



# ARBITRATION AWARD

Panellist/s: Asha Sewpersad  
Case No.: PSHS10-10/11  
Date of Award: 12-Jun-2012

In the ARBITRATION between:

In the matter between:

**MORGAN ATT. obo. MAHABEER M.D.**

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(Applicant)  
and

**DEPARTMENT OF HEALTH-KWAZULU NATAL**

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(Respondent)

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## 1. DETAILS OF HEARING AND REPRESENTATION

- 1.1 The hearing was held on 2<sup>nd</sup> and 3<sup>rd</sup> May 2012 at Doctors Quarters, Sydney Road, Congella. The Applicant was represented by Mr S. Morgan, an Attorney and the Respondent was represented by Mr T. Ndwandwe, an Attorney.
- 1.2 The Applicant handed in a bundle of documents which were marked A and which was admitted into evidence in so far as what they purported to be without the contents being admitted. The Respondent did not hand in any documents. Parties filed closing arguments.
- 1.3 The hearing was digitally recorded hence I shall only summarise the evidence used to arrive at my finding.
- 1.4 The Respondent during the course of the arbitration made an application in terms of Section 34(1) (a) and (b) of the Civil Proceedings Evidence Act for the admission of the following documents into evidence.
  - a. Affidavit of Ms Gcaba dated 22 February 2008;
  - b. Statement of Mr Marcus dated 28 April 2008 ;
  - c. Ambulance & Emergency Medical Services Vehicle Control Form marked page 2 and 3 respectively.
- 1.5 The reason for the application was based on the fact that both witnesses were deceased and therefore not in a position to testify at the arbitration proceedings. Further they had both testified at the disciplinary hearing and were cross examined and their statements were required to prove the facts in dispute. The Respondent's representative referred to a number of decided cases to in support of his application.
- 1.6 The application was opposed by the Applicant and the Applicant's representative was asked whether He required time to prepare his response to the application and he chose to proceed with his response on that day. The Applicant's representative submitted that the application was a classic case of ambush as this ought to have been a substantive application on notice so that a proper response could be prepared. He referred to the Respondent's representative conduct as being unprofessional

and having no regard to the Applicant's constitutional rights which guaranteed him the right to a fair trial. The statements were rejected in its entirety as they had not been proven and further he had not had sight of the original death certificates and was not even sure if they were indeed deceased .The Applicant's representative asked that the application be dismissed with costs

1.7 I considered both Applicant's and Respondent's submissions together with the relevant case law in arriving at my finding and do not intend to repeat all those submissions save for what I have - mentioned above as they form part of the record. I shall highlight only the salient aspects.

Both the deceased Gcaba and Marcus led evidence at the disciplinary hearing and the Applicant was given the opportunity to cross examine them. There is a valid and acceptable explanation for the failure to have the witnesses present and this cannot in any way be disputed.

Acting Judge Wallis in Narianduth v CCMA & Others [2000] 6 BLLR 716 (LC) states as follows:-  
"The rules against hearsay evidence are one which was imported into South African Law from the English law of Evidence. It has always been a controversial rule the justification for which is unclear. (Hoffman & Zeffert: Law of Evidence 4ed at 124-125). In South African law at least the rule is no longer absolute in its effect in consequence of the provisions of Section 3 OF THE Law of Evidence Act 45 of 1988."

It is my submission that in terms of proceedings under the LRA, Commissioners are not as strictly bound by rules of evidence as the courts and they do have the discretion to admit hearsay evidence in the interests of justice.

The deceased's statements are relevant as they form the basis for the charges against the Applicant. The weight to be attached to the statements shall be assessed in relation to the evidence as a whole. It has been held in a number of cases that the rule against hearsay evidence applies even less strictly in arbitration proceedings.(See Edcon Ltd v Pillemer NO & Others (2008)29 ILJ 614 LC.

1.8 The statements are accordingly admitted into evidence in the interests of justice.

1.9 Gcaba's statement read as follows:-

**22-2-2008**

**To MR JOGI  
SHIFT OFFICER**

**From CN XABA**

“On the 22<sup>nd</sup> of February in 2008, I informed paramed 1, Mr Mahabeer of the red code Merebank c/no 149. He told me he is doing only ALS cases. Time was 8h06 on his cell phone. He told me to send paramed 6.

At 8h10 I phone Mr Mahabeer telling him that there is no paramed 6. He insisted that he would do ALS only. At 8h23 I told Mr Marcus on his cell phone and control room officer Mr Jogi at 8h25.

At 8h48 A90 was dispatched on c/no 149. When the crew arrived on scene at 8h55, crew asked for assistance “CCA”. They started CPR at 9h10. At 10h10 we were updated patient was blue code.”

1.10 Marcus statement on Friday 28 April 2008 read as follows:-

“On 22 February 2008 at +- 08h23 I was informed by control, that paramed 1 refused to response to c/n 149 wheezing/difficulty in breathing at Merebank. I personally phone Mahen and ask his position and reason for not responding on a case that control dispatched him. Mahen said that he was in Brickfield Road and that’s not an ALS case or his area. I told he to go on 149 as the were no ESV available at the time according to control. Mr Mahabeer refuse to response. I immediately informed Miss S. Buthelezi a Wentworth crew A904. Took details at 08h48 and requested ALS .Control update paramed 1 that crews were on case 149 are requesting assistance as the C.P.R was in progress. Paramed 1 was informed at 09h00 and responded at 09h01 arrived on scene at 09h20. I was monitoring the radio and update the zonal officer immediately the patient died on scene. The zonal was updated of the outcome of case 149.”

## **2. ISSUE TO BE DECIDED**

Whether the Applicant’s dismissal was procedurally and substantively unfair?

## **3. BACKGROUND TO CASE**

### **RESPONDENT’S OPENING STATEMENT**

- a) The Respondent was employed as an Advance Life Support (ALS) Practitioner by Emergency and Rescue Services.
- b) On 22 February 2008 he was on duty together with his crew member Mr L.M. Govender and was allocated emergency vehicle Alpha 4.
- c) A call was made to him at 8:06am to attend to a patient in Merebank who was having difficulty in breathing.

- d) The Applicant refused to attend to the case and only attended to it at 9:11am when the other ambulance crew member who were requested to attend to the scene advised the Applicant that the patient required advance life support.
- e) At the time that the call was made to the Applicant, he was the only one available to attend to the case as the other ambulance and paramedic were attending on other cases.
- f) After the Applicant had refused to attend to the case in Merebank, the next ambulance was contacted and was only available to attend at 8:48am ie when they were available to attend.
- g) The Applicant used the state vehicle and took an unauthorized trip to his residence. The C-track readings recorded the Applicant's movements from 7:26am until the Applicant and his crew member finished work.
- h) As a result of the Applicant's failure to avail himself at 8:06am to attend to the patient, the patient died and the Applicant was hence charged in terms of the charge sheet dated 7 October 2009.
- i) The charges against the Applicant were as follows:-
  1. *Refusal to respond on case no 149, a red code in Merebank at 08h06, when you were informed by the communications centre;*
  2. *Fail to answer the ESV radio while Control Center was calling you for the case at 08h06*
  3. *You were on unauthorized trip on 22 February 2008 at Reservoir Hills at 07h45;*
  4. *Were insubordinate to you immediate Supervisor by refusing to follow an instruction, when he also informed you to proceed on case no. 149 that you were informed about at 08h06 by the communication centre.*
- j) The Applicant was found guilty on all counts and dismissed.

## **APPLICANT'S OPENING STATEMENT**

- a) The Applicant at the time of his dismissal was employed as an ALS Practitioner and in the course of his case a distinction would be drawn between the powers, obligations and duties of an Advance Life Support Practitioner when compared to ordinary emergency personnel.
- b) In particular one would see a distinct difference between an ALS Practitioner and an ambulance driver/crew.
- c) The Applicant's evidence will show that an ALS Practitioner is required to have more specialized equipment and without that equipment he cannot attend to a call out and perform the services of an ALS Practitioner.
- d) The evidence will further show that on 22 August 2008 the Applicant went to his home in Reservoir Hills to pick up equipment.

- e) There is a difference between equipment required by ALS Practitioner and ambulance personnel ie. Ambulance personnel drive an ambulance which is a motor vehicle specifically equipped to transport patients on a stretcher and an ALS Practitioner is allocated a motor vehicle and is not equipped to transport patients.
- f) On the day in question, when the Applicant reported for duty, there was no motor vehicle available to him and he was then allocated an ambulance.
- g) The Applicant version is that he did not refuse any lawful instruction on that date.  
The Applicant would testify that the alleged failure to answer the ESV radio was as a result of him being in a poor communication area where the ESV signal was poor.  
The Applicant denies that he was on an unauthorized trip and would testify that it was necessary for him to fetch his equipment from his home in Reservoir Hills and that he had informed his Senior Mr G.Marcus of the trip and he had raised no objection to him collecting his equipment.  
The Applicant denied being insubordinate to his immediate supervisor by refusing to follow an instruction, when he was also informed to proceed on case 149 that he was informed about at 8:06am by the communication centre.

#### **4. SURVEY OF EVIDENCE**

##### **RESPONDENT'S EVIDENCE**

The Respondent led the evidence of Mr Deevianantha Padayachi acting Communications Manager for EMRS, Loganathan Moonsamy Govender an Emergency Care Practitioner and Mr Melvin Jogi the emergency medical dispatcher at call centre.

##### **4.1. PADAYACHI testified as follows:-**

- 4.1.1. He was in Communications for approximately 23 years at the central sub district at Oldham House in University Lane in Durban.
- 4.1.2. His function was to ensure that policies and procedures that were laid down was correctly followed by each shift which comprised a shift supervisor and 15 staff members.
- 4.1.3. There was one life support staff per shift within the subdistrict. ie. Central & Wentworth had one life support staff.
- 4.1.4. When call takers received a call they would log the call on the vehicle control form in terms of a set sequence.

- 4.1.5. Once the call taker gathers all the relevant information including the diagnosis of the patient, the case is given a coding based on the level of priority of the call ie. red code for life threatening and yellow code where a patient has to be transported to hospital.
- 4.1.6. In terms of EMRS policy if you have utilized resources available and if you have a red code case nothing prevents you from calling in a unit from a different subdistrict.
- 4.1.7. He had received a report from Mrs N.C. Gcaba as well as the Supervisor Mr Jogie that there were no ambulances available to respond to a case at 7:53 am and that they had attempted to dispatch paramed 1 from the central sub district at 8:10am because no ambulances were available.
- 4.1.8. When they had encountered a challenge in dispatching, Gcaba immediately contacted the base Supervisor to get the problem resolved, however the challenges were not reported to him.

During cross examination he testified as follows:-

- 4.1.9. It was imperative for the ALS Practitioner to have his specialized ALS kit with him at all times to perform his duties.
- 4.1.10 It was reasonable for the Applicant to have gone to collect his ALS kit but certain procedures would have to be followed.
- 4.1.11 He agreed that Reservoir Hills was a poor communication area and usually in those areas private cellphones are used to communicate with the communication centre, however there were issues with certain persons who did not want to be contacted on their cellphones a d vice versa.
- 4.1.12 With regards to case 149 which was a red code the patient had wheezing/difficulty in breathing and a basic or an intermediate could deal with it and it is only if they cannot manage the patient that the ALS is called in.
- 4.1.13 The dispatcher would look for an ambulance first and if the ambulance is not available and ALS is available you would send the ALS.
- 4.1.14 He referred to the Vehicle Register form and stated that in this case there were issues and it was normal practice for dispatchers to write in any space on the form to protect themselves and that it was possible that the time entered on it could be incorrect. He could not comment on the handwriting as he had not seen the original, which was at the records office.
- 4.1.15 There was no record of Gcaba making an attempt to get an ambulance first and according to the form the first time that she got the ambulance was at 8:48 am.

- 4.1.16 Where an ALS is available the dispatcher would utilize ALS before going to another area for a vehicle.
- 4.1.17 He agreed that according to their rules when an ALS received a call he was entitled to engage with the dispatcher on the most appropriate course of action to be taken and the Personnel receiving the call is entitled to tell the dispatcher to use a vehicle in another area if he has some difficulty.
- 4.18. ALS would give advice on the medical issue on a case and not on the distance of where the case is placed at because the dispatchers have set protocols to follow.
- 4.19. During re examination he stated that only if ALS was aware that another vehicle was available would he tell the dispatcher to send another vehicle.

**4.2. L.M. GOVENDER** testified as follows:-

- 4.2.1. He was employed at the Emergency Rescue Services hereinafter referred to as EMRS Central Base for the past 25years as an Emergency Care Practitioner Intermediate.
- 4.2.2. His core function was to ensure that the vehicles were in good working condition and to - ensure that all equipment in the vehicles were in a good state when attending to medical and trauma patients.
- 4.2.3. The Applicant was his Senior and he worked with him on a rotational basis on his shift at the Central base and the Applicant was the Advance Life Support on the shift.
- 4.2.4. There was only one Advanced Life Support on the shift at central base.
- 4.2.5. On 22 February 2008 he was on duty and his Supervisor Mr Marcus asked him to crew up with the Applicant and work on Alpha 4 an emergency service vehicle as the Paramed vehicle which was the response car had been taken in for repairs.
- 4.2.6. After he had checked the vehicle he had overheard the Applicant who was in the crew room talking about going to Reservoir Hills.
- 4.2.7. About ten minutes later the Applicant informed him that he had to go to his home in Reservoir Hills to collect his drug kit and intubation kit.
- 4.2.8 They left the base at 7:25am and the Applicant went home and collected his kit and left for the Base at 8:05am.
- 4.2.9. They overheard the control trying to contact paramed 1 which was allocated to the Applicant. The Applicant answered the radio and told Gcaba to call him on his cellphone as communication was poor and she did a minute later. The Applicant informed her that they were working on Alpha 4 and not the response vehicle.

- 4.2.10. At the time that the call was made no cases were allocated to them .He overheard the Applicant ask whether control had a closer unit because they were in an ambulance and the conversation ended.
- 4.2.11. They were two minutes away from the central base when Mr Marcus (Supervisor) called the Applicant on his cellphone and the Applicant informed him that he was was a minute away from the base and would discuss the matter at the base.
- 4.2.12. When they arrived at the base the Applicant went to Marcus's office for about 5 minutes. He then overheard on the radio that the control centre was announcing that a crew required assistance at Merebank. At the time of the call the patient had arrested i.e. stopped breathing.
- 4.2.13 They then took details of the case and proceeded to Merebank where the patient was in respiratory distress. The Applicant had intubated the patient and administered drugs and they continued administering cardio pulmonary resuscitation and the patient then died.
- 4.2.14. They were aware of a call from 8:05am until 9:11 am but was not aware of which case Gcaba was dispatching and they were not allocated cases from 7:00am until 9:11am and was not aware as to why the Applicant had asked Gcaba to call someone else.

During cross examination he testified as follows:-

- 4.2.15 With regards to count 1 he did not know whether the Applicant had received an instruction to go to Merebank.
- 4.2.16 With regards to count 2 the Applicant answered but communication was poor.
- 4.2.17 With regards to count 3 he did not know whether the trip was authorized as the Applicant informed him about proceeding to Reservoir Hills.
- 4.2.18 With regards to count 4 he was not aware of instructions given to the Applicant as he was in the vehicle when the Applicant was speaking to Marcus.
- 4.2.19 On the day when Gcaba called, the Applicant did not have to respond as she was looking for a response vehicle which is paramed 1 and the Applicant was not using a response vehicle on that day.

During re examination he testified as follows:-

- 4.2.20 Paramed 1 was the response vehicle and the ALS staff on shift were paramed 1 and the Gcaba called for paramed 1 as she had details of the crew on a board in the control room.

**4.3. M. JOGI** testified as follows:-

- 4.3.1 On 22 February 2008 he was filling as Shift Supervisor for the day and was in the office whilst Gcaba was controlling the Central and Wentworth zone vehicles.
- 4.3.2 He had received a report from Gcaba in the morning that she had called the Applicant as she had no ambulance available and was having a problem with him as he was refusing to attend to a case as according to him he was only attending to ALS cases .
- 4.3.3 She had requested the Applicant twice telephonically on his cellphone to take the details to respond to the case but he had not come up for details so she had informed Marcus about it.
- 4.3.4 He telephoned Marcus to inform him about what had transpired and a vehicle which only became available at 8:50 am was dispatched to attend to the case. When the crew arrived at the scene they had requested ALS and commenced CPR. Marcus had requested the documentation which he faxed to him on that day.
- 4.3.5. If the Applicant had come up to take details Marcus would not have been called Gcaba had first informed Marcus then him and he then telephoned Marcus.

During cross examination he testified as follows:-

- 4.3.6. He was not aware of any tampering with the vehicle control form and had last seen the original when he had faxed it to Marcus together with Gcaba's and his statement.
- 4.3.7. The details of the first call are not normally recorded as they expect the person to come up for details and they commence annotating from the second call and he knew nothing about the first call.
- 4.3.8 Anyone could respond to the call, either the driver or the passenger and the unit and person is referred to as paramed 1 and ALS is also referred to paramed 1. The Applicant ought to have taken the call irrespective of the unit he was on, although he was on alpha 2 he would answer as paramed 1. When a telephonist called for paramed 1 she would be looking for the ALS crew.
- 4.3.9 He did not know why the Applicant was refusing to attend as the red code was part of ALS duties and deduced that the Applicant did not want to go on the case when he told her to send paramed 6 as paramed 6 did ALS cases as well and was not on duty.
- 4.3.10 The Applicant had not seen the patient and assumed that it was not for his expertise and if it was not an ALS case he would not have asked Gcaba to call paramed 6.
- 4.3.11 Gcaba had told him that she had called and informed the Applicant about the case twice and he was aware that it was a red code case and he refused to attend. It was not possible that Gcaba had not informed the Applicant that it was red code case as the paramed unit was only used for red code cases.

- 4.3.12 He and the Applicant got along although they had their ups and downs and the fact that he earned more than him had nothing to do with him.
- 4.3.13 He could not dispute the Applicant's version that he had received one call on his cellphone and that she did not tell the Applicant that the case was a red code.
- 4.3.14 He agreed that because of the Applicant's seniority he was expected to make suggestions and that because he was not aware that paramed 6 was not at work on that day it was a reasonable suggestion for the Applicant to tell Gcaba to contact paramed 6.
- 4.3.15 The Applicant was dispatched after explaining to Marcus and after another vehicle was dispatched.

## 5. APPLICANT'S EVIDENCE

**MAHABEER** testified as follows:-

- 5.1. On February 2008 if the control centre had wanted him they ought to have called Alpha 4 and he did not have to respond to paramed 1.
- 5.2. His Supervisor and the control centre were aware that he had gone to collect his equipment from his home in Reservoir Hills which is a poor communication area.
- 5.3. The dispatcher called paramed 1 over the radio and he answered because he presumed she was referring to him and he wanted to notify her that he was not paramed 1.
- 5.4. He answered and she could not hear clearly so she called him back on his cellphone although he was not obliged to answer his cellphone for work related matters nor was he even obliged to even carry a cellphone. He had no meaningful communication with her on the radio.
- 5.5. He told Gcaba that he was in Reservoir Hills and that he was not paramed 1 but Alpha 4 as paramed 1 was stood down. She told him that she had thought that he was at the central base as she had a case in Merebank. He told her that if she needed a paramed unit, she should contact paramed 6 at central base or paramed 4 at Umlazi base or if it was an ambulance that she required there was a vehicle at central base. She thanked him and ended the call and did not call him back again. He did tell Gcaba that if it was an ALS case and if she did not have any units to attend to the case he would proceed to attend to the case.
- 5.6. As a Senior he was entitled to make those suggestions to Gcaba as it is his duty in terms of the Health Professional guidelines and EMRS Standard Operating Procedures when they are

under a mistaken belief to provide suitable alternatives to what she suggested and what he had suggested was in the best interests of the patient.

- 5.7 Gcaba did not tell him that it was a red code case as he would not have told her that he was dealing with ALS cases only. To him it seemed that she had accepted his suggestions and he assumed that she would revert to him.
- 5.8 Whilst he was driving along Brickfield Road he received a call from Marcus who told him that the Control Room had advised him that he had refused to attend to a case he was dispatched on and if that was the case he should proceed with the case. He replied to Marcus that he was not dispatched and explained the contents of his conversation with Gcaba.
- 5.9 To be dispatched means that the dispatcher tells you to proceed to a given address and gives you the diagnosis. In this instance he was not given any of this information. He told Marcus that he was 3 minutes away from the base and would continue with the conversation when he arrived at base.
- 5.10. When he got to base he continued his conversation with Marcus. He was then notified about a case in Merebank where CPR was in progress and he responded immediately. He arrived at the scene approximately 10 or 12 minutes later as the incorrect address was furnished to him.
- 5.11. At the scene the crew was performing CPR and attempts to resuscitate the patient were unsuccessful and he declared the patient a blue code.
- 5.12 He did not share a good relationship with Jogi as Jogi was envious of him because they had both worked together and he was now ALS and earned a higher salary whilst Jogi was not promoted and earned a lower salary. Jogi was also bitter towards him because he made suggestions which were generally accepted against Jogi's suggestions.
- 5.13. Any suggestions that he made were in the best interests of patients and not because he was lazy as suggested by Jogi.
- 5.14. His trip to Reservoir Hills was recorded and he had informed his Supervisor as well as the control room about it and Marcus in his report did not complain about an unauthorized trip.
- 5.15. With regards to count 1 he did not refuse to attend to the case it was an impression created by the Control Room.
- 5.16. With regards to count 2 he did not know that he was being called and the practice is that you call them on the cellphone.
- 5.17 With regards to him failing to obey an instruction, at the disciplinary enquiry, Marcus stated that he did not give him an instruction.
- 5.18. He denied the correctness of Gcaba's statement and stated that the context was not correct as he had told her that paramed 4 and 6 were doing ALS cases and if it was a red code he

would assist. He did not receive a second call from her but received the next call from Marcus. Gcaba had spoken to him briefly on the radio and then on the cellphone and did not call him twice. He was called by the crew on the scene to Merebank.

- 5.19. He was asked to write a report about the incident six months later and was dismissed at the beginning of December 2009. He was since then unemployed and sought reinstatement with compensation and backpay.
- 5.20. He was able to continue with his normal duties despite the relationship he shared with Jogi and saw no reason as to why reinstatement was unsuitable.

During cross examination he testified as follows;-

- 5.21 He joined the Department of Health and was employed by EMRS and his main function was to assist persons whose lives were in difficulty.
- 5.22 He disagreed that in cases of emergency there should be no debate as to which zone should attend as sometimes there was a need to debate and in terms of standard operating procedures it was his responsibility to ensure that the most appropriate vehicle was dispatched.
- 5.23 Red code cases were critical cases which were attended by everyone including him as ALS.
- 5.24. He was under the impression that paramed 6 and him were on duty as ALS but paramed 6 had not turned up for work and he was the only ALS at the central base on that day. There were other ALS at the Wentworth base with a vehicle ie Miss Buthelezi.
- 5.25 From the time he reported for duty until 9:00am he was not allocated any cases.
- 5.26 He did not dispute Govender's evidence that when paramed 1 was being called they were referring to the Applicant because it was the impression that Gcaba was under which was incorrect.
- 5.27 He was not entirely happy with Govender's evidence because they were paired and Govender had overheard and saw everything and was sometimes part of what transpired.
- 5.28 He had sought permission to go home from Marcus before the shift commenced and Govender was not present then.
- 5.29 When Gcaba called him he said 'go ahead' and she could not hear him and she called him on his cellphone but was unsure as to whether he asked her to call him on his cellphone and the conversation lasted a few minutes.
- 5.30 He had told Gcaba that if she had needed an ambulance she should call paramed 4 or 6 as they were available at Umlazi or Central base. He had seen the paramed 6 vehicle at work

but not the member and was not aware that he was not at work as he started his shift at 7:00am and paramed 6 at 8:00am.

- 5.31 He was not aware that Gcaba was looking for a vehicle and did not ask her why she was calling as he was trying to answer the radio and told her that he was in Reservoir Hills and that he was not paramed 1 but Alpha 4 and she said "oh" as if disappointed. He did not see the need to ask Gcaba why she had called him.
- 5.32 He could not dispute Govender's evidence that he had asked Gcaba to call him on his cellphone and stated that Govender did not hear the full conversation when he heard him saying "don't u have a closer unit because we are on Alpha 4."
- 5.33. He could not explain why Govender's version was undisputed but said that he did not know why Govender had not said what he exactly told Gcaba on that day and said that perhaps Govender was nervous.
- 5.34 When Marcus had called him he told him that no case was given to him and repeated the conversation he had with Gcaba and had told her that if it was an ALS case she should come back to him.
- 5.35 He knew that it was not an ALS case because Gcaba had not called him back. He could not explain why he referred her to paramed 4 or 6 if she did not tell him about the case. He could not explain why both Marcus and Govender had said that he was two minutes away from base when Marcus had called him . He did not think that it was important and stated that the Respondent's witnesses were contradicting each other and that he should be believed.
- 5.36 He referred Gcaba to paramed 4 or 6 because she did not tell him that it was a red code case, all he knew was that it was a case in Merebank and what prevented him was that there were closer vehicles to the scene. Nothing prevented him from attending to the case but he was not given any case to attend and disagreed that he refused to attend to the case.
- 5.37 When Gcaba had called him she had the intention to give him the case but did not.
- 5.38. His disciplinary hearing was biased as he was not given the opportunity to ask questions and both he and Govender were disciplined and Govender was suspended for three months without pay.
- 5.39 He stated that the most appropriate vehicle had to be sent in terms of standard operating procedures and therefore he deliberated with Marcus.
- 5.40. The reason as to why Gcaba reported him to Marcus was because she could not get through to him and got upset and perhaps she called back after he had given her suggestions and she could not get through to him.
- 5.41 He refused to go as per Marcus statement because he was not dispatched to go. When Marcus had told him that he was informed by the Control Centre that he was dispatched and

refused to go and that if he was dispatched he must go he told Marcus that he told Gcaba that he would only go if it was an ALS case.

- 5.42 He could not explain why Gcaba had not recorded his suggestions in her statement. It was his duty to make those recommendations in terms of the standard operating procedures and it was not in the patient's best interest for him to attend because there were vehicles in a better position and if there were no vehicles he would have attended.
- 5.43 Gcaba recorded the statement to "cover herself" because the patient died and logically if vehicles were parked it could forty two minutes for the vehicle to be dispatched.
- 5.44 He could not recall who he reported to that he was going to Reservoir Hills but did not tell Gcaba nor Jogi.
- 5.45 He denied the contents of Marcus's statement and disagreed that he refused to go when Marcus asked him to.
- 5.46 He did not believe that the relationship of trust had broken down between him and his employer after the incident and believed that he was being victimized because he had successfully challenged their unconstitutional policies and had succeeded in a case against them.

## **6. ANALYSIS OF EVIDENCE AND ARGUMENT**

- 6.1. In order to prove that the dismissal of the Applicant is fair, the Respondent is required, in terms of Sec 188 of the Labour Relations Act, to have a good reason for the dismissal(substantive fairness) and to have followed a fair procedure(procedural fairness)
- 6.2. The reason for the Applicant's dismissal was as contained in the charge sheet dated 7 October 2009.
- 6.3. John Grogan commented at page 196 and 197 in his book on Dismissal as follows:-  
Insubordination occurs when an employee refuses to accept the authority of his or her employer or of a person in a position of authority over the employee. It can take many forms, and is obviously a matter of degree. The Code of Good Practice: Dismissal lists gross insubordination as a permissible ground for dismissal. Whether insubordination is considered "gross" depends on the circumstances, including the manner in which it is expressed, the position of the person whose authority is repudiated, the reason for the employee's defiance and the number of times it occurs.

In the nature of things, insubordination is a more serious offence than mere impoliteness because it presupposes a calculated breach by the employee of the duty to obey the

employer's instructions. The code requires that to justify dismissal the defiance must be "gross". This means that the insubordinate must be serious, persistent and deliberate, and the employer must adduce proof that the employee was in fact guilty of defying an instruction.

It is generally accepted that, to constitute insubordination, an employee's refusal to obey must be reasonable and lawful. The first requirement presupposes that the employee must be aware of the instruction, understand its import and, it is suggested also be aware that the person giving it has the requisite authority. The second requirement is absolute, in the sense that, if the instruction is unlawful or unreasonable, employees are entitled to disobey, however bloody-minded or stubborn they may seem.

The gravity of insubordination (or indeed whether the refusal to obey an instruction amounts to insubordination at all) depends on a number of factors, including the action of the employer prior to the alleged insubordination, the willfulness of the employee's defiance and the reasonableness or otherwise of the order that was defied.

The following facts were common cause.

- a) That the Applicant was on duty on 22 February 2008.
- b) At 8h06 he receive a call from the control room on his cellphone and spoke to Gcaba.
- c) At the time Gcaba contacted him until he was dispatched at 9h01 he was not allocated any cases to attend to.
- d) When Gcaba informed him about the case in Merebank he offered her suggestions about getting a unit closer or requesting paramed 4 or Paramed 6 to attend.

The Applicant's defence was that he was ALS and that the case was not within his area and that ALS was not corroborated by evidence to prove that if you are ALS you should not attend - immediately when requested to do so, to the contrary Padayachi testified that the control room had set protocols to follow and that it was not for ALS to give advice on the distance of where the case was placed at but rather that ALS would give advise on the medical issue. Padayachi also testified that ALS was entitled to tell the dispatcher to use a vehicle in another area if he has some difficulty. This evidence remained unchallenged.

On the issue of the case not being in the Applicant's area there was no evidence led to suggest that if you are attached to a particular base you cannot attend a case in another area. On the

contrary the Respondent led evidence to the effect that if you are told to attend to a case you should attend irrespective of whether you are ALS or not.

6.4. Turning to the facts of the present case I shall deal with each count separately.

***Count 1-Refusal to respond on case 149, a red code in Merebank at 08h06, when you were informed by the communication centre AND***

***Count 4 –You were insubordinate to your immediate Supervisor by refusing to follow an instruction, when he also informed you to proceed on case no 149 that you were informed about at 08h06 by the communication centre.***

It is clear from Gcaba's statement which is corroborated by Padayachi's and Jogi's evidence that there was no ambulance available to respond to the case in Merebank and that Gcaba had attempted to dispatch the Applicant from the central base because no ambulances were available. Gcaba had reported to Padayachi as well as to Marcus and Jogi that she was encountering problems in having paramed 1 dispatched.

Padayachi testified that according to their rules when an ALS received a call he was entitled to engage with the dispatcher on the most appropriate course of action to be taken and the personnel taking the call is entitled to ask the dispatcher to use a vehicle in another area if he has some difficulty.

He also stated that ALS would give advice on the medical issues in a case and not on the distance of where the case is placed because the dispatchers have set protocols to follow and that ALS would tell the dispatcher to send another vehicle if he was aware that another vehicle was available. He also stated that where an ALS is available the dispatcher would utilize ALS before going to another area for a vehicle. This evidence remained unchallenged by the Applicant in so far as the set protocols followed by the dispatcher. Applicant during cross examination conceded that he referred Gcaba to paramed 4 or 6 because she had not told him that it was a red code case and that what prevented him was that there were closer vehicles to the scene and he then testified that nothing had prevented him from attending except that he was not given any case to attend to. The Applicant did not know as a matter of fact that there were closer vehicles. Although the Applicant testified that he had expected Gcaba to call back and when she did not, he assumed that she had found another vehicle.

According to the Applicant when Gcaba called he told her that he was not paramed 1 but alpha 4 on that day. She had told him that she had thought that he was at the central base

and then he told her to contact paramed 6 at Central base or paramed 4 at Umlazi base and that if it was an ALS case he would attend but she never called him back.

If the Applicant was not refusing to accept the case there was no reason for her to report to Padayachi, Jogi and Marcus.

When Marcus called him at 08h23 and enquired as to why he had not attended to a scene he was dispatched to, according to Marcus's statement the Applicant informed him about his conversation with Gcaba and that it was not an ALS case and when he asked him to go he refused to respond. He immediately informed Miss S. Buthelezi a Wentworth crew who took details at 8h48. According to the Applicant he explained to Marcus that he was not dispatched and that he was three minutes away from base and would come in to discuss the case. At the base he continued his conversation with Marcus and was then notified about a case in Merebank where CPR was in progress. Govender testified that the Applicant went to Marcus and spent about five minutes in his office and he then overheard the control centre announcing that a crew was required as the patient was in respiratory distress and they then took details and proceeded to the case in Merebank. Clearly when Marcus had contacted the Applicant and asked him to go he refused and then he immediately called Buthelezi from the Merebank base. I accept Marcus version of the events in that regard because if the Applicant had followed his instruction to go to the scene an ambulance would have been at the scene earlier than 08h48. The Applicant had arrived at the base at 08h38 and was only dispatched at 09h01 and from the time that he had reported for duty no other cases were allocated to him.

It is in my view unacceptable considering the fact that the Applicant was available to not attend even after Marcus had spoken to him.

In terms of the Public Service Disciplinary Code and Procedure (Resolution 1 of 2003) at **CODES RULES AND STANDARDS, Paragraph 4.1.**

**In applying Annexure A, Management must assess the seriousness of the alleged misconduct by considering:-**

- a) The actual or potential impact of the alleged misconduct on the work of the public service, the employee's component and colleagues, and the public;**
- b) The nature of the employee's work and responsibilities; and**
- c) The circumstances in which the alleged misconduct took place**

The Applicant's conduct on 22 February 2008 had a serious impact on service delivery and for the Applicant to rely on his position as ALS to offer suggestions on obtaining units and not even enquire on the details of the case is in my view completely unacceptable. It would have been a different scenario if the Applicant was not available at the time and according to him nothing prevented him from attending except logistics and then the fact that he was not dispatched. It appears from the evidence that he had frustrated Gcaba's attempts in dispatching him and then when asked by Marcus he also makes mention of him doing ALS cases and it not being in his area.

The Applicant was employed by the Respondent to assist patients who required medical assistance and the assistance sought by Gcaba ON 22 February 2008 was in line with his duties as ALS and his conduct on 22 February 2008 was a breach in the discharge of his duties as an emergency personnel.

A strong message has to be sent to all emergency personnel that the discharge of their duties in all cases of emergency in a swift and efficient manner is of paramount importance and that the highest level of service delivery is expected at all times and any breach therefore shall not in any circumstances be condoned.

The Respondent's witnesses gave their evidence in a concise manner and although there was a contradiction in Jogi's evidence about two cellphone calls made by Gcaba, taking as a whole and in conjunction with Padayachi's evidence, Marcus and Gcaba's statement on a balance of probabilities I find that the Applicant's conduct did amount to a refusal to respond to case 49 and that he was insubordinate to his immediate supervisor Marcus.

The Applicant in my opinion did not prove his defence because insubordination is a refusal to obey a lawful instruction and by stating that he was ALS on that day and it was not in his area suggests that Gcaba had no authority to ask him to go to the case in Merebank which in effect means that she was issuing him with an unlawful instruction which was clearly not the case.

Having found that the instruction was lawful and that Gcaba had the necessary authority to give him that instruction, his refusal constitutes insubordination in both instances firstly to Gcaba and then to Marcus.

The Applicant attempted to discredit the Respondent's evidence on the basis that documents were altered, documents could not be tested as the persons making same were deceased, that Gcaba was not being honest and was trying to cover herself because someone had died and that Jogi was envious of him due to his position and they did not share a friendly relationship. The above factors are not overwhelming in relation to Marcus statement when he said that the Applicant refused to go. The Applicant conceded that he was three minutes away from the base and told Marcus that he would come to the office and continue the conversation knowing full well that an ambulance was required. The more prudent course of action in the interests of the public and service delivery would have been to take the details from Marcus and proceed to the scene instead of returning to the base to continue a conversation relating to logistics when a patient was in distress. The Applicant also testified that he was not happy with parts of Govender's evidence yet he failed to challenge same and could offer no explanation save to save that Govender was nervous.

On a balance of probabilities I find the Applicant guilty of Counts 1 and 4.

***Count 2- Fail to answer the ESV radio while Control Center was calling you for the case at 08h06***

I find the Applicant not guilty of same as the Applicant did respond to the radio call at 08h06 and asked Gcaba to call him back on his cellphone due to poor reception. There was no evidence to suggest that the Applicant did not answer the radio at 8h06.

***Count 3-You were on unauthorized trip on 22 February 2008 at Reservoir Hills at 07h45.***

The Applicant testified that he had sought authority for the trip to Reservoir Hills yet during his evidence he testified that he did not report to Jogi who was the Control Room Supervisor nor to Gcaba who was at the Control Centre. He in fact could not recall who he had spoken to on that day. Had he in fact sought the authority then Gcaba

would

have been aware of his whereabouts as when she contacted him at 8h06 she told him that she thought that he had been at the base as the vehicle status details were monitored by the control room and according to the shift form no such record was made.

Further according to the C-Track Movement form which was never disputed

the Applicant left the base at 7:27 and drove as follows:-

07-27	startup	Western freeway; Warwick; Kwazulu-Natal
07-32		N2/M13
07-37		Quarry Road West; Palmiet; Kwazulu-Natal
07-42		Nathson Cl; Reservoir Hills; Kwazulu-Natal
08-11	startup	Nathson Cl; Reservoir Hills; Kwazulu-Natal
08-16		O'Flaherty Rd; Westville
08-17		Clare Road; Palmiet; Kwazulu-Natal
08-17		Palmiet Road; Palmiet; Kwazulu-Natal
08-20		Lupin Road, Springfield; Kwazulu-Natal
08-20		Lupin Road, Springfield; Kwazulu-Natal
08-25		Roslyn Ave; Sydenham; Kwazulu-Natal
08-30		Brickfield Rd/(M10) Musgrave KwaZulu- Natal
08-35		Berea Rd (M13) ;Bulwer; Kwazulu-Natal
08-38	ignition off	At Oldham House

Taking into consideration the C –track movements I am of the view that the trip was indeed unauthorised.

On a balance of probabilities I find the Applicant guilty of count 3.

#### Fairness of the Dismissal

Those employed at EMRS perform a special service to the public and delays and refusals in executing instructions can lead to the loss of a life as was the case in this instance. The failure to respond caused a delay in the Respondent's ability to attend to the emergency timeously.

Such insubordination in an area as sensitive as health care is inexcusable and in order for EMRS to provide an acceptable standard of service to the public and to maintain a high level of service delivery they have to be staffed with employees who are disciplined to obey and execute instructions timeously in order to save lives. Anything less than that standard would result in loss of faith by the public in the service provided by the Respondent. In the circumstances dismissal is therefore an appropriate sanction.

6.5. With regards to the issue of procedural issues I have no evidence before me to suggest that there was any procedural unfairness save to say that the Applicant during his cross examination

testified that his hearing was unfair as he was not given an opportunity to cross examine witnesses. No further evidence was led in that regard.

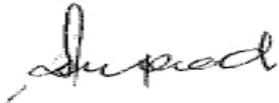
## **7. AWARD**

In the circumstances I make the following award:

7.1. The dismissal of the Applicant, M.D.Mahabeer by the Respondent is found to have been procedurally and substantively fair.

7.2. I make no order as to costs.

**DONE AND SIGNED AT DURBAN ON THIS 25<sup>th</sup> DAY OF MAY 2012**



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**ASHA SEWPERSAD  
PANELLIST**