



ARBITRATION AWARD

Panelist: Nozipho Khumalo
Case No.: GPBC781/2018
Date of Award: 01/07/2019

In the ARBITRATION between:

PSA OBO ZW SHABANE

(Union / Applicant)

and

DEPARTMENT OF JUSTICE AND CONSTITUTIONSL DEVELOPMENT
(Respondent)

Union/Applicant's representative: MR SHIBA
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Respondent's representative: MR MASUKE
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DETAILS OF HEARING AND REPRESENTATION

1. The matter was set-down for arbitration in terms of Section 191(5) (1) of the Labour Relations Act (LRA) at the offices of the Department of Justice and Constitutional Development in Durban on the 25/02/2019, 26/06/2019, 03/06/2019 and 04/06/2019. Mr Mbusi Shibe an official of PSA represented the Applicant, ZW Shabane whilst Mr Stephens Masuku appeared for the Respondent.

ISSUES IN DISPUTE

2. I have to decide whether the dismissal of the applicant was fair and based on the finding decide on the appropriate relief, if any is applicable.

BACKGROUND OF THE DISPUTE

3. The Applicant was employed by the Respondent, Department of Justice and Constitutional Development in 1996 as an Admin Clerk. As at the date of his dismissal, he was the Senior Admin Clerk, a position he occupied for ten (10) years.
4. Mthlani of the Respondent received a complaint from a member of the public, Alexandrina Sithole, who had come to court for a letter of authority for her late uncle's house which was situated at Umlaba Village, Hammarsdale. Alexandrina claimed that she was assisted by the Applicant in obtaining a letter of authority when she came to the court. However, there was a problem because the person who was occupying her uncle's house also had a letter of authority. Alexandrina could not get hold of the Applicant to help her with her problem and spoke to Mthlani instead. When Mthlani looked at the file he found that the letter that was given to Alexandrina was not registered in the system and therefore invalid. Alexandrina also claimed that she paid an amount of R200 to the Applicant for the letter of authority. The matter was reported to the court manager.
5. The Applicant was therefore charged with four (4) charges, gross negligence, extortion, gross negligence and contravention of circular 55/2001.
6. A disciplinary hearing was held on the 11/10/2017 and the outcome was issued on the 22/03/2018 where he was dismissed. He lodged an appeal in November 2017 and the outcome was issued on the 22/03/2018 where dismissal was upheld.

7. Procedure is not in dispute in this case. The Applicant is only challenging the substantive fairness of his dismissal.
8. The Applicant is seeking reinstatement as relief for his dismissal.
9. The Applicant submitted Bundle "A" which was admitted as a common bundle.

SURVEY OF ARGUMENTS & EVIDENCE

The Respondent's case

10. The Respondent called five (5) witnesses, Wilson Mbuso Mthalani "Mthalani", Albert Muzi Zwane "Zwane", Alexandrina Sithole "Alexandria", Soli Wilson Hadebe "Hadebe" and Sithembiso Sithole "Sithembiso". Their evidence is summarised as follows. Mthalani was approached by Alexandria who told him that she has a letter of authority to her deceased father, Msawakhe Vusi Sithole's "Msawakhe" house, "A"76. Alexandra had come to the Hammarsdale Magistrate Court "court" for assistance as the person who was occupying her father's house also had a letter of authority and was refusing to move out, "A"59. Mthalani told her that the letter she was issued by the Applicant, "A"76 is not a valid one as it is not registered on the system. He handed the matter to his manager and it was reported to head office. Mthalani also stated in his evidence in chief as well as in cross examination that Damoyi was the clerk of the estates during the period 2015 to 2016 and Mbili was the signatory on behalf of the court manager during that same period. The letter on "A"59 was signed by Mbili and was issued on the 08/03/2016. He does not know the signature on the letter "A"76 which was issued on the 13th/05/2015. The letter on "A"76 was issued before the one on "A"59.
11. Zwane who is the Deputy Director, Forensics based in Pretoria at the Respondents National Office, was appointed as the investigator in this case. In his investigation he interviewed Mthalani who gave him the estate file and confirmed that it was the Applicant that was dealing with the file. Zwane also interviewed Sithembiso, Hadebe, Alexandria and the Applicant. After the investigation, he concluded a report and made a recommendation that disciplinary action be instituted against the Applicant, "A"27-36.
12. Hadebe stated that he had partially bought the house from Msawakhe while he was still alive. He has paid an amount of R33 000 to him for the house. He met with Alexandrian who told him

that she is the niece of Msawakhe and that she is the one looking after his estate. He showed her some documents and affidavits as proof that he had bought Msawakhe's house.

Alexandrina had similar documents in her possession which she said she had found in her uncle's belongings. They both went to the court where they were assisted by the Applicant.

Alexandrina then told him that the Applicant will need money for the letter of authority. He went to his house and came back with a R200 note which he gave to Alexandrina to give to the Applicant. Alexandrina went in the Applicant's office and gave him the money. The Applicant then gave Alexandrina the letter of authority "A"76. He went to Msawakhe's house to request Mtshali who was residing in the house to move out of the house. Mtshali who refused to move out showed him a letter of authority which was appointing him, Mtshali as the beneficiary, "A"59.

13. Alexandrina who is the niece of Msawakhe was appointed by the family to look after her late uncle's estate before he died. She received a phone call from Hadebe on her late uncle's phone who wanted to discuss the house with her uncle. Hadebe did not know when he called that Msawakhe was late. Alexandrina informed him that Msawake is late but made an appointment to meet with him to discuss this issue as she did not know at that time that her uncle had a house at Umlaba Village. She met with Hadebe who was in possession of documents which were signed and stamped by the Metro Police. Alexandrina had seen similar documents in her uncle's belongings. She and Hadebe went to the court to get a letter of authority for her uncle's house so that she could hand the house over to Hadebe. At the court they met with the Applicant in an office. He told them that such letters are not done at the court but are done at the attorneys. She left because she did not have money to pay the attorneys. On her way out she met with the Applicant again who told her that he could assist her if she gives him something. She informed Hadebe about this. Hadebe then went to his house and came back with a R200 note which he gave to Alexandrina to give to the Applicant. The Applicant took the money and went away. He then came back with the letter of authority, "A"76, but the address on it was incorrect. She alerted the Applicant about the error and the Applicant sat down on his computer and corrected the error. She knows the Applicant from a long time ago as he assisted her with her maintenance issues.

14. Sithembiso stated that he was requested by Msawakhe while he was still alive to look after his house. However, Sithembiso had his own house and he therefore asked Mtshali who was looking for a place to stay, to move in Msawakhe's house. He went to the court to get a letter of

authority for the house after Msawakhe passed on. He was assisted by the Applicant who told him what documents he needed to bring for him to be able to get the letter of authority since he and the deceased have the same surname. The Applicant also requested a payment of R270 from Sthembiso. Sthembiso paid the money but did not get a receipt in return. He wanted the house to be transferred into his name because he did not know Msawakhe's family and wanted to protect it for when he finds Msawakhe's family. The Applicant then issued the letter of authority, "A"59.

The Applicant's case

15. The Applicant testified and called two witnesses, Nonhlanhla Mbili, "Mbili" and Sihle Damoyi, "Damoyi". Mbili who is the Senior Admin Clerk stated she is the one who signed the letter of authority on "A"59 since she was appointed as a signatory on behalf of the master's office. The affidavit on "A"60 was signed by Damoyi. She does not know who signed the letter on "A"76 as she has never seen the signature before. She knows the Applicant's signature as she worked with him, "A"85.
16. Damoyi is a Senior Admin Clerk at Hammarsdale Court. His normal duties include opening of estate files, printing letters of authority and handing over letters of authority to the designated authority (Mbili) for signature. He also signs in their absence. He stated that he is the one who assisted Sthembiso, "A"61. He met with Sthembiso and other family members who stated that Sthembiso is a blood relative of Msawakhe and the beneficiary of his estate, "A"64. "A"69 is a nomination form, nominating Sthembiso as a beneficiary of the estate. Mbili signed the letter of authority as the designated authority and Damoyi issued the letter thereafter, "A"59. He does not know who issued or signed the letter of authority on "A"76 as he has never seen the signature before.
17. The Applicant stated that he worked at the Respondent's criminal and civil section as a senior admin clerk. He was appointed as senior admin clerk in 1996. His duties were administration. He normally dealt with cases of people that have transgressed the law and cases of people that have grievances with their residential areas and debt matters. In February 2017 he was charged and an enquiry commenced. He was called to a disciplinary hearing which took place on the 11/02/2017. At the hearing he was represented but did not testify. The representative was the one that did all the talking. The Respondent called the same witnesses as this

arbitration. He was found guilty and dismissed. An appeal was lodged on his behalf by the representative. Although he was paid his full salary during the appeal period but he suffered from epilepsy caused by the stress of the charges against him.

18. The Applicant further stated that he did not deal with Msawakhe's estate file as he does not deal with estate matters. He also does not know Hadebe and Sthembiso. He only met them at the disciplinary hearing for the first time. Furthermore, it is Damoyi and Mbili who dealt with the file as they even signed on the documents, "A"59 and "A"61. His signature does not appear on any of the documents. When an estate file is opened, it is done in the presence of the family members concerned. One official cannot open an estate file and sign it on his/her own.
19. He does not work with estates but he knows the procedures when dealing with an estate file since he has worked with the Respondent for so long. The letter on "A"59 was signed by Mbili who was the delegated authority and it is her who is supposed to issue the letter. If there are any issues with the letter of authority, the person that issued the letter is the one that must deal with those issues. The letter on "A"59 is valid since it contains a unique number, "8952016EST001663". The one on "A"76, although it does not have a unique number, it is valid looking at the period it was issued. It was issued before the new system was put into place. as it has no unique number.

ANALYSIS OF ARGUMENTS & EVIDENCE

20. In this case dismissal is common cause, it is therefore, the Respondent that carries the burden of proof on a balance of probabilities, that the dismissal is fair in terms of section 192(2) of the LRA. It is also common cause that the Applicant during the period 2015 was a clerk of the criminal court and was not dealing with estates.
21. The Applicant contested the substantive and procedural fairness of his dismissal, therefore, this award deals with both substantive and procedural fairness of the dismissal. In determining the fairness of the dismissal, the law enjoins me to consider the Code of Good Practice: Schedule 8 to the LRA and the CCMA Guidelines on Misconduct Dismissals.

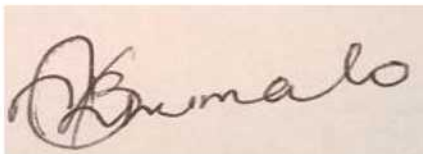
22. The Applicant was charged and dismissed for misconduct which involved an estate file of Msawakhe Sithole. The Respondent's case is that the Applicant issued two letters of authority to two different people, Hadebe and Sthembiso, for one house belonging to Msawakhe, "A"59 and "A"76. He further took money from Hadebe and Sthembiso in exchange for the letters of authority. Damoyi in his evidence stated that he is the one who opened Msawakhe's estate file and that he is the one who dealt with Sthembiso when he come to apply for the letter of authority. In his evidence which was corroborated by Mbili and the Applicant he further stated that he signed the documents related to the file, "A"61 and Mbili who is a signatory on behalf of the master's office issued the letter of authority "A"59. The two witnesses confirmed that they are the people who dealt with the file and not the Applicant.
23. Mbili and Damoyi also stated that they were not called to testify in the disciplinary hearing of the Applicant despite their signatures appearing on the documents. They were also not consulted during the investigation which was conducted by Zwane. I find it quite strange that the Respondent did not enquire from these two witnesses who are currently in its employment and are dealing with estates. It is also strange that the Respondent did not call the two witnesses to testify since their signatures are not disputed.
24. The evidence of Sthembiso, Hadebe and Alexandrina that they were assisted by the Applicant was nullified by that of Damoyi's as he convincingly stated that he was the one who assisted them with the application. I find Hadebe's evidence that the Applicant was paid an amount of R200 for the letter of authority to be hearsay in that he did not personally give the money to the Applicant but gave the money to Alexandrina. Alexandrina then informed him that she gave the money to the Applicant. Hadebe also stated in his evidence that when they first arrived at the court Alexandrina told him that the Applicant will want money.
25. Sthembiso's gave contradictory evidence about his relation to Msawakhe. He stated in his evidence in chief that he is a brother of Msawakhe. In the affidavit which he submitted to as part of his application to the court, he also stated that he is a blood relative of Msawakhe. During cross-examination he changed to say that he and Msawakhe had the same surname but were not blood related as stated in his evidence in chief and his affidavit. Sthembiso also stated that it was the Applicant that advised him on what documents to bring when making an application for a

letter of authority. During cross-examination he said that he was told by Sakhumbe who was the contractor that built Msawakhe's house what documents will be needed for him to get the letter of authority and the Applicant told him to also get an affidavit from Enock Jabulani Sithole.

26. Alexandrina stated in her evidence that she only came to know about her late uncle's house when Hadebe called to tell her that he is the one who bought the house from her uncle. She also stated that Hadebe had documents that were similar to those that she had seen before, in her uncle's goods. I find this evidence to be unreliable in that she has seen the documents but never bothered to find out what they were until someone, a stranger brought similar documents to her. Furthermore, she stated that she was appointed by the family as a beneficiary of her late uncle's estate but was not aware that he had a house at Umlaba Village. Although this version was corroborated by Hadebe but I find both versions to be rehearsed and the two to be unreliable witnesses and their evidence to be incredible.
27. Sthembiso and Alexandrina both stated that they know the Applicant prior to the issuing of the letters of authority. Sthembiso statement was that he knows the Applicant from where he always drinks and that he is always drunk. While Alexandrina stated that she knew him from when she used to collect maintenance money from the court and stopped collecting because of how the Applicant and his colleagues used to treat them when they came to collect maintenance. Both these statement seem to suggest some form of a grudge against the Applicant, hence, their story about the letter of authority seems fabricated.
28. In *Grogan, Dismissal Second Edition* it is stated that in terms of the law, misconduct is said to take place when an employee culpably disregards the rules of the workplace. In this case I find that the Applicant has not disregarded any rule of the workplace. I find the evidence of Mbili and Damoyi more credible than any evidence to the contrary on this issue. It is clear that the Applicant had nothing to do with the estate file in question. I also don't understand why Mbili and Damoyi were not questioned during the investigation that was conducted by Zwane as they are the people who signed the documents.
29. Based on my analysis above, I find the dismissal of the Applicant to be unfair.

AWARD

30. The dismissal of the Applicant was unfair. The Respondent is ordered to within fourteen days of receipt of this award, reinstate the Applicant with retrospective effect from the date of his dismissal.
31. The Respondent is further ordered to pay the Applicant his salaries for the period of his unemployment from the 1st April 2018 to the 1st July 2019 (date of this award) based on the salary scale applicable at the time of his dismissal as follows:
1. (R14 466.25 X 12 months) from the 1st April 2018 to 31st March 2019
 2. (R15 363.25 X 4 months) from the 1st April 2019 to the 1st July 2019
 3. Total payable to the Applicant is R235 048-00
 4. The above amount is to be paid within fourteen days of receipt of this award.
32. Interest will accrue from the date of the award at the prescribed rate as per the provisions of Section 143(2) of the LRA.

A handwritten signature in dark ink, appearing to read 'Nozipho B Khumalo', is written on a light-colored rectangular background.

Commissioner: NOZIPHO B KHUMALO

Date : 01/07/2019