

ARBITRATION AWARD

Case Number: GPBC1061-2021

Commissioner: Solomzi Mpiko

Date of Award: 1 June 2023

In the **ARBITRATION** between

PSA obo S Gantile

(Union/Applicant)

And

Department of Justice

(Respondent)

**Union/Employee's
representative:**

Samkelo Mzuku (Union Official from PSA)

Union/Applicant's address:

Telephone:

Telefax:

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Employer's representative: ***Yamkela Methusi (Respondent's LR Manager)***

Respondent's address:

Telephone:

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Details of the hearing and representation

1. The arbitration of the alleged unfair dismissal dispute between the Applicants, **Sisa Gantile** and the Respondent (**Department of Justice**) was held virtually, on 26 November 2021 and the last sitting was held on 24 January 2023 at the Respondent's premises in Mthatha. The parties were to submit written closing arguments on or before 8 February 2023.
2. The Applicant was present and was represented by **Samkelo Mzuku**, a union official from **PSA**. The Respondent was represented **Nolusindiso Nyangiwe**, a **State Attorney** appointed by the Respondent. She was later replaced by **Yamkela Methusi**, the Respondent's Labour Relations Manager.
3. The proceedings were manually and electronically recorded. **Thuthula Gwija** provided interpretation services and was later replaced by **Violet Gwija**.
4. Both the Applicant and the Respondent submitted bundles of documents which were admitted into the record and marked Annexure A and Annexure R respectively.

Issues to be decided

5. I have to decide whether or not the dismissal of the Applicant was fair. The Applicant challenged both the substantive and procedural fairness of his dismissal. The Respondent's consistency or otherwise in the application of the disciplinary measure.

Background to the Issues in dispute

6. The Applicant was employed by the Respondent as an Administration Clerk on 1 September 2008. He was charged and dismissed for Gross Dishonesty for a alleged misconduct that happened on 21 January 2019. He was dismissed on 23 June 2021. At the time of his dismissal he was earning a salary of R15828.00 (fifteen thousand eight hundred and twenty eight rand) per month. He denied that he was guilty of the charges and wanted retrospective reinstatement as relief.

Survey of evidence and argument

The Respondent's case

7. **Thabile Mendu**, was the Respondent's first witness. She testified under oath and stated that was employed by the Respondent as an Administration Clerk since 2016. They normally close the office door at about 3.30 pm for them to do the round up of the day's work. After closing the door, they would allow only court personnel who would come to pay bail or the admission of guilt fees.

8. The Court Clerk was the one who was to let them know if the bail was granted. She (the court clerk) would provide them with two documents that were written the bail amount and the postponement date. When she received those documents she would know that the bail was granted.
9. On 21 January 2019, after they had closed the door at 3.30 pm, she was at the office with Zibanzi Dila (Dila) who was the main cashier, when the Applicant came to pay bail money for a detainee Boniswa Swapi. She was the one who was supposed to take the bail money from the Applicant as she was the one taking cash on that day. She was busy and she asked Dila to assist taking the money from the Applicant.
10. Dila's duty did not involve receiving cash so she assisted her on how to receive the money by asking her if certain requirements were met. Dila received the amount of R400.00 (four hundred rand) from the Applicant. She also saw the money and the writing on the charge sheet that said "pay bail R400.00). Dila handed the money over to her. She did not capture it on the system because she already signed off. She then put it under money received after banking hours (ABH) and processed it on the system the following day.
11. She confirmed that the original charge sheet was to be used in processing the bail however, they normally accepted a copy. The charge sheet that was brought in by the Applicant was a copy.
12. On 28 January Magistrate Mbonjeni came to their office and wanted to know who processed the money for Baliswa Swapi. He was pointed out to Dila's signature as the one who attended to the matter. The Magistrate told them that they were not supposed to process bail for Baliswa Swapi because she was not released on bail. They were shocked to hear that because they did see the writing that said "pay bail R400.00".
13. The "Pay bail" writing would be written by a Magistrate and to them, it normally meant that the person in custody was to be released on bail. She did not know who wrote "Pay bail" in the case of the Applicant. They were asked to write statements about what happened. They accepted that they were guilty and apologised because the bail was not granted. The Respondent charged them and were given a final written warning. She later realised that the writing on the charge sheet was not "pay bail" but "opposed, pay bail".
14. She remembered that on 28 January 2021 a similar incident happened when Nondwane arranged with a Court Orderly for him to pay bail for someone who was not granted bail. She was also charged and given a final written warning for that misconduct.

15. **Zibanzi Dila**, was the Respondent's second witness. She testified that she was employed by the Respondent for some years. She was a Court Clerk on 21 January 2019 when the Applicant arrived at the cash hall together with the person who was to pay bail money. He handed to her the charge sheet and a copy thereof and he left her with the cash and the person who came to pay the money. She disputed the Applicant's version that he never came to the cash hall with the person who was to be pay bail money. The Respondent never provided the video footage that he indeed went to the cash as he was disputing that. She was sure that the Applicant came to the cash hall.
16. She confirmed that she understood the magistrate's writing now that she was cross examined better than when she read it herself on 21 January 2021. She relied on the Applicant as she trusted him. She confirmed that "pay bail R400.00" was not an isolated writing but was in a sentence which read "req (for request) bail R400.00". As she read the writing on tha day (21 January 2021) she did not see "req" but saw "pay".
17. She was given a final written warning for negligence in that she should have seen that there was no pay bail R400.00 written. She apologised for her conduct. She confirmed that Mr Sibi (the Court Orderly), in another misconduct case similar to the one of the Applicant, was seen in the video footage going to the cash hall to pay bail money.
18. **Mnoneleli Gqiba**, was the Respondent's third witness. He stated that he was employed by the Respondent as a Court Manager and was therefore the accounting officer for whatever happened in the court. The Applicant's duties included taking the charge sheets from the court back to room 124. He had to carry out the court orders as written out in the charge sheet by completing the J Forms.
19. Before the charge sheets were filed at room 124 the Applicant had to capture them on the system. His supervisor would check if everything was in order. If there was bail involved he had to take the chargesheet and the bail money to the cash hall. It was strange that the Applicant in his statement said he did not recall taking bail money, chargesheet and the person who was to pay, to the cash hall in the case in question because, he would have entered that in the movement register if that was the case.
20. He confirmed that two weeks before the Applicant's misconduct occurred, a similar incident happened. In that case a court clerk released a detainee by mistake when the court instructed a further detention.
21. The Admin Officers in the cash hall who were involved in the case of the Applicant were subjected to a disciplinary hearing. They admitted being guilty of their mistake in misreading the writing on the charge sheet. They were sanctioned to a final written warning. The Applicant on the otherhand, he did not want to accept that he was at fault. He was therefore dishonest and was dismissed.

22. Under cross examination he confirmed that he was not the chairperson and would not know how the chairperson made the difference in the sanctions given in the case of the Applicant and that of other officials. It was his opinion that the Applicant was dismissed because he did not admit his mistake whilst the others admitted their wrong.
23. The Applicant could not explain how did the chargesheet, that was with him the whole day, landed at the cash hall. The only logical explanation was clear that he took it there himself as he was its custodian. If the chargesheet did not get to the cash hall but remained with him as he was the its custodian, those cash hall clerks would not have been involved in the misconduct. He confirmed to have reviewed the CCTV footage in the case of Ms Nondwane and never thought of doing the same in the case of the Applicant to see if he indeed went to the cash hall as alleged.
24. The trust was broken as the result, the Respondent would not enter in an employment relationship with the Applicant again. He confirmed however, that the Applicant was never suspended since the time of the alleged misconduct up to more than two years later when he was dismissed. He would not know why it took the Respondent more than two years before charging and dismissing the Applicant.

The Applicant's case

25. **Sisa Gantile**, the Applicant, was the only witness who testified for his case. He testified that the Respondent dismissed him before he was given an opportunity to submit mitigating factors as was the requirement per the Respondent's disciplinary policy.
26. He was not the only one who had access to the chargesheet but, the Prosecutor and the Court Orderly also, had access to it. It was a common practice that the Court Orderly would assist in taking the the chargesheet and accompany the person who was to pay bail to the cash hall. He was of the opinion that Mr Siba was the Court Orderly could be the one who took the chargesheet and the money to the cash hall as he was the one who signed the detention warrant as that was evident on page 3 of Annexure A.
27. According to Mr Gqiba's email on page 13 of Annexure A, Ms Nodwane who was the Court Clerk sent the Court Orderly to the cash hall to process bail that was not granted. According to that email Mr Gqiba is seen on the cctv footage going to the cash hall with the chargesheet. She was not dismissed for the same misconduct that he was accused of. He was denied the cctv footage which was serve as proof that he never went to the cash hall as the Respondent alleged.
28. It was clear from the writing on the detention warranty that the detainee was not granted bail as the writing said "remand in custody". There was nothing that the cash hall officers should have made mistake about it.

29. He denied that he was the one who took the chargesheet to the cash hall. The confirmation was also clear from the court register that from 2. 35 pm until 4.10 pm (the time that it is alleged that he was at the cash hall) the court was in session and he was in court as there was no way that the court would have proceeded in his absence. Mr Gqiba could have seen that if he was honest. Mr Gqiba's evidence that he could not view the CCTV camera because the incident happened long ago was not true as the incident happened seven days earlier before the other one of Ms Nondwane. CCTV footage was not erased that soon.

Analysis of evidence and argument

30. Both parties submitted written closing arguments which I also considered in my decision, not to mention that the parties' attempt to advance evidence at that stage was not assisting me in arriving at a fair decision, as reliability of such evidence could not be tested under cross examination.

Procedural fairness

31. The Applicant submitted that the Respondent did not afford him an opportunity to submit the mitigating factors, as per its disciplinary policy, before dismissing him. Given that the Respondent did not dispute this evidence I cannot conclude that it did not flaw the procedural fairness.

Substantive fairness

32. Item 2 of the Code of Good Practice of the LRA ("the Code") provides that: a dismissal is unfair if it is not effected for a fair reason. Whether or not a dismissal is for a fair reason is determined by the facts of the case.
33. Section 192 (1) of the LRA places the onus of proving the existence of the dismissal on the Applicant.
34. Without repeating the evidence submitted by the parties, I considered that the Applicant denied having gone to the cash hall to pay bail as the Respondent alleged. In this regard, the Respondent failed in its investigation, to consider reviewing the CCTV camera, and checking the court register to trace the whereabouts of the Applicant during the period in question. This is an attempt a reasonable person in its circumstances would do. The Respondent however submitted no justifiable reason why it did not do so.
35. The Applicant who had no onus to prove that he was at the cash hall, took it to himself to prove that he was not there by submitting the court register that proved that the court was in session at the alleged time and that the court could not proceed if he was not there. This evidence too, was not disputed by the Respondent. Without a satisfactory explanation in this regard I cannot conclude that the Applicant was at the cash hall at the alleged time.

36. Yes, I noted the corroborating evidence by the two cash hall officials in this regard however, I find it difficult to find most of their evidence credible as the first Respondent witness, Ms Thabile Mendu, did not want to answer some of the questions she was asked. I also considered that Ms Dila admitted to having misread a clear writing that said "req bail R400.00" and only could understand it when she was cross examined albeit, the writing was read by both of them (Dila and Mendu) with the many years experience they had in the cash hall. They both admitted to having acknowledged their mistake and because of that they were given a lighter sanction which was a final written warning.
37. Mr Gqiba's evidence that the Applicant was the custodian of the chargesheet and there was no way that it could land at the cash hall except for him having taken it there. In this regard, I considered the Applicant's evidence that it was a practice that Court Orderlies would sometimes take the chargesheet to the cash hall, I was not disputed. It was also, not disputed that though the evidence lead pointed to the the Applicant as the custodian of the chargesheet the Prosecutors too, would take possession of it.
38. The Applicant was dismissed because, according to Mr Gqiba, he did not admit his fault. I find no surprise in the Applicant not admitting guilt, because the evidence lead could not be substantiated by proof that he played a role in the detainee being released on bail when she was not supposed to. More than that, the Respondent failed to bring the chairperson who was supposed to be the key witness on the question of consistency. Mr Gqiba admitted that he was not the chairperson and would not know how he (the chairperson) made a difference between the two different sanctions. It was his opinion that the Applicant got a harsher sentence (dismissal) because he did not admit guilt while others did. Without the chairperson giving evidence in this regard I cannot conclude that the Respondent was consistent in the application of the disciplinary measure.
39. I considered that the Applicant was dismissed for dishonesty, yet no evidence was lead on dishonesty.
40. The Respondent raised a question of trust, that it did not trust the Applicant because he was dishonest. I do not find this evidence credible, because the Respondent submitted no justifiable evidence why it continued to work with the untrusted Applicant for two years before he was charged and dismissed.
41. In the light of the evidence before me, I am not satisfied that the Respondent proved its case on the balance of probability.

Award

42. I find that the dismissal of the Applicant, **Sisa Gantile** is both procedurally and substantively unfair.

43. I order that the Respondent, **Department of Justice** reinstates the Applicant Sisa Gantile on the same or similar terms and conditions that regulated his employment before he was unfairly dismissed on 23 June 2021.
44. I order further that, the Respondent, **Department of Justice**, is to remunerate the Applicant, **Sisa Gantile**, with R379 872.00 (three hundred and seventy nine thousand eight hundred and seventy two rand) which is equivalent to the salary he lost during the period of unfair dismissal calculated as R15 828.00 (fifteen thousand eight hundred and twenty eight rand) per month times twenty four months (from 23 June 2021 to 23 June 2023). The Respondent, **Department of Justice**, is to pay the said amount in the Applicant's bank account on or before 15 July 2023. The Applicant **Sisa Gantile** is to report for duties on 23 June 2023 at the same Respondent's premises where he reported before he was unfairly dismissed.

Arbitrator: Solomzi Mpiko

A handwritten signature in black ink, appearing to be 'SMP', with a long horizontal line extending to the right.

Signature: