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ARBITRATION AWARD

Panelist: Ann Marlies Dreyer

Case No: GPBC266/2022

Date of Award: 9 August 2022

In the ARBITRATION between:

Public Servants Association of South Africa ("PSA") o.b.o Lucky Nhlanhla Msibi
(Union / Applicant)

and

Department of Correctional Services
(Respondent)

Union/Applicant's representative:Flip van der Walt (PSA)

Respondent's representative:Seshoba M. Kgoahla

Particulars of proceedings and representation

1. The arbitration hearing was scheduled at the Department of Correctional Services on 15 June and 22 July 2022.

2. Flip Van Der Walt, an official of the Public Servants Association of South Africa ("PSA") represented the Applicant. The Applicant entered a bundle of documents marked as Bundle A, pages 1 to 69, as well as a supplementary document, namely the collective agreement between the parties, the disciplinary code of the Respondent.

3. Seshoba M. Kgoahla, employed by the Respondent as its Regional Co-Ordinator: Employee Relations represented the Respondent. The Respondent entered two bundles of documents marked as Bundles R1, pages 1 to 50, and Bundle R2, pages 1 to 24.

4. An interpreter, one M.J. Mkhwanazi was available to assist with interpreting services, I recorded the proceedings manually and digitally.

Issues to be decided

5. Whether or not the Applicant was guilty of any misconduct; and

6. Whether or not the Respondent acted consistently in its application of discipline,

7. Whether or not the sanction of dismissal was appropriate in the circumstances.

8. If so, whether the decision to dismiss the Applicant was substantively fair.

9. If the dismissal was unfair, the appropriate relief.

Background to the dispute

10. The Respondent employed the Applicant, Lucky Nhlanhla Msibi on 13 September 2000. At the time of his dismissal, the Applicant was employed as a Grade Two Correctional Officer and earned a basic salary of R 26 541.25 (twenty-six thousand five hundred and forty-one Rand and twenty-five cents) per month.

11. The Applicant was dismissed on 11 February 2022, for alleged misconduct. The relief requested by the Applicant was reinstatement.

Survey of evidence and argument

12. In terms of section 138(7) of the Labour Relations Act 66 of 1995 ("the LRA") I am required to issue an award with brief reasons. Herewith is a summary of the evidence and written arguments that I regard as necessary to substantiate my findings.

13. At the commencement of the arbitration process the parties narrowed the issues in dispute and I explained the manner in which evidence was led, including cross-examination.

Respondent's evidence

The Respondent called 5 (five) witness who testified under oath.

Paul Velly Magagula ("Magagula")

14. The Respondent employed Magagula in 2015. At the time of the arbitration Magagula worked as a Unit Manager at the B Section of the Barberton Correctional Services Prison. His duties included ensuring the safety and custody of the unit as well as dealing with any complaints.

15. On 13 May 2015, Magagula was on duty in his office. An offender from cell 14, one Chris Khoza, complained about four offenders from cell 12, demanding, or robbing dagga from Chris Khoza. Magagula took the four offenders to the Head of Centre ("HOC"), Anthony Mashabane.

16. The version the four offenders presented was that another offender, Celebrate Sibuyi, was waiting for an official to give him something, like dagga, to smoke. They denied robbing Chris Khoza and ultimately, another offender, Power Ubisi confessed and stated that he interacted with the Applicant. The HOC ordered Magagula to confiscate Power Ubisi's cell phone, which he did, and handed it to the HOC.

17. Under cross-examination, Magagula confirmed that the Applicant was not caught taking dagga to an offender. Magagula was not sure that there was a rule that prohibited officials from handing cigarettes to offenders but was aware that the sale of tobacco was prohibited by the Disaster Management Act. The use of tobacco was not prohibited. He was not aware of any communication between the Applicant and Power Ubisi, the latter had the Applicant's number.

Samuel Msabatha Mtethwa ("Mtethwa")

18. The Respondent employed Mtethwa as a Supervisor at External Guarding. His duties included the parading and allocation of duties to officials. The Applicant was under his supervision.

19. Mtethwa was called to the HOC's office on 13 May 2020. An offender, Power Ubisi, said he was smuggling dagga with the Applicant. The HOC asked Power Ubisi which number he used to contact the Applicant. Power Ubisi sent the number to the HOC. After Mthethwa confirmed that it was the Applicant's number, he contacted the Applicant and instructed the Applicant to report for dayshift on 14 May 2020.

20. Mtethwa, Magagula, Sindane and the Applicant reported to the HOC's office on 14 May 2020. The HOC asked the Applicant about the allegation that the Applicant was smuggling contraband, dagga, into the prison. The Applicant started to turn, he spoke about family problems, moved from his chair and knelt on the floor and said 'unjalo' which meant that the allegations were true and he was involved.

21. The sale and transport of tobacco was prohibited by the Disaster Management Act and officials were not permitted to share cigarettes with offenders,

22. Under cross-examination Mtethwa confirmed that it was the sale of cigarettes that was prohibited and that the policies he was taught at college, included a ban on sharing with offenders. The Applicant made a verbal confession and wasn't given an opportunity to call a union representative on 14 May 2020 as it was not a disciplinary process. Mthethwa was not present when Power Ubisi's cell phone was confiscated but confirmed that Power Ubisi gave them the Applicant's contact number.

Ben Mandla Gazina ("Gazina")

23. The Respondent employed Gazina as an Investigating Officer in Barberton and Gauteng. He had worked for the Respondent for the last fifteen years and was tasked with investigating the allegations against the Applicant. He testified at the Applicant's disciplinary hearing and was the author of the document in the Applicant's bundle, see A14.

24. Gazina collected evidence from witnesses and documents and arrived at the findings on page A31. The first finding, in 8.1, referred to 'public' which included correctional centres. This led to charge 1, see page A6, against the Applicant, in that the Applicant contravened Resolution 1, Annexure A, namely the contravention of an Act. Five offenders, see 8.2, admitted that they received dagga from the Applicant. On 14 May 2020 the Applicant confessed, see 8.4, in the presence of three officials.

25. The Applicant's cell phone records, see 8.5, showed that the Applicant's cell phone received a cell phone confiscated from an offender, Power Ubisi. The Applicant declined to make a statement. Gazina verified the Applicant's cell phone number from an application for leave form completed by the Applicant, see R2, page 24.

26. The Applicant's cell phone records were obtained in terms of the procedure, and requisite authority, set out in section 205 of the Criminal Procedure Act 51 of 1977 ("CPA"). The cell phone records revealed that a call was made, see page A8, line 5, to the Applicant.

27. Gazina recommended charges against the Applicant as stipulated in his investigation report. Gazina was not aware of any inconsistencies in the Respondent's application of disciplinary measures.

28. Under cross-examination, Gazina confirmed that the first charge against the Applicant referred to the Disaster Management Act which prohibited the sale of tobacco. As a cautionary measure the Respondent issued a directive which prohibited the use of tobacco in its centres. Gazina could not provide a copy of the directive(s) as they were verbal commands at parades. Gazina denied that he didn't ask the Applicant for a statement during the course of his investigation as the Applicant referred Gazina to POPCRU.

29. Gazina was not present when the Applicant confessed or when the offender's cell phone was confiscated. At the Applicant's disciplinary hearing, Gazina testified about the information he had received from witnesses during the course of his investigation. The cell phone records in the Respondent's bundle showed that Power Ubisi called the Applicant's cell phone number.

Bhekizwe Mthethwa ("BMthethwa")

30. The Respondent employed BMthethwa, for the last twenty-eight years, as the Acting Area Co-Ordinator, Corrections Assistant Director under the Bethal Management Area. His responsibilities included the admission and release of offenders, security in the centres and *ad hoc* duties as an investigator or initiator.

31. BMthethwa acted as the initiator at the Applicant's disciplinary hearing, subsequent to which the Applicant was dismissed for the misconduct he was charged with. The witnessed at the disciplinary hearing included
    1. Gazina, the investigator, who explained documents and his investigative report. He took the statement from Power Ubisi
    2. Malumane, the Centre Co-ordinator,
    3. Magagula, the Unit Co-Ordinator where the cell phone was found.

32. Gazina read statements at the disciplinary hearing and the Applicant, who was represented, did not object. Power Ubisi, told BMthethwa he was victimized, and BMthethwa considered him as a hostile witness. Nevertheless, Power Ubisi voluntarily signed a statement under oath.

33. The Applicant pleaded guilty to the first charge and there were clear instructions that tobacco was prohibited in the centres. The Applicant had tobacco in the centre, in full view of the offenders, and shared it with offenders, and, in so doing, breached a rule.

34. The cell phone records, of the confiscated cell phone, were produced by Gazina at the disciplinary hearing. Gazina obtained these records, following the legal requirements, in terms of section 205 of the CPA. The request for the records was signed by the Public Prosecutor and the Magistrate. The Applicant's cell phone number was verified against the Applicant's leave application form. The Applicant's cell phone number appeared on the confiscated cell phone records, see Bundle R2, page 20.

35. Under cross-examination, BMthethwa confirmed that the Applicant pleaded guilty to the first charge, using tobacco in a public place. Although the charge referred to the Disaster Management Act, which prohibited the sale of tobacco, the Respondent's National Office banned smoking in public. The ban was in writing, which BMthethwa did not have with him but was able to provide.

36. BMthethwa considered Power Ubisi a hostile witness because, as BMthethwa was preparing for the disciplinary hearing, Power Ubisi initially denied signing his statement, then he changed his version and said it was his statement but not his signature and lastly, changed his version again and said he was forced, by being beaten, to sign the statement. Gazina read Power Ubisi's statement at the disciplinary hearing and stated that Power Ubisi was not intimidated into making a statement.

37. Not all the witness statements were read at the Applicant's disciplinary hearing as Malumane, Magagula, Mtethwa and Gazina testified in person. The charges against the Applicant were proved on a balance of probabilities.

38. The Respondent issued a Directive, distinct from the Disaster Management Act, which listed tobacco as an item not permitted in public areas at the Department of Correctional Services. The Applicant had cigarettes in his possession and handed it to offenders through a window.

39. The second charge against the Applicant related to the Applicant's verbal confession, and not because the Applicant was caught smuggling dagga. The witnesses at the disciplinary hearing testified that the Applicant confessed he was smuggling because he had sick children at home and asked for forgiveness.

40. BMthethwa confirmed that the third charge related to the cell phone of Power Ubisi, and the cell phone was confiscated from Power Ubisi. A cell phone user could not control incoming calls and sometimes received calls that said, sorry, wrong number.

Anthony Mashabane ("HOC")

41. The Respondent employed HOC as the Head of the Barberton Maximum Correctional Facility. HOC worked for the Respondent for thirty-nine years and knew the Applicant.

42. On 13 May 2020, the HOC recalled that Magagula informed him that there was a quarrel amongst offenders. The offenders were brought to the HOC's office and, as he interviewed them, the HOC established that they were fighting over something, which he thought was dagga, but wasn't sure, given the length of time since it

happened. The offenders said they were receiving the product from the Applicant. As the latter was scheduled to work night shift, the HOC instructed the Applicant to not report for night shift, but to report for day duty the following day.

43. During the meeting on 14 May 2020, the offender repeated the story he had told the HOC the day before. The HOC asked the Applicant for a response and the Applicant stated that the offender was telling the truth. The HOC informed the Applicant that he was not obliged to confirm but the Applicant apologised and said he could see that he would lose his job and his career. The HOC repeated that the Applicant was not obliged to confirm but the Applicant confirmed again. The HOC informed the Applicant, that for the sake of fairness, the matter would be investigated, and the Applicant would be placed at an alternative centre, a placement the Applicant accepted.

44. Prison officials were not permitted to bring items for offenders unless the HOC gave permission to do so or it was required for the execution of their duties. The sharing of cigarettes was also not permitted as it would compromise the ability of the official. The Applicant did not receive the HOC's permission to bring items to offenders.

45. Under cross-examination, the HOC could not recall if the Applicant was caught smuggling dagga. The HOC heard a rumour that the Applicant was smuggling, so he called the Applicant, spoke to the Applicant on a one on one basis, told the Applicant what he had heard and asked the Applicant to stop. The HOC did not catch the Applicant with any smuggled items.

46. At the meeting in the HOC's office the HOC told the Applicant about the allegation against him, offered the Applicant an opportunity to respond and advised the Applicant that he had the right to call a supervisor or representative. When the Applicant confessed, verbally, not in writing, the HOC said was not under duress and informed the Applicant that he would get an opportunity to elaborate or clarify in an investigation.

47. A prison was a public space and, if his memory served correctly, the HOC recalled that officials were not allowed to smoke inside, they were allowed to smoke outside. Cigarettes were not sold outside the kiosk.

Respondent's argument

48. The written argument submitted by the Respondent was perused and considered in its entirety and, since it forms part of the record, is not repeated herein.

49. In summary the Respondent argued that the dismissal of the Applicant was substantively fair and should be upheld. The sanction of dismissal was appropriate because the Applicant was found guilty of serious misconduct in terms of GPSSBC Resolution 1 of 2006. The Applicant smuggled tobacco into the centre, shared a cigarette with an offender and, in so doing, endangered the safety of others. He confessed to smuggling dagga, an unauthorised item into the centre.

50. The position at the Respondent required a person the Respondent could trust and, given his misconduct, the trust relationship was irretrievably broken.

Applicants evidence

The Applicant called 3 (three) witness who testified under oath.

The Applicant

51. The Applicant, who testified under oath, stated that he worked, for the Respondent, as an external guard at Maximum Prison for twenty-two years. At the disciplinary hearing the Applicant pleaded guilty to the first charge, smoking in public because he had smoked in public. He was not aware that what he did was wrong, or that there was any Directive prohibiting smoking as it was neither in writing nor given to him. He was a smoker and therefore smoked in public. The Applicant was aware that the sale of tobacco was prohibited, in terms of the Disaster Management Act, and did not breach this rule.

52. Insofar as the second charge against him, the confession, the Applicant was called to the HOC's office. Four officials, including Mtethwa, the Applicant's supervisor, Malumane and the retired head of security. The officials informed the Applicant about the allegations him, namely that the Applicant smuggled dagga to offenders. The Applicant told the HOC that he never smuggled any dagga to any inmate. The official persisted in the Applicant confessing and the HOC said he would forgive the Applicant if he said something because the HOC could dismiss the Applicant for the cigarette. The Respondent did not catch the Applicant smuggling dagga.

53. After the Applicant's interrogation, two offenders, including Power Ubisi, were called to the HOC office. The offenders were beaten and made to confess that the Applicant gave them dagga. The HOC took them to their station and got security to search their cells. The search did not reveal a cell phone. The cell phone was found in another cell from another offender. The Applicant did not receive any calls from an offender.

54. Under cross-examination, the Applicant did not know why his version, that he did not confess to smuggling or that the cell phone was not found with Power Ubisi, was not put to the Respondent's witnesses when they testified.

Anthony Van Rooyen ('Van Rooyen")

55. Van Rooyen worked for the Respondent and was a full time shop steward for PSA. During Covid 19 the Respondent convened C19 regional meetings. There were no directives, which would be in writing, stipulating that members were not allowed to smoke. If there had been any directives, the task team would have informed them. There were no rules, that Van Rooyen was aware of, preventing smoking as all offenders who were smokers, were placed in one cell. In his experience, officials smoked and would give cigarettes, or

nearly finished cigarettes, to offenders to clean their shoes, like a reward. Van Rooyen was not aware of any directive preventing officials from giving offenders cigarettes.

56. Recent disciplinary hearings at the Respondent included an official in Belfast who pleaded guilty to smuggling and communication and was sanctioned to two month's suspension without pay. Similarly, in Bethal, the official was sanction to three month's suspension without pay for smuggling.

57. Under cross-examination, Van Rooyen explained that a directive included rules and regulations at the Respondent. He was aware that the Disaster Management Act prohibited the sale of tobacco but said cigarettes were sold at the Respondent's kiosks during level 5 lockdown. He denied that officials were not allowed to smoke inside the correctional centres. Van Rooyen conceded that there may have been a rule against officials exchanging items with offenders but it was not enforced.

Johannes Hendrik Roelofse ("Roelofse")

58. Roelofse was employed by the Respondent as a Correctional Officer for thirty-three years. He was a full-time office bearer of PSA and knew the Applicant. He represented the Applicant at the disciplinary hearing which was very long, it took seven days.

59. Gazina, the investigating officer, testified at the Applicant's disciplinary hearing by reading affidavits, not just Power Ubisi's, and what went into his investigation. Roelofse disputed the statements that were read at the disciplinary hearing because he was unable to cross-examine them.

60. An official was not permitted to take unauthorised items to offenders but no-one informed the smokers that they were not allowed to bring cigarettes. The Applicant said he admitted to the HOC that he smoked a cigarette and the offender asked for a few pulls, which happened. The Respondent did not have rules preventing smoking.

61. The offender, Power Ubisi, alleged that he was assaulted by the HOC, when he was questioned about smuggling, something he was never involved with. Power Ubisi did not report it to the police because he was afraid. Further, Power Ubisi did not understand any portion of the written statement, as it was in English. Lastly, Power Ubisi said that smuggling never happened.

62. Roelofse disputed the cell phone records at the disciplinary hearing as he had not seen the s205 application. The documents in bundle R2, pages 19 to 22, were not part of the disciplinary hearing. The Applicant stated that he never spoke to the offender and the call referred to at the disciplinary hearing, had a code 29, see Bundle A, page 11, which meant there was no communication.

63. Under cross-examination Roelofse confirmed that he was familiar with the Respondent's policies and lockdown regulations. Smoking was permitted inside the centres, including during level 5 lockdown. The

Applicant told Roelofse that he confessed to smoking, not smuggling with an offender and pleaded guilty to the first charge.

Applicant's argument

64. The written argument submitted by the Applicant was also perused and considered in its entirety and, since it formed part of the record, is not repeated herein.

65. Briefly put, the dismissal of the Applicant was substantively unfair because the Applicant did not breach any rule when he smoked a cigarette and handed the half-smoked cigarette to the offender. The Applicant disputed that he confessed to smuggling dagga, he admitted to smoking. There was no signed confession. The Applicant was never caught smuggling dagga. The Respondent's evidence related to the offenders' statements was hearsay evidence. The Applicant was not aware of any rule against smoking. The Respondent acted inconsistently when it applied suspension as a sanction to other officials yet dismissed the Applicant, on an allegation of smuggling. The Applicant had twenty-two years of service with the Respondent, a clean record and was unfairly dismissed for unproved charges against him.

Analysis of the evidence and argument

66. In terms of section 192 (2) of the LRA the employer must prove, on a balance of probabilities, that the dismissal was fair.

67. Schedule 8 of the LRA contains a Code of Good Practice: Dismissal which guides an arbitrator evaluating the fairness of a dismissal for misconduct. It provides that any person who determining whether a dismissal for misconduct is unfair should consider whether a rule regulating conduct in workplace was contravened by the employee, and if so whether the rule was valid and reasonable, whether the employee was aware of the rule, whether it was consistently applied and whether dismissal was an appropriate sanction for its contravention.

68. Most of the events and factors leading to the Applicant's dismissal were undisputed, either through the limitation of issues at the beginning of the arbitration process, or the evidence led by the witnesses, and are summarised in chronological order.

<u>The Sequence of Events Leading to the Applicant's Dismissal</u>

69. The Applicant worked as a Correctional Officer for the Respondent and was on duty on 12 May 2020, during a time when South Africa was on level 5 lockdown because of the Covid-19 pandemic. The Applicant was outside, smoking a cigarette, and shared the cigarette with an offender.

70. On 14 May 2020, the Applicant was called to the HOC's office and confronted with allegations of smuggling dagga to offenders. The Applicant stated a version, in the presence of other officials, and the HOC indicated that the matter would be referred for investigation. Gazina investigated the allegations against the Applicant, and interviewed offenders and officials.

71. On 23 June 2021 the Respondent served a notice to attend a disciplinary hearing, scheduled to take place on 5 July 2021, on the Applicant, see A5 to A6. The charges read as follows:

> *It is alleged that during 12 to 14 at Barberton Maximum Centre during official hours of the Centre you contravened Resolution 1 of 2006:*
>
> 1. *Claus "A" contravention of Disaster Management Act 57 of 2002 in relation to Covid 19 lock-down protocols/ regulations in that you were smoking in a public area in a full view of offenders and handed them over the cigarette through the toilet window at cell number 12 whilst the country was on level 5 period whereby the use of tobacco was prohibited;*
>
> 2. *Clause 'ii' breaching of security measure in that confession was made by yourself in the presence of other officials that you admitted to the allegations of smuggling dagga to offenders at Barberton Maximum Centre.*
>
> 3. *Claus "P" dereliction of duties in that through section 205 of the Criminal Procedure Act 1977 that your cell phone with number 0793845809 received a call from a cell phone that was confiscated from Offender Power Ubisi on 14 May 2020.*

72. On 29 August 2021, the chairperson found the Applicant guilty of the charges against him and recommended the termination of the Applicant's services. The Respondent's final decision to uphold the sanction of dismissal occurred on 11 February 2022.

Procedural Fairness

73. In terms of procedural fairness, the Applicant confirmed that: -
    I. The Applicant received a notice of disciplinary hearing.
    II. Read and understood the charges against her.
    III. Had sufficient time to prepare for the disciplinary hearing.
    IV. Attended the disciplinary hearing.
    V. Cross-questioned witnesses of the employer.
    VI. Had an opportunity to state her own version at the disciplinary hearing
    VII. Had a representative and interpreter at the disciplinary hearing,

VIII. Received a written notice of dismissal.

74. The Applicant disputed the procedural fairness of statements being read at the disciplinary hearing as these could not be tested through a process of cross-examination.

75. In Avril Elizabeth Home for the Mentally Handicapped v CCMA and others (JR782/05) [2006] ZALC 44, held that an employer was merely required to investigate and give an employee a reasonable period to respond to any allegations before deciding. In light of the described circumstances I find that the Applicant's dismissal was procedurally fair.

Substantive Fairness

76. At the commencement of the arbitration process, the Applicant conceded that the Respondent had rules in the workplace but disputed that the Respondent had rules against the use of tobacco in the workplace.

77. He was aware of the Respondent's rules and confirmed the reasonableness thereof.

The Area of Dispute

78. Arbitration is a hearing de novo, a new hearing. This means that I am required to determine the disputed aspects of the Applicant's dismissal. To the extent that the versions of the Applicant and the Respondent are contradictory, in SFW Group Ltd v Martell et Cie 2003 (1) SA 11 (SCA) the Supreme Court of Appeal held that the way to resolve factual disputes was to consider the credibility of the witnesses, their reliability and the probabilities.

Was the Applicant guilty of any misconduct

79. At the outset of the arbitration process, the Applicant confirmed that he pleaded guilty to smoking a cigarette at work but was not aware that this was prohibited by any rules at the Respondent. The first charge against the Applicant alleged that the Applicant contravened the Disaster Management Act ("DMA") because he smoked. Ultimately, through the reading of the specific clause, it was established that the sale of tobacco was prohibited by the DMA.

80. The question that needs to be determined is whether or not this amounted to a breach of the Respondent's rules. The Applicant's version, was that the use of tobacco was not prohibited, there were no specific rules banning the use of tobacco in the Respondent's centres, at the time of the smoking incident, namely 12 May 2020. In fact, smoking offenders were placed in the same cell.

81. The Respondent's version, through its five witnesses, differed with each witness. Magagula testified that he was aware of the ban against the sale of tobacco but was not sure that there was a rule against giving cigarettes to offenders. The use of tobacco was not banned. Mtethwa testified that the sale and sharing of tobacco products was prohibited but not the use thereof. Gazina stated that there was a verbal directive against the use of tobacco. BMthethwa testified that the directive banning tobacco was in writing. Lastly, the HOC testified that he was not sure about officials being permitted to smoke inside but was aware that they were permitted to smoke outside.

82. The first charge against the Applicant was for the use of tobacco, because he smoked a cigarette in an outside area. The Applicant admitted that he did so. The different and contradictory versions of the Respondent's witnesses, specifically related to the use of tobacco in the Respondent's centres lead me to conclude that, in terms of the DMA, the sale of tobacco was prohibited, which may have prevented the sale thereof in the Respondent's kiosks, but that the use of tobacco was not banned in the Respondent's centres.

83. It should also be noted that in and during 1 to 31 May 2020, South Africa was on lockdown level 4, and not level 5 as per charge 1. The aspect of sharing the cigarette, during lockdown level 4 with extreme precautions being taken in the form of the wearing of masks and social distancing was not an element of the misconduct the Applicant was charged with.

84. In the circumstances, even though the Applicant pleaded guilty to smoking tobacco at the workplace, I find, on a balance of probabilities, that the Applicant was not guilty of charge one in that the use of tobacco was not prohibited by the DMA.

85. The second charge against the Applicant related to a verbal confession the Applicant made in the HOC's office on 14 May 2020 in the presence of four officials and the HOC. These officials included, Sindane, who did not testify at the arbitration, Magagula, who testified at the arbitration but did not refer to any confession by the Applicant. Mtethwa stated that the Applicant went down on his knees and confessed. The HOC said that the Applicant confessed and he informed the Applicant that, in order to be fair, the matter would be investigated.

86. Mtethwa was a confident witness who spoke with a credible demeanour, The HOC was a composed witness who indicated that the effluxion of time may have impacted his recall. He spoke confidently of the confession that the Applicant made, namely that the Applicant smuggled dagga to offenders. He also testified that the Applicant's confession was not compulsory and would need to be further investigated in order to ensure fairness. Both Mtethwa and the HOC were present at the time the Applicant made a confession and their testimony corroborated one another to the extent that they overlapped.

87. The Applicant testified that he did not confess to smuggling dagga but was pressurised by the HOC in relation to the consequences of the cigarette usage.

88. The question is, which version is more likely, the Respondent's version that the Applicant confessed to smuggling dagga, or the Applicant's version that he did not confess to smuggling dagga? Unfortunately, the Applicant failed to put this version to either Mtethwa or the HOC.

89. In *NUM and another V CCMA and others [2018] 3 BLLR 267 (LAC)* the court set aside an award where the Commissioner found for the Employee on facts that were not put to Employer's witnesses. The court held

*"[14] From the record, it is apparent that the Labour Court correctly determined that the allegation of racial abuse had not been put to the employer's witnesses in cross-examination. The purpose of a proper cross-examination is to place a one-sided version, which often results from examination-in-chief, into proper perspective by eliciting facts which place a different complexion on the matter, or by demonstrating that the witness is untruthful. In eliciting from an opposing witness facts which are beneficial to the case of the cross-examiner's client and to put such client's opposing and contradictory version to the witness, the decision-maker is placed in a position which permits evidence to be properly and appropriately assessed.**[10]** Since key aspects of the employee's case were not put to the employer's witnesses in cross-examination, and had not been canvassed in the evidence of those witnesses in chief, their version on such aspects was not placed before the commissioner. The result was that the commissioner was unable to determine the issue before him in the manner required."*

90. In light of the above I find it more probable that the Applicant confessed to the HOC that he had smuggled dagga to offenders. Nevertheless, I am also mindful of the fact that the HOC specifically indicated that, instead of simply accepting the confession, he wanted the matter to be investigated in order to be fair. This investigation included taking statements from offenders. The content of these statements, although part of the Respondent bundle, were not dealt with in testimony by the investigator, namely Gazina. The offenders themselves did not testify.

91. As a general rule of the Law of Evidence, hearsay evidence is not admitted. In section 3(4) of the Law of Evidence Amendment Act, No. 45 of 1988 (LEAA) as "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence". The testimony related to the offender's versions of events, namely that the Applicant was smuggling dagga to them, was not given by the offenders. This meant that the Applicant was not in a position to cross-examine their version. In addition, I was not in a position to assess the credibility of the offenders' versions and/or, the reliability thereof.

92. Given the above, the testimony I have relied on, in arriving at my findings, was the evidence of witnesses who testified about their own observations and knowledge, as opposed to what the offenders may or may not have said.

93. Ultimately, I find it more probable that the Applicant admitted that he had been smuggling dagga. His admission was verbal and was not confined to writing. The Applicant was never caught in the act of smuggling and no-one came forward to testify that they had received smuggled dagga from the Applicant.

94. It was common cause that officials were not permitted to smuggle unauthorised items, which included dagga, to offenders. As described above, I find that the Applicant admitted that he had in fact smuggled dagga to offenders and in so doing, the Applicant admitted that he was guilty of a breach of the rules, or simply put misconduct. The

subsequent investigation ordered by the HOC failed to prove that the Applicant had in fact smuggled dagga. Nonetheless, the Applicant admitted that he did smuggle dagga and it was this admission, or confession, that he was charged with in the second charge.

95. I do not support the Applicant's argument that the Applicant's confession had to be in writing and in the format prescribed by s 217 of the CPA. The charges against the Applicant were not criminal charges, but were based on a breach of the Respondent's rules in the workplace. In an arbitration related to misconduct, the ordinary meaning of a confession is more appropriate, namely to tell or make known something that is wrong or damaging to oneself.

96. I find, on a balance of probabilities, that the Applicant was guilty of the second charge against him, in that he confessed to smuggling dagga to offenders at Barberton Maximum Centre.

97. Insofar as the last charge is concerned, namely receiving a call from a cell phone allegedly belonging to an offender, Power Ubisi, even the Respondent witness concurred that it was not always possible to control calls received.

98. In the circumstances I am unable to find, on a balance of probabilities, that the Applicant was guilty of the third charge given the Respondent's witness conceding that one could not control all calls received. I am also mindful of the fact that the cell phone records provided by the Respondent were not explained by the author of the document(s).

Were the rules consistently applied?

99. At the outset of the arbitration process the Applicant indicated that it disputed the consistent application of discipline by the Respondent. In *SAPS v SSSBC and others (2011) 32 ILJ 715 (LC)* the court held that the correct approach, where consistency is raised in terms of onus was:

> *"[10} Once the employee has pertinently put the treatment of consistency in issue, the employer has the duty to rebut such allegations… As regards the onus, the onus of proving that the dismissal was fair, and thus of rebutting the allegation of inconsistency, is one which rests squarely on the employer."*

100. Our courts have distinguished two forms of inconsistency, namely historical and contemporaneous inconsistency. Historical consistency requires an employer to apply the sanction of dismissal consistently with the manner in which it applied the sanction of dismissal in the past. Contemporaneous consistency requires that the sanction of dismissal be applied consistently when two or more employees commit the same misconduct.

101. The charge that I found the Applicant guilty of, namely that he smuggled dagga to offenders because he admitted same was the charge that raised the aspect of inconsistent application of discipline. It is important to note that the Respondent did not address the aspect of consistency, in spite of the fact that this was placed in dispute at the

outset of the arbitration process. Their only witness who referred to consistency was Gazina, and he was unaware of any inconsistencies.

102. The Applicant's witness, Van Rooyen, alluded to two incidents of smuggling, where officials were found guilty of smuggling, one in Belfast who pleaded guilty to smuggling dagga and one in Bethal, who pleaded guilty to smuggling. These employees did not face dismissal, instead they were suspended without pay. The Applicant, who similarly confessed to smuggling dagga, was dismissed.

103. I therefore find that the Respondent failed to act consistently when it applied wholly different disciplinary outcomes, and a much harsher penalty to the Applicant, that other employees found guilty of smuggling.

Was the sanction of dismissal appropriate?

104. In determining whether the sanction of dismissal was appropriate I have considered the decision of the Constitutional Court in Sidumo and Others v Rustenburg Platinum Mines Ltd (2007) 29 ILJ 2405 (CC) and considered, amongst others,

a. The importance of the rule that was breached. An employee has certain common law duties towards his/her employer. These duties include the duty to act in good faith, respect the chain of command and to refrain from breaching rules that could compromise their ability to do their job,

b. Smuggling unauthorised items to offenders constituted serious misconduct,

c. The Applicant was informed, after his confession, that the results of an investigation would be used in the interests of fairness. The result of this investigation failed to prove, through reliable, direct evidence, that the Applicant smuggled dagga to offenders,

d. The reason the chairperson applied the sanction of dismissal was based on a finding of guilt on all three charges, as opposed to my finding, on a balance of probabilities, that the Applicant was guilty of one charge,

e. The Respondent acted inconsistently when it applied corrective discipline in the form of unpaid suspensions, for similar misconduct committed by other employees yet dismissed the Applicant

f. The length of the Applicant's service, twenty-two years;

g. The Applicant's clean disciplinary record prior to his dismissal.

h. The Applicant expressed remorse to the HOC at the time he confessed and pleaded guilty to smoking a cigarette although he had no knowledge that he may have breached a rule;

i. Dismissal was not an appropriate sanction as further training, or corrective measures could have been put in place to ensure that the Applicant was on the right track.

105. Taking all the above into account I find that the dismissal of the Applicant was substantively unfair.

106. Section 193(1) and (2) of the LRA provides that the remedies for an unfair dismissal are re-instatement, re-employment and compensation. The primary relief being re-instatement he Applicant stated that if I were to find in his favour the remedy he sought was reinstatement. The amount of remuneration owed to the Applicant as a result of the reinstatement is calculated as follows:

Back pay for March to July 2022	= 5 months
R 260541.25 x 5	= R 132 706.25

Award

1. The dismissal of the Applicant was procedurally fair and substantively unfair.

2. The Respondent, Department of Correctional Services is ordered to re-instate the Applicant, Lucky Nhlanhla Msibi, in its employ on terms and conditions no less favourable to him than those that governed the employment relationship immediately prior to his dismissal. The re-instatement is to operate with retrospective effect from 28 February 2022.

3. As at the date of the award the remuneration due to Lucky Nhlanhla Msibi, because of the retrospective operation of the re-instatement, amounted to R 132 706.25 (one hundred and thirty-two thousand seven hundred and six Rand and twenty-five cents). Department of Correctional Services must pay the amount to Lucky Nhlanhla Msibi on or before 26 August 2022.

4. Lucky Nhlanhla Msibi must tender his services to Department of Correctional Services on 26 August 2022.

Signed and dated at **Nelspruit** on this the **9th** of **August 2022**

Name: Ann Marlies Dreyer

(General Public Sectoral Bargaining Council) Arbitrator