes again, Mr Mkhize on the day of the 24th came with a drum of 210 litres that was not transparent and he requested 50 litres, pertaining to 25 litres when we understand they are transparent, why are there no changes on this one. His response was that he never made any changes on this one.
- 28.37. He was asked, if he can influence this person who came with four 25 litres to change from 80 to 100, to ensure the accuracy, as we have indicated, why now a person who came with 210 litres there were no changes and his response was because he requested 50 litres.
- 28.38. It was put to him that the one from 80 litres, he's changed to 100 litres, which he confirmed.
- 28.39. It was put to him that there's no consistency and his response was that he requested 50 litres and he gave him 50 litres.
- 28.40. With reference to pages 27 and 28, he confirmed that there has been an issue with the dates. It was put to him that he was saying that the incident happened on the 21st and his response was that he said it's a Friday.
- 28.41. It was put to him that the 21st is a Friday, if you go to the calendar and his representative said that in accordance with the 24th, he kept on insisting that the incident happened on the 21st and was asked if he still maintains that, can he put a clarity to the sitting, do we need to accept that, which means if the fuel was dispensed on the 21st, will they dispense the fuel on the 21st and sign the fuel request on the 24th. His response was yes, because it's reflected there.
- 28.42. He was asked, so he will dispense the fuel on the 21st and sign the document later on the 24th, is that what he is saying and his response was no.
- 28.43. It was put to him that it is in accordance, what is requested is what he signed in the Request form and his response was that he signed the date here but he doesn't know what's happening with the dates.
- 28.44. He was asked if it is procedural, as a Departmental official to sign the request form on the 24th, while the incident happened on the 21st, as he indicated on the forms and his response was that if its procedural it could be a human mistake, an error.
- 28.45. It was put to him that he clearly understands his job, he does it so nice and diligently and the Department appreciates him for that, he certainly understands the efficiency and accuracy, the reason being he is able to, on the 18th of the same month, influence the individual who was requesting the fuel to change from 80 to 100 litres to ensure the accuracy, here on the 24th, just a few days after the 18th, which means he understands the picture and was asked how a few days later he failed to ensure the efficiency, as he had done on the 18th, to dispense the accurate amount of fuel that was requested by Mr Mkhize from ARC. His response was that he wants to say yes, on the 18th, they did the change, the figures from 80 to 100, to accommodate four 25 litres. On the 24th, he used the bowser meter readings to confirm the 50 litres, that's it.
- 28.46. It was put to him that the reason he relies on the bowser reading was because he colluded with Mr Mkhize to commit a fraudulent act on filling plus or minus 200 litres diesel into a drum, to remember he told us that the drum was not transparent, he did it deliberately with the intended intention to defraud the Department, which he disputed.
- 28.47. With reference to page 33, the SOP, he understood that the SOP is for creating something to be done according to standards. He confirmed that he never signed this and agreed that this stands as a guidance, how he must perform his task.
- 28.48. It was put to him that we understand that if it's not signed its null and void and was asked, so if there is no signed SOP, what is guiding his duties and his response was nothing.
- 28.49. It was put to him, so if he says nothing, hence he did as he please and his response was no.
- 28.50. He was asked but how is it in terms of pages 26 and 27, someone will come with 25 litres, then he said they must change, he did as he please, on the 18th and on the 24th someone comes with something else, he just does as he please, because there is nothing guiding him, which he and his other colleagues he referred to, sign it. He had no comment.
- 28.51. With reference to page 16 (Investigation report), he confirmed that there was a time he said he was a shop steward. With reference to 5.2. "Progressive disciplinary actions should be instituted...", he understood the meaning of progressive discipline.

- 28.52. He confirmed that before Mr Kent was suspended he was reporting to him and that as his Supervisor he was supposed to give him instruction, meaning he was supposed to take over as a Supervisor.
29. The Applicant's witness, TEMBINKOSI EDWARD MKHIZE, testified as follows:
- 29.1. He was employed by Agricultural Research Council (ARC) and is no longer employed there.
- 29.2. It was put to him that according to the evidence that was presented, he was the gentleman that came through to Farm Section to make the request for dispense of diesel.
- 29.3. With reference to what happened, he agreed that he was that person who went to request for the diesel at the Farm service. That morning he asked his colleagues to sign the Request form, as the approval for him to go and get the amount of 50 litres at Farm Service. He then went there in the morning, after 8, with two 25 litre containers. He then found that the Applicant was not there, so he went back to his section. He continued with the work that he had to do for the day, which was driving a tractor and go to the field and work there. He then did the job.
- 29.4. It was COVID time. People in his section didn't apply for the rotation. They were short of staff in his group, so they were then told that when they were done with work they can leave because they don't want them to be vulnerable, so in their plans they were all leaving at 12:00, by the time. He would be left behind because he was supervising his staff. It happened like that on that day. He was left behind. He was in the field and came back to park the tractor. There was no-one in his section. Everybody was gone, so he took the same bakkie that he was using in the morning to request the diesel. The aim was to go and close the gate, where he was working in the field. On his way, before the main road there was a KZN bakkie, which stopped him. The 'guy' was working for the section, Facility and he said he's bringing the drum for the 'guy' from Soil Sciences. His name is Patrick Mdladla and he worked at Soil Sciences, so because he was not yet there at Cedara, he asked that 'guy' because they were communicating through phone, because Patrick phoned him too and said he must keep the drum for him.
- 29.5. He asked this 'guy' to put the drum in his bakkie because he knew that there was no-one in his section, offload from him and put it in his truck.
- 29.6. On his way to the field, because it passes through the Farm Service, he saw the Applicant walking inside the Farm service. That was after 3:00. He then went in the Farm Section. He then asked the Applicant, "I came in the morning, you were not here, I came for the diesel but you were not here, lucky now I see you, I still have the requisition form in this same bakkie that I was using this morning". The Applicant then said "No, I'm rushing now, I'm going".
- 29.7. With reference to what he then said to the Applicant, when he appealed, "Justin, but I was there in the morning", he told the Applicant "I need diesel". The Applicant then said to him, "I'm rushing". He then said to the Applicant "No, we can use this container", the one that he was carrying, the 210 litre capacity. The Applicant then laughed at him. He said "You are carrying a big container while you requesting a small amount of diesel". He made a joke then. He said "No, because you rushing, that is the only thing we can do now".
- 29.8. The drum was for diesel, because the drum they were using was the same thing for diesel at Soil Sciences.
- 29.9. The Applicant then helped him. He filled 50 litres, as requested on that form.
- 29.10. With reference what the request was, how many litres was he requesting to be filled, on his request form it was 50 litres that he was requesting.
- 29.11. With reference to how much diesel was dispensed to the drum, according to the readings of the diesel pumps, it was 50 litres.
- 29.12. His response if somebody said that the drum was full would be that it is a lie because the drum was not full.
- 29.13. He went to his section after he took the diesel. He then offloaded because he was going to use the same bakkie home, which also proves that what was in the drum was 50 litres. He wouldn't offload if the drum was full. He was by himself when he offloaded because his team was all gone. They had left at 12:00.
- 29.14. When he left the premises of Farm Section the Security was there. She checked the diesel on the site. She even climbed on the bakkie and checked the drum. He even assisted her with his phone light to check inside the drum. That also proved that the drum was not full because if the drum was full there will be no need for her to check inside the drum if the drum was full, she was going to see the diesel on top of the drum.
- 29.15. The Security checked the gate pass when he left there. He remembers that if you are using the container, you must get a pass out and leave it to her. He left it to her.
- 29.16. With reference to page 28, it was put to him on the litres, on top, the Applicant's representative can see there was another number that was written on top of another number and was asked, so when he left this form, what was written there in terms of litres. His response was it was, he had 50, five zero litres and to witness that, it's

not signed by the Applicant to approve this pass out. It was signed by Mr Mshengu. He's the Farm Foreman. He checks it. It was 50 litres, then he signed it.

- 29.17. It was put to him that Mr Mshengu testified that the drum was not full and his response was that that is true.
 - 29.18. He would not know who wrote the 210 litres there because he left it with the Security there.
 - 29.19. If the Security had questions, she wouldn't have let him out of the gate. He was saying that if the diesel in the drum was more than 50 litres, the Security wouldn't have let him leave outside the gate, with the excess diesel. She opened the gate for him to leave.
 - 29.20. With reference to page 27, he confirmed that that is the request form. He is "Thembinkosi" and "Patrick" is his colleague. The Applicant's signature was underneath that. It was 50 litres, as requested.
 - 29.21. With reference to page 28, he agreed that this was altered. It was 50 Litres. Lindokuhle signed it.
 - 29.22. He was aware that sometimes the diesel pump was faulty at the farm because its something that they were using every week. They came and requested either petrol or diesel. The diesel one had a problem. He doesn't know how many times the Applicant told them that the diesel pump is faulty when they were requesting fuel.
 - 29.23. It was their normal practice from time to time to request diesel using the drum.
30. Under cross-examination he stated as follows:
- 30.1. He confirmed that he was dismissed for an offence he committed and this incident was part of it.
 - 30.2. He had been employed by ARC as the Farm Foreman.
 - 30.3. With reference to whether ARC was part of the Department, ARC was part of the government.
 - 30.4. The Respondent's representative placed on record that it's a government entity that deals with agricultural research.
 - 30.5. He confirmed that on the day in question he went to the Farm section to request for 50 litres and that he went in the first place with two 25 litre containers.
 - 30.6. He was asked will that then mean he wanted to ensure, he wanted to get an accurate amount of diesel that he requested. His response was no, that was not like that, to get the accurate, the pump had a problem, not that the pump was giving the wrong calculation, amount of diesel, when you were using the pump it sometimes was cutting off, it's not that it was giving the wrong readings, it was giving the right readings. For him to carry the two 25 litres, it wasn't for ensuring that he would get 50 litres. Those 25 litres were for them but the drum was not for them, as he mentioned before.
 - 30.7. He was asked if the Respondent's representative would be correct that he relied on what the Applicant has told him about the dispensation and his response yes, but he also checked the reading, the pump. He was asked of which the reading indicated 50 litres and his response was yes.
 - 30.8. It was put to him, so that means both of them relied on something that both of them was aware was faulty and his response was as he mentioned, for him the figures itself, he didn't know if it was saying inaccurate figures, what he knows about the pump is sometimes it cuts, it's what he knows, the fault of it, its not that its giving the wrong figures.
 - 30.9. He confirmed that it wouldn't be fair for the entity that he was working for to be billed an amount that is not accurate.
 - 30.10. With reference to page 26, he was familiar with that document. It was the same as page 24. It says it was a Request for diesel. With reference to the signature, it looks like his signature. He elected not to answer further questions on this document.
 - 30.11. It was put to him based on what we have established, he went there at the Farm Service deliberately, knowing that the fuel pump is faulty, as a result of that he knew that it was not going to dispense an accurate amount of fuel and as a result of that the Department was defrauded an amount of fuel, exceeding of what he has requested, which he disputed. He didn't go there for that reason.
 - 30.12. It was put to him that since he knew there was a fault with the bowser, as an efficient and responsible person from ARC, in a first place he went with two 25 litres to ensure an accuracy, which he disputed.

ANALYSIS OF EVIDENCE AND ARGUMENT

31. Section 186 (2)(b) of the Act provides that an unfair labour practice means any unfair act or omission that arises between an employer and an employee involving unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee.

32. In *NAWA & ANOTHER V DEPARTMENT OF TRADE & INDUSTRY [1998] 7 BLLR 701 (LC)* it was held that it is the Applicant who is required to prove that the conduct or practice falls within the statutory definition of an unfair labour practice.
33. From all the evidence presented before me I am satisfied that the Applicant has established on a balance of probabilities that the Respondent has committed an unfair labour practice against him. The reasons for this finding are set out hereunder.
34. It is trite that any decision taken by an employer must be exercised reasonably and judiciously and that an Arbitrator must be loathe to interfere unless there is gross unreasonableness or mala fides.
35. In issuing this Award I have taken into account all of the evidence and submissions of the parties, as well as the relevant legal principles and case law. For purposes of this Award I do not find it necessary to repeat all of the submissions and will deal with what I perceive to be the essential elements.
36. Many facts in this matter are common cause and much of the evidence presented by both parties was not in dispute.
37. It is common cause that the Applicant was found guilty of the following charge at the internal disciplinary hearing:

“Be advised that you, Mr Justin Kistasami, duly appointed by the KwaZulu-Natal Department of Agriculture and Rural Development as a General Admin Clerk, stationed at Cedara Head office, hereby charged with misconduct in terms of PSCBC Resolution 1 of 2023, as follows:

COUNT 1

It is alleged that, on the 24 May 2021 around 15h21 you fraudulently filled +/- 200 litres of diesel into a drum loaded into Agricultural Research Council vehicle (Nissan, BV41GS GP) instead of 50 litres that was requested.

38. It is common cause that the Applicant was found guilty of the charge and dismissed and that the sanction of dismissal was reduced by the Appeals committee to a three (3) month suspension without pay and a final written warning.
39. It was also common cause that both sanctions had been implemented and that the final written warning was valid for six (6) months, from August 2024 to January 2025.
40. The following facts were also common cause:
 - 40.1. The Applicant dispensed the diesel;
 - 40.2. The diesel pump was faulty and obsolete;
 - 40.3. The pumps were giving the wrong readings;
 - 40.4. The faulty issues were reported to farm managers.
 - 40.5. The pumps were not working at the time of the incident reflected in the charge, the 24th May 2021 and that they were replaced thereafter.
41. The facts in dispute were the amount of diesel that was dispensed on the 24th May 2021, the Chairperson's verdict and the imposed sanction.
42. The Applicant's representative maintained in his opening statement that they believed that the charges against the Applicant were fabricated because he was a Whistleblower.
43. The Respondent's representative maintained in his opening statement that the Respondent is disputing that it has committed an unfair labour practice against the Applicant, is saying that the Applicant is guilty of the charge and that the first sanction of the chairperson of the disciplinary hearing was fit and correct.

44. With reference to the pre-arbitration minutes, the issues that needed to be decided were whether the Applicant was guilty of the misconduct, the appropriateness of the verdict and the sanction issued by the chairperson.
45. In an unfair labour practice dispute, I would be required to determine whether any unfair act or omission has arisen between the Respondent and the Applicant involving unfair suspension of the Applicant or any other unfair disciplinary action short of dismissal in respect of the Applicant, as set out in Section 186 (2)(b) of the Act.
46. In this specific matter I would be required to establish whether or not the Respondent has proven that the Applicant is guilty of the aforementioned charge and if they have, whether or not the sanction that was imposed by the Respondent was appropriate and fair.
47. The Respondent called three witnesses in support of its case and the Applicant testified and called one witness in support of his case.
48. The Respondent's first witness, Mr Kent, the Farm Manager confirmed during cross-examination that he was confirmed not involved in the operation of the farm during that period and he got involved because he was asked by Mr Van Rensburg to view the evidence, that is the video footage, to give his opinion on it, as he was familiar with the normal functioning of Farm Services.
49. He took us through the video footage and placed on record what we had seen in the video, which was not in dispute. He also took us through some of the documents and explained what they were used for, which was also not in dispute. Much of the remainder of his evidence amounted to hearsay evidence and opinion evidence. He confirmed during cross-examination that he was not physically there on the day of the incident and that he did not witness how much diesel was there in the drum with his naked eyes. It was his evidence that he witnessed it on the video that was shown to him.
50. It was common cause that the video presented was video footage of the incident that occurred on that particular day from the farm section. The video footage presented does not show how many litres of fuel were in the drum.
51. The Applicant's version was put to this witness, which he could not dispute.
52. The Respondent's second witness, Mr Mshengu, the Farm Foreman came across as a reliable and truthful witness. He was forthright and confident in his testimony. Much of his evidence was not disputed by the Applicant and in fact corroborated the Applicant's version.
53. It was his evidence that the role he played on the day in question was that he signed the pass out. He testified that before you sign the pass out you need to check the amount of those things that they sign at the gate about, if it's a fertilizer how many, if it's diesel, they have to see how many litres.
54. He gave evidence in respect of page 27, the Request form for fuels, that 50 litres was requested, which was not in dispute.
55. He also gave evidence in respect of page 28, the gate pass, which he was responsible to sign and which he signed. He testified that he checked the fuels before he signed and with reference to what he established is there, he testified that he checked, the drum was not full and on the fuel on the bowser was 50 litres, the drum was half full, he thinks it was half full because "you can shake it, you can push it with the hand, it was not full". When he was asked if he is telling us that the drum was not full, the amount that was dispensed, did it collaborate with the amount that was estimated and the one that was dispensed, his response was that based on the reading for the bowser, it was 50 litres but on the drum maybe was more than 50 litres. When he was asked if he said the drum was half full and it can take 210 litres, how many litres could it be if it was half full, his response was maybe 100 or 90, if it was half full, plus or minus 100. With reference to how he saw that it was half full, he testified that the drum has got lines on it, the line on the centre of the drum, that is the half of the drum. When he was asked, so what did he see, his response was he thinks the fuel was about up to that line and confirmed that that was the centre line.

56. Page 28 reflected inter alia as follows:

“CEDARA FARM SERVICES: GATE PASS

This is to certify that (Name): Thembinkosi Mkhize(handwritten) No: 7411235466087 (handwritten)
Section: ARC-AP CRFU (handwritten) Vehicle Registration: BY41GP (handwritten), Make: Nissan (handwritten)
has been issued and is requesting permission to remove the following fuels/Items.

*Note: The requesting official must draw a line through all blank (unused) rows.

PETROL:..... LITERS

DIESEL: 200L(handwritten) LITRES

OTHER ITEMS (describe in detail below)

(three lines struck across)

Signature of Requesting Official: (signature depicted).

57. When this witness was asked if he has signed this pass out, what is the amount of the fuel that he is endorsing, that is actually the correct amount, his response was as he said, the drum was about half full, it was plus or minus 100. He testified that there is an alteration there on the form, on the form you see the “200” and he was asked so, if there is an alteration, when was the alteration, after he signed or before he signed it and his response was after he signed it. He was asked, when he signed the document what was written there in front of litres and his response was it was a “100”.
58. During cross-examination it was put to him that the diesel that left the farm, according to this form is “200L”, so in his evidence in chief he said it was “100” and the Applicant’s representative disagrees with him because if you look at that there, the first “0” in the “200L”, you can see that there is a number underneath there, that number was “5” and they wrote “0” over “5” and they put in the front to put “200”, does he agree, that is what we see here, does he agree with him that the number under “0” there is not “1”, it might be “5”, it might be another number, there is not “1”, their version is that its “5” and he had no comment.
59. When it was put to the Applicant that on the form it looked like “0” was overridden by another number, he confirmed that he saw that. It was his version that he did not override that number, that he did not have any dealings with that form, never saw it on that day and only saw the request form. This was not disputed by the Respondent.
60. The original document was not presented at the hearing despite it being placed on record that I wanted to see it, to see if it was altered. When the issue was raised during the evidence of this witness, the Respondent’s representative confirmed that he did not have the original form, that this is the only copy and with reference to where the original is, he stated that it’s with the documents in Farm Section because this document is supposed to be kept by them. He undertook to check with the Farm Section, if they are able to get this document for us. It appears that he was unable to source this original document, as it was not submitted at the hearing thereafter. It also appears from the Investigation report that formed part of the bundle of documents, referred to in the evidence, which stated under 4. ANALYSIS AND FINDING that “The requisition was for 50L of diesel, the gate pass was issued by LC Mshengu and it was for 200L even though it looked to have been overwritten but he confirmed that he was the one who issued it and he satisfied himself that the diesel was 200L as the drum was full”.
61. This document was clearly altered and the Respondent was unable to produce the original document or explain who altered this document and why it was altered. On a plain sight of this document, which reflects “200L”, it is clear that the number underneath the second “0” is a “5”, which was altered and written over by “0”. This act of altering this document after it had been signed by the Respondent’s second witness, as per his evidence, is illegal and amounts to forgery. This document cannot be relied upon in these circumstances, as the authenticity of it is completely destroyed in this respect.
62. For completion, there was also a discrepancy on the dates reflected on page 28, where it appears that the Respondent’s second witness signed under “To be completed by One Cedara Farm Official, Farm Foreman”, on the “21/05/2021” and the Security Guard signed on the “24/05/2021”, under “I, Cedara Farm Services Security

Guard, have checked that all items as enlisted above, corresponds to what is being removed from the Farm Services premises”.

63. There was evidence presented by the witnesses in this matter, including the Applicant, in respect of this issue. The incident took place in May 2021, which was a relatively long time ago and I appreciate that the witnesses may not remember exactly when this incident occurred. From the calendar it appears that the 21st May 2021 was a Friday. There may have been a misprint of the dates but I find that nothing significant turns on the issue of the date, substantively, as the incident which led to the charge, which is not in dispute, forms the substance of the charge and it is trite that substance must prevail over form.
64. Mr Mshengu also gave evidence in respect of page 33, “Control measures/notes to be read in conjunction with SOP’s for the issuing, recording and control of fuels (weekdays, weekends & public holidays), that he didn’t read everything on the document because the problem that was there was a Director, Van Rensburg wanted them to sign this document but they couldn’t sign it because the bowsers are not working properly, that they must sort out the bowser first before they can sign it and he confirmed that he has never appended his signature to this document because of the bowsers. He also confirmed in his evidence that the bowsers can be faulty and that this was reported to the Seniors in or about the year 2000.
65. Mr Mshengu was referred to the Investigation report and confirmed that he was interviewed by the Investigating Officer, Mr LZ Tshobeni. With reference to page 13. 3.5, which stated “...Mshengu indicated that he was the one who signed gate pass for Mkhize on the 24 May 2021, he also confirmed that Mkhize had taken 200L’s of diesel with a drum loaded in a bakkie”, he was asked what is it that is here because it contradicts his evidence, because according to this investigating report, he said 200 litres diesel with the drum loaded in the bakkie and was asked so he is disputing what is written here in the report, his response was yes, he signed the pass out but he didn’t say that the drum was full of diesel. With reference to “He also confirmed that Mkhize had taken 200L’s of diesel with a drum loaded in a bakkie”, he confirmed that he did not say that. It was his evidence with reference to what he said to the Investigating Officer, that he said that Mkhize had a 210 container or a drum. He confirmed that he was disputing that he said Mr Mkhize left with the drum that had 200 litres inside.
66. He was referred to page 14, 3.6. which stated “Mshengu stated that he did not see Mkhize’s request form, he only signed a gate-pass document based on what was in front of him which was a drum full of diesel”, it was his evidence that he didn’t say the drum was full of diesel.
67. He was referred to page 16, 4.9. which stated “Management had also raised an issue that Kistasami was failing to record the reading of the fuel pump before and after filling of fuel. Mshengu indicated that the pumps were very old and they were not giving the correct reading, he stated that he had raised that issue with Johan many times. Mshengu stated that at times they would fill up a tractor but the pump would only show that they dispensed two litres”, it was his evidence that he did not say the last sentence.
68. The Investigating Officer was not called by the Respondent to testify and confirm what this witness said to him during the interview, as captured in his report. In the absence of this evidence I have no reason to reject Mr Mshengu’s evidence in this respect and accordingly accept his evidence, that he did not tell the Investigating Officer what was captured in this report, as per his evidence above.
69. During cross-examination Mr Mshengu was asked how did he measure the diesel in the drums, did he use his naked eye or had an instrument to measure the diesel in the drums and his response was that he used his eyes. It was put to him that their version is that the diesel inside the drum might be more than 50, it might be plus minus 50 litres inside, because of the wrong readings the pumps were giving and he had no comment. He was asked but he is not disputing their version and his response was no.
70. The Respondent’s third witness, Ms Mchunu, the Chairperson of the Appeal sitting testified in respect of why the Appeal Committee reduced the sanction of dismissal to the three months suspension without pay. It appears that the finding of the Appeals Committee was based only on the documents presented to them. Much of her evidence was common cause. The Applicant’s version was put to her, which she could not dispute.
71. The Applicant testified in support of his case.

72. It was his version that what it was Friday, at about 3h00 that afternoon, he was busy locking up when Mr Mkhize, who was employed by ARC spotted him and came to him, informing him that he came to his section earlier and he was not available, that he then showed him the Request form for fuel that he came earlier on to fill up, when he was not available. It was also his version that he then informed Mr Mkhize that he's locking up everything and he needs to leave because most of them had already left, that Mr Mkhize informed him to please assist because he needs to work over the weekend and he needs diesel, that he informed Mr Mkhize, "let's do this quickly" because he needs to leave and that Mr Mkhize also then informed him that he has this drum in the back of the van because he picked it up from the other section because he was going onto the farm, a 210 litre, which he can fill diesel in there, must please assist him to fill it in there because he left his containers that he originally came with earlier, at his section.
73. It was also his version that he said to Mr Mkhize, "Because you bringing this big drum here, you are looking for trouble, why can't you bring the containers?", that Mr Mkhize said it's fine, he can still use this thing to put the fuel in, that he then proceeded to issue the diesel, signed off the request, then proceeded to his office and continued to lock up.
74. It was the Applicant's version that on Mr Mkhize's request, it was 50 litres and that is what he issued, according to the bowser reading. He confirmed that he dispensed the diesel via the pumps that's got some problems and was asked, then what did he rely on to make sure he dispensed the diesel that was requested and his response was the readings on the pump. He testified with reference to what the reading on the pump was, that before he started, he zeroed and when he reached the amount that was requested, he stopped at that amount, which was 50. He was asked, so because the pump was faulty and reported several times, does he think it might be little bit more than 50 or little bit less than 50, since it was faulty and not dispensing and his response was yes. He confirmed that the drum was not full and he did not know if it was half full.
75. The Applicant was clear and consistent in his testimony. Much of his evidence could not be disputed by the Respondent and was also not challenged to any material extent during cross-examination. I have no reason to reject any of his evidence and accordingly accept it. His evidence was also corroborated to a material extent by the Respondent's second witness and his witness, Mr Mkhize.
76. The Applicant's witness, Mr Mkhize, who requested the fuel testified in respect of what transpired on the day in question. It was essentially his version that the Applicant filled 50 litres into the drum, as requested on the Request form. With reference to how much diesel was dispensed into the drum, he testified that according to the readings of the diesel pumps, it was 50 litres.
77. Mr Mkhize was also clear and consistent in his testimony. His evidence leading up to the request for the fuel from the Applicant and why the drum was used could not be disputed by the Respondent. He came across as a truthful and honest witness and I see no reason to reject his evidence and accordingly accept it.
78. The Applicant relied on the reading on the pump when he filled this 50 litres of fuel, which was requested, into the drum provided by the requester, Mr Mkhize. The question remains as to what tool or instrument was the Applicant supposed to use when dispensing the fuel, other than the reading of the bowser in the circumstances. It was incumbent on the Respondent to ensure that the pumps were working properly at all times. It appears from the evidence, which is also common cause that the pumps were faulty, which management was aware of.
79. Fraud is defined as the "unlawful making, with intent to defraud, of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another.
80. From the evidence presented to me by the Respondent I could find no evidence to substantiate on a balance of probabilities that the Applicant acted fraudulently when he filled the fuel into the drum.
81. The use of "+/-" in the charge is problematic, in that it does not give a specified tangible amount. The term plus or minus denotes an acceptable range of variation for quantities, measurements or values. In practice this allows for a certain percentage or numerical division above or below the stated amount, such as permitting delivery of 5 % more or less than an ordered quantity. Its core function is to provide flexibility and accommodate minor discrepancies, thereby reducing disputes over small variances.

82. In this matter the Respondent's own witness, the second witness Mr Mshengu confirmed that what was in the drum was plus minus 90 or 100 litres. Even if I had to accept Mr Mshengu's evidence that the drum was half full, as testified, and the amount of diesel that was filled in the drum by the Applicant was 90 or 100 litres, this is not a small variance from 200 litres. None of the Respondent's witnesses could confirm exactly how much of diesel was filled in the drum by the Applicant. In the same vein none of the Respondent's witnesses could confirm that "+/-" 200 litres of diesel were filled into the drum by the Applicant, as set out in the charge.
83. What is also noteworthy is that in the Investigation report on page 16, 14.10, the Investigating Officer stated as follows under 4. Analysis and Finding:
"I am of the view that it is the responsibility of the employer to ensure that the systems in place are efficient for everyone to be able to fulfill their mandate. I also requested pump records which would confirm the exact amount of litres that were dispensed and their times on the 24 May 2021. I was told that the department did not have that system, everything was being recorded manually. I therefore find it difficult to hold Kistasami responsible for failing to record pumps reading before and after filling because I was made to believe that the system was not accurate which meant that even if the numbers could be recorded they would be misleading the department".
84. I agree with the Investigating Officer, in this respect. Likewise, I find it difficult to hold the Applicant responsible for dispensing an amount of fuel, which the Respondent maintains is more than the requested amount, where he relied on the reading on the pump, where the pumps were faulty and reported to Management, who did not fix them. I also believe that it is the responsibility of the employer, here, the Respondent, to ensure that the systems in place are efficient for everyone, including the Applicant, to fulfill their mandate.
85. The Standard Operating Procedure referred to in the evidence did not assist the Respondent in this matter, as on the Respondent's own witness's version, the second witness, Mr Mshengu, it was not signed, for the reasons given. The Applicant also confirmed that he did not sign this.
86. From all the evidence presented before me I am satisfied that the Applicant's version is more probable than the Respondent's version.
87. I accordingly find from all of the above and the evidence presented before me that that the Respondent has not proved on a balance of probabilities that the Applicant is guilty of the aforementioned charge.
88. It is not necessary for me to deal with the issues in respect of sanction in light of this finding. However, I will deal with it in the interests of completion and in relation to appropriate relief to award to the Applicant.
89. It was common cause that the sanction issued to the Applicant was three (3) months suspension without pay and a final written warning, which was valid for six (6) months, from August 2024 to January 2025. It was also common cause that both sanctions had been implemented.
90. Issuing two sanctions for the same act of misconduct is generally considered unfair in the context of Labour Law. This principle is rooted in the concept of double jeopardy or double punishment, which applies when a particular sanction has been enforced and then subsequently a further or harsher sanction is enforced for that same act of misconduct, Such discipline would be found to be unfair, unless the employer can present new, significant and relevant evidence that renders the initial decision unfair to the employer.
91. The Respondent's third witness, who dealt with the issues of sanction, did not explain why two sanctions were issued. Her focus was essentially on why the sanction of dismissal was reduced to a three month suspension without pay. In the circumstances I find that the Respondent's conduct in issuing the Applicant with two sanctions for the same act of misconduct, which the Respondent implemented, is unfair, in line with the principles set out above.
92. From all of the above I am satisfied that the Applicant has established on a balance of probabilities that the Respondent has committed an unfair labour practice against him.

93. I find that the Respondent has committed an unfair labour practice in respect of the Applicant.
94. In considering an appropriate remedy I am guided by Section 193 and 194 of the Act. Section 193(4) provides that an arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation.
95. The relief sought by the Applicant was that the sanction of three months without pay be withdrawn, that the three months salary be re-imbursed (R25 676, 50 X3) and that the final written warning be withdrawn.
96. I find that that it would be reasonable and prudent in the circumstances of this case to award the Applicant three months of his salary which not paid to him, as a result of the sanction imposed on him of three months suspension without pay. The amount due to the Applicant would be R77029, 50 (R25676, 50 [salary per month] X 3 months).

AWARD

I make the following award:

- a. The sanction of a three (3) month salary suspension without pay issued against the Applicant, J Kistasami by the Respondent, Department of Agriculture and Rural Development, is expunged.
- b. The sanction of a final written warning which was issued to the Applicant, J Kistasami, for the period August 2024 to January 2025, by the Respondent, Department of Agriculture and Rural Development is expunged.
- c. The Respondent, the Department of Agriculture and Rural Development, is ordered to pay to the Applicant, J Kistasami, compensation in the amount of R77029, 50, within 30 days of the Respondent being notified of this Award.
- d. There is no order as to costs.

A handwritten signature in dark ink, appearing to read 'Keshree Kemi', written in a cursive style on a light-colored background.

Signature: _____

Keshree Kemi