

AWARD

Panelist/s: Annelie Bevan
Case No.: GPBC 726-2023
Date of Award: 1 March 2024

In the ARBITRATION between:

PSA obo MOCOENYANE, MJ
(Union / Applicant)

and

DEPARTMENT OF PUBLIC WORKS AND ROADS, NWP
(Respondent)

Details of hearing and representation

1. This is the award in the arbitration between MJ Mocoenyane, the Applicant, and the Department of Public Works and Roads, North West Province, the Respondent.
2. This arbitration was concluded on 1 and 2 February 2024 at the Respondent's premises in Wolmaranstad, in terms of section 186(2)(b) of the Labour Relations Act, 1995 as amended ("the LRA"), and the award is issued in terms of section 138(7) thereof.
3. Mr T Serame represented the Respondent, and Mr HJ Pretorius of the PSA represented the Applicant.
4. The hearing was electronically recorded and typed notes were made.
5. The parties agreed to submit written closing arguments on 22 February 2024. The Respondent's representative requested an extension until 26 February 2024, as he could not access his office and computer due to protest action. I agreed to the extension. All closing arguments were submitted by 26 February 2024. The closing arguments were considered but are not repeated in this award.

The issue to be decided

6. Whether or not the Applicant's dismissal was substantively fair and, if not, to determine the appropriate remedy.
7. The Applicant seeks retrospective reinstatement. During the limitation of the issues in dispute, the parties agreed that should any retrospective backpay be awarded to the Applicant, the parties will accept the calculations of the Respondent's PERSAL system, and there will be no need for evidence to be presented.

Background to the matter

8. The Respondent appointed the Applicant on 1 February 2018 as a Production Administrative Clerk, earning R15 591.75 per month. The Respondent dismissed the Applicant on 18 April 2023.
9. The Applicant referred an unfair dismissal dispute to the Council on 11 May 2023. The matter was unsuccessfully conciliated, and it was scheduled for arbitration before me on 26 September 2023. On this day, we attended an inspection in loco, and the Respondent party raised a point in limine, whereby he required the Council also to consider the charges against the Applicant on which the Respondent found him not guilty during the disciplinary hearing. The Applicant opposed this application. Parties submitted written arguments, and I issued a ruling on 1 December 2023, dismissing the application of the Respondent.
10. On 26 September 2023, the parties limited the issues in dispute on record and agreed that the following issues were common cause:
 - 10.1 The Applicant was charged with five counts of misconduct and found guilty on four charges, namely:
 - 10.1.1 Charge 1: Dereliction of duty: On or about 1 to 9 March 2022, you failed to perform your day-to-day activities of dipping at the tank and checking the level of diesel (monitoring usage of diesel).
 - 10.1.2 Charge 2: Fails to carry out a lawful instruction without just or reasonable cause: On or around 9 March 2022, you failed to take reasonable instruction from Mr Sebogodi requesting available litres of diesel.
 - 10.1.3 Charge 3: Negligence: On or around 10 March 2022, you intentionally or neglected 622 litres of diesel, which was untraceable as there were not even records to show where it was allocated or poured (622 litres of diesel x R23,55 = R14 648,10).
 - 10.1.4 Charge 4: Negligence: On or around 16 March 2022, you intentionally or neglected 2653 litres of diesel, which was untraceable, and there are no records for allocations (2653 litres of diesel x R23,55 = R62 478,15).

- 10.2 The Applicant agreed that the rules relating to the charges exist at the workplace, that it is fair and valid to have them at the workplace, that he was aware of them, and that the Respondent consistently applies the rules and the sanction.
- 10.3 The dismissal was procedurally fair.
11. On the same date, they agreed that the following issues remain in dispute between them:
 - 11.1 The Applicant did not breach the rules.
 - 11.2 Dismissal was not the appropriate sanction.
 - 11.3 The trust relationship between the parties was never broken, and
 - 11.4 The Applicant had a clean disciplinary record before the incident.
12. The parties submitted the following bundles: Applicant, Bundle A and Respondent Bundle R.
13. The Respondent called the following witnesses: (Throughout the award, witnesses will be referred to by their surnames).
 - 13.1 PK Thamaga, the Regional Accounting Manager for Central Gauteng and the North West Province in the Department of Defence, where the Applicant was previously employed.
 - 13.2 C Tsimane, the Deputy Director of Corporate Management in the Dr Kenneth Kaunda District of the Respondent.
 - 13.3 MSS Mthimkhulu, an Administrative Clerk Production.
 - 13.4 EN Khalane, the Administrative Clerk Supervisor. The Applicant reported to her.
 - 13.5 CL Sebogodi, the Road Superintendent responsible for maintenance in the sub-district of Maquasi hills.
14. The Applicant testified and did not call any witnesses.

Survey of the parties' evidence and submissions

The inspection in loco:

15. During the inspection in loco, we visited the premises where the diesel tank and diesel pump are located. The parties pointed out the valve (close to the diesel tank) that should be opened for diesel to run from the tank to the pump. They also explained that the locking mechanism on the valve was not there at the time of the incident; it was placed there after the incident. The diesel pump can only work once it is unlocked, switched on and the valve is pressed down.

During the leading of evidence and cross-examination, it became clear that the following facts are not in dispute:

16. Between 1 to 16 March 2022, 622 and 2653 litres of diesel were lost, could not be traced, and there were no records for the allocation of such diesel.
17. The Applicant attended workshops held every six months by the Directorate of Labour Relations on the Code of Conduct, the processes of disciplinary hearings, etc.

General testimonies:

18. C Tsimane testified under oath:

18.1 The Applicant's job description has not changed since 2012 (see Bundle R, pages 1-5). Although this job description was signed after the incidents of misconduct, his job description for the previous year would look the same.

18.2 Some of the Applicant's duties include keeping and maintaining the Inventory Stores Register (Para C2.3 of his job description, page 3, Bundle R), doing stock control of the stores (para C3.1, page 3, Bundle R) and ordering, controlling and issuing of stock (Para C3.2, page 3 Bundle R).

19. The Applicant testified under oath:

19.1 The job description in the Respondent's bundle (Bundle R, pages 1-5) is indeed his job description signed by him and his supervisor, although it is the one that was signed after the incident.

Under cross-examination, he testified:

19.2 His job description for the previous financial year looked the same.

Did the Applicant commit the misconduct?

Charge 1: Dereliction of duty: On or about 1 to 9 March 2022, you failed to perform your day-to-day activities of dipping at the tank and checking the level of diesel (monitoring usage of diesel).

Charge 3: Negligence: On or around 10 March 2022, you intentionally or neglected 622 litres of diesel, which was untraceable as there were not even records to show where it was allocated or poured (622 litres of diesel x R23,55 = R14 648,10) and

Charge 4: Negligence: On or around 16 March 2022, you intentionally or neglected 2653 litres of diesel, which was untraceable, and there are no records for allocations (2653 litres of diesel x R23,55 = R62 478,15).

20. Mthimkhulu testified under oath:

20.1 Every week, the administrative store clerks complete the Tally Card (Bundle R, page 23) to show the diesel usage for the week and what diesel is remaining. Later, he corrected himself by saying this was a monthly schedule, not a weekly one. He claimed, however,

that they dip to see the quantity of diesel in the tank every week and record that. Each time that diesel is issued during the week, it is recorded. After a week, they calculate all the issued diesel and ensure that the dipping quantity and issued quantity correspond, and those numbers are then put on a tally card like this one.

- 20.2 He could not explain why the register was not fully completed, as he only started working in this unit after the Applicant had left. It is clear the last inscription was to show that 4357 litres of diesel were received (this was on 25 February 2022).
- 20.3 According to him, the register on page 25 of Bundle R was not completed, as it shows at the bottom of the page that the quantity was 544 litres; below that, it should have indicated the diesel that was issued to bring the total to zero, as the next inscription showed the 4357 litres received on 25 February 2022 and the remained 5357. One cannot determine from this record that the 544 litres of diesel are missing, as it might still be in the tank, the records are just incomplete.
- 20.4 The very last inscription on page 25 of Bundle R showed two-meter readings, and if you deduct one from the other, it showed a balance of 1257, but this was not recorded on this page.
- 20.5 He made a statement when the missing diesel was investigated (Bundle R, page 9).
- 20.6 On 10 March 2022, the Applicant requested him to accompany him to the tank to check the diesel, and they discovered that some of the diesel was missing.
- 20.7 He explained the process of issuing and receiving diesel as follows: Before you receive diesel, you must dip to see what quantity of diesel is left in the tank (See photo of where dipping is placed, photos 7 and 8, Bundle R, page 41). The tank is then locked. Before diesel is issued, they must also dip to verify the quantity. The tank is locked, the valve is unlocked and opened, and diesel is issued (See photo 5 of the valve, Bundle R, page 41). Diesel is issued by opening the safety valve (Bundle R, page 31) under the pump. You lift the pump and press the valve so that diesel can be issued, and lastly, you take the reading on the pump (Bundle R, page 35). Once diesel has been issued, you must verify the quantity of the diesel and ensure that your records correspond.
- 20.8 The driver of the vehicle who received the diesel will record everything on a printed CSI slip (see Bundle R, pages 12 and 50), and the driver and the person issuing the diesel will sign the slip. Furthermore, the driver must also complete and sign a register for the issuing of diesel (Bundle R, page 12).

20.9 He confirmed that the Diesel Workbook Report (Bundle R, page 60) shows the number of lost diesel is 3275 litres. He confirmed that, according to his knowledge, there were no CSI slips for those litres of diesel. At that stage, he was not working full-time; he only assisted here and there.

Under cross-examination, he testified:

20.10 He confirmed that completing a CS1 slip or allocating the diesel is impossible if diesel is lost. The losses are, however, recorded on a register (see Bundle R, page 44). He conceded that for March, shortages are recorded, but the 622 litres of missing diesel are not recorded here.

20.11 Even if the diesel is not traceable, it still represents a loss to the Respondent.

20.12 He admitted that he was not present when first the 1300 litre and then the 3000 litre of diesel were received from the tanker. He can, therefore, not testify as to what process was followed and whether or not the valve was open or locked at that stage.

20.13 He confirmed that diesel is sourced from Potchefstroom. Once the truck is loaded with the diesel, they must dip to confirm the litres of diesel in the truck, and before the diesel is poured into the tank in Wolmaransstad, they must dip the tank to get a reading of the number of litres in the tank.

Under re-examination, he testified:

20.14 One must dip the tank in the morning and the afternoon to establish whether any diesel is missing.

21. Khalane testified under oath:

21.1 She is the Applicant's supervisor. She wrote a report on the loss of unbalanced diesel at Wolmaransstad (Bundle R, page 6) after the Applicant reported the issue to her.

21.2 The Applicant explained to her that they requested 5000 litres of diesel from Potchefstroom Sub-District on 25 February 2022, but only 1357 litres were delivered. On 1 March 2022, 3000 litres of diesel were collected from Potchefstroom Sub-District, bringing the total litres of diesel to 4357 litres.

21.3 The Applicant further explained to her that on 10 March 2022, when he used the diesel dipstick to verify the number of litres of diesel in the tank, it showed only 1200 litres of diesel. He suspected that there was some unbalancing of the diesel and did not report it then as he wanted to verify the total of diesel against any diesel slips in the possession of Mr Mushi.

- 21.4 On 17 March 2022, the Applicant and Mr Mushi reported that the quantity of diesel was not verified after being transferred from the truck to the diesel tank on both deliveries. Mr Mushi relied on the truck meter readings and did not cross-check that with the dipstick reading of the tank.
- 21.5 Three thousand two hundred seventy-five litres of diesel are missing, as only 1082 litres were issued to machinery from 28 February 2022 to 10 March 2022.
- 21.6 She reconciled the diesel received and issued and prepared a report (Bundle R, page 60).
- 21.7 According to her, the Applicant did complete the Tally Card as required (Bundle R, page 23). Even the register (Bundle R, page 44), the Applicant completed the register, and everything is balancing until the inscription in red where the pump reading is 642843. She has no idea why he stopped completing the register.

Under cross-examination, she testified:

- 21.8 The shortage of diesel happened between 10 and 16 March 2022.
- 21.9 She confirmed that the Applicant acted correctly by not immediately reporting the missing diesel and first wanting to verify the CS1s with Mr Mushi. He was, however, supposed to report the misbalancing of the diesel.
- 21.10 She confirmed that Mr Mushi was responsible for issuing diesel; therefore, he had to dip and check the quantity after he issued diesel.
- 21.11 The Applicant was responsible for receiving the diesel, so he had to dip to verify the amount of diesel in the tank. He also had to dip on Mondays and Fridays to verify the diesel received and issued during the week. On Fridays, he also received the CS1 slips from Mr Mushi; he must then do a reconciliation and would, therefore, be able to detect a loss. Mr Mushi will, however, know during the week if there is something wrong as he dips every time after he issues diesel.
- 21.12 She conceded that if the diesel is missing, it is impossible to record it, but the loss should have been recorded.
- 21.13 She confirmed that the Tally Card (Bundle R, page 23) is dated 26 February 2021.
- 21.14 She admitted that the Applicant was charged with negligence in charges 3 and 4, not gross negligence.

22 The Applicant testified under oath:

- 22.1 During the time from when the diesel was delivered from Potchefstroom until it went missing, the key to the lock of the diesel pump was with Mr Mushi. The Applicant did not have the key.
- 22.2 No diesel can be issued without unlocking the padlock (Bundle R, page 31). He also confirmed that the valve (Bundle R, page 41, photo 5) was not locked during and before this incident. Measures for locking this valve were only put into place after this incident.
- 22.3 He confirmed that Mushi signed for all the CS1 slips during this time, as he issued the diesel daily. The Applicant did not issue any diesel during this period.
- 22.4 The Applicant explained that pages 24 and 25 are a spreadsheet and a Diesel Movement Register. On page 25, he recorded the 4357 litres of diesel received from Potchefstroom, and then on page 24, it shows the total of 5347 (this is the amount after what was in the tank is added to the 4357 received from Potchefstroom). He conceded that no other entries were on this book as he was only required to make entries again on 16 March 2022 when he found the tank empty.
- 22.5 According to the Applicant, when he found the tank empty on 16 March 2022, he immediately asked his supervisor how he must now balance the register. She told him that the matter should first be investigated, and then she will inform him how the register can be balanced. He reiterated that the diesel was missing, so he did not have CS1 slips to capture in the registers.
- 22.6 The Applicant maintained that he was not, in terms of Charge 1, responsible for daily dipping the tank levels; that was the responsibility of Mushi. The Applicant was only required to dip on Mondays and Fridays.
- 22.7 The Applicant is not guilty of charges 3 and 4 as he had no information to use to fill in the registers. As there were no CS1 slips for the missing diesel, he had no information to use to complete the registers.
- 22.8 The Applicant suspected that the diesel went missing due to leakage as a similar incident occurred on 22 August 2022, and it was established then that the diesel was missing due to leakage.

Under cross-examination, he testified:

- 22.9 He is not guilty of Charge 1, as it was the responsibility of Mushi to dip daily. As the Applicant, he is only responsible for dipping on Fridays and Mondays. He denied that he did not dip as there were no readings to show that; he claimed that he could show that

diesel was missing because he dipped. He suspected on 10 March 2022 that there was diesel missing. He confirmed that between 1 and 10 March 2022, he only dipped the tank on 10 March 2022.

- 22.10 The Applicant acknowledged that he was responsible for managing the diesel, yet the diesel had gone missing under his watch.
- 22.11 He explained that he did not record on 10 March 2022 the tank levels after he dipped as he realised there was a problem, and he wanted to obtain all the CS1 slips from Mushi before he recorded or reported anything.

Charge 2: Fails to carry out a lawful instruction without just or reasonable cause: On or around 9 March 2022, you failed to take reasonable instruction from Mr Sebogodi requesting available litres of diesel.

23 Sebogodi testified under oath:

- 23.1 The Applicant is a store clerk responsible for procuring diesel for the Respondent's day-to-day operations. He is further responsible for monitoring the diesel levels so that they can be replenished in time.
- 23.2 He made a statement about this investigation (Bundle R, page 38).
- 23.3 He instructed M Moodisa to fetch 5000 litres of diesel from the Potchefstroom Sub-District on 25 February 2022, but only 1357 litres of diesel were received. On 1 March 2022, Mr Moodisa returned to fetch diesel and brought 3000 litres of diesel, bringing the total diesel received to 4357 litres.
- 23.4 He confirmed the Applicant and Mr Mmusi are responsible for receiving, handling and issuing diesel.
- 23.5 On 9 March 2022, he requested the available litres from the Applicant to enable him to decide whether there is a need to replenish. He did not get a response from the Applicant.
- 23.6 He made the same request to the Applicant on 16 March 2022, and it was only then that the Applicant did the dipping.
- 23.7 According to him, the Applicant failed to do the daily dipping of the diesel tank levels on Fridays and Mondays. If this was done the Applicant could easily have responded to him on 9 March 2022.

- 23.8 He testified that the Store Clerk was responsible for the completion of the Issuing of Fuel register (Bundle R, page 11), the Tally Card (Bundle R, page 23) and the Record book for diesel consumption (Bundle R, page 25).
- 23.9 He also testified that the Respondent is engaged in litigation due to a motor vehicle accident caused by the non-maintenance of the roads. The accident occurred within the timeframe that the diesel went missing, and he tried to explain that the Applicant's conduct caused this (Bundle R page 63).
- 23.10 He explained that he requested the Applicant's supervisor to provide him with a report on the missing diesel. He agrees with the numbers indicated in the report, as testified by the Applicant's supervisor (Bundle R, page 60). He also agrees that the missing diesel results from the Applicant's negligence.
- 23.11 According to him, the Applicant is guilty of all four charges.

Under cross-examination, he testified:

- 23.12 He conceded that when he instructed the Applicant on 9 March 2022, he did not give the Applicant any timeframes wherein he should respond.
- 23.13 He also conceded that the Applicant was accused in charges 3 and 4 of negligence and not gross negligence and that there is a definite difference between the two.
- 23.14 He explained that the missing diesel could not be traced through documentation.
- 23.15 He conceded that diesel went missing again at a later stage, but this time, it was because of a pipe leakage. He, therefore, admitted that the diesel could have been lost due to a leakage.
- 23.16 He agreed that the valve at the tank was only locked after this incident as a control measure to ensure that diesel is not easily stolen. Only the person who issues the diesel can access the gate valve.
- 23.17 He initially tried to indicate that the Applicant was responsible for issuing the CS1 slips, but after he was taken through the bundle (pages 12-14), he conceded that it was Mr Mushi who was issuing the diesel.

Under re-examination, he testified:

- 23.18 Although he did not give a timeframe for the Applicant to respond to his instruction on 9 March 2022, he expected the Applicant to answer on the same day so that they could start ordering diesel.

24. The Applicant testified under oath:

- 24.1 On 9 March 2022, after he got the instruction to check how much diesel was left in the tank, he asked Mushi to accompany him to check the diesel levels. Mushi was busy at the workshop. On 10 March 2022, when he realised Mushi would not accompany him, he went with Mthimkhulu to dip to verify the levels of diesel in the tank, and there were only 1200 litres of diesel. He gave the information to Sebogodi.
- 24.2 He approached Mushi to check the tank level against the CS1 slips and the register and found that the numbers were not balancing. He asked Mushi for the other CS1 slips to make up the difference, and Mushi undertook to find them and bring them to him. He did not want to report the discrepancy then, as he was waiting for Mushi to bring him the evidence.
- 24.3 He confirmed that when the amounts of diesel were received, Mushi used the meter readings on the truck and did not dip in the tank as well to ensure that the readings would correspond (See Bundle R, page 8, para 3 of the Applicant's statement).
- 24.4 The Applicant confirmed that when the 1357 litres of diesel were delivered, Mushi handled the receipt of the diesel on his own. When the 3000 litres of diesel were received, Mushi verified the quantity on the truck meter, and he (the Applicant) ensured that he verified the tank levels before and after receiving the 3000 litres.
- 24.5 On 16 March 2022, the Applicant checked the diesel balance in the tank and found that the diesel tank was empty. Mushi also confirmed that the tank was empty. The Applicant reported this to Sebogodi.

Under cross-examination, he testified:

- 24.6 He confirmed that Mthimkhulu accompanied him to verify the tank levels on 10 March 2022 and gave the information to Sebogodi on 10 March 2022. He acknowledged that he did not dispute Sebogodi's evidence that the Applicant only responded to him on 16 March 2022 but claimed that he gave the readings to Sebogodi on 10 March 2022 but gave the report about the missing diesel to Sebogodi on 16 March 2022.
- 24.7 The Applicant explained that it took him a week to verify the levels, as he was very busy with other deliveries for the store on Friday, Monday and Wednesday, and it was raining.

Was dismissal the appropriate sanction?

25. Neither party led any evidence.

Was the trust relationship broken between the parties?

26. Khalane testified under oath:

26.1 Since the diesel went missing between 10 and 16 March 2022, until after the Applicant's disciplinary hearing, the Applicant performed the same functions and jobs as before the incident.

26.2 After the Applicant was found guilty of the misconduct and dismissed, he appealed. She confirmed that he performed the same functions and duties during his appeal. She was, however, promoted to another post and cannot testify to what transpired after 31 March 2023.

27. Sebogodi testified under cross-examination:

27.1 He explained that the Applicant was never suspended pending the investigation of the misconduct or the disciplinary hearing, as his senior stated that one is innocent until proven guilty. The Applicant continued to perform his same duties throughout the disciplinary hearing after his dismissal until his appeal (which took three months) was unsuccessful.

27.2 He stated, however, that Mr Mushi recused himself from diesel duties, and Mr Mthimkhulu was sent to assist the Applicant but agreed that Mthimkhulu only took over the Applicant's duties after the Applicant was dismissed.

28. The Applicant testified under oath:

28.1 According to him, the Respondent kept him in the same position, performing the same duties during the investigation of his disciplinary hearing, which concluded on 25 October 2022, until the finalisation of his appeal on 18 April 2023.

Did the Applicant have a clean disciplinary record before his dismissal?

29. Thamaga testified under oath:

29.1 The Applicant worked for the Department of Defence in Potchefstroom as a senior accounting clerk until 2014 he resigned.

29.2 Incidents of financial misconduct where state funds were lost were investigated. Before the outcome of the investigation, the Applicant resigned with immediate effect on 31 October 2014. He also agreed that the lost money could be recovered from him, as he made a mistake. The Department of Defence accepted his resignation but continued his disciplinary hearing in his absence and found him guilty of misconduct.

Under cross-examination, he testified:

- 29.3 Because the Applicant resigned immediately, he had a clean disciplinary record at that stage. Usually, all employers do reference checks before they appoint a new person, he cannot say whether the Respondent in this matter did that.
30. I want to thank the parties for the comprehensive closing arguments submitted and considered by me.

Analysis of the submissions

31. In my analysis, I intend to offer brief reasons per Section 138 (7) of the LRA: "*Within 14 days of the conclusion of the arbitration proceedings – the commissioner must issue an arbitration award with brief reasons*".
32. In analysing the evidence presented, I have considered Item 7 of the Code of Good Practice: Dismissals in the LRA and the CCMA Guidelines on Misconduct Arbitrations.
33. Section 192(2) of the LRA provides that once the existence of dismissal is established, the Respondent must prove that the dismissal is procedurally and substantively fair. In ***Assmang Ltd (Assmang Chrome Dwarsriver Mine) v CCMA & Others [2015] 6 BLLR 589 (LC)***, the court confirmed that where an employer chooses to dismiss its employee for misconduct reasons, the Employer is the one who then bears the onus to prove that the dismissal was fair on a balance of probabilities.
34. The standard of proof to be satisfied is that of a 'balance of probabilities and involves the weighing up of the respective versions of the parties to determine which is the more probable (See, among other things, ***Avril Elizabeth Home v CCMA and Others (2006) 27 ILJ 1644 (LC)***; ***Network Field Marketing (PTY) Ltd v Mngezana N.O. and others (2011) 32 ILJ 1705 (LC)***).
35. The Supreme Court of Appeal formulated the concept of a 'balance of probabilities in ***Ocean Accident and Guarantee Corporation Limited v Koch 1963(4) SA 147 (A)*** to mean the following:
"It must carry a reasonable degree of probability but not as high as required in a criminal case. If the evidence is such that the tribunal can say, 'we think it more probable than not, the burden is discharged, but if the probabilities are equal, it is not." (my emphasis)
36. A finding on a balance of probabilities is not merely a mechanical balancing of evidence – or, for that matter, the number of witnesses on each side. In ***Selamolele v Makhado 1988 (2) SA 372 (V) at 374J–375B***, the approach to the question of whether the onus has been discharged was dealt with as follows: "*Ultimately, the question is whether the onus on the party, who asserts a state of facts, has been discharged on a balance of probabilities and this depends not on a mechanical quantitative balancing out of the pans of the scale of probabilities but, firstly, on a qualitative assessment of the truth and inherent probabilities of the evidence of the witnesses and, secondly, an ascertainment of which of two versions is the more probable.*"

37. As the parties agreed that the dismissal was procedurally fair, I find the dismissal procedurally fair.
38. The Applicant was charged with the following: 1) Dereliction of duty, 2) Failure to follow a lawful instruction, and 3) Negligence (two counts).

Dereliction of duty:

On or about 1 to 9 March 2022, you failed to perform your day-to-day activities of dipping at the tank and checking the level of diesel (monitoring usage of diesel).

39. The parties do not dispute that regarding the Applicant's job description, and he is responsible for stock control of the stores and keeping and maintaining the inventory stores register.
40. The Respondent led evidence that the Applicant had the duty to dip the diesel tank daily to check the diesel level in the tank. However, under cross-examination, the witnesses conceded that Mushi was responsible for daily dipping after he issued diesel. The Applicant was only responsible for dipping twice weekly, namely at the beginning and end of the week, to monitor diesel usage.
41. After the Applicant received the diesel from Potchefstroom District Office on 1 March 2022, he only dipped the tank on 10 March 2022 and 16 March 2022, although he had to dip to verify the levels on Friday, 4 March, Monday, 7 March, Friday 11 March and Monday 14 March 2022. The Applicant explained that he did not do his usual dipping on 11 March as he did the previous day, 10 March 2022, and no diesel was issued. The Applicant explained that he was very busy after 10 March 2022 with other stock in the storeroom and, therefore, did not attend to his usual dipping.
42. Furthermore, after 10 March 2022, when he realised the diesel was not balancing, he launched his investigation. He approached Mushi, who (as testified by Khalane and Sebogodi) was responsible for daily dipping after diesel was issued, to provide him with the CS1 slips so that he could reconcile the litres of diesel in the tank with the diesel issued. This is a reasonable thing to do. One would also have expected Mushi to approach the Applicant once he realised that the diesel pump and tank dipping readings did not coincide.
43. The evidence shows that Mushi would have been the first to pick up any irregularity. The second layer of risk detection is the dipping to be done by the Applicant, which he failed to do as was expected of him.
44. The Applicant's supervisor, Khalane, testified that he acted correctly by investigating the issue before reporting it to her. It remains true, however, that the Applicant still had to complete the registers to indicate the loss.
45. In ***Clicks Retailers (Pty) Ltd v Madikwe and Others (JR 1924/19)[2023] ZALCJHB 67 (14 March 2023)***, the Labour Court defined dereliction of duty to mean that an employee willfully, wantonly or negligently failed to perform his or her duties or performed them in a culpably inefficient manner.

46. **Collins Concise Dictionary** defined dereliction as "conscious or willful neglect". It thus seems that there should be an intentional or conscious failure of an employee to do their duty.
47. Dereliction of duty does not normally attract a sanction of dismissal, most probably because it skirts the thin line with poor performance. Counselling is, therefore, many times the appropriate approach. However, the seriousness of the dereliction should be considered.
48. I believe the Applicant failed to appropriately execute his duties concerning monitoring diesel levels from 1 to 10 March 2024. I am not convinced that the Respondent successfully showed this was willful or intentional. I do agree that the Applicant was negligent in the execution of his duties or, as was defined in the **Clicks Retailers (Pty) Ltd- case**, "performed his duties in a culpably inefficient manner". Therefore, the Respondent discharged the onus on a balance of probabilities to show that the Applicant was guilty of negligent dereliction of duties.
49. The Labour Court stated in the **Clicks Retailers (Pty) Ltd- case** that to establish this form of misconduct, an employer must, in clear terms, establish the duties of an employee charged and, after that, present evidence which proves on a balance of probabilities that the employee derelict those established duties. Where an employer alleges grossness, the suggestion is that the dismissed manager failed to perform purposefully.
50. As I have already stated, I am convinced that the Respondent succeeded in showing that the Applicant was responsible for monitoring the diesel level in the tank; it failed to prove that this was a daily duty, rather it was a weekly duty, but succeeded in proving that the Applicant failed to execute this duty between 1 and 10 March 2022.
51. The Respondent implied grossness during the arbitration proceedings, although the Applicant was not charged with a gross dereliction of duty and as already stated, the Respondent failed to show on a balance of probabilities that the Applicant was purposefully derelict in his duty.

Negligence: Charges 3 and 4

Charge 3: Negligence: On or around 10 March 2022, you intentionally or neglected 622 litres of diesel, which was untraceable as there were not even records to show where it was allocated or poured (622 litres of diesel x R23,55 = R14 648,10).

Charge 4: Negligence: On or around 16 March 2022, you intentionally or neglected 2653 litres of diesel, which was untraceable, and there are no records for allocations (2653 litres of diesel x R23,55 = R62 478,15).

52. The crux of the Respondent's evidence concerning these two charges is that the Applicant could not account for the missing diesel, as there were no records to show the issuing of these missing litres of diesel.

53. The evidence of the Applicant, which the witnesses of the Respondent confirmed, is that Mushi is responsible for the issuing of diesel. The CS1 slips in the Respondent's bundle clearly showed that Mushi signed all those slips, not the Applicant.
54. The Applicant's duties were to record the slips in a register to show the number of litres of diesel issued weekly. This can only be accomplished should he receive those slips from Mushi. Mushi also had the key to the pump in his possession during the period in question. The Respondent did not call Mushi as a witness to testify and maybe explained that, at a stage, the Applicant took over the duties of Mushi for some other reason. It, therefore, seems clear that the Applicant could only account for the issuing of diesel if Mushi provided him with CS1 slips to that effect. Without that documentation, he could not account.
55. The undisputed evidence of the Applicant is that he requested the CS1 slips from Mushi, who could not provide any, and he then reported the missing diesel after he took the diesel levels in the tank on 16 March 2022. The Applicant's supervisor, Khalane, testified that the Applicant acted correctly by not immediately reporting the diesel issue to her but by first trying to establish from Mr Mushi whether there were missing CS1 slips that could account for the missing diesel.
56. Negligence or gross negligence assumes an inadvertent (as opposed to an intentional) departure from a set norm or standard of conduct. Sometimes, these are general standards not necessarily specifically set out in an employer's rules or policies, e.g. the negligent operation of machinery or the negligent driving of a vehicle. Employers may also set their standards and prescribe specific forms of conduct for employees in policies and procedures. When employees fail to comply with these standards or procedures, disciplinary action may follow.
57. It is now trite law that negligence will not warrant dismissal for a first offence, whereas gross negligence could warrant dismissal for a first offence. It is, therefore, essential to distinguish between the two.
58. Negligence is seen as the failure to fulfil the standard of care that ought to be exercised by a reasonable person in a particular situation. In labour law, the reasonable person test is used to establish negligence. The test entails determining whether a reasonable person/employee, when placed in a similar situation as the accused person/employee, would have acted in the same manner as the accused. According to Prof. PAK Le Roux, the following two elements must be taken into account when dealing with negligence:
 - 58.1 Whether a reasonable person, in the same situation as the employee, could have reasonably foreseen that their conduct could cause harm or damage to another person or that person's property?
 - 58.2 Would a reasonable person have reasonably taken preventive action to avoid such harm or damages caused?

If the answer to the above questions is "yes", then the employee will most likely be guilty of being negligent.

59. The legal test for negligence is an objective one. How would a reasonable person in the same position have acted – or failed to act? As lawyers say, "...it depends on the facts of the case." And it depends on what you think a "reasonable person" would have done – or not done.
60. I am unsure what else another reasonable person in the Applicant's position would have done. If diesel went missing and therefore was not officially issued, no record would have been found, and therefore, what documentary evidence would that person have used to record the diesel? I am not convinced that the Respondent discharged the onus to show that the Applicant was guilty of not providing records for the missing diesel.
61. However, it remains true that on 10 March 2022, the Applicant knew there was a problem with accounting for the diesel. He tried to obtain the necessary evidence from Mushi. A reasonable person in the position of the Applicant would have recorded the diesel tank level immediately and, maybe after a day without any answers from Mushi, put more pressure on him to provide the CS1 slips. He, himself, could also have dipped more regularly. However, this is more relevant to charge 1, namely a negligent dereliction of duty.
62. In the sense that the Applicant, after realising that there was a problem, did not take preventative steps for a week, I find that his actions were negligent. So, on a very narrow basis, the Respondent discharged the onus to prove that the Applicant was negligent as he did not take preventative steps. However, his not recording diesel, for which he did not have documentary proof, cannot be regarded as negligent; on the contrary, it is honest behaviour.
63. The Applicant was only charged with two incidents of negligence and not gross negligence. If one considers the definition of gross negligence in ***MV Stella Tingas and Another: MV Stella Tingas: Transnet Limited t/a Portnet v Owners of the MV Stella Tingas and another 2003 (2) SA 473 (SCA)*** by the Supreme Court of Appeal, the Applicant was correctly charged with only negligence.
64. The Supreme Court of Appeal describes gross negligence as follows: "*It follows, I think, that to qualify as gross negligence, the conduct in question...must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorised as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose validity.*"

Insubordination

Charge 2: Fails to carry out a lawful instruction without just or reasonable cause: On or around 9 March 2022, you failed to take reasonable instruction from Mr Sebogodi requesting available litres of diesel.

65. The evidence of the Sebogodi was clear and concise. He instructed the Applicant to provide him with the diesel tank readings on 9 March 2022, but the Applicant only responded on 16 March 2022. He conceded

during cross-examination that he did not give the Applicant a specific timeline in which he had to respond, but he expected the Applicant to respond to him on the same day.

66. The Applicant claimed that he did give the tank level reading to Sebogodi on 10 March 2022 and again on 16 March 2022. Unfortunately, the Applicant's representative failed to put this version to Sebogodi. It, therefore, seems like an afterthought.
67. The Constitutional Court in **President of the Republic of South Africa and Others v South African Rugby Football Union and Others 1(1) 2000(1) SA 1 (CC)** at para [61] and [62] states that cross-examination is a right that a party has, but it imposes certain obligations: "[61]As a general rule, it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character ... this rule was enunciated by the **House of Lords in Browne v Dunn [(1893) 6 R 67 (HL)]** and had been adopted and consistently followed by our Courts."
68. The rule in **Browne v Dunn** is not merely one of professional practice but is essential to fair play and fair dealing with witnesses (see also **State v Boesak 2001(1) SACR 1 (CC)** at para [26]).
69. I, therefore, accept that the Applicant only complied with the instruction on 16 March 2022.
70. The Employer's common law right to issue reasonable and lawful instructions and the employee's obligation to comply with these instructions is a central element of the employment relationship. Without this right, an employer would not be able to co-ordinate the running of its affairs. Insubordination cannot be tolerated as it undermines organisational effectiveness. There will always be variations between sanctions imposed depending on the degree of intent. An employee is obligated to obey an employer's lawful and reasonable instructions. Where the employee fails to do so, he or she commits an act of insubordination.
71. Dismissal is appropriate where the insubordination is deliberate, sustained, and indicates an intention on the employee's part to repudiate the Employer's authority.
72. In **Wasteman Group v SAMWU (CA 6/2011) ZALAC 10**, handed down on 8 March 2012, the Labour Appeal Court considered the difference between insubordination per se and insubordination, which must give rise to the ultimate sanction of dismissal. It was held that the difference between insubordination and gross insubordination is a question of degree. It was held that there is a difference between an Employee who partially defies an instruction but later completely complies with it and an Employee who deliberately refuses to obey an instruction, expressly defying an instruction and challenging the Employer's authority, especially in the presence of other Employees.

73. It is clear that the Applicant, in this case, falls within the category of an employee partially defying an instruction but later completely complying with it. This is what the Respondent successfully proved on a balance of probabilities.
74. In **SAMWU and another v Rand Water and others ZALCJHB 138** (handed down on 29 April 2013), the Employee was dismissed for refusing to carry out reasonable and lawful instructions amounting to gross insubordination and serious disrespect. In considering the seriousness of the insubordination, a distinction was drawn between a mere failure to comply with the instruction and a deliberate refusal to do so accompanied by a defiant challenge of the Employer's authority in the presence of other Employees. Weighing heavily against a sanction short of dismissal was the cumulative effect of the various acts of insubordination and the lack of any acceptance by the Applicant of the seriousness of her actions or admission of any fault on her part, the absence of any indication of regret on her part, which might indicate a willingness to conform and comply with the reasonable instructions of her superiors. There is no reason why an Employer has to tolerate an Employee who prefers always to march to the beat of their own drum.
75. Considering the Applicant's insubordination against those explained in the **Rand Water case above**, it is clear that the Applicant is not guilty of gross insubordination. Whether or not it can be regarded as insubordination because the Applicant complied with an instruction within a week and not within a day of receipt of the instruction, where the instruction was unclear as to when the Applicant should comply with it, is a matter of perception.
76. The fact that the Applicant had to be reminded about the instruction on 16 March 2022, as testified by Sebogodi, puts the Applicant's conduct within the realm of insubordination.

Was the trust relationship broken between the parties?

77. The Labour Appeal Court, in recent years, dealt with the issue of the breakdown of trust as follows:
- 77.1 In **Impala Platinum Ltd v Jansen & Others (2017) 38 ILJ 896 (LAC)**, it held "...that where an employee is found guilty of gross misconduct, it is not necessary to lead evidence about a breakdown in the trust relationship as it cannot be expected of an employer to retain a delinquent employee in its employ." The LAC held that one must consider the severity of the misconduct as this "may well determine the fairness of the sanction." The LAC further confirmed that the employee's misconduct "went to the root of the employment relationship" in that he not only failed to comply with the regulations of the mine but, in addition, breached the duty to act in good faith by promoting his wife's business to the mine's service providers, which jeopardised the employers' business relationships. The LAC held that "[i]n the circumstances, there was no need to lead any evidence of a breakdown in the relationship, as it was obviously the case." The LAC reiterated that the above might not apply where the Employer specifically alleges in the charges that the misconduct broke down the employment relationship. In that instance, the Employer must lead

evidence on the irretrievable breakdown of the employment relationship at arbitration, as it will be necessary to prove the charges.

77.2 In ***Autozone v Dispute Resolution Centre of Motor Industry and Others [2019] JOL 41073 (LAC)***, the LAC held that the evidence on the issue was undeniably somewhat thin. Where an employer relies on irreparable harm to the employment relationship to justify a dismissal, it would be prudent to lead evidence to support that claim unless the conclusion that the trust relationship has broken down is apparent from the nature of the offence or the circumstances of the dismissal (emphasis added). In cases where the offence reveals a stratagem of dishonesty or deceit, it can be accepted that the Employer probably will lose trust in the employee, who, because of his misconduct alone, will have demonstrated a degree of untrustworthiness, rendering him unreliable and the continuation of the employment relationship intolerable or unfeasible.

78. The charges against the Applicant are not so serious in nature that they would automatically have an impact on the trust relationship. It also seems clear from the evidence presented by the Applicant, which the Respondent party confirmed, that the Applicant was never suspended pending the investigation of the misconduct and finalisation of the disciplinary hearing. On the contrary, the Applicant performed the same duties in the same post.

79. Therefore, the trust relationship between the parties was clearly not damaged due to the incident or the charges brought against the Applicant.

Did the Applicant have a clean disciplinary record?

80. The Respondent claimed that the Applicant did not have a clean disciplinary record and called a witness from where the Applicant was employed to testify about what transpired at that workplace. No evidence was led to show that since the Applicant was employed with the Respondent on 1 February 2018, he had any disciplinary infraction against him.

81. Therefore, I find that the Applicant's disciplinary record was indeed clean before this incident.

Was dismissal the appropriate sanction?

82. The factors to consider in assessing the fairness of the sanction are stated in ***Samancor Chrome Limited (Tubatse Ferrochrome) v Metal & Engineering Industries Bargaining Council & Others (JA 38/2009) [2010] ZALAC 25; (2011) 32 ILJ 1057 (LAC) (26 November 2010)*** in the following terms:

"(1) The duty to determine whether a dismissal is fair rests with the Commissioner. The decision to dismiss belongs to the Employer, but the determination of its fairness does not. Ultimately, the Commissioner's sense of fairness must prevail, not the Employer's view. (***Sidumo at para 75***) The Commissioner must consider all the relevant circumstances (***Sidumo at para 79***).

- (2) Secondly, the decision whether or not the sanction imposed by an employer is fair in a particular case is a value judgment that the Commissioner is required to make based on their sense of fairness.
- (3) Thirdly, each case must be decided on its own merits and due to the totality of the circumstances - an objective approach (*Sidumo* at paras 64 and 68).
82. In *Sidumo v Rustenburg Platinum Mines Ltd (2007) 28 ILJ 2405 (CC)*, the Constitutional Court has ruled that a commissioner does not have the power to decide independently on penalties for workplace delinquency—the task of imposing sanctions vests on the Employer. A commissioner's function is to assess whether that Employer has exercised discretion fairly.
83. The Court in *Sidumo* listed the following factors which need to be considered to determine whether dismissal is the appropriate sanction. After considering the following, I found that the Respondent did not discharge the onus to prove that dismissal was the appropriate sanction, even though the Applicant is guilty of the misconduct to the degrees explained in my award above.
- (a) Whether the sanction was following the Employer's disciplinary Code:
No evidence was led on this.
- (b) Would a lesser sanction have served the purpose?
I am convinced that a lesser sanction would have served the purpose. In light of the gravity of the offence, in that a huge amount of diesel was lost with the accompanying financial loss, I believe a disciplinary sanction short of dismissal would have been appropriate, but leaning towards the more serious sanctions, like suspension without pay. This remains, however, the Employer's prerogative.
- (c) The gravity of the offence:
It is clear from discussing the various disciplinary charges brought against the Applicant that they are not gross. Case law states that an employee will not be dismissed for a first offence of dereliction of duty. The sanction of dismissal is only justified in instances of gross negligence, as opposed to negligence only (*Netshisaulu v CCMA and others (JR 929/15) [2017] ZALCJHB 366*). The Labour Appeal Court found in *Wasteman Group v SAMWU (CA 6/2011) ZALAC 10* that dismissal is reserved for instances of gross insubordination.
- (d) Whether training would have an impact on the conduct of the Applicant
No evidence was led on this, but I think that sensitising the Applicant and Mushi on risk management in their environment might have made a difference in how they would have prioritised their work.
- (e) The employee's disciplinary record
The Applicant had a clean disciplinary record.
- (f) The basis on which the employee challenged the dismissal;
The Applicant challenged the substantive fairness of the dismissal.


- (g) The effect of dismissal on the employee; and
The Applicant testified that he has yet to find other employment.
- (h) Long-service record.
The Applicant worked for the Respondent for four years.

Relief

- 83. The primary relief available to an employee whose dismissal is substantively unfair is reinstatement in section 193 of the LRA. This is also the relief being sought by the Applicant in this matter.
- 84. No evidence was led to show that it would be impractical to reinstate the Applicant. I, therefore, find that the Applicant should be reinstated retrospectively from 19 April 2023 and report for duty on 15 March 2024.
- 85. The parties had agreed that the Respondent's Persal system could calculate the amount due to the Applicant if the award is in his favour. The Applicant will be entitled to remuneration from 19 April 2023 to 15 March 2024, including all increases over the years, less any deductions allowed in law.

Award

- 86. The dismissal of the Applicant, MJ Mocoenyane, by the Respondent, the Department of Public Works and Roads, North West Province, was procedurally fair and substantively unfair.
- 87. The Respondent is ordered to reinstate the Applicant in its employ on terms and conditions no less favourable to them than those that governed the employment relationship immediately before his dismissal.
- 88. The reinstatement in paragraph 87 is to operate with retrospective effect from 19 April 2023.
- 89. The Applicant must tender his services to the Respondent on 2 April 2024.
- 90. The Respondent is ordered to pay the Applicant on/before 15 April 2024 the amounts as calculated by its Persal system covering the period 19 April 2023 to 2 April 2024, inclusive of all increases over the years, minus such deductions as the Respondent is in terms of the law is entitled or obliged to make.

Signature: 
Commissioner: _____
Sector: _____