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# ARBITRATION AWARD

Panelist/s: ADV. W. BLUNDIN

Case No.: GPBC2435/2019

Date of Award: 15 April 2021

In the ARBITRATION between:

**PSA OBO BOYA**

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(Union / Applicant)

and

**DEPARTMENT OF JUSTICE AND CORRECTIONAL SERVICE**

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(Respondent)

**Union/Applicant's representative**

**Adv. Thenjwa Sellem**

High Court Advocate, RSA  
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## AWARD

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### DETAILS OF HEARING AND REPRESENTATION:

1. This award came after an arbitration hearing that was set down on the 10 March 2021 at the Magistrate's Court in Buthertown. The Applicant was in attendance and represented Adv. Salem a legal representative and the Respondent was represented by Mr. Zola Mxalisa an official in the employment of the Respondent. The parties agreed to submit closing arguments in writing which was done by both parties.

### ISSUE TO BE DECIDED:

2. I am required to determine.
  - a. Whether the dismissal of the Applicant was procedurally and substantively fair.

### BACKGROUND

3. The Applicant was employed with the Department of Justice and Correctional Services as a Messenger Driver. The Applicant was charged with various charges inter alia.

#### *Allegation 1*

*On or about 14 March 2017 at or near Willowvale Magistrate's office while on duty you fraudulently changed the dates in the trip authority which was only valid for the 14 March 2017 for state vehicle with registration number FKL 559EC you change the date to accommodate the 15 March 2017, an act you know or ought to have known it was wrongful to do so.*

#### *Allegation 2*

*On or about 15 March 2017 whilst employed by the Department of Justice and Correctional Services as Messenger Driver you fraudulently change the end point Willowvale in the trip authority and wrote Idutywa you changed the end point so that it could appear as if the vehicle with registration number FKL559EC was authorised to be parked overnight at Idutywa as you parked it at Idutywa without authority an act you know or ought to have known is wrongful to do so.*

#### **Allegation three**

*On the 16 of March 2017 at or near Magistrate Office Willowvale whilst employed by the Department of Justice and Correctional Services you drove the state vehicle with registration number FKL559EC without authority by so doing you contradicted the transport circular no 4 of 2000 an act you knew or ought to have known it was wrongful to do so.*

#### **Allegation four**

*On or about 15 March 2017 whilst employed by the Department of Justice and Correctional Services as Messenger Driver and driving the vehicle with registration number FKL559EC was involved in an accident and you never reported the accident to the police as soon as possible or within the 24 hours and by doing so contradicted transport circular 4 of 2000 an act you knew or ought to have known it was wrongful to do so.*

#### **SURVEY OF EVIDENCE AND ARGUMENTS**

4. The Respondent called four witnesses to testify on its behalf, namely Mr. S.Mpako, Ms D. Oosthuizen, Ms N. Giyose and Mr. M. Sinyanga.
5. **Mr. S. Mpako testifies** that he is employed at the Respondent and he was appointed as the presiding officer in the disciplinary case of the Applicant. At the disciplinary hearing held on the 18 and 19 March 2019, the Applicant request that the hearing be postponed because his representative was not available and he could

not represent himself. According to the witness he has consider all rights of the Applicant during the hearing and ask him to obtain other representation.

6. The witness testifies that the Applicant acknowledge that he understands the allegations against him and pleaded not guilty to all allegations. According to him he gave the Applicant an opportunity to be heard, but he chooses not to proceed. He then proceeds with the hearing and found the Applicant guilty. Under cross examination he confirms that the representative of the Applicant makes him irritated because he undermined him.
7. **Ms Dorenda Oosthuizen testifies** that she is employed as an Assistant Director at the Regional Office of the Respondent. She further testifies that she was previously a Court Manager at Queenstown. She testifies that the Applicant was aware of the policy and refer to page 30 of bundle B a document which was signed by the Applicant to confirm that he received Circular 4 of 2000.
8. She testifies that if a driver wishes to alter a trip authority, he/she must go to the Court Manager or that he must sent a copy with such alterations to the Court Manager within 24 hours. Further when the driver arrived at the office, he/she must write a statement and add it to the trip authority.
9. According to her it is not logical to write the same reasons for the 14 and 15 March 2017 as to why the motor vehicle will be used. Further according to her it could not take two days to collect a motor vehicle from Butterworth to Willowvale.
10. According to her the state vehicle must be parked at the offices. If a driver wishes to park it at another place written proof must be given to do so at another court.

11. According to her the Applicant was not authorised to drive the vehicle on the 16 March 2017. She testifies that in cases of an accident such accident must be reported with 24 hours and a Z181 must be completed.
12. **Ntomba Giyose testifies** that she works at the Security Department in Butterworth.
13. **Mr. M. Sinyanga testifies** that the circular 4 of 2000 contained all the details in relation to the use of a state vehicle. He has issued the circular to all the drivers including the Applicant. On the 14 March 2017, the Applicant was authorised to collect the motor vehicle at Butterworth. He testifies that the garage phone the offices to collect the motor vehicle and he was supposed to travel from Butterworth to Willowvale. It could not have taken him 2 days to come to Willowvale. He cannot approve to collect the vehicle for 2 days.
14. The witness testifies that he was not aware about the trip of the 15 March 2017. He was not informed that the motor vehicle was parked at Idutywa Magistrate's Court. He was not aware that the car was parked in Idutywa. Instances on authority he could park it at Idutywa court. He was informed that the vehicle was in an accident on the 16 March 2017. According to him he did not have authority to use the motor vehicle on the 16 March 2017. On page 56 bundle A is documents that form part of the application for a trip authority, which shows that the motor vehicle must be collected on the 15 March 2017. According to him the Applicant did not report the accident within the 24 hours. Under cross examination the witness was referred to page 89 pf bundle A, a form that was filled in by him. In the document he filled in that the motor vehicle was used for official purpose. He only indicates that it was a misprint. He only reports the accident to the office on the 7 June 2017.
15. **The Applicant testifies** that he was not given the opportunity to be represented when the disciplinary hearing started on the 18 and 19 March 2019. On the 14 March 2017 he was given an instruction by his supervisor to collect motor vehicle. All the documents were sign on the 13 March 2017. and his supervisor went to collect the motor vehicle at Genesis Repairs in Butterworth. He then requests his supervisor if he could leave the motor vehicle at Idutywa because he was required the next day to pick up the interpreters at Butterworth and took them to Willowvale.

16. His supervisor gave him permission to do so. He then left the motor vehicle at the Court at Idutywa and the next morning on the 15 March 2017, he collects the vehicle at Idutywa Magistrate's Court and it has a problem with the battery. He borrows charging cables from the people at the Court. He drove the motor vehicle to the front of the Court outside near the entrance on the side of the road because the motor vehicle did not idle. He then went inside to request again assistance to start to vehicle when he arrives back at the motor vehicle, he found that the motor vehicle was bump. According to him, he phoned his supervisor Mr. Stevens and refer the matter to Mr. Tobi because the court manager was not at the office on the 14 and 15 March 2017. Mr. Stevens instructed him to take the motor vehicle to Genesis Body Works for a quotation. On the 16 March 2017 he was instructed to collect the vehicle because they could not repair the vehicle in the absence of a requisition.

## **ANALYSIS OF EVIDENCE AND ARGUMENTS**

17. The onus is on the respondent to show that the dismissal was for fair reasons. *The Applicant was charged with the following charges inter alia.*

### ***Allegation 1***

*On or about 14 March 2017 at or near Willowvale Magistrate's office while on duty you fraudulently changed the dates in the trip authority which was only valid for the 14 March 2017 for state vehicle with registration number FKL 559EC you change the date to accommodate the 15 March 2017, an act you know or ought to have known it was wrongful to do so.*

### ***Allegation 2***

*On or about 15 March 2017 whilst employed by the Department of Justice and Correctional Services as Messenger Driver you fraudulently change the end point Willowvale in the trip authority and wrote Idutywa you changed the end*

*point so that it could appear as if the vehicle with registration number FKL559EC was authorised to be parked overnight at Idutywa as you parked it at Idutywa without authority an act you know or ought to have known is wrongful to do so.*

***Allegation three***

*On the 16 of March 2017 at or near Magistrate Office Willowvale whilst employed by the Department of Justice and Correctional Services you drove the state vehicle with registration number FKL559EC without authority by so doing you contradicted the transport circular no 4 of 2000 an act you knew or ought to have known it was wrongful to do so.*

***Allegation four***

*On or about 15 March 2017 whilst employed by the Department of Justice and Correctional Services as Messenger Driver and driving the vehicle with registration number FKL559EC was involved in an accident and you never reported the accident to the police as soon as possible or within the 24 hours and by doing so contradicted transport circular 4 of 2000 an act you knew or ought to have known it was wrongful to do so.*

18. The Respondent has called various witness to testifies on its behalf. I will firstly deal with the procedural fairness of the disciplinary hearing. According to the Applicant he was not given a fair hearing and therefore the dismissal was viewed to be procedurally unfair. The Respondent called Mr. S. Mpako who was the presiding officer, who testified that he has followed the procedure before he found the Applicant guilty and dismissed him. According to him he gave the applicant the opportunity to be heard but he chooses not to accept. Under cross examination the witness could not show any reason why he did not postpone the hearing to allow the Applicant the opportunity to be heard.

19. On page 77 bundle A of verbatim transcript.



**CHAIRPERSON:** .....You should have taken responsibility there and then when you saw that Mr. Mlongwana is not prepared to inform the employer. I do not want to say much, but the postponement is decline. So we should proceed. “

The Chairperson went further;

**CHAIRPERSON:** Okay. Yes... You say I feel sorry for you but this is something that we have to do and it is done you can go back and see what happens to other disciplinary hearing not this one. Where you have a representative, who wants to do things his way. Representative who wants to do things his way we proceed. We just exclude him because he cannot be a standing block to progress of this. I have been lenient with Mr. Mlongwana. I have been very very lenient. I have never been so lenient with other people. And I think he has been abusing my leniency.

**CHAIRPERSON:** Alright. We have come to this end. I have given the employee the opportunity to respond to allegations. He turned down that opportunity. Saying that he cannot respond to these allegations without his representative. ....I found the employee guilty of the misconduct as it is alleged in those allegations.

20. Having regard to the above and cross examination I must find that the dismissal was procedurally unfair. The Respondent's witness did not adduce any reasonable and justifiable evidence as to why the hearing could not have been postponed. It seems from the above rulings that the representative of the Applicant and the presiding officer don't share the same space and the ruling has been made to spite the Applicant's representative.
21. I will now turn to the substantive fairness of the dismissal. According to the Respondent the Applicant was found guilty of the above charges.

22. It seems to be common cause that the trip authority could be altered if the driver informs the supervisor 24 hours after such trip and that the driver must make a statement. Mr. Sinyanga testifies that he was not aware of a trip authority for the 15 March 2021 and therefore the Applicant did not have authority to use the motor vehicle. The evidence adduced by the Applicant is uncontested that he informed Mr. Stevens that he will park the motor vehicle at Idutywa Magistrate's Court so that he could use it the next day to collect the casual interpreters in Butterworth and take them to Willowvale. Mr. Sinyanga was absent on the 14 and 15 March 2017 and will not be aware of a discussion between the Applicant's supervisor, Mr. Stevens, or Mr. Tobi.
23. In the absence of any contrary evidence, I must accept the explanation of the Applicant as reasonable. To take this matter further the Applicant refers me to page 56 of bundle A, a document that was attached to the application for a trip authority. According to the Applicant he has requested permission from Mr. Stevens to leave the motor vehicle at the Court in Idutywa on the 14 March 2017 so that he could collect the casual interpreters on the 15 March 2017. Further according to the Applicant, he did inform Mr. Tobi and Mr. Stevens. I cannot accept the explanation of Mr. Sinyanga and find him not credible and reliable witness. He tried to hide the fact that he was not at work on the 14 and 15 March 2017.
24. It is common cause that the employee was aware or ought to be aware of the rule. The charge as it stands gives the impression that no alterations can be done. However, the evidence of Ms Oosthuizen properly clarified the rule, that alterations can be made to a trip authority. The rule does not bar the Applicant from making any alterations to the trip authority. It is for these reasons that I find that the Applicant could not have been found guilty on allegation 1 and 2.
25. About allegation 3 the respondent adduced evidence that the Applicant did not have authority to drive the motor vehicle on the 16 March 2017. The Applicant testifies that when the motor vehicle was bumped on the 15 March 2017, he was instructed by Mr. Stevens to take it to Genesis Body Works. On the 16 March 2017 he went to Genesis Body Works in Butterworth to collect the motor vehicle. According to the Respondent the

Applicant did not have authority to drive the motor vehicle. Notwithstanding the explanation of the Applicant, he did not have any authorisation to use the vehicle on the 16 March 2017. The Applicant was aware that he must have authorisation to drive the motor vehicle. It is for this reasons that I find the Applicant guilty on charge 3.

26. Regarding charge 4, the Applicant testify that he did report the accident at the SAPS within the 24 hours. On the other side the Respondent's witness testified that the Applicant did not report the accident within the 24 hours. I am satisfied that the accident was report and the only issue relates to whether it was report within the 24 hours. I cannot conclude that the Applicant has breach any rule.

27. I will now consider the appropriate sanction in relation to charge 3. The charge is serious but consider the explanation of the Applicant that he went to collect the motor vehicle at Genesis Body Works as per instruction of his supervisor, does impact on the seriousness of the charge. The sanction of dismissal only came after he was found guilty on all charges.

28. In *Komane v Fedsure Life*, it was noted that "*fair*" is defined in the *Concise Oxford Dictionary* as "*just, unbiased, equitable*." It is for this reason that a fair and appropriate sanction will be a final written warning.

29. After considering the arguments and evidence of all parties I herewith made an appropriate order.

## **AWARD**

30. That the dismissal of the Applicant was substantively and procedural unfair.

31. That the Applicant be reinstated retrospectively from the 17 May 2021. That the back pay be calculated on R12106.75 x 17 months = R205814.75, (less statutory deductions) be paid to the Applicant by not later than 31 May 2021.

32. In respect of charge 3 the Applicant be given a final written warning as from 14 May 2021.

33. No order as to cost.



J. W. BLUNDIN

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