



In the

GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL

Held in Lebombo Port of Entry - Komatipoort

Date: 12 February 2021

CASE NO: GPBC 964/2020

In the matter between

PSA obo Sylvia Nkosi

Applicant

And

Department of Home Affairs

Respondent

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

- [1] The hearing was scheduled under the auspices of GPSSBC heard before me on the 4th of December 2020, 18 and 19th of January 2021. The Applicant was represented by Ms Pamela Letebele from PSA and the Respondent by Mr Stephen Tsie.
- [2] Applicant submitted a bundle of documents that I labelled Bundle A and the Respondent submitted their document bundle as well that I labelled Bundle R. Proceedings were electronically recorded.



PRELIMINARY ISSUES

- [3] The Applicant raised a *point-in-limine* that the Respondent failed to comply with the *clause 2.2 of Resolution 1 of 2003* in that ***“Discipline must be applied in a prompt, fair, consistent and progressive manner”¹***. The Applicant contended that the Respondent has also failed to adhere to *clause 8.8 of Resolution 1 of 2003* that says ***“Departments must finalise appeals within 30 days, failing which, in cases where the employee is on precautionary suspension, he/she must resume duties immediately and await the outcome of the appeal while on duty”²***
- [4] The Applicant representative contended that the alleged misconduct happened on the 17 of December 2018 but the Applicant was only served with the hearing notification on the 8th of July 2019. She was terminated on 26th of August 2020 whereas she launched the appeal on the 3rd of July 2020. This is deemed as violation of collective agreement.
- [5] The Respondent did not dispute the sequence of events but indicated that there were other departments involved that dragged the investigation and completion of the hearing. I will deal with this in the arbitration award on my analysis.

ISSUE TO BE DECIDED

- [6] I have to decide whether the Applicant's dismissal was fair or not.

BACKGROUND TO THE DISPUTE

- [7] The dispute emanates from the dismissal of the Applicant on the 26th of August 2020. At the time of dismissal the Applicant was employed by the Respondent as an Immigration officer effective from 03 March 2003 until her ultimate dismissal on the 26th of August 2020. At the time of dismissal the Applicant earned a monthly gross salary of R18, 725. 00. The applicant was dismissed after being found guilty on the following allegations/charges:

¹ Clause 2.2 of Resolution 1 of 2003

² Clause 8.8 of Resolution 1 of 2003



Charges:

- [8] You, Ms Ntombikayise Sylvia Nkosi, employed by the Department of Home Affairs, and therefore an officer of the Public Service of South Africa, are hereby charged with misconduct in terms of the Public Service Co-ordinating Bargaining Council Resolution No. 1 of 2003 as amended:

ALLEGATION: 1

- [9] It is alleged that you committed an acts of misconduct in that on or about 17 December 2018 at or near Lebombo Port of Entry, you contravene Section 6 (30 (a) of the Immigration Act 13 of 2002 (as amended) by endorsing entry stamp number stamp number 563 in the passports of the Mozambique nationals to enter Republic of South Africa who did not identify or present themselves as prescribed.³(sic)

Name & Surname	Passport number	Stamp number	TRP
Sara Joao Nhachale	15AN06442	563	57
Meriamo Armeu Sumbane	15AN08590	563	57
Ana Admiria Bernado	13AF93952	563	57

ALLEGATION: 2

- [10] It is alleged that you committed an acts of misconduct in that on or about 17 December 2018 at or near Lebombo Port of Entry, you captured the entry movement of the following Mozambique nationals on the Enhance Movement Control System (EMCS) to enter Republic of South Africa.⁴

Name & surname	Passport number
Sara Joao Nhachale	15AN06442
Meriamo Armeu Sumane	15AN08590
Ana Admiria Bernado	13AF93952

³ Allegations on charge 1

⁴ Allegations on charge 2



SURVEY OF EVIDENCE AND ARGUMENTS

RESPONDENT'S CASE

[11] The Respondent led its case through witnesses and documentary evidence. The first witness was Sergeant Selby Zikalala from the SAPS. He testified under oath as following:
He is employed by the SAPS under Flying Squad. On the 18th of December 2018 he was on duty with Sergeant Khoza when they received a call from CIG informing them about white Toyota Quantum with a North-West registration coming from Malalane to Nelspruit. They were informed that it has a lot of passports in it and their owners are not in the taxi.

[12] The informer followed the taxi until Mataffin bridge where they stopped it. There were six people in the taxi and the bags. They asked to search the vehicle and upon searching they found a bag in the front seat of the taxi. The driver said it is his clothes that are there and upon searching they find clothes and a black plastic with 27 passports, South African and Mozambican passports. When the driver was asked about the passports he said they were given to him by a queue marshal. They then took the driver to Home Affairs office in Nelspruit where they find Mr Mtolo. They explained what transpired and Mr Mtolo confirmed that this is violation of Immigration Act and the driver was taken to police station where he was charged for violation of Immigration Act.

The Respondent called its second witness Mr Adolf Stassen. Mr Stassen testified under oath that:

[13] He is employed by the Respondent as the assistant Director Immigration Services and a Shift Manager for Shift B. He testified that when the traveller is cleared, whether for arrival or departure the traveller must present him/herself in front of the Immigration Officer with their passport for scrutiny. The Immigration Officer upon scrutinizing the traveller and their documents she/he will then put the passport on the eMCS to scan the details of the passport, if it is clear the Officer endorse his/her stamp on it. In case of overstay or a traveller being suspect or fugitive of law, the system will create a hit and the Officer will be blocked until a supervisor comes and clears or unlocks him/her.



- [14] Third witness, Mr Eric Nendauni was called to testify. Upon taking the oath he testified as following;
- In that he is employed by the Department of Home Affairs as Deputy Director – Counter Corruption and Investigations. He testified that he was in Nelspruit around December 2018 when he received the call from DPCI (Hawks) telling him that there is a driver that si arrested with multiple passports in his possession in Nelspruit. The driver was taken to Nelspruit SAPS where he was charged for unlawful possession of passports. Of the passport confiscated 3 of them were stamped with 563 which is a stamp belonging to Ms Nkosi.
- [15] He further said the driver was asked where he was taking the passport to and where are the owners, he said they were in Marikana in North-West. The matter is before the court and it is scheduled to sit on the 15th of February 2021. The magistrate presiding over this matter insisted that the Immigration Officers involved with this must be criminally charged too. He also stated that to have someone's passport or be in possession of so many passports you must have a power of attorney endorsing you to do so.
- [16] During cross-examination he agreed that he didn't know the whereabouts of the travellers, but by the mere fact that their passports were in a kombi yet they were not there an assumption can be made that they were not in front of the Immigration Officer when their passports were endorsed, should they have presented themselves their passports should be with them not with the driver.

APPLICANT'S CASE

- [17] The Applicant, Ms Sylvia Nkosi testified under oath as following:
- She was employed by the Department of Home Affairs as Immigration Officer effective from 03 January 2001 until her ultimate dismissal on the 26th of August. On the 17th of December 2018 at about 01h00 in the morning, three (3) travellers came to her for admission from Mozambique. She performed the normal identification process and upon being convinced that they were the travellers in the passports she endorsed her stamps and scanned their passports on the eMCS scan.



- [18] On the 6th of February 2019 Mr Mtolo came to the Border and informed her of the arrested driver with passports endorsed by her. He said she stamped the passports without the travellers presenting themselves in front of her as per Immigration Act. He then told her to write the statement which she did, but because she was not in agreement with the statement that Mr Mtolo told her to write she did not sign.

ANALYSIS OF ARGUMENTS AND EVIDENCE

- [19] Dealing with the evidence presented before me I will firstly deal with a *point-in-limine* raised by the Applicant party on commencement of the proceedings about the failure of the Respondent to comply with the provisions of collective agreement Resolution 1 of 2003 *clauses 2.2 and 8.8* respectively. The Applicant contends that the hearing was not prompt as the appeal was filed on the 3rd of July 2020 and the outcome was issued after 30 days on the 26th of August 2020.
- [20] The collective agreement is explicit to the fact that if the employee is out on precautionary suspension pending finalisation of the hearing he/she must report back to work immediately if 30 days passes without the matter being finalised. In this case, the Applicant was at work while awaiting for the outcome of the hearing therefore she suffered no prejudice and the Respondent did not contravene the collective agreement. I therefore conclude that there is no contravention to the collective agreement.
- [21] Secondly, I must deal with the fairness of dismissal and both substance and procedural aspects. In this case, the Respondent bears onus to prove that the dismissal was the appropriate sanction and the burden of proof is submitted to the Commissioner for consideration. It is common cause that the Applicant stamped and endorsed the passports of the travellers on the 17th of December 2018. It is also common cause that passports were confiscated from a driver in Nelspruit whom it is alleged he found them at the border gate. The bone of contention is whether the travellers were present before an Immigration Officer when their passports were endorsed or not.



- [22] The Respondent only relies on the fact that if the travellers were present before the Immigration Officer on the day their passports were endorsed, their passports would be in their possession not that on the taxi driver. It is the Applicant's arguments that she captured the travellers on the 17th of December 2018 and the passports were only found the following day the 18th of December 2018 in Nelspruit and she has no control of that. The Respondent indicated that the driver did not get the passports from the Applicant but from someone else who was called by the queue marshal in Marikana to bring him those passports.
- [23] The Respondent drawn an inference and concluded from the fact that among those passports 3 of them were stamped by the Applicant thus means the travellers were not in front of the Immigration Officer. The Applicant is dismissed for capturing and endorsing her stamps on the passports of the travellers that were not in front of the Immigration Officer and the Respondent is relying on circumstantial evidence to prove its case on the allegations levelled against the Applicant. I could not hear or see any evidence led by the Respondent that indeed proves that the travellers were indeed not in front of the Immigration Officer except the fact that passport were found in a taxi in Nelspruit.
- [24] I am expected upon analysing the facts put before me, on balance of probabilities give my decision on which case is more probable than the other. In preponderance of evidence and viewing it in its totality, I cannot ignore the question that what would be the passports of the travellers that were to travel into the country, passed all the scrutiny and be permitted to the Republic but they decide to give their passports to someone else. It is my consideration that a passport is a golden ticket that one can never lose or give it to anyone especially when they travel in the foreign country. How possible one can enter a foreign country and after entering the country give their passports to someone else?
- [25] On the other hand, my preponderance cannot ignore the fact that the passports were endorsed in the early hours of the 17th of December 2018 and the taxi only get stopped and driver arrested on the 18th of December 2018, more than a day since the passports were stamped. The evidence led by the Respondent's witness does not in anyhow put the Applicant in the crime scene as the driver did not mention the Applicant and/or even police charging the Applicant on the proceeds of crime as the allegations are also criminal.



[26] Under these circumstances, having to consider the totality of evidence I have to determine the plausible inference and in so doing, I find it difficult to place the Applicant in the place of crime that she has endorsed the travellers in the country by endorsing her stamp in their passports when they are not in front of her. I therefore find the evidence of the Applicant more plausible and probable than that of the Respondent therefore the dismissal of the Applicant is unfair.

AWARD

[27] I therefore make the following order:

1. The dismissal of the Applicant is substantively unfair.
2. The Respondent is ordered to reinstate the Applicant the previous position without any loss of benefit.
3. The Applicant must report for duty on the 22nd of March 2021
4. Respondent to pay the Applicant an amount of R112, 350. 00 minus statutory deductions on or before the 22nd of March 2021.

Sivuyile Tshingana



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GPSSBC Arbitrator