



ARBITRATION AWARD

Case No.: GPBC 1018-2019

Date of Award: 20 July 2021

Panelist: Jeffrey Nkuna

In the ARBITRATION between:

PSA OBO EULANDA MASWANGANYI

(Union / Applicant)

And

DEPARTMENT OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT

(Respondent)

Union/Applicant's representative: Mr P. Thotobolo _____
Union/Applicant's address: PSA – Gauteng _____

Telephone: _____
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Respondent's representative: Adv Mahlangu _____
Respondent's address: Johannesburg Bar _____

Telephone: _____
Telefax: _____

ARBITRATION AWARD

DETAILS OF THE HEARING AND REPRESENTATION

1. This award is rendered in terms of section 138(7) of the Labour Relations Act, 66 of 1995 as amended (LRA).
2. The dispute was referred for arbitration in terms of section 191(1) & 191(5) (a) of the Labour Relations Act 66 of 1995 as amended ("LRA"). The hearing was held on 18 & 19 November 2019, 12 & 13 February 2020, 24 & 25 March 2021, 15 & 16 April 2021. The matter was initially held at GPSSBC Offices, Centurion, Gauteng Province. However, during the Covid pandemic, the matter was held at the Respondent's head offices at Pretorius Street, Pretoria, Gauteng
3. The **Applicant, Ms Maswanganyi (Employee)**, was represented by **Mr P Thotobolo** an official of **PSA**. The Respondent, **Department of Justice and Constitutional Development** was initially represented by **Adv. Motleanya** who was later replaced by **Adv Mahlangu**, both members of the Johannesburg Bar.
4. The matter was set to be arbitrated on the 18th and 19th November 2019 and on both occasions the Respondent applied for the postponement among others, citing that the pre-arbitration was not held and that they did not understand what the Applicant's case was about. The Respondent representative argued that they were not ready to proceed as the Applicant's representative was not co-operating regarding the issue of exchanging the documents.
5. A directive was given that the parties should utilize the sitting for pre-arbitration and the narrowing of issues. There was also an issue raised by the Respondent that the main witness who conducted investigations, has been transferred and was now based in the Western Cape. It was then agreed that the matter would then be adjourned and the parties will exchange their documents.

6. The matter finally commenced on the 12th, 13th and 14th February 2020 and the Respondent was represented by Adv. Motloenya. The matter was then adjourned to the 13th August 2020 and further postponed as the Respondent's Counsel was unavailable due to medical condition. When the matter was set to be heard on the 14th January 2021, the Respondent was then represented by the new Counsel, Adv. Mahlangu who then requested a postponement as he had just been briefed and tendered costs for the postponement.
7. The matter was then heard on the 24th and 25th March 2021 and later adjourned due to time constraints. The matter was then proceeded with on the 15th and 16th April 2021.
8. The proceedings were manually and digitally recorded and were finalized on the 16 April 2021. The Applicant's Representative requested extension and his closing arguments on the basis that he has lost the records of the matter. The Parties were given an opportunity to file their written closing arguments not later than the 03 May 2021. The Respondent Representative submitted his closing arguments within the agreed time. The Applicant's closing arguments were submitted on the 07 May 2021. Both parties closing arguments were considered in this award.

NATURE OF THE DISPUTE

9. The dispute is about an alleged unfair dismissal.

BACKGROUND TO THE DISPUTE

10. The Applicant was employed as a senior administration clerk from 18 May 2009 and was placed at Kliptown Magistrate Court. She worked as the scheduling clerk and capturing of charge sheets in the criminal court. She was then later moved to human resources as the human resources clerk. During April 2016, she was then appointed as a cash clerk and occupied that position until she was dismissed for misconduct. She appealed against the dismissal sanction, and that sanction was upheld in an Appeal. The Applicant was charged with five charges of misconduct in the Disciplinary Inquiry and she was found guilty of only three charges of

misconduct. The following were the charges dealt with in the arbitration proceedings. The charges were as follows: **Charge 1: Gross dishonesty**: It is alleged that she committed an act of gross dishonesty between September 2016 and February 2017 involving the sum of R71 900.00 **Charge 2 Contravention of the Departmental Financial Instructions Policy** involving the sum of R71 900.00. **Charge 3: Contravention of the Departments' Code of Conduct** which led to the Employer losing money in the sum R71 900.00. The Applicant is challenging only the substantive fairness of her dismissal. The relief sought by the Applicant is reinstatement

ISSUES TO BE DECIDED

11. I am required to determine whether the Applicant's dismissal was substantively fair or not. If so, to order the appropriate relief.

SURVEY OF EVIDENCE AND ARGUMENT

Employer's case

12. The Employer's First witness, **Ms Doreen Mokwena**, testified that she has been employed as a senior administration clerk since 01 April 2009. She knew the Applicant very well and they worked together at Kliptown Magistrate Court. She has been the checking supervisor to the Applicant's work. She further testified that she was responsible for the checking of all the monies collected on the day. The collection was done through the JDAS System. JDAS was an electronic system used to upload the receipts which were manually recorded for the receipt of the money on behalf of the Employer. These money were collected from the people who paid for bail. There were also recording for the bulk amounts from Kliptown and Eldorado Park Police stations. The amounts will be collect and will be recorded manually in the receipt Book. Thereafter, the amount will be entered into the system. The receipts will always reflect who collected the money. She further testified that as the supervisor, she was expected to check the totals of the day and then, they will make reconciliations. She further testified that due load shedding and network challenges, they could not use the system every day. It was during those periods that the system became inoperative. However, once the system is back,

they were expected to upload the manual receipt to the JDAS System. She then testified she realized that there were certain receipts which were not posted in Z263. She further testified that during the time when the system was not working due to load shedding, she would ask the Applicant to go to Protea Court and upload the receipts recorded in Z263. She would come back and state that she could not access the system she borrowed. She further testified that the system started to work properly again on the 20 February 2017. She further testified that on the 21 February 2017 there were a lot of people to collect their bail money. She was working with the Applicant in making those payments. On the 22 February, the Applicant was absent at work, and the witness did not make any payouts on that day. She then concentrated in reprinting all missing receipts. She then realized that many receipts were not captured. She then realized that things were not adding up. She then reported the matter to her senior, Ms Doreen Mazibuko and Ms Sthembiso Mazibuko. During the 23 February 2017, she asked the Applicant to print the missing receipts. She then discovered that the Applicant was printing the receipts that have been already printed. On the 24 February 2017, she once more requested the Employee to do the print outs. At 15:00 she confronted the Applicant, and the Applicant then told her she was working on something to repay the money which was missing. She then advised the Applicant to call Mrs. Maluleka, the court manager about the situation. The Employee failed to do as requested, and the witness then phoned Mrs. Maluleka. Mrs Maluleka wanted to speak to the employee, but Applicant said she was still busy and she will call later. She did not call Mrs Maluleka as promised. She further testified that the amount calculated to be missing was R60 800.00. She further testified that she was not able to check the Applicant's work daily because she spent most of the time in the Regional Office. She was involved in the migration of the information from JDAS to a new system called Mojapay. This was a major project undertaken at the Regional office.

13. The Employer's second witness, **Ms Juanita Baron**, testified that she is the Court manager at Oudshoorn in the Western Cape and she was tasked to investigate the incident about the alleged missing money in Kliptown Magistrate court. During the time of the investigation, she was based in Gauteng Regional office of the Department of Justice. She testified that her report covers from July 2016 to February 2017. In her investigation she considered the Departmental Financial Instruction and Procedure Manual which was a summary of the

Departmental Financial instructions. She also took into considerations the Procedure Manual and Guidelines of the Clerks. She further testified in compilation of her report she was assisted by Ms Mokwena and Ms D Mazibuko. She explained how the 3Rd Party Funds are accounted for. The 3rd Party Funds consist of bail moneys. These moneys are held in the custody of the department until such time as are required to be dispensed. The witness testified that her investigation report was finalized and signed out on the 17 March 2017. The report focused on the bail money received by issuing Z263 in the event the systems are off. The Procedure states clearly the process to be followed if the monies received are in large volumes. The Departmental Financial Instructions clearly outlined the processes. When JDAS become available again, all the manual receipts must be captured in JDAS immediately. The report further stated that large volumes of money were deposited at the Kliptown Magistrate court, especially Mondays and public holidays. The deposits came from Kliptown and Eldorado Park Police stations. The Applicant, will accept the money and receipt into Z263 book and she will present a receipt to police official. The investigation findings further stated clearly that due to negligence on the sight of the checking officer, Ms Mokwena, monies were not recorded at all at JDAS system. The findings by the investigation were accepted by the senior management of the department and there were a number of recommendations. The report singled out the Applicant to have defrauded the Employer. These findings were informed by forensic evidence. This situation could been prevented if Ms Mokwena did the checking. However there were no findings that Ms Mokwena received money which was not recorded in the JDAS. This was exacerbated by failure of the supervisor, Ms Mokwena. She only picked this up very late. The Department also recommended disciplinary be taken against the relevant officials. It also recommended tight security, including CCTV cameras and further trainings.

14. 'The Employer's third witness, **Ms Doreen Mazibuko**, testified that State accountant based in Protea Magistrate Court. She testified that she knew the Applicant when she started to work as human resources officer. She further testified that there were also senior officials in the organ gram of the Kliptown Magistrate Court. There was Mrs. Maswanganyi who was the area court Manager and Mr Mahaswane who was the court manager at KlipTown. She further testified as regard the job description of the Applicant, she only inter acted with Ms Dineo Mokwena who also the Applicant's supervisor. She confirmed that she was contacted

telephonically by Ms Mokwena about the missing moneys. She assisted in the investigation and compilation of the investigation report. She mainly relied on the paper trail. She further testified in her investigation she engaged with the Applicant.

15. The Employer's fourth witness, **Mr Avashoni Michael Mahwasane**, has been appointed as the court manager, Kliptown Magistrate court. In his capacity as the court manager, he is responsible for human resources, court services, finance, stakeholder management and customer services. As regards the finance he was also responsible for the 3Rd Funds. He further testified that he knew about the problem when he was approached Ms Doreen Mazibuko. He further testified that after being informed of the issue he requested all the relevant officials to submit the written statements. He further testified that he did not engage with the Applicant as he had all the necessary information. He further testified during the investigations, the Applicant decided to submit the resignation which was taken to the area court manager who refused to accept her resignation. He further testified that there was forensic investigation which was conducted and that resulted in disciplinary proceedings instituted against the Applicant. There was also criminal case instituted against the Applicant. He further testified that he does not know whether the Employee was trained about Departmental financial Instructions or not. He further testified that there were two people responsible for the bail moneys, the Applicant and her supervisor, Ms Mokwena who was supposed to check and have oversight to the Applicant. He compiled an internal memorandum to the Regional head. He made the recommendations including among other things, the institution of disciplinary proceedings against the relevant officials and the forensic investigations. He further testified that the Applicant was left alone and there was supposed to be a second person to do the checking of the applicant's work. This was not done. He further testified that the Ms Mokwena was not available most of the time and was in the regional office busy with the migrating of JDAS to new system called Mojapay. He further testified that the charges faced by the Applicant were very serious and that if found guilty, that would result in the breakdown of employment relationship.

16. The Employer's last witness, **Ms Kedibone Mababy Phele**, testified that she is the deputy director, 3rd Party Funds in the Employer's Regional office. She further testified that she was responsible for the financial management of about 47

magistrate courts for the Gauteng region. She further testified that her office was responsible for the financial guidance for officials in the region. Her office is also responsible for the investigation of financial misconduct. She further testified that there are clusters and Soweto Cluster has 6 courts and the Kliptown Magistrate Court is one of the courts falling under this cluster. The Kliptown court has its own account. The employer's Departmental Financial Instructions gave a directive and processes to be followed in dealing with the 3rd Party Funds. The Funds in question were subjected to those directives. She testified in this case, clearly the directive was disregarded and officials were to be held accountable. She further testified that the JDAS system was operational in most of the time. In the case when it is not in operation, there were clear directives. The receipt's should as soon as possible, be uploaded in the JDAS system. The system may be not operating as result of network challenges or load shedding. She further testified in this regard, the officials responsible must record the receipts manually and put money in safe until and it was banked as prescribed. The fact that the system was not operational at a particular time, cannot justify shortages. Once the system is not working, the officials must log a call for technicians to attend to the problem. In the case of load shedding, as soon as electricity is back, the officials should upload the receipts in the system. There is also the Z263 receipt book for bulk money coming from the police stations. The Applicant was allocated functions as finance clerk. She was also trained on the allocated duties. She may not perform all the functions, but there were minimum functions. There is no excuse in her not following the Procedures. The Employee was aware of the **Code of Conduct** and **Departmental Financial Instructions** .It was also clear that the Applicant knew what she was doing because some of the receipts were found in her drawer. The Applicant acknowledged receipt and signed for the Employer's Code of Good Conduct. She further testified that the employment relationship has broken down and there is no more trust between the Employer and the Employee. The charges against her were very serious and there was no remorse shown by the Employee She further testified that there Employee has consistently refused to take responsibility and she has been behind the notion that she was not formally trained. The transgression took almost 6 months and she could have earlier reported the problems.

Employee's case

17. The Employee, **Ms Euland Maswanganyi**, testified that she has been employed by the employer from the 18 May 2009 until she was dismissed on the 20 May 2019. During her dismissal she was employed as the senior administration clerk. She further testified that she started work as administration clerk and she was responsible for capturing charge sheets in the criminal court. She worked at the human resources before she was transferred to finances. She started working in finance from April 2016. She testified that she was told that there was shortage in finance and that is why she was transferred. She further testified that she was not given any formal training and she was only showed how things are done by her supervisor, Ms Dineo Mokwena. She also testified that she became aware of the investigation sometime in February 2017. She testified that she was told Ms Sthembiso Mazibuko that there was money missing and that she was under investigation. She testified that Ms Mazibuko asked her how she will repay that missing money. The Applicant further testified that she gave Ms Dineo Mokwena to check her work every day. She further testified that she was informed that there was surprise audit coming during February 2017. She further testified that she was asked by Ms Dineo Mokwena to do some overtime and she refused because she had to fetch kids from school. It was then Ms Mokwena phoned her supervisor that she does not want to work. She further testified that during July 2016 and February 2017 was Evelyn who was on maternity leave and Ms Dineo Mokwena. She further testified that Evelyn left and it was herself and Ms Dineo Mokwena who were responsible for receiving 3rd Party moneys. She testified that it was not unusual that the outages takes a week or two weeks. She testified that during the time when the JDAS was not working, they will resort to manual recording in Z263 Cash Register Book. She further testified that there were daily reconciliations. She further testified that she was never appointed as the main Cashier but as a cashier. Ms Mazibuko testified that the Employer never gave a different appointment letter but the same letter and lesser functions to the Cashier. She confirmed that she signed the appointment letter. She further testified that her appointment letter stated that Ms Sthembiso Mazibulo to be her supervisor, but she was assigned to Ms Dineo Mokwena. There were ten employees in Kliptown but only the Applicant and MS Dineo Mokwena were finance clerks/cashiers. The Applicant denied to have any

knowledge about the alleged missing money. She testified that she has never experienced and shortages. The Applicant further testified that she does not understand why she was the only person charged for misconduct. There was no explanation why the Employer charged her alone. She testified that on the 22 February 2017 she was not at work. She reported to work on the 23 February 2017. On the 23 February 2017 there were lot of people cashing their bail moneys. Ms Sthembiso Mazibuko told her that they are going to work until late. Ms Sthembiso Mazibuko further accused her that there was money missing and that she was responsible. Ms Sthembiso Mazibuko requested a statement from her and advised him she will do so the following day. On the 28 February 2017 she decided to write a resignation letter and advised Ms Sthembiso Mazibuko that the statement was available. She then decided to go home. She denied that she has told anyone that she has taken the money. It was put to her that out all the witnesses, except Mr Mahwasane testified that the employment relationship has not broken down. The Applicant further stated that area manager is her relative and they were not in good terms.

18. The Employee further testified that she has never seen the Departmental Financial Regulations Policy. Reference was made to specific provisions which it is alleged she has contravened. The Applicant signed the appointment letter wherein she appointed in terms of Clause 22.2.1 of the the Departmental Financial Instructions. The letter was signed by the Applicant on the 14 April 2016.
19. The Applicant also testified that she has not been trained about the Departmental Code of Conduct. Reference to Code of Conduct and confirmed that she signed the document on the 30 January 2014. She testified that she signed whilst in court and never had an opportunity to read the contents as she was told it was urgent and the messenger was waiting for the document she will refer later.
20. The Applicant further testified that she has 2 children and she was staying in Tshiawelo during her dismissal. She has now relocated to Limpopo. She now has no means of income. She testified that she sign something she did not understand

ANALYSIS OF THE EVIDENCE AND ARGUMENTS

21. The dispute was referred for arbitration in terms of section 191 (1) of the Labour Relations Act 66 of 1995(LRA) (as amended).). Section 192 of LRA provides that in any proceedings concerning any dismissal, the employee must establish the existence of the dismissal. Once the dismissal is established, the Employer must prove that the dismissal is fair. Dismissal is not in dispute in this case.

22. The Employee faced three charges of misconduct. The Charges were formulated as follows: **Charge 1: "Gross Dishonesty:** *it is alleged that on or around 25 September 2016 and 20 February 2017 while at your designated place of work (Kliptown Magistrate court) on various dates between September 2016 and February 2017 in that you took and failed to capture the receipts from the police station with the value of amount of R71 900.00, while you knew it was wrong.* **Charge 2: Contravention of the DFI Policy:** *On or around 25 September 2016 and 20 February 2017 at or near the Kliptown Magistrate court you committed an act of misconduct by not following the Policy when dealing with the state funds and this led to led to the department losing money total amount of R71 900.00 which was not deposited to the Departments' account while you knew it was wrong for you do so".* **Charge 3 Contravention of the Code of Conduct.** *On or around 25 September 2016 and 20 February 2017 at or near the Kliptown Magistrate you committed an act of misconduct in that you failed to execute your duties in a professional and competent manner when dealing with the state funds and this led to the department losing money to the total amount of R71 900.00, which was not deposited to the Department account while you knew it was wrong for you to do so." the applicant pleaded not guilty to all the charges.*

23. I am required to issue an award with brief reasons. I do not wish to offer an exhaustive survey of all the evidence and arguments presented at the arbitration hearing. I have had regard to everything presented to me, and what follows is a brief summary of the evidence relevant to my findings only.

24. The Employer called 5 witnesses and its case centred mainly on the basis that the Applicant acted dishonestly and contradicted the Employer's financial policy and Code of conduct. The Applicant's did not call any other witness and her case is centred on the basis that she was unaware of the Employer's Policies. The Applicant further argued that the Employer was not consistent in its disciplinary processes and was selective because she was the only one charged for the misconduct.
25. It is common cause that the Employee was employed as the senior administration clerk. She was initially employed in the Criminal court and was responsible for, among other things, for capturing of charge sheets. She was later, appointed as human resources officer and finally as the cashier. It was during her tenure as the cashier that the charges were preferred against her for the missing money from September 2016 and February 2017. The missing amounts were the 3rd Party Funds which were bail amounts paid in the Kliptown and Eldorado Park police stations. Evidence was led that these amounts were to be recorded in Z263 Cash Receipt Book. Immediately thereafter, the receipts should be uploaded or recorded in the electronic system called JDAS. Further evidence was led that there were two officials responsible for the receipt of those amounts. The officials concerned were the Applicant and her supervisor, the Employer's first witness, Ms Dineo Mokwena. Ms Mokwena, was, in addition to receiving the moneys, also responsible for checking the Applicant's recording of cash receipt daily. Evidence was that she was responsible for the daily checking of the amounts received by the Applicant.
26. Further evidence was that the JDAS system had some challenges as a result of load shedding or network problems. However, there was an alternative that the moneys receipt must be manually recorded in the J263 Receipt Book, and as soon as the system was available, the receipt should be printed and be uploaded in JDAS. Ms Mokwena's testimony was that the Applicant had the roaming authority to the system, meaning that she was entitled to upload the receipts at another court, Protea Magistrate Court. The evidence led was that, the Applicant failed to account for the receipts during September 2016 and February 2017. Ms Mokwena, as the supervisor, testified that she only became of the problem during February 2017. To be precise, her evidence is that she realized on the 20 February 2017 when she asked the Applicant to print the receipts in Z263. The Applicant only reprinted what

she has already printed. Her testimony is that the Applicant accepted responsibility for the missing money and told her that she was trying to make some plans on how to repay the money. The Evidence summarized resulted in a formal investigation commissioned by the Employer. Forensic investigation confirmed that the amount which was not accounted for was R71 900.00. In fact, the indication were that there has been serious negligence and dishonesty regarding the missing amount. The evidence mainly singled out the Applicant to have been the responsible official for the missing money. However, the findings went further that if the Ms Mokwena was doing her work and properly checking the work by the Applicant, this would have been prevented. The investigator, Ms Baron testified on the report findings. Her testimony was not contradicted in any material respect. My analysis is that there has been money which was not accounted for. The question is whether the Applicant can be held liable for the missing money. The Applicant's testimony is that she has never had any shortages and she accounted for all the moneys. She further testified that she cannot be held liable because, she was not the only one responsible for the receipts of the money. In her testimony she alleged that there were two other officials besides her who received the money. These officials are Ms Dineo Mokwena and another lady who was later moved to another section.

27. There was documentary evidence submitted that the calculation of the amounts involved are comparable to the Applicant's receipts in Z263 Receipt Book. The Applicant could not give any reasonable explanation why her receipts were not uploaded. Forensic investigations and documentary evidence showed that the Applicant failed to account for the missing receipts and /or failed to follow the prescribed procedures in dealing with the receipt of the 3rd Party funds. The Applicant's version was that there were no missing moneys which she can be held liable because in her daily receipts were accounted for. The Applicant's version was contradicted by the forensic evidence.

28. There was evidence led that, whilst the investigations were underway, the Applicant decided to hand in resignation letter. However, the Employer refused to accept the resignation. Her explanation for resignation was that she did that, because of accusations levelled against her, for something she has not done. What is of concern is the fact that when she was informed that there are moneys missing and that she was required to print any outstanding receipts. She decided to hand in a

letter of resignation. Any reasonable person who was innocent, would have remained in her position until such time was cleared of allegations. The Applicant's reasons for resignation are not sustainable.

29. The Applicant further argued that she was not trained in the position she was appointed. Evidence was led that as regards to her position as a cashier she was trained on the job by Ms Mokwena and there was no way she could have done that job without training. Her testimony is that she was not aware of the Departmental Financial Instructions which was the directive on how to handle the 3rd party Funds. The Applicant went further and testified that she did not have any knowledge of the Departmental Code of Conduct. The Applicant was once employed as the human resources officer and yet she flatly denied to have known the contents of the Code of Conduct. The Applicant has signed for the receipts of those documents. The Applicant has denied everything in her evidence without providing any valid or reasonable explanation. She could not explain why the receipts which were not captured were in her name and yet she denied that they were not captured. Evidence was led that some of those uncaptured receipts were found on her desk. Further evidence was that she was also part of the calculations of the uncaptured receipts. Further evidence was that she confessed to be having some problems and she will make a plan how to repay the money. In fact the Employee is blaming all her superiors in particular the area court manager whom she accused of being unfair. The area manager wanted to engage with her before the commencement of the investigation. The Employee is even challenging the forensic investigation. However, there was no evidence brought before to prove that the forensic evidence was not accurate

30. The Applicant also testified that she has not been trained about the Departmental Code of Conduct. Reference to Code of Conduct and confirmed that she signed the document on the 30 January 2014. She testified that she signed whilst in court and never had an opportunity to read the contents as she was told it was urgent and the messenger was waiting for the document she will refer later. The Applicant went further and testified that she has no knowledge of the Departmental Financial Instructions. Evidence was submitted signed the appointment letter wherein she appointed was terms of Clause 22.2.1 of the Departmental Financial Instructions. The letter was signed by the Applicant on the 14 April 2016.

31. My analysis is that there was overwhelming evidence which proved that the Applicant failed to follow the prescribed procedures in handling of the 3rd Party Funds. there was evidence which proved she knew what where the Procedures. in fact the evidence led did not only prove that she failed to follow the DFI but it went further that she contravened the Code of Conduct which she knew or could have been expected to know. I also wish to point out despite the fact that the Applicant alleged to have not been trained about the Departmental Financial Instructions, there is no justification in not following the Policies regulating the handling of the funds which she knew belonged to the Employer. It is therefore my finding that the Applicant was correctly found guilty as charged for contravention of the ***Departmental Financial Instructions*** and the ***Departmental Code of Conduct***

32. The next issue to determine is whether the Applicant acted dishonestly by not disclosing the missing money. Evidence was led that the transaction occurred for a period of at least 6 months. There was no evidence that the JDAS was not operational for the continuous period of months. The only evidence was that there were times when the JDAS was disrupted and as soon as it was operational, the officials were expected to upload the receipts in the system. The Applicant had no intention of reporting that she has failed to upload in the JDAS system. Further evidence was that if Ms Mokwena did not discover the problem, the Applicant would never have come out clean. My analysis is that there was compelling evidence that the Applicant had no intention to come out clean and informed the Employer that there was the money missing.

33. The Arbitrator has a responsibility of determining on a balance of probabilities and select a conclusion from among several conceivable and plausible conclusions. The Arbitrator must assess the probabilities and improbabilities of each of the disputed facts and determine which is the most probable one is. The Applicant has been evasive in responding to some questions. The applicant made bare denials and in fact denied almost everything which was put to her. Having taken into consideration all the evidence before me, my analysis is that the Employer's version is the most probable one. My finding is that the Applicant has been correctly found guilty of gross dishonesty

34. The next issue is to determine whether this could have been prevented. To be precise is that is whether there other officials to have been liable. The Applicant argued that she should not have been charged alone. Evidence was led that Ms Mokwena was an official who was responsible for checking the work by the Applicant including checking that the amounts collected are balancing. She was the Applicant's supervisor from March 2016 to 11 March 2017. She provided the float to the Employee daily and she was supposed to check the work of the Applicant daily and ensure that there are cash ups. In her evidence she claimed if she was not at work, there was no one to check the work of the Applicant. She further testified during December 2016 she was instructed to move files from JDAS to Mojapay. During cross examination Ms Mokwena was asked why was she not charged as she was not doing her work as required that she did not check the applicant's work daily and if she did, she could have realized immediately that something was wrong, she testified that she had a lot of work to do. It was further put to her that if the Applicant is found guilty, she will also be guilty as she failed to perform her duties, she did not respond.
35. Evidence was led and the investigation report by Ms Baron pointed out the shortfalls of the internal controls in the Kliptown court. But what was crucial was the recommendation by the management that there must be disciplinary proceedings to be instituted against the officials involved. The uncontradicted evidence was led that Ms Mokwena was responsible for checking the work by the Applicant. She gave evidence that she was busy uploading from the current DJAS and to Mojapay. She further stated the incident happened in her absence. The transgression happened for a period of 6 months. It very strange how this could not have been prevented. There is only one explanation, and that is Ms Mokwena failed in her duty to do the oversight. In Fact the DFI was very clear that if there system was down, the uploading should be done immediately when it start operating. Ms Mokwena only discovered this this on the 20 February 2021. Although there were no charges preferred against Ms Mokwena because there were no missing receipts in her own name. Ms Mokwena also had obligation to perform her duties in line with the Code of Conduct and departmental financial instructions. It is also my analysis that there was a degree of negligence and dereliction of duty on the side of Ms Mokwena. However, there are no compelling reasons why she was not charged for failing to do her duties. My analysis is that, there is enough evidence to pursue disciplinary

proceedings against Ms Dineo Mokwena.

36. The Applicant further argued that the Employer was not consistent in charging her only and was selective in the institution of disciplinary proceedings and thus failed to apply the so called parity rule.
37. In **SACCAWU & Others v Irvin & Johnson Ltd (1999) 20 ILJ 2302 (LAC); [1999] 8 BLLR 741 (LAC)** the Court held that where there is a number of employees who have committed misconduct that the best one can hope for is reasonable consistency. Some inconsistency is the price to be paid for flexibility, which requires the exercise of discretion in each individual case.
38. In ***G4S Cash Services v NBCFRLI and others (JR 1103/13) ZALCJHB 335(handed down on 06 September 2017)***.” Honourable Acting Judge Baloyi held that it is highly notable that over the years the Courts have exercised caution when dealing with the cases where inconsistency application of discipline happened to be the issue. it further held that it is trite that a plea of inconsistency should to a large extent be sparingly be upheld by Arbitrators with or without invitation, an Arbitrator is required to apply a discretion that is upon consideration of all facts placed before him/her.”
39. in the ***Labour Court Appeal judgment in ABSA Bank Ltd v Naidu and others(2015 36 ILJ 602(LAC)*** held that the parity principle should be applied with caution. Each case should be decided on its own facts and circumstances and the parity principle is not intended to profit or benefit Employees who commit serious acts of misconduct.
40. It is against this background that the Applicant cannot benefit from the inconsistency principle in the present case. Despite the fact that Ms Mokwena has not be charged. The degree of alleged transgression are completely different. Ms Mokwena’s conduct may amount to negligence and dereliction of her duties. On the hand the alleged transgression of the Employee involved dishonesty, contravention of the Employer’s Code of Conduct and departmental Financial Instructions

41. The next issue is to determine whether dismissal was an appropriate sanction in the circumstances. **Item 3(4) of the Code of Good Practice contained in Schedule 8 of the Labour relations Act** provides that: “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....”.

42. The Court manager, Mr Mahaswane testified that the employment relationship has not broken down irretrievably and he is of the opinion that the relationship can be mended. The Applicant can be placed in any other position where money is not involved. I find no logic in this argument more particularly to the fact that Employee demonstrated bare denials throughout the arbitration. However, Mr Mahwasane in his evidence in chief confirmed that the charges were very serious and in the event the Applicant was found guilty, that would have resulted in the breakdown of employment relationship. There was no remorse demonstrated by the Applicant. In fact, she believed that her dismissal was orchestrated by the management.

43. Evidence was led by Ms Mazibuko that the employment relationship has broken irretrievably. There is no more trust between the Employer and the Employee. My analysis is that this one of the cases where despite that fact that the Employee is the first offender on the charges she was facing, the seriousness and the harm caused to the employment relationship, is such that dismissal was appropriate in the circumstances

AWARD

44. The dismissal of the Applicant, **Ms Euland Maswanganyi (Employee)** by the Respondent, **Department of Justice and Constitutional Development (Employer)** was procedurally and substantively fair.

45. The application is dismissed

46. The Respondent is ordered to pay the wasted costs of the Council for the three days for postponements

A handwritten signature in dark ink, consisting of a stylized 'J' followed by a horizontal line extending to the right.

Panelist: Jeffrey Nkuna