



**PHSDSBC**

PUBLIC HEALTH AND SOCIAL DEVELOPMENT  
SECTORAL BARGAINING COUNCIL

# ARBITRATION AWARD

Commissioner: Elsabè Skinner

Case No: PSHS484-16/17

Date of ruling: 21 September 2017

In the matter between:

**NEHAWU obo Mofahla and 2 others**

(Union/ Applicant)

and

**Department of Health - Free State**

(Respondent)

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## DETAILS OF HEARING AND REPRESENTATION

1. The matter was scheduled for arbitration on the 16<sup>th</sup> of February 2017, the 3<sup>rd</sup> and the 4<sup>th</sup> of May 2017, the 5<sup>th</sup> of June 2017, the 17<sup>th</sup> to the 20<sup>th</sup> of July 2017 and the 4<sup>th</sup> of September 2017 until the 6<sup>th</sup> of September 2017 at Bopelo House in Bloemfontein. The parties requested an opportunity to file written heads of arguments when the matter was finalized. It was agreed that it should be filed on the 13<sup>th</sup> of September 2017.
2. The Applicants were represented by Mr Jwayi, an official of NEHAWU. On the 5<sup>th</sup> of September 2017, Mr Jwayi withdrew as the representative of Mr Mofahla. Mr Mofahla then represented himself on the 5<sup>th</sup> and the 6<sup>th</sup> of September 2017. The Respondent was represented by Mr Mapena, the Senior Employee Relations Officer of the Respondent.

3. The proceedings were held in English and were mechanically recorded. The interpreter was Mr Tshabalala.
4. The Applicant's representative presented bundles of document which were marked A1 – 90, B1 – 2 and E1 – 4. The Respondent presented bundles which were marked C1 – 47, D1 – 12, F, G1 – 6.

## **BACKGROUND TO THE DISPUTE**

5. During the narrowing of the issues, the parties agreed as follows:
  - 5.1 The First Applicant, Mr Elias Tefo Mofahla, was a Senior Messenger in the employ of the Respondent. He worked five days per week, Mondays to Fridays. His gross salary was R9 832.25 per month (page 4 bundle G).
  - 5.2 The Second Applicant, Mr Phinias Risanga Mathebula was a General Worker in the employ of the Respondent. He worked five days per week, Mondays to Fridays. His gross salary was R8 761.50 per month (page 5 bundle G).
  - 5.3 The Third Applicant, Mr Joseph Mpho Nteo, was a General Worker in the employ of the Respondent. He worked five days per week, Mondays to Fridays. His gross salary was R10 093.50 per month (page 6 bundle G).
  - 5.4 The Applicants were dismissed on the 22<sup>nd</sup> of July 2016 subsequent to a disciplinary hearing that was held. The Applicants were charged with various charges, namely (page 1 bundle C):

### **Charge 1: (only related to the Second and the Third Applicant)**

“That you are allegedly guilty of misconduct in terms of Resolution 1 of 2003, Disciplinary Code and Procedure for the Public Service in that on or before 1<sup>st</sup> April 2015 you were found to have sold government property without permission to do so at FSW Scrap Metal. BIN, WASTE RECEPTABCLES, STEEL PH 00002573, PH 00002622, 142584 BIN WASTE PAPER STEEL PH 000020938, 142584,

141721,/190136342, DRAWER SHELF 184169, 184 170, TASKI POLISHER 364416, 364482, 109511, 063668, 106526, POLISHER CLUMBUS, 129758, 063445, 063670, 123169, 063671, 129328, 106674, 127674, 124506, 108718, 063667, 125324, 063853, 063665, 0133471, 126832, 063666, 139524, 128224, 132761, 063664, 184797, 290051, 140067, POLISHER BLUE AND RED 129037, 290050, 36446, 30023, 315207, 315381, 315385, 364408, 127022, 138604, S/NR 201000999, WETROK 063854, 063848, 063846 SORMA 063833, 108325, RECKITT INDUSTRIAL 063850.

**Charge 2 (applicable to all three Applicants):**

“That you are allegedly guilty of misconduct in terms of Resolution 1 of 2003, Disciplinary Code and Procedure for the Public Service in that on or before 1<sup>st</sup> April 2015 you behaved dishonestly in that you committed theft by removing the following items without permission to do so. BIN, WASTE RECEPTABLES, STEEL PH 00002573, PH 00002622, 142584 BIN WASTE PAPER STEEL PH 000020938, 142584, 141721,/190136342, DRAWER SHELF 184169, CABINET DRAWER 184168, 184170, TASKI POLISHER 364416, 364482, 109511, 063668, 106526, POLISHER CLUMBUS, 129758, 063445, 063670, 123169, 063671, 129328, 106674, 127674, 124506, 108718, 063667, 125324, 063853, 063665, 0133471, 126832, 063666, 139524, 128224, 132761, 063664, 184797, 290051, 140067, POLISHER BLUE AND RED 129037, 290050, 36446, 30023, 315207, 315381, 315385, 364408, 127022, 138604, S/NR 201000999, WETROK 063854, 063848, 063846 SORMA 063833, 108325, RECKITT INDUSTRIAL 063850.

All these items were sold to FS Scrap Metal for the book value of R99 293.66.

**Charge 3 (applicable to all Applicants);**

“That you are allegedly guilty of misconduct in terms of Resolution 1 of 2003, Disciplinary Code and Procedure for Public Service in that on or before the 1<sup>st</sup> of April 2015 you put the name of the Department in disrepute in that your action tarnish the image of the department”.

**The First Applicant, Mr Mofahla, was also charged with a further charge:**

“That you are allegedly guilty of misconduct in terms of Resolution 1 of 2003, Disciplinary Code and Procedure for Public Service in that on or before the 1<sup>st</sup> of April 2015 you contravened the Departmental Asset Management policy section 6.4 subsection 6.4.1 which reads:

‘All movements of state vehicles must have a signed trip authority before the vehicle is driven. Trip authority must be authorized by the relevant supervisor with a rank not lower than Chief Clerk and Transport Control Officer as Head of Office, trip authority for divisional Officer and higher must be approved by their Supervisor. When you drove state vehicle to FS Scrap Metal which was no indicated as an authorized trip”.

**5.5 Regarding Charge 1:** (the charge only applicable to Mr Mathebula and Mr Nteo) the parties agreed as follows regarding substantive fairness:

5.5.1 The rule was that employees were not allowed to sell government property without permission.

5.5.2 The Applicants were aware of the rule.

5.5.3 The rule was valid and reasonable.

5.5.4 The rule was consistently applied.

5.5.5 Dismissal was the appropriate sanction for breach of the rule.

**5.6 Regarding Charge 2: (the charge applied to all three Applicants)** the parties agreed as follows regarding substantive fairness:

5.6.1 The rule was that employees were not allowed to remove items without permission; it amounts to dishonesty and constitutes theft.

5.6.2 The Applicants were aware of the rule.

5.6.3 The rule was valid and reasonable.

5.6.4 The rule was consistently applied.

5.6.5 Dismissal was the appropriate sanction for breach of the rule.

**5.7 Regarding charge 3 (applicable to all three Applicants), the parties agreed as follows:**

5.7.1 The rule was that employees were not allowed to bring the name of the Department in to disrepute and they were not allowed to tarnish the image of the Department.

5.7.2 The Applicants were aware of the rule.

5.7.3 The rule was valid and reasonable.

**5.8 The parties agreed as follows regarding the charge that only related to the First Applicant, Mr Mofahla:**

5.8.1 The Rule was that employees could only use government vehicles in terms of the procedure as set out in charge 1. The trips had to be authorized and it should be indicated on the trip authority.

5.8.2 The Applicant was aware of the rule.

5.8.3 The rule was valid and reasonable.

**5.9 Regarding procedural fairness, the parties agreed as follows:**

5.9.1 The Respondent's Disciplinary Code and Procedures were set out in Resolution 1 of 2003 which was a Collective Agreement.

5.9.2 A disciplinary hearing was held on the following days: 18<sup>th</sup> of June 2015, 9 of July 2015, 5 and 6 November 2015.

5.9.3 The Applicants were properly notified of the hearing in terms of the Resolution.

5.9.4 The Applicants were given enough time to prepare for the hearing

5.9.5 The Applicants were aware of their rights.

5.9.6 They were given the opportunity to be represented. Mr Jwayi represented them during the disciplinary hearing as well.

5.9.7 They were given the opportunity to state their cases.

5.9.8 They were informed of the outcome of the hearing.

**5.10 The parties agreed to the following facts during the narrowing of the issues:**

5.10.1 The First Applicant, Mr Mofahla, used the Government vehicle with registration number GFJ 755 FS from the 3<sup>rd</sup> of March 2015 until the 26<sup>th</sup> of March 2015.

5.10.2 Mr Mathebula and Mr Mofahla were cleaning the yard from the 16<sup>th</sup> of March 2015 until the 20<sup>th</sup> of March 2015.

5.10.3 On the 1<sup>st</sup> of April 2015 the Applicants were arrested by the Police.

5.10.4 Polisher Columbus, Taski Polisher, bin and waste receptacles were found at FS Scrapyard on the 1<sup>st</sup> of April 2015. Ownership was placed in dispute, but Mr Mathebula and Nteo agreed that they had seen similar items at the Department's hospitals.

5.10.5 During the cleaning process, the 16<sup>th</sup> of March 2015 until the 20<sup>th</sup> of March 2015 Mr Mathebula and Mr Mofahla removed refuse to the dumping site using that government vehicle.

### **ISSUE TO BE DECIDED**

6. I am called to determine whether the Applicants' dismissal was substantively and procedurally fair in terms of section 188 of the Labour Relations Act 66 of 1995 (hereafter called the Act).
7. Regarding charges 1 (the charge only applicable to Mr Mathebula and Mr Nteo) and charge 2 (applicable to all Applicants) I must determine whether the Applicants breached the rule. Regarding charge 3 (applicable to all Applicants) and the charge that only related to the First Applicant, Mr Mofahla, I must whether the rule was consistently applied, whether the Applicants breached the rule and whether dismissal was the appropriate sanction for breach of the rule.
8. Regarding procedural fairness, I must determine whether the chairperson was biased when it was alleged that he had not considered all the evidence whilst he considered uncorroborated hearsay evidence.
9. The Applicants were seeking retrospective reinstatement.

## **SURVEY OF EVIDENCE AND ARGUMENTS BY THE PARTIES:**

### **Evidence by the Respondent**

**Mrs Masebata Lydia Tumo** testified under oath and her evidence was, in essence, as follows:

9. She was a Constable/Detective in the employ of the SA Police Service. She was the Investigating Officer in charge of the police docket, Mangaung with number CAS129/04/2015. They investigated an incident where employees of the Respondent were found with property belonging to Pelonomi Hospital in a scrapyard at Heidedal.
10. Mr Mofahla, the First Applicant, made a statement to the police which was filed as A3 in the docket (pages A1 and B1). He was made a state witness because of the statement that he had made.
11. She did not take the statement and she was not present when the statement was taken. The person who took the statement was from Heidedal Police station. She agreed during cross-examination that the Applicant did not write the statement as the courts wanted statements in a specific format. He could not write his own statement. He would sign it when he was satisfied with it. It was pointed out to her that the person who wrote the statement fabricated what had happened and changed what was told to him. She answered that the person who wrote the statement would be able to answer, but a Police Officer was not able to write specification of places and events where he was not at. He would only write the story that was given to him. When they take a statement from a witness he, the witness, would explain what had happened, they would give it to him and he would read it and sign it, if he agreed with the contents. She did not know whether his rights were read to him when he was arrested although all Police Officers were supposed to know this.
12. She testified that Mr Mofahla did not make a presentation to the court that it was not his statement, he did not defend it and he did not say that he was forced to make the statement. He also never objected to being made a state witness. She did not go through the statement with the Applicant. She did not know whether he testified in

court. The case was thrown out at court as they could not trace the owner of the scrapyards and the police officers did not attend court, they attended courses, *et cetera*.

**Mr Lutanda Yawa** testified under oath and his evidence was, in essence, as follows:

13. He was the chairperson at the disciplinary hearing. He briefly summarized the evidence that was presented to him during the hearing. He denied that he was biased when evaluating the evidence. He considered the facts that were presented to him. During closing arguments, the employees had argued that they sold the items to the scrapyards as if they were redundant. He agreed that there was no specific sentence where they admitted guilt, but his view was that they took the stuff inside the yard because they said they were taking the rubbish from the Respondent's premises to the rubbish site, but then went to the scrapyards (pages 20- 26 bundle A). This was never their version during the case. He was referred to various parts of the evidence during the disciplinary hearing and it was put to him that he had not considered the evidence. He denied this. The disciplinary hearing was recorded, but the recordings got lost.

**Mr Sylvester van Wyk** testified under oath and his evidence was, in essence, as follows:

14. He was the Head of Security at Pelonomi Hospital. The Hospital had a lot of problems with theft.
15. On the 18<sup>th</sup> of March 2015, they arrested a man at the hospital regarding the theft of copper pipes which led to a lot of water coming from the Trauma Section. The man confessed that he had sold it to scrapyards. They went to the Chappies Scrapyard, after they had gone to another scrapyards which was found locked, to investigate. They had interactions with the Police which resulted in them going to different scrapyards to check if there was property belonging to the Hospital. They found property belonging to the Hospital at Chappies Scrap Metal, it also went by another name. He identified the Hospital's barcode. He had asked the lady at the scrapyards about the barcoded items. She paged through her file and went to the ID document of Mr Nteo (page 21 bundle C). She said that he was the gentleman who normally came there to sell those items. He then identified Mr Nteo from the document. She said he usually came there with other colleagues in a government vehicle with red registration numbers. She did not say who the driver was.

16. It was a concern that items with barcodes were at the scrapyards as the barcodes were removed when it was deemed scrap. It was no longer state property when it was taken to auctions. He took photos of some of the items with his cellphone. These items, for example, the walking frame were usually found at hospitals. He was not able to say that the items on these photos belonged to the Respondent. A supply and Technical Service expert had to identify the state property. He did not identify the items and he did not compile the lists of items. He was not involved with the arrest of the Applicants.
17. It was pointed out to him that Mr Nteo would testify that his identity document got lost. The copy on page 22 bundle C was the copy that was kept by the Respondent when he was employed. He could not have kept it and presented it. He had never presented a copy of his identity document. He presented a copy of his driver's license when he sold other items at the scrapyards. It was further pointed out to him that the police officer also said a driver's license. He answered that this was what he saw.
18. He remembered the 18<sup>th</sup> of July 2017, Mandela day, when the Premier and other officials had visited the Hospital. On this day, a few items were placed on a truck. He was not involved with this as the Acting CEO was there. It was pointed out to him that some of the items that were loaded on the truck were listed in the Applicants' charge sheet. He answered that he would not know.

**Leteketoa Alfred Khiba** testified under oath as follows:

19. He was responsible for Technical Services at Pelonomi Hospital. On the 18<sup>th</sup> of March 2015, they had an incident where somebody damaged the infrastructure of the hospital which led to the flooding of the hospital. Security managed to apprehend the man and he identified scrapyards where he sold the items. He went with the Police to the scrapyards to identify the items. At Chappies Scrapyard he identified medical equipment with barcodes which was specifically used by Pelonomi Hospital. They asked the lady of the scrapyards about this. She said that the items were sold by people who said they were busy cleaning the hospital so a whole lot of things were thrown out. They went through a file and found a list of items which included a lot of polishers which were too big to be used at a house and x-rays (page 44 bundle C). She also gave them the driver's license of Mr Nteo. After the lady gave them Mr Nteo's copy she said

that the came daily between 11h00 and 13h00. The detective told her to continue as normal and to phone if they happened to come again.

20. On the 1<sup>st</sup> of April 2015, he received a phone call that he had to go to the scrapyard. On his arrival, he met a lot of police officers. Mr Mofahla was driving the same bakkie on that day. On his arrival, the lady at the scrapyard identified him and said that he was the person who regularly came with the vehicle. Mr Mofahla mentioned the names of the other officials that were helping him. He made a statement on site with the Police. Other officials were linked to the incident based on his statement.
21. Asset Management were called to label the items to classify it with the barcodes. A list of the items was compiled by Supply Chain (page 52 A). He did not go through the list. He was not involved in this. He was not able to verify ownership.
22. If items were made redundant he would write it off and he had to sign a technical assessment report. If the cost of repairs were beyond the limits they would scrap it.
23. It was pointed out to him that politicians visited Pelonomi Hospital on this day and took items with a big truck. He answered that he remembered the visit, but he did not see the truck.

**Scanda Panish Gudla**, testified under oath as follows:

25. He was a Warrant Officer in the SA Police with 23 years of experience.
26. The Police sent a task team to the scrapyard to see if there was compliance with the Act regarding second hand goods. The scrapyard was not in compliance and was issued with a fine. Pelonomi Hospital's items were in the register as required, but other items were not in the register.
27. Mr Mofahla was arrested at the scrapyard. He did not arrest him, but he was present when he was arrested. He could not remember who arrested the Applicant and he could not remember whether his rights were read to him. When a person is arrested, his/her rights were read to them and they were told why they were arrested. He was not able to comment whether the arrest was illegal if the rights were not read. The

Driver was arrested at the scrapyard, other police officials left to arrest the other employees. The Driver was accidentally arrested, it was not pre-planned. The owner pointed him out as the person who usually came there.

28. He took Mr Mofahla's statement at Heidedal Police Station (pages 1 A and B). Mr Mofahla was sober-minded when he made the statement. He did not raise any objections or concerns. During cross-examination, he testified that he did not write the statement; a colleague wrote the statement. He, the witness, stood next to him when the statement was made and written which was why he was able to commission the oath. He was allowed to do so. The statement was written in English, he read it to him in Sotho. The Applicant agreed with the statement and he commissioned the oath.

**Daniel Jochemus Maritz**, testified under oath as follows:

29. On the 1<sup>st</sup> of April 2015, he was called by Mr Stofile, his Manager, to go to an unknown scrapyard. He asked Mr Mofahla to take him to the place as the other drivers were busy. They entered the scrapyard and the lady from the scrapyard approached him. The lady identified the bakkie that they were travelling with and Mr Mofahla as the Driver. He confirmed that Mr Mofahla was indeed the authorized driver of the vehicle with registration number GFJ755FS and that various trip authorities were issued to him (pages 26 – 41 bundle C). Mr Mofahla assisted with driving duties when there was nobody else. Mr Mofahla assisted driving items to the dumping site. Mr Mofahla never requested him to go to the scrapyards.
30. Mr Nteo worked as the General Assistant at the store. He was told that people from the stores would assist Mr Mofahla to remove items to the dumping sites. He did not know who assisted him.
31. There was a signed trip authority for Mr Mofahla to go to Pelonomi Hospital and the scrapyard on the 1<sup>st</sup> of April 2015. He wrote it in on the trip authority when he realized where they were going (page 70 bundle A). He did not know that Mr Mofahla was involved, he asked Mr Mofahla to take him there as the previous driver requested to go on a tea break.

32. He usually told employees not to enter if it was not safe as it was expensive to get a recovery vehicle to tow them out. He denied that they were told to throw the rubbish out wherever they deem fit. It could only be dumped at the dumping site which was also called the White House. There were broken desks and cabinets which had to be taken to the informal setting to be used by the people there. This was done on the first day. Mr Mofahla had to take the rubbish to the dumping site with the bakkie. The rubbish did not have barcodes on it. The barcoded items, including polishers were inside the old hostel. The doors at the hostel were not locked, it was kept open.

**Avela Madoda Stofile**, testified under oath as follows:

33. He was the Deputy Director Financial Management. His scope was Finance and Supply Chain and he was also responsible for Asset Management.

34. He corroborated the Respondent's witnesses in all material aspects. Pipes were stolen at Pelonomi Hospital. The investigation led them to Chappies Scrapyard where items were found of Pelonomi Hospital. The lady at the scrapyard gave them a list of items that were brought in by employees as well as the identity document of Mr Nteo. He heard from others that the lady said that the government officials came with a state vehicle during working hours. Other items were found, lists were compiled and the barcodes were checked against the system of the Respondent. He had no knowledge regarding the investigation. His role was limited to identifying the assets of the Hospital.

35. A lot of items were found that were used in a hospital, but they were either dismantled or did not have the barcode. They were not able to say for certain that the items belonged to Pelonomi Hospital. During evidence in chief he testified that pages 17 – 20 bundle C consisted of the list of items found at the scrapyard. In terms of the list the book value of the items found at the scrapyard was R99 000.00. They also compiled a list of items that were unaccounted for at the White House (page 23 bundle C). It could be that it ended up at the scrapyard. However, during cross-examination, he testified that the list of items that were found at the scrapyard was contained on page 24 bundle C. The items that were identified were kept at the White House. The Respondent usually stored items that were about to be disposed, which were redundant or obsolete at the White House. It was kept there to determine whether it

could be fixed, redistributed or sold for the Department to recover revenue. If it was broken, it did not mean that it was discarded. They had disposal processes so that they could recover revenue. He did not know when the last auction was held at the Hospital.

36. Page 24 bundle C contained the list of items that were received back from the scrapyard. He compared the items on the list with some of the items on the charges sheet (page 1 bundle C). Five items were the same as on the charge sheet namely a silver dust bin, two white waste bins and a medicine steel holder.
37. The lady at the scrapyard gave them a list of the items that were sold to the scrapyard (page 42 bundle C), but the scrapyard sold items. He could not say the items were never there.
38. On the 18<sup>th</sup> of July 2014, the Premier and other politicians arrived and took items from Pelonomi. It was loaded in a truck and taken to Lebohang Building to the basement. They presently had a list of the items that were removed, but they did not have a list of the items when the union wrote and requested it. What happened on this day was unusual, they were not given any reasons why the items were removed. The items were going to be tested to see if it was still working. They were not able to remove the items from their inventory list. They made numerous requests to communicate with the Premier's office as they needed to come up with a process where the goods should either be removed from their inventory list or they had to return it. There were Taski Polishers amongst those items. He was not able to say which brands were taken. He was asked whether it was possible that some of these items that were removed by the Premier's office could have ended up at the scrapyard. He answered that he could not make such an assumption. He could not say with certainty that the items were still there at the date of the arbitration, but he was given the opportunity to go and verify the machines for audit issues at the building which he did.
39. He gave instructions in 2014 that Pelonomi hospital should be cleaned and items should be taken to the dumping site. The White House was also referred to as the dumping site. Mr Mathebula worked with assets and he knew that assets could not be taken without proper processes. The place was messy and they had to clean it and the items should be disposed. They could not just go through the expired items. There was a process for that.

40. The Respondent's representative made the unusual request that Mr Mofahla, the First Applicant, should testify on behalf of the Respondent. He placed on record that it was a voluntary action from the Applicant's side. The Applicant's representative argued that it was caught off guard by this as he was not aware of this. The case stood down to enable him to obtain instructions. When the case resumed, he presented a document which was written and signed by Mr Mofahla where he had terminated the mandate of Mr Jwayi. Mr Jwayi withdrew as the representative of Mr Mofahla. Mr Mofahla confirmed that he wanted to represent himself. He indicated that he was aware of the consequences of becoming the Respondent's witness. He confirmed that there was no agreement that he would be reinstated and he understood that the commissioner must make a finding on what is before her. He was not influenced at all and he was doing it out of his own free will.

**Elias Tefo Mofahla**, the First Applicant, testified under oath as follows:

41. He was employed during April 1983. It was pointed out to him by the Respondent's representative that the PERSAL document indicated that his employment date was 5 December 1993. He testified that they went on strike. Upon their return to work they were informed that their employment date had changed.

42. He confirmed that he made the statement in bundle F and the statement on pages 1A and 1 B in bundle C. He was told by Mr Maritz to assist Mr Mathebula with the cleaning of the White House. The other drivers had lots of work and he had to assist them for the week of the 16<sup>th</sup> to the 20<sup>th</sup> of March 2017. On the 19<sup>th</sup> and the 20<sup>th</sup> of March 2017 Mr Maritz told him not to go to the dumping site as it was raining. The road was slippery and the vehicle would be stuck. He did not have the money to pull him out. He told them that they could dispose the things anywhere in town. They gave the wooden material to people. Mr Mathebula said they had to take the remainder to the factory area. On his arrival, he saw that it was Chappies Scrapyard. He was not able to say what items were sold, it was trash, corrugated iron and metal. He was only the driver of the vehicle. He reversed the vehicle and dropped the things. He assisted with the loading and off-loading of wooden material. Mr Mathebula sold Pelonomi property and received money for the property. He, the witness, did not sell Pelonomi Property and

he did not receive money for it. He did not know whether Mr Mathebula had permission to sell Pelonomi Property. He did not make a big deal out of it as he was not there to sell, but to dispose of the items. He could also not say a word as Mr Mathebula would tell him that he was brought to assist and not to give instructions. He had to drive him where he wanted to go. It was pointed out to him that Mr Mathebula never went with him to the scrapyard. He denied this.

43. On the 1<sup>st</sup> of April 2015, he went with Mr Makgetla to the State Mortuary as instructed by Mr Maritz. Upon their return Mr Maritz requested Mr Makgetla to take him to the East End. Mr Makgetla told him that it was time for his tea break and he, the Applicant, took Mr Maritz to Chappies Scrapyard. They met many police officials at the scrapyard. The police official told him that the lady of the scrapyard had identified him and the vehicle. He denied that he had sold scrap material. He explained to the police official that he disposed of scrap material at the scrapyard. He never handed in his ID nor got money for the materials that were left there. The police officer took his statement. He signed it and Mr Maritz took the car keys from him. It was pointed out to him that he had sold material to the scrapyard and not Mr Mathebula. He agreed that he went with the state vehicle to Chappies Scrap Metal as indicated in the charge sheet. It was pointed out to him that he took advantage of the trip authorities as he went there to sell items. Mr Mofahla asked how it would have been possible for him to gain access to where the equipment was stored at Pelonomi Hospital. Security at the gate would ask them for loading documents, *et cetera*, but Mr Mathebula had all those documents. He was not going to take responsibility for those documents.
44. It was again pointed out to him that Mr Mathebula never went with him to the scrapyard. He answered that the representative would say this as he was representing Mr Mathebula. He never went to the scrapyard alone. His version was the truth. He would never give another version than this one.
45. When he went with Mr Maritz to the scrapyard there were other items there as well, but it was not what he had transported with Mr Mathebula. He had a trip authority for the trip on the 1<sup>st</sup> of April 2017, but he did not have trip authorities for the two days that they went to the scrapyard.

46. Mr Nteo did not escort them to the scrapyard. He only met him in the corridors of Pelonomi Hospital. He was surprised when Mr Nteo was joined to this case. Mr Nteo would have to explain how his identity document ended up at the scrapyard. He was the only one who could explain that.
47. He was not sure whether Mr Mathebula was entitled to sell property at the scrapyard. He had a document to clean the place.

**Evidence by the Applicant:**

**Joseph Mpho Nteo**, the Third Applicant, testified under oath as follows:

48. He started working for the Respondent on the 2<sup>nd</sup> of February 1984. They went on strike in 1987 and were taken back to work in 1990. During cross-examination, it was pointed out to him that his date of employment on his pay slip was 1 August 1996. He answered that he did not know. There might be a “mix-up” regarding the dates.
49. He was on leave during March 2015 until the end of April 2015 as indicated in the attendance register (page 51 bundle A). He did not have a copy of his application for leave form. During cross-examination, he testified that he could not remember the exact dates. It was pointed out to him that it was never put to the Respondent’s witnesses that he was on leave. He testified that he went on leave from the 1<sup>st</sup> of March 2015 until the 30<sup>th</sup> of March 2015. He later testified that he went on leave from the middle of March 2015 until the end of April 2015. It was pointed out to him that nobody in the Public Service had more than 35 days leave and it lapses in June if it was not taken. He answered that he knew this and then said it was a new thing.
50. During the first week of his leave he went to the scrapyard to sell some of his vehicle parts. He was cleaning his house as he was beginning to build his house. He did not sell property of Pelonomi Hospital at the scrapyard. It was pointed out to him that it was never disputed that a list (page 52 bundle A) was attached to his identity document. He answered that he did not know.
51. At the scrapyard, he gave his driver’s license as requested by them. He was not given a receipt for the items that he had sold there. He received R450.00 for the items.

52. On the 18<sup>th</sup> of July 2014, the Premier and other officials came and loaded machines at the White House.
53. He never went with Mr Mofahla and Mr Mathebula to the scrapyard. He worked at the storerooms of the White House and other warehouses where they had to load and off-load equipment. If there was too much work for Mr Mathebula, he had to go and assist Mr Mathebula at the White House. Mr Mathebula managed the stores. He did not have an in-depth knowledge of what was happening in the stores, but he had knowledge.

**Phinias Risanga Mathebula**, the Second Applicant, testified under oath as follows:

54. He worked at the White House, not the stores. The White House stored items that could be used and those items that could not be used. He was never seen at the scrapyard. None of the witnesses connected him with the case. There was nothing that he could comment regarding the statements made by Mr Mofahla. He was objecting to the fact that he said that he went with him to the scrapyard. During cross-examination, he testified that the statement was a lie.
55. It rained for two days during the period that he worked with Mr Mofahla. Mr Maritz told them not to take material to the dumping site. They had to take it to the squatter camp area next to the Hospital.
56. On the 18<sup>th</sup> of July 2014, he was at work. The Premier and his entourage came and took stuff from the White House. A truck was called to load the stuff. The Premier said the stuff that was dumped at the White House could still be used. He told them that the stuff was not dumped. It was placed there if a need arises in the hospital. No list was compiled of the items that were taken.
57. He was a General Assistant. His responsibilities were to take items that were no longer needed or in use in the wards and to take it to the White House. The White House was not locked and there were several complaints about the loss of things that were not locked. He had to go to the police station on several occasions to identify property of the White House. He was asked during cross-examination where his evidence was

to proof this. He answered that he was told that Mrs Kruger was going to testify on behalf of the Respondent and the Respondent then later sent her back. He would not have stolen the property as he had a list of barcoded items.

58. He denied that he was part of a syndicate of people who stole stuff from the White House. He did not request an inspection *in loco* to prove that the White House was not locked as he did not know that such questions would be directed to him. He agreed that he had access to the White House when they cleaned the yard as it was not locked.

59. The above-mentioned witnesses gave evidence under oath and were cross-examined. At the end of the hearing the parties requested to file written heads of arguments. Mr Mofahla requested to address me in closing.

59.1 The Second and Third Applicant's representative wrote that the reason for the dismissal was unfair and that the chairperson was biased. The Respondent presented hearsay evidence as the owner of the scrapyard, the person whom they alleged to have heard, did not testify under oath and could not be cross-examined. The hearsay evidence was never corroborated. The "real evidence" which was presented by the employer clearly showed that the Second and Third Applicant were not linked. The Respondent's witnesses contradicted each other. Mr van Wyk testified that the scrapyard owner presented the ID document of Mr Nteo and said that he had always travelled with a state vehicle. This was not true as confirmed by Mr Mofahla. Mr Khiba testified that the driver's license of Mr Nteo was used as a form of identification and not the ID document. He confirmed that neither Mr Nteo nor Mr Mathebula was identified by the scrapyard owner. The testimony of Mr Stofile clearly showed that the charges against Mr Mathebula and Mr Nteo was unfounded. Mr Stofile testified that only five items on page 24 bundle C corresponds with the items that the Applicants were charged for. He argued that the items that appear in the charge sheet which were found in page 24 bundle C were not taken to the scrapyard by the Second and Third Applicant; maybe Mr Mofahla could have taken them as he confessed under oath that he went to the scrapyard to sell scrap metals and falsely so with Mr Mathebula. Another possibility how the items in page 24 bundle C could have reached the scrapyard was when the items were taken by the Premier on the 18<sup>th</sup> of July 2014. The testimony of Mr Mofahla had no truth in it as there was no proof of identification of Mr Mathebula which was given to the employer by the scrapyard owner. The statement

of Mr Mofahla was dishonest considering the circumstances that led him to tender such evidence especially after the employer was not able to bring a witness to testify about the authenticity of the statement which the employer alleged that the Mr Mofahla had made under oath on the 1<sup>st</sup> of April 2015. The statement made by Mr Mofahla on the 31<sup>st</sup> of July 2017 was a clear indication that the employer could have promised Mr Mofahla that they would plead for leniency against him if he could make a statement once more to implicate Mr Mathebula. The absence of the scrapyard owner vindicates the testimony of Mr Mathebula that he had never set feet at the scrapyard to sell those scrap metals. There was no direct evidence presented during the arbitration. It leaves them with the conclusion that the Respondent's witnesses' testimony was just speculation. There was no corroboration for the allegation that Mr Nteo had indeed sold the items listed on page 42 bundle C. Mr Nteo was not denying that he once visited the scrapyard to sell his car parts. He conceded that indeed Mr Mathebula worked with most of the items found at the scrapyard in that he had to collect it at the wards and place them at the White House. The Respondent had failed to discharge the onus to prove to prove the allegations against Mr Mathebula and Mr Nteo. The dismissal was substantively and procedurally unfair.

59.2 Mr Mofahla argued that he did all kinds of work when he was in the employ of the Respondent. He was never selective regarding his duties. He found himself in this situation because he had assisted. He believed that if he was kept at one place then he would not have fallen into this situation. He was 54 years old. He had three children, aged 21, 13 and 6 years. He was the breadwinner in his family and he was seeking reinstatement.

59.3 The Respondent's representative wrote that page 52 bundle C clearly stated the items that were sold by Mr Nteo at the scrapyard. Mr Nteo was clearly identified and linked to the items. The evidence led by the Applicants were never put to the Respondent's witnesses. Mr Nteo never produced any corroboration for his version. An inference should be drawn that he was not telling the truth. He failed to produce his leave form and he failed to produce a list of the items which he alleged to have sold. Mr Mathebula was placed directly on the scene by Mr Mofahla. The owner of the scrapyard was mentioned directly. The commissioner must consider the Judgement in the Labour Court Case no JR56/14 Delivered on the 19<sup>th</sup> of August 2016. Minister of Police and RM M, M Smith N.O regarding the admissibility and weight of hearsay evidence in

arbitration proceedings. Some elements of the proceedings gave clear indications as to what had happened on the 1<sup>st</sup> of April 2015. It was no coincidence that items that were identified could just end up at the scrapyards without it being sold by the officials working or being exposed to the Hospital. The case became public knowledge and had drawn a lot of public interest. Justice must be served and the Applicants must face the repercussions of their actions. He, the representative, had attempted to get a mandate from his principals regarding Mr Mofahla, “all has failed, he could therefore not advance a plea regarding Mr Mofahla”.

60 I have not repeated all the evidence before me, but concentrated on those that assisted me on arriving at my final decision.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

61. In terms of section 192 of the Act the onus rests on the Respondent to prove that the dismissal was substantively and procedurally fair.

### **Regarding substantive fairness:**

62. The Applicants were charged with various charges, in summary, that they had sold government property without permission at FS Scrap Metal on the 1<sup>st</sup> of April 2015 (applicable to the Second and Third Applicant only) and that they had stolen government property without permission on the 1<sup>st</sup> of April 2015 (applicable to all the Applicants) and that they brought the Respondent’s name into disrepute (charge 3) (applicable to all Applicants) (page 1 bundle C).

63. Mr Mofahla was charged with a further charge, namely that he drove a state vehicle without the necessary signed trip authorities on or before the 1<sup>st</sup> of April 2015.

64. In terms of Item 7 of Schedule 8 – Code of Good Practice: Dismissal a person should consider the following when determining whether a dismissal for misconduct is fair:

- (a) Whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and

- (b) If a rule or standard was contravened, whether or not
- (i) The rule was a valid or reasonable rule or standard;
  - (ii) The employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
  - (iii) The rule or standard has been consistently applied by the employer;
  - (iv) Dismissal was an appropriate sanction for the contravention of the rule or standard.

65. During the narrowing of the issues, it was decided that I should determine regarding charges 1 (the charge only applicable to Mr Mathebula and Mr Nteo) and 2 (applicable to all Applicants), whether the Applicants breached the rule. Regarding charge 3 (applicable to all Applicants) and the charge that only related to the First Applicant, Mr Mofahla, I must whether the rule was consistently applied, whether the Applicants breached the rule and whether dismissal was the appropriate sanction for breach of the rule.

66. However, in my view, charges 1, 2 and 3 amounts to a splitting of charges. Charge 1 was the selling of items without permission, charge 2 was theft of the same items and charge 3 was bringing the name of the Respondent into disrepute. In my view, it applies to the same act namely the removal of items without permission. Charge 3 is only the consequence of the actions in charges 1 and 2. I am therefore going to deal with all three charges simultaneously.

### **Whether the Applicants breached charges 1, 2 and 3:**

67. The Respondent's witnesses corroborated each other regarding all material aspects. In summary, the evidence before me was that pipes were stolen at Pelonomi Hospital. The investigation led them to FS/ Chappies Scrapyard where items were found that were used by the hospital. The owner of the scrapyard told them that the items were brought by employees who drove a government vehicle. She took a copy of an identity document and a list from her file and said that they brought in these items. The identity document belonged to Mr Nteo. It is true that the Respondent's witnesses contradicted each other in the sense that Mr van Wyk testified that it was the ID document of Mr Nteo and that Mr Khiba testified that it was the identity document of Mr Nteo. I do not attach much weight to this. It is clear that a document which identified Mr Nteo was

found at the scrapyard. This was never disputed by the Applicant's representative. In fact, this was also the testimony of Mr Nteo. He testified that he had visited the scrapyard and left a copy of his driver's license at the scrapyard.

68. The owner of the scrapyard was never called to testify. The investigating officer testified that the scrapyard had closed down and the owner could not be found. The Applicant's representative argued that it amounted to hearsay evidence. I do not agree with this. The Respondent called three witnesses who confirmed that she gave them Mr Nteo's ID document (for ease of reference I am going to refer to the document as an ID document) as well as a list of the items that was brought in by him. All three heard this and corroborated each other regarding this. If I am wrong and it amounts to hearsay evidence, I am satisfied that the reason for the Respondent not calling the witness was reasonable and probable. It was never disputed that she could not be found. I find corroboration for her version that Mr Nteo sold items at the scrapyard in his own version. He testified that he presented his driver's license to the scrapyard when he sold his car parts. Considering this, I am satisfied that it is in the interest of justice to allow this evidence and to attach weight to this as it was indeed corroborated.
69. During Mr Nteo's evidence in chief, he testified that he was on leave during the period. He was not able to prove this and he was also not able to give the exact dates of his leave period. I must agree with the Respondent's representative that the dates were indeed crucial. However, on his own version, he testified that he had visited the scrapyard during this period. He went to the scrapyard to sell car parts. He had no proof of this. It was only pointed out to Mr van Wyk that the Applicant went to the scrapyard to sell other items and that he had presented his driver's license to the scrapyard. This was never put to any of the other witnesses.
70. I must agree with the Applicant's representative. The onus was on the Respondent to prove that the Applicants' were dismissed fairly. However, in my view, the onus shifts to Mr Nteo to adduce evidence in rebuttal. I am guided by the Labour Court case **SAMWU obo Damens v Breede Valley Municipality and Others (C828/2012) [2013] ZALCCT 52; [2014] 6 BLLR 614 (LC); (2014) 35 ILJ 2018 (LC) (4 December 2013)** where the Court held as follows regarding the onus:

[12] There is also no basis for saying that the arbitrator effectively reversed the onus of proving the applicant's dishonesty in arriving at this conclusion. In **South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd** Corbett JA

succinctly set out the distinction between the evidentiary burden and the onus of proof:

"As was pointed out by Davis AJA in *Pillay v Krishna* 1946 AD at 952-3, the word onus has often been used to denote, inter alia, two distinct concepts: (i) the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the court that he is entitled to succeed on his claim or defence, as the case may be; and (ii) the duty cast upon a litigant to adduce evidence in order to combat a prima facie case made by his opponent. Only the first of these concepts represents the onus in its true and original sense. In **Brand v Minister of Justice 1959 (4) SA 712** (A) at 715 Ogilvie-Thompson JA called it 'the overall onus'. In this sense the onus can never shift from the party upon whom it originally rested. The second concept may be termed, in order to avoid confusion, the burden of adducing evidence in rebuttal ('weerleggingslas'). This may shift, or be transferred in the course of the case, depending upon the measure of proof furnished by the one party or the other. (See also **Tregea v Godart** 1939 AD 16 at 28; **Marine and Trade Insurance Co Ltd v Van der Schyff** 1972 (1) SA 26 (A) at 378-9.)"<sup>[4]</sup>

[13] **In my view it was not unreasonable for the arbitrator to expect an explanation from the applicant as to how the same constellation of initials appeared on two separate documents completed on different occasions.** Mr White, for the applicant, suggested that it was not improbable that three initials could easily appear in an identical pattern on different pages in the same affidavit. No doubt, if the applicant had demonstrated at the arbitration hearing how easily this could occur by reference to some other multipage document initialled by a number of individuals or had tendered other similar evidence, then she might have succeeded in displacing the reasonable inference that the initials had been transposed from one document to the other. When confronted with the evidence she could not offer an alternative explanation, but merely reiterated her version that all the signatories had initialled the new document and that she could not comment on the coincidence because she was not a handwriting expert. The adverse inference to be drawn from the unusual coincidence was strong enough to require something more by way of rebuttal from the applicant, especially in the context of other evidence led in the arbitration hearing that the original initialled version of the amended business plan

could not be found. **This was not a situation where it could reasonably be said that the adverse inference was too weak to require rebuttal.** (my emphasis)

71. In my view, the fact that his identity document was filed with a list of items, which were clearly not car parts, placed a duty on Mr Nteo to adduce evidence in rebuttal. This was even understood by Mr Mofahla, who testified during cross-examination that Mr Nteo would have to come and explain how his identity document ended up at the scrapyard. Mr Nteo must prove that he had indeed sold car parts to the scrapyard. There is no evidence before me to prove this. There is also no explanation before me why the list that contained polishers and x-rays were filed with his ID document. Considering this, I am satisfied on a balance of probabilities that he scrapyard and sold items as per the list (page 42 bundle C). The Applicants placed ownership of the items in dispute. However, during the narrowing of the issues Mr Mathebula and Mr Nteo had agreed that Polisher Columbus, Taski Polisher, bin and waste receptacles were found at Chappies Scrapyard on the 1<sup>st</sup> of April 2015. They agreed that they had seen similar items at the Department's Hospitals. Mr Stofile compared the list of items that were found at the scrapyard with the charge sheet and confirmed that bin and waste receptacles, medicine steel holders and dust bins belonged to the Respondent. The list that was also attached to Mr Nteo's ID document mentioned polishers, x-rays, *et cetera*. I am satisfied on a balance of probabilities that the items belonged to the Pelonomi Hospital. I also find it interesting that the Applicants placed ownership in dispute, but argued that it might be possible that the items, which belonged to the Respondent and were removed on the 18<sup>th</sup> of July 2014 had ended up at the scrapyard. I am not able to conclude that it was these items that ended up at the scrapyard as Mr Stofile had testified that he had visited the Premier's office and confirmed that the items were indeed there. This was never disputed by the Applicants' representative.

72 The Respondent's witnesses testified that the First Applicant, Mr Mofahla, drove to the scrapyard with Mr Maritz. He was identified by the owner of the scrapyard. This was corroborated by various Respondent's witnesses. Mr Mofahla was questioned on the scene and he made a statement where he incriminated Mr Mathebula (pages 1A and B Bundle C). Whilst Mr Mofahla was represented by the Applicants' representative the statement and the contents of the statement were placed in dispute. It was repeatedly pointed out to the witnesses that his rights were not read to him by the police officers and the police officer wrote his own story. Mr Mofahla never corrected his

representative when he cross-examined the witnesses regarding these issues. However, when Mr Mofahla testified on behalf of the Respondent he confirmed and corroborated that it was indeed his statement and he confirmed the contents thereof. In fact, he had made another statement to the Respondent's representative on the 31<sup>st</sup> of July 2017 (bundle F). He confirmed the statement and the contents thereof as well.

73. In the statement made to the police Mr Mofahla wrote that was told by Mr Maritz to assist Mr Mathebula. Mr Mathebula requested him to go to Chappies Scrapyard. His intention was to go to the dumping site. He helped Mr Mathebula as he was in need of money. He, Mr Mofahla, was "really not included in the case of selling. He only transported them to the yard". He corroborated the statement by the subsequent statement that he had made to the Respondent's representative (bundle F). He testified during his evidence in chief that he had never sold the government property. This was never disputed by the Respondent's representative. He was also called to witness on behalf of the Respondent and, interestingly also, he was never charged that he had sold government property. He was only charged for theft of government property. He testified that he was told to assist with the loading and off-loading of government property. This was corroborated by the testimony of Mr Maritz. He testified that he had not known whether Mr Mathebula had permission to sell the property of Pelonomi Hospital. In my view, this should have placed him on guard or he should have informed the Respondent about this. The Respondent's representative never put this to him. In fact, the Respondent's representative took away the opportunity to cross-examine him when he made him a witness for the Respondent. He also never made an application to declare him a hostile witness. It appears as if he believed him. I specifically told the Respondent's representative that I want to hear him regarding Mr Mofahla in his written heads of argument. He wrote in his closing arguments that he sought a mandate from his superiors regarding Mr Mofahla, but he did not receive any. There is no evidence before me to prove that Mr Mofahla was indeed involved with the selling of the Respondent's property. However, as stated previously, I was surprised to hear that he had indeed made the statement when it was repeatedly placed in dispute. He knew the rules of the Respondent. He had agreed that there was a rule that he was not allowed to drive the vehicle without a trip authority, yet he made trips to the scrapyard without the necessary documentation. He saw that Mr Mathebula was selling the Respondent's property and that he was keeping the money for himself. He was not sure whether he had the permission to do this and did

not make any enquiries about it. He did not report the incident to anyone. He, conveniently, kept quiet. In my view, he was negligent and did not act in due diligence as was expected of him. However, as stated previously, there is no evidence before me to prove that he was involved with the selling of the items.

74. Mr Mathebula was connected to the incident via the testimony of Mr Mofahla. I am reminding myself that I must weigh it carefully as he was a fellow Applicant. However, there was no evidence before me to prove why Mr Mofahla would lie about this. Mr Mathebula's version was a mere denial and he stated that the statement was false, but there was no explanation why Mr Mofahla would lie about this. Mr Mofahla made two statements, the first one at the premises of the scrapyard and the other to the Respondent's representative. The statements corroborated each other. I am further satisfied that Mr Mofahla's purpose was not to incriminate all of them as he categorically stated that he did not know how Mr Nteo was connected to this matter, although he wrote "they" in his statement to the police. I do not know who the "they" was. He testified that Mr Nteo did not go with them to the scrapyard. Considering this, I have no reason to reject Mr Mofahla's testimony as incredible or improbable. He was honest that he did not have the necessary trip authorities when he made the trips as well. Considering the above, I am satisfied that the Mr Mathebula was guilty of theft when he sold property which belonged to the Hospital at the scrapyard.
75. Considering the above, I am satisfied that Mr Nteo and Mr Mathebula were indeed guilty of theft in that they sold government property at the scrapyard. I am not satisfied that Mr Mofahla was guilty of theft.
76. During the narrowing of the issues, Mr Mathebula and Mr Nteo had agreed that dismissal was the appropriate sanction for breach of the rule. I am therefore satisfied that their dismissal was substantively fair.

**Regarding the separate charge for Mr Mofahla:**

77. The First Applicant, Mr Mofahla, was also charged with a further charge, namely, that on or before the 1<sup>st</sup> of April 2015 he contravened the Asset Management Policy by driving the state vehicle to FS Scrap Metal without a signed trip authority (in summary).

78. The parties agreed during the narrowing of the issues as follows:

78.1 The Rule was that employees could only use government vehicles in terms of the procedure as set out in charge 1. The trips had to be authorized and it should be indicated on the trip authority.

78.2 The Applicant was aware of the rule

78.3 The rule was valid and reasonable.

79. It was placed in dispute that the rule was consistently applied, whether the Applicant breached the rule and whether dismissal was the appropriate sanction for breach of the rule.

#### **Whether the rule was consistently applied:**

80. There was no evidence before me that the Respondent had inconsistently applied the rule. No comparators were also raised during the narrowing of the issues.

81. Considering this, I am satisfied that the Respondent had consistently applied the rule.

#### **Whether the Applicant breached the rule:**

82. Mr Maritz testified that the Applicant had a trip authority when he drove the vehicle to FS/Chappies Scrapyard when they were summoned to the scrapyard on the 1<sup>st</sup> of April 2015. However, on the Applicant's own version, he did not have a trip authority when he drove Mr Mathebula to the scrapyard when he sold the items. The charge sheet reads "on or before the 1<sup>st</sup> of April 2015". I am satisfied that he was not only charged for the 1<sup>st</sup> of April 2015 and that the Applicant, on his own version, was indeed guilty that he did not have a valid trip authority when he went to the scrapyard. I am satisfied, on his own version, that he had breached the rule.

#### **Whether dismissal is the appropriate sanction for breach of the rules**

83. I am guided by clause 94 of the CCMA Guidelines that stipulates that three enquiries were involved in determining whether dismissal was an appropriate sanction: an enquiry into the gravity of the contravention of the rule; an enquiry into the consistency

of application of the rule and sanction; and an enquiry into factors that may have justified a different sanction.

84. I have already dealt with the issue regarding consistency.
85. The Respondent led no evidence regarding the gravity of the breach of the rule, in that he drove the vehicle to the scrapyards without a trip authority.
86. The Respondent led no evidence regarding the trust relationship. However, I am guided by the case **Impala Platinum Ltd v Jansen and others (LAC) (JA100/14)** where the Court reaffirmed the reasoning in **Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others 3 (2015) 4 BLLR 394 (LAC)** that the breakdown in the trust relationship was implied from the gravity of the misconduct and that dismissal is the appropriate sanction.
87. I am not satisfied that the breakdown of the trust relationship is implied for in the charge regarding the trip authority. The Respondent led no evidence to prove that dismissal was the appropriate sanction for breach of the rule. Considering this, I am not satisfied that dismissal was the appropriate sanction for breach of this rule. However, in my view, Mr Mofahla misused government property without permission and when doing so, the vehicle was used to commit theft at the workplace. In my view, Mr Mofahla must be issued with a final written warning for breach of the rule.
88. I find the dismissal of the First Applicant substantively unfair.
89. As stated previously, I am satisfied that the dismissal of the Second and Third Applicant was the appropriate sanction for breach of the rule. I find the dismissal of the Second and Third Applicant substantively fair. The dismissal of the First Applicant was substantively unfair.

#### **Regarding procedural fairness:**

90. During the narrowing of the issues, the parties agreed as follows regarding procedural fairness:

- 90.1 The Respondent's Disciplinary Code and Procedures were set out in Resolution 1 of 2003 which was a Collective Agreement.
- 90.2 A disciplinary hearing was held on the following days: 18<sup>th</sup> of June 2015, 9 of July 2015, 5 and 6 November 2015.
- 90.3 The Applicants were properly notified of the hearing in terms of the Resolution.
- 90.4 The Applicants were given enough time to prepare for the hearing
- 90.5 The Applicants were aware of their rights
- 90.6 They were given the opportunity to be represented. Mr Jwayi represented them during the disciplinary hearing as well.
- 90.7 They were given the opportunity to state their cases.
- 90.8 They were informed of the outcome of the hearing.
91. Regarding procedural fairness, I must determine whether the chairperson was biased when it was alleged that he had not considered all the evidence whilst he considered uncorroborated hearsay evidence.
92. There is no evidence before me to prove that the chairperson was biased or there was a perception of bias regarding his conduct during the hearing. The argument before me was that he had not considered all the evidence whilst he considered uncorroborated hearsay evidence. In other words, I am required to determine whether the chairperson had properly applied his mind to the evidence that was presented before him. This is not my role; only a review Court is able to do so. An arbitration is a hearing *de novo*, I am required to determine afresh whether the Applicants are guilty or not and not whether the chairperson had properly applied his mind. I must add, in passing, that, even if I was entitled to do so, I would not be able to do this, as I do not know the exact evidence that was presented. The recordings got lost and was not transcribed.
93. Considering this, I am satisfied that the dismissal was procedurally fair.

### **Regarding the appropriate remedy**

94. I must determine the appropriate remedy regarding the First Applicant, Mr Mofahla. He was seeking retrospective reinstatement. In terms of section 193 (2) of the Act reinstatement is the primary remedy as it states as follows:

“The Labour Court or the arbitrator **must** require the employer to reinstate or re-employ the employee unless:

- (a) the employee does not wish to be reinstated or re-employed;
- (b) the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable;
- (c) it is not reasonably practicable for the employer to reinstate or re-employ the employee; or
- (d) the dismissal is only procedurally unfair”

95. The Respondent did not lead any evidence to prove that the circumstances surrounding the dismissal are such that a continued employment relationship would be intolerable or that it is not reasonably practicable for the employer to reinstate the employee.

96. Considering the above, I deem reinstatement to be the appropriate remedy.

97. I must also determine how much backpay should be afforded to Mr Mofahla. The parties had agreed that the Applicants were dismissed on the 22<sup>nd</sup> of July 2017, but the Respondent’s representative handed in documentation that stated that Mr Mofahla had indeed received his salary until the 15<sup>th</sup> of August 2016 (page 4 bundle G). The contents of this document were not placed in dispute. A period of approximately 14 months would have passed from September 2016 to the date of reinstatement. The Applicant was guilty of using a state vehicle without a trip authority on various days. He misused government property and, as stated previously, I am also not satisfied that he showed due diligence towards the Respondent when Mr Mathebula sold the items of the Respondent and he kept quiet. Mr Mofahla placed his statement in dispute until the 31<sup>st</sup> of July 2017 when he, for reasons unknown, went to the Respondent’s representative and confirmed the old statement by making another statement. From the 31<sup>st</sup> of July 2017 to the 23<sup>rd</sup> of October 2017 (the date of reinstatement) a period of approximately 2 months and 3 weeks would have passed. I deem it appropriate to award him backpay for the period of 2 months only.

## **AWARD**

98. I make the following order:

98.1 The dismissal of the Second and Third Applicant is substantively and procedurally fair.

98.2 The dismissal of the First Applicant is substantively unfair, but procedurally fair.

98.3 A final written warning is issued against Mr Mofahla for using a government vehicle without a signed trip authority.

98.4 The Respondent, **Department of Health- Free State**, is ordered to reinstate the Applicant, **Tefo Elias Mofahla**, its employ on terms and conditions no less favourable to him than those that governed the employment relationship immediately prior to his dismissal.

98.5 The reinstatement in paragraph 98.4 is to operate with retrospective effect from the 22<sup>nd</sup> of July 2016.

98.6 As at the date of the award the remuneration due to Tefo Elias Mofahla because of the retrospective operation of the reinstatement amounted to **R19 664.50** minus such deductions as the Respondent is in terms of the law entitled or obliged to make.

The amount is calculated as follows:

R9 832.25 (Monthly salary) x 2 months = **R19 664.50**

98.7 The amount referred to in paragraph 98.6 is to be paid to Tefo Elias Mofahla on the 23<sup>rd</sup> of October 2017.

98.8 The Applicant is ordered to report for duty on the 23<sup>rd</sup> of October 2017.

98.9 I make no order as to costs.

Signature:

A handwritten signature in black ink, appearing to read 'Elsbi' or 'Elsbi Skinner', with a large loop on the left side.

Commissioner: **Elsabè Skinner**