

ARBITRATION AWARD

Panellist/s: Leonard van Leeuwen
Case No.: GPBC 333/2018
Date of Award: 09 February 2020

In the ARBITRATION between:

Public Servants Association of South Africa obo Kutu, Phuti Pieter
(Union / Applicant)

and

Department of Justice and Constitutional Development
(Respondent)

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DETAILS OF HEARING AND REPRESENTATION:

1. The Arbitration Hearing into an alleged Unfair Dismissal Dispute, referred in terms of Section 191(5)(a) of the Labour Relations Act 66 of 1995, as amended ("LRA") was held at the Offices of the Department of Justice and Constitutional Development in Nelspruit on 23 August 2018, 12 February 2019, 15 July 2019 and 19 January 2020 . The Award is issued in terms of Section 138 (7) of the LRA and is a summary of the evidence I considered, with brief reasons for my findings and is not intended to be a verbatim record of the proceedings.
2. The Employee, Mr Kutu, Phuti Pieter (hereinafter referred to as the Applicant), was present and represented by Ms Asnath Sedibane, a Union Official from the Public Servants Association of South Africa (PSA). The Employer, Department of Justice and Constitutional Development (hereinafter referred to as the Respondent), was represented by Mr Nkosi SS.
3. The Hearing was held in English and was both digitally and manually recorded.
4. After the conclusion of witness testimony on 19 January 2020, parties requested to submit written closing arguments in support of their respective cases. It was agreed that these closing arguments must be submitted to the Bargaining Council on or before 27 January 2020. Both parties submitted their respective closing arguments on the said day .

ISSUE TO BE DECIDED:

5. I must decide whether the Dismissal of the Applicant was procedurally and substantively fair.
6. With regards to the substantive fairness of his Dismissal, it was the Applicant's submission that he did not commit the said misconduct as is alleged by the Respondent and secondly that if it was found that he did committed the said misconduct than the sanction imposed was too harsh.

BACKGROUND TO THE MATTER:

7. The Applicant was employed by the Respondent on 01 January 2011 and at the time of his Dismissal on 12 February 2018 he was employed as an Administration Clerk at the office of the Master of the High Court in Nelspruit and earned a monthly salary of R14 204.75.

8. He was notified in writing on 10 May 2017 to attend a Disciplinary Hearing to be held which was held on 15 June 2017 and 07 July 2017. He was charged with three counts of misconduct which read as follow-

Allegation 1- Gross insubordination

In that on or about 10 March 2017 or any period incidental thereto at or near the masters office, Nelspruit you intentionally and wrongfully committed an act of gross misconduct in that during the said period you were instructed by Ms. Sithole, the Assistant Master not to register an estate file in respect of the late Vusi Abby Mona, because the Master's office did not have the powers to administer such an estate, and that you registered this estate and caused that a letter of authority be issued to one Simangele Edith Mona.

Alternative- failure to carry out a lawful and reasonable instruction without just cause or reason

In that on or about 10 March 2017 or any period incidental thereto, at or near the Master's Office Nelspruit you intentionally and wrongfully committed an act of misconduct in that you failed to carry out a lawful and or reasonable instruction by Ms. Sithole the Assistant Master, in that you failed/refused to refer the registration of the estate of late Vusi Abby Mona to the Legal Aid and that you registered the estate without referring it as instructed. That by so doing you did commit an act of misconduct, an act you knew or ought to have known that it was wrong.

Allegation 2- Gross dishonesty

In that during the period March 2017 or any period incidental thereto at or near the Master's Office Nelspruit, you intentionally and wrongfully committed an act of gross dishonesty in that you lied to Ms. Sithole the Assistant Master when you said you did not give Ms. Simangele Edith Mona the Letter of Authority, whereas you did give her the letter of authority. That by so doing you did thereby commit an act of misconduct, an act you knew or ought to have known that it is wrongful.

Allegation 3- Abuse of office, power and authority

In that during the period March 2017 or any period incidental thereto at or near the Master's Office Nelspruit you intentionally and wrongfully committed an act of misconduct in that in the said period you registered the estate no 001027/2017 and caused that Simangele Mona be appointed and given the letter of authority whereas she was divorced and had no legal capacity to be appointed in this estate. That by so doing you committed an act you knew or ought to have known that it was wrongful.

9. He was informed that he was found guilty as per the charges leveled against him and that he had to submit mitigating factors by 18 August 2017. On 04 October 2017 he was informed that a sanction of

dismissal was imposed where after he lodged an appeal against the guilty finding and sanction that was imposed. He was however informed on 12 February 2018 that his appeal was unsuccessful.

10. The Applicant disputed that he was ever instructed to transfer the matter to Legal Aid which resulted in him being accused of having committed the above stated misconduct.
11. During the narrowing of the issues the Applicant agreed to abandon his claim with regards to the procedural fairness of his dispute and only dispute the substantive fairness of his dismissal.
12. As to relief, the Applicant requested retrospective reinstatement.

SURVEY OF EVIDENCE AND ARGUMENT

Documentary

13. Both parties, at the commencement of the Arbitration, submitted documentary evidence in support of their respective case. The Respondent's bundle was marked Bundle "R" and consisted of 78 pages. The Applicant's bundle was marked "A" and consisted of 20 pages.

Respondent's evidence and arguments:

The Respondent called the following witnesses, who briefly testified after being duly sworn in:

Martha Sithole (Sithole), testified as follows:

14. She is employed by the Respondent at the Office of the Chief Master in Nelspruit as an Assistant Master. The Applicant who was an administration officer reported directly to her. Page 13 to 16 of bundle "R" is her statement she had made regarding the incident involving the Applicant which lead to his dismissal.
15. The Applicant's duties included amongst others the assisting with filling, assisting the public and capturing new matters on system. The new matters would include deceased estates and trust matters.
16. With regards to the incident relating to the estate of the late Vusi Abe Mona the Applicant on the day approached her and requested her in assisting with interviewing the client who was seated in the cubical. There were three people namely the spouse of the deceased and two gentlemen, one was her brother. She requested the death certificate which the lady handed to her. On the death certificate she

noticed that the deceased was divorced. The lady confirmed that they were divorced but that at the time of his death they had been living together again. She further noticed that the death certificate as per page 20 of bundle "R" indicated that the cause of death was unnatural. The lady further confirmed that they had a minor child together and that the only asset was a Ford Ranger. Based on the information given to her the practice is when the deceased is not married and the beneficiary is a minor the matter must be referred to legal Aid SA as per the agreement between the Respondent and Legal Aid SA as per pages 23 to 32 of bundle "R". This was indeed the advice she gave the Applicant in front of the clients where after she left as the Applicant was conversant with the process to follow in referring a matter to Legal Aid.

17. After about two weeks she received a phone call from a Mr Ngcobo from Pietermaritzburg who asked her as to why had they issued a letter of authority in favour of a divorced spouse. She did not have an idea what he was talking about and took his details and the estate number.
18. Prior to going to look for the file she checked the ICSM system which indicated that it was registered by the Applicant. She thereafter went looking for the file in the filing room where she found the Applicant. She asked him if he knew anything about the file. He denied having knowledge of the said file. She then went to the Applicant's work cubicle where she found the file. While she was checking the file, the Applicant approached her and asked her what she was doing with the file. She explained to him as to why she was looking for the file and asked him if he had given the letter of authority to the person, which he denied.
19. While perusing the file she realized it was the matter she had told him to refer to Legal Aid and that the letter of authority was issued on a date on which she had not been at work due to illness. The letter of authority was issued by Deon van Schalkwyk. There was only one copy of the letter of authority in the file which meant that a copy was given to the client. The original remains in the file.
20. The procedure followed with the registering of a deceased estate is that the official at the front desk will interview the client who will be requested to submit all relevant documents such as the death certificate. If all requirements are met the official will register the estate on the system. This is usually done by the administration official or estate controller. Once the estate is registered the file is taken to the Assistant Master for approval who will check if file is in order before he approves it. If anything is outstanding, he will send it back. The Assistant Master must check that each document in the file is captured on the system. The marital status will guide you as to who will be appointed.
21. In this instance the file had to contain a certified copy of the death notice signed and commissioned and an affidavit by next of kin. A signed inventory with an evaluation certificate of assets and a bank

statement. If the death certificate indicates unnatural death than a report from the SAPS with regards to cause of death is also required. Certified copies of the children's birth certificates as well as certified copies of person's identity documents who have an interest in the estate. If estate is under R250 000.00 it will be dealt with in terms of Master's Discretion and a J155 form must be in the file. If estate is above the abovementioned amount there must be a J190 form completed and in the file. In this instance the file did not comply with the said requirements as divorce decree and report from SAPS were not contained in the file.

22. The above requirements are contained in the directive regarding the appointment of executors in deceased Estates as contained in pages 33 to 55 of bundle "R".
23. The Applicant had failed to adhere to an instruction which was given to him by his supervisor.
24. During cross examination she confirmed the Applicant was only allowed to capture the deceased estate on the system, he did not have access to the function which allowed him to approve or transfer the matter to legal Aid. Only the Assistant Master had access to the function on the system to approve letters of authority or to transfer the matter to Legal Aid. He does not have the authority to issue letters of authority.
25. She further confirmed that she did inform the client that they had to obtain an evaluation for the vehicle and that she stated in her affidavit that she had requested Hendrik Sithole to look for the file, who had informed her that he could not find it.
26. She also confirmed that after the investigators arrived at the office the Applicant approached her, and she informed him to tell the truth. She denied that she told him what to write. She further agreed that the agreement did not state that it was a must that cases involving a minor must be transferred to Legal Aid. She refrained from commenting when it was put to her that it was the Master's discretion whether he wanted to transfer the matter to Legal Aid.
27. She further confirmed that the Master's decision could only be set aside by the court and that clause 7.12 on page 49 of bundle "R" contains the list of documents that must be in the file and that there is no requirement for a report from the SAPS required in the case of unnatural deaths.
28. That the Applicant denied knowing where the file was when she asked him about it.

Hendrick Sithole (Hendrick), testified as follows:

29. He is employed by the Respondent as a driver / messenger at the office of the Master in Nelspruit. He also assists as a help desk operator. He confirmed that he is married to Martha Sithole.
30. He was in Van Schalkwyk's office when the Applicant came in and requested van Schalkwyk if he would approve the file for him. He placed the file on van Schalkwyk's table and left. He also left the office and returned to his desk. He noticed the client sitting at the Applicant's desk. Van Schalkwyk approved it as the Applicant came back and gave her a document which he thinks was the letter of authority. Van Schalkwyk came to the Applicant's desk and explained something to him.
31. He was present when Sithole asked the Applicant whether he had given the letter to the client. He denied that he had done so where after he stood up and told the Applicant not to lie.
32. He confirmed having made a statement during the investigation. He denied that he told the Applicant as to what to write in his statement.
33. During cross examination he confirmed that there was nothing wrong with Van Schalkwyk approving the file and that it was indeed correct as stated in his statement on page 17 and 18 of bundle "R" that it took him about 20 minutes to approve the file and that he never saw the content of the letter.
34. According to him the Applicant did not do anything wrong with regards to the process in approving the file.

Morodi Monye (Monye), testified as follows:

35. He was the investigator in this matter at the Master's Office. He interviewed the Applicant as to get an understanding as to what had happened and asked the Applicant to provide him with a written statement to the effect. His colleague, Amos Moeng was also present during the interview.
36. The Applicant then e-mailed him a statement as contained in pages 8 to 12 of bundle "R" .
37. During cross examination he stated that he was instructed by his Director, Mr Nel to conduct an investigation on how the letter of authority was issued. He in the investigation found that the Applicant had been given an instruction to transfer the matter to Legal Aid as a minor was involved and that van Schalkwyk issued the Letter of authority. He recommended that disciplinary action be taken against the Applicant and van Schalkwyk.

38. He denied that Mr and Mrs Sithole were present during the interview or that he was aware that they had told the Applicant to admit guilt.

Kopyane Amos Moeng (Moeng), testified as follows:

39. He is stationed at the Respondent's Forensic Audit unit.
40. He and Monye interviewed the Applicant with regards to the letter of authority that was issued to client were after they requested him to write a statement with regards to what he told them in the interview. The Applicant did not immediately write a statement. They left a template of a statement with him. He later e-mailed his statement to Monye.
41. During cross examination he confirmed that they had interviewed, Mr and Mrs Sithole on the same day as the Applicant but that Van Schalkwyk was sent a list of questions to answer.
42. The finding was that a fraudulent letter of authority was issued. He however does not know what the recommendations were.
43. He denied that the Sithole's were present during the Applicant's interview.

Arguments

44. In Closing Argument, the Respondent submitted that they, on a balance of probabilities have proven that the Applicant had disregarded a lawful instruction that was given to him which was in line with the Chief Master's Directive 2 of 2015 and when he was confronted with regards to having any knowledge about the letter of authority that was issued he had lied to his supervisor about it. The Respondent cannot be expected to keep in its employment employees who are dishonest and insubordinate. The continued employment of the Applicant is intolerable and a risk to the operation of the Respondent.
45. The Respondent had also referred to numerous cases in support of their decision to impose a Sanction of Dismissal in this instance, namely, ***Mthuthuzeli George Ndwanya v South African Local Government and others [2013] ZALC JHB (27 January 2013), Kalik v Truworths (Gateway) & Others (2007) 28 ILJ 2769 (LC), Council for Scientific & Industrial Research v Fijen (1996) 17 ILJ 18 (A) at 26 D-E and Martin & East (Pty) Ltd v Bulring and Others [2016] ZALCCT 2 [2016] 5 BLLR 475 (LC)***.

Applicant's evidence and arguments:

The Applicant called the following witnesses, who briefly testified after being duly sworn in:

The Applicant, Phuti Pieter Kutu, who after being duly sworn in testified as follow:

46. His duties included filling, scanning, registering and collecting of post, withdrawing of files, dealing with guardian fund matters, interviewing clients and the capturing information when required to do so which was not part of his required duties. He confirmed that he reported to Sithole.
47. Page 6 of bundle "A" is an advert for an administration clerk vacancy which contains the key performance areas for the said position he was employed in.
48. He was in the filling room when Sithole called him and told him there was a client to be capture on the system. He used someone else's workstation to capture the matter were after it was time for lunch. He could not find Sithole and told the client, Edith Mona who was accompanied by her brother and Themba Shongwe to return on the Monday.
49. He waited untill 15 March 2017 when van Schalkwyk was in the office. He went to him and told him that the client was sitting in front and requested him to approve the file. When he handed the file to van Schalkwyk it contained the death notice, declaration forms, undertaking and inventory form. After the approval was done and letter issued, he handed the letter to the client.
50. He denied that he had interviewed the Client. Sithole had everything with her when she called him, namely death certificate, Identity document of deceased and of the executor. He would not have captured it on the system if Sithole had told him that the matter had to be transferred to Legal Aid.
51. He works with a lot of files and cannot remember every file that he works with. He denied that he told Sithole that he did not give the client the letter but stated that he could not remember whether he had given her the letter of authority.
52. He denied that he had abused his power as he does not have the authority to issue a letter of authority. Van Schalkwyk is also an Assistant Master who has the same level of authority as Sithole. He never influenced Van Schalkwyk in issuing the said letter. Van Schalkwyk was the only one in the office on the day.
53. On the day the investigators came to the office they went directly to Sithole's office who after a while came to him and told him that they were there for him. He went to another office. Present in the office was the investigators, Sithole and her husband, Hendrick. Sithole started telling him that he should tell

the truth as what had transpired with regards to the issuing of the letter of authority to Mona. Monye told him he should tell them his side of what transpired. Sithole said she would protect him if he told them everything where after Monye told him that he would give him time to write his statement where after he left and went home. The Sithole's came to his house and told him that he should admit everything in his statement. On the Monday Money phoned him and asked him when he was going to send them his statement.

54. He did not know the procedure to follow in referring matters of estates to the Legal Aid SA. Page 3 of bundle "A" is a copy of the letter of authority that was issued by Van Schalkwyk. Page 4 of bundle "A" is the Death Certificate for Vusi Mona and page 5 of bundle "A" is a valuation certificate for the vehicle. Sithole instructed the client to go and get a reduced value on the vehicle.
55. During cross examination he denied that he altered the value of the vehicle on page 5 of Bundle "A".
56. He confirmed that Simangele Mona testified on his behalf in the disciplinary hearing, but that she was lying when she said that he had instructed her to change the value of the vehicle.
57. Sithole told him to write in his statement that he interviewed the client and that he was instructed to refer the matter to Legal Aid.
58. He did not during cross examination put it to the Sithole's that they came to his house as it was not that important.
59. He wrote the statement while alone at home.
60. He did not know if the letter of authority was recalled.

Themba Shongwe (Shongwe), who after being duly sworn in testified as follow:

61. He knows the Applicant as he worked in the Masters' office in Nelspruit. He went with his sister Simangele Mona to the Master's office to assist her in getting a letter of authority as her husband had died. He could however not remember the date on which they first went to the Master's office. They were first assisted by a lady who then referred them to the Applicant.
62. They were instructed to go and get a valuation done on the vehicle which they did as per page 5 of Bundle "A", when they returned with the valuation document the lady told them that they should change the value of the vehicle to the nearest round figure which they then went and did. On their return they

were assisted by the applicant. He could not remember if anyone told them that they had to go to Legal Aid for assistance.

- 63. Page 3 of bundle "A" is the letter of authority that was issued to his sister.
- 64. During cross examination he confirmed that he testified at the disciplinary hearing.
- 65. He could not comment on the fact that his sister had testified that it was the Applicant who told them to amend the value of the vehicle.
- 66. He is aware that his sister was requested to return the letter. He however does not know the reason as to why she was requested to do so.

Mojalefe Simon Dipholo (Dipholo), who after being duly sworn in testified as follow:

- 67. He is employed by the Respondent as a senior administration clerk and had worked with the Applicant.
- 68. He explained that if a client reports an estate, they obtain the relevant document from the client. The document is taken on face value as being correct. The clerk who is allocated the work then captures it on the system. The system will verify information with home affairs. The system after information was verified will indicate that file must go to the Assistant Master for approval. The Assistant Master will verify the information in the file with that on the system and if everything is in order will then issue a letter of authority.
- 69. The agreement with Legal Aid only states that they may refer matters to Legal Aid involving minors, it does not state they must. On occasion Legal Aid had also sent clients back to them without assisting them.
- 70. The Masters office cannot decline to register an estate.
- 71. Sithole could have instructed that the matter must be sent to Legal Aid, but a second opinion of a different Assistant Master felt that it was not required to refer it to Legal Aid.
- 72. During cross examination he stated that there is nothing in the requirements which stated that if the death of a person is due to an unnatural cause a report form the SAPS is required.
- 73. He does not know if Sithole had give the Applicant an instruction to refer the matter to Legal Aid.

Theresa Bezuidenhout (Bezuidenhout), who after being duly sworn in testified as follow:

74. She is employed by the Respondent as a Chief Director in the Office of the Chief Master of the High Court and is currently the acting Chief Master and has been acting in the said position since April 2017. She exercises control over all 15 Master's offices in South Africa. She is responsible to ensure that all offices deal with matters in the same manner and to ensure service delivery. She is also responsible to report to parliament.
75. All complaint received form the public must be reported to the Office of the Chief Master who will decide whether the complaint should be investigated and or dealt with in an informal manner. If the complaint relates to fraud or a serious offence it will be referred for investigation to the Forensic Unit and await a report. The matter could also be referred to the Employee Relations Unit for investigation.
76. She does know the Applicant. The matter came to her attention when the Applicant had informed her that he had been charged with misconduct. She then requested a report on why the matter was not reported to her office. The Master at the time was Bina Masuku who informed her that she also did not have any knowledge of the complaint.
77. Walk in clients will be screened by one of the registration official. If all documents were in order the matter would be registered on the Paperless Estate Administration System (PEAS). One's the estate is registered the system registers an estate number where after a file will be opened. The system then transfers the worklist to the Assistant Master pending approval. The Assistant Master after having checked all documents that were submitted on system with that in file will if satisfied that all requirements are met will approve the appointment of the executor. The system automatically generates the letter of authority which will be printed and then signed by the Assistant Master. The original letter will be handed to the client. If the Assistant Master is of the view he/she cannot approve it, he will issue a J84 document which will indicate what documents are still needed or why a person cannot be appointed.
78. Registration on the system does not mean a letter of authority would be automatically issued.
79. All estates must be registered at the Master's office.
80. Not all cases involving minors are transferred to Legal Aid. Only cases where officials in the Master's office is of the view that the minors interest would not be served the matter must be transferred to Legal Aid. It mostly relates were both parents of the minor had passed away and were a guardian is appointed. The Assistant Master has the discretion as per clause 6.1 on page 27 to decide whether the matter must be transferred.

81. Clerks may not transfer matters to Legal Aid as they are not legally trained. She referred to clause 6 on page 27 of bundle "R" which states that the Master will assist a person to complete a referral form to Legal Aid for assistance. It is the responsibility of the Master to transfer the matter.
82. It is irrelevant for the clerk capturing the estate on whether the deceased was divorced or not. The Master must approve the executor if the person is nominated in the will. If a person dies within three months of being divorced his or her ex-spouse could still be appointed as executor of the estate.
83. Based on the information available she would have made the same decision as Van Schalkwyk has made and issued the letter of authority.
84. It later appeared that there was a will and that the correct person was indeed appointed.
85. During cross examination she stated that the instruction given to the Applicant by Sithole was unreasonable as it was procedure for the Assistant Master to have called the client and explain as to why matter had to be transferred to legal aid as it was her responsibility to deal with clients.

Arguments

86. The Applicant's Representative in her Closing Argument stated that the Applicant's Dismissal had been procedurally unfair as the Chairperson of the disciplinary hearing had been biased when he failed to rule on the point in time that was raised at the commencement of the hearing .
87. The charges of misconduct leveled against the Applicant are centered around the letter of authority that was issued by the Master's office in Nelspruit. Sithole's evidence with regards to the fact that she gave him an instruction to transfer the matter was denied by the Applicant. The Applicant's version that it was Sithole and not him who told the client to amend the valuation of the vehicle was corroborated by Mr Shongwe who assisted his sister.
88. The Applicant had admitted that he denied that he had given the letter to Ms Mona when asked about it. He did not intend to be dishonest but had only forgotten about it as he deals with a large volume of files on a daily basis and that this was the only wrongdoing on his part.
89. If found that the Applicant did commit misconduct then the Panelist must consider whether dismissal was an appropriate sanction in these circumstances.

ANALYSIS OF EVIDENCE AND ARGUMENT

90. Section 185 of the Labour Relations Act (LRA) 66 of 1995 as amended, stipulates that every Employee has the right not to be unfairly dismissed or to be subjected to an Unfair Labour Practice.
91. The meaning of a Dismissal and Unfair Labour Practice is found in Section 186 of the Labour Relations Act (LRA) 66 of 1995 as amended.
92. Section 188 of the Labour Relations Act (LRA) 66 of 1995 as amended, stipulates that a Dismissal that is not automatically unfair, is unfair if the Employer fails to prove that the reason for the Dismissal is a fair reason related to the Employee's conduct, or capacity, and that the Dismissal was affected in accordance with a fair procedure. Any person considering whether the reason for the Dismissal is a fair reason or affected in accordance with a fair procedure must take into account any relevant Code of Good Practice issued in terms of this Act.
93. The Code of Good Practice: Dismissal is attached to the Labour Relations Act as Schedule 8.
94. Section 192 of the Labour Relations Act (LRA) 66 of 1995 as amended, stipulates that once the Employee has established the existence of the Dismissal, the Employer must prove that the Dismissal was fair.
95. In the present matter the existence of the Dismissal was not in dispute, therefore the onus to prove that the Dismissal was affected in accordance with a fair procedure and for a fair reason rests with the Respondent.
96. Section 138 (6) of the Labour Relations Act (LRA) 66 of 1995 as amended, further stipulates that a Commissioner, conducting an Arbitration, must take into account any Code of Good Practice issued by NEDLAC and any guidelines published by the CCMA. In this regard, the CCMA Guidelines on Misconduct Arbitrations, published by the CCMA in terms of Section 115 (2) (g) of the Labour Relations Act (LRA) 66 of 1995 as amended, is relevant.
97. The Court in ***Sidumo and Another v Rustenberg Platinum Mines Ltd and Others (2007) 28 ILJ 2405 (CC)*** considered and listed some factors which the Commissioner had to consider. It held that Commissioners must consider the totality of the circumstances, importance of the Rule that had been breached, the reason for imposing the Sanction, the basis on which the Employee challenges the

Dismissal, the harm caused by the Employee's conduct, whether additional training and instruction may result in the Employee not repeating the misconduct, the effect of Dismissal on the Employee and his long service record.

98. In determining the substantive fairness of a Dismissal relating to misconduct, one must assess the Dismissal per the criteria as set out in Item 7 of the Code of Good Practice: Dismissal. One should therefore consider whether the Employee contravened a rule or standard, regulating conduct in the workplace, whether the rule contravened was a valid or reasonable rule or standard, the Employee was aware or could reasonably be expected to be aware of the rule or standard, the rule had been consistently applied by the Employer and Dismissal was an appropriate Sanction for the contravention of the rule or standard.
99. In ***Early Bird Farms (Pty) Ltd v Mlambo* [1997] 5 BLLR 541 (LAC) at 544**, the Court stated the Employer did not have to prove with absolute certainty that the Employee was guilty of the alleged misconduct, but that the proof on a balance of probability was sufficient.
100. In coming to a finding, I have taken into consideration the oral and documentary evidence as well as the Closing Arguments submitted by both parties.
101. The Applicant had disputed the substantive fairness of his dismissal in that he denied having committed the said misconduct and if it is found that he did transgress that the sanction which was imposed was too harsh.
102. The dismissal of the Applicant relates to the incident in which a letter of authority was issued to Simangele Edith Mona. The Applicant did not dispute that he had captured the matter on the system or that a letter of authority was issued to Ms Mona. It was the Respondent's case that the actions of the Applicant lead to the said letter being issued to her were as she was not supposed to have been appointed. It is common cause that both the Applicant and Sithole at one stage assisted Ms. Mona and that Sithole was the Applicant's supervisor and an Assistant Master as well as that another Assistant Master by the name of van Schalkwyk had approved the letter of authority thus appointing Ms Mona as the executor of the estate.
103. The Applicant as a result was charged with three main charges namely Gross insubordination in that he was given an instruction by his supervisor, Sithole an Assistant Master on 10 May to transfer the estate of late Vusi Mona to Legal Aid which he failed to do. Gross dishonesty in that he lied to Sithole as he told her that he allegedly did not give Ms Mona the letter of authority and the abuse of power as

he wrongfully registered an estate which resulted in Ms Mona to be appointed were as she was not entitled to be appointed as she was divorced from the deceased.

104. The Disciplinary Code and Procedure for Public Servants, Resolution I of 2003 at Annexure "A", list Acts of misconduct. This list is not exhaustive.
105. Regarding to the first charge relating to insubordination the Applicant had denied that Sithole had instructed him not to register the estate of the late Vusi Mona and to transfer the matter to Legal Aid as the Master's office did not have the powers to administer the estate. The first question to be determined in this charge is whether such an instruction was given and secondly if it is found that such an instruction was given whether the instruction was a valid, lawful and or a competent instruction which he was able to perform.
106. With regards to whether the said instruction was given basically comes down to who of Sithole or the Applicant's version on whether the instruction was given or not is the more plausible of the two versions presented.
107. It was Sithole's evidence that when she saw that the deceased was divorced and a minor was involved she instructed the Applicant to transfer the matter to Legal Aid as per the agreement between the Respondent and Legal Aid SA and in terms of the Chief Master's directive 2 of 2015 as pe pages 33 to 55 of bundle "R". The Applicant denied that he was given such an instruction. The Applicant's representative in her closing submissions stated that the version of Sithole on whether she had given the Applicant the instruction to transfer the matter must be rejected on the bases that she had denied instructing the client to go and have the evaluation reduced were as Shongwe had confirmed the Applicant's version in this regard that it was Sithole who told them to have the valuation of the vehicle changed and if this version is perverted it means that Sithole had not been truthful in stating that she had given the Applicant an instruction to transfer the matter. It is however not that simple as evidence was led that Ms. Mona in the Disciplinary hearing had stated that it was the Applicant who told them to have the evaluation off the vehicle changed thus confirming Sithole's version which leaves me at a stalemate. The Applicant had made a statement during the investigation as contained on pages 8 to 12 of bundle "R" in which he confirms that he was given an instruction by Sithole to transfer the matter to Legal Aid. It was however the Applicant's evidence that he was coerced in writing the statement by Sithole and her husband Hendrick who came to his house after he was interviewed by Money and Moeng. He however fails to put this important issue to Sithole and Hendrick during cross examination. When asked as to why it had not been put them, he stated is was because he did not consider it as important. In my view one would surely put such an important factor to the witnesses, the only reason in

my view as to why he failed to do so was because it never happened. It was not disputed that after the interview the Applicant was given time to go and write his statement and e-mail it to the investigators and that they did not pressurize him in writing a statement immediately. He further testified that when he wrote the statement that he was alone at home and as such I find that he could not have been coerced or pressurized in admitting in the statement that he was told to transfer the matter to Legal Aid and as such it must be accepted as the correct version. This is as previously stated is not were the enquiry into charge one ends as one must determine whether he was given a lawful and competent instruction which he was able to perform.

108. Sithole stated that in terms of the agreement between the Respondent and Legal Aid all cases involving a minor must be transferred to Legal Aid. Dipholo testified that they may not decline to register deceased estate. His testimony in this regard was corroborated by Bezuidenhout, the acting Chief Master who testified that all estates must be registered with the Master's office. Their testimony in this regard was not disputed. It was also further Dipholo and Bezuidenhout's undisputed evidence that the agreement does not state that all case involving a minor must be transferred to Legal Aid but states at that they may refer cases involving minors to Legal Aid, thus given them a discretion to do so. It was further Bezuidenhout's testimony that cases which are referred to Legal Aid for assistance mostly relates to were both parents of the minor had passed away and were a guardian is appointed.
109. The Chief Master's directive 2 of 2015 at clause 7.10 (b) (vi) states that were a minor heir is involved the Master may refer the estate to Legal aid for assistance. This confirms the testimony of Diholo and Bezuidenhout in this regard.
110. It was further Bezuidenhout's undisputed evidence that an administration clerk does not have access to the function on the system to transfer a matter to Legal Aid or the authority to do so as he is not a legally trained person. Only an Assistant Master has access on the system to transfer a mater as it is the duty and responsibility of the Assistant Master to transfer the matter to Legal Aid after he or she had engaged the client and explained as to why the matter must be transferred.
111. Sithole during cross examination confirmed that ones the matter is captured on the system the Applicant would not have had access to the function to transfer the matter as only the Assistant Master has access to the said function on the system.
112. Having regard to the above evidence it is clear that the Applicant was required to capture the estate on the system and ones it was captured the discretion and authority to decide whether the matter needed

to be transferred to Legal Aid lied with the Assistant Master if he was of the view that it would be in the interest of the minor to do so. As it was not the Applicant's duty to transfer matters to Legal Aid and that he did not have access to the function to transfer the matter nor the authority to do so I find that the instruction that was give to him by Sithole to have been an unlawful and an unreasonable instruction and as such the Respondent had failed to prove on a balance of probabilities that the Applicant was guilty of Gross insubordination when he failed to transfer the matter.

113. In the second charge the Applicant was charged with gross dishonesty in that he lied to Sithole when he was asked if he had given the letter of Authority to the client as he denied doing so. It was Sithole's undisputed evidence that she had first asked him in the filling room when she went to look for the file whether he had seen the file where upon the Applicant stated that he did not know where the file was. It was then further her undisputed evidence that she then went to his workstation where she found the file on his table, while she was busy perusing the file the Applicant approached her and asked her what was she doing with the file where after she explained to him why she was looking for the file. She then asked him whether he had handed the letter of authority to the client, which he again denied doing.
114. Sithole's evidence is corroborated by the undisputed evidence of Hendrick who testified that he was present when Sithole asked the Applicant whether he had given the letter of authority to the client, which he denied. He then stood up and told the Applicant to stop lying as he witnesses the Applicant giving the client the letter.
115. The Applicant disputed that he had denied that he had given the letter to the client. He merely stated that he could not remember as he works with many files on a daily basis. Surely when he confronted Sithole at his desk he by then would have remembered whether he had handed the client the letter or not. Having regard to the above evidence I find the Respondent's version to be the more probable of the two version be form and as I result find that the Applicant had been dishonest when he had denied that he had got given the letter to the cleint. I am however of the opinion that in this instance the actions of the Applicant does not amount to gross dishonesty as the Respondent did not suffer any real or potential prejudice as a result of the Applicant's actions in this instance as the correct person was indeed appointed as executor of the state on which I will elaborate more when dealing with the third allegation of misconduct.
116. As to the thirds charge it was alleged that the Applicant had abused his office, power and authority as he wrongfully registered an estates which resulted in Ms. Mona being appointed whereas she was not entitled to be appointed as she was divorced form the deceased.

117. It was Bezuidenhout's undisputed evidence that for purposes of registering the estate it is irrelevant whether the person was divorced or not. If a person has in any event not been divorced for longer than three months the ex-spouse could still be appointed as the executor of the estate. That in this instance it had in any event transpired that the deceased did have a will in which he appointed Ms. Mona the executor of his estate and that although the original letter had been recalled she was eventually appointed as the executor of the estate. The registering of an estate does not result in the automatic approval and appointment of a person as an executor of an estate. The only person with the authority to issue a letter of authority is the Assistant Master which in this instance was Van Schalkwyk. The Applicant did not have the authority to issue a letter of authority or to appoint a person as an executor of an estate. It was further her testimony as already stated that all estates must be registered with the Master's Office and that was the only legal duty the Applicant had which he complied with. Having regard to the requirements as to the said documents required to make an informed decision whether to issue a letter of authority, she in this instance would also have issued the said letter.
118. Hendrick stated that he did not see anything wrong with the Applicants action in registering the state on the system. Sithole in her evidence confirmed that the Applicant could not authorise the appointment of an executor as only an Assistant Master had the delegated authority to do so.
119. As a result of the above evidence I find that the Respondent on a balance of probability had failed to prove that the Applicant had abused his office, power or authority.
120. As I have found that the Applicant was indeed guilty of dishonesty, I am required to determine what a suitable sanction in these circumstances would be. The Respondent after having found the Applicant guilty on all the above charges had imposed a sanction of dismissal.
121. The Disciplinary Code and Procedure for the Public Service at Clause 4: Code, Rules and Standards at Clause 4.1, states that Schedule 8 of the LRA insofar it relates to Discipline, forms part of the Code and Procedure. The Disciplinary Code does not indicate an appropriate sanction for the said misconduct.
122. The LRA Schedule 8, Code on Good Practice: Dismissal at Item 3 (4) stipulates, that Dismissal shall be appropriate for serious misconduct such as: gross dishonesty, willful damage to property of the Employer, willful endangering the safety of others and physical assault on the Employer, a fellow Employee, client or customer and gross insubordination.
123. The Court in the past as a rule has always endorsed a sanction of dismissal for misconduct relating to gross dishonesty.

124. As I have already stated above, I have in this instance found that the Applicants dishonesty does not amount to gross dishonesty as his actions did not result in the Respondent suffering any actual or potential prejudice and as such do not view dismissal as an appropriate sanction in this instance. Yes, his actions did harm his relationship with Sithole. I am however of the view that his behavior can be corrected by means of progressive discipline by giving him a final written warning and moving him to another supervisor. I am convinced that the Applicant would have learned a great lesson from this whole experience.
125. I find that the Respondent has failed to discharge the onus as required in Section 192 of the Labour Relations Act (LRA) 66 of 1995 as amended in proving that the Applicant's Dismissal was substantively fair.

Relief

126. When a dismissal is found to have been unfair, the arbitrator must determine an appropriate remedy.
127. Section 193 of the LRA prescribes specific remedies for unfair dismissals. It permits an Arbitrator to direct an Employer who has dismissed an Employee to reinstate the Employee, re-employ or pay compensation to the Employee.
128. As to the appropriate relief, the Applicant had requested retrospective reinstatement. As I am of the view that the trust relationship has not been irretrievably damaged, I have decided to comply with the Applicant's request.
129. At the time of his dismissal, the Applicant was earning a gross salary of R14 204.75 per month.
130. The Applicant was dismissed on 12 February 2018.
131. The Applicant's arear salary / remuneration (back pay) is calculated as follows: **R14 204.75.00** (Monthly salary) x **24** (months since dismissal and finalization of arbitration) = **R340 914.00**
132. I make the following Award:

AWARD:

133. The dismissal of the Applicant, Phuti Pieter Kutu was substantively unfair.
134. The Respondent, Department of Justice and Constitutional Development, is ordered to reinstate the Applicant in the position he occupied prior to his dismissal on the same terms and conditions of employment, salary and benefits he enjoyed prior to the dismissal with effect from 12 February 2018.
135. The reinstatement in Paragraph 134, is subject to any increase in salary and benefits that may have accrued to the position in question in the interim, that is, if there was any increase in salary or benefits during the absence of the Applicant, he must be reinstated at the present salary and benefits.
136. The Respondent is further ordered to pay back-pay to the Applicant in the amount of **R340 914.00** (Three Hundred and Forty Thousand Nine Hundred and Fourteen Rand) this being the equivalent of 24 months' salary. The payment is to be affected by no later than 15 March 2020.
137. The Applicant is directed to report for duty at the Office of the Master in Nelspruit on 02 March 2020.

Signed and dated at eMalahleni on 09 February 2020



Name: Leonard van Leeuwen

GPSSBC: Arbitrator