

ARBITRATION AWARD

Panellist/s: GP RAMAKADI
Case No: GPBC 86/2021
Date of Award or Ruling: 10th December 2021

In the ARBITRATION between:

PSA OBO J.S MAHLANGU

APPLICANT

(Union / Applicant)

AND
DEPARTMENT OF CORRECTIONAL SERVICES
RESPONDENT

(Respondent)

APPLICANT'S REPRESENTATIVE
MR L.M MASHABA: PSA
Telefax:

Telephone: _____

Respondent's Representative:

MR CLOUW: OFFICIAL FROM EMPLOYEE RELATIONS

Respondent's address:

Telephone:

Telefax:

ARBITRATION AWARD

INTRODUCTION AND BACKGROUND

1. **DETAILS OF THE HEARING AND REPRESENTATION:** This award is in the arbitration between JS Mahlangu (the Applicant) and Department of Correctional Services (the Respondent). The arbitration was held under the banner and auspices of the GPSSBC in terms of section 191(1) read with section 191(5) [a] of the Labour Relations Act 66 of 1995, as amended (the Act) and the award is issued in terms of section 138(7) of the Act and GPSSBC Arbitration Guidelines. The arbitration hearing was heard before me on the 4th and 5th October 2021. Parties were represented as per information on the cover page. The proceedings were recorded digitally.
2. **ISSUES TO BE DECIDED:** This is unfair dismissal dispute for alleged misconduct. I am required to determine whether the dismissal of the Applicant was both procedurally and substantively unfair. I am therefore called upon to decide whether or not the Applicant's dismissal was preceded by fair inquiry and if it was for a fair and valid reason, in the circumstances I find that it was unfair, I must determine and grant appropriate relief in terms of section 193 of the Act.
3. **BACKGROUND TO THE HEARING:** The background facts and circumstances of the case to the extent that they are not seriously disputed are summarised as follows:
 - The Applicant was dismissed for misconduct.
 - The Applicant was charged, found guilty and dismissed for misconduct in that he, on or about 13 July 2018 and 14 October 2019 he allegedly rented a Departmental house number 05 Romeo Street that was allocated to him to private people in exchange for money which is in contravention of the stipulations of the Departmental Housing Policy.
 - The Applicant's appeal was unsuccessful and the dismissal was confirmed by the Appeal Authority.

4. SURVEY OF EVIDENCE AND ARGUMENT.

The Respondent's case.

A summary of the Respondent's two witnesses' testimonies under oath follows hereunder:

- 4.1 Mr Emmanuel Chabi Sesoko testified that he is currently working at Bethal, Mpumalanga.
- 4.2 He holds a position of Area Coordinator Corporate Service at the rank of Deputy Director dealing with human resource matters.

- 4.3 He was previously working at Kgosi Mampuru II management area holding a position of Management Employee Relations.
- 4.4 He knows the Applicant.
- 4.5 He received information about applicant with regards to his house.
- 4.6 It was said there is a movement of people at his house purported to be his tenants.
- 4.7 He was summoned to the house.
- 4.8 He went to the Applicant's state house and found two gentlemen in the garage.
- 4.9 Upon engaging them they said to him that, they are tenants renting rooms from the Applicant.
- 4.10. He explained to them that, they cannot be tenants at the state house, they have to move out.
- 4.11. They said they are three (3) in number but the 3rd one was not present at the time when he was addressing the other two.
- 4.12. They moved out, maintenance officials welded the doors.
- 4.13. The 3rd one namely Vusi Frans Kgomo came after some days and removed the welded bar to the door.
- 4.14. He was called there again.
- 4.15. He found Mr. Kgomo who said he removed the bar to get his belongings in the house.
- 4.16. He further said he was paying rent and Mr. Mahlangu told him to come and remove his things.
- 4.17. Mr Sesoko called the police who came and took them away.
- 4.18. Mr. Kgomo removed his belongings in the presence of the police.
- 4.19. The conduct of the Applicant was investigated.
- 4.20. The Applicant was suspended.
- 4.21. The hearing was conducted after finalisation of the investigation.
- 4.22. He testified at the hearing.
- 4.23. The Applicant was found guilty and dismissed.
- 4.24. He appealed and dismissal was confirmed.
- 4.25. The conducted of Applicant was passing serious security threats to the Institution.

4.26. The Regional, area and National Commissioners are residing there (inside the yard) and their safety becomes at risk with private and unknown people staying in the yard.

4.27. On 2018 there was another official who was caught subletting.

4.28. He was charged and dismissed.

4.29. The Applicant did not show remorse as he never pleaded guilty to his conduct.

4.30. He failed to come clean during investigation when he had the opportunity to do so.

4.31. During his investigation and when he was served with notice of intention to suspend when allegations were brought before him, he never indicated that, people who were staying at his house were his relatives.

Testimony of Collen Rambau

4.32. He testified that he was the chairperson at the disciplinary hearing.

4.33. He testified that he had complied with the disciplinary code and procedure.

4.34. He further testified that he did not agree to the application for his recusal during the hearing because the reasons advanced for his recusal were not valid.

4.35. He testified that he was not biased and he was consistent with the decision he made as employer cited one member who did same misconduct as the Applicant and was dismissed.

4.36. He said there was no double jeopardy as the Applicant was only disciplined once for subletting.

Applicant's case: Jonas Sipho Mahlangu.

4.37. He testified that he had 15 years of service with the Respondent.

4.38. He further testified that he was a first time offender.

4.39. He denies that he has sublet the house.

4.40. he was staying with his relatives and the policy does not deny him staying with family members.

4.41. He testified that both Mr Kgomo and Mr Mokgokong are traceable and they can be located.

4.42. He said the employer was harsh by suspending him before a disciplinary sitting after being evicted.

4.43. His house was locked and he could not access entry.

4.44. He wrote a letter to the housing section asking them to stop deducting his money.

4.45. He said the chairperson was harsh to dismiss him because he failed to take into account issues that he raised.

5. ANALYSIS OF EVIDENCE AND ARGUMENT/SUBMISSIONS:

- 5.1 This is unfair dismissal dispute, existence of which is not disputed.
- 5.2 The LRA casts the onus of proving that the dismissal was fair on the employer.
- 5.3 Although the LRA does not prescribe the standard of proof to be used in labour matters, it is universally accepted that evidence must be evaluated according to the yard stick used in civil matters.
- 5.4 As in *casu* the onus to prove the fairness of the dismissal both procedurally and substantively rests with the Respondent.
- 5.5 The Respondent called two (2) witnesses' who did not provide evidence that linked the Applicant to a charge of subletting or renting out the property of the employer.
- 5.6 The only evidence that the Respondent relies on is that of the two (2) "tenants".
- 5.7 This brings me to the application of the general rule to hearsay evidence and its exceptions.
- 5.8 In terms of the above section 3(1)(b) of Act 54 of 1998 hearsay evidence may be provisionally admitted where the court is informed that then person upon whose credibility the probative value of the evidence depends on is going to testify at some future time in the proceedings.
- 5.9 Section 3 (3) provides that if the relevant person does not testify, the hearsay evidence will not be taken into account unless it is admitted by consent in terms of section 3(1)(a) of the Act or is admitted by court in the interest of justice as provided for in section 3(1)(a) of the Act or is admitted by the court in the interests of justice as provided for in section 3(1)(c) of the Act.
- 5.10. It is my concern that the two (2) tenants who could not testify at the disciplinary hearing *a quo* could still not be corroborated. I think any reliance on their statements without any form of corroboration will be irregular.
- 5.11. I also want to touch on the sanction meted out to the Applicant. The question is whether any reasonable presiding officer could have arrived at that decision. The Code of Good Practice provides that one of the requirements of a fair dismissal for misconduct is that the dismissal must be an "appropriate" remedy in the light of the facts of the case. According to John Grogan page 155 on Dismissal the choice of the word "appropriate" reflect the difficulty the courts have experienced in laying down principles for deciding whether dismissal or some lesser sanction should be imposed for a proven offense. Further the writer asserted, that presiding officers in internal disciplinary inquiries are required to exercise their discretion in respect of sanction reasonably, honestly and with due regard to the general principles of fairness. It is a trite principle of law that decisions to exercise discretion must be reasonable and fair.

A tribunal performing an independent task must exercise this discretion independently, impartially and reasonably. (My emphasis).

5.12. I think the sanction is disproportionate to the offence itself.

5.13. This motivation stems from the fact that the substance of the case was not proven.

5.14. it is also trite that the long service of the employee in the workplace mitigates strongly in him or her getting lenient penalty. It is common cause that the applicant had rendered 15 years of his services without a blemished record. Arbitrators are required to assess the reasonableness and fairness of the decision to dismiss an employee and may interfere with the employer's decision if that decision is found to be unreasonable and unfair when assessed against an independent standard. In the case of **Nampak Corrugated Wadeville v Khoza (1999) 20 ILJ 578 (LAC)**, the Labour Appeal Court held that, "*in matters where the sole issue is whether the sanction of dismissal was appropriate, arbitrators have the limit function of insuring that the dismissals do not fall outside a 'band of reasonableness', the parameters of which are determined by general principles of fairness*". The million-dollar question is how can one establish whether a decision to dismiss an employee for a particular misconduct was so aberrant that it can be said that no reasonable presiding officer would have taken that decision in the circumstances.

The Constitutional Court has entered into the fray regarding the interpretation and application of reasonableness. (**Sidumo v Rustenburg Platinum Mines Ltd (2007) 28 ILJ 2405 (CC)**).

5.15. It is apparent from the mentioned elements, to prove a charge of subletting or renting out the property, the employer had failed to discharge the onus of proving that the Applicant's action meets the definition of subletting.

5.16. it was also not brought to my attention that the relationship between the parties had irretrievably broken down. (**NEHAWU obo Motsogae v SARS (2010) 19 CCMA**).

5.17. In the totality of the circumstanced I find it appropriate to award as follows:

6. AWARD

6.1 The Respondent is ordered to reinstate the Applicant, JS Mahlangu into its employ on terms and conditions no less favourable to him than those governed the employment relationship immediately prior to his dismissal.

6.2 The re-instatement in paragraph 6.1 if effective from the 2nd of January 2022.

G.P RAMAKADI

..... Thus done and signed in Pretoria on this date:
15/12/2021

Name

(Council name) Arbitrator