

Council Name

# ARBITRATION AWARD

Panellist/s: P M NGAKO  
Case No.: GPBC541/2018  
Date of Award: 23 NOVEMBER 2019

In the ARBITRATION between:

PSA OBO MP MAYISELA

(Union / Applicant)

and

DEPARTMENT OF HOME AFFAIRS

(Respondent)

Union/Applicant's representative: RIAAN SMIT

Union/Applicant's address: \_\_\_\_\_

Telephone: 011 718 5400

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Respondent's representative: LERATO KOBESE

Respondent's address: \_\_\_\_\_

Telephone: 012 406 4145

Telefax: 086 625 0312

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## ARBITRATION AWARD

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### DETAILS OF HEARING AND REPRESENTATION:

- 1.1 This matter was set down before me on the 1<sup>st</sup> of November 2018 and the 7<sup>th</sup> of February 2019 at the offices of the GPSSBC 260 Basden Avenue Lyttelton Centurion. Appearing before me was the applicant who was represented by Riaan Smit an official from the trade union PSA. The respondent was represented by Lerato Kobese an employee in the employment of the respondent. After conclusion of oral evidence parties submitted written closing arguments as agreed on the 12<sup>th</sup> of November 2019.

### ISSUE TO BE DECIDED:

- 2.1 I am required to determine whether the dismissal of the applicant was substantively and procedurally unfair.

### BACKGROUND TO THE MATTER:

- 3.1 Applicant was employed by the respondent at OR Tambo as an Immigration officer before his dismissal.
- 3.2 Applicant when he was dismissed was in the employment of the respondent for seven years.
- 3.3 Applicant does not dispute that on the 30 September 2015 he processed the two ladies Liu Yu and Xiauo hong, and stamp 534 was allocated to him on that day.
- 3.4 He does not dispute he is the one who was captured by ACSA cameras assisting the two ladies.
- 3.5 Disciplinary charge sheet against the applicant is dated 26 July 2016
- 3.6 Applicant was charged and found guilty on the following allegations during the disciplinary hearing:

#### Allegation1

It is alleged that you committed an act of gross negligence in that on or about 30 September 2015 at or near OR Tambo International Airport, your arrival stamp number 534 was used to

endorse the passport of Liu Yu Passport No: E06689263 whilst she was in possession invalid work permit.

#### Allegation 2

It is alleged that you committed an act of gross negligence in that on or about 30 September 2015 at or near OR Tambo International Airport, your stamp arrival number 534 was used to endorse the passport of Zhu Xiaohong Passport No: E06689263 whilst she was in possession of an invalid work permit

#### Allegation 3

It is alleged that you committed an act of gross negligence in that on or about 30 September 2015 at or near OR Tambo International Airport, your user ID H25446193 was used to capture Zhu Xiaohong's movement on the Movement Control System while she was in possession of an invalid work permit.

#### Allegation 4

It is alleged that you committed an act of gross negligence in that on or about 30 September 2015 at or near OR Tambo International Airport, your USER ID H25446193 was used to capture Liu Yu's movement on the Movement Control System whilst she was in possession of invalid work permit.

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

#### RESPONDENT'S CASE

4.1 The first witness called by the respondent was Matthews Eddie Nkuna who after being duly sworn in testified as follows: that the applicant was not supposed to process the two travellers because their permits were invalid, the applicant was trained to identify the permits as invalid the TRP on the permit is not of the same font, and the permits of the two ladies were issued at the head office while they were supposed to have been issued from the mission house from their country, and the date of the permits were earlier than the date the travellers arrived in the country while the applicant in the movement control system was aware that the record show that it was the first time travellers were travelling into the country. The applicant should have referred the two travellers to his

supervisor and should have processed them and as result his conduct was gross negligent as he was experience and knew what steps he should have taken.

4.2 Under cross examination it was his evidence that he can't tell where the permits were issued, and the travellers were supposed to have applied for their permits at the mission house in Hong Kong.

#### APPLICANT'S CASE

6.1 Applicant Petrus Mhlupeki Mayisela after being duly sworn in testified as follows: he confirmed that he is the one who processed the two lady travellers from china. it was his evidence that if there was something wrong with permits when he scanned the permits they would not have generated a TRP number, he denied that he was gross negligence as the procedure he followed was in line with his training and it was his evidence that he did not refer the ladies to his supervisor as there was nothing he identified and also the movement control system processed their movement into the country.

6.2 Under cross examination he testified that the verification tool he used to determine the authenticity of the permits was the scanner and it was his evidence that there was nothing wrong with the permits of the two travellers

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

##### **PROCEDURAL FAIRNESS**

7.1 The applicant indicated his dismissal was procedurally unfair because the respondent delayed in instituting disciplinary proceeding against him, and respondent failed to comply with PSCBC Resolution 1 of 2002 paragraph 2 (2.2) which states that a hearing must be held in a prompt, fair and consistent manner. I then advised the respondent representative that she must lead evidence and justify the delay in instituting disciplinary proceeding against the applicant. The respondent became aware of this incident against the applicant on the 30<sup>th</sup> of September 2015, but the charge sheet against the applicant at page 1-3 of the bundle is dated 26/7/2016 employer took almost 10 months before instituting disciplinary proceedings

against the applicant. The explanation received is that a submission was submitted and went through the chain of commands to investigate the applicant, such process can't take a month, and I do not have evidence before me what caused the delay after the submission of the memorandum. The applicant referred me to the Constitutional Court decision in *Stokwe v MEC Department of Education Eastern Cape and others* (CCT33/18) 2019 ZACC 3. The court at para 72 held:

*"[72] In Moroenyane, the Labour Court considered factors which this court initially propounded in Sanderson. In the context of assessing delays in criminal prosecutions, and applied those factors to determine what constituted an unfair delay in the context of disciplinary proceedings. It held:*

- "(a) The delay has to be unreasonable. In this context, firstly, the length of the delay is important. The longer the delay, the more likely it is that it would be unreasonable.*
- (b) The explanation for the delay must be considered. In this respect, the employer must provide an explanation that can reasonably serve to excuse the delay. A delay that is inexcusable would normally lead to a conclusion of unreasonableness.*
- (c) It must also be considered whether the employee has taken steps in the course of the process to assert his or her right to a speedy process. In other words, it would be a factor for consideration if the employee himself or herself stood by and did nothing.*
- (d) Did the delay cause material prejudice to the employee? Establishing the materiality of the prejudice includes an assessment as to what impact the delay has on the ability of the employee to conduct a proper case.*
- (e) The nature of the alleged offence must be taken into account. The offence may be such that there is a particular imperative to have it decided on the merits. This requirement however does not mean that a very serious*

*offence (such as a dishonesty offence) must be dealt with, no matter what, just because it is so serious. What it means is that the nature of the offence could in itself justify a longer period of further investigation, or a longer period in collating and preparing proper evidence, thus causing a delay that is understandable.*

*(f) All the above considerations must be applied, not individually, but holistically.”*

- 7.2 The respondent did not provide me with a reason for the delay except that a submission was made to investigate the allegation against the applicant which submission can't last almost 10 months. I expected the respondent to lead evidence from the investigators what caused the delay in concluding the investigation and preferring charges against the applicant, as there is no explanation before me for the delay, taking into consideration the above points holistically I find that as result of the delay which is unexplained by the respondent the dismissal of the applicant is found to be procedurally unfair.

## **SUBSTATIVE FAIRNESS**

- 8.1 The applicant on balance of probabilities is found guilty on allegation 1 and 2 preferred against him because he was trained by the respondent to identify irregularities that he should have identified on the work permits of the two Chinese ladies. According to the records on the system of the respondent, it was the first time the two ladies came into the country on the 30<sup>th</sup> of September 2015, and their permits were issued in July 2014 and; if they had been in the country before the 30<sup>th</sup> of September 2015, there would have been prior movements on the system which is not is not recorded on the system and applicant should have taken that into consideration when he processed the two ladies. he should have been able to identify that the respondent in its permits does not use the words “general working permit” but used the words “general working visa” and does not use the words on the permit “work” but “work visa” and also he failed to take into consideration the font of the TRP on both permits were not the same which an immigration officer who have been trained and with seven years' experience should reasonably have identified them and referred the ladies to his supervisor. As result the applicant on balance of probabilities is guilty of gross negligence for stamping

the passport of the two chines ladies while she should have reasonably been aware that their work permits were invalid.

8.2 I have found that the applicant should have reasonably been aware the work permits of the two ladies were invalid, and the applicant does not dispute he is the one who processed them when they came into the country on the 30<sup>th</sup> of September 2015; and he does not dispute that he is the one who captured them on the movement control system and because the respondent has proven on balance of probabilities that the work permits were invalid, applicant is found guilty on gross negligence on allegation 3 and 4.

9.1 APROPRIATE RELIEF: I have found the dismissal of the applicant to be procedurally unfair, but substantively fair. As result of the prejudice that applicant suffered in instituting disciplinary proceedings against him, one month compensation under the circumstances in my view will be appropriate. I have found the dismissal of the applicant to be substantively fair and the allegation against the respondent is gross negligence which goes at the heart of the employer and the employee relationship. As result there is no reason for me to interfere with the sanction of dismissal imposed on the applicant by the respondent. As a result a sanction of dismissal is imposed for each of the 4 allegations.

#### **AWARD:**

10.1 The dismissal of the applicant is found to be procedurally unfair but substantively fair;

10.2 The respondent as result is ordered to pay the applicant one month compensation being R19 279 25 (nine teen thousand two hundred and seventy nine rand and twenty five cent;

10.3 The respondent is ordered to comply with this order of compensation within 15 days after receipt of this award;

10.4 There is no order as to costs.

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