

## **DISCIPLINARY ENQUIRY**

**HELD AT:**

**DEPARTMENT OF PUBLIC WORKS**  
Roads and Transport Offices  
Mafikeng, Northwest Province.

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**THE DEPARTMENT OF PUBLIC WORKS, ROADS  
AND TRANSPORT** (“the Department”)

Employer

and

**MR. EDDIE THEBE**

Employee

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### **SANCTION**

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1. In terms of the Disciplinary Code and Procedures contained in Resolution Number 2 of 1999 which is a collective agreement between the employer and employees, where an employee is found guilty by a disciplinary enquiry, the disciplinary processes should be a two phased enquiry. The first enquiry is the establishment of misconduct which in this particular matter has already been found to exist. The next phase is to determine the appropriate penalty for the misconduct in respect of which the employee has been found guilty.
2. In general, the intended purpose and scope of the disciplinary code and procedures is to support constructive labour relations in the public service, to ensure that managers and employees

share a common understanding of misconduct and discipline, to promote acceptable conduct or to avert and correct unacceptable conduct. Some of the principles upon which the code and procedure is based is that discipline which is a management function is a corrective measure and not a punitive one, and that it must be applied in a prompt, fair, consistent and progressive manner. In the event the alleged misconduct justifies a more serious form of disciplinary action than provided in some parts of the disciplinary code, the employer is permitted to initiate a disciplinary enquiry. Accordingly, it is only in respect of serious misconducts that the employer may, in terms of the code, convene a disciplinary enquiry to deal with the alleged type of misconduct.<sup>1</sup>

3. In terms of Schedule 8, Item 3(2) and (3) the concept of corrective or progressive discipline is encouraged and in terms of which discipline is taken as a means for employees to know and understand what standards are required of them. All efforts should thus be made to correct employees' behaviour through a system of graduated disciplinary measures such as counselling and warnings. Dismissal should be reserved for cases of serious misconduct or repeated offences.<sup>2</sup>

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<sup>1</sup> See Resolution No. 2 of 1999 clause 6 on serious misconduct.

<sup>2</sup> See Schedule 8, Code of Good Practice – Dismissal, Item 3(2) and (3).

4. In brief, the employee representative addressed me at length on the need, in the circumstances of this case, to adopt a similar approach that all efforts should be made to correct Mr Thebe's behaviour through a system of graduated disciplinary measures in that dismissal is not an appropriate sanction. He accordingly called upon me to impose any of the following sanctions:
  - 4.1 Any manner of a warning which may also be a final warning;
  - 4.2 Suspension without pay for not longer than three (3) months; or
  - 4.3 A transfer to another department so that he could plough back the investments that the Department had made on him in funding for his education until at Masters level.
5. The submissions were largely based on Mr Thebe's personal circumstances, clean disciplinary record and the fact that he had not been found guilty of fraud or corruption for his personal gain. Whilst on the other hand the Department urged me to impose a sanction of dismissal.

6. Mr Thebe submitted that the test on mitigating factors is whether the facts taken individually or cumulatively whether he would repeat the same offence in respect of which he has been found guilty. For this reason, he referred me to the following facts, his long service, personal circumstances that he is remorseful and his commitment to the workplace. He submitted that long service is an important or weighty consideration, depending on the circumstances to determine whether he will repeat the offence or not.
7. With regard to his long service, he commenced working for the Department in its Traffic Section on 27 January 1981. Since then, the Department has been and still is the only employer from a very young age, whilst he was in his twenty's. In 1984 he was promoted to a Chief Traffic Officer and in 1988 he was transferred to the Transport Section as a Road Safety Liaison Officer. In 1995 he became a Deputy Director for Road Safety. In 2005 he became a Director for Road Safety. In 2006 he was promoted to a Director for Roads. In 2007 he became an Acting Chief Director for Roads Management and in 2008 he became Chief Director, Road Management which is the position he currently occupies. He has accordingly over 22 years of service within the Department of Transport.

8. During this period he was never charged nor found guilty of any misconduct within the workplace accordingly he has a clean disciplinary record. It was contended that such an impressive record is a weighty factor to be considered in the determination of an appropriate sanction and it is also an indicator whether he will commit the same offence or not.
9. It was submitted on his behalf that he has no propensity to commit the same or similar transgressions and since he now knows of the offences or conducts constituting offences, various safeguards can be implemented to avoid such from him happening again. Mr Thebe accordingly tendered his commitment to all the workplace values now that it has become clear what the complaints are against him. He is fifty years old, close to retirement and committed to staying with the Department until his retirement. From the time he commenced working for the Department until now, the Department had invested extensively in him through his education which was fully paid for by the Department.
10. He sketched out his personal circumstances in the following manner; that he is married with four children, three of whom are at university and one still at primary school level. All of them are staying and dependent on him, including his wife who is unemployed. If he is dismissed, it will be difficult for him at

his age to find another job in the public service. If the Department dismisses him, it would also lose an investment it had made in his education. Through the Department's financial assistance, he obtained his matric in 1987, obtained a Diploma in Public Relations in 1990, Bachelor of Arts or BA in 1998, Honours Degree in Communication in 1999 and a Masters Degree in Public Relations Management in 2005. The position he currently occupies or had occupied in the Department are in line with his qualifications and is accordingly prepared to plough back to the Department. Mr Thebe is now genuinely remorseful and would not have wished that such a situation occur on the Department and himself. He is full of regret that he now finds himself in this situation after many years of reliable service to the Department.

11. He further submitted that, despite him having been found guilty of misconduct, he can still be trusted as he has over the last 22 years honestly served the interests of the Department and given his personal circumstances he is an appropriate case for corrective or progressive discipline as a means to correct his behaviour or conduct. The sanction to be imposed upon him should not only be punitive in nature, but corrective as the code of good practice and guidelines contemplate. His personal circumstances need not be specifically used to send a message

to everyone because internal matters are not intended to be precedent setting.

12. Whilst on the other hand the employer submitted that it is important to understand that his personal circumstances should be weighed with the level of education he had received, especially that he has a Masters Degree. Mr Thebe is a person of above average intellectual capacity. That he spent his entire youth working for the government means that he is one of those employees who migrated from the old administration of the Bophuthatswana Government to the new administration. From the sketched out personal circumstances, it shows that he has an impressive developmental record within the Department. However for a person of his level, he should have cherished what he had achieved for himself and the family over the years.
13. The Department further submitted that the charges against him related to a proper utilisation of public funds which is a serious charge. The stance that he took against these charges was that he did not know of the processes sketched out and basically denied any wrongdoing. This is despite the fact that he is a person who worked his way up within the Department from a very junior level. By virtue of this fact, he knew very well its processes and it could thus not be correct for him to have stated that he was not aware of these processes he was charged of

having contravened. From the stance which he had taken it shows that he is a person who cannot be rehabilitated nor can he be transferred to another department because the department from which he is to be transferred cannot trust him. If he is transferred to another department, that cannot be a lesson enough for others within the Department not to contemplate committing the same offences. The offences in respect of which he was charged and found guilty had resulted in the Department losing a lot of money. Therefore, any sanction short of a dismissal would not be a deterrent to other public service employees within the Department. The fact that he was called upon to answer to these charges in a disciplinary hearing, it meant that the charges were very serious against him.

14. Accordingly, the Department or employer urged me to impose a sanction of a dismissal. That he is a breadwinner should not be a determining factor for a person of his intellectual capability. He occupied a very senior position in government where he was entrusted with the duty to guard public funds and to ensure that service delivery is carried out. He failed to carry out such functions in ignorance of the fact that he is a breadwinner. As a result it submitted that that factor should not sway me to find in favour of Mr Thebe. Those were the parties' respective submissions.



15. In terms of the Code of Good Practice and Guidelines, it is stated that:

“(4) Generally, it is not appropriate to dismiss an employee for a first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination. Whatever the merits of the case for dismissal might be, a dismissal will not be fair if it does not meet the requirements of Section 188.

(5) When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider facts such as the employer’s circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself.”

16. It has been contended on behalf of Mr Thebe that I should consider his length of service, disciplinary record and personal circumstances, including the fact that he was not found guilty of fraud or corruption or that no personal gain has been demonstrated in these set of facts. These guidelines also make it clear that it may not be inappropriate to dismiss an employee despite his or her clean record or the fact that he or she is a first offender. The determining factor is the seriousness of the misconduct which has a result that it renders the employment relationship between the two intolerable. It is now quite clear that in terms of the Code of Conduct, Mr Thebe was charged with a serious misconduct, hence there was a need for the misconduct in respect of which he was charged to be referred to a disciplinary enquiry for determination in terms of clause 6 of the Disciplinary Code which makes provisions for serious misconducts.
17. Whilst on this issue, Mr Mokhare for the employer submitted that the Department cannot even consider the possibility of transferring Mr Thebe to any other department within the Provincial Government of the Northwest Province because his own department cannot trust him. They therefore cannot expect other departments to trust him when he is not trusted by his own department. That appears to me to be the position from the side of the Department.

18. With regard to this issue, Mr Gwaunza on behalf of Mr Thebe referred me to two Labour Appeal Court judgments on this point. The first one is *De Beers Consolidated Mines Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 ILJ 1051 (LAC) at 1058-1059. The relevant passage he sought to refer me to appears on paragraph 22 of the judgment in the following manner:

*“(22) Long service is no more than material from which an inference can be drawn regarding the employees probable future reliability. Long service does not lessen the gravity of the misconduct or serve to avoid the appropriate sanction for it. A senior employee cannot, without fear of dismissal, steal more than a junior employee. The standards for everyone are the same. Long service is not as such mitigatory. Mitigation, as that term is understood in the criminal law, has no place in employment law. Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society’s moral opprobrium of a minor theft; it has*

*everything to do with the operational requirements of the employer's enterprise.”<sup>3</sup>*

19. In paragraph 25 of the judgment it is stated as follows with regard to remorse:

*“(25) This brings me to remorse. It would in my view be difficult for any employer to re-employ an employee who has shown no remorse. Acknowledgement of wrongdoing is the first step towards rehabilitation. In the absence of a recommitment to the employer's workplace values, an employee cannot hope to re-establish the trust which he himself has broken. Where, as in this case, an employee, over and above having committed an act of dishonesty, falsely denies having done so, an employer would, particularly where a high degree of trust is reposed in an employee, be legitimately entitled to say to itself that the risk of continuing to employ the offender is unacceptably great.”*

20. Whilst it is clear that long service may be a factor to be considered cumulatively with other existing factors in the circumstances of each case, it cannot on its own be a mitigatory

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<sup>3</sup> See also *Shoprite Checkers (Pty) Ltd v CCMA and Others* (2008) 12 BLLR 1211 (LAC) at 1220-1221, para 30. Where the court emphasised or took into account the employees long service of 30 years was emphasised upon by the court.

factor. All what one has to do is to consider all the existing facts cumulatively including the employee's personal circumstances, the nature of the job and the circumstances of the infringement he has been found guilty of. It is important to take note that Mr Thebe was in a position of leadership and thus assumed the position of a custodian of the Department's resources or assets and procurement processes. He has already admitted, although I do not have a clear idea on what basis, that he is an accounting officer within the Department.

21. Mr Thebe has in mitigation through his representative submitted that he is now remorseful, committed to the workplace values and knows what the nature of the complaints are against him as a result he would from now on conduct himself according to such knowledge. He is further sorry that he finds himself in this situation.
22. I must point out that he has all along and throughout the disciplinary proceedings denied any involvement in committing the offences in respect of which he was found guilty. He has always denied that he was responsible for all the actions but pointed towards the EMC, DPC and the HOD as the recommending and final decision making structures. He denied any wrongdoing on his part.

23. These denials were made even against the background, that at some stage and on more than one occasion, the DPC did not agree with the manner in which he sought to procure certain services for his department. For example, he had made an attempt to extend the list of the emergency contractors which the DPC, with the assistance of the Provincial Treasury, advised him that it is not legally feasible to extend the list since it was compiled and accepted in September 2005.
24. Despite this clear advice to the contrary, he went ahead and sought to extend this list at the level of the EMC. He was at that stage advised that you cannot extend the list despite that he went ahead and refused to take the advice of the body which is entrusted with making procurement decisions. This is the nature of the offence he ultimately committed and the role which he had played. He surely did not claim any ignorance of these facts because he was central to them, but what he managed to do was to shift the blame to the EMC when he was the person who made the recommendations and request to the EMC despite having being advised about eight months earlier that it is not possible to achieve what he intended to achieve. Until now there is no DPC resolution recommending an extension of the short list of emergency contractors, nor an approval by the HOD to extend such a list. Despite that, these

contractors were ultimately appointed as a result of Mr Thebe's steadfastness.

25. Another example was the DPC's resolution in its meeting of 12 May 2009 in which it stated that the appointment of a service provider done by the Chief Director, Roads is irregular. That the current budget is insufficient to carry the costs of the appointment made by the Chief Director and as such the contract should be cancelled with immediate effect. Despite all of these factual backgrounds, Mr Thebe was steadfast in his belief and submissions that he was not wrong nor that he was aware of any wrongdoing on his part. Against this background and any of the other factual circumstances I referred to in the main body of my ruling, I am not at all satisfied that Mr Thebe is remorseful or that the remorse which he appears to demonstrate now is genuine. He is according to me remorseful because he has been caught.
26. Mr Thebe had admitted in his submissions on the merits of his case that he is an accounting officer as well. As an accounting officer, the Public Finance Management Act 1 of 1999 ("the Act") in section 36(3) provides that the relevant treasury may, in exceptional circumstances, approve or instruct in writing that a person other than the person mentioned in subsection 2 be the accounting officer for (a) a department or a constitutional

institution, or (b) a trading entity within a department. In subsection 2, the persons referred to as accounting officers are; the head of department and the chief executive officer of a constitutional institution. It is quite clear that Mr Thebe was none of these two person contemplated or referred to in subsection 2.

27. In terms of section 38 of the Act, such accounting officers for a department must ensure that the department maintains effective, efficient and transparent systems of financial and risk management in internal control or an appropriate procurement and provisioning system which is fair, equitable, transparent, competitive and cost effective. Such accounting officer is also responsible for the effective, efficient economical and transparent use of the resources of the department. He must also take effective and appropriate steps to, amongst others; manage available working capital efficiently and economically. It is also his responsibility to manage, safeguard and maintain the assets of the department.
28. In terms of section 45 of the Act an official in a department is required to ensure that the system of financial management and internal control established for that department is carried out within the area of responsibility of that official; is responsible for the effective, efficient, economical and transparent use of



financial and other resources within that official's area of responsibility; must take effective and appropriate steps to prevent, within that official's area of responsibility, any unauthorised expenditure, irregular expenditure and fruitless and wasteful expenditure; is also responsible for the management including the safeguarding of the assets and management of the liabilities within that official's area of responsibility.

29. As I state above and in the main body of my ruling, Mr Thebe was found, for example by the DPC to have irregularly employed the services of a service provider in circumstances where there was no budget to carry the costs of such appointment and ultimately such contract was immediately ordered to be cancelled. These facts, amongst others, which I do not intend to repeat, clearly demonstrate that the provisions of this Act were not followed by Mr Thebe in his official area of responsibility. He has failed to ensure that he protected or safeguarded the assets or resources of the Department in amongst others, taking a careless attitude when the Department was caused to pay ridiculous amounts of monies to Raliform in purchasing the four jetpatcher machines and the Cationic 65 Emulsion. This is not a person who can genuinely claim ignorance of the provisions of these policies and the legislation, also against the background that he sketches out of his development or career

progression within the Department. He knew very well how to overcome the difficulties encountered with the DPC in his mission to ignore the existing emergency contractors when he ultimately ensured that the three contractors referred were appointed. This is the general nature of the circumstances of the infringement he had committed and been found guilty of having committed.

30. In my concluding remarks let me emphasise the point that Mr Thebe was charged with and found guilty of gross misconduct in respect of 8 charges. He had initiated a process for the procurement of goods, with full knowledge, without following proper and prescribed procurement processes. In some of these processes the Department bought four jetpatcher machines and 500 drums of Bitumen Cationic 65 Emulsion at ridiculously inflated prices despite his knowledge that these products were sold at far less than what the Department had ultimately paid for them. Being the initiator of these processes and in his capacity as Chief Director of the client department within his area of responsibility, he was in full control of these processes.
31. He had by virtue of these facts a heavy responsibility that these processes are not only above board, but that he should adopt cost effective measures in the manner he employs public funds. It was his duty in terms of the Act to ensure that the resources

of the Department are protected from unauthorised, irregular, fruitless and wasteful expenditure. Mr Thebe's conduct was clearly, without doubt and quite unfortunately for a person of his rank, the complete opposite of what is required of him in the circumstances. When such a conduct is committed by a person of his seniority within the Department, clearly the message that is sent to junior employees within his area of responsibility will be wrong if he is not strongly dealt with.

32. His oral evidence that, despite having initiated the process to acquire the jetpatcher machines and the purchase of 500 drums of the Cationic 65 Emulsion, he was not interested in knowing about the costs involved, clearly demonstrates that he cannot be such a person who can be entrusted with such a sensitive responsibility to manage the Department's resources or assets in an efficient, economic and transparent manner. If this is viewed against what the Department had actually paid for some of these products, it is indeed, as he says, correct that he cared less about the cost of the products ultimately acquired. For example, instead of paying R779.76 inclusive of VAT for a drum of Cationic 65 Emulsion, he caused the Department to pay R2 820.13 per drum which represented an overpayment of R2 040.00. In respect of the 400 drums, the Department ultimately paid R2 890.64 for a drum when it could have paid R779.76.

33. At all relevant times, an employee at the level of Mr Thebe's position is under a duty to take all reasonable care, steps and expertise in the handling of the property and business of his employer. Mr Thebe failed quite spectacularly, not because he lacked the know-how, but because he was not interested or cared less on how much some of these products will cost the Department. He completely failed to use the financial resources of the Department efficiently and economically.
34. At the time when he initiated a process in terms of which contractors not on the emergency list of contractors were appointed contrary to the Supply Chain Management Policy, caused loss to the Department in paying ridiculously inflated charges for the jetpatcher machines and Cationic 65 Emulsion and irregularly appointed contractors as he was found to have, he knew very well of his personal circumstances as set out above
35. This is a person who was well aware of what the Supply Chain Management Policy documents provided for. It was not good enough for him to always shift the blame to the DPC, EMC and the HOD because the DPC took the decisions in respect of processes which were not only initiated by him, but were motivated by him. I guess that the responsible DPC member

would also be required to provide an account of their role in all of this. Where the DPC disagreed with him as I state above, he knew very well how to get around the obstacles.

36. It is my view that the fact that he was not found guilty of fraud or corruption to his benefit or derived personal gratification to his benefit, cannot be a mitigating factor. This ignores the fact that as Chief Director the Act placed a responsibility on him to ensure that public funds should be employed in a cost effective and economic manner. He failed in this regard.
37. It is equally serious that he persistently lobbied for the appointment of certain identified contractors which he had head hunted and succeeded in having them appointed contrary to the Department's procurement processes. In doing this he completely ignored the emerging contractors on the emergency list, thus making a mockery of the Department's procurement processes. What was then the point of compiling such a list if the Department will not, through people like Mr Thebe, have regard to its own processes. This will clearly not encourage public trust in public institutions and their processes.
38. In the circumstances it is my view that his personal circumstances, length of service with a clean disciplinary record cumulatively taken against the nature of his job and the nature

and circumstances in which he committed these offences do not afford him with sufficient mitigatory facts. As a result I find that in the circumstances of this case, dismissal is an appropriate sanction.

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**V P NGUTSHANE**

Chambers  
Johannesburg  
4 June 2010