



ARBITRATION AWARD

Panellist/s: Mandla Nkabinde.
Case No.: GPBC 482/2020
Date of Award: 24 November 2020.

In the ARBITRATION between:

**POPCRU OBO MASINA AND ONE OTHER.
(Union / Applicant)**

and

**DEPARTMENT OF COMMUNITY SAFETY AND LIASON.
(Respondent)**

Union/Applicant's representative: POPCRU OBO MASINA AND ONE OTHER.
Union/Applicant's address: 14 Henshall street.
Worklife building,
MBOMBELA 1200
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Respondent's representative: Department of Community safety and liaison
Respondent's address: Private bag 11259
Telephone: 013 7661617
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ARBITRATION AWARD

DETAILS OF HEARING AND REPRESENTATION:

This matter was referred as an unfair dismissal related to conduct. The matter was arbitrated on 07, 24 and 25 August 2020 at Mbombela government buildings. The applicants, NE Masina and JHL Mashego were represented by Lucky Fakude a paraligalist from POPCRU, the respondent, Department of community safety and liaison was represented by GG Hlungwane an assistant director, labour relations. Four paginated and labelled bundles of documents were exchanged for easy of reference.

ISSUE TO BE DECIDED:

Whether or not the respondent dismissed the applicants procedurally and substantively fair.

BACKGROUND TO THE MATTER:

The applicants were employees of the respondent working at Umjindi cost centre as traffic provincial inspectors. On 06 May 2019, the two officials were posted on road R38 to Barberton for their routine traffic inspection duties. They operated on a department marked vehicle GBN 247 MG. The vehicle if fitted with a tracker supplied by Amasondo fleet services.

They were charged with three similar charges:

1. Abuse of power in that on or about 06 may 2019, at or near Barberton, in your capacity as provincial inspector at or near Singobile trust. You unlawfully detained a motorist TJ Mkhwanazi t follow you to Barberton SAPS in order to for him to be issued with a ticket at the SAPS station, while there was no need to be detained and issued with a traffic fine in Barberton, while you knew or ought to have known that it was unlawful to do so.
2. Dishonesty in that on or about 06 May 2019, at or near Barberton, in your capacity as provincial inspector, you indicated in you statement that you in your state vehicle GBN 247 MG was traveling more than 160 km/hour in order to pull off the motorist Mr TJ Mkhwanazi from the road, while you knew or ought to have known that it was unlawful to do so.
3. Dishonesty in that on or about 06 May 2019, at or near Barberton, in your capacity as provincial inspector, you indicated in you statement that the passengers who were with TJ Mkhwanazi challenged how you detected the speed of 160km/hour, while the vehicle never travelled at that speed, while you knew or ought to have known that it was unlawful to do so.

An internal inquiry was held and they were found guilty on two charges 1 and 2, and not guilty on charge 3. They were dismissed on 19 March 2020, appealed and lost.

Four paginated and labelled bundles were exchanged for easy of reference. An interpreter assisted whenever it was necessary.

The desired outcome is re-instatement.

SURVEY OF EVIDENCE AND ARGUMENT:

The evidence of the applicants was tendered through one of the applicants and another witness. The respondent called five witnesses to attest for the department. Both parties' witnesses were sworn in, led their evidences, cross-examined, re-examined and closed their cases.

Evidence

The respondent.

The driver was pulled out of the road by marked traffic vehicle, it flickered lights behind, a few meters before a four way crossing between R38 and R40 separating the township and town. No alarm/siren, blue light and parallel driving.

No corroboration on stopping and or failure to do so on two railway lines.

Never saw the marked vehicle before it flickered the lights around the cross section.

Only the two officers and the driver were out of the vehicles, only the driver spoke to the officer.

The question on the scene was about speed, no mention of railways crossing offence. An apology was offered but unaccepted as it was words only.

Officers would use the tracker on their vehicle to prove the speed of about 160km/h.

The highest speed of the state car for that day and time in question was 118km/h.

Then told he was arrested, follow to the police station, followed without argument, drove his car with his driver's licence with the officer.

The officers could arrest on good grounds but the events were such that the ticket could have been issued on the spot. Going to station was abuse of power, if not arrest should have been effected.

They should assess safety first to pull a car off the road and only do so when it is safe to do so.

Driver driving his car with two officers in their car does not indicate arrest. None of the three ways of arrest were effected.

Got to the station, invited into the state car, closed windows cool sunny morning, continued to apologise with words, railway crossing ticket issued. Accepted and went to court for reduction.

Taking the driver into the state car under those condition is inexplicable.

Advised against opening a case as evidence was not tangible. But complaining as the next resort. The complaint was later sent to authorities including the department.

The applicant.

The driver drove more than 160km/h, they concluded on this because they drove 175km/h to catch up with him.

They sounded the siren, the blue lights and flickered head lights all in vain.

Eventually drove parallel, directed car out, it complied.

Licence given, speed question and non-stopping denied, apology offered.

One front seat passenger of unknown sex, questioned the instrument used for the speed. Two reports not corroborating this accession.

Instructed the driver to follow us to the police station to be written a ticket, it was unsafe at the scene, due to strike, one passenger and due to all three passengers.

While driving to the station we discussed how we going to effect the arrest, as the evidence of the Amasondo tracker we don't trust. We agreed on no-stopping ticket (reports).

This was not exercise of power but execution of our duties.

The police station farther compared to the control centre but decided to go to station. Centre is also a safe place.

We drove around 175 km/h, the instrument is not to be trusted. The only instrument to be trusted is Truvelo and Midago but they work differently and do a different task.

Amasondo tracker once misled us in locating a state car because they use GPS. I do trust GPS for my use though.

Arguments.

What the driver was apologising with, is a discussion that is said to have taken place, twice but every time between the driver and one officer.

The ticket could and should have been issued on the spot, the ticket is for the railway crossing, the speed was at the centre of discussion at the scene.

This sanction is the only sanction befitting these charges, the disciplinary code has a list of possible sanctions.

The relationship is broken, evidence and conduct should support this notion, a statement is just not enough.

During the investigation and the appeal period the applicants were at work doing their normal road inspection functions.

ANALYSIS OF EVIDENCE AND ARGUMENT:

Driver co-operated with the officers.

Driver accepted non-stopping ticket on both railways crossings.

It was reasonable for the driver to believe he was arrested based on what was said and where they led him to.

Arrest discussion on their reports support the arrest accession, the change as the result of lack of speed evidence and the method of proof, tracker, is sensible.

No arrest methods were effected at the scene and or on the way and or at the station.

Written traffic violation ticket counters the above.

Why they took the driver to police station passed the control centre.

The applicants' safety concerns are hard to believe.

The driver's car had some issues with the camera speed traps.

I have no reason to doubt Amasondo tracker on their reports.

Safe to say 118 km/h on 80 km/h zone is high but above 165 to 175km/h has no basis.

Did the purported chase occur? I am not convinced.

If it occurred, was driving at high speed unlawful, no rule argued or evidence led.

The respondent has a disciplinary code; it promotes progressive discipline with dismissal as the last option.

The options are numerous and have a potential of sending a strong message to deter even other officers.

This being the first offence of both applicants.

An offence does not automatically or on its own prove broken relationship.

The respondent (though not binding to me) already found applicants not guilty on charge three involving the same elements of dishonesty raised in a different context in charge 2.

The respondent fully discharged onus on procedure but narrowly did so on substance.

Under the circumstance a benefit of doubt has to favour the applicants

The application of the applicants is partly sustained.

These officers could have handled this situation better or differently.

AWARD:

1. Re-employ the applicants in the positions they occupied on or before 19 March 2020. (provincial inspectors).
2. On same salaries they earned at the time of dismissal, with no adjustments or increases that might have occurred to the department during the dismissal period to the re-employment date. This includes salary increments based on collective agreements. (Re-employment my emphasis).
3. The record of their service is broken.
4. The re-employment to be effective from 21 September 2020.
5. Membership of and entitlement to benefits from medical, retirement or any other scheme or policy do not continue, to be treated as new employees.
6. They are eligible for further promotions like other provincial inspectors.
7. They should report for duty to the labour relations office on 01 December 2020.

Mandla Nkabinde

Name:

GPSSBC

(Council name) Arbitrator

A handwritten signature in dark ink, appearing to be 'M. Nkabinde', written in a cursive style.