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ARBITRATION AWARD

Panellist/s: Motseki A. Mokoena
Case No.: GPBC 112/2022
Date of Award: 15 July 2023

In the ARBITRATION between:

PSA obo MARITZ B.P.

(Union / Applicant)

and

DEPARTMENT OF WATER AND SANITATION

(Respondent)

Union/Applicant's representative: Mr. N. BAARTMAN

Respondent's representative: Mr. H. MOTALANE

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

The arbitration process was scheduled on 17 November 2022 at the premises of the respondent in Bloemfontein, Free State province. The Applicant PSA was represented by Mr N. Baartman an official of the union, the affected member Mr. P.B. Maritz was present. The Respondent Department of Water and Sanitation was represented by Mr. H. Motalane Labour Relations official. The proceedings were digitally recorded.

ISSUE TO BE DECIDED

I must decide whether or not the alleged conduct of the respondent amounts to unfair labour practice.

BACKGROUND TO THE MATTER

The Applicant is employed by the Respondent as Assistant Director Health and Safety. He was charged and found guilty of gross negligence and he was sanctioned to three months salary and final written warning. The applicant found the trailer at the roof top parking and moved it to his place of residence. When the applicant removed the trailer, it was not barcoded, it was barcoded at his place of residence. Supply chain allocated the trailer to Larry Crisp after being advised to do so by Corporate Service Manager. The applicant brought back the trailer and locked it around the pillar at central parking (opposite king kong) using his own chain and lock. The applicant notified communications section that the trailer was moved to the central parking. The trailer stayed there for about 2 years (2015-2017). The applicant stopped at the central parking after he had finished paying the subsidized car. The private vehicles should pay for their own parking at the central park. The applicant is the one who found out that the trailer was no more there. The investigation was done by Tibane L. (Principal Security Officer). The second investigation commenced in 2019 which led to the disciplinary action of the applicant. The trailer amounted to R29 990,00
The parties signed the pre-arbitration minutes.

SURVEY OF EVIDENCE AND ARGUMENT

EVIDENCE OF THE APPLICANT

The 1st witness: Petrus Benjamin Maritz testified under oath as follows:
His duties involve 95% Health and Safety issues and 5% Security issues. The principal security officer Mr. Tibana is doing 10% of security issues. When a person wants to buy something he must make a request memo requesting an asset. Once the asset is delivered the person who requested it must sign and if he/she is absent the supervisor will sign for it. Supply chain will inform the asset holder and barcode the asset and thereafter it will be allocated to the asset holder. The policy is not clear on how long does it take to be allocated to asset holder but is allocated immediately to the user once bar coded. The asset holder is the responsible person for that asset according to the policy. I took the trailer to my house because roof parking does not have physical security, there is easy access for people to steal it as it an open space and it was not locked. After removing it to my place I enquired from supply chain who is responsible for trailer and they indicated to me that it was Mr. Chris from communication section. I took them to my residence to barcode it. I then took it to Central parking near King kong because there is 24 hours service and the place is locked between 6 p.m. and 6 a.m. and the other trailers are parked there as well. After losing parking rights at King kong I parked at environmental affairs parking which is where my wife is working. One day my wife did not go to work and I paid R20 to park at Central parking and noticed that the trailer is not there and I enquired from Mr. Crisp about its whereabouts and he indicated that he does not know. I requested Mr. Tibana to do investigations and he came with the report. I locked it with my own chain and lock as I was worried that during the day people may come and take it. I reported to either Kubeko or Koloku I am not sure. If the employer is saying I did not show reasonable care to state property they must show me which measures I should have taken as I do not understand which measures I should have taken. I suffered prejudice because I lost medical certificates, I lost a car benefits and pension.

Under cross examination he testified that he is not head of security. To manage is to oversee the functions listed on Bundle A1 p.36-37. It is not stated that I am responsible for five percent security but that is my view. The role of Principal Security Officer is to take charge of physical security, investigations including that of lost or damaged items, managing of private security company, insuring that asset removal forms are filled and kept at reception so that when removal takes place someone can check whether there is removal approval or not. The reason to take it to my place is because roof parking does not have a security. The I am talking about is not contracted to the department it is that of the landlord the ones contracted by the department is the one when you enter the office at the access control. There are two private company securities the one contracted by the department of Water and Sanitation which are managed by the principal security officer and the ones at the parking area are controlled by the landlord. I was the only one with access lock. The spare keys were not allocated to Mr. Crisp as he said he does not know that the trailer was allocted to him. There were no keys left at the security they were all with me. I do not agree that I had the sole responsibility with regard to the loss of the trailer. I did not leave the trailer unattended as it was a parking area where there is private

security. I did not inform anyone to look after the trailer as it there was a standard procedure to record everything. I do not have a procedure but I can refer to the investigation report. I agree that there is no standard procedure between the department of water and sanitation and the private security they are employed by the landlord. I agree that the investigation was not approved by loss control committee that is why there was another investigation. The missing trailer was reported to the police by Mr. Tibana and I did not report it as it is the responsibility of the asset holder in terms of the policy. I disagree that I was negligent with the property of the state.

CLOSING ARGUMENT AS SUBMITTED BY THE APPLICANT

The applicant found the Trailor at the parking area which was not safe and took it to his residential place for safety. He was further told the people responsible (SCM) for bar coding. He was further told that the Trailor has been allocated to Larry Crisp from communication section. He took the trailor back and parked it at the central parking and used his chain and lock to safeguard the Trailor.

The applicant made sure that communication section and Mr. Larry Crisp are aware that the Trailor is parked at the central parking. The Trailor parked there for a period of about two years, and it was also established during investigation that the communication section was not in need of the Trailor. The applicant parking rights expired, and he changed the parking to that of his wife and when he came back one day, he found that the Trailor was no more there. He then went to communication section to find out if there is anyone who is using the Trailor and he found out that the trailer had disappeared.

The applicant reported on the Trailor and instituted the investigation. The second investigation was instituted which found that the applicant was negligence in taking care of the departmental asset. During cross examination, Mr. Makola agreed that the when the Trailor was parked at the central parking locked around the pillar it was safe. He also acceded that the applicant took necessary steps to safeguard the Trailor when he locked it around the pillar.

In ***MV Stella Tingas and Another: MV Stella Tingas: Transnet Limited t/a Portnet v Owners of the MV Stella Tingas and another 2003 (2) SA 473 (SCA)*** the Court averred that 'Gross negligence is where the conduct in question… must involve a departure from the standard of the reasonable person to such an extent that it may properly be categorized as extreme; it must demonstrate, where there is found to be conscious risk-taking, a complete obtuseness of mind or, where there is no conscious risk-taking, a total failure to take care. If something less were required, the distinction between ordinary and gross negligence would lose its validity'

The question that needs to be answered first is whether the applicant failed to take care of the departmental asset and secondly, who was the person who was supposed to be held accountable for the safe guarding of the asset. It is clear from the evidence that the applicant had made means to safeguard the departmental asset and informed the asset holders who did not care about the asset. In the first place it was not the responsibility of the applicant to look after the Trailor as he was not the asset holder. Commissioner it is our submission that the applicant was only used as a scapegoat and the real offenders were left unpunished. On page 74 of the applicant bundle, clause 8.4.2 states clear that in event of the loss the asset, the asset holder should be held accountable.

In conclusion the applicant should not have been found guilty during the disciplinary hearing because the steps that he took to safeguard the departmental asset are plausible considering that it was not even his responsibility to do so. The communication section and

Mr. Larry Crisp were the once who were supposed to face disciplinary hearings because the Trailor was allocated to them, and they were informed about the whereabouts of the Trailor, but they did not care.

EVIDENCE OF THE RESPONDENT

The 1st witness: Donald Hlopheho Makola testified under oath as follows:

I was a Chief Security Officer at the Department of Water and Sanitation and I was reporting to Mr. Maritz. In the investigation I found that the applicant took the trailer to his place and later returned it later to the parking area he was using. It was chained around the pillar and locked. After sometime he stopped using that parking and upon his return he found the trailer missing and instructed Mr. Lancelot Tibane to investigate the trailer. After he stopped parking he never advised his subordinate then that he should safeguard the trailer as he is no longer parking there. The investigation by Tibane was under his control. It was his responsibility to ensure that there is adequate measures to protect the assets of the respondent. There are no camaras. In the central parking there is no one responsible for in and out going cars but it is someone responsible for boom gate who is not a security personnel. The department has a key procedure of key control which gives guidance to the protection of the assets of the department in terms of key control i.e The department does not give provision for us to use our personnel property to safeguard its assets. Necessary arrangements were supposed to be made. In this case personal equipment was used. The applicant should have communicated to department security measures on side in terms of protection.

Under cross examination the witness testified that the reason for the trailer to be taken home by the applicant was to safeguard the trailer. I won't agree that that the central parking is a safe area as there is no security in every floor despite that they are there for 24 hours. I agree that asset management procedure does not preclude someone to use personal keys to safeguard the assets of the department. The trailer was allocated to Crisp without his knowledge but I do not agree that he was supposed to be held accountable. I agree that when an asset has been allocated to someone, he should be held accountable. It is not to my knowledge that Crisp was charged. The applicant indicated that it was communicated to communication department/section that the trailer is back but the investigations revealed that Crisp only gained knowledge that he was the asset holder after the trailer went missing. The version I got is that the applicant locked the trailer on the pillar but I cannot confirm that. When it was put to him that the applicant should not have been charged because he took reasonable care of the trailer his comment was at that specific moment yes. On the follow up question that there is no moment that the applicant unlocked the trailer his response was that in 2016 was required to move goods and it was used. The trailer was not taken care of in that the public has access central parking area. There were no steps taken to ensure that someone else was taking care that the trailer was safeguarded. On the question that there was a chain and lock which safe guarded the trailer the witness testified that between 2015 to 2017 the trailer was safe guarded in that Maritz between 2015 to 2017 Maritz had the padlock key until it was reported stolen.

The asset holder had responsibility to safeguard the trailer. The trailer was used before it disappeared (see p.11, annexure 2, 6.7.2). The department of Water and Sanitation and the public at large had access. Since the applicant had taken steps to lock the trailer around the pillar he could have handed the key to communication officer or to the asset holder as he had prior knowledge that the trailer belonged to communication office.

CLOSING ARGUMENT AS SUBMITTED BY THE RESPONDENT

The Central parking was open for public and accessible to everyone. There was a boom gate with the cash point and securities at the entrance were not responsible to identify owners or users of any vehicles entering and exiting but only responsible to ensure that users of the parking pay for time spend in the parking.
A trailer was parked at the open parking with the small chain and slot. The fact that Mr Maritz chained the trailer with the slots and chain which both were not discovered after the missing of trailer is sufficient to show that the slot was either taken or chain broken and the latter chain would not have been used by reasonable person to chain the trailer of such magnitude.
The chaining of the trailer against the post or pillar by Mr Maritz cannot be considered as reasonable grounds to exonerate him from responsibility of its lost.
The same parking has no Department Water and Sanitation security to take care of any items of the department and it was left vulnerable and unattended.
On many occasions the boom was opened for free access to the parking by the public and same confirms that it was unsafe for the trailer to be unattended.
It is worth noting that no item of the department is left or stored in that parking because it is unsafe and unsecured to be parked there.
It is knowledgeable for Mr Maritz that there are vehicle breakings in that parking.
Mr Maritz knew that there was sufficient space for him to store the trailer at Kruger drift Dam and the trailer was supposed to have been left there for safety reasons.
Lastly Commissioner that a trailer was in his sole and direct control and use, and a person whom was allocated the trailer was deprived of the control due to Mr Maritz conduct.

Roof top parking is safer, and it has CCTV cameras with a locked boom gate and hence it has 24 hours private security guards.
The roof top parking has an exit point which it closes at six o" clock (18h00).
The same trailer was initially stored at the roof top parking and never went missing
We still have a big trailer parked at roof top parking for almost a year and still secured.
Lastly that the private security at roof top are not contracted to the Department, however register whatever is parked/left behind in the parking

Negligence is a principle related to an employee's obligation to act with care, and not to perform as well as they are capable of performing. As noted in recent Arbitration award which I will cite below, the requirements for dismissal for a single act of negligence are (1) that the employee failed to exercise the standard of care and skill that can be reasonably expected of him or her, (2) that the lack of care and skill manifested itself in an act or omission that could have caused loss to the employer, (3) that the loss or potential loss to the employer resulted or could have resulted from the employee's negligence act or omission, and (4) that the negligence must be gross.

In ***Transnet Freight Rail v Transnet Bargaining Council and Others (2001 6 BLLR LC),*** it was stated that negligence can be defined as a failure to comply with the standard of care that would be exercised in the circumstance by a reasonable person and this was

reiterated in the Arbitration Case of ***Petrus Frederik Rautenbach v Cashbuild (Pty) Ltd [FSBF2638-17],*** when it was restated "that negligence is the failure to comply with the standard of care that would be exercised in the circumstances by a reasonable person. Negligence can manifest in either acts or omissions.
Having given the above Commissioner it evident that Mr Maritz is the Assistant Director: Health & Security responsible to manage Security Officers, provide health & safety in the workplace, demand plan for safety & security, overseeing of CCTV cameras, facilitate vetting process and budgeting.

It was evident that Mr Maritz was responsible to manage the Principal Security Officer (Mr L Tibane) based on the following Security functions; physical security, investigation of loss items, manage private security company contracted to the department, investigation of lost assets and access control.

Further Commissioner to indicate that Mr Maritz acted grossly in neglecting Departmental Trailer which resulted to have been stolen as follows:
Been the Manager responsible for Health, Safety and Security in the Department.
He removed the departmental Trailer to his place of residents after realising it is at risk of being stolen, he however returned the trailer after 2-3 after being barcoded to non-departmental security parking (Central Parking).
He chained the Trailer around the pillar using his personal chain and lock.
He failed to share the lock with either his subordinate (Mr Tibane), Mr Larry Crisp, Supply Chain Management and Communication officials.
After he lost his parking rights Mr Maritz realised after 6 to 8 months that the Trailer is no longer where it was parked.
He failed to report the matter to the South African Police Services (SAPS) but rather shifted such responsibility to his subordinate.
He knew that the Central Parking does not have dedicated security personnel attached to guard for 24 hours.
He failed to ensure that there are adequate security measures to protect the departmental trailer.

Procedurally Commissioner if I am borrowed any of the state assets irrespective of being an Assets inventory and/or Asset holder it is my responsibility to take care of such property because is under my custodianship. The reasoning by Mr Maritz that he is not an assets holder is misplaced.

The Supreme Court of Appeal in the case of Transnet Ltd t/a Portnet v Owners of the MV Stella Tingas & Another [2003 (2) sa473 SCA] stated that "to qualify gross negligence the conduct in question…… must involve a departure from the standard of the reasonable person to such an extend that it may properly be categorised as extreme, it must demonstrate, where there is found to be conscious risk taking, a complete obtuseness of mind or, where is no conscious risk taking and a total failure to take care.

Given the above case Commissioner it is evident that Mr Maritz failed to apply conscious risk taking because at all material times he wanted to shift responsibility to those officials whom he failed to inform when his parking rights were expired. He even failed to inform his subordinate (Mr Lancelot Tibane) in order to look after the trailer and/or provide him with the spare key for the padlock. Commissioner his evidence cannot be trusted and/or be relied on. Therefore, to submit that you disregard his testimony as it lacks credibility.

ANALYSIS OF EVIDENCE AND ARGUMENT:

It is trite law that he/she who alleges must prove, thus the Applicant has a duty to convince the Council that he is entitled to succeed with his claim. The parties testified at length but I will confine myself to that evidence which serves relevance to the dispute before the council. The evidence from both parties reveals that most issues are common to parties. What is disputed in the main is whether or not failure by the applicant to indicate that he is no longer parking at the parking where the trailer used to be parked amounted to gross negligence. I am not saying that the rest of the evidence is irrelevant, it is rather an ancillary vein to the aorta of this dispute. It came to the attention of the respondent that the trailer was at the applicant's place and it was bar coded there on the advice of the applicant. At no stage was it ever testified that it became a concern that the trailer was at the applicant's place without permission. There is evidence common to parties that the respondent was aware of the trailer under the control of the applicant for more that two years. The trailer was allocated to communications section/department of the respondent, however there was no evidence tendered that the trailer was under the care of any other person other than the applicant. I do not understand why the asset holder was not given responsibility as the policy so require. If an employee is charged and found guilty of gross negligence it must be established that a reasonable man in the position of that employee could have acted differently. In order to do that the employer/respondent has to show what is it that the reasonable employee could have done differently than the applicant and when such is evaluated with the conduct of the applicant it should outweigh the conduct of the applicant. I do not find the respondent to have proven negligence. I do find it somehow that the applicant used his equipment to keep the trailer safe, but at the same time I am tempted and thus conclude that, it was the only option if the asset holder does not take care of the trailer. The evidence of Mr. Makola is that the applicant took reasonable care of the trailer from 2015 to 2017. The question which the respondent did not cover or lead evidence on is what is that was expected from the applicant from 2017. In the absence of convincing evidence to the effect that the applicant was expected to act in a particular manner it is difficult for me to confirm negligence. During his examination in chief the applicant testified that if the respondent is of the view that he (applicant) did not show reasonable care of the state property they must indicate what measures was he supposed to take. The respondent did not lead evidence to that effect; therefore it would be proper to conclude that the respondent is unable to prove that there was no reasonable care. The respondent did not serve me with reasons why the authority over the trailer was not given to communication department/section from the moment the trailer became part of the state property. The applicant in his own volition alerted the respondent that the trailer is at his place and requested them to bar code it. If at all the respondent wanted to take its control from the applicant he should have done so at that stage. The applicant testified that he had not been parking at central parking for two to three months and the day he went to park there he noticed that the trailer is missing and took action there and then. The respondent, I conclude so guided by testimony, was for years generally comfortable about the asset (trailer) under the control of the applicant, the negative attitude was only ignited when the trailer got missing. The respondent did not lead evidence to the effect that failure by the applicant failure to

communicate that he is no longer parking at the central parking is the cause for loss or trailer to be missing. I am not convinced that by virtue of not parking at the central parking that in itself is a ground to prove or conclude that it is the cause of the trailer to be missing, which dictate one to arrive at a conclusion of gross negligence.

The applicant testified that he did not keep the trailer at roof parking because it has no security. The respondent in 2016 used the trailer and the question is after using it what was the reason for not handing it over to the asset holder. I find it strange why the respondent did not deal with the trailer in a manner required by the policy. The evidence by Makola that Crisp indicated during the investigstions that he does not know that the trailer belonged to his department is not plausible as it is reflected under common cause issues that the trailer was allocated to Larry Crisp and further that the trailer was moved to central parking. The respondent did not show what would have been the difference between an instance where the trailer got lost while the applicant was still parking the car on daily basis and when he was no longer parking. There is no evidence that if the applicant did not stop parking at the central parking there is no possibility of the trailer being lost. From the evidence presented it is clear that the respondent has been reckless with regard to the trailer or assets as they did not ensure that there is compliance with its policies and procedures. Thus without any other evidence proving gross negligence I am not convinced that the applicant is guilty.
When taking the totality of all the evidence into account it is my view that the version of the applicant is more probable than that of the respondent. The applicant has therefore succeeded to discharge the onus on its part. The question on whether onus was discharged was dealt with in **Selamolele v Makhado (1988) (2) SA 372 (VSC) at pages 374J-375B** as follows "*Ultimately the question is whether the onus on the party, who asserts as state of facts, has been discharged on a balance of probability and this depends not on a mechanical quantitative balancing out of the pans of a scale of probabilities of the evidence but, firstly on the qualitative assessment of the truth and/or inherent probabilities of the evidence of the witnesses and secondly, the ascertainment of which of the two versions, is the more probable*".
It is my finding that the applicant has succeeded to prove that the respondent committed an unfair labour practice as his conduct did not amount to gross negligence.

AWARD

The Respondent's conduct amount to unfair labour practice.
The applicant's three months suspension without pay and final written warning are set aside.
The Respondent is ordered to pay the Applicant his salary of three months calculated as follows **(R 44 625,99c x 3= R133 877,97c) one hundred and thirty-three thousand, eight hundred and seventy-seven rands and ninety-nine cents only** and all the benefits that the Applicant lost during the suspension period, less income tax and other statutory and contractual obligation.
There is no cost order.

Name:
Motseki A. Mokoena
(GPSSBC) Commissioner