



ARBITRATION AWARD

Case Number: **GPBC216-20**
Commissioner: **Tiyani Makhubele**
Date of Award: **21 August 2020**

In the **ARBITRATION** between

Mmadingaka Mahlangu
(Union/Applicant)

And

Department of Correctional Services
(Respondent)

DETAILS OF HEARING AND REPRESENTATION

- 1 This is the award in the arbitration between **Mmadingaka Mahlangu** (hereinafter referred to as the Applicant) and **Department of Correctional Services** (hereinafter referred to as the Respondent).
- 2 The arbitration was set down on 16 August 2020 at the Offices of the GPSSBC in Centurion. The Applicant was represented by Mr Serame Maleho, a fellow employee while the Respondent was represented by Mr Ntshimane Maleka.
- 3 The arbitration was referred in terms of section 191(1) (5) of the Labour Relations Act 66 of 1995, as amended (the LRA). The award is issued in terms of section 138 (7) of the LRA.
- 4 The parties submitted written closing arguments on 11 August 2020. I consider 11 August 2020 being

the last day of the arbitration.

- 5 The proceedings were digitally recorded.

ISSUE TO BE DECIDED

- 5 I must determine whether the applicant's dismissal was substantively and procedural fair. If I find that the dismissal was unfair, I must determine the appropriate relief.
- 6 The Applicant indicated that he seeks reinstatement in the event that I find that the dismissal was unfair.

BACKGROUND TO THE DISPUTE

- 7 The Applicant was employed by the Respondent as a Correctional Official Level 3. The Applicant was employed by the Respondent on 6 March 2006. The Applicant earned a salary of R20 377,60 per month at the time of her dismissal. The Applicant was dismissed from her employment on 16 January 2020.

SURVEY OF EVIDENCE AND ARGUMENT

- 8 It is not the purpose or the intention of this award to provide a detailed transcription of all the evidence that was placed before me. Even though all evidence and arguments were considered, I have only summarised the evidence that I found to be the most relevant to make a determination in this dispute.

The Respondent's case

- 9 The Respondent called two witnesses who testified under oath as follows:
- 10 **Mr Thomas Shitiba** testified that he is employed by the Respondent as a Centre Condition Operation Support. From time to time he works as the Head of the Centre. He has been in the employ of the Respondent for 34 years. He stated that he was the Chairperson of the disciplinary hearing between the Applicant and the Respondent.
- 11 He further stated that the disciplinary hearing begun in August 2019 and was concluded in January 2020. The disciplinary hearing was set down for 8 days and was postponed on several occasions. The Applicant was given ample opportunity to defend herself however the Applicant did not make use of the opportunity as she and her representative chose to delay hearing and eventually decided not to attend the disciplinary hearing.

- 12 The Applicant's disciplinary hearing commenced on 17/09/2019 and was postponed to 21-25/10/ 2019 because the applicant's representative lost his grandmother. On 21/10/2019 the Applicant representative requested for a postponement because of the shortage of water supply in the respondent's premises. The matter was stood down for 22/10/2019. On 22/10/2019 the hearing proceeded however the applicant's representative was disruptive during the hearing. It was agreed that the matter will be heard on 23/10/2019, on the day in question the applicant's representative walkout of the hearing and left the Applicant unrepresented. The matter was postponed in order to afford the Applicant an opportunity to find a new representative. The matter was postponed to 6/11/2019, because the (Chairperson) mother passed away. The matter was rescheduled for continuance on 13/11/2019, the applicant's new representative requested for postponement on the basis that he had to prepare a defence for the applicant's case.
- 13 He further testified that on 27/11/2019 the matter was provisionally set down for 18-20/12/2019 because he was hospitalised after an accident and the Applicant was sick.
- 14 It was his testimony that on 18/12/2019, the hearing could not proceed because the standing chairperson was booked off sick and he was still on sick leave. The hearing was rescheduled for 15-17 January 2020. On 15 January 2020 the hearing reconvened however the Applicant and her representative were not in attendance. The matter was stood down for almost an hour to establish the whereabouts of the Applicant and her representative. On or around 10:00 am the Applicant emerged with a new representative and requested for postponement. Postponement was granted and it was agreed that the matter would proceed on 16 January 2020.
- 15 On 16 January 2020 the Applicant and her representative did not attend the hearing and their whereabouts were unknown. He made a ruling that the hearing proceed in their absence. He issued the outcome of the disciplinary hearing and the Applicant was subsequently dismissed.
- 16 **Mr Ntshimane Maleka** testified that the Respondent was consistent in the application of the rules and discipline across the board without fear or favour. There was no selection in terms of discipline. Furthermore each case it's tried on its own merits. All employees who committed similar misconduct have been dismissed. He mentioned cases of Ms Mashila, Messrs Mjakuca and Kekana as an example that the Respondent had been consistent in terms of discipline. He confirmed that all three employees were dismissed.

Applicant's case

- 17 The Applicant relied on her own testimony and testified as follows;
- 18 **Mr Mmadingaka Mahlangu** testified that she fell ill on 16 January 2020. She was supposed to attend a disciplinary hearing on the day in question. On or around 08:00am, she called Nthabiseng Tlaribe and reported sick. She informed her that she would not be able to attend a disciplinary hearing and that she was going to the doctor. It was her testimony that she tried to call Employee Relations Manager without a success. She walked from home to the taxi rank to catch a taxi to consult her doctor. She stated that the Respondent never called her to find out why she did not attend the disciplinary hearing.
- 19 She stated that it was common practice that when you short of money the office you pay from your own pocket. Employees have been short of money but no one has ever been subjected to a disciplinary hearing. She said that she was the only employee who was dismissed for being short of money. Furthermore the head of the unit was aware of the practice that when you short of money you pay from your own pocket.

ANALYSIS OF EVIDENCE AND ARGUMENT

- 20 Section 192 of the LRA provides that in any proceedings concerning any dismissal, the employee must establish the existence of the dismissal. Once the existence of the dismissal is established, the employer must prove that the dismissal is fair. The dismissal of the Applicant was not in dispute in this matter, therefore, the Respondent bears the onus of proving, on a balance of probabilities, that the dismissal was fair.
- 21 In terms of Section 188(1) of the LRA, the dismissal of the Applicant by the Respondent is unfair if the Respondent fails to prove that the applicant's dismissal was based on a fair reason and that proper procedures were followed. It is appropriate to note that procedural fairness was not in dispute.

Substantive Fairness

- 22 The Applicant was charged, found guilty and dismissed for misconduct. On substantive issues the Applicant only challenged consistency and argued that the rule had not been applied consistently. The Respondent disputed that rule had not been applied consistently.
- 23 The Labour Appeal Court in the matter of **SACCAWU and others v Irvin and Johnson Ltd (1999) 20 ILJ 2302(LAC)** held that *some inconsistency is the price to be paid for flexibility, which requires the exercise of*

*a discretion in each individual case. The Court further held that a wrong decision can only be unfair if it is capricious or induced by improper motives or worse, by a discriminatory management policy. In a subsequent judgement also from Labour Appeal Court in **Cape Town City Council v Masitho and others (2000) 21 ILJ 1957(LAC)** the court dealing with historical inconsistency held that an Employer cannot be expected to continue to repeat a wrong decision in the name of consistency.*

- 24 The respondent's witness Mr Ntshimane Maleka testified that each case it's tried on its own merits. The Applicant testified that it was common practice that when one is short of money he/she must pay from their own pocket and that this practice was known by the head of the centre. Applicant failed to submit evidence to support this assertion. It abundantly clear that the Applicant does not dispute all the charges preferred against her by the Respondent, which leaves one to draw a conclusion that she committed a misconduct. Mr Ntshimane Maleka has demonstrated in his evidence that the Respondent was consistent in the application of the rules and discipline across the board. He mention three cases which are similar to the present case. Furthermore all three employees in these cases were dismissed. This evidence remains undisputed by the Applicant.
- 25 It stands to reason in line with the above cited legal principles. In the present case I am persuaded that the applicant's case was dealt with based on in its own merits. Furthermore the Applicant did not dispute the evidence of Mr Ntshimane Maleka when he testified that each case it's tried in its own merits. The Applicant did not present any evidence of a similar case where the Respondent had failed to dismiss an employee for a similar conduct
- 26 Even if one is to accept the applicant's argument for consistence, it would still stand to fail on the basis that it would be unreasonable to expect Respondent to continue to repeat a wrong decision in the name of consistency.
- 27 Based on the aforementioned analysis it is my finding that the Respondent has successfully proved that the rule had been applied consistency.

Procedural Fairness

- 28 When arbitrators decide whether a dismissal was procedurally fair, they must have regard to Item 4 of Schedule 8 of the Act (Code of Good Practice). Item 4 of Schedule 8, spells out the nature and extent of a

right to a fair procedure preceding a dismissal for misconduct. A summary of the requirements as set out in Item 4 of Schedule 8 are as follows; an investigation should be conducted by the employer into the alleged misconduct; employee should be notified of the allegations; employee should be afforded an opportunity to state a case in response to allegations; employee should be entitled to a reasonable time to prepare the response; assistance of a representative or fellow employee; a decision by the employer and notice of that decision. The essence of procedural fairness are whether the employee was given a fair opportunity to state a case in response to the allegation levelled against him by the employer.

- 29 The critical question for determination is whether or not the dismissal of the Applicant was procedurally fair. Furthermore whether the Respondent was justified in continuing with the disciplinary hearing in absence of the Applicant.
- 30 It is common cause that the Applicant and her representative did not attend the disciplinary hearing on 16 January 2020. What remains in dispute is whether the Applicant informed the Respondent that she fell ill and that she would not be able to attend the disciplinary hearing. Moreover whether the Respondent was justified in continuing with the disciplinary hearing in absence of the Applicant and dismissed her.
- 31 The Respondent case was that the Applicant failed to inform the Respondent that she would not be attending the disciplinary hearing on 16 January 2020 and it was justified for the Respondent to continue with the hearing in absence of the Applicant. The Applicant failed submit evidence or to call any witness to support her claim that she informed the Respondent that she was sick and that she would not be able to attend the disciplinary hearing on 16 January 2020. She testified that she called Nthabiseng Tlaribe and reported sick. She did not call Nthabiseng Tlaribe to corroborate her testimony.
- 32 It is appropriate to state that the Applicant failed to attend the disciplinary hearing and she did not apply for postponement or requested her representative to apply for postponement on her behalf.
- 33 I am persuaded that the Respondent was justified in continuing with the disciplinary hearing in absence of the Applicant as there was communication from the Applicant that she will not attend the hearing because she was sick. Furthermore there was no application for postponement.
- 34 It is my considered view that the onus was on the Applicant to inform the Respondent that she would not be able to attend the disciplinary and that she went to the doctor for consultation.
- 35 With regards to the sick note, the Applicant failed to submit the sick note within time. She testified that she faxed the sick note the following day. There was no evidence submitted that such sick note was faxed to

the Respondent. Analysis evidence revealed that the Applicant submitted the sick note after she was dismissed by the Respondent.

36 *In Mgobhozi vs Naidoo & others (2006) 3 BLLR 242 (LAC) the court held that medical certificate without supporting evidence from the doctors are mere hearsay and the court must especially be vigilant to prevent abuse. Held further that medical certificate annexed to the founding affidavit in the application for condonation constitute inadmissible hearsay evidence in absence supporting affidavit by the doctors.*

37 It is very apparent that the medical certificate tendered as evidence was not accompanied by supporting affidavit from the doctor.

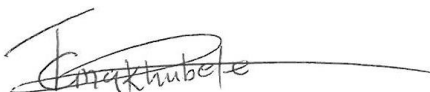
38 It is therefore my considered views that the dismissal of the Applicant was procedurally fair and Respondent was justified in continuing with the disciplinary hearing in absence of the Applicant. The Applicant was given a fair opportunity to state a case in response to the allegation levelled against him by the Respondent but decide not to attend a disciplinary hearing.

Findings

39 Based on the analysis above I have reached the decision that the Respondent has discharged the onus to prove on a balance of probabilities that the applicant's dismissal was substantively and procedurally fair. It is, therefore, my finding that the applicant's dismissal was substantively and procedurally fair and I make the following award:

AWARD

- a) The dismissal of the Applicant Ms **Mmadingaka Mahlangu** by the Respondent **Department of Correctional Services** was substantively and procedurally fair.
- b) The application is dismissed.
- c) I make no order as to cost



GPSSBC Panellist: Tiyani Makhubele