Physical Address:
260 Basden Avenue,
Lyttelton, Centurion,
Pretoria

Postal Address:
PO Box 16663,
Lyttelton, 1040

Tel: 012 644 8132
Web: http://www.gpssbc.org.za

In the

GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL

Held in Bethal

Date: 8 October 2024

CASE NO: GPBC1634/2022

In the matter between

PSA obo DT Mahlangu **Applicant**

And

Department of Justice and Constitutional Development **Respondent**

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

[1] This is an arbitration award issued in terms of section 191(5)(a) of the Labour Relations Act of 1995. The hearing was scheduled under the auspices of GPSSBC heard before me on the 11 July 2023, 1 - 2 November 2023, 7 – 8 March 2024 and 1-2 July 2024 respectively.

[2] The Applicant was represented by Mr Jakobus Heynecke of PSA and the Respondent was represented by Mr Stephen Masuku. Proceedings were in in vernacular, translation services were obtained from Mr Mndeni Mkhwanazi and were electronically recorded. Parties submitted their bundles which I labelled them as “Bundle A” for the Applicant bundle and the Respondent bundle was labelled Bundle R.

[3] Parties submitted a signed pre-arbitration minutes that aligned all the issues in dispute and in common cause, including the remedies sought out of the proceedings and were recorded. Parties agreed to submit their closing statements/heads of arguments by no later than 14 June 2024.

ISSUE TO BE DECIDED

[4] I had to decide whether the dismissal of the Applicant by the Respondent is procedurally and substantively or not as per the section 191(1)(a) of the LRA as *amended*.

BACKGROUND TO THE DISPUTE

[5] The dispute emanates from the dismissal of the Applicant by the Respondent on the 7 October 2022. At the time of dismissal, the Applicant was holding a position of a Clerk of the court responsible for violence and assault section; earning a salary of R14, 800.00 per month. Mr Mahlangu was charged with 17 counts of allegations pertaining to fraud and gross dishonesty; however, out of the 17 charges he was only found guilty on 3 charges namely charge 2, 11 and 14 respectively.

[6] During the arbitration proceedings the Respondent withdrew charge 2 and the Applicant remained with two counts levelled against him and were as following:

You are charged with an act of misconduct of fraud, the details of which are set out in Annexure A on the date mentioned in Colum B, at or near Bethal Magistrate of the Department of Justice and constitutional development you issued fraudulent JDAS receipt number mentioned in Colum E under the username of Ms BM Ngwenya to the amount mentioned in Colum G to a member of the public mentioned in Colum H in respect of summons number mentioned in Colum D. As a result of your action the department suffered a financial loss to the amount mentioned in Colum G:

ANNEXURE A: MR DT MAHLANGU							
No of charges **A**	**Date of the transaction** **B**	**Nature of misconduct** **C**	**Summons number** **D**	**JDAS receipt number** **E**	**Court date** **F**	**Amount** **G**	**Name of the person** **H**
11	2018/09/25	Fraud alternative Gross Dishonesty	54-17939	61618AOG 000980	2018/10/16	R100.00	VW Masina
14	08/08/2018	Fraud alternative Gross Dishonesty	40-29588	61618AOG 000750	06/09/2018	R150.00	CC Skosana

SURVEY OF EVIDENCE AND ARGUMENTS

RESPONDENT'S CASE

[7] The Respondent led its evidence by calling Advocate AM Ndiitwani who presided over the hearing of Mr Mahlangu and issued the dismissal sanction as a witness on procedural aspect. The Applicant argued that Advocate Ndiitwani lacked jurisdiction to preside over the hearing as he is not the employee of the Respondent but an employee of Road Traffic Management Corporation therefore; by virtue of not being the employee of the Department he lacked *locus standi* to preside over the hearing of Mr Mahlangu.

[8] He further supported his argument by invoking *Resolution 1 of 2003 paragraph 7.3 b*. which states that:

> *"The **chair of the hearing** must be **appointed by the employer** and must be an **employee on a higher** grade than the representative of the employer."*

He further argued *that the definition of the employer according to Resolution 1 of 2003* states that:

> *"employer" means the Head of the Department or **any member of his department** designated to perform the specific action, unless the context indicates otherwise*

[9] The Applicant went further to raise another point in that the disciplinary proceedings must be nullified as the chairperson did not have the notes of the hearing including the outcome and records except the sanction, by virtue of this information not available renders the process null therefore it must be dismissed and the Applicant be reinstated without loss of income and/or benefit.

[10] Third issue that he raised was the substantial delay in finalizing the matter and claim to have the employer-employee relationship is irretrievable broken. He stated that the misconduct was known in September 2018 only to finalize the hearing and dismiss the employee four years later. By virtue of this delay without any explanation nor suspension of the employee doesn't render broken trust relationship. He stated that according to *resolution 1 of 2003* the reasonable period is 60 days and if the employee is on suspension.

[11] Advocate Ndiitwani stated that Road Traffic Management Corporation is the State Owned Company SOC and the employer of Mr Mahlangu is the State not the Department. Therefore, the argument that he cannot chair the hearing as he is an outsider should not be considered as the RTMC is a state organ and the Department is the State department too.

[12] The Respondent called Ms Eljo van Eeden as the second witness and she testified under affirmation that she is the employee of the Respondent as the Court Manager. She stated that she knows Mr Mahlangu as the Administration Clerk at non-finance section. She stated that she was informed of fraudulent activity in September 2018 by Ms Abigail Mfuse and Ms Gugu Sithole who presented two documents to her of fake JDAS receipts for admission of guilt issued by Ms Benzi Mahlangu, who at the time was on maternity leave. They told her they found this on Mr Mahlangu's desk and they suspect him using Ms Mahlangu's name to issue those fake receipts to the public.

[13] She stated that she informed Ms Sithole to keep the documents safe whilst she is doing her own investigation. She also stated that at that time the office has moved away from JDAS pay system but to a new MOJA pay system so it wouldn't be possible to issue receipts on JDAS but on MOJA Pay and Mr Mahlangu and other clerks do not have access to it. In Noveber 2019, Ms Benzi Mahlangu confronted her about the use of her name in issuing fraudulent admission of guilt receipt through JDAS system, she told her that the matter is being investigated.

[14] During cross-examination he couldn't state the reason for her to withhold this information and not execute disciplinary processes against Mr Mahlangu. She mentioned the involvement and/or investigation by police as well in this regard.

[15] The Respondent further called another witness Ms Buyi Mfuse who testified under affirmation that she is the Senior Admin Clerk for the Respondent stationed at Bethal Magistrate Court. She stated that she previously worked as he Main cashier at cash hall and a Counter Clerk where she was working with admission of guilt fines, bail, court fines and compensation. She stated that she reported on duty with Ms Gugu Sithole on the 18 September 2018 and she went to non-financial section as per the norm.

[16] Ms Sithole went to collect Control Documents on Mr Mahlangu's desk where she found the receipts of admission of guilt issued via JDAS system but bearing the name of Ms Benzi Mahlangu (then Ngwenya). She then came over to witness that and she was confused how did this happen as Ms Ngwenya was on maternity leave. They then took an initiative to report this o the court manager Ms Van Eeden who told them not to tell anyone about it as she will investigate further.

[17] Ms Mahlangu came back on leave on the 08 of October 2018 and they went to Ms Van Eeden asking if they should inform her about the ordeal in her absentia she said no. A week later seeing that nothing is happening they decided to inform Ms Mahlangu about their discovery.

[18] The above version was confirmed by Ms Sithole when she was called in as the witness, also confirming the veracity of her sworn affidavit in this matter. However, both witnesses were very evasive during cross-examination which they blame it on the matter being old and memory fading. What they could corroborate on was the fact that they found those receipt on Mr Mahlangu's table/desk and he was not there when they got them.

[19] The respondent went further to call fifth witness Ms Lindiwe Mahlangu who testified under affirmation that on the 25 of January 2019 she was at her work station. The printer of Mr Mahlangu was not working so he was connected to her printer. He then printed a document bearing a name of Mrs Benzi Mahlangu and she took it, Mr Mahlangu grabbed the paper and said it is his. She told Mrs Benzi Mahlangu about this incident and she told her it was not for the first time she heard about that incident.

[20] The Respondent then called the sixth witness Mr Cliff Skosana who testified that he was issued with a ticket fie by the traffic officers on the 04 July 2018 for driving a vehicle with a cracked windscreen. He then came to Bethal Magistrate Court on the 08 of August 2018 for reduction of a fine to Mr Mahlangu. He stated that Mr Mahlangu issued him a reduced fine of R200.00 and he paid it. He also came back to come for a reduction of fine for his wife after getting this discount from Mr Mahlangu and her ticket fine of R500 was reduced to R200 by Mr Mahlangu.

[21] During cross-examination he had difficulties in answering questions about the location of the office and the layout of the place where Mr Mahlangu met him, through his evasiveness he cried of memory loss due to the matter being old and loss of exact memory.

[22] Then another witness by the name of Mr Victor Masina was called in. He testified under affirmation that he is the retired school principal who received a fine for driving without wearing a seatbelt. He then came to Bethal Magistrate Court on the 25th of September 2018 for reduction of fine. He was directed to Mr Mahlangu who came and met him through the glass window and reduced his R500 fine to R100 and he was given a slip showing that his fine for admission of guilt is paid. During cross-exam he stated that he did not clearly see Mr Mahlangu as he was referred to him by one ladies at the foyer where he came for reduction of fine.

[23] Lastly the Respondent called Mr Morodi Monye who testified under affirmation that he is the Senior Forensic Investigator for the Respondent as from 01 April 2015 until to date. He stated that he holds National Diploma in Internal Auditing and he has more than 12 years' experience as an investigator. He made reference to the investigation report attached on bundle R on page 26 where he stated that he was the lead investigator of this incident.

[24] He was given this task after receiving an anonymous tip about the maladministration and misappropriation of public funds that were meant to go to the public purse but instead going to the pockets of individual named Doctor Mahlangu. He stated that although the report states that it was initiated by Mr P. Nel who signed it off as his, in actual fact he was the person who investigated the matter but as a matter of internal procedures the investigation is assigned to the Director and he appoints an investigator and that investigator submits a report to the Director, the Director will sign it off as if it was his/her own report, hence there is no mention of him in the report but Mr Nel the retired director.

[25] He further mentioned that he conducted an investigation by interviewing all the relevant parties and they submitted their sworn statement as shown in the bundle, he commissioned their affidavits as the commissioner of oaths and made a recommendation that Mr Mahlangu be charged after he found substantial evidence from the affidavits given by the witnesses he talked to; who also happened to come and testify on the events of what happened.

[26] During cross-examination he maintained that although the investigation report is neither authored by him nor signed off by him but Mr P. Nel; it is all his work and the departmental investigation process is done in a such manner, no investigator signs the investigation report but only the Director that does so.

[27] This was said despite the affidavits signed by him as a commissioner of oaths, however, when it comes to the report he said the director has a last say and does the report as if he is the one compiled it. Upon being asked about the director not called to be the witness to this, he stated that the director is no longer in the employ of the Respondent as he has retired.

APPLICANT'S VERSION

[28] Mr Mahlangu testified under affirmation that he was employed by the Respondent in 2005 as the Clerk of the Court, he then worked as Cashier Asset Controller and subsequently the Clerk at Domestic and Harassment unit then Senior Admin Officer Asset Controller and also a document controller until his ultimate dismissal in October 07, 2022. In this whole period of the debacle he was at work and was never suspended except the period where he was shifted to Secunda due to bail conditions.

[29] Mr Mahlangu stated that he wouldn't dispute what they alleged to have found in his desk, he was not there and he never saw what they found. Secondly, they work on an open space office that is shared among other clerks except the finance section. He stated that they were 6 at non-financial section sharing an open space office with each one having their desk, he couldn't put any document there as it would be easily lost.

[30] He stated that people would always come to the office for the reduction of fine, he will direct them to an official appointed by the municipality to deal with that function and he has never reduced any fine for anyone. He further stated that the investigators took the tower of his computer and never returned it until his dismissal, as the witnesses alleged that he reproduced those admission of guilt on fake JDAS from his computer the evidence should have been there.

ANALYSIS OF ARGUMENTS AND EVIDENCE

[31] Section 1(d)(iv) of the LRA explains the purpose of this *Act* in that it has the responsibility to promote effective dispute resolution in the workplace. This is coupled by *Clause 2.2 of* PSCBC Resolution 1 of 2003 that governs the management of discipline and resolution of disputes in the public sector where it says:
"Discipline must be applied in a prompt, fair, consistent and progressive manner".

[32] The above assertions are quoted in this case as the Applicant raised the issue of the substantial delay in finalizing the disciplinary hearing against him. In that, by virtue of a delay of up about to 4 years the Respondent has waived his right to discipline the him. Furthermore, the fact that the employee has been in the employ for four years post misconduct proves that there is no love lost between the employer and the employee, therefore, the broken trust relationship issue must fall.

[33] Also, the fact that the Chairperson of the disciplinary hearing was coming from an outside company Road Traffic Management Corporation other than the senior employee of the department as per the provisions of the collective agreement that governs employee relations between the employer and employee, renders the process unfair and irregular as the Respondent has contravened the provisions of the Collective Agreement on who must chair the hearing in the Department.

[34] Although the respondent argued that the RTMC is a state-owned enterprise, I am of the view that the Applicant is correct to say it is not the Department as the collective agreement dictates. I cannot in my capacity as arbitrator undermine the provisions of the Collective Agreement concluded by the parties to resolve their disputes and go against that. Resolution 1 of 2003 that is used to discipline the Applicant explicitly explains that the employer is the department, it doesn't extend it to state-owned enterprises and the RTMC is not covered by the provisions of the said resolution. I therefore find the argument of the Applicant plausible in this regard as the employer undermined the collective agreement by unilaterally appointing an external chairperson to chair an internal matter without following provisions of the Collective Agreement.

[35] Dealing with the issue of substantial delay in instituting and completing disciplinary enquiry, the Applicant raised the waiver of the right by the Respondent to institute and discipline the employee if the employer failed to act promptly as per the provisions of the same collective agreement quoted above. He argued that in the case where the employee is suspended, the collective agreement makes a provision of 60 days to institute and complete a disciplinary enquiry not unless there are compelling reasons to go beyond that and in *casu,* there is no reasonable justification for the delay.

[36] The employer's argument that the investigation took long and there were police who were involved was not backed by any proof or evidence of that except *viva voce* argument which I cannot consider without corroboration by any form of evidence. In *Moroenyane v Station Commander of the SA Police Services, Vanderbijlpark*[1] in paragraph 42 the Court held:

> 'In summary, I do not believe that what may be considered to be a lengthy delay in the institution, and then conclusion, of disciplinary proceedings, can *per se* lead to a conclusion of unreasonableness and unfairness. A disciplinary hearing cannot be directed to be aborted just because there is a long delay. More is needed.
> What must always be considered, in deciding whether to finish off disciplinary proceedings because of an undue delay, is the following:
>
> 42.1 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.
>
> 42.2 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.
>
> 42.3 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.
>
> 42.4 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.

[1] [2016] JOL 36595 (LC) at para 42.

42.5 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.

42.6 All the above considerations must be applied, not individually, but holistically".

[37] The learned judge did not reminisce his words when he penned this judgement quoted above on the substantial delay in completing the disciplinary enquiry and the failure by the Respondent to comply with the above deliberations holistically renders the process unfair.

[38] Coming to the substantiveness of the case; I am bound by the provisions of Schedule 8: Code of Good Practice: Dismissal on *item* 7 states it clear 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, or of relevance to, the workplace; and

(b). if a rule or standard was contravened, whether or not-

(i). the rule was a valid or reasonable rule or standard;

(ii). the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;

(iii). the rule or standard has been consistently applied by the employer; and

(iv). dismissal was an appropriate sanction for the contravention of the rule or standard.'[2]

[39] In the above case, the Applicant is accused of corruption and/or fraudulent activity by giving members of the public a fictitious discount on their admission of guilt fines and pocketing the rest of the money upon himself. When doing so, he uses the names and/or details of Mrs Benzi Mahlangu and this was discovered at the time when Mrs Mahlangu was on maternity leave. The evidence collected was found on his desk when he was not around and he was not informed about the evidence of fraud found on his table but this was directed to the manager.

[2] Item 7 of Schedule 8: Code of Good Practice: Dismissal

[40] The strange part is that no one bothered to confront Mr Mahlangu about this, from the witnesses who discovered this Ms Buyi Mfuse and Ms Gugu Mahlangu up to the Court Manager Ms van Eeden who advised them to make copies and return the papers to the desk of Mr Mahlangu. I am further puzzled by the determination to have Mr Mahlangu be dealt with by Ms Mfuse and Ms Sithole to even go as far as putting pressure to the manager to take action and taking it upon themselves defying their manager's instruction not to tell Mrs Benzi Mahlangu about the incident but on their own accord they informed her in any way although instructed not to.

[41] What I also cannot find in order is the fact that the Court Manager didn't escalate this matter to forensic department for investigation, but the forensic department acted on an anonymous tip and took it upon themselves to investigate Mr Mahlangu's alleged misconduct and the above evidence was adduced through statements given by the witnesses. From the evidence of the two witnesses of Mr Cliff Skosana and Mr Victor Masina, I completely failed to draw any inference to their testimony as they were both too evasive and vague in answering questions during cross-exam citing the memory loss due to length of the period of the misconduct.

[42] Without repeating their evidence, the two witnesses failed to put the Applicant into the crime scene in that indeed those documents were given to them and they had copies as per the allegation that they were issued with fake JDAS receipts, none of them produced the receipt except those that were alleged to be found in the table of the Applicant in his absence. The Labour Court in *SACCAWU obo Dlamini v Commission for Conciliation, Mediation and Arbitration and Others*[3] held recently that:

> *"The company investigated the incident because Chauke "felt" and "suspected" that the employee had a bottle that contained something "similar" to lemon juice. What followed was a violation of the employee's right to privacy, disguised as an investigation. His bag was searched without his permission and in his absence. The substance contained in the bottle allegedly found in the employee's bag was tasted in his absence."*

[43] The evidence of the Respondent is clear in that the Applicant was not in his desk when this was found and anyone could have left the receipts there. The Applicant's privacy was violated as someone allegedly went to his work station and took information in his absentia and used it against him. If there was no sinister motive to Mfuse and Sithole, they should have called the court manager to the crime scene and call Mr Mahlangu to come and respond to the fraudulent discovery.

[3] SACCAWU obo Dlamini v Commission for Conciliation, Mediation and Arbitration and Others (JR2281/21) [2024] ZALCJHB 180

[44] However, they decided to hide this from him, even when Mrs Mahlangu came back from leave, they still hid the information to the accused but divulge it to Mrs Mahlangu in order to put pressure to the manager to act. This further exacerbated by the investigators who also, without involving Mr Mahlangu obtained statements from witnesses and confiscating the tower of his desktop without any explanation and keeping with them despite claiming to have completed the investigation.

[45] It is with the above deliberations that after listening and balancing the probabilities in this matter I find the version of the Applicant more plausible and more probable than that of the Respondent, as a result, the application by the Applicant to declare his dismissal both procedurally and substantively unfair to succeed.

REMEDY/RELIEF SOUGHT

[46] The Applicant sought both retrospective reinstatement without any loss of income and; if I find in his favour that indeed the process was flawed and was outside the parameters of the *Collective Agreement* Resolution 1 of 2003 entered into between the parties in dispute here to craft a way to resolve disputes. Section 193(4) of the LRA states that:

> *"An arbitrator appointed in terms of this Act may determine any unfair labour practice dispute referred to the arbitrator, on terms that the arbitrator deems reasonable, which may include ordering reinstatement, re-employment or compensation."*

[47] As per the provisions of the *Act* here above, I am appointed to determine the fairness of the dismissal on procedural and substantive grounds therefore I will not award any compensation for the breach of process, however, the *Act* directs us to award employee with a reinstatement not later than the date of employee's dismissal without any loss of income. It with this notion I believe the retrospective reinstatement with a backpay counted as following will suffice as equitable and just to remedy the unfair dismissal of the employee: **R340, 400.00** = Basic salary of **R14, 800 x 23 months.**

AWARD

[45] In light of the above deliberations in make the following order:

1. The Applicant's application to have his dismissal be declared procedurally and substantively unfair succeeds.
2. The Applicant's dismissal by the Respondent is declared procedurally and substantively unfair.

3. The Respondent is ordered to reinstate the Applicant to the post he occupied prior his dismissal or similar position without loss of any income or benefit.
4. Applicant to report on duty by **Monday, 1 November 2024.**
5. Respondent is ordered to pay the Applicant a backpay amounting to **R340, 400.00 = Basic salary of R14, 800x23 months** within 30 days of issue of this award.
6. No cost to order is made.

Sivuyile Tshingana

……

GPSSBC Arbitrator