



In the

GENERAL PUBLIC SERVICE SECTOR BARGAINING COUNCIL

Held in Nelspruit

Date: 22 December 2020

CASE NO: GPBC 14/2020

In the matter between

PSA obo C Mashego

Applicant

And

Department of Employment and Labour

Respondent

ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION

- [1] The hearing was scheduled under the auspices of GPSSBC heard before me on the 6th of August 2020, 3rd and 4th of September 2020 and from the 28th to the 20th of November 2020 respectively. The Applicant was represented by Ms Pamela Letebele from Public Service Union herein referred as PSA and the Respondent was represented by Ms Theron Makuya. Proceedings were manually and electronically recorded.
- [2] Applicant submitted a bundle which I labelled it "Bundle A" and the Respondent submitted its bundle that I labelled it Bundle "R". Parties agreed to submit closing arguments in writing on or before the 30th of November 2020.



ISSUE TO BE DECIDED

- [3] I have to decide whether the Applicant's dismissal by the Respondent is fair or not.

BACKGROUND TO THE DISPUTE

- [4] The dispute emanates from a dismissal of the Applicant by the respondent on the 17th of December 2019. At the time of dismissal the Applicant was working as the Paymaster in Nelspruit Labour Centre, earning a gross monthly salary of R19, 324. 00.
- [5] The Applicant was charged with the following allegation:
"It is alleged that during on or about 14 February 2018 and 03 May 2018 near or at Nelspruit Labour Centre you committed an act of misconduct in that you intentionally and willingly involved yourself in a 2(two) fraudulent UIF applications of Mr Thulane Lucky Ngomane as a result, the Department suffered a financial loss of R14831,56.¹

SURVEY OF EVIDENCE AND ARGUMENTS

RESPONDENT'S CASE

The Respondent led its case through witnesses as following:

First witness – Mr Keagan Koen

- [6] He testified under oath that he is an employee of Eduardo Construction based in Witbank. His primary role is to oversee the Human Resources and Industrial Relations of the company. He said the UI-19 form on page 78 of the Respondent's bundle is not theirs as they only type the forms. This form is both printed and also written by pen. He also testified on behalf of Ms Maria Mashiane in that she is not the one who populated that form,
- [7] He further testified that in their records they do not have or never had any employee by the name of Thulane Lucky Ngomane.

¹ Allegations labelled against the Applicant, page 1 of Bundle R



Second Witness – Mr Sydwell Mngadi

- [8] Mr Mngadi testified under oath that he is Assistant Director Employee Relations and Human Resources Operations in Gauteng Department of Employment and Labour. His functions entail overseeing HR, IR, ER and all labour related matters. He said he chaired the disciplinary hearing of the Applicant and found him guilty on balance of probabilities.
- [9] He testified that the fair procedure was observed in coming to a dismissal sanction and the witnesses of the employer were more credible than the ones of the Applicant. In balancing the probabilities the version of the employer was more probable hence he arrived to the decision of dismissing the Applicant.

Third witness – Mr Thulane Lucky Ngomane

- [10] Mr Ngomane testified under oath that he was employed by Emnotweni Resort from 2013 until 30th of August 2017 when he resigned. He went to Department of Employment and Labour in Nelspruit on the 14th of February 2018 to apply for UIF benefit. It was already late as he was coming from Ngodwana. He found Collen Mashigo and submitted his UI-19 form. Clooen said he must come tomorrow as it is late. He phoned him after a week and told him he doesn't qualify but he will make a plan for him.
- [11] The Applicant told him to come to the office, he couldn't come as he was working in Ngodwana already. He said the Applicant told him that there is a money that was going to be deposited in his account and he must know that the money is coming from the Department. He then gave him his bank card, not the pin code, the Applicant came to Ngodwana to fetch the bank card. He said he cannot remember when exactly the money was deposited but the Applicant kept on calling him saying he will give him R1500 but later changed and said he will give him R3000.
- [12] On the 17th of May he went to the bank and transferred the money to another account. The Applicant kept on calling and he ignored his calls. Some lady called him and told him that the money he got is little, she must come to the office and sign another documents to get another money. He said the Applicant threatened him in that they were supposed to share the money and it won't end well. He called him again saying when the Department calls him he must not answer and he must change his numbers.



- [13] He then read and confirm his statement on page 34 of the Bundle R in that it is his and it is correct. He confirmed to have filled the UI-19 application form on page 69 of the Respondent's bundle. He also filled the bank form on page 75 of the same bundle but denied to have taken it to the bank for confirmation of banking details and signing the bottom part. He also testified that he was working for the company named New 45 in Ngodwana Sappi, but he is not sure exactly about the dates he worked but worked there for 3 weeks.
- [14] Under cross-exam he said he came to the Labour Centre on the 14 of February 2018, he only came once and never returned again. He said he was assisted by the security officer, who told him it was late but showed him Collen who took him to his office. He only had UI-19 and the ID. He also said the UI-19 on page 75 of bundle R was brought by him on that day. He was then given a bank form by Collen and filled it.
- [15] He also testified that he cannot remember on whether he signed the UI-19 form on page 69 of the Bundle R. He also stated that he doesn't know Mr Fezeka Mathe but he only met him on the 14th of February 2018. He also said the Applicant came to Ngodwana Sappi factory to collect the card but he is not sure when was this, but around 16h30. He said the Applicant kept on calling him but he has lost his phone that has his contacts. He then met the Applicant around town (Nelspruit) and gave him wrong pin.
- [16] When asked when he went to the bank to transfer the money and do a new card he said he can't remember. He said the Applicant called him the whole day after that but he can't remember the day. Asked whether he knows about the second application he answered no, but he remembers that the Applicant called him again, but he can't remember when this was. He denied the signature on page 59 of the Applicant's bundle, which is the bank confirmation form (UI-6), but confirmed the signatures on page 35 (Sworn affidavit) and 75 (UI-2.8 form – Bank mandate). But he denied the signature on page 81 of bundle R.
- [17] ON re-exam he confirmed that he only knows Mr Fezeka Mathe through the Applicant. The Applicant once sent Mr Mathe to him for some documents. Mr Mathe and him stay 5km apart.



Fourth witness – Mr Michael Nkabinde

[18] Mr Nkabinde testified under oath that he is Assistant Director at Department of Employment and Labour in Mpumalanga. His role is to support labour centres, training and giving direction to those centres needing that. He testified that all what is done in the Department emanates from the Unemployment Insurance Act of 2001 and Unemployment Contributions Act of 2002. His testimony was based on 3 roles namely; Paymaster, Assessor and Employer Services Role.

[19] He said in all these roles, the incumbents are trained and given different roles and signing powers. Those roles are segregated and cannot be done simultaneously by one person to avoid collusion that leads to fraudulent transactions. He said at Labour Centres they have registration services done by Client Services Official where clients come and register their claims. The CSOs will take the application forms and give them to the Supervisor with the had-over list. The CSO endorse the form by signing it upon verifying it.

[20] After the form has been sent to the Supervisor it goes to the Employer Services and they will check the correctness of the information and verify it. Then they will take it to Assessor/Supervisor that will either approve or reject the claim, if approved it then goes to Paymaster for payment. If refused it goes back to CSO for further evaluation and/or checking.

[21] Under cross-exam he was asked about the form on page 69 of bundle R, which he said it is an application form for the UI benefits, approved by Mr T.S. Sibiya. He confirmed that although it was supposed to be batched as an approved claim it was not batched as it does not appear on the batch list on page 80 of bundle A.

Fifth witness – Josephine Mashamaite

[22] Ms Mashamaite testified under oath that she was employed by the Respondent from 2017 until 2018 July as an Intern. Her role was that of a learner Customer Service Officer responsible for taking claims from clients, check them and give them relevant information or forms required to complete their claims.



- [23] She testified that on the 14th of February 2014 she received an application from the Applicant, although not sure about the exact time she completed it and wrote ID seen and signed the form despite not seeing the ID. She acknowledged that this amounts to misconduct and is wrong but, because the Applicant was senior to her she decided to do that to score points.

Sixth witness – Mr Samkelo Nkosi

- [24] Mr Nkosi testified under oath that he was employed by the Respondent effective from June 2017 until May 2018 as Client Service Officer Learner. He said on the 3rd of May 2018 Mr Mashego came to him with an application form and asked him to write 'ID Seen' though the client was not present with the ID. He indeed signed it and wrote the "ID seen" as requested by the Applicant. He said he knew that was wrong but because he was asked by his senior to do so he did so to score points as he was a learner.
- [25] When asked about the 2 statements he gave, he said because he was no longer working the recollection of his memory was not good, the investigator offered him opportunity to bring another information when he remembers. In his first statement he indicated that he got the form from the Applicant and wrote everything as if client was before him though he was not, para 2 and 3 of the statement in bundle R in page 44.
- [26] On the second statement on page 47 he indicated that he is the one who assisted the client on the 3rd of May 2018 and signed all this on his own accord without being coerced.

Seventh witness – Mr Phillip Mnisi

- [27] Mr Mnisi testified under oath that he is employed by the Respondent as the Senior Admin Officer: Risk Management, Fraud Detection and Fraud Investigation. He said he received a disputed declaration from on the 3rd of April 2018 picked up by Mr Thulani Sibiya. This was pertaining the employment record of Mr Thulani Lucky Ngomane at Eduardo Construction. He requested the application form and took it to the company, the company denied knowing or having such employee in their database.



[28] He then interviewed all the witnesses that are mostly listed above. Took their statements and compiled for HR to take action.

Eighth witness – Mr Thulani Sibiya

[29] Mr Sibiya testified under oath that he is employed by the Respondent as the Senior Administrator in the Mbombela Labour Centre. On the 19th of March 2018 Mr Fezeka Mathe came to him with the application of Mr Thulane Ngomane, because it was busy on that day he did not approve it then but approved it only the following day. Upon checking the claim again he realised that the claim was approved without salary schedule and the Applicant was enquiring about this claim.

[30] He then checked with the company Eduardo Construction where she spoke to the lady called Maria, who she denied knowing the client as their employee. He then asked Risk Unit to intervene and put the claim on hold.

Ninth witness – Ms Khethiwe Nkalanga

[31] Ms Nkalanga testified under oath that she is employed by the Respondent as the Claims Assessor. Her role includes capturing of the applications, ordinary, illness and maternity claims. She said on the 17 May 2018 she checked and approved the claims in her desk. Of the claims approved was that from 03 May 2018 of Mr Ngomane. Asked whether the Applicant was involved on that claim, she said she doesn't know.

APPLICANT'S VERSION

First witness – Mr Collen Mashego

[32] The Applicant testified under oath that he was employed as Admin Clerk – Paymaster of the Respondent from 01 March 2014 then promoted to Paymaster position in 2016 until his dismissal. Part of his responsibilities is to release the payments to clients upon receipt of approved claims by the Assessors. He testified that on the 14th of February 2018 there were some clients requiring service. Normally on busy days they will come out and assist only those who have approved claims for payment continuity. He then went to take the payment forms and gave those who needed the forms. Among those who were there for payment application was Mr Thulani Ngomane.



- [33] On the 18th of May 2018 he received batch of approved claims for payment, he checked on the system and they were approved for payment and one of those was that of Mr Ngomane. He indicated that he does not capture, load or approve claims but he checks the claim status on Siyandiza, which is the software used by the Respondent on all claims and status, then checks with the payment application form if the details are correct as per the system indicates then release payment. He denied the allegations that he coerced Nkosi and Mashamaite to write ID seen on the form or having knowledge of the applications made by Ngomane TL.

Second witness – Mr Philemon Fundzama

- [34] Mr Fundzama testified under oath that he is employed by the Respondent as the Registry Clerk. He receives applications from CSOs for registration, receives files from Assessors and batch the approved files to Provincial office and keep the rejected or refused claims for further investigations.

ANALYSIS OF EVIDENCE AND ARGUMENTS

- [35] I am tasked with the responsibility to determine whether the dismissal of the Applicant by the Respondent is fair or not as it is enshrined in the Labour Relations Act of 1995, Schedule 8 of Code of Good Practice on Dismissal, read along with the Collective Agreement the parties entered into pertaining matters of discipline in the workplace, Resolution 1 of 2003 of Public Sector Coordinating Bargaining Council.

- [36] It is the onus of the employer to discharge that the process and substance that led to dismissal of the employee was fair and the dismissal was an appropriate sanction. In this case, the Applicant was charged with

“It is alleged that during on or about 14 February 2018 and 03 May 2018 near or at Nelspruit Labour Centre you committed an act of misconduct in that you intentionally and willingly involved yourself in a 2(two) fraudulent UIF applications of Mr Thulane Lucky Ngomane as a result, the Department suffered a financial loss of R14831,56” (sic)²

² As per charge sheet.



- [37] It is therefore trite to understand that when anyone is alleged to have committed an offence he/she that alleges must prove. In so doing the Respondent relied on its witnesses to prove that they followed correct procedures in coming to that decision. Analysing the process followed until the Applicant was dismissed the Respondent followed the provisions of the Collective Agreement in doing so as a result, I could not find the flaw in the procedure followed. The Respondent also complied with rules of natural justice as none of the Applicant's rights were infringed in the process.
- [38] On matters pertaining the substance, one relies fully on the evidence provided by parties and upon balancing the probabilities the more probable version will be carried. The Respondent has brought 9 witnesses to prove its case. First one being Mr Koen from Eduardo Construction who testified that the client was not in their employ and was fictitious employee, also the claim form was never populated by their administrator Maria Mashiane.
- [39] The second witness Mr Mngadi also testified that he only chaired the hearing and made his decision based on what was presented to him and both of them with the first witness failed to put the Applicant on the crime scene, or in this case, fraud scene or occurrence. Their testimonies cannot be taken into consideration when deciding on this case. Third witness, Mr Lucky Ngomane who is the client and the recipient of the money deposited in his account, his testimony is riddled with lies and contradictions as he said he only went once to the Labour Centre but on his own statement he indicated to have gone there twice.
- [40] Mr Ngomane testified about the dates where most of the things occurred but he could not remember when he was employed in Ngodwana Sappi, when the Applicant exactly came to him to fetch the bank card and also the name of the employer. In most of the crucial questions pertaining his testimony during cross-exam he mostly answered "I do not remember" although that was on his testimony.
- [41] The evidence by Ms Mashamaite and Mr Nkosi is really appalling, they both said in their statements that they knowingly broken the rules to please Mr Mashego, though they were trained by the department on how to handle claims. Ms Mashamaite claimed to have been given the form



by the Applicant but when asked when was this she could not remember, she could also not remember what did she do with the form after that. On the other hand Mr Nkosi brought 2 statements that were contradictory and also came to contradict those statements which to me were just clear fabrication and lies that were so bare but the Respondent chose to ignore.

[42] In all Respondent's witnesses none of them has adduced a burden of proof that indeed the Applicant involved himself in the fraudulent or fictitious claim as alleged. The Respondent has given an affidavit by Mr Fezeka Mathe admitting to have failed to do a thorough check in the claim, sworn affidavits from 2 witnesses admitting to have committed fraudulent activity knowingly and the Supervisor approving the claim without following the due process, and again, the Assessor who approved the claim that is put on hold.

[43] The Applicant's version cannot be disputed to be correct in this case, as the applicant agrees to have processed this payment with other approved payments from the system. It is common cause that the claim procedure only involves the Applicant when the claim is approved and process the payment. In this case this is his involvement that can be proved and I could not find any evidence linking him to the allegation above.

FINDING

[44] It is my finding that, having considered the evidence brought before me and on balance of probabilities, the dismissal of the Applicant is procedurally fair but substantively unfair as the Respondent failed to adduce evidence pertaining the allegations labelled against the Applicant.

AWARD

[45] In view of the above deliberations I make the following order:

1. The dismissal of the Applicant is substantively unfair
2. The Respondent is ordered to reinstate the Applicant retrospectively in his previous position without any loss of income or benefit.
3. The Applicant to report on duty on Monday; 01 February 2021.



4. Respondent is ordered to pay the Applicant an amount of **R231, 888. 00** less statutory deductions on or before 26th of February 2021.

Sivuyile Tshingana



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GPSSBC Arbitrator