

**IN THE DISCIPLINARY HEARING OF  
MS.M.N. KITSI  
HELD AT DHA UPINGTON OFFICE BOARDROOM ON  
21 OCTOBER 2024 AT 10H:00**

**IN THE MATTER BETWEEN:**

**MS.M.N. KITSI**

Employee

And

**DEPARTMENT OF HOME AFFAIRS**

Employer

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**DISCIPLINARY HEARING OUTCOME**

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**DETAILS OF THE HEARING AND REPRESENTATION**

- [1] Ms. Kitsi was invited to attend a disciplinary hearing scheduled on 13 September and 21 October 2024.
- [2] Ms. Kitsi the employee (hereinafter referred to as “the employee”) was present, and represented by Mr. Russel Bindeman from PSA, whilst Mr. Pule Tikane represented the employer, the DEPARTMENT OF HOME AFFAIRS.

## **ISSUE TO BE DECIDED**

[1] Whether the employee, Ms Kitsi is guilty of the following allegation or not;

### **Allegation 1**

It is alleged that you committed an act of misrepresentation in that on or about 08 November 2023 at or near Upington Office, you submitted a medical certificate to the employer indicating that you are unfit for work from 06-07 November 2023 whereas you were able to attend Upington magistrate court on 07 November 2023.

### **PLEA:**

[1] The employee pleaded not guilty to the allegation. The employer was asked to present its evidence and the employee was given the opportunity to challenge it and to present her version and own evidence before a decision was made.

## **SURVEY OF EVIDENCE AND ARGUMENT**

[1] I will not deal with every aspect of the evidence of each witness and will only record part of evidence that I deem necessary for the purpose of this determination.

[2] I will deal with the evidence of all witnesses in the same manner.

### **Employer's version:**

The employer called two (2) witnesses:

- **Mr Nico Steven Andreas: Control Immigration Officer**

**Mr Andreas testified that:**

- [1] He is a supervisor within Immigration Services in Uppington Office and he reports to Mr Davids. He said there are six Immigration Officers reporting to him and the employee, Ms Kitsi, is one of them. Asked what happened in this matter, the witness said he received summons to attend court on allegations of harassment. He could not remember the exact date. He said the matter was postponed because the Magistrate presiding over the case, knew him on the basis of (court of law being stakeholder) and another Magistrate was appointed from somewhere. He testified that the employee wanted a case to be postponed because she didn't have annual leave days. The court refused to accede to her request, as she was a complainant. The witness said the matter was dismissed by the court due to insufficient evidence to prove harassment.
- [2] The witness said he completed special leave for court hearings and he didn't receive any leave form from the employee. And he said if he's not around, Mr Davids will be the supervisor the employee will be reporting to. Asked if he did receive any leave form from the employee, the witness said no. The witness said the employee attended court of law whilst on sick leave. Asked if he was on duty on 06 November 2023, the witness said, he was and the employee was in as well. The witness was asked to read the Doctor's note and she confirmed that on 07 November, the employee was at court and he saw her. Asked what was she supposed to do, when arriving at court, the witness said, to inform the court that she was on sick leave and submit medical certificate.
- [3] Asked by the employee representative, if he testified that he couldn't remember the court dates, the witness said yes. The defence said it was understandable because the allegation happened long time ago, almost a year. Asked if he had proof that the employee had requested for postponement of the matter at court because she didn't have leave days, the witness said he can get the proof from the court. Asked if he was granted special leave, and if the employee didn't qualify for it. The witness said he was the respondent representing the employer and he was entitled to it and the employee was not entitled to it. The witness was asked for a proof of what he was saying? The witness said he can go and check the policy. He was then asked that what he was taking about was not in front of him, he answered in the affirmative.

[4] It was put to the witness that the employee didn't decide when will she be sick, somebody else did, the witness agreed, but further indicated that why didn't she tell the court that she was not feeling well. Asked when did the employee consulted with the Doctor, the witness said on 06 November. In addition, it was put to him that on 08 November the employee submitted a leave form, the witness said not to him. Asked if it is possible that one can feel better the same day or following day after consulting with the Doctor, the witness agreed that it is possible. Asked what was wrong with that, the witness said the employee came to court and not work and she needed to have submitted the medical certificate at court. Asked if there is anything he can produce that says if a person feels better the next day, he/she can't go anywhere, the witness said he doesn't have any. The defence further indicated that how was the employee suppose to know. Asked what is he basing his argument on when he said the employee was supposed to have submitted medical certificate to the court. The witness said he knows of regulations at court. It was put to him if the employee had a discretion to submit or not. The witness said yes. It was put to the witness that the employee was not being charged for dishonesty or fraud. The witness said yes. Asked what is meant by misrepresentation, the witness said like in the present case, the employee is sick but gets to attend court proceedings. Asked no rule is barring that, the witness said yes.

**Ms Sue-Allan Botha: Deputy Director: Business Partnering**

[1] She testified that she is responsible for the overall HR matters in the Province. Asked what is the procedure to follow when an official is appearing in a court of law in so far as leave is concerned. The witness said the official must apply, and it will be recorded as appear as witness, as subpoenaed by a court of law. It was put to the witness that the employee reported sick for duty but appeared in court of law. The witness said if she was sick why seen at court. The witness said the special leave applies only to officials appearing as witnesses. Asked by the defence, what guiding principles is she using, if anyone is seen somewhere and regarded not fit for work? The witness said there is no policy. The witness said they are guided by Employee Wellness. It was put to her that there is no such a guideline in terms of the Employee Wellness. Asked if the Department has a rule which says that if an employee is booked off by the Doctor he/she must stay at home, the witness said there is no such rule.

## EMPLOYEE'S VERSION

- [1] She testified that she was appointed in 2006 as an Immigration Officer and her duties are investigating, arresting and detaining illegal immigrants, conducting operations and inspections. She said she started as being an Immigration Officer at OR Tambo International Airport and moved to Upington in 2007. She said the first witness (Mr Andreas) to testify for employer is her supervisor. She said her relationship with Mr Andreas is not good. He is always picking on her and issuing her with *audi letters* and not issuing other employees, despite them having alleged committed what she committed. Asked to expand on the allegations of harassment, the employee stated that they were having an operation and the supervisor instructed her to stop with the operations. The employee said she accosted him and indicated that there were positives out of the operation. She said the supervisor informed her that it must stop. The employee said the following week on Monday; she approached the supervisor and advised him to listen to different opinions. The supervisor responded by saying what he says goes. The employee further stated that he is forever shouting at her in presence of other colleagues. The employee said it was too much and had she had to act.
- [2] She lodged a grievance but the employer could not resolve it. She lodged a dispute with CCMA and it could not proceed. She then decided to go to court of law; in court, she was informed that she must lodge the case with Labour Court through CCMA. She said she did not lodge the dispute with CCMA. Asked to explain what happened on 06 November 2024, she said she came to work not feeling well and her back pain started getting worse. She asked to be released to consult with the Doctor. The Doctor booked her off on 6 & 7 November 2024. Asked if he did report to her supervisor, the employee said yes but he was not there, and went to HR supervisor and asked her to inform Mr Andreas. Asked if she asked the Doctor how he should book her off, the employee said no. She said she started feeling better in the evening after taking the medication.

- [3] Asked why did she write the letter as reflected on page 2 & 3 of employees bundle, she said she was issued with an *audi letter* and she attached her leave form and subpoena. Asked if anyone provided her with information or rule that, she may not be seen elsewhere when booked off by the Doctor, the employee said no. Asked if did anyone from Home Affairs indicated to her that it was wrong for her to be at court whilst booked off, the employee said no. Asked why she went to court, the employee said she received subpoena from the Magistrate and according to what she was taught, Magistrate has an authority and as such, she had to honour the subpoena. Asked if she felt better on 07 November, she said yes and on 08 November reported for duty. Asked if her leave form was approved, the employee said she doesn't know.
- [4] Asked by the employer representative, why did she take the matter to court. The employee said she was being harassed and needed a protection order. Asked what was the harassment, she said abuse of power. Asked how was the supervisor abusing his power, she said always picking on her and writing to her *audi letters* and not to other colleagues. It was put to her that whatever the supervisor was doing, it was work related. The employee said yes but she said he was a selectively disciplining her. Asked who was with her in the grievance meeting, the employee said shop steward and Mr Davids. She said Mr Davids had promised to come back to her. Asked according to the sick note she was not fit to report for duty. The employee responded in the affirmative. Asked according to her evidence in chief she said she was sick and later no longer sick. The employee said she felt better. Asked if the two days on leave was paid leave, the employee said yes. It was put to her that her evidence was misleading in that she was on sick leave yet attended court proceedings. Asked why didn't she report for duty on the day she appeared in court, the employee said she went to court at 09h00.
- [5] It was put to the employee that the reason she didn't come to work; was she didn't have any annual leave days. The employee said she could have taken fraction hours. The employee said she was not aware that she was supposed to report for duty. It was put to her that she misled the Department because she wanted to attend court proceeding initiated by her. Asked if she was bedridden, she said no. Asked if she did inform the court that she was sick, the employee said no. She said they took five minutes in court.

- [6] Asked if they took five minutes in court, why didn't she report for duty. The employee said she was on sick leave. Asked during re-examination by her representative, if there is a rule in the Department of Home Affairs that if booked for two days and she's feeling better, she must report for duty, the employee said no. Asked if it was her testimony that she did not tell the doctor to book her off, the employee said yes.

## **DETERMINATION**

- [1] In the present dispute, I am required to determine whether the employee is guilty of the allegation levelled against her or not.
- [1] As a general principle, in considering the finding of not guilty or guilty against the accused employee, the Presiding Officer is called upon to consider all the evidence led at the disciplinary hearing by both parties. Based on the evidence, the Presiding Officer will decide on the balance of probability whose version is more likely to be true. It is a trite that the employer/initiator bears the onus to prove allegation(s) of misconduct against the employee on a balance of probabilities during disciplinary proceedings. To identify misconduct, the following questions must be asked:
- (a) has a rule or standard been broken?
  - (b) If so, is that rule or standard reasonable and lawful?
  - (c) If so, was the transgressor aware of that rule or standard?
  - (d) Or could she/he reasonably be expected to have been aware of it?
  - (e) Has the rule or standard been consistently applied by the employer?
- [2] The nub of the allegation is that; the employee had misrepresented herself in that she claimed to be sick yet attended court proceedings. The employee submitted a medical certificate indicating that she was sick and was booked off for two days. The first witness for the employer, Mr Andreas, who also happens to be the supervisor of the employee, testified that he went to court and was granted special leave. This was because the employee had opened a case against him. And this would make him the defendant/respondent and the employee the plaintiff/applicant. Mr Andreas testified that he was granted special leave because he was the respondent in the matter and the employee was not entitled to it.

He could not substantiate why the employee was not entitled to it. However, I believe being the supervisor or being considered the employer, justified why he was granted special leave. This would be in the context of the claim having arose from official duties. However, it's mind boggling why the same was not granted to the employee, because her complaint was within departmental space. The harassments as she claimed, happened in line of duty or at the office. Unfortunately, the employer did not attach the special leave policy to this effect, which made it difficult to determine who qualifies for special leave.

[3] The employee is accused of breaching the departmental rule or misrepresentation. And the employer must have evidence that the employee had knowledge thereof, something which was not presented during the disciplinary hearing. I believe that the Departmental Leave Policy might have assisted. The employee testified that she was not aware of any rule which proscribed that if booked off and feeling well subsequent she must report for duty. I believe that this matter was supposed to have been dealt with at floor management level. The employee testified that she lodged grievance which was not attended to and felt that court of law will be her saviour. Even if the matter was to go to court, as it happened, the employer was to have been clear that who qualifies for special leave. The employee was ill, and was booked off, and it not my terrain to assume that she was malingering because of her court case.

[4] The second witness for the employer, could also not point to the transgression the employee committed. She said the employee was at court whilst on sick leave. Asked if there was anything barring the employee in attending to court, the witness could not tell. The question is was the employee indisposed or did she fake her illness to attend court case? The employee felt better and deem fit to attend court. The pertinent question as well is that was the employee wrong to attend court case. The defence requested for a rule which stated that if a person feels better he/she must return to work. The employer did not present such. The employee responded to an *audi* letter written to her. She responded by submitting an extract from Magistrate Act No 32 of 1944. The employer could have still challenged that but failed to do so. It is clear that the employee had no knowledge or knew the existence of the rule the employer relied on, hence the extract from the Magistrate Act.



- [5] The employee was on sick leave, and there was no policy referred to, which required the employee to report for duty when her condition improved. It is not enough for the employer to prove the employee is guilty of the misrepresentation. The employer must also prove that honesty is an essential requirement, of which it was never done.
- [6] It is a trite that when an employee is charged there must be a rule and employee must know of the rule. *In casu*, the employer representative could not refer to a specific rule which the employee breached in so far as the allegation is concerned. In ***Dikobe Matlotleng Gerald v CCMA and Others (JA 45/2015) [2016] ZALC JHB***, the court held that where there is an alleged breach of a rule, the burden is on the employer to lead evidence on the existence, the specific content, the dissemination, as well as knowledge of the rule on the part of the employee. The burden is even more substantial where the rule is of an oral nature. ***The court in Woolworths (Pty) Ltd v SACAWU and others (JA 56/2016) [2017] ZALAC 54***, laid down steps for an enquiry into breach of a rule and held that in cases of breach of a rule, Commissioners must consider the following:
- (a) Whether there was a rule breached;
  - (b) The nature and the importance of the rule breached;
  - (c) Whether the employee had knowledge of the rule or was expected to have such knowledge;
  - (d) Whether the rule has been consistently applied;
  - (e) Whether the dismissal was an appropriate sanction.
- [7] There must be a rule that the employee contravened, applicable to the workplace. There was never specific reference to the rule by the employer representative and the witnesses. This must entail the existence of the rule and the infraction. A reference to misrepresentation committed by the employee is not enough. It was expected of the employer to make employee aware that the type of misconduct charged is proscribed in terms of the departmental leave policy. Even if there was no specific rule the employer was obliged to point to an implied provision that the employee failed to comply with.

[8] The employer adopted the subjective view on the burden of proof. The vital evidence needed to have been presented in relation to the allegation. There was nothing that proscribed the employer from calling the medical practitioner who examined the employee, if they had issues with the legitimacy of the employee's claim that she was sick. The fact that she attended court proceedings is insufficient evidence to expose her false impression. I think relevant departmental policy, albeit, not attached as bundle of evidence, does not suggest that, if an employee feels better she/he can't run some errand or let alone attend court proceedings. Not all illnesses incapacitate a person to the extent that they need to stay in bed or remain at home. The onus was on the department to adduce evidence on the legal requirement for an employee who has been signed off to stay at home and no go anywhere else. I think the employee provided an explanation to the employer as to what happened. There was also no evidence led that there was an abuse of sick leave by the employee.

[15] Having considered the parties' submissions and arguments, and based on the balance of probabilities, I'm persuaded to believe that the onus was not sufficiently discharged. The employer, as *dominus litis*, was under a duty to adduce evidence on balance of probabilities to the effect that the employee has committed a misconduct. In the premise, it is my conclusion that, the employee is not guilty of the allegation preferred against her. I have no hesitation in pronouncing that Ms. Kitsi is not guilty of the allegation.

[1] **FINDINGS BASED ON THE ABOVE-MENTIONED DELIBERATIONS**

**Charge 1 : Not Guilty**

DULY SIGNED

**PAPI MABALA  
CHAIRPERSON**

**DATE: 26/11/2024**