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ARBITRATION AWARD

Panelist/s Chance Khazamula
Case No.: GPBC1724/2019
Date of Award: 05 December 2021

In the ARBITRATION between:

PSA obo T Mavuso

(Applicant)

and

Statistics South Africa

(Respondent)

Applicant's representative: Mr P Thotobolo

Respondent's representative: Ms H Sibiya

AWARD

DETAILS OF HEARING AND REPRESENTATION

1. The matter was an unfair dismissal dispute referred to in terms of unfair dismissal in terms of Section 191(5) (a) of the Labour Relations Act, Act 66 of 1995, as amended ("the LRA"). The matter was set down for arbitration physically and virtually before me and commenced on 05 October 2020. The matter proceeded on various dates until it was completed on 13 September 2021.

2. Parties submitted a bundle of documents as evidence and they were labelled "Bundle A" for the Applicant and "Bundle R" for the Respondent. Parties further concluded and signed pre-arbitration minutes. The pre-arbitration minutes were amended on record during the clarification process. Parties further submitted written closing arguments.

ISSUE TO BE DECIDED

3. I have to determine whether the Applicant's dismissal was procedurally and substantively fair or not. In doing so, I must determine the following;

Substance

- 3.1. Charge 2; whether the Applicant failed to report to the office as instructed by the Field Operations Manager or not

- 3.2. Charge 4; whether the Applicant refused to surrender the vehicle with registration number CG95NJGP to his supervisor Mr Sehloho or not
- 3.3. Combined Charges: Charge 5, 6 and 7¹; whether the Applicant visited the dwelling units or not when he completed the questionnaires.

Procedure

- 3.4. Whether the Applicant was a shopsteward or not, whether the Respondent refused to provide the Applicant document's to prepare his case or not and whether the Respondent exceeded 30 days to
4. The relief sought claimed by the Applicant is reinstatement with back pay.

BACKGROUND TO THE ISSUE

4. I will not repeat the common cause issues agreed to between the parties in the pre-arbitration minutes and the clarification session which is part of record save to say that the Applicant was employed by the Respondent as a Survey Officer on 01 June 2007 earning a monthly salary of R17678, 50 was dismissed on 31 July 2017 for seven (7) allegations of misconduct². The Applicant pleaded guilty on charge 1 and was issued with the sanction of Final Written Warning. He was not guilty on Charge 3 and he was found guilty and dismissed on charges 2, 4, 5, 6 and 7 respectively following the Respondent's internal disciplinary process.
5. The Applicant was aggrieved by the decision of the Respondent and he referred a dispute to Council. The matter was thereafter scheduled as arbitration before me.

¹ Parties agreed to combine this charges and deal with as 1 charge

² Page 82 of Bundle R

SUMMARY OF PARTIES EVIDENCE AND ARGUMENT³

The Respondent

6. The Respondent's 1st witness Judas Ngobeni ("Ngobeni") testified he was appointed to investigate the allegations of misconduct levelled against the Applicant. The investigation report⁴ was placed on the record. Ngobeni testified that the Applicant told him during the investigation that he went to the Doctor on 29 June 2015 and he was booked off from 29 to 03 July 2015. The Applicant did not notify Namane that he was booked off by the Doctor. On 30 June 2016, the Applicant was telephoned by the Field Ops Director Mr Manchidi to bring the questionnaires because his progress report was outstanding. He agreed that he will personally submit the progress report however he did not do so and he further did not notify Manchidi that he was booked off.

7. Ngobeni testified about his findings⁵ of the investigation. Ngobeni testified about the linked questionnaires⁶ for the dwelling units ("DU's") which was visited and completed by the Applicant and the unlinked questionnaires⁷ which were visited and completed by Taetsana and Mathebula ("the verifiers"). Sehloho and Namane also visited the DU's on 22 August 2015 as part of an investigation. Ngobeni also visited the DU's on 25 August 2015 and the information he gathered matched that of the verifiers and Sehloho. He submitted that the Applicant did

³ I have considered all evidence submitted before me. I however will refer to evidence relevant to the determination or to support any of the elements of fairness as required. This does not imply that in coming to a determination I failed to consider or ignored other evidence.

⁴ Page 2 to 9 of Bundle R

⁵ Page 5 of Bundle R para i

⁶ Page 31 to 32 and 36 to 37 of Bundle R

⁷ Page 28 to 30 and 33 to 35 of Bundle r

not visit the DU's or complete the questionnaires with the DU's household members. Both households confirmed that they were never visited by the Respondent's officials. The outcomes of the Respondent's officials did not match that of the Applicant.

8. The Respondent's 2nd witness Motebang Sehloho ("Sehloho") testified that he was the District Survey Coordinator – Quarterly Labour Force Survey ("QLFS") and the direct supervisor to the Applicant and they have been friends since the year 2000. The Applicant was supervised by Namane due to increased personnel. Sehloho submitted that he was the only one who had access to the ITS system and confirmed that the Applicant had outstanding questionnaires to be submitted. He left the issue to Namane and Ms Thakhudi – District Manager ("the DM") to collect the state vehicle and the questionnaires at Mavuso's place.
9. On 30 July 2015, Sehloho went to the Applicant's mother's residence with Tshidiso Matie. On their way there he was trying to contact the Applicant but he was not answering his calls. On arrival, he found his mother and told her that he was looking for the Applicant without specifying the reason. The Applicant's mother called him using her cellphone to him that Sehloho was at his place. When his mother gave Sehloho her cellphone to speak to the Applicant, the phone went off. Sehloho left and informed the DM that he did not get the Applicant at his place.
10. On 01 July 2015, Sehloho was called by the Applicant because he wanted to take the questionnaires to Head Office ("HQ") to be captured. He told the Applicant that he could not do so because there were processes to be followed in that the data need to be captured at the District office before they can be taken to the HQ. Sehloho went to Applicant with Namane and took the vehicle and

questionnaires, captured them and took them District office. Sehloho was aware of charge 4 because he was unable to get the Applicant on his phone after it rang without being answered and that his mother called him to make him aware of his presence at the Applicant's place and the phone went off.

11. Sehloho went to do verification with Namane on the DU's which the Applicant alleged to have visited and the information they gathered was not the same as the Applicant. The verifiers were the first people to go there and Sehloho and Namane went on 22 August 2015. Sehloho testified about the unlinked questionnaires⁸ that were given to the verifiers to verify after they were instructed by their immediate supervisor Namane. Their information was contradicted that of the Applicant. In the Applicant's linked questionnaires⁹ the names, the number of people and the place were different.

12. The Respondent's 3rd witness Ianthe Wessels ("Wessels") testified that she was the chairperson during the Applicant's disciplinary enquiry ("the enquiry"). Wessels stated that It was indicated at the enquiry that the Applicant requested the bundle of documents and they were issued to the Applicant 7 days before the enquiry. The Applicant requested questionnaires however the initiator Mr Bosch stated that it was impossible to get 500 questionnaires and they had no access to those questionnaires because they were already submitted to the data processing unit. The Applicant requested questionnaires completed by other people and the Respondent stated that they were confidential. The Applicant could not link the document required with the charges and it was on this basis that Wessel proceeded with the enquiry.

⁸ Page 28 to 30 of Bundle R

⁹ Page 31 to 32 of Bundle R

13. The Respondent's 4th witness Ben Bosch ("Bosch") testified that he was the initiator of the Applicant's enquiry. He was given an investigation report with recommendations and he compiled the charges. With regards to charge 2, Bosch interviewed Manchidi to understand the recommendation and Manchidi said he called the Applicant on his cellphone because of his outstanding questionnaires and the Applicant committed to personally deliver the questionnaires to the office at 12H00. At 12H45, Manchidi called the Applicant but his cellphone was not answered. Bosch submitted that the linked questionnaires¹⁰ were completed by the Applicant and the unlinked questionnaires¹¹ were completed by the officials which were sent by Namane and Sehloho.
14. The Respondent's 4th witness Thabo Manchidi ("Manchidi") during the Applicant's investigation he employed as the Respondent's Field Ops Manager. The Applicant failed to report to the office as agreed during the telephone conversation with him. Manchidi submitted that the reports were reconciled every month and the Applicant had to submit his questionnaires to his supervisor to check the quality and thereafter data capture will capture them. The Applicant questionnaires were not delivered and captured. Manchidi called the Applicant directly that morning because it was an emergency and he told him that he had the questionnaires. Manchidi told the Applicant to deposit the questionnaires to the district office and he will call him at 12H00. At 12H00, Manchidi called the Applicant and he did not answer. At 12H30 and 12H45, he called the Applicant and his phone was off.
15. Manchidi called the district office to check if the Applicant arrived. He thereafter called the DM to arrange a car to fetch the questionnaires at the Applicant's residence because it was a day to reconcile everything and also because it was the last day of the month the Applicant had to be issued with a new trip authority.

¹⁰ Page 31 of Bundle R

¹¹ Page 28 of Bundle R

The validity of the Applicant's trip authority¹² was ended on 30 June 2015. He made arrangements with the HQ to put personnel to assist with the capturing of questionnaires.

The Applicant

16. The Applicant testified that he was elected as a shopsteward of Public Servants Association ("PSA") at the district office a year before his dismissal and the Respondent charged him before informing his trade union. He could not recall if he made Wessel and Bosch aware that he was a shopsteward however he was surprised that Bosch was not aware that he was shopsteward.

17. On 29 June 2015, he sent an SMS to Namane who he was reporting to inform him that he was going to visit the Doctor and he was booked off from 29 June 2015 to 03 July 2015. The Applicant submitted that he agreed to Manchidi's instruction to submit the questionnaire however he was confused because he was under medication. The Applicant stated that he reported to Namane and he submits the questionnaires to him. The Applicant knew Manchidi at a professional level and it was the first time receiving instruction from Manchidi. Namane did not call him because he was aware of his whereabouts since he sent an SMS to him. Manchidi made him believe that he was at the District office and he did not understand the instruction. The applicant again stated that it was the last day of the quarter to submit the questionnaires as they were reporting three times a week. It was not wrong for him to have the questionnaires because his supervisor was aware and if Manchidi could have gone through his supervisor first, the confusion could have been eliminated.

¹² Page 10 and 11 Bundle R

18. The Applicant did not want to put his supervisor in trouble because Manchidi made him believe he was at Benoni office and he thought the supervisor told him that he had the questionnaires. He wanted to cover for his supervisor and also he thought he would be able to bring the questionnaires however he was sick. The Applicant apologises for not bringing the questionnaires. He did not tell Manchidi that he was sick because he was confused by his call and he ended up agreeing because he did not want to make the matter worse.
19. The Applicant became aware that he was investigated on 22 July 2015 and Ngobeni told him that he was appointed to investigate the abuse of the state vehicle. Ngobeni did not tell him about the charges. He knew about charge 1 and he apologises for utilising the vehicle for personal reasons and without permission. Concerning charge 4, the Applicant submitted that he never received instruction from Sehloho. Sehloho was correct that the phone went off but he did not know the reason because it was his mother's phone. For anyone to collect a vehicle from an employee who is off sick should have a trip authority to do that issued by the Selma Ntshangashe.
20. The Applicant testified about the unlinked¹³ and linked¹⁴ questionnaires. The linked questionnaire has pre-populated information. He explained the codes in the questionnaires and submitted that the assignment number, survey date, DU address and response details are important. The assignment number on the linked questionnaires were his and he completed the questionnaires on 10 June 2015. The quality assurance would normally take samples to verify and at the time they had one quality assurance because of the workload and he would do sampling verification.

¹³ Page 28

¹⁴ Page 31

21. With regards to the unlinked questionnaires, no one would know who verified in the absence of the assignment number and all survey officers had assignment numbers. He further testified that there was other information missing in the form. He was surprised by the charges because he visited the DU's in question and if justice had to be served they could have taken him to show them the DU's he visited. In the past, the Respondent would take people to the field and compare if there were discrepancies on the questionnaires. The Applicant was never told that Respondent was investigating the alleged DU's. This would have been reported to the methodology who designed the sample however none of that occurred. They visit the same DU four times per quarter of a year. The Applicant disputed the investigation report¹⁵ and submitted that without the assignment number no one could identify a person who completed the unlinked questionnaires. Regarding Page 156 of Bundle R, he cannot recall if he was required to respond to the charges that will be levelled against him.

ANALYSIS OF EVIDENCE AND ARGUMENT

Procedural unfairness

22. I deem it first to deal with the Applicant's allegation of procedural unfairness in that his trade union was not consulted in terms of the requirements of the LRA. In his evidence in chief, the Applicant submitted that he was elected as a shopsteward at the district office however he did not produce any shred of evidence to substantiate the allegation except his oral testimony. During cross-examination, he stated that he submitted a copy proving that he was an elected shopsteward to HR and he had his copy however he did not furnish this copy as

¹⁵ Page 6 of Bundle R

evidence during the enquiry and this arbitration. Bosch submitted in cross-examination that no one told him that the Applicant was a shopsteward and there was no need for him to enquire. It was the first time that the issue of the Applicant's shopsteward status was raised in the arbitration and no one at the enquiry knew that the Applicant was a shopsteward. This evidence collaborated with that of Wessel in cross-examination. Wessels submitted that if this was raised at the enquiry she would have confirmed it that was true and which trade union the Applicant was affiliated to. I, therefore, find that the Applicant failed in this regard to prove the allegations of procedural unfairness in this regard. I agree with the Respondent's evidence that the issue was not raised at the enquiry. In my view, the Applicant could have raised his shopsteward status at the beginning of Ngobeni's investigation which he did not.

23. The Applicant raised another procedural unfairness of his dismissal in that the Respondent issued the outcome of his appeal after 30 days however no evidence was led in this regard. I therefore would not make any findings. The Applicant alleged that the Respondent failed to provide him with documents to prove his case in defence of the allegations. Wessels in her evidence in chief testified that the Applicant should have advised her at the enquiry how the documents which he requested were linked to the charge. She submitted that it was not possible to provide the documents because the Applicant did not state the purpose of the document and what they would be used for. The Applicant was unreasonable because he required about 500 questionnaires that had confidential information. In my view, the Applicant should have requested this information before attending the enquiry and not at the beginning of the enquiry because he was allowed time to prepare his case in defence. No evidence was led to suggest that he did so.

24. I find that there was no evidence led to suggest that the Applicant requested these documents after he was issued with a notice of disciplinary enquiry. The evidence led in this arbitration was that this request was done at the enquiry including other preliminary points raised by the Applicant as stated by Wessels which was not disputed. The Applicant further did not lead any testimony or provide evidence on how he was prejudiced by the Chairperson's ruling and how such ruling affected his ability to prove the allegations. In my view, the Applicant ought to have requested this information or any other information he required to prepare his defence immediately after he was issued with the notice of disciplinary enquiry. If there were outstanding information, the Applicant would have requested the enquiry to be postponed on the basis that he was unready to proceed with the enquiry. It is also a common cause that the information requested at the enquiry was not provided even at arbitration however this did not prevent the arbitration from proceedings. I am not convinced that the Applicant's dismissal was procedurally unfair and therefore, I find that the Applicant's dismissal was not procedurally unfair.

Substantive fairness

Charge 2: Disobeying a reasonable and lawful job instruction – on the 30th June 2015 you failed to report to the office to submit questionnaires as instructed by the Field Operations Manager, Mr Thabo Manchidi

25. Parties agreed that it was a common cause that when an employee was sick and submitted a sick note was not obliged to perform work and also that the Applicant was sick between 29 June 2015 and 03 July 2015 and submitted a sick note. It was not disputed that Manchidi issued the instruction to Applicant on 30

June 2015. Bosch submitted that he drafted the charges based on the investigation report of Ngobeni. It was a further common cause that Namane who was the Applicant's supervisor at the time of the incident did not testify during arbitration proceedings. I shall not deliberate in detail the importance of the instruction on Manchidi because in my view it does not find any relevance to the charge. It does not mean that I do not recognise the importance of the Applicant to submit the questionnaires to the Respondent as it was the last day of the quarter. The question to be dealt with is whether the Applicant committed an act of insubordination or not.

26. Ngobeni testified in his evidence in chief, submitted that he was appointed to investigate the allegations of abuse of a state vehicle that was officially in the possession of the Applicant. It is important to note that Ngobeni was appointed on 03 July 2015¹⁶, which was the last day of the Applicant's sick leave according to the sick note. It is common cause that the allegations of abuse of state vehicle were not the reason for the Applicant's dismissal however it should be noted that Ngobeni's investigation uncovered other allegations of misconduct against the Applicant which led to his dismissal. The timing of Ngobeni's investigation and his extension of investigation is concerning. It appears that the trigger to the Applicant's investigation was caused by his failure to submit the questionnaires as instructed by Manchidi.

27. Manchidi submitted that the Applicant failed to report to the office as agreed telephonically with him and that was not disputed. He submitted that he knew Manchidi professionally but he was not his direct supervisor because he reported to Namane. He further submitted that it was the first time he received instruction from Manchidi and Namane was aware of his whereabouts. He further submitted

¹⁶ Page 76 of Bundle R

that he agreed because he did not was protecting Namane. I understand the reason why Manchidi called the Applicant directly because it was an emergency however this suggests to me that the Applicant's management at the District did not exercise due care in the performance of their duties because they were supposed to ensure that all questionnaires are captured. It should not have taken Manchidi to go beyond their roles to contact their junior employees to request questionnaires. Sehlohlo testified that he had access to the ITS system which tracks the questionnaires which were captured. There was no evidence tendered by the Respondent witnesses that there were attempts by the District to ensure that all questionnaires were submitted and captured before Manchidi's instruction to the Applicant. It was only after 12H30 that Manchidi called the District Manager to arrange the car to fetch the questionnaires from the Applicant. Manchidi was correct that he did not know that the Applicant was booked off sick because the Applicant does not report to him. I also agree with the Applicant that this could have been avoided if Manchidi requested this information via the Applicant's supervisor.

28. It was not disputed that the Applicant reported to Namane that he was going to see the Doctor. What the Respondent did not consider or fail to acknowledge was that when a person reports that he was going to the Doctor, it suggests that such an employee was sick. The Respondent seems to fail to acknowledge the fact that the Applicant was sick but only puts its focus on the Applicant's failure to report that he was booked off. The sick note provides indisputable evidence that the Applicant was sick. It appears Namane did not relate the message to his superiors to inform them that the Applicant went to the Doctor and may have been booked off. It was also the responsibility of the Respondent to follow up with the Applicant since he has reported considering that it was close to the last day of

the questionnaires to be submitted. The fact that he reported to Namane should have raised warning bells to the District leadership and his supervisors that he may not be able to submit the questionnaires in time and plans would have been made to collect them from the Applicant.

29. Sehloho testified on 01 July 2015, the Applicant called him because he wanted to take the questionnaires to Head Office however he told him that he cannot because of the processes which needed to be undertaken at the District. He went with Namane to collect the questionnaires and the state vehicle. This informs me that the Sehloho and Namane knew the Applicant's whereabouts and the reasons. Firstly, it would have been misconduct on the Applicant's side if he failed to submit questionnaires particularly on the last day of the quarter. The sick note of the Applicant would have been questionable upon his return. None of that occurred and Namane received an SMS from the Applicant informing him about the Doctor's appointment.

30. The Applicant's explanation that he was under medication was plausible and this explanation coupled with the sick note should have been accepted and paid by the Respondent before charging him. Ngobeni's investigation report was drafted on 28 August 2015 but it was strange that it did not consider that the Applicant submitted a sick note to the Respondent upon returning to work. Wessels in cross-examination submitted that the Respondent's case was that the Applicant did not communicate that he was booked off however she acknowledged that the Respondent knew that the Applicant was sick on 29 June 2015. She confirmed that the Respondent should have considered that the Applicant was sick. Bosch in cross-examination also admitted that he did not know that the Applicant was

booked off. The Respondent's evidence relied on the fact that the Applicant did not communicate that he was booked off.

31. I have no problem with Manchidi's instruction because he did not know the whereabouts of the Applicant and that the Applicant did not inform him that he was booked off however it was a fact that the Applicant reported that he was going to consult with the Doctor and the possibilities that he would have been booked off were high. The District should have informed Manchidi following their receipt of the Applicant's sick note. I, therefore, find that the Applicant's failure to fulfill the instruction of Manchidi was reasonable based on his state of health and it was not willful or deliberate because on 01 July 2015, he offered to take the questionnaires to the Head Office but was prevented to do so by Sehloho. The very same questionnaires were collected from the Applicant's and captured. ***In Sylvania Metals (Pty) Ltd v Mello N.O. and Others (JA83/2015) [2016] ZALAC 52 (22 November 2016)***, it was held that; *"Insubordination in the workplace context generally refers to the disregard of an employer's authority or lawful and reasonable instructions. It occurs when an employee refuses to accept the authority of a person in a position of authority over him or her and, as such, is misconduct because it assumes a calculated breach by the employee of the obligation to adhere to and comply with the employer's lawful authority. It includes a willful and serious refusal by an employee to adhere to a lawful and reasonable instruction of the employer, as well as conduct which poses a deliberate and serious challenge to the employer's authority even where an instruction has not been given."* According to evidence none of what is defined in the above authority was proven by the Respondent. The Applicant did not disobey a reasonable and lawful instruction but there were reasonable circumstances which were not disputed that made him not to fulfill the instruction." ("my underlining") ***In SAMWU obo Felicia v CCMA and others (JR2195/14) (2016) ZALCJHB 338*** "the Court enunciated the principles that govern insubordination in that insubordination is serious offence because it presupposes an intentional breach by the employee of the duty to obey the employer's

instruction. Therefore, the code requires that the defiance must be 'gross' to justify dismissal. This means that the insubordination must be serious, persistent and deliberate, and that the employer must adduce proof that the employee was guilty of defying an instruction. In order for an employee's conduct to constitute gross insubordination evidence is required to demonstrate a persistent and willful refusal to comply with an instruction, which constitutes gross insubordination.

32. The evidence was overwhelming in that the Applicant reported to Namane that he was going to the Doctor and provided proof of his whereabouts upon return. The Applicant called Sehloho to inform him that he was going to submit the questionnaires at Head Office. Sehloho and Namane collected the questionnaires and captured them. These were facts that should have been considered before the Applicant would be charged. It was clear that Ngobeni's and Bosch who drafted the Applicant's charges were not aware of the fact that the Applicant submitted the sick note. If they were made aware of this perhaps it would have mitigated the reasons why the Applicant could not fulfil the instruction of Manchidi. It was unfair to charge the Applicants without full appreciation of the facts and therefore the Applicant's dismissal was substantively unfair in this regard because I have no reason to doubt the Applicant's reason why he failed to submit the questionnaires as instructed by Manchidi. His failure to fulfil the instruction was neither willful nor deliberate.

Charge 4: **Insubordination** – *On 30 June 2015 you refused to surrender the vehicle to your supervisor, Mr Sehloho when he was at your place of residence to collect the vehicle when you dropped the phone in his ear and refused to speak to him*

33. The essence of the Respondent's case was that the Applicant dropped the phone in the ear of Sehloho. Manchidi in his evidence in chief testified that the Applicant's trip authority required him to return the vehicle on 30 June 2015 but his

focus was to retrieve the questionnaires. The Respondent's witnesses Ngobeni and Sehloho contradicted themselves because Ngobeni submitted that Sehloho and Namane went to the Applicant's place of residence to collect the state vehicle and he also mentioned this on his investigation report¹⁷ however Sehloho testified that he went with Tshidiso Matia. Neither Namane nor Tshidiso testified in this proceeding to corroborate either Ngobeni or Namane's evidence. It is worth noting that Ngobeni's evidence was based on hearsay because he took what he was told by Sehloho rather than what he witnessed. During cross-examination, Ngobeni confirmed that the Applicant was not notified if the vehicle was going to be collected and he was further not certain if they went to the Applicant's place of residence or not. It was clear from the evidence led that there was no instruction given to the Applicant to surrender the vehicle to Sehloho. Also, it was a fact that at the time of the incident, the Applicant was reporting to Namane.

34. Sehloho testified that on the way to collect the vehicle he attempted to call the Applicant. They went to the Applicant's mother in Katlehong and this was also stated Sehloho's statement whereas the trip authority of the Applicant stated that the Applicant's residence was in Tokoza and the vehicle would be kept overnight in Tokoza which explains why they did not see the vehicle. Also, Ngobeni testified in cross-examination that the vehicle tracker did not show any vehicle movements. It was a fact that he did not speak to the Applicant on his phone. When they arrived at the Applicant's place he found his mother that he was looking for the Applicant without stating the reasons thereof. It was not disputed by the Applicant that his mother call him with her cellphone. The Applicant admitted that the phone went off when he spoke to Sehloho but he did not know the reasons why the phone went off. According to Sehloho the Applicant dropped the phone in his ear. This

¹⁷ Page 4 para (f) of Bundle R

testimony was not backed up by relevant evidence because both Sehloho and the Applicant did not know the reasons why the phone went off. I agree with the Applicant that there may be a lot of reasons which caused the cellphone to drop off. I do not understand why Sehloho did not use his cellphone immediately after the Applicant's mother's cellphone went off because according to his evidence he used his cellphone on their way to the Applicant's residence. I may agree with the Applicant that although he and Sehloho were friends before, the relationship was sour at the time of the incident because it was unreasonable for Sehloho to conclude that because the cellphone dropped to suggest that the Applicant was insubordinate without making follow up or at least leave the message to the Applicant's mother about the reason of the visit. The Applicant's mother would not know if the visit was a social one or a work-related one. The Applicant was not aware of the reasons for his call and also the cellphone dropped with no explanation. The Respondent failed to prove that the Applicant's actions amounted to insubordination. The fact that Mavuso's mother dropped does not mean that the Applicant willfully and deliberately dropped the phone. The Respondent's evidence was disconnected to charge of insubordination. In ***TMT Services and Supplies (Pty) Ltd v CCMA and 2 Others [JA32/2017] [4]*** As to "insubordination" as a class of misconduct, it has been advanced by John Grogan¹⁸ that the enquiry into the gravity of the specific insubordination considers three aspects: the action of the employer before the deed, the reasonableness of the instruction, and the presence of willfulness by the employee". I, therefore, find that the Applicant's dismissal of this charge by the Respondent was substantively unfair.

¹⁸ John Grogan, *Workplace Law*, Juta 12th Edition, chapter 12, Para 3.8, pp125-126

Combined charges 5, 6 and 7 – *The Applicant submitted completed questionnaires while he did not visit the DU's*

35. It should be noted that the verifiers did not testify in this arbitration however the Respondent relied on the questionnaires allegedly to have been completed by the Respondent verifiers as evidence to prove that the information contained in their questionnaires was different to that of the Applicant. There was no proof of other DU's which were stated in the report. The Applicant disputes the investigation report. The Applicant submitted that the assignment number on the questionnaires identifies an official who visited the DU and completed the questionnaires. It is a common cause that the verifier's questionnaire did not contain assignment numbers to prove that they were the ones who completed the questionnaires and therefore without their testimony it is difficult to conclude that they visited the DU's as alleged. The Applicant's questionnaires had an assignment number and he was identified with it. Furthermore, the verifier's questionnaires are incomplete compared to that of the Applicant and also as testified by Sehloho Part A of page 28 was allegedly completed by Namane and other parts by the verifiers. This makes the questionnaires unreliable particularly if they are not supported by the testimony of witnesses. Ngobeni also could not with certainty identify who completed the questionnaires.

36. There was a discrepancy in Ngobeni's report because according to the verifier's questionnaires, they visited the DU 01 and 67 on 25 August 2015 which were visited by the Applicant on 10 June 2015 however the Ngobeni's report stated that the verifiers visited the DU's on 04 and 05 July 2015. Ngobeni alleged that he visited the same DUs on 25 August 2015. The verifier's questionnaires indicated that they visited the DU's on the same date. Sehloho in cross-examination testified on the

statement of the verifiers in that they visited the alleged DU's on 04 and 05 July 2015. He further submitted that he was sure they visited the DU's but he was unsure about the date which they visited the DUs.

37. Ngobeni in cross-examination submitted that he also went to visit the same DU's however he did not complete the questionnaires meaning that he did not have evidence to corroborate his testimony. I disagree with Ngobeni's reasons that he could not complete the DUs because it annoys the DU's members. After all, the purpose of his visit to DUs was to investigate and I doubt the DU's members would refuse to cooperate if the purpose of the visit was properly disclosed and explained. As part of the investigation process, Ngobeni ought to have obtained some form of evidence to support his findings.

38. Sehloho also visited the DUs with Namane and independently completed the questionnaire however he confirmed that the questionnaires which they completed were not part of the bundle of evidence in this arbitration. Sehloho submitted that he did not state in his statement that he visited the DUs because he was not supervising the Applicant and Namane was the responsible supervisor. I find this explanation illogical because he was either there to verify as part of the investigation or to assist as a witness to Namane and therefore his evidence would have been a crucial part of the evidence to be collected by Ngobeni.

39. Considering the above, it is clear that the Respondent's witnesses Ngobeni and Sehloho could not provide relevant evidence to support their testimonies especially completed questionnaires with assignment numbers as a method of identifying the official who visited the DUs. The incomplete unlinked questionnaires, the contradiction of dates by the witness and the lack of other Respondent's witness questionnaires did not assist the Respondent's case. This was imperative because the allegations against the Applicant are that the Applicant did not visit the DUs

compared to their visit. Without this evidence, there was insufficient proof to compare. It was not clear why Ngobeni, Namane, and Sehloho did not instruct the Applicant to take them to the DUs which he visited. It cannot be said that he would have tempered with the investigation because he could simply point the DU's he visited and they would complete the questionnaires. Further, the Applicant was using a state vehicle installed with the tracker. The tracker report would have at least pointed to the location of the Applicant vehicle position during the days of the visit to the DUs. I find that the Respondent failed to prove that the Applicant did not visit the DU's as alleged. I further find that the dismissal of the Applicant was substantively unfair.

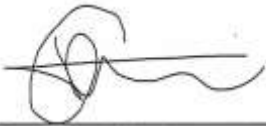
40. The Applicant's relief sought was to be reinstated with retrospective effect. ***In Fermel (Pty) Ltd v Talane NO and Others (JR2545/14) [2019] ZALCJHB 83 (4 April 2019) [28]*** It was held that *"The Commissioner is therefore required to award retrospective reinstatement in a manner that places the employee in the position he/she would have been had it not been for the dismissal. An employee is not to be placed in a more advantageous position which results in the dismissal being beneficial to the employee and the reinstatement ordered is not meant to place the employer in an unnecessarily burdensome financial position."* Having found that the Applicant dismissal was procedurally fair but substantively unfair, I do not have any reason not to order the Applicant's relief.

AWARD

41. I, therefore, issue the following award;

42. The dismissal of the Applicant by the Respondent is procedurally fair but substantively unfair.

43. The Respondent is ordered to reinstate the Applicant with back pay within 14 days from the date of the award.
44. The Respondent is ordered to pay the Applicant a sum of R901603, 50 (R 17678, 50 x 51 = R901603, 50) as back pay within 14 days from the date of the award.



Chance Khazamula
GPSSBC PANELIST