



Council Name

# ARBITRATION AWARD

Panelist/s: NTATE JOSIAS MABILO  
Case No.: GPBC1072/2021  
Date of Award: 31 AUGUST 2022

In the ARBITRATION between:

PSA obo Ncongwane, EA

(Union / Applicant)

and

Department of Correctional Services

(Respondent)

**Union/Applicant's representative:**

Union/Applicant's address:

Telephone:

email:

Mr. Flip van der Walt of PSA\_\_\_\_\_

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**Respondent's representative:**

Respondent's address:

Telephone:

email:

Ms. Seshoba Kgoahla\_\_\_\_\_

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## ARBITRATION AWARD

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### DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration of the unfair dismissal dispute between PSA obo Ncongwane, EA (applicant) and Department of Correctional Services (Respondent) was held under the auspices of GPSSBC, on the following dates: 07 March 2022, 19-20 May 2022 and 10 August 2022. The hearing on 07 March 2022 was held virtually and the remainder of the sessions were physical meetings.
2. The applicant was represented by Mr. Flip van der Walt of PSA and the respondent was represented by Ms. Seshoba Kgoahla, an employee of the respondent.
3. The proceedings were recorded both manually and electronically.

### ISSUE TO BE DECIDED:

4. I am required to determine whether the dismissal of the applicant was unfair or not, specifically with regard to whether the applicant committed the misconduct or not.
5. Remedy requested is re-instatement.

### BACKGROUND TO THE MATTER:

6. The applicant started to work for the respondent on 09 October 2006.
7. He occupied the position of Correctional Officer Grade 1 and he was stationed at Barberton Correctional Centre.
8. He was dismissed on 03 June 2021 after a disciplinary process.
9. The respondent is Department of Correctional Services.

## **SURVEY OF EVIDENCE AND ARGUMENT:**

### **Respondent's Submission:**

The first witness was **Mr Ben Mandla Gazina** who testified under oath and stated the following:

10. He was a Security Officer Grade 1 and he had been investigations officer for 15 years. He knew the applicant as a colleague. Himself and RJ Zulu were appointed to investigate the case at hand.
11. On the 7 May 2020, during lockdown level 5, they found the applicant carrying tobacco at the access gate. The applicant was told that he was not allowed to enter the premises with the tobacco and he managed to enter with the items into the premises. He further confirmed findings of the investigation report by himself and a Mr. Zulu, which report was included in the bundle of documents.
12. He referred to the disciplinary code, which is Annexure A of the Resolution 1 of 2006, item (w) which reads as follows: 'An employee will be guilty of misconduct if she or he among other things be in possession of illegal, unauthorised and or stupefying drug on departmental premises.'
13. The items which the applicant was said to have taken into the premises were read and confirmed by the witness as per item 9.4 of the investigation report. They are 30x20s boxes of various cigarettes brands, 3 by 50grams of Boxer tobacco products and 3 Medium Ntsu brand Snuff. No officials are allowed to bring items such as those into the correctional centre.
14. It was during lockdown; tobacco was not allowed in the premises and Correctional Services also had to comply with the Disaster Management Act. He referred to the provisions of the Act, especially paragraph 27 which provides for prohibition of tobacco.
15. Under cross examination, he stated that the products were not allowed at the centre and it was also during level 5 of covid and they were prohibited.

16. It was put to the witness that paragraph 27 of the Disaster Management Act speaks of selling and being in possession of and did not say carrying. He answered that the items were not allowed in the Correctional Services premises.
17. He stated that they based their findings on Disaster Management Act and the prohibition in the code of conduct. When it was argued that the disaster management Act only prohibited selling, he replied that in addition, tobacco products were not allowed into correctional services premises.
18. There was no specific directive to the correctional officers prohibiting cigarettes at the correctional centre, but at parades, they were told that they were not allowed to be in possession of same. Barberton Maximum was a non-smoking area with designated smoking areas. During lockdown, no smoking was allowed and the security officials at the gate did also make him aware on that day.
19. When the applicant was searched by M. Mogakane he said that he was taking the items to an offender in the prison. He was found in possession of the tobacco products, the security took the items and placed aside and later it was found that the items were no longer there where they were placed.
20. Again, when asked whether section 27 of the Disaster Management Act prohibited giving tobacco to another person, he replied that the said section read with the code of conduct item 'w' it was clear that such substances were not allowed. In institutional orders of the prison, officials are not allowed to bring such substances to the inmates.
21. In re-examination he confirmed that officials were not allowed to bring anything to the inmates. He further confirmed that his recommendations were based on the code of conduct and regulations of correctional service and not what was said in the parades.

The second witness was **Mr Lawrance Mpotseng Mogakane** and he also testified under oath as follows:

22. He was a Correctional Officer at Barberton Maximum Correctional Centre and he had been there for 16 years. He was part of the Emergency Support Team (EST) which was responsible for searching officials or inmates as well as to deal with riots and hostages. He knew the applicant as one of the officers at the Maximum prison.

23. On the 7 May 2020, he was posted at Bravo 01 to search officials entering and leaving the centre or any other person. The applicant came reporting on duty and he was carrying two black plastics. He was searched and of the two bags one was containing food containers and the other was containing tobacco products (cigarettes, Boxer and Snuff).
24. He told the applicant that he was not allowed to enter the premises with those items. The applicant agreed that he knew that but the items were not much. He did not allow him to enter with the items. He then confirmed with a Mr Mthethwa who also told the applicant not to take those items into the prison.
25. When they noticed that the applicant had taken the bag into the centre, they reported to the Admin block and he was stopped. The witness asked him to come back to the gate with the plastic and the applicant replied that he rather take the bag with him. The applicant handed the bag to him and he took it with him back to the guardhouse. The bag with those items were handed to the seniors.
26. The applicant found him at Mr Mashabane's office and there he confirmed to Mr Mashabane that the items were his. Mr Mashabane reminded the applicant that he had told him to stop smuggling things into the centre and he confirmed. The police came and fetched him to the police station where he made a statement. The statement was referred to in the bundle of documents.
27. Under cross examination he answered that he did not know the outcome of the court case. He was referred to section 27 of the disaster Act and after it was read, he accepted that it was not about transporting or being in possession of but selling of tobacco products.
28. He stated that the applicant said that he was carrying the items for an inmate and that was contravention of the Department of Correctional Services Act of 1998 sub-section 118 (a-c).
29. When asked whether he was aware of the staff member who was caught and nothing was done to him, he answered that he was not aware.

30. It was the first time he caught someone with tobacco products. He confirmed that indeed the applicant was carrying the tobacco products and not selling when he was caught.
31. In re-examination, he confirmed that whether food or dagga it was not allowed for an official to bring to the inmates at the centre. Again, he confirmed that the photo of the items was taken on the day of the incident.

The third witness was **Alfred Ngwenya** who testified under oath as follows:

32. He stated that he knew the applicant as any other officer of the prison. He did not know anything about the cigarettes. He further stated that he never received any cigarettes from the applicant.
33. That he only received in February 2020 before lockdown and it was for cutting his hair. He said he asked the applicant to bring him because he had no visitor to bring him roll-on or cigarette. He asked the applicant because he was a kind man.
34. When asked whether he was the only one assisted he said that he did not know. He said the applicant said that he was not allowed but would assist me.
35. In cross examination he was asked whether he was the only one who came to have his hair cut and he answered that it was not only the applicant.
36. The applicant never sold any cigarette to him. He submitted that there were other officials who came to have their hair cut and they gave him cigarettes. For others you would polish the officials' shoes the whole month and they give you something in return. It happened every day and you and you are rewarded at end of the month. The practice had been happening and he was aware since 2013.
37. In re-examination he was asked whether he was aware that it was not allowed to cut officials' hair and he answered that he was aware. He said that the applicant gave him cigarettes because he requested him.

The fourth witness was **Mr Mgidimi Anthony Mashabane** who testified under oath as follows:

38. He was the head of the Correctional Centre for the past 23 years. His responsibilities included the control and management of the Centre. He knew the applicant as a colleague.
39. Reference was made to the statement he made regarding the incident of the 7 May 2020 at the Correctional Centre and he confirmed the statement. He stated that the applicant admitted that the bag with tobacco products was his and it was confiscated at the gate. After the admission, the witness handed the matter to the police.
40. Again, reference was made to the applicant's statement wherein he also stated that the bag with tobacco products was his. In his statement, the applicant stated that he was taking the cigarettes to the offender who polished his shoes. He was doing business with the offender which is not allowed.
41. The applicant brought prohibited items into the Correctional Centre. During that period smoking was prohibited in the centre. Officials were not allowed to bring any items to offenders or to sell to them.
42. He referred to the disciplinary code in the bundle as well as the code of conduct to substantiate that officials were not allowed to be in possession of any habit-forming or stupefying drugs in the Correctional Centres.
43. Under cross examination he stated that when the incident happened, he was not at the centre. When he arrived, the bag was at the gate and he was made aware of it. He then called the officials to his office to hear the whole story.
44. It was put to the witness that the Disaster regulations only prohibited the selling of tobacco product. He answered that no official was allowed to smoke in the centre.
45. When asked about the kiosk at the centre he replied that it was there and functioning but officials were not allowed to buy cigarettes for offenders without permission.
46. A version was put before the witness that offenders do clean the shoes of officials. The witness agreed that it did happen but policy did not allow it.

47. About the confession of the applicant before him, the witness replied that the applicant said it verbally in the presence of the police and other officials that the bag with the tobacco products belonged to him. The confession was not in writing.
48. In re-examination, the witness was referred to the applicant's statement in which the applicant stated that he told the witness that the bag was his.
49. The respondent's evidence ended.

**Applicant's Submission:**

The first witness, **Mr. Elvis Andile Ncongwane** testified under oath and stated the following:

50. He started to work for the applicant on 09 October 2006 and worked at the Barberton Maximum Prison till 03 June 2021.
51. He referred to and read the chargesheet and the Disaster Management Act section 27 which provided for prohibition of the sale of tobacco products. He stated that the charge referred to possession while the Disaster Act referred to the sale of tobacco products and the two were not the same. Only selling was prohibited and not being in possession.
52. On the 7 May 2020, he reported to work having three cartons of cigarettes and his lunch box in separate plastic bags. When he arrived at Bravo Zero1 he found EST officials searching. It was Mogakane and Nkosi and Nkosi did body search while Mogakane searched his two bags. The witness was allowed to enter the premises with the two bags. When he had walked about 150 meters into the premises, Mogakane called him and wanted to take the bag with cigarettes. He handed it over to Mogakane and proceeded into the centre.
53. At 07:30 he was called to Mr Mashabane's office. He found Mr Mashabane with the cigarettes bag. He acknowledged the bag as his own with 3 cartons of cigarettes only. Mr Malumane and Mr Mogakane were called and they found him in Mr Mashabane's office. He only knew the three cartons and the other things were not his.



54. Some officials used to smuggle cell phones, for example Nomthandaso Khoza who was only suspended for 1 month while it was not first time and previously, she brought KFC and cake during the offender's birthday.
55. In closing he stated that he was never involved with smuggling.
56. In cross examination, he described a carton of cigarettes as 10 of 20's and stated that he was taking them to his cabinet and he would give to the offender who polishes his shoes.
57. When asked why did he breach the rules while he was trained and knowing the rules, he replied that it was normal practice to give cigarettes to offenders for polishing officers' shoes and there are records to that effect.
58. He was referred to his statement in the bundle, where he stated that he was told that the cigarettes were not allowed in the institution, he replied that he did not know why they said so, because according to him it was normal practice.
59. In re-examination, he confirmed that while the investigation refers to different colours of plastic bags, his were two black bags one with cigarettes and the other containing his food.

The second applicant's witness, **Sibusiso Edward Mkhonza** testified under oath and stated the following:

60. He was an investigation officer at Nelspruit Correctional Centre and he knew the applicant. He was the one who represented him at the disciplinary hearing.
61. The witness confirmed that giving offenders cigarettes for polishing the officers' shoes was a normal practice. Mr Fielding was caught with cigarettes in Nelspruit and nothing was done to him except taking the cigarettes. Vincent Chiloane smuggled dagga and he was sanctioned for two months without salary. There are many similar cases in Nelspruit. He said that the sanction of dismissal was too harsh and personal.
62. Regarding the prohibition of tobacco products by the Disaster Management Act at that time he replied that it only prohibited selling and nothing else.

63. Under cross examination, he confirmed that he was an investigator and at the same time a shop steward and he represented the applicant at the disciplinary hearing. He did however agree that unauthorised articles were not allowed in the centre.

64. He agreed that each case had its own merits.

65. In re-examination he explained that by unauthorised articles he meant dagga or weapons, but not cigarettes were not unauthorised article and there is no policy that prohibit cigarettes.

66. He said Chiloane smuggled dagga and was sanctioned for two months without salary and the applicant brought cigarettes and was dismissed which was not fair.

#### **ANALYSIS OF EVIDENCE AND ARGUMENT:**

67. The matter was referred as unfair dismissal in terms of sections 191 (1) and 191 (5) (a) of the Labour Relations Act 66 of 1995. The matter was therefore set down for arbitration.

68. I am required to determine whether the dismissal was unfair or not. It is specifically the breach of the rule which is in dispute. This is in line with Schedule 8 Item 7 of the Code of Good Practice: Dismissals.

69. Section 188(2) of the LRA states that any person considering whether or not the reason for dismissal is a fair reason or whether or not a dismissal was effected in accordance with a fair procedure, must take into account any relevant code of good practice issued in terms of the LRA.

70. Again section 192 (1) of LRA provides that in any proceedings concerning any dismissal, the employee must establish the existence of the dismissal. Subsection (2) of the same section provides that if the existence of dismissal is established, the employer must prove that the dismissal is fair.

71. In the current case, there was no dispute about the existence of dismissal. The onus was therefore on the respondent to prove on a balance of probabilities that the dismissal was for a fair reason and more specifically regarding the contravention of the rule.

72. In **Woolworths (Pty) Ltd / SACCAWU and others (JA 56/2016) [2017] ZALAC 54** the Labour Appeal Court laid down steps for an enquiry into a breach of a rule and held that in case of a breach of a rule, commissioners must consider the following:

- (a) Whether there was a rule breached;
- (b) The nature and importance of the rule breached;
- (c) Whether the employee had knowledge of the rule;
- (d) Whether the rule had been consistently applied;
- (e) And whether dismissal was an appropriate sanction.

73. In the current case, the existence of the rule and knowledge thereof was not in dispute. What was in dispute were the reasonableness of the rule, breach of it, consistency and appropriateness of the sanction.

74. Before getting into the facts of the case, I need to point out that the standard of proof applied here is balance of probabilities and not proof beyond reasonable doubt as applied by courts of law. Arbitrators are expected to resolve matters with minimal legalities. When the issues were narrowed down, it became clear that procedure was not in dispute and the dispute was on the substance, mainly breach of the rule, consistency of its application and appropriateness of the sanction.

75. The respondent's version is that the applicant committed a misconduct by transgressing the disciplinary code and procedure which had been made part of GPSSBC Resolution 1 of 2006 and the provisions of Correctional Services Act 111 of 1998 as well as the departmental code of conduct. The provision of the Resolution, in Annexure A (W) prohibits being in possession of illegal, unauthorized, habit-forming and or stupefying drug on departmental premises. The Correctional Services Act 111 of 1998 provides in section 118 that no correctional or custody official may sell, supply or derive any benefit or advantage from the sale or supply of any article to or for the use of any offender. Their witnesses corroborated that during the lockdown, tobacco was prohibited in their Correctional Centers. And the applicant did confirm that he took the tobacco products into the Center. In short, they are saying the applicant contravened the rule which was reasonable and he was aware of it and the sanction was appropriate.

76. The applicant's version is that it is undisputed that the applicant brought three cartons of cigarettes into Barberton Maximum Prison Correctional Centre, for purposes of giving it to an offender as payment for doing work for him inside the institution. The Disaster Management Act, section 27 only prohibited the sale of tobacco products, e-cigarettes and related products. They also argue that there was no specific departmental directive prohibiting smoking during covid -19. It is further argued that it was normal practice that officials do pay offenders daily with cigarettes for work done within the institution. The party cited a number of cases which happened and the incumbents were not dismissed and found that to be inconsistent application of the rule. Finally, they find the sanction to be too harsh for the applicant who worked for 15 years with a clean disciplinary record.

77. Flowing from the evidence tabled and the versions stated above I find the following:

- The existence of the rule and the knowledge thereof was undisputed together with procedural fairness and that was agreed upon during the narrowing of issues.
- The fact that the applicant brought the tobacco products into the premises to give an offender who used to polish his shoes is not in dispute. That in my view is in contravention to the provision in the Correctional Services Act that no official may sell or supply or derive any benefit or advantage from the use of any offender. The same applies to the disciplinary code in the GPSSBC Resolution.
- It is worrying that what is prohibited is taken to be normal practice. When a trend is allowed to continue it becomes a norm and if no action follows to discourage it becomes a trend and you cannot discipline anybody for it. You will have condoned the practice. I did not hear the respondent party denying that that trend is happening, offenders polish officials 'shoes and get given somethings in return. Yet the prescripts stated that such should not happen.
- A number of incidents were cited in which people smuggled things into the Correctional Centre and were not dismissed. I expected that those specific cases would be rebuffed with specific details of their unique merits which made them different. Otherwise, it points to inconsistency as claimed by the applicant party.

- The issue of harshness of the sentence to a person with fifteen years' service and having a clean disciplinary record was raised. I must state it clearly that long service does not entitle anybody to be treated differently or leniently. However, when considering dismissal, you cannot ignore it.

78. Based on the above and the balance of probabilities, I am convinced that the onus had been discharged. However, I am also of the opinion that the sanction was a bit harsh.

**AWARD:**

The award is as follows:

1. The dismissal of the applicant, be replaced with a Final Written Warning valid for 6 months accompanied by two months suspension without pay.
2. The applicant to resume duties on 1 November 2022. There is no back pay applicable.
3. The respondent, Department of Correctional Services is ordered to oblige to the above sanction.



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**NTATE JOSIAS MABILO**

**(GPSSBC Panelist).**