



ARBITRATION AWARD

Panellist/s: Archibald Mafa
Case No.: PSHS12-11/12
Date of Award: 23-Aug-2011

In the ARBITRATION between:

DENOSA obo Buthelezi, P.B

(Union / Applicant)

and

Department of Health & Social Development - Gauteng

(Respondent)

Union/Applicant's representative: DENOSA
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DETAILS OF HEARING AND REPRESENTATION

- [1] This matter was scheduled for arbitration on the 19th July 2011 at Bank of Lisbon Building, 14th Floor, Cnr Sauer and Market Street in Johannesburg.
- [2] The Applicant Mr PB Buthelezi was represented by Mr. BS Qankase of Denosa and Miss K Maphunye represented the Respondent during these arbitration proceedings.
- [3] The arbitration proceedings were electronically recorded and detailed handwritten notes were also taken which forms part of the record. The Respondent submitted bundle A-C and Applicant A1, B2 & C3.

PRELIMINARY ISSUES

- [4] No party to the dispute raised any preliminary issues with me during these arbitration proceedings.

ISSUE TO BE DECIDED

- [5] I must decide whether the applicant was unfairly dismissed or not. If it is found that the applicant was indeed unfairly dismissed, then I must grant an appropriate relief.

BACKGROUND TO THE ISSUE

- [6] The Applicant was employed as a professional nurse earning a monthly salary of R11 000-00 per month. His responsibilities include Termination of Pregnancy, Management of STI infection and Family Planning. Those responsibilities offered by Applicant were free services offered by the hospital. In March 2010 he was charged with misconduct. He attended the disciplinary enquiry and was also represented by a union official.

The Applicant was found guilty and dismissed. He appealed against the verdict and sanction was upheld by MEC.

SURVEY OF EVIDENCE AND ARGUMENT

The Respondent's evidence

- [7] **Nokuthula Dube** was the 1st witness.

She knows the Applicant from Far East Rand Hospital. She went to the hospital for termination of pregnancy. It was on the 22nd February and did not find him. She came back on the 01st March 2010 and he checked her and she was 12 weeks pregnant. She was told by Applicant that in order to continue with the process she needs to pay R500 which she did not have. She was further told to at least come with half of the money and she promised to come back the following day. She testified that she was shown a document by Applicant in his office of price list which indicated R500-00 for 12 weeks termination. After her discussion with Applicant she was supposed to pay money because she went there knowingly that she is not supposed to pay any money. She then reported the matter on the

same day to the Head Master in the hospital and the Head Master advised her to do what Applicant has requested her to do and come back the following day. The following day she went back and informed the Applicant that she doesn't have the money and Applicant told her that he can't help her and wrote her a letter of referral to another clinic.

She took the same letter and went back to the Head Master who organized nurses and one Doctor Mongeni to help her. Dr Mongeni checked her again and told her she was 11 weeks pregnant and continued to help her with the process. She was referred to document "C" from Respondent and she recognizes the document as the price list. She testified that the document doesn't belong to Far East Rand Hospital as it indicates Blue Raindrop's Womans Clinic in Germiston. She felt unhappy about the treatment she got from Applicant because she went there knowing that she is not suppose to pay.

During cross examination the witness confirmed that she was living at Tsakane 4906 Maphophe Street, Ext 5, East Rand when the incident happened and now she lives in Soweto. She is 20 years old and was 19 years when the incident happened. The nurse she found on the 22nd February 2010 did not identify herself. She was informed that Applicant was not present and only knew that it was a male nurse on the 01st March 2010 after he identified himself. By us she was referring to other people because she was not checked alone. The witness testified that Applicant called her in his office on the day in question which is a two room office and others were sitting in the other room. She attended hospital on the 22nd February, 01st March and 03rd March 2010. She went to Head Master for the first time on the 02nd March 2010 that is the day she asked to come back the following day. The Head Minister did introduce herself although she cannot remember the date. She testified that she was directed to the Minister's room by people within the hospital. She testified that she is not familiar with all document relating to the procedure of filing a complaint. She agrees that she did not know the procedure even after she laid the complaint. She acknowledges that she mixed dates of the events. She confirmed that she was contacted again after they opened a case against Applicant to ask her what happened and she told them what happened. She consulted with someone from the department who took her statement. She cannot recall writing anything except on the 01st March 2010 when she wrote a statement of what transpired. She confirmed that Applicant demanded R500-00 from her. She confirmed that the second page of document "B" [Respondent] as statement wrote with the Head Minister. She confirmed the date as the correct date she wrote the statement. She testified that she wrote Doctor Buthelezi on the statement because at first she thought he was a doctor even though she said Applicant identified himself as a nurse when he introduced himself.

She did not capture the fact that Applicant told her about R500-00 initially because at the time it never crossed her mind. She confirmed that she did not pay him any money. She dared that the Applicant told her to go to another clinic if she wants to save time and that it will be at an amount reflected on the document "C". She recognizes a radiological report on the bundle and also a letter of referral.

Under re-examination she still maintained that Applicant requested money from her that she reported the matter. The last time she saw the Head Minister was on the 02nd March 2010 but she can identify her.

[8] **Dr. Mugeni Imidi** was the 2nd witness

He is a Chief Medical officer at Far East Rand hospital for the past ten(10) years dealing with the gynecological and obstetrics (dealing with deliveries). He testified that he recognize the document completed before the sonar and confirmed doing a sonar on the patient being Nokuthula Dube resulting in eleven (11) weeks pregnancy. According to him the hospital only allows to terminate up to twelve (12) weeks. He testified further that no money is paid at

government hospital to conduct a termination process. According to him sonar may be done immediately if time is available. All patient report to room 15 and then they sent them for sonar because they don't have the machine in room 15. He testified that the person who works in room 15 is the one who assist patients by completing a form and referring them for sonar. He testified that Applicant was working in room 15 as well. He insisted that there is no sonar machine in room 15 and as such there is no way Nokuthula Dube could have done a sonar in that room.

He confirmed under cross examination a document on page 3 of document "C" as the document that is signed when a patient has to go for sonar. He interpreted the document as a legal document and that the patient was twelve (12) weeks two (2) days when she was checked. He could not relate to the aforesaid document because it is not his but confirmed document "B" to be the one he completed which resulted in eleven (11) weeks pregnancy. He confirmed that the difference of weeks as per document "B" and page 3 of document "C" is normal because it is within the same range. He confirmed knowing Applicant and (obstetrics and gynecology) and TOP (termination of pregnancy) was later moved to labour wards. He doesn't know if Applicant can operate a sonar machine or not but can confirm that doctors does the sonar. He confirmed that Dr Moalosi as he was then a Superintendent is the one who requested him to do the termination of pregnancy. He confirmed that **Mane** as it appears at the bottom of page 3 of document "C" means tomorrow. Drind re-examination he testified that he doesn't know why Applicant was moved from termination of pregnancy to labour ward.

[9] **Ivy Rebone Masilela** was the 3rd witness

She is employed by Gauteng Department of Health stationed at the Far East Rand Hospital since October 2008 as a Nurse Manager. Her responsibilities are the supervision of the overall nursing department. She knows the Applicant as one of her **male** nurses. She is familiar with the complaint against Applicant after one of the clients went to complain about the Applicant to the Clinical Manager. The complaint was that one client complained about Applicant requesting money from her to perform termination of pregnancy services and was shown a fee structure. The Clinical Manager then involved Labour Relations and they approached Applicant at termination of pregnancy to inquire on delegations and pamphlets on the walls displaying price lists contrary to their policies and/or procedures. She is familiar with document "C" as the pamphlets they found on the wall and when he was asked why he was displaying them he said for no apparent reason. The CEO then instructed that Applicant stop doing termination of pregnancy in order for the matter to be investigated. She testified that Applicant was the only person working with termination of pregnancy services. The CEO wrote a letter on the 02nd March 2010 removing Applicant from his workstation. The matter was then handed over to the Labour Relations which continue with the investigations. The particular Clinical Manager referred to is Dr Moalosi. She is familiar with document "B2" relating to the precautionary transfer. According to her the hospital does not charge any fee for termination of pregnancy. She cannot deliberate on performance and conduct as she was not his direct supervisor.

During cross examination she confirmed that since 2008 it was the first incident reported to her by the nurse manager. She confirmed further that the Clinical Manager is the Supertendent. She further confirmed that the Clinical Manager called her on the 02nd March 2010. She confirmed that she did not follow Resolution 1 of 2003 (Disciplinary Code) in dealing with the matter because the complainant had gone directly to him. She acknowledged being familiar with document "A" as the procedure of lodging complaints. She further explained her understanding of the document. She confirmed that complainant was charged R250-00 and that the Assurance Quality Manager investigated the matter. She recalls seeing the letter for the first time in the CEO's office on the 03rd March 2010 and she knows it was party to it because she is the one who gave it to applicant. She confirmed also that the termination of pregnancy services were immediately suspended during their visit on

the 02nd March 2010. She testified that on the 03rd March 2010 Applicant reported at the OPD. She testified that Room 15 is one big room which is sectionally divided into two (2). She testified that she cannot recall seeing the price list before the incident. During re-examination she testified that she is not the author of A1 document and therefore it has no signature and authentic. She clarified and confirmed with me that the procedure as outlined in "A1" is still applicable and that the CEO called her to her office with the letter already typed and delegated her to issue it to the Applicant.

The Applicant's evidence

[10] Patrick Bekhubuhle Buthelezi (Applicant)

According to him the disciplinary procedure was not followed and the evidence presented during the hearing indicates that he was unfairly dismissed. He testified that he never requested any amount from the complainant because termination of pregnancy is for free service from government. He testified that he think there was misrepresentation on explanation or communication breakdown between Johannesburg Hospital and Blue Raindrop Woman's Clinic. According to him when he arrived at Room 15 he found the fee structure of Blue Raindrop Woman's Clinic on the wall which gave patients option to terminate pregnancy at a fee from clinic. He testified that on the first date of the visit by patient he would complete a form as per page 3 of the bundle "C" and immediately refer patient for sonar. They would come back with the result and if they are above twelve (12) weeks he would complete form as per page 2 of bundle "C" and refer patient to Germiston Hospital or Charlotte Maxeke Hospital because their hospital doesn't terminate after twelve (12) weeks. According to him he would normally advice patients to go to Blue Raindrop Woman's Clinic if they want urgent termination. According to him he saw the complainant patient on the 01st March 2011 because he was not available on the other dates. On the same day when Ms Dube arrives he completed the form for her and did sonar. Afterwards he then informed her that she is above twelve (12) weeks and the hospital cannot assist but can transfer her to Johannesburg General or Germiston Hospital. On the form he completed he wrote "MANE" meaning tomorrow, indicating that he will do her the following day even if is above twelve(12) weeks because Mrs. Mosadi advised that they can do it if is not more than twelve(12) weeks three(3) days. He was performing the termination after hours and thought the hospital was thinking that he was charging patients. He testified that he referred the patient as per page 2 of bundle "B" and also promised her to assist her the following day. He denied ever asking for money from the patient. According to him on the 02nd March 2010 he reported for his normal duty and continue with his daily routine of seeing patients/clients, completed forms and took them for sonar. When he was left with about two (2) patients the Labour Relations Officer came to Room 15 and informed him that he was **instructed** closed immediately because they got a message from GSSC.

He requested to finalize with the process of cleaning patients and Dr Moalusi came as well and told him to hurry up and leave immediately. According to him if there is a grievance it should first be investigated but in his case he was just told to leave without explaining anything. He testified that Mrs Masilela was also there when he was removed and told him to go to the Labour Ward. He testified that he felt confused and embarrassed by the manner in which he was treated and three (3) cassettes were broken by the CEO deliberately. According to him he received certain documents on the 10th March 2010 from Mrs. Masilela who informed him that it was charges preferred against him. He was actually charged on the 02nd March 2010 and only received the document on the 10th March 2010. He testified that he was transferred on the 02nd March 2010 but "B2" refers to 04th as date of the transfer.

According to him he was not given an opportunity to respond to "B2" because as per the letter he was suppose to respond by the 03rd March 2010. He testified that his office is wall partitioned and had 3 rooms. He denied that he conducted sonar to the patient because the only sonar available is in the sonar room. According to him the Blue Raindrop Woman's Clinic documents is used to advice clients who have money to pay.

During cross-examination he confirmed his rank to be a Senior Professional Nurse before he left. His duties include termination of pregnancy etc. He started working for the Respondent in 1992. He confirmed to be familiar with the Disciplinary Code of the department. He confirmed receiving a charge sheet through his union on the 23rd June 2010. He further confirmed having attended the hearing and being given an opportunity to challenge Applicant's evidence. He was found guilty and dismissed. He never appealed. He could not tell why document "C" was on the wall because according to him he found it there. He was responsible for the department and it was relevant to have document on the wall to assist clients to the hospital. According to him there was a link between the hospital and clinic. According to him if he were to be dismissed then other staff which were working in the same department must go as well.

The complainant client on the day in question did sonar and advised her that she is more than twelve (12) weeks. He confirmed only seeing Ms Dube for the first time at the hearing. According to him he wanted to do both transfer and also termination. He insisted that he is not misleading the process and never demanded money on her. According to him the reason why he had an interest on Dube's case is because she was young and stressed by the pregnancy. He confirmed that the document as per page 2 of "C" was completed on the 01st March 2010. He confirmed having done sonar on Ms Dube and did a course on sonar and on that day all Doctors were busy. According to him hospital is aware that he is performing sonar. He confirmed that between the 02nd and 10th March 2010 he was on the Labour Ward. He confirmed that he received the letter as per document "B2" on the 10th March 2010 because he was off duty. Under re-examination he insisted that Ms Dube refused to be referred and when she left she was crying because he went out looking for her. The witness confirmed that the client left referral on the day in question.

ANALYSIS OF EVIDENCE AND ARGUMENT

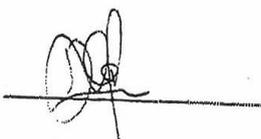
- [11] From the factual matrix of this case, the Respondent has proved on a balance of probabilities that the dismissal of Applicant was both procedurally and substantively fair as envisaged in the Labour Relations Act 66 of 1995.
- [12] From the evidence presented before me it is not in dispute that Ms Dube was visited by the Applicant at his workplace regarding the termination of pregnancy. It is also not in dispute that Applicant did assist the patient, Ms Dube by doing sonar on her and advising her that she was more than twelve weeks pregnant and should be transferred to another hospital.
- [13] Ms Dube insisted throughout the proceedings that the Applicant requested money from her in order to assist her with the termination of pregnancy. In his own testimony Applicant confirmed during cross examination that he wanted to do both the referral and termination. I find it strange how he wanted these two processes to be done at the same time because if really his interest on the case was because Ms Dube was young and stressed by the pregnancy he could have immediately assisted her without transferring her. The basis of the aforesaid submission is that Applicant knew even before seeing Ms Dube that she could be assisted if the pregnancy is not more than twelve weeks and 3 days.

- [14] The averment that the Applicant informed Ms Dube that he cannot assist her because she was more than twelve weeks pregnant but at the same time wrote MANE indicating that he will assist her the following day because he was aware of the 3 days allowance is disturbing. If Applicant's attention was really drawn by the age and stress of Ms Dube in my view, he would not have firstly created an impression that she cannot be helped and later want to assist her. I have no doubt that in her condition as described by Applicant, Ms Dube needed urgent help. Following the Applicant's evidence he would have advise her of the option available at the private clinic where she needs to pay money. I am therefore convinced that the only reason why the Applicant initially told Ms. Dube that she cannot be helped was to frustrate her and create an impression that the only available option was for her to pay R500.00 in order to be assisted. I am therefore convinced that indeed the Applicant showed Ms. Dube the price list from Blue Raindrop Woman's Clinic with full knowledge that assistance is available for free at the hospital with the motive of getting Ms Dube to pay some money to him. The Applicant's averment therefore that he found the price list placed on the wall and used them to assist clients who needed urgent help is untenable. In my view, the Applicant intended to use the same pricelist to his own benefit and nothing else.
- [15] The Respondent's witnesses corroborated the version of the complainant client, Ms. Dube throughout the arbitration proceedings. I must accept further that the evidence of Ms. Dube was to some extent contradictory on the dates she visited the hospital and her meetings with the Head Minister. In weighing up the entire evidence I find those contradictions to be immaterial to the main issues and as such I still find her evidence credible. On the other hand, the Applicant failed to call witnesses to corroborate his testimony and as such to some extent his evidence remains hearsay. In respect of the procedural fairness it is my considered view that in as much as the complaint procedure was not followed but the Respondent in dealing with this matter. The Applicant however confirmed in his own testimony that at the internal disciplinary hearing his rights were observed. If indeed the Applicant was not afforded the audi alteram partem hearing he would have referred an unfair labour practice dispute which he failed to do. In essence I cannot find any material procedural flaw in the manner in which the whole matter was handled.
- [16] I am therefore not persuaded that the dismissal of the Applicant was both procedurally and substantively fair.

FINDING

- [17] On the basis of the evidence and argument presented before me during these arbitration proceedings; I find as follows:
- [18] The dismissal of the Applicant Patrick Bekubuhle Buthelezi was both procedurally and substantively fair.
- [19] The Applicant's case is therefore dismissed.
- [20] There is no order as to costs.

DATED AT PRETORIA ON 19 JULY 2011.



Archibald Mafa