



GENERAL PUBLIC SERVICE  
SECTOR BARGAINING COUNCIL



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# ARBITRATION AWARD

Panelist: PHEEHA DANIEL SEOPELA  
Case No.: GPBC777-18  
Date of Award: 18 DECEMBER 2020

## In the ARBITRATION between:

PSA OBO P MUKHAMBI ----- APPLICANT  
(Union / Applicant)

and

DEPARTMENT OF JUSTICE - RESPONDENT

**Union/Applicant's representative:** MR TUNI MADIMABE

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Braamfontein

2017 \_\_\_\_\_

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**Respondent's representative:** DAVOCATE S. B NHLAPO

Respondent's address:

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## ARBITRATION AWARD

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### DETAILS OF HEARING AND REPRESENTATION:

[1] This matter was first heard as an arbitration on the 11<sup>th</sup> of November 2019 at 09h00 at the offices of the GPSSBC in Centurion, Gauteng Province and was virtually finalised on the 01<sup>st</sup> of October 2020. Both parties were in attendance. The applicant, Ms P Mukhambi was represented by Mr Tuni Madimabe, a union Official of PSA. The respondent, Department of Justice was represented by Advocate S, B Nhlapo. Pre-arbitration meeting was conducted on the 11<sup>th</sup> of November 2019. Parties were required to submit written heads of arguments and such were considered in this award. The proceedings were digitally recorded.

### ISSUE TO BE DECIDED:

[2] I must determine whether the dismissal of the applicant was fair in terms of the substance.

[3] I must further determine whether the respondent is consistent in the application of its disciplinary code as the applicant claimed that Mr Nkosinathi Zungu committed the same offence but he is still employed.

[4] I must determine. the appropriate relief if I find in the favor of the applicant in terms of section 193 of the Act.

### BACKGROUND TO THE MATTER:

[5] The applicant was employed by the respondent on the 01<sup>st</sup> of January 2007. She was employed as a Data Capturer at the time of the dismissal. She was earning R13 929-00 per month at the time of the dismissal. The applicant was dismissed on the 22<sup>nd</sup> of March 2018. The applicant was charged as per pages 1&2 of bundle A. The applicant was not found guilty on charge number 2 and alternative charges 1&2 as it was ruled that they amount to unnecessary splitting of the charges. The applicant was found guilty on charge number 01 only. The procedural aspect of a dismissal is not in dispute. It is the case of the respondent that the dismissal of the applicant was substantively fair in that the applicant received cash in the amount of R170 000-00 for bails but such is not accounted for and further that it does not appear on the bank statement of the respondent. It is the case of the respondent further that the case of the applicant is not the same as the case of Nkosinathi Zungu. It is the case of the applicant that her dismissal was substantively unfair. The applicant contended further that the respondent is not consistent in the application of its disciplinary code as Nkosinathi Zungu committed the same offence but was not dismissed. The applicant prayed for reinstatement. The respondent submitted bundle A which is comprises of 61 pages and bundle A1 which is comprises of 35 pages. The applicant submitted bundle B which is comprises of 78 pages.

### SURVEY OF EVIDENCE AND ARGUMENTS:

#### The case of the respondent

**The first witness of the respondent, Mr Thembani Clifford Masingi, the Assistant Director under third party fund unit testified under oath as follows:**

[6] He is stationed at the Regional office in Johannesburg, Gauteng Province. Third funds include maintenance money, bail money, admission of guilty money and others. Paragraph 14.1.2 at page 41 of bundle A is about capturing money on JDAS (Justice Deposit Account System). The money which is not captured on the JDAS will not be on standby case or cash book and it will not reflect or appear on the financial statement. He received a phone call from the main Cashier (Supervisor), Sello Monyeki stating that cash book was not balancing. He went with Mr Radebe to Randburg magistrate court to investigate the matter. They scrutinized the transactions and have found that there were EFT transactions in the cash book. The bank statement was checked and the transactions in question were not appearing. They discovered serious discrepancies. The main Cashier allocate cash float on the system in the morning. Float is allocated to a Clerk in order to capture EFT transactions. JDAS generate a receipt which must be signed by the Clerk and the Supervisor. At the end of the shift handover receipt is printed and it should be signed by both the clerk and the Supervisor. The Supervisor cash up each clerk and then bank the money. The other process is called DFI (departmental financial instrument). There is a handover certificate to be signed before doing handover. Handover must be done in writing. Procedures are in place for the purposes of tracing money. Handover must be in writing to avoid a word of mouth. The system was working on the day in question. A1 is a daily audit trail that reflects all transactions by the applicant on the JDAS system from 02<sup>nd</sup> of December 2016 to the 08<sup>th</sup> of February 2017. The applicant worked on the 19, 20, 21, 22, 23, 24, 28, 29 and the 30<sup>th</sup> of December 2016. He does not know why the applicant was cleared on R150 000-00. Pages 25-37 of A are a bank statement which shows that the money was not banked.

[7] They obtained statements from the applicant and Mr Zungu as per pages 39&40 of bundle A. The applicant did not tell him that page 39 was not her own statement. He does not know the statement at page 78 of bundle B. He denied a version put to him that the applicant saw him for the first time during the disciplinary hearing. The issue was triggered by a client who came having a receipt to come and collect money. A proper handover was not conducted. The applicant did not count money with Zungu. The applicant recorded the money as EFT deliberately.

**The second witness of the respondent, Makhaula Tsosane, the Court Manager stationed at Rodepoort Magistrate Court testified under oath as follows:**

[8] He acted at Randburg Magistrate Court from the 01<sup>st</sup> of March 2017 to the 31<sup>st</sup> of August 2018. He was also monitoring activities in the cash hall. The version of the applicant that there was unwritten handover practice is not true. Handover is the primary work of the clerks. The data Capturer and the Supervisor must sign for the money. The handover is important for the tracing of money and also to protect clerks in case there is a claim of not receiving money. There must be a receipt for bail money. Bail money can be paid via EFT or cash. Money paid via EFT will be supported by bank statement. The conduct of the applicant affected employer and employee relationship as dishonesty and fraud are serious offences. There was a deficit of R170 000-00 on the audit trail. The applicant did not count the money with Mr Zungu. Monyeki told him that the applicant misappropriated state funds. The applicant issued J399 bail receipts as cash. The handover done by the applicant is not according to the procedures. It was never brought to his attention that Zungu was refusing to sign handover.

**The third witness of the respondent, Murasiet Mento, the Regional Manager under Judicial Inspectorate for Correctional Services testified under oath as follows:**

[9] He is stationed at Centurion. He was the chairperson of the disciplinary hearing. He prepared pages 49-55 of bundle B. The date at page 59 is 25<sup>th</sup> of October 2017. He only concentrated on receipt number H073459 of R20 000-00 as the charge did not have invented commas as per oxford dictionary. Dishonesty was a threshold in the charges levelled against the applicant. He found the applicant guilty on charge number 2. Charge number one is about gross dishonesty. Charge 2 is about theft of R20 000-00. There was overwhelming evidence that the applicant stole all the monies.

[10] He testified that he considered the charges collectively when it was put to her that he found the applicant guilty on charge number 1 which is about dishonesty and not theft. The applicant was found guilty of dishonesty. The applicant was found guilty of dishonesty and the mention of R20 000-00 was just explanation. His finding is correct. He testified that he was reading it for the first time when he was referred to page 61 of bundle B which is an appeal finding wherein charge number 2 which was about theft was set aside at appeal level. Oxford dictionary commas are in relation to charge number 2.

**The case of the applicant**

**Ms Phyllis Mukhambi, the applicant testified under oath as follows:**

[11] She does not understand the finding of the chairperson of the disciplinary hearing as she followed the same procedure with regard to R50 000-00 x3 and R20 000-00. She is surprised that she was found guilty on R20 000-00 only. Charge number one is about dishonesty and not theft. Charge number 2 is about theft. She was not found guilty on charge number 2 as per page 61 of bundle B which is the outcome of the appeal. The appeal authority set aside charge number 2. Charge number 2 is about theft of R170 000-00. R170 000-00 is made up of R50 000-00 x3 and R20 000-00. She was not on duty on the 13<sup>th</sup> of January 2017. She did not go to the office on the 20<sup>th</sup> of January 2017. She admitted that there was a transaction of done on the 20<sup>th</sup> of January 2017 by herself and that it was EFT. She recorded that R170 000-00 was paid via EFT. She wrote the statement appearing at page 39 of bundle A and further stated that the contents are true and correct. She prayed for reinstatement.

**ANALYSIS OF EVIDENCE AND ARGUMENT:**

[12] This matter was referred as an unfair dismissal dispute. The applicant is required in terms of section 192 (1) of the Act to establish the existence of a dismissal. The existence of a dismissal is not in dispute in this case. The employer is required in terms of section 192 (2) of the Act to prove fairness of a dismissal. The applicant is contesting her dismissal on two grounds namely: That the dismissal was substantively unfair and further that the respondent is not consistent in the application of its disciplinary code as Mr. Zungu committed the same offence and he was not dismissed. It is the case of the applicant that she counted the money with Mr. Zungu but he was not dismissed. It is the case of the respondent that the dismissal of the applicant was substantively fair and further that the respondent is consistent in the application of its disciplinary code as Mr. Zungu did not count the money with the applicant. The applicant was charged with four counts of misconduct. The charges are four in that each charge has got alternative charge. The applicant was however found guilty on charge number one only as per the outcome of the disciplinary hearing. The applicant appealed the sanction of a dismissal but the appeal

authority upheld the dismissal. I am going to repeat charge number one herein under for easy reference. Charge number one reads as follows:

*You're charged with misconduct of **gross dishonesty**, in that on or between the period 20 January 2017 to 23 January 2017 or at any period incidental thereto and at or near your designated place of work (Randburg Magistrate Court); you unlawfully captured the bails as EFT on JDAS while you knew or ought to have known that such bails were received as cash at the counter and not EFT. The bail receipts are as follows: **H073459 (R20 000-00), H073528 (R50 000-00), H073433 (R50 000-00) and H0733434 (R50 000-00).***

[13] It is common cause that the applicant was not found guilty on charges number 2 and alternatives charges to charge number 1&2. It is common cause that the applicant recorded an amount of R170 000-00 as cash whereas it was in fact paid via EFT. It is common cause that the applicant captured receipt number H073459, H073528, H073433 and H0733434 as EFT whereas they were paid as cash. Mr. Masingi testified that he was phoned by Sello Manyeki, main Cashier (Supervisor) informing him that cash book does not balance as there was a shortage of R170 000-00. It is also common cause that the monies recorded as EFT by the applicant did not reflect on the bank statement of the respondent. The chairperson of the disciplinary hearing found the applicant guilty of theft of R20 000-00 and did not pronounce himself on other amounts of R50 000-00 x3 which R150 000-00. The case of the applicant is mainly centered on the fact that she was found guilty on charge number one on a theft of R20 000-00 whereas charge number one is about gross dishonesty and not theft. The second one is that finding of guilty on the second allegation (charge 2) amounts to splitting of convictions and is set aside by the appeal authority. In essence the case of the applicant is that because charge number 2 deals with theft and was set aside by appeal authority and she was found guilty on charge number one there is no more case for her to answer. Charge number one does not deal with theft but gross dishonesty. The chairperson of the initial disciplinary hearing found her guilty on charge one but charge one does not deal with theft. Charge number two is set aside which is about theft. Differently put, the applicant was exonerated from theft at appeal level as finding of guilty on the second charge amounts to splitting of convictions.

[14] The only charge which is remaining is charge number one which is about gross dishonesty. It was stated as per paragraph 2 at page 61 of bundle B that the applicant was found guilty of dishonesty which was the reason she was terminated. The confusion was triggered by the fact that the chairperson, in his conclusion found the applicant guilty of theft of R20 000-00 and nothing was said about gross dishonesty. Mr. Mento testified that the evidence was overwhelming at the disciplinary hearing that the applicant stole money of the state. The appeal authority felt that a finding of guilty on charge number one was sufficient. The person who dealt with appeal was specific in terms of charges whereas the chairperson of the disciplinary hearing dealt with both charges under analysis but in his conclusion only dealt with theft of R20 000-00 which is about the second charge and such was overturned by the chairperson of the appeal as a finding of guilty on the second allegation amounts to splitting of convictions and was set aside.

[15] The applicant was found guilty on charge number one. The operating phrase as per charge number one is **gross dishonesty**. The operating phrase as per charge number two is **theft**. The finding of guilty on charge number two was set aside at appeal level. The chairperson of the disciplinary hearing found the applicant guilty of theft and such finding was set aside at appeal level. The chairperson of the disciplinary hearing was carried away by allegations of theft and showed how they were supposed to have been coined as four charges of theft and fraud in his finding or conclusion and in the process left out a

finding on gross dishonesty. The chairperson of the appeal dealt with an issue which was not before him as he confirmed a finding of guilty on charge number 01 without verifying the facts because the applicant was actually found guilty on charge number 2 as per the finding or the conclusion of the chairperson of the disciplinary hearing.

[16] I make a finding that the dismissal of the applicant was substantively unfair as he had no case to answer. The question is whether there is still any other case available to be answered by the applicant. It is my considered view that there is no more case to be answered by the applicant as she was exonerated of theft at appeal level. The applicant was not found guilty of gross dishonesty but was found guilty of theft during the disciplinary hearing, a decision which was set aside at appeal level. The chairperson of the disciplinary hearing did not pronounce himself on the charge of gross dishonesty and it cannot therefore be parachuted into this arbitration. I cannot pronounce myself of the charge which is not a subject matter before me.

[17] It is the case of the applicant further that the respondent is not consistent in the application of its disciplinary code. The two witnesses of the respondent, Mr. Masingi and Mr. Tsosane testified that the case of the applicant is not the same as the case of Mr Zungu as Zungu did not count the money with the applicant. I reject the evidence of the applicant that the respondent is not consistent in the application of its disciplinary code as her evidence in this regard is far-fetched.

[18] The applicant prayed for reinstatement in this arbitration. I have no reason why the applicant should not be granted her prayer under the circumstances of this case. The applicant would not be entitled for the back pay as the amount of R170 000-00 did not reflect on the bank statement of the respondent which was in my view due to her negligent even though she was not found guilty on charges leveled against her. The respondent suffered financial loss hence I am not ordering back pay.

**AWARD:**

[19] The dismissal of the applicant was substantively unfair.

[20] The respondent, Department of Justice is ordered to reinstate the applicant, Ms Phyllis Mukhambi.

[21] The applicant is to resume her duties on the 05<sup>th</sup> of January 2021.



**PHEEHA DANIEL SEPELA**

**Name:**

**(GPSSBC) Arbitrator**