

Council Name

ARBITRATION AWARD

Panelist: Jeffrey Nkuna
Case No.: GPBC794/2019
Date of Award: 14 October 2019

In the ARBITRATION between:

PSA obo Mnisi M J

(Union / Applicant)

And

DEPARTMENT OF HOME AFFAIRS

(Respondent)

Union/Applicant's representative:

Union/Applicant's address:

Telephone:

Telefax:

Respondent's representative:

Respondent's address:

Telephone:

Telefax:

ARBITRATION AWARD

DETAILS OF THE HEARING AND REPRESENTATION

1. This award is rendered in terms of section 138(7) of the Labour Relations Act, 66 of 1995 as amended (the LRA).
2. The dispute was referred for arbitration in terms of section 191(1) & 191(5) (a) of the Labour Relations Act 66 of 1995 as amended ("LRA"). The hearing was held on the 16 September 2019 at the Department of Home Affairs Offices, Oshoek Border Post in Mpumalanga Province.
3. The Applicant, Mr M J Mnisi (Employee) was represented by Mr J Heyneke, a representative of PSA, and the Respondent, Department of Home Affairs (Employer), was represented by Ms R Chokoe, an official of the Department of Home Affairs.
4. Both parties handed in bundles of documents which were marked "Employer's bundle A" and "Employee's bundle B" respectively. It was agreed at the commencement of the proceedings that the documents are what they purport to be.
5. At the end of the arbitration proceedings, both parties were directed to submit written arguments not later than 26 September 2019. Both parties complied with the directive and the arguments were considered in this award.

BACKGROUND TO THE DISPUTE

6. The Employee was employed as an Immigration Officer by the Respondent from the 1 April 2013 until he was dismissed on the 05 April 2019. He was earning a monthly basic salary of R17114.75. The Employee was charged by the Employer with two counts of misconduct. It was alleged that in the first count he irregularly endorsed entry stamp number 333 allocated to him, and issued Temporary Residence Permits on passport of Ms Khetsile Nonhlanhla Dlamini Swazi National number 40592072 whereas she did not present herself before him as prescribed. In the second charge, it is alleged that he irregularly captured the movement of Khetsile Nonhlanhla Dlamini passport number 40592072 on the Movement Control System without following the correct Departmental Procedure. The disciplinary hearing was conducted and the Employee was found guilty and dismissed. The Employee is challenging both the procedural and substantive fairness of his dismissal. The relief sought by the Employee is re-instatement

ISSUES TO BE DECIDED

7. I am required to determine whether the Applicant was dismissed. If so, I have to determine if the dismissal was procedurally and substantively fair or not and order the appropriate relief.

SURVEY OF EVIDENCE AND ARGUMENTS

Employer's evidence

8. The Employer's first witness, **Ms Chokoe** testified that the case was received by the Labor Relations Unit from the Counter-Corruption and Investigations Unit on the 17 April 2018. Charges were proffered against the Employee on the 23 May 2018 and the first disciplinary hearing was arranged for the 20 June 2018. She further testified that a week before the hearing, a certain Ms Letebele who confirmed that she was the representative of the Employee requested for the video footage of the scene of the alleged misconduct. The video footage was not readily available as it did not belong to the Employer. As a result thereof, the disciplinary hearing could not be proceeded with on the 14 June 2018. She further testified that she then requested the Employee representative that a date for disciplinary hearing be set for September 2018. However, the Employee's representative was not available. There was therefore no earlier date available as she also went away for the examination during October and November 2018. The next hearing date was then arranged for January 2019.
9. The Employer's Second witness, **Mr Frans Lehlogonolo Motolo** testified that he received an information about that, Ms Dlamini who was Swazi national extended her visa at the Oshoek Border Post without presenting herself to the officials at the Border Point of Entry. Ms Dlamini worked at Delmas Lower Primary School. He testified that he then went to Delmas to interview Ms Dlamini on the 20 February 2018. He then requested her to show him her passport. She then advised him that she did not have the passport with her as it was in the car of her friend. She was then requested to make an affidavit and she stated in her affidavit that the passport was not in her possession. He then requested her to email him her passport which she did. After scrutinizing her passport he realized that it was endorsed and processed on the day he interviewed her being the 20 February 2018. He then consulted with Ms Dlamini again and this time she changed her statement and made another affidavit and stated that her passport has been endorsed more than twice in her absence and she normally requested a bus driver who will take it to the Oshoek border Post for endorsement. He also discovered that the endorsement on her passport was issued by the stamp allocated to the Employee. The Employee confirmed to him that he was on duty on the day in question.
10. The Employer's third witness was **Mr L M Mokoena**, who testified that he was the deputy director and the manager at the Oshoek Border Post. He testified that the Employee was his sub-ordinate and reported directly to him. He testified that the endorsement of any passport, the holder who enter or exit the Republic of South Africa must present himself or herself to the Immigration Officer at the Border Post. Mr Mokoena also testified that any official who does not comply with this procedure if found guilty he will be dismissed. This is a serious misconduct as it compromised the security of the country. Mr Mokoena further testified that such a misconduct may result in the breakdown of trust and employment relationship. Mr Mokoena further testified that there are cameras monitoring the immigration officer whilst performing their duties. He however, testified that he is not sure who is in control or custody of the video footages
11. The Employer's forth witness, **Ms Khetile Dlamini**, who testified that she is the owner of the passport in question. She testified that she was in Delmas on the 20 February 2018 and she was interviewed by Mr Motolo on that day. She further testified that she told Mr Motolo that she was not in possession of

her passport and it was in the friend's car. She further testified that she had her passport endorsed in the Oshoek border in her absence. She will normally give the passport to the Bus driver who will take it to the Border for endorsement. She further testified that she did not know who stamped her passport. She will only present herself in the Border when she went home. she also confirmed that she lied to Mr Motolo when he interviewed her and inquired about the whereabouts of her passport on the 20 February 2019.

Employee's evidence

12. The **Employee**, Mr **Mndeni John Mnisi** testified that he was on duty on the 20 February 2018 and confirmed that the stamp which was in the Ms Dlamini's passport on the day belonged to him. He further testified that he has never stamped the passport of any person in the absence of that person. He further testified that on that day he did stamp the passport and that was done in the present of the owner of the passport. He further testified that on the date in question he followed all the procedures when he endorsed the passport. He further stated that he was sure that on that day the owner of the passport presented herself to him.

ANALYSIS OF THE EVIDENCE AND ARGUMENTS

13. This dispute was referred to the Council in terms section 191(5) (a). Section 192 of the Labour Relations Act, 1995 provides that in any proceedings concerning any dismissal, the employee must establish the existence of the dismissal. Once the dismissal is established, the Employer must prove that the dismissal is fair. Dismissal is not in dispute in this case.
14. The Employee faced two charges of misconduct. **Charge 1:** It was alleged that the Employee on or about 20 February 2018 at or near Oshoek Port of Entry, irregularly endorsed entry stamp and issued Temporary Residence Permits on passport of Khetsile Nonhlanhla Dlamini Swazi National passport number 40592072 whereas she did not present herself before him as prescribe. **Charge 2:** It was alleged the Employee on or about 20 February 2018 at or near Oshoek Port of Entry irregularly captured the movement of Khetsile Nonhlanhla Dlamini passport number 40592072 on the movement Control System without following the correct Departmental Procedure.
15. It is common cause that the Employee was found guilty of both charges and was dismissed. The Employee is challenging both the procedural and substantive fairness of his dismissal. As regards the procedural fairness, evidence was led by the Employer that Charges were proffered against the Employee on the 23 May 2018 and the first disciplinary hearing was arranged for the 20 June 2018. She further testified that a week before the hearing, the Employee's representative requested for the video footage of the scene of the alleged misconduct. Due to unavailability of the Employer's Representative and Employee's Representative for reasons which were not contradicted, the disciplinary hearing could not be proceeded with timeously. My finding is that there were valid reasons for such delays and the Employee remained employed and suffered no prejudice as result of such delays. It is therefore my finding that there was no unfairness regarding the procedure.
16. The **Immigration Regulations** issued in terms of section 12 of the Immigration Amendment Act, 3 of 2007 issued in terms of **Government Notice No 37679 on the 24 May 2014** provides for among other things, regulating the entry and exit of the Republic of South Africa ports of entry. It is common cause that the endorsement of the passport when the holder enters or exit the Republic of South African is regulated and there are Rules and Procedures which ought to be followed. Any person who leaves or enter the country must present himself or herself to the Immigration officer at the particular Port of

entry. The endorsement of the passport must be done in the presence of the person concerned. It is also common cause that the passport of Ms Dlamini was stamped and endorsed by the Employee. The question is whether the endorsement was done in the presence or absence of Ms Dlamini

17. In this case there is no dispute regarding the existence of the Rule or the Standard. The question is whether the Employee has contravened such a rule. The onus is on the Employer to prove that the Employee has broken the rule.
18. The Employer led evidence of 4 witnesses. Mr Motolo who was the Investigating Officer testified that he interviewed Ms Dlamini on the 20 February 2018 and she lied to him that she was not in possession of her passport as it was in her friend's car. She even supported her lie by attesting to the statement under oath. When he received the copy of her passport and discovered that it was endorsed on the day he interviewed her. Ms Dlamini then decided to come with another story and stated that her passport was taken by a bus driver to the Oshoek Port of Entry. She made another statement under oath which contradicted the previous statement. This was a confession to committing of an offence of lying and oath and contravention of the immigration laws by sending someone to go and have her passport endorsed in her absence.
19. During cross examination it was put to the Investigating officer why he did not have her detained or engaged the SAPS. There was no explanation from the Investigating officer. Ms Dlamini also testified that she has done the endorsements in her absence more than twice. She did not in any way implicate the Employee. Ms Dlamini also mentioned that her unlawful activities were facilitated by the driver of the Bus. The bus driver was not called as a witness. . The question is whether Ms Dlamini can be trusted as witness. Her credibility is questionable. My findings in this regard is that Ms Dlamini knew she has broken the law and she was in trouble and she can say anything to save herself.
20. The only evidence available is that the stamp belonged to the Employee. The Employee has admitted that he did stamp the passport and that the owner of the passport was present before him during the endorsement. The Employee will then have to prove that the person who was present during the endorsement was not Ms Dlamini. Evidence led by the Employee was that from the beginning of the investigation, the Employee requested the footage which was going to assist in confirming whether there was person present or absent during the endorsement.
21. The Employer confirmed that there were cameras available and there was a video cameras. This means that the video footage was available. Further evidence was that the video footage was not in control or possession of the Employer. Another submission from the Employer's side was that the video footage might have been in control or possession of the SAPS. The video footage was requested during the proposed date of hearing which was 14 June 2018 and the hearing only took place in June 2019. The Employer had enough time to make the video footage available as the hearing only took place in almost a year after the request of video footage was made. There was no evidence before me to show that the Employer took all the reasonable steps to secure the video footage.
22. The Employee also testified that it is possible that the person who appear before you, may not be the person you think is the person in the book. He testified that they did previously have such cases where they think the person in front of them is the person in the book, but then it is not. This evidence was not contradicted by the Employer.
23. The Employee also testified that as regards the issue of irregularly not monitoring the movements of Ms Dlamini's passport where it shows that there are 3 A's (arrivals) in succession and no D (departures).the Employee testified that as immigration officers they have no access to print out. All

they do is to scan the passport and he did that. My findings are that evidence of the Employee was not contradicted in material respects. My finding is that the Employer has on a balance of probabilities failed to prove that the employee has contravened any rule and therefore cannot be found guilty of both charges.

24. The Arbitrator has a responsibility of determining on a balance of probabilities and select a conclusion from among several conceivable and plausible conclusions. The Arbitrator must assess the probabilities and improbabilities of each of the disputed facts and determine which is the most probable one. It is my finding that the Respondent has on balance of probabilities failed to prove that the Applicant's dismissal was substantively fair.
25. The relief sought by the Employee was re-instatement. I am accordingly ordering that the Employee be re-instated retrospectively with the back payment from the date of his dismissal.

AWARD

26. The dismissal of the Applicant, M J Mnisi (Employee) by the Respondent, Department of Home Affairs (Employer) was procedurally fair and substantively unfair.
27. I order the Employer to re-instate the Employee retrospectively to work with the same terms and conditions before his dismissal and must report at work on the 01 November 2019.
28. The Employees' salary be back dated in the sum R 119 744, 36 from the date of dismissal being the equivalent of 6 months' salary (R 19975.36 x 6).
29. The amount referred to in paragraph 28 is to be paid to the Applicant on or before 30 October 2019; and
30. As provided for by section 143(2) of the LRA, any unpaid amount due in terms of this award will attract interest at the rate prescribed in terms of section 2 of the Prescribed Rate of Interest Act, Act 55 of 1975, as from the date on which it was due

Dated and Signed at POLOKWANE on this the 09 October 2019

A handwritten signature in blue ink, consisting of a stylized 'J' followed by a horizontal line extending to the right.

Panelist: Jeffrey Nkuna