GPSSBC
GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL

ARBITRATION AWARD

Case No: GPBC912 - 2020
Date: 16 June 2022
Panellist: Vuyiso Ngcengeni

In the matter between

PSA obo Ntetha N **Employee**

And

Department of Justice and Correctional Services **Employer**

Employee representative: Mr Zweli Msane

Employer representative: Mr Sipho Magwaza

DETAILS OF HEARING AND REPRESENTATION

1. This is the award in which I briefly record the evidence and arguments placed before me by the parties in an arbitration that was scheduled before myself on multiple dates starting on the 9th January 2021 and the last day being 13th May 2022.

2. The arbitration was held under the auspices of the General Public Service Sector Bargaining Council (the Council) in terms of section 191(1) [191(5)(a)] of the Labour Relations Act, No 66 of 1995 as amended ("the Act").

3. The Employee was present and he was represented by Mr Zweli Msane, whilst the Employer was represented by Mr Sipho Magwaza.

4. I received the closing arguments on 3rd June 2022.

5. The Employee submitted bundles A – includes the statement from Mr Sizwe Shabangu from his lawyers, bundle E - the transcripts of the disciplinary hearing held on 8th August 2019, which led the dismissal of the Employee. The transcripts have been accepted by the parties as being part of the records for this arbitration.

6. The Employee submitted bundles: B – referral documents and the details of the disciplinary hearing, C and D - handling of appeals and delegation of power within the department, F – mainly about the powers of the appeal authority and internal correspondences' regarding this dispute.

ISSUE TO BE DECIDED

7. I am called upon to determine whether the dismissal of the Employee was procedurally and substantively fair on the grounds below:

   7.1 Procedure:

   7.1.1 The Employer failed to comply with para 7.30 of the disciplinary policy which state that a sanction must be communicated within 5 days, in this case, it was communicated after 33 days.

   7.1.2 The Employer failed to comply with para 8.8 of the disciplinary policy in that it communicated the appeal outcome after 6 months, instead of 30 days.

7.1.3 The delegation and authority of the person who decided the appeal was not duly authorized to do so in terms of section 17(b) of the Public Service Act read together with para 8 of the disciplinary code (Resolution 1/2008).

7.2 Substance:

7.2.1 He denies both charges in which he was found guilty.

7.2.2 The sanction was too harsh. He does not dispute that if he is guilty of charge number one, it will follow that he is also guilty of charge number 2.

8. The Employee wants to be reinstated to his position or to an alternative position.

BACKGROUND TO THE ISSUE

9. The Employee was employed by the Employer on 5th June 2012 and worked as an Administrative Clerk within the Domestic Violence unit. He was on salary level 5 and at the time of his dismissal, he earned R 17 226.00 per month. .

10. He is currently unemployed and he submitted that he had a clean record, after his previous dismissal was reversed after he had appealed against it.

11. He was dismissed on 12th August 2020 and referred this dispute fr conciliation to the Council on 25th of same. A certificate of non-resolution was issued on 28th September 2020 and he subsequently referred the matter for arbitration on 7th October 2020.

12. He was charged with the charges below: -

12.1 In that you contravened Circular 55/2001 in that during the period of October 2018 or any period incidental thereto, in that at or near the magistrate's office in Ntuzuma, you intentionally and wrongfully committed an act of misconduct in that whilst performing your official duties in your capacity as the employee of the Department, you requested/demanded/solicited and received from one SS Shabangu, an amount of R 2000.00 for having advised him, given him forms for the application for protection order and having referred him to the local SAPS office for further handling, whereas you knew very well that this kind of service is offered free of charge by the Department of Justice.

> *12.2 Bringing the reputation of the Office / State and or government department into disrepute by committing the charge 1.*

13. The Employee was dismissed on 27th January 2020 (p 39 – B). He filed a notice of application for appeal (p 29-35 –B) against his dismissal. The appeal outcome was issued on 25th June 2020 (p 27 – B) and served onto him on 12th August 2020. The appeal outcome confirmed the sanction of dismissal.

14. The appeal outcome is signed by Ms Penelope Roberts, who was the Acting Chief Director – Coastal (Master).

15. I granted an application by the Employer to rely on the hearsay evidence of Mr Sizwe Shabangu, in terms of Section 3(1) of Law of Evidence Amended Act 45 of 1988, as he is the primary complainant and the alleged payer of the R 2000 bribe to the Employee. This after the Employer had failed to secure Shabangu's presence in the arbitration.

16. Shabangu's evidence therefore is on bundle E from page 3 up to page 62. I have thus incorporated the said evidence in the analysis below as part of my determination of the matter.

SURVEY OF EVIDENCE AND ARGUMENTS

EMPLOYER'S CASE

Mr Mthokozisi Ngcongo (Ngcongo) testified under oath on behalf of the Employer as follows:-

17. He is employed as an Administrative Officer, based at the Regional offices in Durban. He received the complaint from one of his colleagues, who was a Supervisor, Ms Thwala on 26th March 2019. The complaint was about money exchanges and Thwala asked him to speak to the Employee before attending to the complaint. He spoke with the Employee and assured him that he was dealing with the matter.

18. Shabangu said he did not want the Employee to be in trouble, and that all he wanted was his money and he would appreciate of the Employee would pay him back. Their conversation was done telephonically. At that time, he had already read the statement (p 20-21 /A) which is –

2 "…It is our instruction that on or about October 2018, our client had approached your court to open a Protection Order case at your Domestic Violence Division.

3 Our client advised that he was assisted by Mr Nkanyiso Ntetha whom requested the client to effect a cash payment to him in the amount of R 2000.00 (Two Thousand Rand), in order for him to attend to his case in a quick manner. It is our instruction that he had further advised our client to not effect the payment of the money in his bank account and to make a cash payment. Our client further advised that he proceeded to make the cash payment in October 2018 as per Mr Ntetha's request. Our client then approached Mr Ntetha when the matter he reported was not finalised as per their agreement and he informed our client that he will refund him by the 15th November 2018 and requested that our client not report the matter. Our client further advised that he approached Mr Ntetha on numerous occasions, to no success…"

19. All Shabangu wanted was a protection order and the Employee promised to him that for the process to be done faster, he must pay an amount of R 2000. Shabangu requested him to speak to the Employee as his colleague, since he did not want the Employee to face the consequences which might affect his family.

20. He called the Employee and spoke with him, and he asked the Employee how could he do that to a client. The Employee apologised and indicated that he wanted to pay Shabangu his money back. They agreed that Shabangu must come to the court on 15th April 2019 to collect the money.

21. As they were approaching the pay day, which is the 15th April, he called Shabangu and told him that the Emplyee was willing to pay his money and that he (Shabangu) must come to the court n 15th April 2019.

22. Shabangu called him at about 14h00 n 15th April and told him that the Employee has not paid him yet and that he was not at work. Shabangu also said there had been a number of times where the Employee had reneged on an agreement to pay him. He tried to call the Employee but was unsuccessful, and around 25th April, he handed the matter to the security division and it was out of his hands.

23. There was no point at which the Employee had spoken about the money having been for a stockvel, and not for a bribe. When he called the Employee, he read from the statement (p 20-21 / A) and the Employee did not dispute what is written in the statement. The employee acknowledged that he was wrong, hence he kept on apologising.

24. The above are the allegations that he related to the Employee and he did not dispute them, but rather apologised. Page 22 of same was attached to the statement and a communication via WhatsApp between the Employee and Shabangu and reads thus "Ntetha yazi ngithule ngibuka izenzo zakh wagcina usende msg ngafona wangalubamba ucingo" (from Shabangu)' loosely translated to mean that he is just quiet and observing, the Employee did not respond to his (Shabangu's) call. The Employee responded by saying he was trying to organise his (Shabangu's) money, so when he calls, he (Employee) does not know what he would say.

25. On p 139 - B is a court document in which Shabangu applied for a protection order, about six months before the complaint was received. This is the document he links to the allegations against the Employee.

26. The conduct of the Employee is unacceptable and it amounts to fraud and corruption, which the Department has a zero tolerance for.

27. The Employee during their telephonic conversation was apologising for fraud and corruption. He does not think he would have apologised for something which was a private matter, that is if the matter was related to the alleged R 1000 from a stockvel. The Employer would not have bothered with such a matter.

28. **Cross examination** – They do not have a standard operating procedure on handling complaints. All he knows is that he handles complaints and where they are complex, he escalates them.

29. The purpose of his call to Shabangu was to assure him that he was the one handling the complaint and he was dealing with it. Shabangu told him that the money was for the fast-tracking of the process, but did not say how that was going to be done.

30. He disputed that he did not read the statement (p 20-21 - A) to the Employee telephonically and said that that was a lie. He read the statement and the Employee acknowledged its content and he apologised. Also, the Employee would be lying if he said he (witness) did not tell him about the R 2000.

31. He conceded that in the conversation on p 22, there is nothing that talks about money being for a bribe. The Employee had the opportunity to put his version when he called him and read the statement to him, but he did no dispute it but rather apologised and confirmed that he would pay the money back.

Ms Nonhlanhla Sylvia Mbambo (Mbambo) testified as follows:-

32. She is the Court Manager – Ntuzuma and has been in the post for 10 years. After receiving the complaint (p 20-21 - A), she wrote a report and sent it to the Employee Relations unit, because it involved an exchange of money, so it needed someone with specialised skills to investigate it further.

33. It was the first time that they have received such a complaint where a member of the public was made to pay for service, but it was not the first incident involving the Employee as he had a similar incident before, and she changed him to his current department where money is not handled. She no longer trusts the Employee.

34. If the money would have been for a stockvel, it would not have come to the court as that is a private matter and in that case, she would have advised Shabangu to go and open a case in the small claims court. The matter was referred to the Employee Relations because Shabangu said the money was for the services to be expedited.

35. On page 10 of E from para 15, Shabangu said he for the first time met the Employee when he came to the court to open a case. as he said *"Yes, it was for the first time that I spoke to him on that particular day, but I used to come to this court, for that reason his face was familiar to me although I was speaking to him for the first time."*

36. **Cross examination** – She does not know at which stage was the R 2000 paid, but even though Shabangu knew the return date when he left, looking at the Employee's past incident which led to his dismissal, she felt that the matter must be fully investigated as she no longer trusted him.

37. She does not deal with private agreements, so there would have been no reason for Shabangu to write a letter to the Employer and mention the claim as he did, if that was for a stock-fell money.

EMPLOYER SUBMITTED THE ARGUMENTS BELOW:-

38. During cross examination the Employee admitted that during the appeal period he was paid his salary in full and he continued to benefits as if he was not dismissed by the respondent till the outcome of the appeal was issued to him.

39. He further admitted that he never suffered any prejudice for receiving the both the outcome of the hearing and the appeal, instead he continued enjoying the salary monthly.

40. He further admitted that although paragraph 9 (8.4) of page 2 annexure D state that appeals are delegated to the Chief Directorate Legal Services but there is an option that an alternative appeals authority may be appointed if required.

41. Ms Roberts was appointed by Chief Legal services to adjudicate in the Employee's matter and she was the Acting Chief Director - Costal Operation under the branch Chief Master and she met all requirement and the principles outlined in the documents alluded to above as well as Resolution 1 of 2003 Disciplinary code for the public service clause 8.4 (a) (b) which state that the executive of the employee or the employee appointed by the executive authority who was not involved in the decision to institute charges and is on a higher grade than the chairperson shall consider the appeal lodge by the employee.

42. During the re-examinations he stated that employer was in bridge of the resolution and delegation even if he did not suffer any prejudice.

43. It the Employer's contention that the Employee does not have a case with regards to the procedural fairness on the following basis: he did not lead evidence in chief as to how the Employer contravened the resolution and HR Delegation Annexure D.

44. The Employee received his monthly salary for the duration of the period while in the employ of the Employer and thus benefitting from the delay of the sanction and the outcome of the appeal. He failed to prove that he suffered any prejudice. This point therefore lacks substance and has no bases and is his desperate attempt to get anything out of this application.

45. The Employee's evidence cannot be admitted on the basis that he did not have any proof of their friendship with Mr Shabangu except that he was a client which is proven by the document that Mr Shabangu came to apply for. His evidence cannot be trusted on the basis that he is blaming everyone but himself and he was also contradicting himself and failed to answer most of the questions and he was not reliable and credible. It is our plea that his evidence be found to be, inconsistent, not reliable and not credible.

46. Faye's evidence cannot be trusted on the basis that she was a flip flop always wanted to say things that will cover the Employee even when she had acceded to the correct version, when it comes to the Employee, she would try her level best to change it to suite him and that kind of a witness is unreliable and not credible. It is our plea that her evidence be dismissed as she was an unreliable witness.

47. Ngcongo's evidence in summary is that he was given the matter for Shabangu by his supervisor and he called the Employee and explained to

him that there was a compliant that he solicited a bribe from Shabangu and he apologised and promised to pay him on the 15th of the month, and on the 15th of the month, he ran away and that is why Shabangi ended up reporting the matter to the department.

48. The Employee in his own evidence admitted that he doesn't know Ngcongo nor he had a problem with him and therefore Ngcongo as a department official, had no reason to lie in his evidence, in that he read the complaint to the Employee and the Employee apologised.

49. The transcripts of Shabangu also confirm that the Employee solicited the bribe from him for an amount of R2000.00 and this was collaborated by Ngcongo in his evidence in that he confronted the Employee about this and he apologised and promised to pay it back which he did not do.

50. It does not make any sense that Shabangu would lie against the Employee to the extent that, he would waste his money going to the attorneys to report the matter and also report the matter to the department knowing very well that they were friends with the Employee and their friendship is known at work. The story that he reported the Employee because was bitter and wanted the Employee to be dismissed does not hold any water. During the cross examination the Employee read the evidence of Shabangu and confirmed that Shabangu said in his evidence he never wanted him to be dismissed and all he said he wanted was his money, and he doesn't sound like a bitter person.

51. During Shabangu's evidence in the disciplinary hearing, at no stage did the Employee tell him under cross examination, that they were friends and that he was going to call witnesses that will confirm their friendship so that Shabangu would answer. The evidence that the Employee visited Shabangu at his old house, and that they went to the same church was never put to Shabangu in anyway during the cross examination. These versions were only put by the Employee in his evidence in chief knowing very well that Shabangu had already testified and he was no longer there to refute which was a very spiteful and deceitful thing to do.

52. Both the evidence of Faye and the Employee was never put before Shabangu so that he would refute it and it even worse that their evidence is not consistent when looking at the transcript of the disciplinary hearing and the evidence they tendered at arbitration, there are a lot of changes and at that time Employee knew that Shabangu was no longer coming to give his evidence at arbitration and they decided to add more spices.

53. The evidence of Shabangu is more probable than the one of the Employee more so that the Employee agreed to owing and also admitted to having owed him R 2000.00 as per Shabangu's claim and the only thing

the Employee is denying is how was the money sourced from Shabangu, alleging the friendship which did not exist, and the Employee doesn't have anything to prove this friendship that it ever existed except bringing Faye whose evidence is inconsistent and a bunch of lies.

54. It is our plea that you find the evidence of Shabangu more credible and reliable more so that it was corroborated by the evidence of Ngcongo.

55. The evidence of both Faye and the Employee cannot be trusted on the basis that, it clear that the her evidence was fabricated in order to try and rescue the Employee. It cannot be true that every time the Employee met a new friend he would introduce them to Faye. It is common course that Shabangu had visited the court as a client and he came a couple of times looking for the Employee but what is clear is that he was looking for him to get his money that he paid him for bribe.

56. The evidence that Shabangu came numerous time looking for the applicant was also confirmed by Pillay who confirmed that she learned at a later stage that the reason for Shabangu coming to court was because he was owed by the Employee and the Employee introduced him as a client to her and not a friend as Faye alleged.

57. Faye's credibility was not only tarnished in relation to the evidence relating to friendship but also when she vouched that under no circumstances, the protection order is signed the next day, this statement was contrary to the date appearing in the application for Shabangu dated 25th September 2019 but signed on the 26th September 2019 at 8:30 which was the next day.

58. Faye's evidence was crushed by Pillay when she said that it is a common thing that application for protection order be signed the following day on the basis that they do not have a resident magistrate and they don't inform the applicant of the outcome before it is signed by the magistrate.

59. And in this case this means that when the Employee testified that Shabangu left on the 25th of September 2019 and he never came back because he had nothing to come back for was actually a lie because according the documents and Pillay, Shabangu came back the next day to get a signed protection order the on the 26th September 2019 which contradict the evidence of Faye and the applicant.

60. The Employee's claim that Shabangu was bitter because he owed him money, is just an excuse and it was out of desperation because he never thought that Shabangu would go to the extent of reporting the matter on the basis that he was of the view that if Shabangu reported the matter it would backfire on him as well because he was also corrupt by paying the

bribe and this would also put him in trouble since he was employed as an educator.

61. The Employee contradicted himself also about him visiting Shabangu at home, in that, in his evidence in chief he testified that he visited Shabangu and during cross examination he testified that he never visited him.

62. Most of the applicant's testimony relating to the friendship was never canvassed before Shabangu including the evidence of Faye so that Shabangu can respond whether all the things said were true or not. The statement of the applicant that he forgot or he was waiting for his time to give evidence is a lame excuse and therefore his evidence lacks credibility and cannot be relied upon to make a decision.

63. The claim by the Employee that he apologised to Ngcongo because he knew he was owing Shabangu is also a lie on the bases that he could have explained to Ngcongo, how he owed Shabangu or tell him that the matter was private and there was no need for the department to interfere, so that Ngcongo could explain further how this matter was of the interest in the department.

64. Pillay was the only credible witness of the Employee in that she testified that Faye was not telling the truth that the protection orders are signed only on the same day and they cannot be signed the following day. She further confirmed that when she asked the Employee who Shabangu was, his response was that he was a client and he never introduced him as a friend and this contradicts both evidence of Faye and the Employee on the basis that, if Shabangu was a friend as they claim, the Employee would have told Pillay that he was his friend, not a client.

65. We have no reason not to believe Pillay's evidence as she had no reason to turn against the Employee except that she wanted to tell the truth and assist the process to get to the truth. Her evidence was credible, reliable and consistence with the truth.

66. The evidence submitted is enough to prove on balance of probabilities that the Employee committed misconduct and during the arbitration he proved to be unreliable and not remorseful. Faye was clearly prepared to talk contrary to the truth even during cross examination she was always careful not to sell the applicant to the extent that she would twist the truth, to favour the Employee and her evidence lacks credibility and she was unreliable.

67. It is our plea that the evidence of both the Employee and Faye be rejected on the basis that it lacks credibility, is inconsistent and unreliable, and find that on balance of probabilities that the Employee committed a

misconduct and he is guilty of charges levelled against him, as he was previously found guilty by the chairperson at disciplinary hearing.

Employee's case

The Employee testified as follows-

68. He understands that there was a complaint raised by Shabangu (p 20-21/A). He knew Shabangu before the complaint he met him in 2012 when he was a court clerk on hijackings, including working registering cases to be on the court roll. He noted Shabangu, because he would confuse the dates and appear at the court the next day, after the due date and he did that consistently. He would then complete a J15 form for Shabangu to withdraw a warrant of arrest, and that is how they got to know each other and exchanged cell phone numbers.

69. They used to communicate, mostly on WhatsApp and chat about work related issues and family matters, including church issues. His colleagues, Mr Mzwandile Ngalo and Xoliswa Fani were aware of their relationship.

70. He recalls a lot about Shabangu, hence he was shocked when he got the allegations levelled against him.

71. In 2013, he had advised Shabangu on a paternity matter, after Shabangu had come to the court to meet him.

72. In 2018, Shabangu came to the court following a fight between him and his neighbour, and he assisted him. Shabangu was given a letter for protection.

73. On one Sunday around October 2018, he called Shabangu and borrowed R 1000. Shabangu said he did not have the money and on Monday, Shabangu returned to him and had Mrs Khanyile with him and she was from a stokvel. Khanyile spoke with him and explained that she could lend him the money and he would have to return it with 25% interest. He agreed to such terms and Shabangu, on that Monday came to the court after lunch and gave the money to him.

74. He paid the interests on the money twice and did not continue to pay the capital, which led to the deterioration of his relationship with Shabangu, such that Shabangu would call him, looking for the money and he would ignore his calls.

75. For Shabangu to say the money is R 2000, he may have included interests and to say he gave him the money to expedite his case is a lie. There is no

way he could have done that and Shabangu knew the return date as he left the court.

76. It is a lie for Shabangu to say he gave him R 2000 to expedite the case, whereas. Shabangu knew the return date as he left the court and there is no quick way of assisting a member of the public with a case. Shabangu, as a state employee knows that the services at the court are offered freely.

77. The second time he spoke with Khanyile was when she called him and she swore at him telephonically and threatened that she would come to the curt with her colleagues and embarrass him. He apologised to her.

78. He cannot associate Khanyile's complaint with Shabangu's complaint because they are not the same. Shabangu lied when he said he gave him R 2000 to expedite a case. It might have been the results of frustration that Shabangu ended writing the complaint.

79. Their WhatsApp conversation on p 22 of –A (bundle A) was based on the R 1000 he had borrowed from Shabangu.

80. He received a call from Ngcongo and he agreed that he knew Shabangu. Ngcongo did not ask him if he owed money to Shabangu, all he said is that he must pay Shabangu back his money. He agreed that he was going to pay R 2000 to Shabangu.

81. He saw the R 2000 as arising from the R 1000 that he had taken, and increased with interest. Their discussion ended with an agreement that he was going to pay Shabangu the R2000, although he ended up not paying it.

82. It is incorrect for Ngcongo to say he read the letters telephonically for him, he only saw the content when he was served with the charges for the first time.

83. There was no need for him to explain to Ngcongo how did the R 2000 come about, because he did not ask such a question.

84. Ngcongo asked him if he knew that not paying Shabangu his money back was wrong, and he consented. It is true that he apologised, but his apology was for the fact that he borrowed money from Shabangu and did not pay it back, not for the content written on p 20-21-A. had he known the said content, he would not have apologised.

85. He could not have told Ngcongo about the stockvel because he never asked what was the money for. So there was nothing that would have led him to explain, and also, he was shocked at Shabangu raising such allegations.

86. On p 139-156 – B, are the details of the protection order applied for by Shabangu and he together with Nerh Maphumulo (the respondent) did not attend the hearing on 4th December 2018.

87. He disputes that Shabangu only met him for the first time in 2018, they met in 2012 and had been communicating ever since.

88. When Shabangu was asked to explain what was the money for, he could not explain and only referred to what his lawyers have written (p 19-20 - E), it was because he knew that he was lying and he found it difficult to repeat such a lie in his (Employee's) presence. Shabangu also did not want to contradict himself.

89. It is not true that Shabangu gave the money to him in the office, Shabangu asked that they meet outside and that is what they did and he gave him R 1000, not R 2000. It is also not true to say Shabangu gave him the money in the afternoon, it was in the morning.

90. He thinks Shabangu went to the attorneys as a result of getting pressure from his colleagues. His relationship with Shabangu was spoilt by his failure to pay back the money.

91. On p 31-47 - F is a protection order application by Shabangu dated 13 July 2019. When the protection order was opened (p 33 - F) Shabangu was the respondent. The dates on p 45 - B, which is October 2018 is not the same as that on p 33 - F which is 7th March 2018.

92. Mbambo's testimony about the charges in which he was acquitted is only meant to make him look bad. He thinks Mbambo was influenced with hatred towards him when she said he cannot work at the switchboard.

93. There is nothing that would have made Shabangu to come to the offices on 26th of September 2018. He only became aware of the documents stamped the 26th during the arbitration hearing. However, he only saw Shabangu on 25th, so the Magistrate who signed the document on 26th is the one who can explain that.

94. He followed the due process when assisting Shabangu and Shabangu knew as he left the premises that his return date was the 4th December.

95. He did not borrow the money from Shabangu when he was at the offices.

96. **Cross examination** – having been employed for over 10 years, he knows what is expected from him as an employee, and that includes not to have unprofessional conduct with members of the public. He disputes the allegations that he took R 2000 from Shabangu in exchange to expedite the protection order application.

97. It was after Shabangu had come to open the case of a protection order that he borrowed money from him. His relationship with Shabangu is different in that they had been friends since 2012, and they would meet after work and on Sundays.

98. When he first knew Shabangu, Shabangu was a client as he had come to the court as an accused person and also when he took money from Shabangu, Shabangu was still a client of the Department. Shabangu came to the court to give him the money. He moved out of the offices and they met outside the premises' gates.

99. On the communication on p22, where he referred to Shabangu as "Mfwethu" signals that they were indeed friends. He agreed that he said 'mfwethu' because he humbled himself to Shabangu, since he owed him money and therefore he was begging him.

100. He had some documents mentioned that shows that Shabangu was his friend, but he could not point out where exactly that is. He also has people who knew of their friendship, and they include Ms Xoliswa Faye (Faye), colleague of his.

101. He made a mistake when he said he has never been to Shabangu's house, he had been to his old house at K section, kwa Mashu, once or twice, and is at Shabangu's new house in Umzinyathi that he has never been to.

102. He told Shabangu during the disciplinary hearing that they were friends, but did not remind him that he had been to his house as there was nothing that led him to say that. He did not have anything else, except that he knows that at the time, Shabangu was driving a white polo vehicle.

103. Shabangu never agreed that they were friends as indicated in the transcripts, p 15 to 18 - E.

104. Shabangu only came to the curt once, for the protection order. There was no need for him to demand R 2000 from Shabangu, because as Shabangu left the court, he knew his return date.

105. He maintains that what he assisted Shabangu with was protection from harassment, not protection order as mentioned on p 20-21. He agreed that what is contained on the pages 154-159 - A are the documents he assisted Shabangu wth and gave them to him.

106. He agrees that p156 - A is part of the documents and is dated 26th September 2018, not 25th as he said Shabangu went out on the 25th already with the order. He believes the Magistrate has made an error by affixing a date stamp of 26th instead of 25th. Also, the issue of the date does not change the fact that Shabangu knew his return date as he left the court.

107. He agrees that the Magistrate is the one who would have known his available date, that is 26th, but he is not sure what happened and he cannot answer for the Magistrate. But the documents point to everything having been done on 25th September. There is no way that the application could have been done in two days as it is the procedure that clients wait for their orders and are handed out on the same day, unless they relate to old matters.

108. Faye knew that he was friends with Shabangu and there are other people as well who used to see them sitting and laughing together. He worked closely with Faye and has known her for many years.

109. He did not have any quarrel with Shabangu, before he took the money from him. He thinks Shabangu came to the court and complained because he (Shabangu) may have been under pressure from his colleagues

110. When it was put to him that Shabangu in the disciplinary hearing said "*I do not want anything else or this matter to be dragging on and on. All I want from Mr Ntetha is my money*" p 49 para 1-2 -E, and asked whether does Shabangu sound like someone who wanted him to lose his job, he had no comment.

111. Ngcongo lied when he said he read the document for him telephonically when they spoke. He does not know why would Ngcongo lie as he did. He admitted to Ngcongo that he owed Shabangu, at that stage, he did not know what money was Ngcongo talking about. He knew about a R 1000, with interest.

112. He did not know about the small claims court. His apology was only for the fact that he took money from Shabangu and did not return it. He apoligised to Ngcongo, for not paying the money.

113. He agrees that Ngcongo told him that what he did to the client was not right. He did not ask him why was he asking that as he did not take the money from a client, but a friend, but he now understands what that means. He thought Ngcongo was speaking about a client who was in front of him at the time and he got confused by the word 'client'. He only saw the full document when he was served with the charges.

114. The Employer is the one who is prejudiced due to the delay in communicating the sanction of his dismissal to him. But it is not like he got salaries that he did not deserve, he worked as usual and earned his salaries.

Ms Xoliswa Faye on behalf of the Employeeas follows:-

115. She is employed as a clerk and has been doing the job since 2011. She had a working relationship with the Employee and even when one of them was not at work, they would call each other and that is how she became aware of his friends.

116. She knows Shabangu as the Employee's friend. Since her arrival in the court in 2011, Shabangu would come and look for the Employee and he would arrive anytime, then the two would chat.

117. She does not know anything about the alleged R 2000 bribe and this is confusing to her, because during the course of their work, there is nothing that requires them to take money from the public.

118. After the problems started between the Employee and Shabangu, she distanced herself from Shabangu, following an incident in which she met Shabangu at Bridgecity Mall and he shouted at her, loudly, saying "*it would have been better if she was the Employee, as he would have assaulted him*". She was angry at the manner in which Shabangu shouted at her, in front of many other people.

119. He used to come alone when he was looking for the Employee, and it was only on one occasion that he came with someone else. He would come on 15th of every month, pass via her office ask where was the Employee and that took place for about four or five months and he complained that the Employee was always not at work on the pay day.

120. On the other month, on the 15th, he came with another lady and she was complaining that the Employee took R 1000 from the stokvel and now

he is nowhere. She does not know who that lady was. The lady appeared angry.

121. She informed the Employee about her interaction with Shabangu in Brigde city mall and also about the R 1000 loan and the Employee appeared to know about the loan.

122. There is no way in which a client can be treated in a quicker manner, because as they leave the court, they are already aware of what the return date is.

123. She did not fabricate her story, she is telling the truth.

124. As reflected on p156 – B, the magistrate signed the application on 26th September 2018 at 08h30, after it was compiled on 25th of same at 15h56.

125. **Cross examination** – It is correct that in 2012, he was already aware of the Employee's friends, especially Shabangu, because the Employee introduced him to her as a friend. There are other friends which the Employee introduced to her in the same manner.

126. She agrees that an impression as she mentioned in her statement on p 103 that *"I even had an impression that they are friends because, each time Mr Shabangu would come, then together with Mr Ntetha they would go outside and see them laughing and then talking about their matters"* and be sure are not the same.

127. She is not aware that she was not sure in the disciplinary hearing that Shabangu was a friend of the Employee, but all she knows is that she knew Shabangu as the Employee's friend.

128. When she was referred to the last para on p105 - E where she said *"Particularly so because I thought of them as friends",* she said it depends on the context of the discussion. To think that people are friends is not the same as being sure that they are friends.

129. She cannot dispute the differences in what she said in the disciplinary hearing and in the arbitration. She disputes that she was lying and insist that she is telling what she knows.

130. It is not possible that an employee can deceive a member of the public by soliciting money in order to expedite an application. This is because there are serial numbers and the files do not just end with them as clerks, they go to the magistrates who also have their own numbering.

131. At the time that she met Shabangu in the mall, it was after Shabangu had informed her that the Employee owed him R 1000.

132. When they arrive at work in the morning, guided by their diary, they would know exactly when will the return date be for the cases applied for on that specific day and that specific date will be the date for all the cases opened on the day. No case can be made to be heard on an earlier date.

133. When opening a case, three copies would then be made and they would give two to the client and inform him/her of the return date. The client would only know of the return date after the file had been signed by the magistrate.

134. She does not know what would have happened between the Employee and Shabangu. Only once the file has been signed by the magistrate can she then inform the client of the return date, even though she would have always known the return date as per the diary.

Ms Jayshree Shrinavasan Pillay testified as follows:-

135. She is an Administration Officer and currently acts as the Curt Manager. She has almost 23 years in the service and was transferred to Ntuzuma Court in 2016.

136. She was the Employee's Supervisor when he was at the children's court and they had a working relationship together. He was a good worker and she could rely on him, as he worked very well with clients.

137. She was referred to p54 – B where Shabangu said "*…There is a lady I spoke to. It was an Indian lady but I kept on asking for the whereabouts of Mr Ntetha because I would be told he is not here, he is not here. But I realised that I could not tell my story to that particular one because it would then need an interpreter….*"

138. She knows Shabangu and he must have been referring to her as she is the only Indian lady who is a Supervisor in the court. She has on many times seen Shabangu with the Employee and he would greet her calling her "*mphathi*", meaning boss.

139. Shabangu used to come to her at times and he once told her that the Employee owed him money, to which she told him to open a case or contact a lawyer.

140. When Shabangu told her that the Employee owed him money, he was speaking in English, so she does not understand why then did he mention that he would have needed an interpreter to speak with her.

141. She viewed Shabangu's interactions with the Employee as those of friends, as they would talk in a friendly manner and sometimes Shabangu would come and sit with the Employee.

142. Under no circumstances would she collude in corrupt activities, if anything, she would be a whistle-blower.

143. Knowing the Employee and how dedicated to his work he was, it is hard for her to believe that the Employee did what is alleged in the charge.

144. The process when opening a case is that the client opens a case, a case number is allocated and it is referred to the magistrate on the same day. After collecting the files from the magistrate, the clerk would read the order for the client and give the client the return date.

145. It would not be wrong for the Employee to say he only saw Shabangu on 25th September, and yet the magistrate signed the file on 26th of same because mostly, they make copies and give such to the client with the return date.

146. The application was done on 25th September at 15h55 and the magistrate dealt with it on 26th at 08h30. As she said, they do not have a resident magistrate, the magistrates have their other normal functions. So it appears here that the magistrate received the file very late and attended to it the next day.

147. **Cross examination** – She does not think that the Employee has taken R 2000 as a bribe. It is possible that he may have taken the money as a bribe. They constantly find people who come to the court, looking for staff members saying they had taken money from stokvels.

148. It does happen that the file is opened on one day and the magistrate deals with it the next day, and this is because the date is allocated by the clerk and it is a common date, so it is possible that the Employee would have told Shabangu of the return date.

149. The procedure is that the date is only communicated to the client after the magistrate has signed the file, but the practice is different. However, as to the order by the magistrate which could either be an interim order or a notice to show cause, it is not possible to inform the client before the magistrate makes the order.

150. If the Employee told Shabangu the return date, such is in line with the procedure because the procedure is that a client must leave the court being aware of the return date.

151. You only inform the client of the outcome once you have received it form the magistrate. So it is not correct that Shabangu knew the outcome as he left the offices on 25th, since the magistrate dealt with the matter on 26th. So the documents do not support the statement that Shabangu came to the court only once, for this matter.

EMPLOYEE SUBMITTED THE ARGUMENTS BELOW:-

152. On permission granted by the Commissioner, the PSA addressed the sitting that the applicant will be challenging both the procedure and substantive unfairness. Procedural and Substantive issues were cited by the applicant, I will address the commissioner as part of heads of closing arguments. Mr Sithole on behalf of the employer indicated that the respondent may have about 5 witnesses. Applicant intended to call 3 witnesses including dismissed employee.

153. On the second sitting, 9 February 2021, the Employer was accordingly advised that the Applicant on behalf of the Employee is challenging both the procedure and substantive fairness in this present case.

154. As parties agreed to proceed it was placed on record that procedural issues raised by the applicant will be argued on papers of closing arguments after substantive evidence has been presented before the commissioner.

155. It is worth mentioning that subsequently all attempts of the employer to call its second witness Shabangu failed as he refused to come and testify.

156. On procedure: The Employer did not comply with paragraph 7.3. (A) of the Disciplinary Code and procedure (Resolution 1 of 2003) -

156.1 On the 24th of July 2019, the Employee was served with a charge sheet, and he was informed that a disciplinary hearing against him was to be held on the 8 of August 2020 at 10h00. The Charge sheet contained two charges. The Disciplinary hearing was held for a number of days.

156.2 Resolution 1 of 2003, disciplinary code and procedure, paragraph 7.3. (a), provides that disciplinary hearing must be held within ten

working days after the notice referred to in paragraph 7.1 (a) is delivered to the employee. The Employer here in this matter held the enquiry on the 11th day after a notice was delivered and that amounts to non-compliance with the set standards in managing dispute and renders the process procedurally unfair. (See page 73, bundle B)

157. The Employer did not comply with paragraph 7.3. (o) of the Disciplinary Code and procedure (Resolution 1 of 2003) -

157.1 The disciplinary hearing was concluded on the 9th of December 2020. On the date the Chairperson delivered her judgement where he found the employee guilty as charged. However, the process was to be finalised after the recommended dismissal sanction considered by the delegated authority from the department and the outcome was to be issued within 10 days after the conclusion of the enquiry but that did not materialise.

157.2 The final outcome of the disciplinary enquiry was signed by the Regional Head of DOJ KZN on the 7th of January 2020 and served to the Employee on 27 January 2020, which is 33 days late, after the internal enquiry was concluded.

157.3 The Employer is aware of the rules and is aware of the Disciplinary Code and Procedure (Resolution 1 of 2003) which paragraph 7.3. (o), which provides that the Chairperson of the enquiry must communicate the final outcome of the hearing to the employee within five working days after the conclusion of the disciplinary enquiry. (See page 74, bundle B)

157.4 Even if the period from the 16 December 2019 to the 7th January 2020 were to be excluded, (cool off period), still, the outcome was issued after the specified period taking into account the time frame specified by Resolution 1 of 2003.

157.5 Furthermore, the Employer did not comply with paragraph 8.8 of the Disciplinary Code and procedure (Resolution 1 of 2003). On the 3rd of February 2020, which was the fifth (5) day after the final outcome of dismissal was issued, the Employee lodged an appeal with the Deputy Director: Employee Relations: DOJ KZN, in thereto the Employee complied with the time frame stipulated in Resolution 1 of

2003, paragraph 8.2, which provides that employee must within 5 working days of receiving a notice of the final outcome of a hearing or other disciplinary procedure submit the appeal to the executive authority. (See page 75, Bundle B)

157.6 A decision of the appeal confirming the outcome of the disciplinary proceeding sanction was signed on the 26th of June 2020 by the Acting Chief Director: Coastal (Master) and served to the employee on the 12th of August 2020.

157.7 Resolution 1/2003 on para 8.8, provides that the employer must finalise appeals within 30 working days failing which in a case where the employee is on precautionary suspension, he or she must resume duties immediately and wait the outcome of appeal while on duty. The Employer failed dismally to comply with this provision hence, delays were very much unreasonable, unjustifiable and this renders the process procedurally unfair. This delay is excessive as it finalised the appeal on 12 August 2020. The resolutions provides for resolution within 30 days, yet the Employer took 6 months.

157.8 The Employee allegedly committed this misconduct in October 2018 and charged in July 2019, that is 9 months later, and the entire internal process was only concluded in August 2020 which is equivalent to a year plus 10 months. The principles, paragraph 2.2, was undermined and deliberately ignored by the employer as it made mention that discipline must be dealt with in a prompt, fair, consistent and progressive manner. (See page 69, Bundle B).

158. Applicant's address and Submission on Public Service Act provisions.

158.1 I refer to an appeal letter, (page 27 of Bundle B) Subject line "*against the outcome of disciplinary hearing*" where the Acting Chief: Coastal (Master) who was of the opinion that the appeal of the Employee must be dismissed and thereafter dismissed the Employee.

158.2 In terms of the Public Service Act Section 17 and 16 b (1) subject to subsection (2) the Acting Chief Director: Coastal (Master) lacks and had no authority to decide the appeal of the Employee, so she had no authority to dismiss him. She is not the Head of Department of Justice.

158.3 It is common cause that dismissal letter's in every Department of the public service comes with a Signature of the Head of that Particular. In this case, the letter on page 27, bundle B came with a signature of the person who decided the appeal, who was an Acting Chief Director and is not the Head of Justice Department.

158.4 In view and in understanding the section above I submit the following for your attention and consideration:-

- The Acting Chief Director lacked authority to dismiss and decide the appeal against the outcome of disciplinary enquiry, therefore the dismissal of the Employee was unconstitutional, unlawful, invalid and of no force and effect and must be set aside.

158.5 It is our submission that the authority to decide appeals lies with the Chief Director: Legal Services in the office of the Chief Litigation Officer as delegated by the Minister of Justice and Correctional Services. Further, the authority to dismiss an Employee lies with the Head of Department.

158.6 Bundles C and D contain delegations and procedures on how appeals in the department of Justice should be handled and managed. First and foremost, it worth mentioning that according to the Employee bundle C is not relevant to his dispute. Bundle D retracted delegations of appeals contained in bundle C.

159. It was clear and evident enough that Ngcongo was introduced to prove that a complaint was received from Shabangu as he reported at Regional Office, which the Employee did not dispute from the onset, therefore, undisputed evidence bears no weight in this present dispute.

160. There is no rule or peace of labour law evidence substantiating that an apology may be viewed as generally admission of guilty. It is common to apologise, furthermore, tendering an apology is an ordinary and something civil to do, it does not necessarily mean admission of guilt.

161. Ngcongo during his testimony contradicted himself and was due to unsubstantiated evidence to implicate the Employee to the charges.

162. Further, the absence of convincing evidence whether the statement was read by Ngcongo to the Employee during the telephone communication made such testimony difficult to believe.

163. There was no overwhelming evidence to prove admission of alleged misconduct by the Employee as such no balance of probability may be established within the evidence of Ngcongo.

164. It must not be forgotten that the main charge was that the Employee demanded, requested or solicited an amount of R2000.00 from Shabangu in order to deal with his case in a quicker manner and therefore, Ngcongo has failed to link the Employee to the allegations.

165. In as much as the ruling was in favour of the employer to utilise transcript of the disciplinary hearing, this did not wave common understanding that arbitration is a process in de novo. The applicant will still deliver new evidence if necessary.

166. I would like to caution the Commissioner about Shabangu's evidence during the disciplinary hearing, in that he was very doubtful and hesitant to answer questions and also, he surprisingly refused to come and testify at the arbitration.

167. The evidence of Shabangu on page 10, line 21 to 25 bundle E that he met the Employee for the first time when came for assistance, cannot be true and believed over or against the evidence of the Employee, Faye and Pillay whom presented collaborating evidence confirming that Shabangu and the Employee knew each other and used to visit each other, sit in office, go out of the office and seen talking and laughing.

168. In terms of reliability of the Employee's witnesses, please note that Pillay was a supervisor of the Employee and Faye was senior to him, therefore, they had no reason to lie about him and his relationship or friendship.

169. The Employee's evidence alone was enough to establish probability that the two were friends and Pillay and Faye's evidence was more than enough to conclude that Shabangu misled the disciplinary hearing in saying that he met the Employee for the first time on 25th September 2018. If the evidence of the applicant and his witnesses will be carefully assessed, there is no doubt that a balance of probability will be established in favour of Mr Ntetha.

170. Shabangu's evidence in that he was reluctant to answer simple questions as *"how Mr Ntetha wanted the money to come to him?"*. It takes him minutes to answer the question, in fact he gave an irrelevant answer as he said "*he gave him cash in hand*" whereas the question asked for something else.

171. Shabangu is the one who made extract of conversation of a cell phone of page 8 between himself and the Employee, see page15, bundle E, line 12-13. (as per our bundle it page 47 of bundle B), and the interesting thing is that he was selective in printing out these conversations, because this was not the only conversation they had. Shabangu was hiding other conversations that could have proven their friendship.

172. Right up until the end of proceedings, Shabangu did not testify on how his matter was going to be dealt with in a quick manner and failed to tell the tribunal what is it that the Employee did not do which then led him to claim his money back. (see page 11, para 1-3, - E). Shabangu's evidence is not enough to prove the allegations of misconduct levelled against him.

173. As disciplinary hearing goes on, Shabangu did not want to answer questions, he wanted to refer from the complaint prepared by his attorney. This was argued until the employer representative jumped the question, see Page 19, para 8-10, bundle E, and this was his practice throughout the entire proceedings.

174. We submit that this was caused by the fact that indeed, he could not lie again in front of the Employee as their friendship was once cordial and that he knew he told lies to the attorneys.

175. It is safe to mention that it has not been proven that Shabangu paid an amount of R2000.00 to the Employee for the services. The evidence of Shabangu was not reliable and contrary to what happened between himself and of the Employee.

176. It must be noted with serious concern that three officials including the Supervisor would not have colluded against the member of the public and lie for the purposes of carpeting the Employee's wrongdoing. This fact alone proves that Shabangu cannot be trusted if he also denied a simple friendship with the Employee. His impatience in the hearing was a

conclusive proof that he could not repeat his own evidence that he presented to attorneys.

177. The Employee brought new evidence in arbitration that he used to visit Mr Shabangu in KwaMashu, it was not disputed and the Employer's exercise to rebut this failed dismally. It was imperative for him to tender this relevant friendship evidence to qualify his version and bring understanding to the tribunal that he borrowed money from Mr Shabangu.

178. It must be noted that the Employee presented evidence relating to the date of 25th September 2018 regarding the application of Protection from Harassment for Mr Shabangu. Taking into consideration the evidence and process that members of the public do not go back home without being told of the next court date, which was also confirmed by both his witnesses, it was reasonable and not even wrong for the Employee to insist that Shabangu knew his next court date, therefore, there is no way that he was going to pay for his case to be dealt with in a quick manner.

179. As far as the date of 26th September 2018, the Employee had no knowledge of this date as he knows that new applications are dealt with on the day. The Employee cannot be blamed for his honest evidence and understanding of what should have been done in the processes.

180. We submit that Faye evidence on opening of protection order files was based on the due process. Therefore, her evidence cannot be dismissed.

181. Pillay confirmed that the Employee was a very good worker that goes an extra mile, was very friendly and ensure that all clients assisted even if they are not from his section.

182. Pillay's and Faye's evidence corroborated that Shabangu on many occasions came to the court visiting the Employee in the office. They have

been seen together, chatting and laughing to each other which indicate that they were friends.

183. Shabangu is the only person that could have disputed the above evidence in the arbitration, however, he gave up his right to do so by not attending the arbitration.

184. The Employer representative appeared to believe that Faye presented different a version in that at the hearing, she stated that she had an impression that the Employee and Shabangu were friends, secondly, she said "*I thought of them as friends*".

185. The Employee submits that the Employer representative continuously erred when referring witnesses to transcripts in that he was only reading selective responses of witnesses without understanding the background of the whole question. We refer the Commissioner to Page 104, Bundle E, para 2 to 5. If one reads from page 103 to 105 – E, will understand that her answer complemented the background of the question, therefore, evidence still brings the probability of the Employee's friendship with Shabangu.

186. It goes without saying that Pillay and Faye were both reliable witnesses whom both delivered evidence of what they know and saw in relation to the Employee's interactions with Shabangu.

187. The Employee proved his friendship in line with his version that money was borrowed from Shabangu as a friend. The Employer failed to discharge evidence that money referred to was for services. We submit that after the Employee introduced friendship evidence, the Employer lost focus in terms of introducing evidence that will prove his case and continued to try and rebut applicant evidence and he failed to do so.

188. I want to bring to your attention that there is no way that since 2012 Shabangu was coming to old the Ntuzuma Court Building because of his money. At that time they were not owing each other but Mr Shabangu often came to court to chat with the Employee as said by the Employee and Faye. Such visits continued right until the new building, as stated by the Employee and both of his witnesses and there was no evidence presented by the employer to rebut this continued visit from 2012. This indeed prima facie proves that the two were friends.

189. It was a mammoth task for the employer to prove the allegations that the Employee was paid an amount of R2000.00 for rendering service in a quick manner and indeed, the employer failed. Firstly, there were no detailed evidence led on how the parties entered into an agreement of paying for services quick manner. The Employer was supposed to adduce evidence as to what the Employee promised to do for Shabangu.

190. There was no evidence led by Shabangu regarding the date of 26 September 2018. The employer appeared to believe that Shabangu came back to court on the 26 of September 2018 since the Magistrate only signed the application on that date. This belief was not qualified by any evidence and Shabangu was not present to qualify it.

191. It is accordingly submitted that the Employee's dismissal be found to be unfair as the evidence tendered by the Employer lacks substance.

192. It should accordingly be established that the dismissal of the Employee is unfair.

ANALYSIS

193. In Cooper and another v Merchant Trade Finance Ltd [2000] (3) SA 1009 (SCA), the approach to be adopted when an inference is sought to be drawn from other facts was summarised, and that is, the court in

drawing inference from the proved facts, acts on a preponderance of probability. The inferences of an intention to prefer is one which is, on a balance of probabilities, the most probable, although not necessarily the only inference to be drawn. If the facts permit more than on inference, the Court must select the most plausible or probable inference. If this favours the party on whom the onus rests, he is entitled to relief. If, on the other hand, an inference in favour of both parties is equally possible, the party who bears the onus will not be entitled to relief.

194. It is common cause that Ngcongo called the Employee telephonically and raised the issue of R 2000 owed to Shabangu. What is in dispute in Ngcongo's testimony is whether he read the letter word for word, and also, whether the Employee apologised for having taken the money for the purposes mentioned in the letter, as it was submitted by Ngcongo, or that he apologised for his failure to pay the money back in terms of their agreement, and nothing to do with Shabangu as a client or such money being a bribe.

195. It is also common cause that on 25th September 2018 Shabangu came to the court and was assisted by the Employee.

196. Shabangu on p 42 – E (transcripts) para 19 confirmed that after he was assisted by the Employee on 25th September, the Employee gave him documents to give to the police and the respondent (in Shabangu's case) and also told him about the return date. This tallies with the Employee's version of the 25th September.

197. The only issue being unclear is whether Shabangu came to the court only on 25th September or that he also came on 26th of same. The importance of the foregoing is to the effect that the Employee might have been untruthful when he said Shabangu only came on 25th September, which may then cast doubt on his credibility. However, given that Shabangu also said that he went back on 25th September having been informed by the Employee of his return date and also with the necessary documents, there is nothing for me to further determine on this aspect.

198. Ngcongo mentioned that during his call to the Employee, he read the full statement (p20-21-A) and the Employee did not dispute its content. The Employee apologised and indicated that he wanted to pay Shabangu his money back. There was no point at which the Employee had spoken about the money having been for a stockvel, and not for a bribe and his apology was for fraud and corruption. He further mentioned that he did not think that the Employee would have apologised for something which was a private matter

199. The statement by Shabangu that (p10 of E from para 15) when responding to a question from the Employer representative on whether it was for the first time that he met the Employee when he came to pen the case, Shabangu said *"Yes, it was for the first time that I spoke to him on that particular day, but I used to come to this court, for that reason his face was familiar to me although I was speaking to him for the first time"*.

200. Shabangu confirmed the content written by his lawyers and that he paid a bribe of R 2000 to the Employee for his matter to be dealt with in a quick manner.

201. The Employee submitted that he knew Shabangu before the complaint and they met in 2012 and detailed how they used to communicate, mostly on WhatsApp and chat about work related issues and family matters, including church issues.

202. The Employee further said that on one Sunday around October 2018, he called Shabangu and borrowed R 1000, which Shabangu said he did not have the money and on the following day, Shabangu returned to him and had Ms Khanyile with him. Khanyile spoke then with him and she lent the money to him with 25% interest.

203. He stated that his apology to Ngcongo was for the fact that he borrowed money from Shabangu and did not pay it back, not for the content written on p20-21/A. Otherwise had he known the said content, he would not have apologised. He further stated that he could not have told Ngcongo about the stockvel because he never asked what was the money for.

204. The Employee under vigorous cross examination said he could not remember if he gave the forms to Shabangu, but to say that Shabangu got the protection order on 25th not 26th was the procedure. This much has been corroborated by both his witnesses and they further clarified that a date is actually determined by the clerks as they start work in the morning on everyday, in accordance with their diary.

205. Faye averred that when they arrive at work in the morning, guided by their diary, they would know exactly when the return date would be for all the cases applied for on that specific day and that specific date will be the date for all of those cases. No case can be made to be heard on an earlier date.

206. Pillay submitted that it would not be wrong for the Employee to say he only saw Shabangu on 25th September, and yet the magistrate signed the file on 26th of same because mostly. She further submitted that if the Employee told Shabangu the return date, that is in line with the procedure

because the procedure is that a client must leave the court being aware of the return date.

207. The facts above are not contradicted and they indeed, indicate that there was nothing untoward when the Employee informed Shabangu of his return date on 25th September.

208. I must hasten to mention that there is nothing that has been put forward by the Employer in relation to the processing of Shabangu's application that would make the handling of such application questionable and or devoid from the norms and practices known, which would have lent credence to Shabangu's bribery claim.

209. Evidently, the Employee handled Shabangu's application in accordance with the norms and expectations of the court.

210. Having the foregoing in mind, it then boggles the mind as to how was the Employee supposed to expedite the application. Shabangu in the disciplinary hearing could not explain how such expeditious handling would be done, rather, he gave an example of borrowing money from a person who works in the institution in which he (Shabangu) would have come for help.

211. It must be borne in mind that Shabangu is a professional person and one who had on a number of times before 25th September, came to the court for a variety of cases, therefore he was not a novice in the process.

212. The claim by Shabangu is therefore without merit and if anything, his evidence was clumsy, incoherent and he was also cagey and not forthcoming with key aspects of his alleged claim in the disciplinary hearing. This is based on a number of issues which are at odds with the known reality, and they include his statement that he could not speak to Pillay because he would need an interpreter, his statement that he spoke with the Employee for the very first time on 25th September 2018 and to top it all, he could not even explain what exactly his complaint was, but rather chose to refer to the letter that is written by his lawyers. This after he was asked more than once, to elaborate on the circumstances of lending the money, which I find inexplicable.

213. Further to the above, on p51 para 9 to 20, the Employee's version was put to Shabangu, which is the same version that the Employee submitted in the arbitration, and it is that he called Shabangu on a Sunday and borrowed a R 1000, which was given to him from a stokvel carrying 25% interest, and that for Shabangu to make his allegations about the money being a bribery for quick handling of his application was just false and malicious. Shabangu chose not to respond, in what was a great

opportunity for him to dispute such a version and enlighten the hearing as to what exactly happened.

214. Even though Faye mentioned that when she said she had the impression (p103) that the Employee was friends with Shabangu, which in her own words is not the same as saying they were friends, her elucidation of where she drew her impression from, which she said that Shabangu would come to the court, then he together with the Employee, would go outside and she would see them laughing and then talking about their matters, attest to an existing friendship. This much has been submitted by Pillay when she said that Shabangu on multiple occasions would come to the court to see the Employee and they would chat for long time and sometimes sit together as friends.

215. For all intense and purposes, the evidence submitted is manifestly adequate and sufficient to point to the existence of a friendship between the Employee and Shabangu. Shabangu's denial of the friendship prior to the exchange of money between himself and the Employee is therefore misleading and is a sore attempt to give credit to his story, which he refused to explain during the disciplinary hearing.

216. I also found it curious that Shabangu, when he was asked during the disciplinary hearing on cross examination firstly on p53 –E para 6 to 11, to confirm his statement that he gave the money to the Employee in order for his services to be attended to quickly, he responded by giving an example, *"yes…you come to where I work, you need my help to register your child where I work. Can you then borrow money from me?"*… (cross examiner) ... *so you agree with me that you assumed that the request for money was for services*", his response was "yes". He gave the same response on p40 on para 4, consenting that his assumption was on the basis that the Employee used the Department's telephone (landline) and it was about three or four days after he had been to the premises to open his case.

217. Again on p59 para 22-24, when he was asked what were the circumstances around the R1000 he gave to the Employee, his response was *"I won't answer that question"*.

218. With the above being said, it stands to reason that Shabangu refused to answer the circumstances for the exchange of money, simply because they cannot be different from what the Employee had put forward, and that it was his own assumption that when he gave the money to the Employee, it was a form of a bribe. This is an unfortunate assumption by him, which made him not to be able to even dispute the Employee's version when put to him.

219. I find it bizaar that Shabangu, who had been coming to the court for a variety of cases on top of his friendly visits to the Employee, would not have known that services offered at the Court are free (p52 para 10).

220. In my view, Shabangu's denial of his friendship with the Employee was only a ploy to avoid such friendship being used as the genesis of the exchange of money, and thus thwarting his bribery claim.

221. It is clear that Shabangu's claim that the money was paid for bribery withers when compared to the preponderance of evidence in relation to how his application was handled which is in accordance with the rules and practice, the fact the he was friends with the Employee as the evidence to that effect is credible, and further that, it is not disputed that on one day, he came to the premises with Khanyile, who was from the stokvel.

222. When one has regards to the Labour Court in Dunlop Mixing and Technical Services (Pty) Ltd v NUMSA obo Nganezi [2016] 10 BLLR 1024 (LC) decision where it held that *"an inference may be drawn from the proven or uncontested facts. Where there is more than one possible inference, the most probable and natural one should be accepted",* the fact that the Employee's corroborated version that he was friends with Shabangu for many years, that Shabangu used to come to him in the offices and they would talk as friends about issues that have nothing to do with work is plausible and it is indeed, a natural inference in this regard as it would have been very strange that Shabangu would visit the Employee, sit and chat with him even at the workplace.

223. In my view, it is irrelevant as to whether the money came from a stokvel or only from Shabangu, because it is common cause that he took the money from Shabangu. The Employee said it is Shabangu who introduced him to the stokvel and again, it is common cause that it is Shabangu who gave the money to the Employee. The Employee therefore was indebted to Shabangu and viewed in this prism in this context, it is reasonable for the Employee to have apologised for having taken the money from Shabangu and failed to pay it back.

224. Also, Shabangu's refusal to answer clearly pointed questions and version put to him cast a huge doubt in his already flagging story.

225. In the analysis, it is my view that on the balance of probabilities, the charge of bribery and fraud lacks substance.

226. The dismissal of the Employee is therefore substantively unfair.

227. The Employee has admitted that notwithstanding the fact that outcome of the disciplinary hearing was issued after the specified period taking into account the time frame specified by Resolution 1 of 2003, he has not suffered any prejudice. So there is no harm cause, he continued to receive his salary until the dismissal was sanction after his failed appeal. This admission extends to the manner in which his appeal was handled and therefore, the procedural unfairness claim has no merit.

228. The Employee sought reinstatement as a relief, however, I learned before writing this award that he has unfortunately passed away The relief therefore will be that of compensation.

229. Having regard to the above, in terms of section 194 of the Act, I believe that twelve months equivalence of compensation is fair and equitable.

230. The Employee submitted that he earned R 17 226.00 per month. His compensation is thus computed as follows: R 17 226.00 x 12 = **R 206 712.00**.

AWARD

231. The dismissal of the Employee by the Employer was substantively unfair.

232. The Employer is ordered to pay compensation to the Employee, of **R 206 712.00** (Two hundred and six thousand seven hundred and twelve rands)

233. The Employer is further ordered to pay the above sum by no later than 15th July 2022.

Commissioner: Vuyiso Ngcengeni