

# ARBITRATION AWARD

Panellist/s: Mr VF Mthethwa \_\_\_\_\_  
Case No.: GPBC 1871/2018 \_\_\_\_\_  
Date of Award: 27 September 2019 \_\_\_\_\_

**In the ARBITRATION between:**

**PSA obo PL Ngwenya**  
(Union / Applicant)

and

**Department of Justice and Constitutional Development**  
(Respondent)

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## **DETAILS OF HEARING AND REPRESENTATION:**

1. This is the award in the matter between Phumlani Mlindelwa Ngwenya the Applicant, and the Department of Justice and Constitutional Development, the Respondent. The hearing was conducted under the auspices of the GPSSBC at the Magistrates' Court in Newcastle on 20 March 2019, 15 May 2019 and 10 July 2019. The Applicant was present and he was represented by Mr MC Ngubane from PSA. The Respondent was represented by Mr DI Silawule. The parties submitted bundles of documentary evidence which were admitted into evidence and used by both parties. The proceedings were digitally recorded.

## **BACKGROUND TO THE DISPUTE:**

2. The Applicant is employed by the Respondent as an Administration Officer in Newcastle Magistrates' Court. On 14 October 2015 the Applicant was involved in a collision while driving a state vehicle. The state vehicle sustained damage during the collision. The Respondent preferred two charges of misconduct against the Applicant and subjected him to a disciplinary hearing.
3. Charge 1 alleged the following:  
"Reckless and negligent driving  
In that that the on or about 14 October 2015 at or near Harding Street, Newcastle you unlawfully and negligently drove a state vehicle with Reg. Number KZN 91247 and failed to apply proper and reasonable lookout to wit you collided with another vehicle and caused damage of R 39 613.01 to the aforementioned state vehicle."
4. Charge 2 alleged the following:  
"Breach of Transport Circular 4 of 2000  
In that on or about 14 October 2015 you unlawfully and intentionally drove a state vehicle with Reg. Number KZN 91247 without obtaining required and necessary authority from your supervisor and by so doing you were in contravention of Transport Circular 4 of 2000."
5. The Applicant was found guilty of charge 1 and not guilty of charge 2. The Respondent issued the Applicant with the sanction of one month suspension without pay. The Respondent also made deductions from the Applicant's salary in the amount of R 43 000.00 to recover the cost of repairing the damage.
6. The Applicant challenges the finding against, the sanction issued to him as well the deductions from his salary. He submits that the Respondent subjected him to an unfair labour practice as contemplated in

section 186(2)(b) of the Labour Relations Act 66 of 1995 (hereinafter the "LRA"). The Respondent denies the Applicant's submission. The Applicant seeks reimbursement of the one month salary as well the total amount of the deductions which were made against his salary. The Applicant earns a monthly salary of R 25 000.00.

**ISSUE TO BE DECIDED:**

7. I am required to determine whether or not the Respondent subjected the Applicant to an unfair labour practice; and if so;  
Decide on an appropriate remedy.

**SURVEY OF EVIDENCE AND ARGUMENTS:**

**SURVEY OF EVIDENCE AND ARGUMENT OF THE APPLICANT:**

8. The Applicant testified in support of his case. His evidence is briefly that he has been employed by the Respondent for 7 years. He was appointed as an Administration Clerk in November 2007. In March 2015 he was promoted to Administration Officer. He reports to the Court Manager, Ms Mhlongo, who is an Assistant Director. Ms Mhlongo reports to the Area Court Manager, Mr Nene, who is a Deputy Director. As Administration Officer he is second in charge at the office. Mr Jojo reports to him since he supervises the Transport Section. He approves the use of state vehicles in the absence of Ms Mhlongo and Mr Nene.
9. Transport Circular 4 of 2000 is one of the documents used to regulate the use of state vehicles. However, the said transport circular was not applied in Newcastle. Employees have always performed their duties in accordance with the established office practice in Newcastle rather than the transport circular. No other employees have been charged with misconduct for following the office practice instead of the transport circular. On 11 January 2018 he received a notice of disciplinary hearing.
10. Charge 1 was for reckless and negligent driving alleging that on or about 14 October 2015 he unlawfully and negligently drove a state vehicle. The charge further alleged that he failed to apply a proper and reasonable lookout and thus collided with another vehicle and caused damaged of R 39 613.01 to the state vehicle.
11. Charge 2 was for breach of Circular 4 of 2000 alleging that on or about 14 October 2015 he unlawfully and intentionally drove a state vehicle without obtaining the required and necessary authority from his supervisor. The charge further alleged that, in so doing, he contravened Transport Circular 4 of 2000.

12. He does not understand what he was charged for. In the present arbitration the Respondent's representative is asking him about failure to update the logbook and failure to report the accident. However, he was dismissed for reckless and negligent driving, something which happened on the road. Failure to update the logbook and failure to report the accident are irrelevant.
13. He was found guilty of charge 1 and not guilty of charge 2 during the disciplinary hearing which was held on 18 and 19 January 2018. The Respondent made deductions of R 3 360.31 per month from his salary from March 2018 to March 2019. He was also suspended without pay for one month. Therefore he has paid more than the estimated cost of the damage to the state vehicle since approximately R43 000.00 has been deducted from his salary; and one month salary in the amount of approximately R25 000.00 has been withheld.
14. These measures are too harsh considering that the Respondent took too long to hold the disciplinary hearing. In addition, the Respondent is inconsistent in its application of discipline. For example, Ms NP Ntombela in the Richmond office was issued with a final written warning after she had caused damage to a state vehicle. He seeks reimbursement of the deducted amounts and payment of his one month salary which was withheld during his suspension.
15. It was unfair for the Respondent to subject him to a disciplinary hearing 27 months after the alleged act of misconduct. The delay in holding the disciplinary hearing was disadvantageous to him due to memory loss. He could not clearly remember the events relating to the incident which gave rise to the charges of misconduct. The Respondent did not inform him why there was a delay of 27 months in subjecting him to a disciplinary hearing. While the matter was reported to Loss Control at head office on 24/11/2015, he disagrees that Labour Relations only became of the matter much later. On the day of the accident he called the Transport Officer, Mr Jojo, who arranged for towing of the vehicle. Therefore management in Newcastle became aware of the accident on the same day it happened. Loss Control, a component of the Respondent, became aware of the accident in November 2015. It is not his problem that Labour Relations was not informed.
16. He did not drive the state vehicle unlawfully. He was authorised to drive the state vehicle in question as he was co-driver in the trip authority dated 13 October 2018 on page 43 of Bundle "B1". The accident occurred in Newcastle, a place covered by the trip authority. He signed the trip authority as Supervisor and also as Responsibility Manager since he was the only senior person in the office. Mr Jojo signed as

Transport Officer. Mr Zwane was to drive the state vehicle from Newcastle to Madadeni; and he was to return the car to the office alone. Therefore he was alone in the vehicle when the accident happened.

17. The purpose of the trip was to transport Aspirant Prosecutors. The log book is completed at the end of the month using trip sheets. He does not trust the accuracy of the copy of the log book in Bundle "B1" on page 44 since the log book is compiled at the end of the month and the information is simply back-dated. Mr Zwane was the main driver. He was the co-driver. Mr Zwane reports to him. The Court Manager, Ms Mhlongo, the Area Court Manager, Mr Nene were not available.
18. It was practice in the Newcastle office to sign the trip authority as supervisor and also as responsibility manager in the absence of seniors in the office. Mr Nene and Ms Mhlongo were aware of this practice since it developed in compliance with their instructions. The trip authority in Bundle "A1" page 36 is proof of the said practice in 2015. Ms Mhlongo signed as Responsibility Manager and also as Supervisor on behalf of Mr Pretorius. Again, in Bundle "A1" page 37 Ms Mhlongo signed both as Responsibility Manager and as Supervisor. Also in Bundle "A" page 38 Ms Mhlongo signed as Responsibility Manager and as Supervisor. In Bundle "A1" page 39 Mr Nene signed as Responsibility Manager and also as Supervisor. It is therefore not true that the practice happened prior to the incident as Mr Nene signed this particular trip on 02/12/2015, long after the incident occurred on 14 October 2015. Mr Nene was Area Court Manager on salary level 12. Ms Mhlongo was Court Manager on salary level 10. He is junior to both Mr Nene and Ms Mhlongo as he is on salary level 08. While the transport policy does not allow one person to sign twice, the Area Court Manager and the Court Manager were doing it in accordance with the practice that prevailed at the time. Therefore his trip was not unlawful.
19. The record of evidence of Mr Nene during the disciplinary hearing in Bundle "B1" page 16 confirms that there was such a practice in Newcastle in 2015. In his evidence during the disciplinary hearing Mr Nene states that the said practice happened mostly prior to the incident involving the Applicant but maintained that it was wrong for that practice to happen. Mr Nene further submitted that he did not charge Ms Mhlongo with misconduct since the procedure is that he has to warn the person first. On why the Applicant was not warned first like Ms Mhlongo, before being charged, Mr Nene submitted that he could not say that the Applicant was not warned as he does not supervise him. Mr Nene did not respond when asked if it was not peculiar that the Applicant was charged but the supervisor was not charged.
20. During the disciplinary hearing he was found not guilty of charge 2, namely, driving without obtaining a trip authority. The charge has a contradiction in that it also alleges unlawful driving and driving without obtaining a trip authority.

21. He collided with two vehicles on Harding Street while driving back to the office. He was attempting to avoid a Mercedes Benz which was getting off a parking space when a bakkie, attempting to get into the parking space left vacant by the Mercedes Benz, turned right without indicating and collided with him. The bakkie driver was negligent. He was going to collect a USB with statistics which the Senior Public Prosecutor needed.
22. He was on sick leave from 14/10/2015 to 22/10/2015. He was at work from 17/10/2015 to 30/11/2015 but Ms Mhlongo was not in the office from 17/10/2015 to 30/10/2015. He reported the accident to Mr Nene by *whatsapp* or SMS the same day it happened.
23. He was found guilty of reckless and negligent driving in the criminal court. However, the test applied to determine guilt in criminal matters is different from the test to be applied in labour matters. The current arbitration proceedings are not bound by the findings of the criminal court since the criminal trial and the present arbitration proceedings are separate and parallel processes. He agrees that the disciplinary outcome does not include liability to pay damage. He disagrees that a commissioner only has jurisdiction to determine fairness and has no jurisdiction to determine liability for damage.
24. The second witness for the Applicant was Mr Sikhumbuzo Kenneth Jojo. His evidence is briefly that he was employed by the Respondent as a messenger in July 2006. In 2010 he was promoted to Administration Clerk. In 2014 he became an Administration Clerk in the Procurement Section. He has worked in various other sections such as the Civil, Maintenance and Transport sections. He was in the Transport Section from around 2014 or 2015 to 2017.
25. He authorised the trip authority in Bundle "A1" page 3. On 13/10/2015 Mr Zwane requested the vehicle to transport Aspirant Prosecutors to Madadeni. The Applicant approved the trip for Mr Zwane. The following day the Applicant had to use the vehicle to collect a memory stick from Mrs Maphumulo. He agrees that Bundle "B1" page 40 shows that the driver closed the trip at 220 154 kilometres, that Mr Zwane did not undertake the trip with the Applicant and that a new trip authority has to be completed when transport is needed. However, the trip authority was still valid when the Applicant used the vehicle since it was still the 14<sup>th</sup> of October 2015, the date reflected on the trip authority. Furthermore, charge 1 is not about the closing of kilometres or the logbook. The Applicant was not found guilty of breaching Transport Circular 4 of 2000. He does not know if management were aware of the trip before the accident occurred. He did not inform Mr Nene about the accident since he was not in the office. He agrees that it the Applicant's responsibility to report the accident to his supervisor.

26. The Applicant was alone in the car when the accident happened. Therefore it is unfair that the Respondent found that the Applicant drove the vehicle unlawfully and negligently. He disputes the version that the co-driver has to be in the vehicle with the main driver. Sometimes the co-driver is not in the car.
27. For purposes of service delivery, officials in the Newcastle office do sign the trip authority as supervisor while they are co-driver. There is no hindrance in them signing their own trip authority. He was not trained regarding Transport Circular 4 of 2000. The circular was not given to him either. Therefore he is not privy to it. His supervisor, Mrs Kotze, told him how to administer state vehicles. Ms Mhlongo did nothing different in relation to what Mrs Kotze told him. It will thus not be true for the Respondent to say that the Applicant was wrong to authorise a trip in which he would be driver or passenger. It always happens that an official signs the trip authority as supervisor also be the driver, co-driver or passenger. For example, in the trip authority in Bundle "A2" page 1 Ms Mhlongo signed as Responsibility Manager and also as Supervisor in respect of a trip in which she would be a passenger. He would not know about the version that the purpose of the trip was for emergency operational requirements of the Respondent. He has access to the intranet system of the Respondent. He does not know if policies are on the system.
28. In Bundle "A2" page 2 Ms Mhlongo signed the trip authority dated 02/12/2016 as Responsibility Manager while she was also a passenger. In Bundle "A2" page 3 Ms Mhlongo signed the trip authority dated 13/03/2016 as Responsibility Manager while she was also co-driver. In Bundle "A2" page 4 Ms Mhlongo signed the trip authority dated 13/03/2016 as Supervisor while she was also a passenger. Therefore the practice of authorising your own trip as driver or passenger continued well after the accident which involved the Applicant on 14/10/2015.
29. It is therefore unfair that one person who does what everyone else does is regarded as a culprit. No-one else has ever been asked to pay for damage to a state vehicle after it had been involved in an accident. A colleague who is an administration clerk at Utrecht, Mr Motha, was involved in an accident while driving a state vehicle during the weekend. He attended a disciplinary hearing but he was not found guilty. Mr Motha's case was more or less the same as that of the Applicant
30. Bundle "B2" pages 1 and 2 show charges of misconduct against an official in Richmond, Ms NP Ntombela. Ms Ntombela was involved in an accident with a state vehicle, failed to report the accident and then had the vehicle repaired. In the trip authority Ms Ntombela was the driver but she signed as Supervisor, Responsibility Manager and Transport Officer. Therefore in Richmond there is worse non-

compliance with the transport circular. Ms Ntombela's sanction was reduced to a final written warning on appeal. Unlike Ms Ntombela, the Applicant lost one month salary and R 43 000.00 was deducted from his salary. Therefore the Respondent is unfair in that it is not consistent in its application of discipline. He would not know that the Legal Section determined the debt amount which was to be recovered from the Applicant. He would not know that determination of the debt amount is line with the disciplinary code and procedures. The amount of the debt in Bundle "A1" page 22 is different from the amount in charge 1.

## **SURVEY OF EVIDENCE AND ARGUMENT OF THE RESPONDENT**

31. The first witness for the Respondent was Miss Nontuthuko Slindile Nkwanyana. Her evidence is briefly that she has been the Deputy Director: Supply Chain Management (hereinafter "SCM") since 01/05/2019. She was Assistant Director: Asset Management from 04/01/2016 prior to promotion to her current position. She was Manager: SCM in the Department of Correctional Services (hereinafter "DCS") before then. When she was Assistant Director: Asset Management she responsible for management of assets in the KZN region. She was in charge of fleet management, which entails control over use of state vehicles within the Department. She was still with the DCS when the Applicant was involved in an accident with the state vehicle. She trained drivers and transport officers on Transport Circular4 of 2000 and relevant policies in 2016. However she did not train officials in the Newcastle office. She would neither agree nor disagree that the Applicant was trained on the transport circular.
32. Paragraph 2(i) of the transport circular in Bundle "B1" pages 57 to 100 stipulates that an employee may only drive a state vehicle if there is an approved trip authority. The state vehicle may only be moved if the trip authority has been signed by an official at the level of Assistant Director or above within line management. Log sheets are to be completed during, and immediately after, the trip. In the event of an accident the employee must report the accident to the police and also to the local Transport Officer.
33. An official who becomes involved in an accident while using a state vehicle without authority will be liable for costs of repairing damage sustained by the vehicle during the accident. Where there has been loss due to an accident during an unauthorised trip the Loss Control section deals with liability of officials while Labour Relations deals with their discipline.
34. The log book is completed with the odometer reading from the trip authority when the journey has ended. If the office needs to use the vehicle thereafter, a new trip authority has to be completed. The Applicant was the driver but signed as Responsibility Manager on the trip authority for 13 and 14



October 2015 which is on page 43 of Bundle "B1". It is not permissible for an official to approve his own trip. Someone senior has to approve the trip. An official may approve the trip and also be a passenger only in an emergency situation and if the supervisor is aware of that situation. The trip authority of 13 and 14 October 2015 was for the vehicle to move from Madadeni to Newcastle. That trip authority could not be used for any other trip after the trip had been closed. When the accident occurred, the vehicle should not have moved. The co-driver must drive in the presence of the main driver. Charges 1 and 2 are similar in that they refer to unlawful and negligent driving. The two charges mean one and the same thing.

35. The Ntombela matter is different from that of the Applicant in that Ntombela's trip was authorised by a senior official whereas the Applicant authorise his own trip. Further than that, she is unable to comment since she is not trained or involved in misconduct investigations.
36. She has been made aware of the structural deficiencies in the courts and some of the common practice in Newcastle due to shortage of staff and non-availability of managers. Regarding the trip authority dated 19/12/2013 in page 1 of Bundle "A2" where the Court Manager signed both as Supervisor and Responsibility Manager, she can submit that it is not in line with policy. She does not know if there was an emergency. The trip authority of NP Ntombela dated 2017/07/17 on page 3 of Bundle "B2" is made valid by the fact that he was in Pinetown while the official who signed as Supervisor, Responsibility Manager and Transport Officer was at head office. On the other hand, the Applicant's trip authority is not valid since he authorised his own trip and thus there was no segregation of duties.
37. The second witness for the Respondent was Miss Mildred Thoko Mhlongo. Her evidence is briefly that she has been the Court Manager since July 2005 and is currently based in Newcastle. Among others, her duties involve administration of court services, human resource management, and financial management as well as leave administration. Her supervisor is the Area Court Manager, Mr Nene. The Applicant is the Administration Officer and her second in charge in the office. The Applicant's leave records show that the Applicant was at work and available in-between his periods of leave. Her leave records also show that she was at work and available in-between her periods of leave.
38. She agrees that there was delay in holding the disciplinary hearing of the Applicant. The accident happened on 14 October 2015. The Applicant completed the Report on an Accident form on 23 November 2015 since she was not in the office when the accident happened. Upon her return Mr Nene informed her about the accident. That is when she reported the accident to Loss Control at the regional office in Durban for them to determine liability. She subsequently discovered that the matter had not

been reported to Labour Relations. She also agrees that the delay causes prejudice to the Applicant since witnesses cannot remember everything given the length of time that has passed. Charges 1 and 2 are essentially one the same charge phrased differently. Her working relationship with the Applicant is good.

39. The transport circular governs the use of state vehicles in the department. The SCM policy also deals with the use of state vehicles, among other things. Mr Jojo was the Transport Officer when the accident happened. She disagrees that the Applicant and Mr Jojo were not trained on the transport circular. In-house or on-the-job training was conducted by Mrs Coetzee in the absence of formal training. They do not keep written records when they conduct on-the-job training as it is informal. They also guided and helped the Applicant and Mr Jojo. In addition, the two officials have performed their duties well and in compliance with the transport circular. They know that a trip authority has to be issued before a state vehicle may be used. The policy is on the department's intranet, DJINI, and is available and accessible to everyone.
40. The trip authority of 13 and 14 October 2015 authorised the Applicant to transport Aspirant Prosecutors from Newcastle to Madadeni; and then from Madadeni to Newcastle the following day. The accident happened after the vehicle had already been handed back and the trip closed. It is strange that the Applicant was still using the same trip authority when the accident happened. The trip authority was no longer valid.
41. The Applicant signed the trip authority as Responsibility Manager while he was also the co-driver. If you sign the trip authority you are not allowed to drive the vehicle. The Applicant could sign in this way only in emergency situations. As the Applicant was the co-driver, she expected the main driver to be in the vehicle with him. The trip authority on page 4 of Bundle "A2" is valid since the Applicant is the main driver but the Responsibility Manager is Mr Nene. The trip was accordingly authorised by a senior person. She signed the trip authority on page 1 of Bundle "A2" both as Supervisor and Responsibility Manager. However that trip authority is valid since she was the only senior person available and the trip was urgent. The purpose of the trip was to serve subpoena's. Subpoena's are served in terms of specific periods. The official who serves subpoena's has a disability therefore someone else must accompany him to stand in queues for example. Then the official comes in to serve the subpoena.
42. She approved her own trip in the trip authority dated 02/02/2016 in page 2 of Bundle "A2" because of operational issues. In addition, she did not drive the vehicle. She travelled to Charlestown to do clerical duties while the other official was to do maintenance queries. No official is based in Charlestown.

43. She was Acting Court Manager in all the trip authorities in Bundle "A2". She did not authorise her own trips. She communicated with supervisors who then approved the trips telephonically. They were therefore aware of the trips. You cannot authorise your own trip as a driver, unless management approve. She was counselled by Mr Nene for signing the trip authorities on pages 1 and 2 in Bundle "A2". The trip authority on page 3 of Bundle "B2" was issued by an official who also signed as Responsibility Manager, Transport Officer and Supervisor. This is not allowed in terms of Transport Circular 4 of 2000. In the trip authority in page 43 of Bundle "B1" the Applicant was co-driver but approved the trip as Supervisor and drove the vehicle. In the trip authority in page 3 of Bundle "A2" she signed as Responsibility Manager the main driver, but Mr Mbhele drove the vehicle.
44. The third witness for the Respondent was Mr Fika Benard Nene. His evidence is briefly that he has been the Area Court Manager for the Newcastle cluster since October 2006. He is based in the Newcastle Magistrates Court and 7 offices report to him. He is always available to officials within his cluster through emails and telephone calls. He manages finances, facilities, human resources and other functions in offices within the cluster. Court managers manage day-to-day operations in respective offices.
45. He learnt of the accident in question from an official late in November 2015. He then approached the Court Manager to ask if the accident had been reported to the regional office. However the Court Manager was not aware of the accident as the Applicant, who had been Acting Court Manager in her absence, did not inform her upon her return. It is not true that he was not available at the time of the accident. He may have been in another office but he is available through e-mail or telephone even if he is in another office. When the Manager: Loss Control informed him that nothing had been done against the Applicant he contacted Labour Relations to take disciplinary action. The criminal matter was a separate matter.
46. Miss Mhlongo informed him about the trips described in Bundle "A2" where she signed as Responsibility Manager and Supervisor while being a co-driver. The Applicant approved his own trip in the trip authority in page 43 of Bundle "B1". The trip authority was for transporting Aspirant Prosecutors, not collecting the USB. Officials are not allowed to approve their own trips. He was not informed about this trip. Mr Jojo did not inform him about the accident. The Applicant was also supposed to inform him about the accident since he was Acting Court Manager.

47. Richmond is a small office headed by an Administration Officer, Mr Ntombela. All responsibility falls within the Administration Officer and he cannot delegate. Therefore the trip authority in page 3 of Bundle "B2" is valid. The misconduct charges against Mr Ntombela are not the same as those against the Applicant. Mr Ntombela is an Administration Officer while the Applicant was Acting Court Manager.
48. Charges 1 and 2 appear to be more or less the same to him. He testified during the disciplinary hearing of the Applicant. Bundle "A2" was not presented during the disciplinary hearing. He has a good working relationship with the Applicant.
49. He does not remember where he was on the day of the accident, 14 October 2015. He goes around various offices within the cluster, namely Vryheid, Danhauser, Dundee, Madadeni, Newcastle, Utrecht and Glencoe. The Newcastle Court Manager was on leave. He disagrees that the delay in taking disciplinary action against the Applicant has caused memory loss since the accident is documented. There will be things that the Applicant will not remember. He cannot comment on why the Applicant was counselled like Miss Mhlongo.
50. An official may sign the trip authority and also be a passenger in the vehicle but not a driver. They cannot stop operations. During the disciplinary hearing he testified that the common practice stopped after the audit. He disagrees that Miss Mhlongo drove the vehicle from Newcastle to Glencoe where the driver, Mr Mbhele, was stationed. It could be that Mr Mbhele was in Newcastle on the day.

#### **ANALYSIS OF EVIDENCE AND ARGUMENT**

51. Section 186(2)(b) of the LRA defines an unfair labour practice as any unfair act or omission that arises between an employer and an employee involving the unfair suspension of an *employee* or any other unfair disciplinary action short of dismissal in respect of an employee.
52. The Respondent found the Applicant not guilty of breaching Transport Circular 4 of 2000. I accordingly find the evidence regarding the validity or otherwise of the trip authority of 14 October 2015 to be irrelevant. The wording of Charge 2 clearly relates to contravention of Transport Circular 4 of 2000. On the contrary, the wording of charge 1 relates to reckless and negligent driving alleging that on or about 14 October 2015 the Applicant unlawfully and negligently drive a state vehicle. I accordingly reject the notion of the Respondents' witnesses that charges 1 and 2 are the same or relate to the same thing. The said notion seems to be a sorry attempt at transferring the guilty finding in respect of charge 1

(which the Respondent is unable to explain) to charge 2. Charge 1 clearly relates to an allegation which is completely different from the allegation in charge 2.

53. The phrasing of charge 1 in alleging that the Applicant drove both recklessly and negligently and qualifying the allegation by saying that the Applicant drove unlawfully and negligently is defective. Reckless driving means driving with wanton disregard of the safety of other road users; whereas negligent driving means driving without exercising the level of care an objective person would exercise in similar circumstances. Therefore to qualify both reckless and negligent driving as negligent and unlawful driving is inaccurate.
54. Despite the unpleasant drafting of charge 1, I still have to determine whether the Applicant drove the state vehicle recklessly and negligently on 14 October 2015. In *Martins v Prakash NO and Others* (JR 2104/08) [2010] ZALC 220 , at para 47, the court held: “Accordingly, just because the misconduct was framed using terms similar to a criminal charge does not mean it could only be dealt with in criminal proceedings. It remains a charge of misconduct to be established in the ordinary way. Consequently, I do not agree that the arbitrator lacked jurisdiction to entertain the charge of malicious damage to property as a disciplinary matter.” Therefore I empowered to determine whether the Applicant drove the state vehicle recklessly and negligently on 14 October 2015.
55. There is no evidence on which the Respondent relied in finding that the Applicant drove the state vehicle recklessly and negligently on 14 October 2015. The totality of the evidence presented by the Respondent relates breach of Transport Circular 4 of 2000; but it is irrelevant since the Applicant was found not guilty of contravening the transport circular. In contrast, the Applicant submits that the accident was caused by negligence of the bakkie driver. This submission was not disputed by the Respondent. I accordingly find that there is no basis for the Respondent finding the Applicant guilty of reckless and negligent driving on 14 October 2015.
56. I accordingly find that the Applicant succeeded in showing that the Respondent subjected him to an unfair labour practice as contemplated in section 186(2)(b) of the LRA.
57. Section 193(4) of the LRA provides that “An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation.” I agree with Norton D in her article entitled “When is a Suspension an Unfair Labour Practice? A Review of Court Decisions” (2013) 34 ILJ 1694 where she proclaims that “the word ‘include’ suggests that the arbitrator may fashion

*a remedy suited to correct the unfairness.”* In the circumstances I accordingly find that the appropriate remedy to correct the unfairness is reimbursement of the Applicant’s one month salary in the amount of R25 000.00 (Twenty Five Thousand Rand) which was withheld on the basis of the suspension without pay. I also find that the deductions which the Respondent made from the Applicant’s salary in the amount of R43 000.00 (Forty Three Thousand Rand) have to be reimbursed. I considered that the applicant suffered financial losses due to the suspension without pay as well as due to the deductions from his salary.

## **AWARD**

58. The Respondent, DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT, is found to have subjected the Applicant, PHUMLANI MLINDELWA NGWENYA, to an unfair labour practice.
59. The one month suspension without pay which was issued to the Applicant in around August 2018 is set aside.
60. The Respondent is ordered to reimburse the Applicant in the amount of R 68 000.00 (Sixty Eight Thousand Rand) which is the total of the amounts specified in paragraph 57 above, minus such deductions as the employer is in terms of the law is entitled or obliged to make, within fourteen days of the council delivering this arbitration award to the parties.
61. No cost order is made.



Panellist: Mr VF Mthethwa  
Sector: General Public Service  
GPBC1871/2018

