



# ARBITRATION AWARD

Panelist: Mashooda Patel \_\_\_\_\_  
Case: GPBC 685-2019 \_\_\_\_\_  
Date of Award: 20<sup>th</sup> September 2019 \_\_\_\_\_

In the ARBITRATION between:

PSA obo Ramogama MS \_\_\_\_\_  
(Union / Applicant)

And

Department of Correctional Services \_\_\_\_\_  
(Respondent)

Union/Applicant's representative: Mr. Abram Moribe \_\_\_\_\_  
Union/Applicant's address: 563 Belvedere street \_\_\_\_\_  
Arcadia \_\_\_\_\_  
Telephone: (012) 432 4800 \_\_\_\_\_  
Telefax: \_\_\_\_\_

Respondent's representative: Mr. Rambasa \_\_\_\_\_  
Respondent's address: \_\_\_\_\_  
Pretoria \_\_\_\_\_  
Telephone: \_\_\_\_\_  
Telefax: \_\_\_\_\_

### **PARTICULARS OF PROCEEDINGS AND REPRESENTATION**

1. The arbitration hearing was held at the offices of the Respondent in Mogwase on the 9<sup>th</sup> December 2019. The Applicant opted to not lead any evidence and based its matter on submissions that were to be filed on or before the 18<sup>th</sup> September 2019.
2. Mr. Abram Moribe, a trade union official from the PSA represented the Applicant. The Respondent was represented by Mr. Rambasa the Regional Coordinator: Legal Services.
3. The Respondent submitted documents marked as Bundle "A" (62 pages). The Applicant submitted a bundle of documents marked as Bundle "B"(25 pages)
4. The proceedings were digitally recorded and no interpretation was required.
5. The process of Arbitration was explained to the Applicant by his representative.

### **ISSUE IN DISPUTE**

6. I must decide whether the dismissal of the Applicant was substantively fair. Should I find any unfairness; the Applicant seeks Reinstatement.
7. During the pre-arbitration stage the Applicant disputed the following in terms of substantive fairness:
  - Dismissal as an appropriate sanction.

### **BACKGROUND TO THE DISPUTE**

8. The applicant commenced employment on the 6<sup>th</sup> March 2006 and held the position of a Correctional Officer Grade The applicant was dismissed on the 2<sup>nd</sup> February 2016.
9. The Applicant was charged, pleaded guilty and dismissed for the following:
  - *The applicant's charge read as follows 'you are alleged to have contravened Resolution 1 of 2006 the disciplinary code and procedures for the Department of Correctional services clause (ii) in that on the 9<sup>th</sup> November 2018 you breach security measures of Mogwase Correctional Centre by being in possession of four cellphones inside the Correctional facilities at D1 without written permission by the delegated authority.*

### **SUMMARY OF THE EVIDENCE AND ARGUMENT**

10. In terms of section 138(7) (a) of the LRA, I am required to issue an award with "brief reasons". I do not propose to offer an exhaustive survey of all the evidence and argument led at the arbitration hearing. What follows is a summary of the evidence relevant to my findings only.

#### **RESPONDENT'S EVIDENCE:**

11. The Respondent led the evidence of one witness which is canvassed below:
12. **Mr. Lehutso Elias**, the chairperson of the disciplinary hearing, his evidence is summarized below:
13. The seriousness of the misconduct and the gravity of the transgression was considered. The misconduct was serious in that it could lead to an escape by the prisoners or smuggling.
14. The Correctional Services Order 4 indicates that officials must not bring cell phones into the prison and the applicant was sensitized and warned, by failing to adhere to same it lead to insubordination.
15. Regardless of the applicant having pleaded guilty the seriousness of transgression cannot be outweighed.
16. All other sanctions were considered however dismissal was the most appropriate.
17. He was not aware as to whether the Applicant communicated with any of the prisoners or public as he was not the investigator in the matter.
18. It was indicated by him that the Applicant cannot be rehabilitated as one would not know what had transpired prior to him having been found in possession of the cellphones and one would not know the outcome after counselling.
19. It was argued on behalf of the Respondent that it is a principle and security rule that cell-phones are not allowed into the correctional Centre, the possession of cell phones in the Correctional Centre is a contravention of DCS policies, cell – phones are permitted into the Centre only when authorized by the Head of Correctional Centre. Such conduct is a serious threat because it can lead to escape by inmates as testified by respondent's witness and this was not challenged by applicant.
20. Although the applicant pleaded guilty that cannot overweight the seriousness of the transgression. Taking into consideration the nature of misconduct and the circumstance under which it was committed that dismissal was the only suitable or appropriate sanction.

#### **APPLICANT'S SUBMISSIONS:**

21. The following submissions were made on behalf of the applicant:
22. The Applicant did not want to leave his post unguarded and proceeded to the kitchen with the cell phones. He had no ulterior malicious motive in being in possession of the cellphones.

23. It was submitted that the Deputy Director of Employee Relations indicated on page 23"B" that the sanction was too harsh and that Management should consider a sanction of one month without pay as a prisoner was not involved. This was vetoed by the Regional Coordinator, Mr. Rambasa. However the Acting Deputy Regional Commissioner being the last decision maker indicated that dismissal was appropriate as the cell phones are smuggled inside to advance criminal activities, which the Applicant has been exonerated in terms of the Investigation report.
24. It was argued that the Applicant did not enter the prison with any intention of being malicious.
25. It was argued that the Applicant was dismissed based on suspicion by the Respondent, there was no tangible evidence to indicate that the Applicant will be aiding prisoners to escape.

#### **ANALYSIS OF THE EVIDENCE AND ARGUMENT**

22. Substantive fairness was placed in dispute.
23. Prior to making a determination on the substantive issues thereof, it must be noted that I have had regard to the Labour Relations Act as amended ('Act') in conjunction with Item 7 of Schedule 8 of the Act( Code of Good Practice: Dismissal ) coupled with the CCMA Arbitration Guidelines: Misconduct.
24. Schedule 8 to the Labour Relations Act, the "Code of Good Practice: Dismissal" gives guidance to an arbitrator evaluating the fairness of a dismissal for misconduct. It provides that any person who is determining whether a dismissal for misconduct is unfair should consider:
- (a) Whether or not the employee contravened a rule or standard regulating conduct in the workplace, and
- (b) If such rule or standard was contravened, whether:
- a. the rule was valid or reasonable
  - b. the employee was aware of the rule
  - c. the rule was consistently applied by the employer
  - d. dismissal was an appropriate sanction for contravention
25. In respect of substantive fairness the following aspect was placed in dispute:
- Dismissal as an appropriate sanction.
26. Was Dismissal an appropriate Sanction?
27. In the Sidumo case, the Constitutional Court proceeded to list the factors that a commissioner must consider when deciding on the fairness of a dismissal. These factors do not represent a



closed list and the weighing that should be attached to each factor would differ from case to case. The factors are:

- The importance of the rule that was breached.
- The reason the employer imposed the sanction of dismissal.
- The basis of the employee's challenge to the dismissal.
- The harm caused by the employee's conduct.
- Whether additional training and instruction may result in the employee not repeating the misconduct.
- The effect of dismissal on the employee.
- The long-service record of the employee.

28. The rule which the applicant breached is the *being in possession of four cellphones inside the Correctional facilities at D1 without written permission by the delegated authority*. The importance of having such a rule in place is in order to deter any smuggling or escape by any prisoners in the Correctional Centre. One must note that this occurred within a Correctional Centre where the prisoners are to be detained according to the sentences that they have obtained. It is of utmost importance within the correctional center to ensure that no prisoner escape as it would defeat the purpose of a correctional facility. It would also be of utmost importance to deter prisoners from smuggling within the Correctional facility as this could lead to injury amongst prisoners or security offices.

29. The respondent set out that the reason the sanction of dismissal was imposed was as a result of the fact that this viewed as a very serious offence. Firstly because the Applicant was sensitized about this procedure and secondly because his conduct was insubordinate and could have resulted in an escape/smuggling.

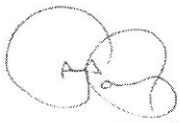
30. The applicant confirmed and pleaded guilty to the charges and his defence to same was that he did not want to leave his post unguarded and proceeded to the kitchen with the cell phones. Can this be a viable defence? The Applicant is aware that one is not allowed to be in possession of cell phones in the facility. The question which follows is why would the Applicant be in possession of cell phones being fully aware that one cannot do so, further to that, reference is made to four cell phones and not just one. Why would a person be in possession of four cell phones within a workplace where he knows that same is not allowed? No explanation is given by the Applicant in this regard and the only inference that I can draw from same is that even though it has been argued that the Applicant was not involved in any malicious activity it can be inferred

that there is a probability that malicious activity was at 'play'. Had the Applicant been in possession of one cell phone, my decision would have differed. I find that it is more probable that based on the number of cell phones the Applicant was in all probability involved in activity that was untoward. I thus find that the defence by the Applicant is not a viable defence to the alleged charge.

31. The harm which was caused was in the form of potential harm which could have resulted in an escape or smuggling within the correctional centre. This in turn affects the reputation of the Respondent.
32. The Respondent has set out that the Correctional Services Order 4 indicates that officials must not bring cell phones into the prison and the Applicant was sensitized and warned in that regard. I thus find that further training would not correct his behaviour.
33. The Applicant has + 13 years service with the Respondent. This is considered to be a long service record and is an aggravating factor in that it would indicate that the Applicant is in a perfect position to know what is expected of him within the facility.
34. No personal circumstances were submitted by the Applicant.
35. I thus find that taking into consideration all the factors as referred to above, dismissal is an appropriate sanction.

#### AWARD

36. The dismissal of the Applicant is substantively fair.
37. The dismissal is upheld.



GPSSBC Panelist  
Mashooda Patel  
North West