



Council Name

# ARBITRATION AWARD

Panellist/s: P M NGAKO  
Case No.: GPBC1477/2018  
Date of Award: 1 OCTOBER 2019

In the ARBITRATION between:

PSA OBO M MAKGOKA  
(Union / Applicant)

and

DEPARTMENT OF HOME AFFAIRS  
(Respondent)

**Union/Applicant's representative:** L J JENSEN  
Union/Applicant's address: \_\_\_\_\_  
\_\_\_\_\_  
Telephone: \_\_\_\_\_  
Telefax: \_\_\_\_\_

**Respondent's representative:** T SEKOELE  
Respondent's address: \_\_\_\_\_  
\_\_\_\_\_  
Telephone: \_\_\_\_\_  
Telefax: \_\_\_\_\_

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## ARBITRATION AWARD

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### DETAILS OF HEARING AND REPRESENTATION:

- 1.1 This matter came before me on the 3<sup>rd</sup> of September 2019 at the Offices of the GPSSBC 260 Basden Avenue Lyttelton. Appearing before me was the applicant who was represented by LJ Jensen an official from the Trade Union PSA. The respondent was represented by T Sekoele an employee in the employment of the respondent. Parties held the pre-arb and agreed that the facts are common cause. I agreed that they could submit written heads of arguments

### ISSUE TO BE DECIDED:

- 2.1 According to the pre-arb minutes I am required to decide:
- Whether the respondent acted unfairly when it held the applicant liable for the stolen laptop and subsequently deducted funds from the salary to pay back the laptop;
  - Whether the respondent will have to reimburse the applicant for funds already deducted

### BACKGROUND TO THE MATTER:

The following facts were are common cause between the parties

- 3.1 Applicant had his laptop stolen on the 10<sup>th</sup> July 2014 through an alarm jamming exercise;
- 3.2 Applicant was informed that he was liable for the stolen item and what he would have to pay back the department.
- 3.3 Applicant was advised to pay back an amount of R36 822.00, to which he has already paid an amount R13 569.00
- 3.4 That the respondent stopped deduction effective from 1 May 2018 without any reason presented to the applicant.
- 3.5 Applicant declared an unfair labour practice dispute
- 3.7 Applicant did not agree to the deductions made from his salary

Applicant is of the view that

- 4.1 The employer unfairly ruled that he is liable for the stolen item;
- 4.2 The employer unfairly deducted instalments to the amount of R13 569.00 for the value of the stolen laptop from his salary;
- 4.3 The employer did not comply with the PFMA when it decided to perform these actions against the applicant.

## **SURVEY OF EVIDENCE AND ARGUMENT:**

### **APPLICANT'S SUBMISSION**

- 5.1 It is the contention of the applicant that the respondent erred when it held him liable for the stolen laptop in his car in that the laptop was underneath the passenger seat and not visible. The applicant submits that that the respondent was made aware of the letter dated 12 April from the DPSA page 7 of the applicant's bundle declared that section 38(2)(b)(i) of the Public Service Act is unconstitutional . this was the basis upon which wrongly granted remuneration were recovered from the salaries of such employees, it was recommended departments may utilize other available legal processes to recover such amounts which may include a court of law or through process in compliance with section 34 of the BCEA of 1997
- 5.2 The applicant further submitted that respondent contravened the Treasury Regulation 12.7.2 at page 44 of the applicant's bundle that provides where an official fails to comply with a request to pay to the State an amount for a loss or damaged caused by such official, the matter must be handed to the State Attorney for recovery. It is the contention of the applicant that the respondent had no substation to decide that applicant was liable for the loss of the laptop and he submits that the respondent acted unconstitutionally when it decided to deduct the monetary value of the laptop from his salary

### **RESPONDENT SUBMISSION**

- 6.1 It is the submission of the respondent that the Lost Control Committee found the applicant was liable for the loss of the assets as car jamming mechanism burglars or theft cannot be

a loss incurred by the department more so that the laptop was left on the car seat it is the responsibility of the official to safeguard laptop allocated to him. The respondent further submitted that the respondent advised the applicant he may appeal the decision of the lost Control committee but applicant failed to appeal and the department embarked on the process of recovering money; and an amount of R13 569.00 was deducted from the applicant after failing to appeal and when he appealed the decision of the lost Control Committee then the respondent stopped the deduction pending the decision of the appeal board. The respondent contends that the respondent does not see any good cause on the part of the of the applicant for not appealing and should therefore be blamed or made to accept to the responsibility of the applicant's fault; as result the respondent prays that I should dismiss the applicant's application.

#### **ANALYSIS OF EVIDENCE AND ARGUMENT:**

7.1 The Constitutional Court in *Public Servants Association obo Ubogu v Head of Department of Health and others* CCT6/17 [2017] ZACC 45 at para 66 and 67 held:

*"[66] Section 38(2)(b)(i) undermines a deeper principle underlying our democratic order. The deductions in terms of that provision constitute an unfettered self-help – the taking of the law by the state into its own hands and enabling it to become the judge in its own cause, in violation of section 1(c) of the Constitution. Self-help, as this Court held in Chief Lesapo, "is inimical to a society in which the rule of law prevails, as envisaged in section 1(c) of our Constitution." Although there may be circumstances when good reasons exist – justifying self-help – this is however not a case of that kind.*

*[67] By aiding self-help, the impugned provision allows the state to undermine judicial process – which requires disputes be resolved by law as envisaged in section 34 of the Constitution. This provision does not only guarantee access to courts but also safeguards the right to have a dispute resolved by the application of law in a fair hearing before an independent and impartial tribunal or forum. It is not*

*insignificant that section 31 of the Act envisages recovery of money, in the case of unauthorised remuneration, “by way of legal proceedings”. The Minister of Public Service argues that Ms Ubogu’s section 34 right was not violated because that protection applies only to disputes that are capable of resolution by application of law. This contention is flawed. The Minister does not explain why the existing dispute was not capable of resolution by the application of law in a fair public hearing before a court. The mechanism through section 38(2)(b)(i), as currently formulated, is clearly unfair. It promotes self-help and imposes strict liability on an employee in respect of overpayment irrespective of whether the employee can afford the arbitrarily determined instalments and was afforded an opportunity for legal redress.”*

7.2 The applicant disputes that he is liable for the stolen property and did not consent to the deduction on his salary, and the enabling section that allowed the respondent to deduct money from his salary without his has been declared unconstitutional as it amounts to self- help.

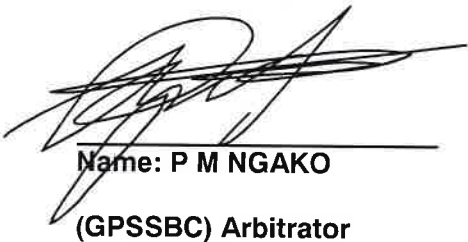
7.3 When the respondent started to deduct money from the applicant’s salary already the Constitutional Court had already declared Section 38(2)(b)(1) unconstitutional. The respondent received a circular from the DPSA dated 12/04/2018 at page 17 of the applicant’s bundle informing departments that the Section has been declared unconstitutional and advised the departments to utilise other available legal processes to recover such amounts owed to departments

7.3 As the section 38(2) (b) (i) has been declared unconstitutional by the above decided case, a section that enabled the respondent to deduct money form the applicant’s salary, it does not matter when the applicant lodged his appeal or not; the nub is

that the enabling legislation does not exist, the respondent should have instituted legal proceedings against the applicant. The conduct of the respondent is found to be unfair as it deducted applicant's salary without his consent and using a section that has been declared unconstitutional, the conduct of the respondent amounts to self-help.

**AWARD:**

- 8.4 The unilateral deduction of money from the applicant's salary is found to be unfair as the enabling Section 38(2) (b) (i) of the PSA has been declared unconstitutional;
- 8.5 The respondent is ordered to refund the money it has deducted from the applicant's salary being R13 569.00(thirteen thousand five hundred and sixty nine rand);
- 8.6 The respondent must refund the money it deducted from the applicant salary with 15 days after receipt of this award
- 8.7 There is no order as to cost.



**Name: P M NGAKO**  
**(GPSSBC) Arbitrator**