

Arbitration Award

Case Number:	<u>GPBC1199/2020</u>
Commissioner:	<u>Monice Roodt</u>
Date of Award:	<u>20 October 2021</u>

In the **ARBITRATION** between

PSA obo D Smuts
(Union/Applicant)

And

Department of Military Veterans
(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. This is the award in the Arbitration between Mr D Smuts, the Applicant and the Department of Military Veterans, the Respondent.
2. The Arbitration hearing was held under the auspices of the bargaining council in terms of section 191(5)(a)(i) of the Labour Relations Act, 1995 as amended ('the Act') and the award is issued in terms of section 138(7) of the Act.
3. The Arbitration proceedings took place on numerous dates, concluded on 06 & 07 October 2021, were conducted in English and digitally recorded.

4. The Applicant was represented by Mr Thobakgale, a representative from PSA, and the Respondent was represented by Mr Shirindza.
5. Parties submitted documentary evidence in support of their version, the documents were accepted as what they purport to be. The Respondent's bundle was marked "R" and the Applicant's bundle "A". There were no objections and parties agreed that the documents were what they appear to be. At the conclusion of the proceedings parties agreed to submit closing arguments in writing by 13 October 2021.

ISSUE TO BE DECIDED

6. I am required to determine whether the Applicant's dismissal was substantively fair. Should I find that the dismissal was unfair, I am required to determine the appropriate relief.
7. The Applicant sought retrospective reinstatement as relief.

BACKGROUND TO THE ISSUE

8. The Applicant was employed by the Respondent on 01 December 2014. He was dismissed on 16 September 2020 for alleged misconduct. At the time of his dismissal he was employed as a Deputy Director – Social Economic Support Services, earning a salary of R70 417.04 per month.
9. The Applicant disputes the substantive fairness of his dismissal, limited to breach of the rule and the appropriateness of the sanction.

SURVEY OF EVIDENCE AND ARGUMENTS

10. What follows is a summary of evidence presented at the arbitration hearing, on those aspects perceived to be relevant to the issues in dispute. I have considered all the evidence and submissions of the parties in reaching my decision.

Respondent's evidence:

11. The Applicant was dismissed on an allegation of gross dishonesty in that he:

- During 2016 misrepresented information relating to invoices submitted by Levingston in that he indicated that they had relevant supporting documents eg lease agreements and invoices that coincided with the length of time a student was to be in rented accommodation. His conduct is in contravention of Section 45 of the Public Finance Management Act (PFMA);
- During July 2016 he committed misrepresentation as contemplated in the Disciplinary Code and Procedure for the Public Service, Resolution 1 of 2003 of the PSCBC in that he accepted a payment from the DMV of approximately R35 000.00 in respect of accommodation for his dependant while he knew or ought to have known that it was wrong to do so.
- During 2016 he colluded with a service provider for bursary benefits to cause the DMV to pay through this company money to several beneficiaries in respect of travelling and meals while he knew or ought to have known that this were not part of the benefits paid for by the department.

12. Four (4) witnesses testified:

Alfred Sambaza:

13. Mr Sambaza testified under oath that he is the Director of Sizwe Ntsaluba Gobodo Advisory Service (SNG) and they were appointed in 2017 to investigate irregularities on the payment of Tertiary Education benefits. The scope of their investigation related to concerns identified by the Chief Director of Health and Wellness, more specific relating to private tertiary education benefits. He had a team who was involved with interviewing employees, students and the Service Provider who was facilitating the distribution of monies to the students (Livingstone, the principal being Mr Mnguni). He signed off the final report which was submitted to the Department of Military Veterans (DMV).
14. During their investigations, a certain Mr Thabang Mbemba informed them that he came to the department to request certain funding for transport, food etc and was informed by Mr Smuts that those expenses are not covered by the bursary and he was advised to process an application for accommodation, which funds can then be used for transport, etc. Mr Mnguni, the Service Provider who was involved with DMV students would arrange / provide accommodation for the full academic year (10 months) and an invoice would be issued to DMV for payment. From the

investigations it became evident that Mr Mnguni charges a fee for his services, which is deducted from the funds provided by DMV. According to Mr Mnguni the Applicant and Mr Makapane were aware of the arrangement. The Applicant himself requested accommodation benefit for one of his children in 2016. An amount of R35 000 was paid by DMV to the service provider, of which he paid R32 000 for accommodation and withheld R3000 as his service fee. The Applicant queried the short payment, after which the R3000 was paid to the Applicant. The Applicant denied being aware of the arrangement that a service fee would be deducted from the accommodation benefit. Mr Mnguni submitted that he received R35 000 from DMV, of which R32 000 was paid to the Applicant in respect of accommodation for his child who was renting a room from him.

15. As part of the investigation, a student Esther Maluleka deposed of an affidavit that she was awarded a bursary from DMV in 2016 amounting to R68 000, and she was registered at Rosebank College for a marketing course. This amount covered transport fees (6 x R2200), books and R21 990 for school fees.
16. Investigations showed that the education bursary / benefit amounted to R68 000 for 2016. A portion was for accommodation, transport fees, books and tertiary fees. In terms of the DMV benefits, the Applicant is considered a veteran and therefore entitled to the tertiary education benefit. But he was not able to find documentation confirming that the Applicant is entitled to the accommodation benefit in respect of his child renting a room from him. DMV students need to apply for the benefit on the database, and should they be successful, they are then granted the bursary. Supporting documentation is required. From his investigation it became evident that at the time DMV did not require a lease agreement in respect of a claim for accommodation, and it was only implemented later.
17. During cross examination the witness stated that he is a qualified Chartered Accountant with 21 years' experience in external audits and forensic investigations. He was present during the interview with the Applicant as well as Mr Mnguni's interview and involved with reviewing a number of documentation received during their investigations. He signed off the final investigation report. His terms of reference was to investigate allegations of irregularities in terms of payments made during 2016 for accommodation, laptops and text books. The Applicant's name came up during the investigation. Concerns were raised in respect of the Applicant as he

failed to prevent fruitless and wasteful expenditure, by not ensuring that supporting documentation in terms of claims for accommodation was in place. They made no finding in respect of the charges against the Applicant, but only recommended that action be taken. Action was also taken against the Chief Director, Ms Morolo and the CFO, but he cannot confirm if the CFO was disciplined. When asked whether the Applicant was entitled to the tertiary benefit scheme, he responded that as a veteran he and his beneficiaries are entitled to the benefits. He could however not establish whether the Applicant was entitled to a benefit in respect of accommodation when his child stays with him.

18. He concedes that the Standard Operating Procedures (SOP) in respect of processing of tertiary benefits is not part of the documentary bundle, but was provided during the investigation process. Mr Mnguni provided proof of the 2 payments made to the Applicant, totalling R35 000 in respect of his dependant's accommodation fees. When confronted with the statement that the Applicant is a military veteran and his child a registered student, and that there was no undue benefit by the Applicant, he responded that they did not find any documentation that prevented the Applicant from receiving the benefit, despite the student staying in his house. He cannot comment on whether it is appropriate or not, as the SOP was silent in terms of such an arrangement. He could not find a requirement stating which documents the Applicant had to have in place before payment is made, he is only aware of documentation that the service provider required, eg lease agreement, proof of student registration, quotation iro books, ect, although not documented. He concedes that it is ideal to outline the requirements in the SOP, but that the Applicant should have controls in place to prevent wasteful expenses.

Thabang Mbemba:

19. The witness testified under oath that he is an Administration Assistant in the Department of Basic Education. In 2016 he applied for a bursary for his tuition fees, stationary, laptop, accommodation and transport. The department then paid for his tuition, books, laptop, transport and tutor classes after the DDG approved the application. Subsequently the Applicant then rejected the application and informed him that he can only claim for accommodation, and the above can be paid from that payment. He was instructed to obtain an invoice from the service provider Mr Mnguni, and further signed a lease agreement.

20. Under cross examination he conceded that he received the payment of R35 000 in respect of his accommodation, and did not pay or share this amount with anyone.

Germina Nkgweng:

21. The witness testified under oath that she is the Assistant Director – Financial Accounting & Bookkeeping. On 26 November 2018 she noticed a payment received in the amount of R12 763.20. She corresponded with the bank by email to obtain details from the depositor and confirmed that the payment was made by the Applicant. She received an email from the Applicant stating that the amount paid as part of the bursary was for a computer, and as it was above the threshold, he decided to refund the cost of the computer. She traced the supplier and the amount was paid to them. She did not conduct further investigations as it was not processed by her department.

Edzisana Munyai:

22. The witness testified under oath that he was appointed as the chairperson in the Applicant's disciplinary hearing by DMV. Mr Mbemba testified that he did not initially apply for funding for accommodation as he stayed at home, but was informed by the Applicant that he should include a claim for accommodation, which he did, after which he received the allowance.
23. A second witness, Mr Sambaza testified that he conducted interviews with students who received bursaries, one of which was Mr Mbemba. He became aware of the involvement of a service provider, who provides students with everything they need and DMV would then pay the service provider. The service provider provided him with a proof of payment of an amount of R35 000 which was paid into the Applicant's account. During the hearing the Applicant disputed that he received the payment. Based on the evidence presented to him, he found the Applicant guilty on the charges levelled against him.
24. The Applicant claimed for accommodation in respect of his child staying with him, but this was for the benefit of students using external accommodation, and it was inappropriate to claim for accommodation when you are staying at home. It is not acceptable for the Applicant to receive an accommodation allowance when his child stays in his house.

25. Under cross examination he conceded that the Applicant disputed the proof of payments presented as there were no bank stamp on them. The investigator stated that during his investigation the proof of payments were provided to him by the service provider who made the payments to the Applicant. These documents were provided to the Applicant 5 days prior to the disciplinary hearing.
26. He found the Applicant guilty on the charge of failure to adhere to the provisions of the PFM Act, section 45 in respect of irregular expenditure, in that he authorised a payment for accommodation where no accommodation was in place, which amounts to irregular expenditure. His finding was based on the evidence of Mr Mbemba. He cannot recall whether the PFMA formed part of the documentary evidence but he is familiar with the PFMA. He cannot recall if he was provided with a DMV policy in terms of Education and/or bursaries. He can also not recall if he was provided with a Standard Operating Procedure into how bursaries are allocated or processed. The Standard Operating Procedures were irrelevant.
27. He was not provided with the investigation report during the disciplinary hearing, and his outcome was based on evidence presented during the hearing. The Applicant was not identified/introduced as a military veteran during the hearing. When he questioned the payment of R35 000 to the Applicant, he was informed that the payment was received from the service provider, which according to him is not allowed. When asked what informed his decision in respect of whether the Applicant was entitled to the payment or not, he responded that the investigator told him that the service provider made the payment to the Applicant. He was not informed what the money was for. When confronted with the version of the investigator who confirmed that the Applicant is a military veteran and that his children are entitled to a tertiary bursary, and that it was those funds which were paid to the Applicant, he responded that even if the Applicant's child received a bursary, she stays with her parents, and should not have received that benefit. He conceded that no standard operating procedure was presented during the disciplinary hearing.
28. He confirms that Mr Mbemba informed him that he received an accommodation allowance, which he did not apply for and was not entitled to. Mr Mbemba did not indicate what the requirements

were to qualify for an accommodation benefit, neither did he indicate what the funds were used for.

29. In respect of the second charge, alleging that the Applicant received an accommodation allowance which he was not entitled to, he conceded that at the time DMV had no approved policy to indicate how it should be utilised, but in the absence of a policy the PFMA applies as a broad policy. When questioned on whether the PFMA was put to the Applicant during the hearing to respond to, he submitted that the PFMA was not part of the evidence, he just applied his mind. He further did not see the need to check if the Applicant's child was registered as a recipient of the benefits, as the child stayed with the Applicant. It is improper to receive an accommodation allowance if the child is not making use of external accommodation. He cannot recall if the investigator found this to be irregular.

30. When it was put to the witness that the investigator referred to the payment as a bursary benefit, which children of military veterans are entitled to, that the benefit is not classified as accommodation, transport, etc, and is a benefit irrespective of where the child stays, as there is no documentation which guides that, he did not respond.

Applicant's evidence:

31. Mr Deon Smuts testified under oath that he was employed in 2014 as a Deputy Director – Social Economic Support, and was responsible for one of the benefits in terms of the Military Veterans Act, namely Education Support. He himself is a military veteran. When the Director resigned in 2015 he was responsible for the Education Support section and dealt with all administrative functions iro Military Veterans' education support. It posed a challenge from the onset to develop documents in terms of the process. In terms of the Military Veterans Act, where benefits are listed, regulations need to be promulgated and then policies drafted. Although he was not responsible for drafting policies, the processes were rolled out without policies. On numerous occasions he tried to address the absence of policies, as for all other benefits of military veterans there were regulations, except for Education Benefits, which posed a huge challenge.

32. There were 2 groups of students, Public and Private institution enrolled students. He communicated with the CFO of DMV in terms of processes to compensate students in terms of the allowances they are entitled to, which never materialised, despite the DMV having to provide

that service. In respect of students enrolled at Public institutions the department had an agreement with the Student Financial Aid Office to administrate all the MV students. But in respect of Private Institutions this was not the case. For example in respect of Boston College a student's tuition fees and accommodation could be paid but they could not pay any other disbursements. Iro Public institutions students received their other disbursements via vouchers etc. All of these issues relating to 4500 students were his responsibility, with no administrative support, and he was responsible for all re-imbursements.

33. Students and parents will approach him and raise issues of unfairness as students enrolled at public entities would receive their allowances, but in respect of students enrolled at private institutions DMV had no system in place to pay their disbursements. The BAS system being used only allows for payments based on an invoice received. It does not cater for payments like travel, etc. He had to find a solution to ensure fairness to all students who qualify for benefits. They made use of a service provider who processes their accommodation disbursement and can also assist students with the remainder of the allowances, within the threshold of the bursary. The service provider will then provide an invoice to enable him to disburse the funds. He never benefitted financially from this process, even in the case of Mr Mbemba, who received the full amount due to him.
34. In respect of his own child, at the time she was enrolled at a private institution and although she stays with him, she had a long distance to travel daily. As with all other students she utilised her tertiary benefit for transport, meals and accommodation. In the absence of a policy he constantly put pressure on his superiors to formally document which benefits students are entitled to. His section was issued with guidelines on an annual basis. The only requirements to receive the benefit were that the student must be registered at an institution and be a dependant / child of a military veteran. The military veteran and all dependants are registered on the database, and in his case it was done in 2014. At no stage did he process any payment to himself. The necessary documentation would be processed with the required signatures, and would not be signed off by himself.
35. He received the payment of his child's tertiary bursary from the service provider into his account. This payment was in respect of accommodation in terms of the benefit he was entitled to. He has no personal relationship with the service provider, and he is aware that the service provider is

registered on the Military Veteran procurement database as a service provider. He was not involved with the service provider's registration on the database, and was informed that he assists with student accommodation. He never received any benefits from the service provider.

36. During cross examination the Applicant confirmed that his child stays with him and she claimed the accommodation benefit as the Education Support Benefit bursary amount of, for example R68 000 is allocated per student per year. In respect of students enrolled with private institutions, none of them receive transport or meal allowance, which led to DMV finding a solution that a service provider will assist those students, and the full bursary amount was paid to the service provider.
37. There were no requirements in place for paying student accommodation. Using the BAS system they could process payment based on an invoice provided. By December 2016 the Director General signed off a policy to deal with these challenges but this was not approved by the Department of Defence. Despite this not being approved, DMV used this policy as a guideline and then required a lease agreement, tax clearance etc to support a claim for accommodation as from 2017. But prior to this there were no such requirements in place.
38. Mr Mbembe joined DMV in 2015, was a dependant of a military veteran and he applied for a bursary to study. He was informed by Mr Mbembe that he does not need funds for accommodation, and he responded that the DMV will then only pay his tuition fees. Mr Mbembe then queried how his transport etc would be covered, to which he responded that those expenses cannot be processed via DMV systems. He then recommended to Mr Mbembe that he applies for an accommodation benefit and he then dealt with the process himself.

ANALYSIS OF EVIDENCE AND ARGUMENTS

39. In terms of section 185 of the Labour Relations Act, 66 of 1995 as amended ("the LRA") every employee has the right not to be unfairly dismissed. Section 192 of the Act provides that the employee carries the onus of proving the existence of a dismissal, whilst the employer has to prove that it was fair. What is fair depends upon the circumstances of a particular case and essentially involves a value judgement (*NEHAWU v University of Cape Town* (2003) 24 ILJ 94 (CC) par 33).

40. In the present case it was common cause that the Applicant was dismissed. He challenged the substantive fairness of his dismissal limited to breach of the rule and the appropriateness of the sanction.

Substantive fairness:

41. Schedule 8 of the Code of Good Practice : Dismissal item 7 stipulates as follows:

“Any person who is determining whether a dismissal for misconduct is unfair should consider –

(a) Whether or not the employee contravened a rule or standard regulating conduct in, or relevance to, the workplace; and

(b) (iv) dismissal was an appropriate sanction for the contravention of the rule or standard”

42. The charges which resulted in the Applicant's dismissal were gross dishonesty.

43. In determining whether the Applicant's conduct amounts to dishonesty, I considered the following:

44. In respect of the allegation that the Applicant was dishonest in that he misrepresented information relating to invoices submitted by Levingston by indicating that all relevant supporting documentation such as a lease agreement and an invoice was in place, no evidence was presented by the Respondent to support this allegation of misrepresentation. The Respondent's first witness, Mr Sambaza even conceded that at the time, during 2016 DMV did not require a lease agreement in respect of a claim for accommodation. He further conceded that they did not find a requirement stating which documents the Applicant had to have in place before payment is made. The allegation by the Respondent that the Applicant failed to prevent fruitless and wasteful expenditure by not ensuring that supporting documentation in terms of claims for accommodation was in place, is therefore unfounded as there were no supporting documentation required.

45. The chairperson of the disciplinary hearing testified that he found the Applicant guilty on the abovementioned allegation as he failed to adhere to the provisions of the PFMA by authorising a payment for Mr Mbemba's accommodation, where no accommodation was in place. According to him that amounts to irregular expenditure. The chairperson came to this conclusion without

indicating how he concluded that Mr Mbemba was not entitled to accommodation in terms of the bursary policy. He further cannot recall if the PFMA formed part of the documentary evidence during the disciplinary hearing. He could also not recall if he was confronted with the Standard Operating Procedure iro how bursaries are allocated and processed, and further argued that even if it was presented, it was not relevant.

46. In respect of the allegation that the Applicant accepted a payment from the DMV in the amount R35 000.00 in respect of accommodation for his dependant while he knew or should have known that it was wrong to do so, Mr Sambaza testified that his investigations confirmed that the education bursary amounted to R68 000.00 for 2016, which provides for accommodation, transport fees, books and tertiary fees. It is common cause that the Applicant is a military veteran and therefore entitled to the tertiary education benefit. He further testified that he could not find any documentation during the investigation that prevents the Applicant from receiving the accommodation benefit, despite the student staying in his house. The Standard Operating Procedure was also silent on this aspect.
47. The chairperson referred to the payment made to the Applicant, and during the disciplinary hearing he was informed that the payment was made to the Applicant by the service provider, which he found to be inappropriate. When he was questioned on why he found the payment to be inappropriate, he conceded that he was not informed what the payment of R35 000.00 was for. He was further not informed that the Applicant is a military veteran. I find this quite shocking as it turns on the allegations levelled against the Applicant. When he was then confronted with the version that the amount paid to the Applicant was in respect of his child's tertiary bursary, he then has a change of heart and responds that even if it was for a bursary, she was not entitled to it as she stays with her parents. Once again this was not supported by any policy or standard operating procedure.
48. In respect of the allegation of colluding with the service provider for bursary benefits to be paid to beneficiaries for travelling and meals while knowing that this was not part of the bursary benefits, this is inconsistent with the investigator, Mr Sambaza's evidence that the education bursary amounted to R68 000 for the year 2016, and it included accommodation, transport fees, books and tertiary fees. Furthermore no evidence was presented to support the allegation that the Applicant colluded with the service provider. The Applicant testified that he has no personal

relationship with the service provider and was also not involved with the service provider's registration on the DMV database. He furthermore received no benefits from the service provider. No evidence was led to the contrary.

49. The Applicant testified that when he became responsible for Education Support in 2015 there were no policies in place. The existing BAS System did not cater for any payments other than accommodation and tuition fees and therefore disbursements for students enrolled at private institutions could not be processed. This was not disputed by the Respondent. To overcome this challenge DMV made use of the services of a service provider who was able to process the accommodation disbursement as well as the rest of the allowances. The service provider was registered on the DMV procurement database, not due to his doing, and no benefits were ever received from the service provider.
50. There were no requirements in place for paying student accommodation, except for confirmation that the student was enrolled at an institution, and a dependant of a military veteran. His child was entitled to the tertiary bursary as she met these requirements. She used her benefit for transport, meals and accommodation, like all other students did. There was no policy in place which prevented a student from claiming the accommodation benefit if they stay with their parents. This was not disputed.
51. The Applicant faced a charge of gross dishonesty. Dishonesty can consist of any act or omission that entails deceit. However dishonesty is not a loose term that can be thrown at employees in any circumstances. In the matter of *Nedcor Bank Ltd v Frank (2002) 23 ILJ 1243 (LAC)* the Labour Appeal Court held that dishonesty entails a lack of integrity or straightforwardness and, in particular, a willingness to steal, cheat, lie or act fraudulently. The court also held that the term implies intention on the part of the employee. An employee can also not be dishonest if he acts with an honest intention, however dubious the wisdom of the act may be. In the matter of *Sappi Novaboard (Pty) Ltd v Bolleurs (1998) 19 ILJ 784 (LAC)* the court found that a charge of dishonesty requires proof that the person acted with intent to deceive.
52. I am not satisfied that the Respondent established a valid reason for the dismissal.

53. I accordingly find that the Applicant's dismissal was substantively unfair. The Applicant is seeking reinstatement. I have no reason to believe that a continued employment relationship would be intolerable.

54. I accordingly make the following award:

AWARD

55. The Applicant's dismissal was substantively unfair.

56. The Respondent, Department of Military Veterans is ordered to re-instate the Applicant with effect from 08 November 2021.

57. The Respondent is to pay the Applicant, Deon Smuts back pay for the period 16 September 2020 to 08 November 2021. I have considered the fact that the finalisation of the matter was delayed due to postponements requested by either one of the parties. I am therefore ordering back pay of 50% of the calculated amount. The amount payable is calculated on 6.5 months at R70 417.04 per month, totalling R457 710.76 (four hundred and fifty seven thousand, seven hundred and ten rand, seventy six cents).

58. Payment of the amount referred to in paragraph 57 must be effected by paying the said amount into the Applicant's bank account by 30 November 2021. The Applicant must report for duty on 08 November 2021.

A handwritten signature in black ink, appearing to read 'Monice Roodt', is enclosed within a dashed rectangular box.

Council Commissioner

Monice Roodt