



ARBITRATION AWARD

Panelist: RG Pieterse _____
Case No.: GPBC427/2020 _____
Date of Award: 31 July 2021 _____

In the ARBITRATION between:

PSA obo MP Khangala _____
(Union obo Applicant)

and

Department of Correctional Services _____
(Respondent)

Union/Applicant's representative: Sam Mbatha _____

Union/Applicant's address: Public Servants Association _____

Telephone: _____

Telefax: _____

E-mail: henry.hall@psa.co.za _____

Respondent's representative: Isaac Magoro _____

Respondent's address: Department of Correctional Services - JHB _____

Telephone: (011) 933 7056 _____

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E-mail: Isaac.magoro@dcs.gov.za _____

DETAILS OF HEARING AND REPRESENTATION

- [1] This is the award in the arbitration between PSA obo MP Khangala (hereinafter referred to as the Applicant) and Department of Correctional Services, (hereinafter referred to as the Respondent) that was held on 28/08/2020, 08/12/2020, 02/02/2021, 25/02/2021 and 31/05/2021.
- [2] The arbitration was held under the auspices of the General Public Service Sectoral Bargaining Council (GPSSBC) in terms of section 191 of the Labour Relations Act 66 of 1995 as amended (LRA) and the award is issued in terms of section 138(7) of the LRA.
- [3] Both parties were present at the arbitration. The Applicant was represented by Mr Sam Mbatha, an official from the Public Servants Association (PSA) and the Respondent was represented by Mr Isaak Magoro.

ISSUE TO BE DECIDED

- [4] Whether the dismissal of the applicant was procedurally fair.

IN LIMINE

- [5] The Respondent raised a point *In Limine* that the Commissioner / Council does not have jurisdiction to arbitrate the matter as it is not one that relates to unfair dismissal based on procedure, but it relates to the unlawfulness of the dismissal.
- [6] The Commissioner decided to proceed with the matter to get more facts and detail about the matter.

BACKGROUND TO THE ISSUE

- [7] The Applicant was challenging the procedural fairness of the dismissal.
- [8] The Applicant cited that the Correctional Services Act, 11 of 1998 gives authority to the Department Investigation Unit (DIU) to investigate acts of misconduct related to theft, fraud and maladministration as mentioned in section 95A and B of the Correctional Services Act, 111 of 1998.
- [9] The Applicant further cited that the Code Enforcement Unit should then proceed to prosecute that matter / disciplinary hearing in terms of section 95A and B of the Correctional Services Act, 111 of 1998. The Applicant further referred to Circular 3 of 2018 signed by the National Commissioner authorizing the DIU and CE to deal with section 95A and B as investigators and prosecutors and not by the Regions or Management Area.

- [10] The Applicant stated that the Johannesburg Management Area investigated his case which involved acts of misconduct referred to in section 95A and B of the Act which as actually supposed to be referred to the DIU for investigation and the Code Enforcement Unit for prosecution.
- [11] The Applicant was investigated for fraud and theft by Management Area.
- [12] The Applicant was charged and subjected to a formal disciplinary hearing.
- [13] During the hearing, the applicant's representative raised a *point in limine* stating that the proceedings was unlawful as the Management Area investigated the matter and subsequently convened a disciplinary hearing which was not in compliance with section 95A and B of the Correctional Services Act, 111 of 1998.
- [14] The Chairperson ruled that the proceedings were properly convened since it was convened in terms of section 95A and B of the Correctional Services Act, 111 of 1998.
- [15] The Applicant then decided to abandon the proceedings and waived his right to be heard.
- [16] The Chairperson proceeded with the disciplinary hearing in the absence of the applicant and the applicant was subsequently dismissed.

SURVEY OF EVIDENCE AND ARGUMENT

- [17] It is the argument of the Respondent that the Council lacks jurisdiction to arbitrate this matter as the applicant is challenging the lack of authority by the Management Area to investigate the misconduct as it relates to fraud and theft. Put differently, the Applicant is challenging the lawfulness of the dismissal.
- [18] The Applicant's argument is based on the fact that the investigation and subsequent prosecution of the applicant was supposed to be done by the DIU and CEU respectively.
- [19] The entire case of the applicant is based on the fact that the investigation was conducted by the Management Area and not the DIU in terms of section 95A and B of the Correctional Services Act, 111 of 1998. The applicant's contention goes further to the extend that the disciplinary hearing should have been initiated by the Code Enforcement Unit as per section 95A and B of the CSA.

- [20] The Applicant argued that the dismissal of the applicant was procedurally unfair because the Respondent did not comply with section 95A and B of the Correctional Services Act, 111 of 1998.
- [21] The Respondent submitted that the Council / Commissioner can only deal with the fairness of a dismissal and not the lawfulness of a dismissal.
- [22] In terms of the LRA7.11 form the applicant indicated that the dismissal was procedurally unfair, but did not list the reasons why he says the dismissal was procedurally unfair.
- [23] It is my view that the applicant's whole case is about the circular 3 of 2018 and section 95A and B that the Respondent did not comply with section 95A and B of the CSA and not about the procedural fairness of the dismissal.
- [24] It is my view that the non-compliance with section 95A and B of the Correctional Services Act, 111 of 1998 does not relate to the procedural fairness (or unfairness) of the dismissal but rather to the lawfulness (or unlawfulness) of the dismissal.
- [25] The Council / Commissioner may only determine the fairness of dismissals and not the lawfulness of dismissals.

CONCLUSION

- [26] Having considered all the submissions and arguments from both parties I am satisfied that the Commissioner lacks jurisdiction to determine this dismissal dispute since it relates to the lawfulness of the dismissal and not the fairness of the dismissal.

AWARD

- [27] In the premises I make and deliver the following award:
- [28] The matter is dismissed.
- [29] There is no order as to costs.



Panelist: RG Pieterse