IN THE DISCIPLINARY INQUIRY
HELD AT SANDTON

In the matter between:

SOUTH AFRICAN REVENUE SERVICES	Employer
and	
JONAS MASHUDU MAKWAKWA	Employee

FINDINGS

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1 INTRODUCTION

1.1 These are findings in the disciplinary hearing between the South African Revenue of Services ("the employer") and Mr Jonas Mashudu Makwakwa ("the employee").

1.2 The employer has proffered six (6) allegations of misconduct charges against the employee.

1.3 The hearing was held on 27 and 28 July 2017 and again on 15 August 2017.

2 BRIEF BACKGROUND FACTS

2.1 On 15 September 2016, the employer served the employee with a notice of suspension. This was subsequent to the employer instituting an investigation around the Financial Intelligence Centre report dated 17 May 2016 ("FIC report").

2.2 The FIC report uncovered what it terms "seventy five (75) suspicious and unusual cash deposits and payments" made into the employee's bank account.

2.3 Though not directly relevant in these proceedings and for purposes of completeness, I must mention that the employee consented to the suspension but has since challenged its validity. That dispute had been referred to the CCMA.

2.4 The terms of the employee's suspension are as follows:

> "*a) ... you are hereby suspended for thirty (30) working days with full pay and benefits, pending the outcome of an investigation and/or subsequent disciplinary hearing.*
>
> *b) You remain bound by all SARS policies and procedures as well as the SARS Code of Conduct and all other applicable policies and procedures.*

c) *Although your services may not be required by SARS during your suspension period, you need to be available and contactable by SARS. You are required to furnish SARS with the address and contact details of where you will reside during your suspension period.*

d) *You need to obtain permission from the SARS representative mentioned below before visiting any SARS premises or contacting SARS employees <u>during working hours</u>; and*

e) ... " (emphasis added)

2.5 On 13 January 2017, the employee contacted Dion Nannoolal ("Nannoolal") by way of a telephone call and the employer deemed that to be a breach of his suspension conditions.

2.6 The employer on 19 January 2017 served the employee with a charge sheet.[1] Later and on 12 June 2017, a consolidated charge sheet was served on the employee.

3 THE CHARGES

3.1 The following are the charges that were proffered against the employee:

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[1] For purposes of completeness, an investigation report compiled by the employer's attorneys of record, Hogan Lovells (South Africa) cleared the employee of any wrongdoing in respect of the seventy five (75) suspicious and unusual cash deposits and payments uncovered by the PWC report.

"CHARGE 1: BREACH OF SUSPENSION CONDITIONS

3.1.1 On 15 September 2016, you were placed on suspension.

3.1.2 One of the suspension conditions governing your suspension is that you are not to contact SARS employees without permission from Mr Teboho Mokoena or Commissioner T Moyane.

3.1.3 On 13 January 2017 you telephonically contacted Dion Nannoolal and discussed a taxpayer and a current active tax matter.

3.1.4 Your conduct as set out above is in breach of your suspension conditions.

CHARGE 2: GROSS INSUBORDINATION

3.1.5 On 11 October 2016, you were reminded and instructed by Million Mbatha via email not to contact any SARS employees whilst you are on suspension.

3.1.6 Notwithstanding this instruction, you again contacted a SARS employee on 13 January 2017 as fully set out in charge one above.

3.1.7 Your conduct constitutes gross insubordination.

CHARGE 3: FAILURE TO ACT IN THE BEST INTEREST OF SARS AND/OR PLACING SARS IN A POSITION TO BE BROUGHT INTO DISREPUTE

3.1.8 Your suspension and the reasons that brought about your suspension have been the subject of wide media coverage.

3.1.9 Notwithstanding the media attention and your senior position within SARS, you proceeded to conduct yourself as set out in charge one and two above. As you are aware or ought to be aware should your conduct as aforesaid become publically known, it has the potential to place SARS into disrepute.

3.1.10 Your conduct has a potential of putting SARS into disrepute.

CHARGE 4: ABUSE OF POSITION AND/OR EXERCISING UNDUE INFLUENCE

3.1.11 In contacting Nannoolal as set out in charge 1, you sought to instruct and/or direct and or unduly influence Nannoolal in the performance of his duties. Nannoolal does not report to you.

3.1.12 You had no authority to direct, instruct or influence Nannoolal in the performance of his duties. Your conduct constitutes an abuse of your position as a senior SARS employee, and/or exercising influence on a SARS employee.

CHARGE 5: BREACH OF SARS INTERNAL ETHICS POLICY – CONFLICT OF INTEREST AND CODE OF CONDUCT UNBECOMING CONDUCT AND/OR DISHONESTY

3.1.13 On or about 8 February 2012 you were appointed as a director of Biz Fire Worx (Pty) Limited.

3.1.14 You failed to disclose to SARS, your appointment as director of Biz Fire Worx (Pty) Limited.

3.1.15 In representations made as part of an investigation you stated that you had provided the director of Biz Fire Worx, Lekisane Moloa, with financial assistance and strategic funding, advice and planning, as well as supervision of staff.

3.1.16 Your conduct as aforementioned constitutes a breach of the Internal Ethics Policy well as the Code of Conduct in that you knowingly and/or deliberately and or in circumstances where you ought to have known you were required to disclose:

3.1.16.1 failed to disclose your appointment as director and/or directorship in Biz Fire Worx.

3.1.17 Your conduct as aforementioned constitutes a breach of the Internal Ethics Policy well as the Code of Conduct in that you knowingly and/or deliberately and/or in circumstances where you ought to have known you were required to obtain permission:

3.1.17.1 failed to obtain permission to undertake outside employment as required.

3.1.18 In addition, given your senior position within SARS, your conduct as aforementioned also constitutes conduct unbecoming of a person in your position and/or dishonesty.

CHARGE 6: BREACH OF SARS INTERNAL ETHICS POLICY- CONFLICT OF INTEREST- FAILURE TO DECLARE IMMOVABLE PROPERTY AND RENTAL INCOME AND/OR UNBECOMING CONDUCT AND/OR DISHONESTY

3.1.19 In terms of the SARS Internal Ethics Policy and established practice, you are required to disclose details of immovable property registered in your name and any rental income received in respect thereof.

3.1.20 In 2011 you failed to declare the following properties:

3.1.20.1 38 Brooklands Ridge

3.1.20.2 4 Lavender Lane

3.1.20.3 2193 Kosmosdal

3.1.21 In 2012 you failed to declare the following properties:

3.1.21.1 38 Brooklands Ridge

3.1.21.2 4 Lavender Lane

3.1.21.3 2193 Kosmosdal

3.1.22 In 2013 you failed to declare the following properties:

3.1.22.1 2193 Kosmosdal

3.1.23 In 2013 you failed to declare the following properties:

3.1.23.1 38 Brooklands Ridge

3.1.23.2 4 Lavender Lane

3.1.23.3 2193 Kosmosdal

3.1.24 In all the aforementioned years, you also failed to declare rental income received in respect of 4 Lavender Lane, Summerfield estate.

3.1.25 Your conduct as aforesaid constitutes a breach of policy and/or practice and given your senior position within SARS is conduct unbecoming of a person in your position and/or dishonesty."

4 SUMMARY OF EVIDENCE

4.1 The employer called four (4) witnesses. The employee is the only one who testified on his behalf.

4.1.1 Dion Naramoolal

4.1.1.1 He is a senior manager, High Value Enforcement Unit, which involves the collection of high value cases and litigation.

4.1.1.2 On 13 January 2017 at around 15h32, he received a call from the employee.

4.1.1.3 The employee advised him that he had received a call from Mr Rudzani Mukwevho ("Mukwevho"), a representative of the Mpisane family.

4.1.1.4 Mukwevho requested an urgent meeting with Nannoolal. However, due to the fact that he was on leave, he contacted the employee.

4.1.1.5 The employee requested that he meet with Mukwevho, as the Mpisane family needed their tax clearance certificate and wanted to settle their tax dispute with SARS.

4.1.1.6 The employee also mentioned the fact that Mukwevho raised the question of the assessment having been done by PriceWaterhouseCoopers ("PWC") and not by SARS. Further that if it were true, that would have been irregular since such conduct would be contrary to the Tax Administration Act.

4.1.1.7 The employee was aware that he was on leave at the time and he apologised for disturbing him during his leave period.

4.1.1.8 He does not have the power to agree to settlement agreements and/or compromises.

4.1.1.9 He agreed to the meeting and requested that it must be held on Monday 16 January 2017 at 11h00.

4.1.1.10 But for the employee's request, he would have met with Mukwevho during the course of that week after attending to his emails and familiarising himself with the merits of the matter.

4.1.1.11 He sent a text message to Vusi Nqgulnana and advised him that he had received a call from the employee in relation to the Mpisane matter.

4.1.1.12 The employee advised him not to do anything against the law when dealing with Mukwevho.

4.1.1.13 He acceded to the request because the employee is his superior and he has respect for him. However, he was not pressured into doing anything, i.e. acting in a particular way.

4.1.2 Mr Million Mbatha

4.1.2.1 He is an Employment Relations Specialist.

4.1.2.2 He was tasked with communicating with the employee regarding his suspension and the various extensions of the employee's suspension.

4.1.2.3 The employee was suspended due to allegations levelled against him emanating from the PIC report.

4.1.2.4 On 11 October 2016, he addressed an email in which he reminded the employee of his suspension conditions. The email was sent to the employee following the Commissioner's advice that the employee had attempted to contact him several times.

4.1.2.5 He had further communications with the employee, during his suspension, owing to the fact that he was tasked with handling the Lackay matter in which the employee was a witness.

4.1.2.6 The employee enquired whether in responding to Mbatha's messages, would he not be breaching his conditions of suspension.

4.1.2.7 He advised the employee on 26 of January 2017 by way of a text message that the employee was not breaching his suspension conditions when he communicates with him regarding the Lackay matter as that matter is not related to the FIC report investigation.

4.1.2.8 The employer has working hours that are published for office workers and they are 7h30 to 16h30 and 8h00 to 17h00.

4.1.3 Teboho Mokoena ("Mokoena")

4.1.3.1 He is employed as the Chief Officer, Human Capital and Development.

4.1.3.2 He was involved in assisting the Commissioner, Thomas Moyane in issuing the suspension ("the Commissioner").

4.1.3.3 He became aware of the telephone call made by the employee to Nasnoolal when he returned from leave.

4.1.3.4 He was the individual who was tasked with facilitating communication between the employee and the employer, regardless of the fact that the Commissioner had also been named as the other person with whom the employee could communicate.

4.1.3.5 The employee never requested permission from him prior to communicating with Nasnoolal.

4.1.3.6 If permission had been requested from him prior to the employee communicating with Nannoolal, he would have considered the circumstances of the call, the basis of the request and if the employee has to contact any of his colleagues specifically who might have to deal with the relevant matters cited in the request. He would then make a determination as to whether or not to consult the line manager of the employee.

4.1.3.7 In response to the question that I had asked him as to whether was his authority to grant the employee permission to speak to SARS employees during his suspension was only limited to the issues stipulated in the notice of suspension, he responded in the affirmative.

4.1.3.8 This issue was explored by the employer's legal representative in an attempt to clarify his response to the question that I had asked him. He confirmed the correctness of the response that he had given. He later changed his answer when the issue was explored further.

4.1.3.9 With regard to the employee's suspension, it was decided that the employee be placed on suspension after having considered the seriousness of the allegations that had been raised against him and were being investigated. The employer was further guided by Disciplinary Code and Procedure Policy provisions dealing with suspensions.

4.1.3.10 He was asked about the limitation that is imposed by paragraph (d) of the notice of suspension, i.e. the one that refers to the working hours. His response was that:

> "***MR MOKOENA:*** *Firstly I, I do not thing that the working hour's limitation should find expression in that paragraph because it places an unrealistic limitation because working hours differ from one aspect of our operation to the other.*"

4.1.4 Ms Tumelo Faith Gopane ("Gopane")

4.1.4.1 She s manager, Integrity Compliance Officer.

4.1.4.2 She is responsible for managing security vetting and conflict of interests at SARS.

4.1.4.3 All SARS employees are required to declare all their private interest on an annual basis between the period of April and May. The employees are further required to apply for permission if they wish to conduct work outside of SARS.

4.1.4.4 Employees are required to declare all their shares, directorships and partnerships in accordance with the Ethics Policy.

4.1.4.5 She was taken through the declaration on page 79 of bundle A and the following was her testimony:

4.1.4.5.1 She printed the document on 28 of October 2016 after she had been requested by management as it was relevant to an ongoing investigation.

4.1.4.5.2 The declaration of April 2011, for purposes of or under property, only refers to Centurion. It does not provide the details thereof.

4.1.4.5.3 The properties situate at 38 Brooklyn's Ridge, 4 Lavender Lane and 2193 Kosmosdal were not found in the declaration form submitted on 7 December 2012.

4.1.4.5.4 No property was found in the declaration form submitted on 26 April 2013.

4.1.4.5.5 No property was found in the declaration form submitted on 1 April 2014.

4.1.4.5.6 No rental income was declared for the years 2012 and 2013.

4.1.4.6 The employee did not obtain any approval from the employer for any extra remuneration.

4.1.4.7 If the employee had previously declared property in a certain year, that property will remain in the system however, under the profile of that specific year in which it was declared.

4.1.4.8 The system requires employees to annually either update the existing declaration, export the existing declaration or to create a new declaration.

4.1.4.9 The manner in which declarations is done is not prescribed by the policy. However, it is a rule that exists by virtue of the system used by the employer.

4.1.4.10 No action was taken against employees that had previously not declared.

4.1.5 Mr Jonas Makwakwa ("Makwakwa")

4.1.5.1 He is the Chief Officer, Business and Individual Taxes and has been in the employ of SARS for a period of twenty-two (22) years.

4.1.5.2 He first met the Mpisane family in March 2009 when he had been deployed to KwaZulu Natal to provide executive leadership.

4.1.5.3 In the year 2012, he was a witness for the employer in the dispute it had against the Mpisane family.

4.1.5.4 He believes he was suspended because the FIC report had wide media coverage and thus his continued presence would cause unnecessary harm or attention to the employer.

4.1.5.5 From the reading of his notice of suspension, he was not permitted to contact and or access the employer's offices during working hours without obtaining permission.

4.1.5.6 He made a telephone call to Nannoolal after he received a call from the taxpayers' representative, Mukwevho, who advised him that he had been trying to make contact with the employer regarding the Mpisane matter. Mukwevho advised him that he urgently needed to meet representatives of the employer for the following reasons:

4.1.5.6.1 The Mpisane family urgently needed their tax clearance certificate.

4.1.5.6.2 The matter was set down in court for the next Tuesday and Mukwevho was aware of the PWC report together with the problems associated therewith.

4.1.5.6.3 The Mpisane family wanted to settle the matter with the employer prior to the scheduled court date and this is the reason that the meeting had to occur on Monday.

4.1.5.7 He did not think he was breaching his suspension conditions when he contacted Nannoolal as the latter was on leave, i.e. thus "working hours" were not applicable.

4.1.5.8 When a matter is the subject of litigation, no individual at SARS can settle a matter with a taxpayer. Any settlement and/or compromise is recommended by a committee known as a Tier 4 committee that makes recommendations to the Commissioner.

4.1.5.9 He was a witness on behalf of the employer in the Lackay matter. After Mbatha had contacted him, he sent a text message to Mbatha as he was not clear whether by communicating with him in relation to the Lackay matter, he was breaking his suspension conditions.

4.1.5.10 His understanding of the declaration system is that he is invited by the system and the system will have all the details and thus serve as evidence of the declarations of the previous years. The system will require him to either confirm the current information as it appears on the system or update the existing information that is on the system.

4.1.5.11 His further understanding was that he only needed to update the system if he wanted to include new declarations, i.e. those he had never previously declared.

4.1.5.12 Brooklyn Ridge and 4 Lavender Lane are investment properties from which he earns rental income.

4.1.5.13 He declared the following properties on the system:

4.1.5.13.1 2193 Kosmosdal - 2003.

4.1.5.13.2 38 Brooklyn Ridge and Lavender Lane - 2009.

4.1.5.14 He could not make any declaration during April/May 2012 as the system was not functioning at that time. He only had an opportunity to make a declaration when the system began operating in December 2012.

4.1.5.15 He was a director of Biz Fire Worx (Pty) Limited. The company was registered in February 2012 however, he could not declare in April/May of 2012 as the system was not functioning.

4.1.5.16 He is aware of individuals at the employer who had failed to make declarations in accordance with the policy and were never disciplined.

4.1.5.17 He underwent a vetting procedure in 2015.

4.1.5.18 He had the employer's best interest at heart when he made the call to Nannoolal. He would never allow the employer to be placed in a position of disrepute.

4.1.5.19 The reason why he called Nannoolal was because he wanted to avoid SARS being embarrassed in court again at the instance of the Mpisanes.

4.1.5.20 In response to a question that I put to him, he stated that the fact that he had made a call to Nannoolal in respect of matter of Mpisanes would have had negative consequences to SARS if that information had leaked.

5 SUMMARY OF THE PARTIES' SUBMISSIONS

The employer's submissions

5.1 Charges 1 to 3

5.1.1 The interpretation of the suspension conditions adopted by the employee is incorrect.

5.1.2 The employee knew he was required to obtain permission from Mokoena prior to making the call in issue and the employee did not obtain such permission.

5.1.3 The Chairperson should take into consideration the judgment of the Supreme Court of Appeal in Natal Joint Municipality Pension Fund v Endumeni Municipality[3], that outlines the principles of interpreting written documents.

5.1.4 The employee's interpretation of his suspension conditions suggests that he may contact other employees without Mokoena's consent provided it is not during working hours.

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[3] 2012(4) SA 593 (SCA) at para [18]

Such interpretation, the employer contends, clearly undermines the purpose of the suspension.

5.1.5 To interpret the suspension notice in any other way would undermine the purpose of the document and lead to insensible and unbusinesslike results.

5.1.6 The employee does not dispute having received the email of 11 October 2016. He contends that he was not aware of the reason for the email, however does not dispute that he did in fact contact the Commissioner while on suspension.

5.1.7 The email of 11 October 2016 constituted a lawful and reasonable instruction and the employee's conduct poses a deliberate and serious challenge to the employer's authority.

5.1.8 The employee was aware that there would be negative consequences to SARS if the call became public knowledge. The fact that these negative consequences would arise if the information would be leaked was the employer's concerns.

5.1.9 There was subsequent negative media coverage relating to the employee breaching his suspension conditions and it being linked to the Mpisane matter.

5.2 Charge 4

5.2.1 There was in reality no need for the employee to intervene on behalf of the employer. The employer had already communicated with Mukwevho that they would not do anything until Nannoolal returned to work.

5.2.2 The employee sought to arrange a meeting with the employer on behalf of the taxpayer that would otherwise not have happened any time prior to the court date.

5.2.3 Nannoolal testified that it is out of respect that he acceded to the employee's request to depart from the employer's official stance and avail himself that would otherwise not have happened as early as it did.

5.2.4 It does not matter that Nannoolal testified under oath that he did not feel influenced by the employee. What matters is that the employee knew that he could influence Nannoolal to

deviate from the official stance of the employer and that he in fact did.

5.3 Charges 5 and 6

5.3.1 The employee did not disclose his appointment as a director and only disclosed his resignation as a director in December 2012.

5.3.2 Under cross-examination the employee conceded that if a person is appointed a director in August 2017, in terms of the Ethics Policy he must not wait until April 2018 to declare his directorship in the entity.

5.3.3 Full disclosure of private interest is key to the prevention of and in resolving situations of conflict of interest and upholding the integrity of the employer.

5.3.4 The message from the Commissioner that accompanied the Ethics Policy emphasises the importance of full disclosure by SARS officials and the context within which the Ethics Policy was drafted and its intended purpose. The message provides as follows:

"Good corporate governance is far more important than legal obligation and oral duty for the employer; it is also a business imperative. The employer mission to broaden the tax base and promote voluntary compliance relies heavily on how well SARS looks after the public funds entrusted to it."

5.3.5 The wording of paragraph 9.1 of the Ethics Policy clearly creates an obligation on the employer's official to annually submit a declaration from April and May. It creates a further obligation for the employer's officials to submit an additional declaration form as and when there are changes in the officials' private interests.

5.3.6 The reason for the employee's resignation as a director in May 2012, i.e that potential conflict of interest, demonstrates the importance of the obligation to declare changes in private interest as and when they occur as opposed to April and May when the annual declaration is submitted.

5.3.7 The employer submits that the employee should be found guilty of this charge.

5.4 Charge 6

5.4.1 The employee is a qualified auditor and a senior executive at the employer and yet expects the Chairperson to believe that he did not understand the policy to create an obligation on him to declare rental income.

5.4.2 The employee could not give an example of what would constitute *"other interests in land and property"*. Therefore, the policy would have no practical meaning if the employee's interpretation were to be accepted.

5.4.3 At a factual level, the employee does not dispute that he did not declare rental.

5.4.4 Even though Gopane testified that it was her understanding that the Ethics Policy did not create an obligation on employees to declare rental income, this must not be accepted as the employer's position.

5.4.5 Our courts have been emphatic on this issue: the correct interpretation of any written document is "a matter of law and

not of fact and, accordingly, interpretation is a matter for the court and not witnesses".

5.4.6 The employer submits that the employee is guilty of contravening the provisions of the Ethics Policy by failing to declare rental income for the immovable property situate at 4 Lavender Lane.

5.4.7 In addition to his failure to declare rental income, the employee failed to annually declare his ownership in certain immovable property during the years 2011, 2012, 2013 and 2014.

5.4.8 At a factual level, the employee does not dispute that he did not declare his ownership in these properties for the periods set out in the charge sheet.

5.4.9 The employee gave four versions during his testimony as to why he failed to annually declare his properties. These versions were that:

5.4.9.1 He was obliged to declare repeatedly.

5.4.9.2 Interests previously declared appearing in subsequent forms as a result of a change of description of that interest.

5.4.9.3 Interests previously declared where there has been no change in the description appearing on the subsequent declaration form because of a change of an interest elsewhere on the form.

5.4.9.4 Not knowing why the system prints the information it prints at all.

6 The employer submits that the employee should be found guilty of all the aforementioned charges.

The employee's submissions

6.1 The charges were not drafted by the employer's employees. Neither Mbatha nor Mokoena drafted the charge sheet.

6.2 The employer's assertion that in terms of its Ethics Policy, the employee was obliged to declare his immovable property every year as well his

rental income, is a direct contradiction to the evidence that was given by Gopane, the employer's only witness with regards to charges 5 and 6.

6.3 No evidence was led to demonstrate any entitlement or authority to interpret the Ethics Policy any different from the interpretation given to them by their custodian, Gopane.

6.4 No evidence was led that the Ethics Committee had ever raised concerns with any of the employee's declarations.

6.5 If the employer's contention that interpretation is a matter of law and not of fact was to be accepted in the circumstances of this case, it would be prejudicial to the employee in that it:

6.5.1 would entitle the employer to attach an interpretation that is at odds with the evidence that was given by its own witness; and

6.5.2 undermines the employee's ability to raise a defence to these allegations.

6.6 This is in the context of the evidence that was given by Gopane to the effect that the policy imposes the obligation to declare and the system requires employees to declare annually.

6.7 An employee is entitled to be judged against a clear rule. It does not assist the employer to refer to cases on contractual interpretation.

6.8 The employee finds himself in the position where he is facing discipline flowing from an interpretation of policies.

6.9 Gopane's clear evidence is that the Ethics Policy does not oblige the employee to declare his rental income or to duplicate declarations.

6.10 Gopane further testified that there is disparity in how the Ethics Policy is applied.

6.11 No evidence was presented by the employer that the:

6.11.1 employee's telephone call to Nanoolal related to his suspension or prejudiced the reason for which he was suspended;

6.11.2 employee knew of the varied and conflicting interpretation of how he should understand the express prohibition in paragraph (d) of the suspension notice; and

6.11.3 employee was aware that the *"during working hours"* limitation in the prohibition was to be interpreted as broadly as suggested by the evidence of Mbatha or Mokoena.

6.12 Neither Mbatha nor Mokoena could establish the rule or standard with which rule the employee was required to comply.

6.13 Nannoolal gave clear evidence that there was nothing untoward or improper with the call of 13 January 2017.

6.14 The employee had no entitlement or power to instruct, direct or influence Nannoolal. The call had no material consequence and the taxpayers concerned could not gain any advantage as a result of the employee passing a message about a meeting to Nannoolal.

6.15 There is no evidence of disrepute. The fact that the employee had been charged for a telephone call, the occurrence of which was leaked to the media, does not prove that the conduct was disreputable.

6.16 The employee was subjected to a vetting process and is in possession of a security vetting clearance and had never been denied such clearance.

6.17 A crucial determination is whether the evidence presented at the disciplinary hearing was sufficient to sustain charges proffered against the employee in terms of the guidelines laid down in Item 7 of Schedule of the Labour Relations Act 66 of 1995 as amended.

6.18 The employee submits that the employer has failed to prove a *prima facie* case against the employee.

7 RELEVANT CONSIDERATIONS

7.1 Charges 1 to 4 essentially concern the following allegations:

7.1.1 The breach of the suspension conditions.

7.1.2 Gross insubordination.

7.1.3 Failure to act in the best interest of the employer and/or placing the employer in a position to be in disrepute.

7.1.4 Abuse of position and/or exercising undue influence.

The breach of the suspension conditions

7.2 In order for one to determine the veracity of the allegations relating to the breach of the suspension conditions, it is important that the principles relating to suspensions be understood. It is very often that suspensions get challenged and employers, when this happens, are called upon to justify their decisions to suspend employees.

7.3 In MEC for Education v Gradwell,[3] the court stated the following:

> *"[24] The judge's conclusion that the MEC did not have 'an objectively justifiable reason to deny the employee access to the workplace' was predicated upon his findings that before such a course of conduct could be justifiable the MEC had to have taken a decision to conduct an investigation, and that in this instance the MEC had not done so. The requirement of paragraph 2.7(2) is that the employer should believe (reasonably) that the presence of the employee 'might jeopardise any investigation ...' The judge was of the opinion that if no decision to investigate is taken before imposing a suspension, then a condition precedent to the lawful exercise of the power has not been fulfilled. As he put it: 'there ought at least to be a decision to conduct the investigation before suspension is contemplated.' He found that the MEC decided to suspend the respondent before he took a decision to investigate and hence that the suspension was unlawful. The conclusion, in my view, sets the standard too high and is in any event factually erroneous.*

[3] [2012] 8 BLLR 747 (LAC)

[25] The learned judge based his factual finding on a sentence in the MEC's letter to the respondent dated 14 July 2010 which reads:

> *'Please note that a decision to investigate has not yet been finalised, but this office awaits your further input to consider whether grounds exist to suspend you on the basis of the allegations made and/or to further investigate the allegations received by this office.'*

This statement cannot alone serve as categorical proof that the condition precedent had not been met. The wording of paragraph 2.7(2) does not unequivocally require the employer to take a conclusive decision to investigate before the power can be lawfully exercised. It is enough that any (current or future) investigation might be jeopardised. The use of the word "any" intimates that if an investigation is within contemplation the precondition will be met. The statement in the letter of 14 July 2010 makes it abundantly plain that such an investigation was being contemplated, but that due process required the respondent's input before a final decision was taken.

[26] But even were a decision to investigate a prerequisite to the lawful exercise of the power to suspend, the MEC averred, and the available evidence confirms, that such a decision was in fact taken prior to the suspension. In the letter of suspension dated and delivered to the respondent on 15 July 2010, the MEC stated:

> *'Consequently I have decided to commission a thorough and immediate investigation into the allegations of misconduct which are levelled against you in your capacity as Chief Director and acting Superintendent-General pertaining to the registration and funding of the Bessie Mpelegele Ngwane Care Centre, and all acts and omissions ancillary thereto. In an effort to allow the investigation process to continue without any real and/or perceived hindrance and/or influence on your part and on the basis of the seriousness of the allegations against you,*

I have decided to invoke the provisions of Clause 2.7(2)(a) of Chapter 7 of the SMS Handbook ...'

[27] In the result, the learned judge's supposition that the suspension was unlawful, because there was no objectively justifiable reason to deny the applicant access to the workplace when no investigation was under way, was both legally and factually incorrect.

[28] Aside from that, the judge erred in his approach to determining the lawfulness of a suspension in terms of paragraph 2.7(2). His choice not to consider the serious allegations against the respondent was mistaken. As a general rule, a decision regarding the lawfulness of a suspension in terms of paragraph 2.7(2) will call for a preliminary finding on the allegations of serious misconduct as well as a determination of the reasonableness of the employer's belief that the continued presence of the employee at the workplace might jeopardize any investigation etc. The justifiability of a suspension invariably rests on the existence of a prima facie reason to believe that the employee committed serious misconduct. Only once that has been established objectively, will it be possible to meaningfully engage in the second line of enquiry (the justifiability of denying access) with the requisite measure of conviction. The nature, likelihood and the seriousness of the alleged misconduct will always be relevant considerations in deciding whether the denial of access to the workplace was justifiable.

[29] ...

[30] In the present case, the MEC's version sets out a detailed and compelling prima facie case of serious misconduct against the respondent. As discussed earlier, most of the allegations were not even canvassed, never mind denied, by the respondent in reply. The reasons he advanced for

> *not dealing with them are at best spurious, if not misleading. <u>By the same token, the case made by the MEC that the respondent's presence at the workplace 'might jeopardise any investigation' was both logical and justifiable in light of the seriousness of the alleged misconduct. The complaint against the respondent includes the accusation that the respondent brought pressure to bear on his subordinates to act inappropriately and the assertion that he would be in a position to do so again were he to remain in the post</u>."* (emphasis added)

7.4 It is from the prism of court decisions that deal with disputed suspensions that relevant aspects of this charge should be assessed and determined.

7.5 It is common cause that on 15 September 2016, the employee was served with a notice of suspension.

7.6 In terms of the employee's suspension conditions, he was advised not to contact any of SARS employees without obtaining permission from the employer's representative, Mokoena.

7.7 It is also common cause that the employee contacted Naroolal on 13 January 2017, without obtaining permission.

7.8 The employee's suspension was effected in accordance with the employer's Disciplinary Code and Procedure. Clause 9 of the Disciplinary Code and Procedure records the following:

7.8.1 The employer may suspend the employee on full pay and benefits or transfer the employee pending an investigation for a period not longer than thirty (30) working days:

7.8.1.1 If the employee is alleged to have committed an offence that is of a serious nature.

7.8.1.2 To stabilise the working environment in order to conduct a proper investigation into the allegations levelled against the employee/s, and to avoid the potential tampering with evidence and/or interference with the investigation.

7.8.1.3 To minimise any risk and/or potential damage to SARS property and/or danger to the wellbeing of other SARS employees during an investigation.

7.8.1.4 To protect and secure witnesses and to avoid interference or intimidation of witnesses during the course of the investigation.

7.9 It is clear from clause 9 of the Disciplinary Code and Procedure that there is a requirement for there to be a nexus between an investigation and a suspension. I am of the view that it is the integrity of the investigation that the employer seeks to protect through restricting an employee's entitlement to communicate with fellow employees while on suspension, without obtaining permission.

7.10 Sensibly interpreted, the prohibition and the need to obtain permission provides the employer with a safety net through which it is able to supervise and preserve the aforesaid integrity of its investigation. This also enables the employer to protect potential witnesses by reserving unto itself the right to screen, assess and determine the prejudice, if any, that might ensue on account of permission that is requested by an employee on suspension, to contact a fellow employee.

7.11 It is for this reason that there is no total bar or absolute prohibition for a suspended employee to contact his/her fellow employees.

7.12 Where no harm or prejudice might be caused by such request, it does not seem that there would be a proper reason or basis for the employer to decline the request.[4]

7.13 This must be what informed Mbatha's response to the employee regarding whether he was breaking his suspension conditions by communicating with him with regards to the Laokay matter when he responded by stating that those are "two separate matters".

7.14 What should also not be ignored is the evidence of Nannoolal when he stated that firstly there was nothing untoward about the employee's call and secondly, that the employee advised him not to do anything unlawful in his handling of the matter.

7.15 In addition, it is important to note that the subject of the telephone call did not concern the issue for which the employee had been suspended, i.e. the FIC report or investigations in respect of issues relating to his alleged non-declaration, assuming that he was aware that this too was a reason for his suspension.

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[4] Steve Mogami Mosala v Commission for Conciliation Mediation and Arbitration ZALCJHB, 364 at para 41 where the court mentioned the question of integrity and the fact that its protection is one of the purposes of the suspension.

7.16 For one to determine whether the employee breached the conditions of his suspension, it will also be necessary to consider the meaning of the words "working hours".

7.17 It was not disputed that when the employee contacted Nannoolal he was aware that Nannoolal was on leave.

7.18 The word "leave" is defined, accordingly to the South African Concise Oxford Dictionary to mean "time when one has been given permission <u>to be absent from work or duty</u>."

7.19 Condition (d) of the Conditions of Suspension imposes a restriction or prohibition on the employee to not contact SARS employees "during working hours".

7.20 I am of the view that read both sensibly and purposively, the prohibition that relates to "working hours" cannot apply to an employee that is on leave since by its very definition, the word "leave" as already indicated hereinbefore, authorises an employee to be absent "from work or duty".

7.21 It thus cannot, in my view, be said that although an employee has been given permission to be absent from work or duty, their hours while on leave, should be interpreted to constitute "working hours".

7.22 A different way to interpret the words "working hours" is for one to approach it on the basis that those are the hours that an employee dedicates and/or devotes to an employer. That cannot be said to be the case where an employee is on leave. That is their own time.

7.23 For these reasons, I conclude that when an employee is on leave, their time does not qualify as time dedicated and/or devoted to an employer. I accordingly do not consider same to constitute "working hours".

Gross Insubordination

7.24 The allegation is that on or about 11 of October 2016, Mbatha sent an email to the employee. The email referred to the suspension conditions contained in the suspension notice dated 15 September 2016.

7.25 The employer led evidence that the email was sent as a result of the Commissioner having receiving calls from the employee during his suspension.

7.26 The employer contends that the email from Mbatha served as a lawful instruction to the employee and the employee failed to adhere thereto.

7.27 Having already found that contacting an employee that is on leave does not amount to contacting such an employee during his "working hours",

it follows that by contacting Nannoolal, the employee's conduct does not amount to insubordination, let alone gross insubordination.

Failure to act in the best interest of the employer and/or placing the employer in a position to be in disrepute

7.28 The employer alleges that the telephone call made by the employee to Nannoolal had the potential of placing it in disrepute and further that the employee's actions did not safeguard the employer's best interest.

7.29 The employee conceded that had someone leaked the information that he made a call to Nannoolal, the matter would receive negative media attention.

7.30 In terms of the South African Concise Oxford Dictionary already referred to hereinabove, the word "disrepute" is defined to mean "the state of being discredited".

7.31 When applied to the charge, it means that the employee is being charged with conduct that could potentially cause the employer to be discredited. This is premised on the telephone call that he made to Nannoolal and the potential of that fact, i.e. that he had called Nannoolal, being leaked to the members of the public.

7.32 It is important to consider the fact that if SARS had indeed been put into disrepute on account of the employee calling Nemoolsi, it could have exercised its prerogative of discipline by charging the employee with such conduct.

7.33 SARS did not charge him the employee's conduct putting it into disrepute. It charged him with a potential of putting it into disrepute.

7.34 If the charge had been that of actually putting SARS into disrepute, principles such as those that were referred to in the matter of <u>HRP Distribution v National Bargaining Council for the Road Freight Industry and Two Others</u>,[5] where the following was stated:

> *"[19] In this regard, the present circumstances are far removed from those in Timothy v Nampak Corrugated Containers (Pty) Ltd - - a case on which Mr Jackson relied. In Nampak, the employee had been dismissed for having inter alia impersonated an attorney, acting dishonestly and bringing his employer into disrepute. That could hardly be equated with sending a few salacious emails to a customer's employee 'to make her jealous', as was Clayton's intention. As Davis JA said in Nampak:*
>
> > *'A reasonable decision maker would have engaged in an objective evaluation as to whether the employee brought the company into disrepute. An objective test enjoins an examination, in all the circumstances, of the nature of the*

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[5] [2013] 3 BLLR 283 (LC)

> *conduct, evaluates the turpitude and seriousness thereof and then makes an evaluation as to whether the charges can be sustained.'*
>
> *[20] In this case, the employee's actions, albeit childish and deliberate, <u>are not of such a serious nature that it can be said to have brought the company into disrepute.</u> It does not equate to 'turpitude', i.e. depravity or base action of the kind that would bring the company (as opposed to the employee) into disrepute."*

would have become applicable.

7.35 If the employee had been charged with having actually brought the employer into disrepute through making this phone call, his conduct would have had to be examined through an objective test as alluded to in the above legal authorities and to determine whether, as a matter of fact, his conduct did bring the employer into disrepute.

7.36 In such an instance, the presence or absence of the element of turpitude would have had to be examined.

7.37 Having regard to both the evidence of the employee and that of Namoolal, taking into account what the subject matter of the conversation was about, it cannot be disputed that the totality of the evidence does not exhibit the presence of turpitude. To the contrary, it does not.

7.38 I am mindful of the fact that the employee was only charged with the potential and not actually bringing the employer into disrepute. I am also mindful of the fact that the employee admitted that if the fact that he had made a telephone call had leaked, it would have had negative consequences for SARS. However, that would not have been the end of the matter. If SARS was aggrieved thereby and having been satisfied that such conduct did put it into disrepute, it would have so charged the employee.

7.39 It is also important to have regard to the fact that one of the complaints by the employer regarding this conduct is that the employee failed to act in its best interest.

7.40 In this regard, the employee stated that when he made the telephone call, he was motivated by the employer's best interests and the desire to avoid a repeat of SARS being embarrassed at the hands of the Mpisanes.

7.41 The employer states that there was no need for the employee to intervene since its interests were not at risk, for the reasons stated hereinearlier.

7.42 What the employer's evidence does not show however is that the employee knew that the employer's interests were not and could not have

been at risk at the time that he made the telephone call but proceeded to call Nannoolal, nonetheless.

7.43 Given the fact that what is stated in paragraph 7.42 above does not arise in this case, it begs the question whether the employee's explanation regarding his motive for making the telephone call can be dismissed or rejected out of hand. If so, does the evidence point to any other motive and what is it?

7.44 It is common cause that Nannoolal had no authority to settle with the taxpayer and that no attempt was made by the employee to either instruct or influence him to settle with the Mpisanes. To the contrary, he was expressly told not to act contrary to the law.

7.45 It is clear that by telling Nannoolal not to act contrary to the law, the employee was making it plain to him that the Mpisanes should not gain any unfair advantage in how Nannoolal was going to deal with the matter, flowing from that telephone call.

7.46 Nannoolal did not give evidence that the employee unduly influenced him in the performance of his duties. The sum total of the action that was taken by Nannoolal consequent or premised upon the telephone call that he received from the employee, was to arrange a meeting on Monday as

both he and the employee were not aware that the court matter that was set down for the following Tuesday, was no longer going to proceed.

7.47 I accept Nannoolal's evidence that but for the telephone call, he would not have scheduled the meeting for the Monday. However, that evidence must be viewed in the totality of the context of the entirety of his evidence. Although this meeting was convened on Monday, it was called or arranged in circumstances where the employee had made it clear and Nannoolal also understood that lawful conduct was expected on his part in dealing with the matter.

7.48 Our law often refers to the trite principle that where there is cause but no effect, that conduct is not actionable. By way of example, if there is a collision between two vehicles and one of them was driving at 120 kph in a 60 km zone, it does not follow that proving this fact establishes causality. Causality will still have to be established at a factual level.

7.49 The same principle applies here in that the calling of such a meeting without any undue influence, exerting of authority and no instruction for any unlawful advantage to be secured on behalf of the Mpisanes, amounts to cause without any effect.

7.50 I accordingly find that there is no basis to reject the employee's evidence read together with that of Nannoolal, that he was motivated by the employer's best interests when he made the telephone call.

7.51 It accordingly follows that the employee's conduct does not constitute an abuse of his position and/or an attempt to exercise improper influence, let alone influence on a SARS employee. I elaborate further hereinbelow.

Abuse of position and/or exercising undue influence

7.52 In dealing with this allegation, regard must be had to the following:

7.52.1 Nannoolal in his evidence testified that he did not feel pressured by the employee.

7.52.2 The employee advised him to act in a lawful manner in his handling of the matter.

7.52.3 There was nothing untoward with the call from the employee.

7.52.4 The employee is not his direct line manager.

7.52.5 He does make settlement agreement and/or compromises with the taxpayer. A committee named Tier 4 is vested with that authority.

7.52.6 He acceded to the request of the employee because he respects the employee however, he advised that he would acted in the same manner had he been requested by other colleagues of his who are also involved in the Mpisane matter.

7.53 The employer's contention that the employee intended to pressurise Nannoolal, irrespective of whether Nannoolal felt that he was being pressured to act in a particular manner or not, is difficult to sustain based on the aforementioned objective facts.

7.54 There is simply no basis to find that the employee intended to pressurise Nannoolal and/or abused his position and/or exercised undue influence in circumstances where no direct or meaningful outcome to the benefit of the taxpayers could be obtained by virtue of that telephone call. I accordingly reject the employer's contentions in this regard.

Charges 5 and 6 relate to the employee's failure to make certain declarations as prescribed by the Ethics Policy

7.55 It is alleged that the employee failed to disclose the following:

7.55.1 His investment properties as recorded under charge 6 above;

7.55.2 His rental income in respect of the abovementioned properties.

7.55.3 His directorship position at Biz Fire Worx (Pty) Limited.

7.56 The employer deems same as a violation of clause 9 of the Ethics Policy as well Clause 5 of the Ethics Code of Conduct.

7.57 Gopane under cross-examination conceded to the following:

7.57.1 The repeated declarations are not prescribed by the Ethics Policy.

7.57.2 It is a rule of the system utilised by the employer that there be repeated declarations.

7.57.3 The system was not functioning from April 2012 until December 2012.

7.57.4 The Ethics Committee would address correspondence highlighting an employee's non-compliance with the rules.

7.57.5 There are numerous other employees who had not declared their properties and assets, however they were not subjected to such disciplinary processes.

7.58 It is common cause that the employees are required to declare their assets and further required to request permission prior to engaging in any work outside of the employer in order to avoid possible conflict of interests.

7.59 The employee in his evidence admitted the following that:

7.59.1 he was indeed a director at Biz Fire Worx (Pty) Limited;

7.59.2 the company was registered in February 2012 and he resigned in May 2012;

7.59.3 he could not declare because in April the System was not functioning;

7.59.4 he had declared his properties previously and was not aware that he had to declare annually;

7.59.5 he was subjected to a security vetting procedure and he obtained the security vetting clearance certificate in 2015; and

7.59.6 he did not know that he was supposed to declare his rental income.

7.60 There is confusion regarding how the system of declaration operates and what was required of the employees.

7.61 The employer contends that the evidence of Gopane should be ignored and that since interpretation is a question of law and not of fact, the question should be determined purely by way of an interpretational exercise.

7.62 While I agree with the employer that interpretation is a question of law and not a question of fact, contextual evidence based on decisions such as that of Natal Joint Municipal Pension Fund *supra* and Bothma-Batho Transport (Edms) Bpk v S Bothma and Seun Transport (Edms) Bpk,[6] is permissible in the process of interpretation.

7.63 Insofar as the allegation of failure to declare is concerned, the question of the correct interpretation does not become relevant in the circumstances of this case due to the fact that both on the version of the employer per

[6] 2014 (2) SA 494 (SCA) at paras [10]-[12]

the evidence of Gopane and that of the employee, no punishment was metered out against employees that had failed to declare in the past.

7.64 Due to the fact that the employer's witness is the one that referred to this fact and no other witness was called by the employer in an attempt to correct that evidence and/or to present different facts in that regard, the employee does not need to satisfy the requirements set out in the matter of ABSA v Naidu,[7] where the court makes it clear that in seeking to invoke the parity principle, an employee must do more in an effort or attempt to demonstrate that the case(s) he/she seeks to rely upon, are indeed comparable to the allegations of misconduct with which he/she has been charged.

7.65 It is important to bear the following four tenants or pillars on which the process of discipline rests:

7.65.1 There must be a rule.

7.65.2 The rule must be known.

7.65.3 The rule must have been breached.

7.65.4 The rule must be consistently applied.

7.66 On the basis of the evidence presented in respect of failure to declare, I find that by charging the employee, the employer has inconsistently applied discipline and for that reason, there is no basis to find the employee guilty of that charge.

7.67 The existence of the requirement for the employee to obtain permission to undertake outside employment is common cause together with the fact that it was not complied with. The purpose of requesting and obtaining permission for engaging in any work outside of that of the employer is for purposes of avoiding possible conflict of interest.

7.68 The employee has given evidence regarding the security vetting procedure and the security vetting clearance certificate that he obtained pursuant thereto. He gave evidence that anything that he did not declare that he was required to declare, would have been detected in that process. The fact that he was furnished with a security vetting certificate is indicative of the fact that there was no transgression on his part.

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[7] [2015] 1 BLLR 1 (LAC) para 36

7.69 Although the employee did not disclose his appointment as a director of Bix Fire Works (Pty) Limited, he declared his resignation.

7.70 In all instances of non-declaration on which the employer seeks to rely, it is important to note that there are none that the employer established of its own accord, that are not on its system.

7.71 The complaint is either that of failure of declaring repetitively or declaring the resignation in circumstances where the appointment as a director had not or was not declared.

7.72 It would be artificial to seek to distinguish between not having declared the appointment as a director and failing to request permission prior to engaging in work outside of that of the employer in order to avoid possible conflict of interest. The fact of the matter is that it is his appointment as a director that enabled him to or through which he performed work outside of that of the employer. In this instance, the two acts are inextricably linked and the splitting is impermissible since the one is a consequence of the other.

7.73 Accordingly, having found that the employee should not be held responsible for his failure to declare in circumstances where other

employees had also not declared in the past and no disciplinary action was taken against them, I also find the employee not guilty in this regard.

7.74 In addition, I also find that there is no evidence that establishes conduct that is either unbecoming and/or dishonest on the part of the employee.

8 CONCLUSION

For the reasons set out hereinabove, I find the employee not guilty of all of the charges that are levelled against him.

TERRY MOTAU SC

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13 October 2017