

ARBITRATION AWARD

Panellist/s: Leonard van Leeuwen
Case No.: GPBC 435/2018
Date of Award: 28 July 2019

In the ARBITRATION between:

Public Servants Association of South Africa obo Sibande, Gloria
(Union / Applicant)

and

Department of Justice and Constitutional Development
(Respondent)

Union/Applicant's Representative: Asnath Sedibane (PSA)

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DETAILS OF HEARING AND REPRESENTATION:

1. The Arbitration Hearing into an alleged Unfair Dismissal Dispute, referred in terms of Section 191(5)(a) of the Labour Relations Act 66 of 1995, as amended ("LRA") was held at the Offices of the Department of Justice and Constitutional Development in Nelspruit on 24 August 2018, 23 November 2018, 19 February 2019, 25 April 2019 and 04 July 2019. The Award is issued in terms of Section 138 (7) of the LRA.
2. The Employee, Ms Gloria Sibande (hereinafter referred to as the Applicant), was present and represented by Ms Asnath Sedibane, a Union Official from the Public Servants Association of South Africa (PSA). The Employer, Department of Justice and Constitutional Development (hereinafter referred to as the Respondent), was represented by Mr Stephen Masuku.
3. The Hearing was held in English and isiSwati and was both digitally and manually recorded. Interpretation services was rendered by Ms Andile Mthembu, an accredited Bargaining Council Interpreter.
4. After the conclusion of witness testimony on 04 July 2019, parties requested to submit written closing arguments in support of their respective cases. It was agreed that these closing arguments must be submitted to the Bargaining Council on or before 12 July 2019. Both parties submitted their respective closing arguments on the said day .
5. The Arbitration Award is a summary of the evidence I considered, with brief reasons for my findings and is not intended to be a verbatim record of the proceedings.

ISSUE TO BE DECIDED:

6. I must decide whether the Dismissal of the Applicant was both procedurally and substantively fair.
7. With regards to the substantive fairness of her Dismissal, it was the Applicant's submission that she did not commit the said misconduct as is alleged by the Respondent and secondly that the Respondent had been inconsistent with regards to the imposing of an appropriate sanction in relation to the said misconduct.

8. As to procedure, it is the Applicant's submission that the Presiding Officer in the Disciplinary Hearing was grossly negligent in the execution of his duties when he found the Applicant guilty on a charge that had been withdrawn.

BACKGROUND TO THE MATTER:

9. The Applicant was employed by the Respondent on 01 May 2004 and at the time of her Dismissal on 26 February 2018 she was employed as an Administration Clerk at the Magistrates Court in Nelspruit and earned a monthly salary of R14 795.75.
10. She was notified in writing on 22 March 2016 to attend a Disciplinary Hearing to be held on 11 April 2016. The Disciplinary Hearing however did not continue on the said date as it was postponed. The Disciplinary Hearing was concluded during February 2017. She was informed that she was found guilty as per the charges leveled against her and that she had to submit mitigating factors by 31 March 2017. The outcome of the Disciplinary Hearing was only issued on 10 July 2107. A sanction of dismissal was imposed where after she lodged an appeal against her guilty finding and the sanction that was imposed.
11. She was initially charged with 6 counts of misconduct but at the commencement of the Disciplinary Hearing, the Respondent withdrew charges 1, 3 and 6. Each charge also had an alternative. She was however found guilty on the remaining main charges. This was also confirmed by the Respondent's representative at the commencement of the Arbitration.
12. Charges 2, 4 and 5 read as follow:

Charge 2

You are charged with misconduct of fraud, in that on or about 05 January 2015, at or near Nelspruit Magistrate you paid out bail money in the amount of R20 000.00 from Bail Reference Number BAI 60515OUT000005, in the matter of the State v CJ Heunis, without the knowledge and consent of Mr FB Prollius (Bail Depositor) and or CJ Heunis. As a result of your conduct, you caused the Department of Justice & Constitutional Development to suffer a financial loss to the amount of R20 000.00

Charge 4

You are charged with misconduct of fraud, in that on or about 14 August 2014, at or near Nelspruit Magistrate you paid out bail money in the amount of R25 000.00 from Bail Reference Number BAI 60514OUT000905, in the matter of the State v JS Lund, without the knowledge and consent of Mr PJ

Lourens (Bail Depositor) and or JS Lund . As a result of your conduct you caused the Department of Justice & Constitutional Development to suffer a financial loss to the amount of R25 000.00

Charge 5

You are charged with misconduct of fraud, in that on or about 29 September 2014, at or near Nelspruit Magistrate you paid out bail money in the amount of R10 000.00 from Bail Reference Number BAI 60514OUT001075, in the matter of State v FJ Joubert, without the knowledge and consent of Mr F J Joubert while the case has not yet been finalized. As a result of your conduct you caused the Department of Justice & Constitutional Development to suffer a financial loss to the amount of R10 000.00

13. The Applicant did not dispute that she had paid out the bail money that formed the bases of the allegations against her. It was however her case that she paid out the money in line with the Respondent's Policies.
14. It was also common cause that the bail deposit receipts were still in possession of the original bail depositors.
15. The Applicant referred a Dispute to the Bargaining Council on 01 March 2018. The matter was not set down for Conciliation and a Certificate indicating that the matter remained unresolved was issued on 13 April 2018 on the expiring of the 30 day period since the Referral was received by the Bargaining Council where after the Applicant on 16 April 2018, submitted a request for Arbitration to the Bargaining Council. The matter was set down for Arbitration before me on 24 August 2018.
16. As to relief, the Applicant requested compensation.

SURVEY OF EVIDENCE AND ARGUMENT

Documentary

17. Both parties, at the commencement of the Arbitration, submitted documentary evidence in support of their respective case. The Respondent's bundle was marked Bundle "R" and consisted of 88 pages. The Applicant's bundles were marked "A1" and consisted of 7 pages, "A2" which consisted of 17 pages and "A3" that consisted of 4 pages.

18. The parties at the commencement of the Arbitration also submitted pre-arb Minutes.

Respondent's evidence and arguments:

The Respondent called the following witnesses, who briefly testified after being duly sworn in:

Azwidihwi Micheal Ndiitwani (Ndiitwani), testified as follows:

19. He is currently employed as the Director Labour Relations in the National Department of Transport.
20. He chaired the Applicant's Disciplinary Hearing and confirmed that it is his finding that he had made on Page 10 of Bundle "A2". According to his findings he found the Applicant 'guilty' as charged except on Charge 1, 3 and 6 which was withdrawn at the start of the Hearing.
21. His analyses however refer to Charges 2, 4 and 5. It was an error in the findings when he stated that charge 5 was withdrawn as he confirmed that he found her guilty on the said charge. It is also an error stating that he found her guilty of theft as he had found her guilty of fraud.
22. On Page 13 of Bundle "A2" he provides a reason as to why he imposed a Sanction of Dismissal, after having found her guilty of the alleged misconduct. He had considered the mitigating factors and aggravating factors submitted before imposing the said sanction. He also in aggravation found that the Applicant never showed any remorse for her actions.
23. He further confirmed that he chaired the Disciplinary Hearings of Manana and Mavimbela, who were charged with negligence in that they allowed someone to use their password. He confirmed that it was his report with regards to the said Hearing, on Page 71 of Bundle "R".
24. Both Manana and Mavimbela pleaded 'guilty'. Both the Respondent and the Applicants requested a sanction of a final written warning which was ultimately imposed.
25. During Cross-Examination, he denied that when he chaired the Applicant's case, he already had insights into the merits of the Applicant's case as the other two employees had pleaded guilty and therefore, he did not deal with the merits of their case.
26. He conceded that the original document in relation to the said pay outs, could not be found and were not submitted during the Disciplinary Hearing.
27. He confirmed that Ms Sedibane was aware that he chaired the Disciplinary Hearing of Manana and Mavimbela prior to the Applicant's Disciplinary Hearings. Sedibane never requested that he recuse himself when the Applicant's Hearing commenced.

Matimba Evans Chauke (Chauke), testified as follows:

28. He is employed by the Respondent in the position of Assistant Director Financial Operations and is stationed at the Respondent's regional office. His duties include providing support to Courts with regards to financial administration and financial operating systems. He was appointed to investigate the theft of money at the Mbombela Magistrates Court.
29. The Courts make use of the Justice Administration System (JDAS). In accessing this system, a person needs a password and a username. The system is used to administer third party funds which included monies received for the payment of fines, bail, maintenance and compensation.
30. When bail is paid at a Court, the Official receiving the money will issue a manual J399 receipt and record the transaction on the system, where after the system will generate a receipt that is kept for audit purposes. Once the Case is finalized, the Clerk will go on the JDAS system and capture that the Case has been finalized where after the bail money will be refunded to the Bail Depositor, who must bring the original J399 receipt and his identity document. The money is paid out by the Clerk at the Cash Office.
31. The Depositor can only request the bail money once the Case had been finalized, either by the person being convicted or if the case was withdrawn or it was struck of the roll by the Court.
32. Before the money is however paid to the Depositor, the Clerk at the Cash Office will require the Depositor to sign the system generated receipt and original J399 receipt that was issued to him, at the back of the said receipt where after the Clerk will compare the detail on the original receipt with the detail in the identity document of the person collecting the money as to ensure that it is the correct person who is collecting the said bail money.
33. He confirmed that in exception circumstances, bail money can also be paid to other persons than the original Bail Depositor. Such instances are where the Bail Depositor has given Power of Attorney to a person authorizing him/her to collect the bail money on his behalf. Such a person will also bring the original J399 receipt and his or her identity document together with a certified copy of the Depositor's identity document and the Power of Attorney letter.
34. The Clerk of the Court's Office and that of the Cashier's Office are separate from each other.
35. During his Investigation, he found that bail money was paid out in the following instances while the cases were not yet finalized. With regards to charge two, in relation to the matter of the State v Heunis they received bail to the amount of R20 000.00 from Mr FB Prollious on 8 July 2013. The system generated receipt indicated that the said bail money was paid out on 05 January 2015 and that the

person who paid out the money was G Gama. This was the surname of the Applicant at the time. He contacted Mr Prollious who informed him that he did not receive any bail money and that he was still in possession of the receipt nor did he authorize any person to collect the money on his behalf and or made an affidavit to the effect or that he had lost the original receipt. In this Case, the system showed that it was updated on 17 November 2014 by the Clerk of the Court, stating that the matter was finalized and indicated RFC which meant the money was ready for collection. The Clerk of the Court at that time was Mr Mavimbela.

36. With regards to Charge 4, in the matter of the State v J S Lund, he found that they received bail to the amount of R25 000.00 that was paid by Mr PJ Lourens on 14 April 2011 at the Magistrate Court in White River and the said bail money was paid out to PJ Lourens on 14 August 2014 at the Magistrates Court in Nelspruit. The bail money was paid out by G Gama. He did interview Mr Lourens during his Investigation who confirm he did not receive the money and that he was still in possession of the original J399 receipt. He made an affidavit to the effect that he did not give any person power of attorney to collect the money on his behalf or that he had lost the original receipt. The JDAS system showed that A Themba on 05 April 2012 updated the system indicating 'Case Finalized' and that the bail money was ready for collection. He however did not interview A Themba.
37. As to Charge 5, in the matter relating to the State v F J Joubert he found during his Investigation that they had received bail to the amount of R10 000.00 from Mr Joubert on 10 February 2012 and that the said bail money was paid out to Mr Joubert on 29 September 2014 by G Gama. He did interview Mr Joubert during his investigation, who confirmed that he did not receive the said bail money and that he was still in possession of the original J399 receipt. He too made an affidavit to the effect that he did not give any person power of attorney to collect the money nor that he had made any statement stating that he had lost the original receipt. The JADS system indicated that the status was updated on 25 September 2014 and made ready for collection by Mr Mavimbela.
38. In all the above instances when the money was paid out, the Cases were not yet finalized and in all the above instances the Applicant had handed over cash to the alleged recipients.
39. If a Depositor had lost the Original Receipt, they would be required to go and make an Affidavit to the effect and a copy of the J399 receipt together with a copy of the Identity Document will be attached to the system generated receipt and other Court documents before money can be paid. The signature of Depositor will still be verified with the signature on the copy of J399.

40. During Cross-Examination, he stated that the Prosecutor will sign on the back of the J379 and indicate that the matter was finalized. This can also be done by the Clerk of the Court. Money may not be paid out to a person if the Case was not finalized.
41. If the Case is not placed back on the Court Roll with a future date, it will be regarded as finalized and the Prosecutor will indicate it as being finalized.
42. He also confirmed that he did not during his Investigation, interview the Applicant.
43. To access the JDAS System, one will need a password. The owner of the said password used to access the system, will be regarded as the person who was conducting the transaction. The Respondent does have a Policy governing the use of passwords and in terms of the Policy one is not allowed to share your password with another person.
44. The Cashier cannot make any payments if the Case was not managed and indicated as finalized by the Clerk of the Court.
45. The J399 Receipt, JDAS Receipt and copy of the Identity Document and Daily Audit Report must be kept. All these documents are collected and given to the Supervisor for checking, who will then remain the custodian of the said documents. During the said period, Esme Heyns was the Checking Officer.
46. He did request all the Transaction Documents for the period that formed part of his Investigation. The document for all other Clerks was available except those for the Applicant. He also found that Clerks were not submitting documents to the Supervisor during the said period.
47. He agreed that Bail can also under certain circumstances, be paid out to someone else than the original Bail Depositor but that in these circumstances the said requirements must be met.
48. The bail money in relation to the said charges were all paid out in cash

Gomi Seargent Mavimbela (Mavimbela), testified as follows:

49. He is employed by the Respondent as an Administrative Clerk in the Criminal Section at the Magistrates Court in Mbombela (Nelspruit). During 2015 he was responsible to manage bail on the system. If a person comes to request for his or her bail money to be refunded, he first had to go and verify on the Charge Sheet if the Case was finalized and whether the bail wasn't forfeited. If bail was to be paid out, he will sign it on the back and place a stamp on it, where after he will open the JDAs System where he

will manage the bail to indicate that the Case was finalized and that the bail money was ready for collection. The Bail Depositor will be present while he is managing the bail on the system. Where after the Receipt will be given to the Cashier for payment of the bail money to the Depositor who will be present at the Cashier.

50. The Cashier, before paying out the money must verify the signature of the person who is collecting the Bail with the signature on the Receipt and by means of his Identity Document that it indeed is the depositor. The Depositor must sign in front of the Cashier.
51. In relation to the incidents that showed that he had managed the Bail Money on the System it could have happened that the Office was very busy and that he was alone in the Office at any given stage and that the Cashier would come and assist him to manage the Bail on the System. It would have happened when the Cashier assisted them that they had not signed out and then the person could just work on their name. The Applicant, on some of those occasions did assist him to manage Bail.
52. He was charged with negligence as he allowed fellow employees to work on his computer while he was logged in, using his credentials. He pleaded 'guilty' and was given a Final Written Warning.
53. He confirmed that in the incident relating to the charges against the Applicant, the Court Cases were not finalized when the Bail Money was paid out.
54. During Cross-Examination he denied that he had ever given any one his password.
55. If the matter had been withdrawn in Court against an accused, then the Bail will be refunded to the Depositor.
56. He confirmed that before 2015 they never used to attach the Charge Sheet to the Bail Receipt when Bail was to be refunded.

Petrus Johannes Lourens (Lourens), testified as follows:

57. He is a practising Attorney in Nelspruit. At the time of the alleged incident, he was practising as an Attorney in White River. He confirmed that he acted on behalf of Mr Lund, who was arrested, and he brought a Bail Application on his behalf. The Bail was set at R25 000.00. He paid the Bail at White River during 2010. The Receipt was in his name and it is his signature on the Receipt.
58. He never received the said Bail Money on 14 August 2014. He was informed that the matter had been struck of the Court Roll and did go to collect the Bail Money but was informed that it was not available.

He never gave anyone Power of Attorney to collect the money on his behalf, nor did he make any Affidavit stating that he had lost the Bail Receipt.

59. He did testify in the Applicant's Disciplinary Hearing where he produced the original Receipt. The Receipt is still in his possession.
60. During Cross-Examination, he confirmed that Mr Lund could not claim the Bail Money as he had paid the Bail. If the money is no longer in the State Account than it must have been fraudulently claimed.

Frederich Baldwin Prollius (Prollius), testified as follows:

61. During 2010 he was employed as the Manager Traffic and Law Enforcement in Mbombela.
62. He confirmed that he paid Bail on behalf of Mr Heunis who at the time was a colleague of his.
63. He denied that he had received the Bail Money on 05 January 2015 and that the Case at that time, was not yet finalized. He denied that he gave anyone Power of Attorney to collect the said Bail Money on his behalf nor did he make any Affidavit stating that he had lost the original Receipt. He further confirmed that he did testify in the Applicant's Disciplinary Hearing and that he produced the original Receipt during the said Hearing. He further testified that the Case of Heunis was only finalized during 2016.

Arguments

64. In Closing Argument, the Respondent submitted that they, on a balance of probabilities have proven that the Applicant had committed fraud which is a serious charge. The misconduct that the Respondent had found the Applicant guilty of, namely fraud, has an element of dishonesty, which destroys the trust relationship.
65. The Respondent had also referred to numerous cases in support of their decision to impose a Sanction of Dismissal in this instance, namely ***Nedcor Bank Ltd & others (2002) 23 ILJ 1243 (LAC)***, ***Kalik v Trueworths (Gateway) & others (2007) 28 ILJ 2769 (LC)*** , ***Humphries & Jewell (Pty) Ltd vs Federal Council of Retailing and Allied Workers Union 1991 ILJ 1932 (LAC) 1037***, ***Ease Access Rental v CCMA (2016) 37 ILJ 1419 (LC)*** and ***Woolworths v Mabija (2016) 5 BLLR (LAC)***

Applicant's evidence and arguments:

The Applicant, Gloria Sibande, who after being duly sworn in testified as follow:

66. She was employed by the Respondent as a Cashier. Her duties include the receiving and paying out of Bail and Maintenance money. She was however not the only person performing the said functions, as there were also two other cashiers by the names of Phumzile Swane and Moses Ngomane.
67. Depositors come to her with the Receipt that is signed on the back of the Receipt by the clerk of the Court confirming that the Case was finalized and that she may pay out the said Bail Money. The Depositor must provide them with their Identity Document and must sign the Receipt. They then verify the two signatures by comparing the two signatures. Before they can pay out the money, they must check the system to see where it indicates that the Case is finalized, and the Bail was made ready for collection.
68. She denied that she could manage the Bail on the System. She also denied that she had ever assisted anyone to manage Bail on the System.
69. Bail cannot be paid out without someone claiming it. If a person comes with the correct documentation to claim his Bail Money, there is no way that they can decline paying it.
70. After the Bail has been paid out, the documents are all verified by the Cashier, the Supervisor and the Office Manager. This is done the same day in the afternoon, once they have cashed up. They print an Audit Trail Report and attach all transaction documents to it, where after it was given to the Supervisor for checking. After the Supervisor had checked it, it is taken to the Office Manager.
71. Pages 3 to 6 of Bundle 'A1' is the Cash Receipts and Pay Out Check List for 5 January 2015, signed by the Office Manager indicating that all was found to be in order. The Office Manager will then take all the documents and place them in the Storeroom. The Manager then also submits the Check List online to the National Office.
72. She confirmed that the Cashiers and the Clerks of the Court do not work in the same office.
73. She was informed on 07 September 2015 that she was transferred to another Office, namely the Divorce Section where she worked until her Dismissal. After her transfer she was not allowed to enter the Cash Office again. She was not informed as to why she was being transferred to another Office.

74. She did not deny that all the Bail Depositors were still in possession of the original receipts.
75. According to her, the Chairperson was biased as he had all three the Charge Sheets with him and as such had prior knowledge of the Case against her.
76. During Cross-Examination she confirmed that she did call two witnesses to testify on her behalf during the hearing.
77. She paid out the Bail Money to the relevant persons who had submitted the correct documentation to her.
78. She confirmed that on occasion, Heyns would ask her to assist to check her colleagues work as she was over worked.
79. She further confirmed that she never applied that the Chairperson recuse himself.
80. She further confirmed that she was on duty on the days in question, and that according to the JDAS System she had paid out the Bail Money.

Arguments

81. The Applicant's Representative in her Closing Argument stated that the Applicant's Dismissal had been procedurally unfair as the Chairperson found the Applicant 'guilty' on a Charge that was withdrawn and secondly because the Respondent had delayed in taking disciplinary action against the Applicant they had in fact waived their right to dismiss the Applicant and that this amounts to procedural unfairness. In support of her submission regarding the procedural unfairness of the Dismissal, she referred to the following cases namely the ***Union of Pretoria Municipal Workers & Another v Stadsraad van Pretoria [1992] 13 ILJ 1563 (IC)***, ***Denel (Pty) v Voster [2005] 4 BLLR 313 (SCA)***, ***PSA obo Bawa v Department of Social Services and Poulation Development [2009] JOL 244419 (PHSDSBC)*** and ***Stokwe v Member of the Executive Council: Departemnt of Education, Eastern Capoe and Others [2018] ZACC 3***.
82. As to the substantive fairness of the Applicant's Dismissal that in the absence of any documents to show to who the money was paid to that it was unfair to come to a conclusion that the Applicant was guilty of fraud and as a consequence the Applicant's Dismissal was unfair.

ANALYSIS OF EVIDENCE AND ARGUMENT

83. Section 185 of the Labour Relations Act (LRA) 66 of 1995 as amended, stipulates that every Employee has the right not to be unfairly dismissed or to be subjected to an Unfair Labour Practice.
84. The meaning of a Dismissal and Unfair Labour Practice is found in Section 186 of the Labour Relations Act (LRA) 66 of 1995 as amended.
85. Section 188 of the Labour Relations Act (LRA) 66 of 1995 as amended, stipulates that a Dismissal that is not automatically unfair, is unfair if the Employer fails to prove that the reason for the Dismissal is a fair reason related to the Employee's conduct, or capacity, and that the Dismissal was affected in accordance with a fair procedure. Any person considering whether the reason for the Dismissal is a fair reason or affected in accordance with a fair procedure must take into account any relevant Code of Good Practice issued in terms of this Act.
86. The Code of Good Practice: Dismissal is attached to the Labour Relations Act as Schedule 8.
87. Section 192 of the Labour Relations Act (LRA) 66 of 1995 as amended, stipulates that once the Employee has established the existence of the Dismissal, the Employer must prove that the Dismissal was fair.
88. In the present matter the existence of the Dismissal was not in dispute, therefore the onus to prove that the Dismissal was affected in accordance with a fair procedure and for a fair reason rests with the Respondent.
89. Section 138 (6) of the Labour Relations Act (LRA) 66 of 1995 as amended, further stipulates that a Commissioner, conducting an Arbitration, must take into account any Code of Good Practice issued by NEDLAC and any guidelines published by the CCMA. In this regard, the CCMA Guidelines on Misconduct Arbitrations, published by the CCMA in terms of Section 115 (2) (g) of the Labour Relations Act (LRA) 66 of 1995 as amended, is relevant.
90. The Court in *Sidumo and Another v Rustenberg Platinum Mines Ltd and Others (2007) 28 ILJ 2405 (CC)* considered and listed some factors which the Commissioner had to consider. It held that Commissioners must consider the totality of the circumstances, importance of the Rule that had been

breached, the reason for imposing the Sanction, the basis on which the Employee challenges the Dismissal, the harm caused by the Employee's conduct, whether additional training and instruction may result in the Employee not repeating the misconduct, the effect of Dismissal on the Employee and his long service record.

91. In determining the substantive fairness of a Dismissal relating to misconduct, one must assess the Dismissal per the criteria as set out in Item 7 of the Code of Good Practice: Dismissal. One should therefore consider whether the Employee contravened a rule or standard, regulating conduct in the workplace, whether the rule contravened was a valid or reasonable rule or standard, the Employee was aware or could reasonably be expected to be aware of the rule or standard, the rule had been consistently applied by the Employer and Dismissal was an appropriate Sanction for the contravention of the rule or standard.
92. In ***Early Bird Farms (Pty) Ltd v Mlambo*** [1997] 5 BLLR 541 (LAC) at 544, the Court stated the Employer did not have to prove with absolute certainty that the Employee was guilty of the alleged misconduct, but that the proof on a balance of probability was sufficient.
93. In coming to a finding, I have taken into consideration the oral and documentary evidence as well as the Closing Arguments submitted by both parties.
94. The Applicant had disputed both the procedural and substantive fairness of her dismissal. I will firstly deal with the substantive fairness of his dismissal.
95. It was the Applicant's submission that she did not commit the said misconduct as alleged by the Respondent. It was however her case that she did pay out the Bail to the relevant persons who presented her with the required and or necessary documentation.
96. The Applicant in the 3 main charges were charged with having committed fraud in that she on 05 January 2015, paid out Bail to the amount of R20 000.00 in the matter of the State v CJ Heunis without the knowledge or consent of Mr Prollius (depositor) and or Mr Heunis, on 14 August 2014 she paid out Bail money to the amount of R25 000.00 in the matter of the State v JS Lund without the knowledge of Mr Lourens (depositor) and or Mr Lund and on 29 September 2014 she paid out Bail to the amount of R10 000.00 in the matter of the State v FJ Joubert without the consent of Mr Joubert and in all these instances the Department had suffered a financial loss to the said amounts as indicated above.
97. It is to be noted that the Applicant did not dispute that she was or could reasonably have been aware of the Rule nor that it was a valid and or an unreasonable Rule. She however did challenge the

inconsistent application of the rule and the imposing of a suitable sanction for the breach of the said rule and or that Dismissal was an appropriate sanction if found that an Employee had contravened the Rule.

98. The Disciplinary Code and Procedure for Public Servants, Resolution I of 2003 at Annexure "A", list fraud as misconduct.
99. Fraud is defined as the unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice, or which is potentially prejudicial, to another.
100. It was not disputed by the Applicant that in all three the charges leveled against her, the Depositors of the said Bail money, Mr Prollius, Mr Lourens and Mr Joubert were still in possession of the original J399 Bail Receipts.
101. Chauke testified that during his Investigation he had found that in all three instances, the Applicant had paid out the Bail money. This was confirmed by the JDAS generated Bail Receipts, as per Pages 14, 37 and 48 of Bundle "R" that indicated that the said Bail was paid out by G Gama which was the Applicant's name at the time. He during the Investigation contacted the said Bail Depositors who all informed him that they had not received their Bail Money and that they were all still in possession of the original Bail Receipts. They all denied that they had made any affidavit stating that they had lost the original receipts or that they had give power of attorney to another person to collect the bail money on their behalf.
102. It was further Chauke's testimony that at the time the Bail was paid out, the said Criminal Cases had not yet been finalized. This was not disputed by the Applicant.
103. Prollius testified that he had paid the Bail of R20 000.00 as per Page 12 of Bundle "R" and denied that he was paid the Bail Money on 05 January 2015 and that he at that stage was still in possession of the original receipt and confirmed that the matter at that time had not been finalized. He however did confirm that he did claim his money on 06 May 2016 when the Case was finalized. This in effect would have meant that the said Bail Money was paid out twice resulting in a loss to the Respondent to the amount of R20 000.00. He further categorically denied that he had made any Affidavit stating that he had lost his Receipt or that he had made an Affidavit in which he gave Power of Attorney to another person to collect the Bail Money on his behalf.
104. Lourens, an Attorney testified that he had paid Bail on behalf of Lund to the amount of R25 000.00 as per Page 324 of Bundle "R" and denied that he had been paid the said Bail Money on 14 August 2014.

It was his undisputed testimony that he applied for the money but was told that it was not available and that he is still in possession of the original receipt and further denied that he had made any Affidavit in which he stated that he had lost his receipt or that he had given any person Power of Attorney to collect the money on his behalf.

105. It is however common cause that Bail Money can be paid out under a number of circumstances such as when the Case is finalized, when the accused is either found 'not guilty' or found 'guilty' and sentenced or when the Case is withdrawn by the State or when it is taken off the Court roll and there is no further date indicating when the matter will be placed back on the roll. In all these instances the matter will be viewed as finalized and only then can the Bail be paid out.
106. It is also common cause that the Bail must preferably be paid out to the original Bail Depositor who is in possession of the original receipt or to the Bail Depositor who had made an Affidavit stating that he had lost the original receipt. In the first instance the Depositors will sign the receipt in the presence of the Cashier who will compare the signature on the front with the signature on the back and obtain a copy of his Identity Document to verify whether he is the Depositor. In the second instance a copy of the receipt will be obtained and once again the Cashier will follow the same process. The copy of the receipt will be obtained from the Cash Office as the Clerk of the Court does not work with the said receipt books.
107. In the third instance where the Depositor has given Power of Attorney to another person then an Affidavit to the effect by the Depositor is required and a copy of the Depositor's Identify Document as well as a copy of the person who is collecting the Bail's Identity Document is required.
108. As the Bail Depositors in these three instances were still in possession of the original receipts, the only other way the Bail Money could have been paid out, would have been in the manner as described in the second and third instances. It was the Applicant's Representative's submission in her closing arguments that the Applicant must have been the victim of fraud as false Affidavits must have been obtained in which the person who claimed the Bail Money either stated that he had lost the original receipt and that the Depositor in the said instance had also given the person Power of Attorney to collect the money. I agree that this scenario is possible, except for the fact that this person would have needed a copy of the Identity Document of the Depositor and that the Cashier would have had to compare the Identity Number on the Affidavit with the Identify Number on the original Depositor's Identity Document and that the Cashier would also have been required to compare the signature on the Affidavit with that on the copy of the J399 Receipt. I however find it improbable that the so-called alleged fraudster would have been able to obtain a copy of all three the original Bail Depositors Identity Documents.

109. In her defense, the Applicant stated that all document was each afternoon checked by the Supervisor and submitted Pages 2 to 5 as per Bundle "A1" which is a daily checking list for third party funds for 05 January 2015, which shows that al documents on the said day was found to have been in order.
110. It was however Chauke's undisputed evidence that before 2014 Cashiers did not submit documents daily for checking and that this was corrected in 2014 by means of training. It was further common cause that the documents in relation to the Bail payout in relation to the three charges leveled against the Applicant could not be found.
111. The Daily Checking List, as per Pages 2 to 5 of Bundle 'A1' under the Heading: Bail at Point 7 and 8 respectively, deal with whether the Checking Officer had verified that a copy of the Identity Document of the Depositor is attached to the JDAS receipt and in the instance where receipts were lost whether there is an Affidavit attached to the JDAS receipt. On the said checklist it is indicated that this was found to have been done on 05 January 2015. As stated above, I find it highly unlikely that the alleged fraudsters would have been able to have obtained a copy of the Depositor's Identity Document and for this reason I find it highly improbable that the said check list is a true reflection of what the said person had checked and found on the said day.
112. The Applicant during Cross-Examination confirmed that she on occasions assisted Heyns with checking her colleagues' work as Heyns was over worked. Under these circumstances one can make a reasonable conclusion having considered the fact that Heyns was over worked that it was quite probable that Heyns did not do thorough checking and verification of all documents. It would thus in these circumstances have been probable for the Applicant to have easily deceived Heyns. The Applicant could have falsified an Affidavit and obtained a copy of the J399 Receipt as she had access to it. She could also after having done so retrieved the said documents and destroyed them as to eliminate any evidence of wrongdoing.
113. Page 77 of Bundle "R" indicates that in the matter of the State v Heinis as per Charge 2, the Bail was managed on the system by Mavimbela and made ready for collection on 17 November 2014 and was paid out on 05 January 2015. Page 78 of Bundle "R" in the matter of the State v Lund, as per Charge 4 indicates that the Bail was managed on the system by Themba and made ready for collection on 05 April 2012 and only paid out on 14 August 2014. Page 79 of Bundle "R" as per Charge 5, indicates that the Bail was once again managed by Mavimbela on the system and made ready for collection on 25 Septemder 2014 and paid out on 29 September 2014.
114. Mavimbela testified that on occasions when they were busy and a person would come to collect his Bail Money, the Applicant would assist them to manage the Bail on the system and that on these occasions

the Applicant would work on the system while he was logged into the system. The Applicant however denied this but failed to give a plausible explanation as to why Mavimbela would be lying about this

115. The bail was managed by two different clerks of the Court in the three instances. The only common denominator in the three instances instance, is the Applicant. The Applicant was Responsible to check that all the relevant documentation was present and in order before the bail was paid out. The documents could not have been in order as there could not have been any identity documents of the three bail depositors present when she paid out the said bail money.
116. In the first two instances, as per the documentary evidence that the Bail was made ready for collection a considerable period prior to paying out the Bail. In the last instance this was only done a few days prior to paying out the Bail. Usually Bail Depositors and especially an Attorney would claim the Bail Money on the same day that the matter was finalized or shortly thereafter. They would not wait almost two years as was the case in the matter relating to Charge 4 or two months as was the case in Charge 2. The only reasonable explanation for this is that the Applicant after having made the Bail Money ready for collection, waited to see if what she had done on the JDAS System would be discovered and once she became comfortable that no one had noticed what she had done, she then paid out the money and as time had gone on she had become more relaxed and this had resulted in her reducing the waiting period before paying out the Bail Money, as per Charge 2 and 5.
117. I found the Respondent's witnesses, Chauke, Mavimbela, Prollius and Lourens to have been credible witnesses whose demeaner remained calm throughout their testimony and their version of what had transpired remained consistent despite being subjected to cross examination.
118. I can only come to the reasonable conclusion that in the absence of any identity document or a certified copy of the identity document of the original depositors there could not have been valid and or legal documents before the Applicant to process and therefore any compliance with the procedures with regards the paying out of the bail money unless the Applicant had been involved in the illegal paying out of the bail money and therefore having committed fraud which is a act of dishonesty.
119. The Labour Appeal Court in ***Nel v Construction and training Authority and others (PA 3/2017)*** [2018] ZALAC held that fraud consist of unlawfully making with intent to potentially prejudice to another. In misconduct hearings, one is not required to satisfy the criminal law requirement of any wrongdoing. It should be established that the Employee committed misconduct and whether the misconduct is

dishonest conduct. The labels assigned to the misconduct is irrelevant. The decisive point is whether the evidence before the Arbitrator demonstrates dishonesty. I find this cited case applicable in this instance.

120. The only logical conclusion I can come to, is that either the Applicant had paid out the money to herself or had an accomplice who assisted her in collecting the money on the said days.
121. I find that the Respondent has subsequently proven on a balance of probabilities that the Applicant is guilty of having committed the fraud as was alleged in Charges 2, 4 and 5 of the charges that was leveled against her by the Respondent, as her actions have caused actual and or potential prejudice to the Respondent and the original Bail Depositors as it had to or still will be required to pay out the bail money to the remaining original bail depositors which will result in the Respondent having paid the bail money twice which will result in a financial loss.
122. The Respondent imposed a sanction of Dismissal after having found the Applicant 'guilty' of having committed the said misconduct.
123. It was the Applicant's submission that the Respondent did not act consistently when it came to the mispositioning of a suitable sanction when it came to where employees were found guilty of having committed serious misconduct in that Mavimbela and Manana were only given final written warnings.
124. The Disciplinary Code and Procedure for the Public Service at Clause 4: Code, Rules and Standards at Clause 4.1, states that Schedule 8 of the LRA insofar it relates to Discipline, forms part of the Code and Procedure. The Disciplinary Code does not indicate an appropriate sanction for the said misconduct.
125. The LRA Schedule 8, Code on Good Practice: Dismissal at Item 3 (4) stipulates, that Dismissal shall be appropriate for serious misconduct such as: gross dishonesty, willful damage to property of the Employer, willful endangering the safety of others and physical assault on the Employer, a fellow Employee, client or customer and gross insubordination.
126. It needs to be noted that both Mavimbela and Manana were charged with negligence in that their credentials were used to manage Bail on the JDAS System, which resulted in the fraudulent paying out of Bail Money. The said charge was just negligence and not gross negligence which in hindsight I think should have been the more appropriate charge that should have been preferred against them. This however is not an issue that I am required to decide. Mavimbela and Manana had also pleaded 'guilty' during the Disciplinary Hearing. The Applicant, on the other hand was charged and found 'guilty' of a very serious charge namely, fraud and she however pleaded 'not guilty' in the Disciplinary Hearing.

127. The Respondent referred to case law in support of the sanction of this Dismissal that they had imposed as Courts have found that fraud involves an element of dishonesty which destroys the trust relationship.
128. CCMA Arbitrators and the Labour Court consider fraud a serious offence because it damages the trust relationship, which is implicit in the Employment Contract and have in various occasions upheld the Employer's decision to impose a sanction of Dismissal in these circumstances.
129. The Labour Court in ***Sengu Municipality v SALGBC and others [2015] ZALCPE 24*** found that the dismissal of Employees who were found 'guilty' of misconduct relating to the fraudulently issuing of learners licenses and or temporary and or permanent drivers licenses to members of the public who had not been tested and who was not present at the testing station when the examiner certified their presence at the testing station, to have been fair.
130. The Applicant was employed as a Cashier at the Magistrates Court, where the Public's money was entrusted into her care and that of the Respondent. She entrusted to ensure that money is paid to the correct person, she however misused this position to enrich herself by defrauding and or stealing from the Public and or the Respondent. I find that her actions had irretrievably damaged the trust relationship between her and the Respondent.
131. The Applicant had not shown any remorse during her Disciplinary Hearing and the subsequent Arbitration as she maintained her so-called innocence although the evidence proved the contrary.
132. I find that the Dismissal in this instance had been a fair and just sanction.
133. It was the Applicant's submission that her Dismissal was procedurally unfair as the Presiding Officer in the Disciplinary Hearing had found the Applicant 'guilty' on a charge that had been withdrawn and as a result it renders the Applicant's guilty finding and sanction void. During the Arbitration, it was also alleged by the Applicant that the Chairperson was biased as he had prior knowledge of the matter as he chaired the Disciplinary Hearing of Mavimbea and Manana prior to chairing her Disciplinary Hearing.
134. During the Closing Argument that was submitted, the Applicant's Representative also referred to a third procedural aspect, namely that because there was delay in instituting disciplinary action against the Applicant, the Respondent had forfeited their right to take action against the Applicant. I have decided not to deal with this third procedural aspect, as it was not raised at any stage during the Arbitration but that the Applicant's Representative seeks to introduce this issue through the proverbial back door.

135. Should it indeed have been true that the Chairperson had found the Applicant 'guilty' on Charge 6 that was withdrawn, I am of the view that this on its own, would not have been sufficient to void the Applicant's subsequent 'guilty' finding and sanction as she was also found 'guilty' on Charge 2 and 4, which on their own would justify a sanction of Dismissal.
136. Ndiitwane, who chaired the Hearing, testified and explained that the reference to Charge 6 was a typing error which I have found to be a plausible explanation. His analysis, as per Page 8 and 9 of Bundle "A2" clearly makes reference to Charges 2, 4 and 5 and it was these charges on which he had found her 'guilty' on.
137. It is clear from the analysis on the said pages, that he only dealt with the evidence in relation to the said three charges and clearly indicates that they are in relation to fraud and not theft, as alleged by the Applicant.
138. The Applicant alleged that he was biased as he had prior knowledge of her Case, as he had chaired the Disciplinary Hearing of Mavimbela and Manana prior to chairing her Hearing.
139. Ndiitwane did not dispute the fact that he had chaired the Hearing of Mavimbela and Manana prior to chairing the Applicant's Hearing. He however disputed that he had prior knowledge of the details relating to the Applicant's case, as both Mavimbela and Manana had pleaded 'guilty' and therefore it did not require him to listen to the detail of the alleged misconduct that they had committed and or who else was involved in their misconduct that they had committed.
140. It was also his undisputed submission that the Applicant's Representative Sedibane had known that he had chaired Mavimbela and Manana's Disciplinary Hearing, as she initially was appointed to represent them but on the day of the Hearing had withdrew due to a conflict of interest and that she nor the Applicant at any stage, requested that he recuse himself from chairing her Disciplinary Hearing nor did they at any stage during the Hearing state that they found that he had been biased towards the Applicant.
141. Mavimbela and Manana's charges are on pages 71 and 72 of bundle "R" and nowhere is there in the said charges made any mention of the Applicant nor did the Applicant provide any substantiated evidence that during the said hearing of Mavimbela and Manana that her name and or her alleged involvement had been mentioned. I subsequently find that the Applicant had failed to show that Ndiitwane in his conduct during the Disciplinary Hearing had been biased towards her or that there had been any perceived bias towards her.

142. I find that the Applicants Dismissal was procedurally fair.

143. I find that the Respondent has successfully discharged the onus as required in Section 192 of the Labour Relations Act (LRA) 66 of 1995 as amended and subsequently find that the Applicant's Dismissal was substantively and procedurally fair.

144. I make the following Award:

AWARD

145. The Dismissal of the Applicant, Gloria Sibande was substantively and procedurally fair.

146. The Dismissal of the Applicant is confirmed.

147. The Bargaining Council is to close the Case File.

Signed and dated at eMalahleni on 28 July 2019

A handwritten signature in black ink, consisting of a large, stylized 'L' followed by a cursive 'v' and 'L', all enclosed within a large, oval-shaped loop.

Name: Leonard van Leeuwen

GPSSBC: Arbitrator