

ARBITRATION AWARD

Case Number: GPBC1258-2021

Commissioner: Solomzi Mpiko

Date of Award: 19 October 2023

In the **ARBITRATION** between

PSA obo Chuma Somdyala

(Union/Applicant)

And

Department of Justice and Constitutional Development

(Respondent)

**Union/Employee's
representative:**

Gilbert Seakamela (Union Official from PSA)

Union/Applicant's address:

Telephone:

Telefax:

E-mail: gilbert.seakamela@psa.co.za

Employer's representative: ***Mncedisi Nqiwa (Respondent's LR OManager)***

Respondent's address:

Telephone:

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E-mail: mnqiwa@justice.gov.za

Details of the hearing and representation

1. The arbitration of the allegedly unfair dismissal dispute between the Applicant, **Chuma Somdyala**, and the Respondent (**Department of Justice and Constitutional Development**) was held virtually on 25 April 2022 and was concluded on 6 June 2023. The parties were to submit written closing arguments on or before 10 January 2023.
2. The Applicants were present and were represented by **Gilbert Seakamela**, a union official from PSA. **Lihle Mlungwana**, in one occasion, also represented the Applicant however, the matter did not proceed on that day as the Respondent failed to attend. The Respondent was represented by **Mncedisi Nqiwa**, the Respondent's Labour Relations Manager.
3. The proceedings were manually and electronically recorded. **Nonzukiso Mahlakatha** provided interpretation services.
4. Both the Respondent and the Applicant submitted bundles of documents which were admitted on record and marked Annexure R and Annexure A respectively.

Issues to be decided

5. I have to decide whether or not the dismissal of the Applicants was fair. The Applicant challenged both the substantive and procedural fairness of his dismissal.

Background to the Issues in dispute

6. The Applicant was employed by the Respondent as a Court Interpreter. He was charged and dismissed for gross dishonesty in that he unlawfully accepted money (R7 570.00 / seven thousand five hundred and seventy rand) from a member of the public (Nothusile Sokani), on behalf of the Respondent, while not authorized to do so, and deposited such money to his personal bank account. He was also found guilty and dismissed for failure to comply with the Respondent's instructions to give back the money he unlawfully accepted it, as well as for insubordination, in that he failed to capture his leave on the system as was required and instructed .
7. The hearing proceeded in the Applicant's absence after the Respondent allegedly tried but failed to secure his attendance as he could not be found albeit, many attempts were made.
8. The Applicant challenged both the substantive and procedurally fairness of his dismissal. He wanted reinstatement as relief.

Survey of evidence and argument

The Respondent's case

9. **Sidima Majeke**, was the Respondent's first witness. He testified under oath and stated that he was employed by the Respondent as the Office Manager in Libode. The Applicant was a Court Interpreter in his office. The Applicant was dismissed for accepting money (R7 570.00 / seven thousand five hundred and seventy rand) from a member of the public (Nothusile Sokani) which was to be paid to the Small Claims Court. He was not allowed to accept money on behalf of the Respondent as he did not have an appointment to work at the Small Claims Court. His duties as an interpreter had nothing to do with accepting money. He would not confirm or deny that the Applicant worked at the Small Claims Court but, confirmed that he was not appointed to work there.
10. He got a complaint about what the Applicant did. It was also reported to him that the Applicant was refusing to give the money back. The money that Nothusile Sokani gave to the Applicant was intended to be paid to the Small Claims Court which it would in turn pay it to Nomaxhosa Koyana, Nomzamo Samuel, and Lulama Mpikwa. The Applicant was not at work at the time he got the complaint. He therefore asked the three people to come back the next day.
11. They all came back the following day. The Applicant was still not at work. He phoned him and he confirmed to have accepted the money and that he was not going to hand it over. The Applicant informed him that he accepted the money at the beginning of the month (April 2020) and had deposited it in his bank account for safe keeping. It was at that point that he involved the police. At the police station the Applicant handed the money over to the people who were to be paid.
12. He confirmed to have complaint about the Applicant for refusing his instruction to give back the money he unlawfully accepted from Nothulile Sokani. His other complaint was in regard to the Applicant to have absented himself from work, for five days, without authorisation. He never had an agreement with his supervisor that he could take leave. He also asked the Applicant many times by email, to submit the leave forms however, he never responded to his email. He denied that the Applicant had a problem in using the system to capture his leave. He never raised such an issue with his supervisor.
13. **Sibusiso Qhashani**, stated under oath that he remembered the Applicant from the time he was working in Libode Police Station as a Special Commander, where it was reported to him that he accepted money from a community member and refused to hand it back. The police were called to intervene and assist the community members to get their money back. He instructed police to get the Applicant to the police station. The Applicant co-operated and gave the money back. The community members were happy to receive the money. He would not know the reason or under what condition the Applicant accepted the money.

14. **Nomaxhosa Koyana**, was the Respondent's third witness. On about 23 December 2019 she and other two members of the community went to the Small Claims Court for assistance as Nothulile Sokani did not want to give them the money they put together and saved during the year which was to be divided among themselves in December. The Small, Claims Court assisted them and ordered Nothulile Sokani to pay the money. Nothulile complied with the court order and went to pay. She however, told them that she could not find them when she went in court. The Court was also closed due to Covid 19. She then gave it to the Applicant.
15. They went to the court to look for the Applicant. The Applicant confirmed to have accepted the money from Nothulile Sokani and had deposited it into his bank account for safe keeping. He said he did not have his bank card with him and told them to come the next day. He left them there and did not go back to work but walked down town. They reported the matter to the court and the manager tried him on his phone but did not succeed.
16. The next day they went back to court. Nothulile Sokani was not with them. The manager called the Applicant to his office and asked him about the money. The Applicant told the manager that he had the money in his pocket but was not going to hand it over in the absence of Nothulile Sokani. The manager accompanied them to the police station to report the case. The police phoned the Applicant and he told them that he had the money with him though it was not the full amount and would have it in full the next day. The police told them to go back and come back the next day. On the next day the Applicant did not come to the police station until the police went to fetch him. The Applicant handed the money over. They were asked to count it. It was recovered in full. The Applicant apologised for making things difficult for them. They accepted the apology because they were happy that they received their money.
17. **Yamkela Sihle Methusi (Methusi)**, was the Respondent's second witness. His evidence was that the Applicant was given the set down notice on 14 October 2020 and the disciplinary hearing was to proceed on 27 and 28 October 2020. The matter was postponed at the Applicant's request for him to consult with his union in Mthatha.
18. On the second set down date which was on 17 November 2020, the Applicant sent a message to the Respondent's manager that he was not well as he woke up with a runny stomach. He did not inform his representative of his condition. The Respondent opposed that the matter be postponed as not proof was submitted that the Applicant was not in a position to appreciate the nature of the proceedings. About 2.00 pm in the afternoon, no medical certificate was received from the Applicant and he had switched off his phone. The Disciplinary Hearing Chairperson refused to postpone the matter and proceeded in default.

Applicant's case

19. **Chuma Somdyala**, on 31 March 2020, the day of the alleged misconduct he left work at the time everyone else had already gone. The Court closed earlier on the day because of Covid 19. When he was near the exit he was approached by Nothulile who told him that he was there to pay money to the Small Claims Court. The amount was R7570.00 (seven thousand five hundred and seventy rand). He told her to come some other time as there was no one to assist him then. Nothulile Sokani begged him to accept the money. He told her that he was not allowed to take the money. After she continued begging him he gave in and took the money. He was on leave and was to come back some days after, as per the agreement he had with his supervisor. He deposited the money into his bank account. Although he was employed as an interpreter, it was a common practice that he assisted the Court Clerk who was authorised to accept money. He was however not allowed to receive money. He accepted the money because Nothulile begged him to take it.
20. He did not deny that he took money from Nothulile Sokani however, he was not aware that the money was for the Small Claims Court as she did not inform him that way but only wanted him to keep it for her. He confirmed however, under cross examination, that when he took the money Nothulile Sokani told him that it was the money she came to pay to the Small Claims Court. He did not know that she had a case at the Small Claims Court until the time she told her that the money was for the Small Claims Court. He put it in his bank account because she did not come the following day as per their arrangement even though he tried her on her phone several times. It did not come to his mind that he should hand the money over to the Respondent's Cashiers or tell the Manager about it. He did not have with him the bank statement showing that the money was in deed deposited and later withdrawn.
21. A rotation system was introduced because of Covid 19, and he had to return to work on 28 April 2020, It was then that he found the three ladies (Nomaxhosa Koyana, Nomzamo Samuel and Lulama Mpikwa) waiting for him. They demanded that he gives them the money he received from Nothulile Sokani. He refused to give them the money because the amount they wanted was not what was given to him by Nothulile. He told them to come the next day as he would not get the full amount from the bank due to his daily limit. They reported him to the Court Manager and he was called to his office. He told the Court Manager that he would not give them the money in the absence of Nothulile Sokani from who he received it.
22. He denied that he refused to hand the money over when he was instructed to do so and submitted that the amount of money the three ladies demanded was different from what he was given by Nothulile Sokani and he did not want to hand it over in her absence.

23. The disciplinary hearing took place in his absence albeit, he sent the Manager a message that he was sick. He was not given an opportunity to submit mitigating factors.
24. **Nothulile Sokani**, testified for the Applicant's case. She stated that on 31 April 2020 she went to the Respondent's office (Small Claim's Court) to pay the money that she owed Nomaxhosa Koyana, Nomzamo Samuel, and Lulama Mpikwa. When she arrived there, she was told that they had all left and the Court was closed. She asked the Applicant to please keep the money for her. He refused but she pleaded with him until he accepted it.
25. When she came bank on 20 April 2020 she could not find the Applicant. She tried him on his phone but was not successful. The Manager assisted in her getting the money back.
26. **Ndiphiwe Mthini**, also testified for the Applicant. He stated that he was employed as an Administrator at the Small Claims Court. It was a formal operation in mediation that the parties would agree on a date when they would come before the court and pay each other as per their agreement. He confirmed that the Respondent's employees were not allowed to take money from the public for safe keeping.

Analysis of evidence and argument

27. Both parties submitted written closing arguments which I also considered in my decision.

Procedural fairness

28. The Applicant submitted that he was not allowed to present his side of the dispute during the disciplinary hearing. He was also not given an opportunity to submit mitigating factors. The Respondent disputed this evidence and submitted that the Applicant was given two opportunities. One being on 27 and 28 October 2020 and the other on 17 November 2020. In the first instance, the disciplinary hearing was postponed to allow the Applicant an opportunity to consult his union. On the second occasion the Applicant failed to attend citing that he was not well.
29. I considered that the Applicant appealed the decision of the disciplinary hearing however, no evidence was lead that he presented the medical certificate then, to prove that he was not well on the said date. As the matter was postponed earlier for him to consult his union, it would be expected that his union representative at least, attends when he was not well however, no evidence to that effect was lead. The evidence rather, was that he did not inform his union representative that he was not well and would not be attending the arbitration. In the absence of the Applicant and or his union representative, as was rerasonably expected, I cannot conclude that the Respondent was unfair in proceeding *in default*. The Applicant was given more than one occasion to attend the disciplinary hearing.

30. I also considered that the Applicant would not have had an opportunity to submit mitigating factors if he failed to attend the disciplinary hearing. The Applicant had a union. His failure to attend or the absence of an explanation why his union representative was also not present was of his making and cannot blame anyone that the disciplinary hearing proceeded in default and that he was not able to mitigate the sanction. I cannot conclude that the dismissal was procedurally unfair.

Substantive fairness


31. 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.
32. Section 192 (2) of the LRA places the onus on the employer to prove that the dismissal was fair.
33. The Applicant disputed that he was insubordinate in regard to capturing his leave on the Respondent's system and submitted that he did not know how the new system operated. He however, did not dispute the Respondent's evidence that the manager sent him several email asking him to comply yet he responded to none of that.
34. He also denied that he was insubordinate in regard to handing the money over to the relevant people and submitted that he did not want to hand it over in the absence of Nothulile Sokani from whom he received it. I find some logic in his reasoning in this regard however, I considered that he thereafter, failed to hand the money over in the first instance he was at the police station. I do not understand why at that moment he would still need the presence of Nothulile Sokani as the police were there to witness that the money was in deed handed over. His reason that he needed to put the money together is not acceptable as he already knew, for some days then, that the money was needed back. I cannot rule out the possibility that the Applicant was buying time to have the money put together because he no longer have it. This reasoning is corroborated by his failure to prove that the money was in his bank and that he withdrew it from his bank account before handing it over.
35. The Applicant did not dispute that while he was not allowed to have accepted the money from a member of the public who came to pay it to the Small Claims Court and that he deposited it into his personal bank account. He submitted that he could not think of handing it over to the manager or pay it to the cashiers the following day. In this regard, he failed to conduct himself as a reasonable person in his circumstances would do. I cannot comprehend why he thought of his bank account instead. I also do not believe that he in deed deposited the money in his bank account as he could not support that by a bank deposit slip or statement as proof that in deed he did so, even after he was allowed time to source such proof from the bank.

36. While I considered the evidence that the Applicant was not willing to take the money but was persuaded to do so, he was not cerced to take it, and should have surfed above the waves of such temptation for the sake of integrity. He knew the rule and had decided to go against it. A situation where an employee would compromise such a critical employer's rule only because he was persuaded to do so, cannot be accepted. In this regard, I cannot therefore conclude that he was unfairly found guilty of dishonesty and dismissed.
37. In the light of the evidence before me, I am satisfied that the Respondent has proved its case on the balance of probability.

Award

38. I find that the dismissal of the Applicant, **Chuma Somdyala**, was both substantially and procedurally fair.
39. I order that the Applicant's case is dismissed

Arbitrator: Solomzi Mpiko

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

Signature: