



# ARBITRATION AWARD

Case No: PSHS1353-16/17

Commissioner: Catherine Willows

Date of Award: 13 August 2017

In the matter between:

**NEHAWU obo S KRELELE**

(Union/Applicant)

And

**DEPARTMENT OF HEALTH – EASTERN CAPE**

(Respondent)

## **DETAILS OF HEARING AND REPRESENTATION**

1. The matter was set down for arbitration at Lilitha Nursing College, Bisho, Eastern Cape on the 7<sup>th</sup> July 2017 and 1<sup>st</sup> August 2017.
2. The Applicant, Mr S Krelele attended the proceedings and was represented by Mr P Matu, an Official of NEHAWU of which the Applicant is also a member.
3. The Respondent, Department of Health- Eastern Cape, was represented by Mr Q Van Der Merwe, the Deputy Director within the Labour Relations Department of the Respondent.

4. The matter was finalised on the 1<sup>st</sup> August 2017 where after the parties agreed to submit their respective closing arguments by 7<sup>th</sup> August 2017.
5. The proceedings were digitally recorded and hand-written notes are on hand.
6. Ms X Xulu provided interpretation services on 1<sup>st</sup> August 2017.
7. Both parties submitted bundles of documents to be utilised in the presentation of their respective cases. These were articulated as “Applicant Bundle A & B” and “Respondent Bundle”.

### **ISSUE TO BE DECIDED**

8. The Applicant has referred a dispute to the Bargaining Council relating to unfair dismissal. I am required to determine whether the dismissal of the Applicant by the Respondent was substantively fair.
9. The issues were narrowed as follows: no procedural fairness was challenged. Substantive fairness was challenged on the basis whether the Applicant was guilty of the charges levelled against him and in particular, the Applicant was not challenging the fact that he undertook a private trip in government vehicle GGW039EC on 1 January 2016, but that such trip was duly authorised.

### **BACKGROUND**

10. The Applicant was employed as a Forensic Pathology Officer in Graaff-Reinet and commenced employment on 1 November 2015. A Disciplinary Enquiry was convened on 21 July 2016, whereby the sanction of dismissal was given on 14 November 2016.
11. The Applicant appealed such sanction, and Appeal process was denied and handed to the Applicant on 6 February 2017.
12. The Applicant was charged with the following offences:

Charge 1: *Without permission, you wrongfully used the property of the State in that over the period 1 January 2016 you drove a government vehicle, GGW039EC, from Graaff-Reinet to Willowmore to Aberdeen to Graaff-Reinet and about town in Graaff-Reinet for private purposes.*

Charge 2: *Without permission, you wrongfully used the financial resources of the State in that for the period 1 to 4 January 2016 you used the government petrol card on at least two separate occasions, that is on 1 January 2016 and 2 January 2016, to pay for fuel for your private trips using the government vehicle GGW039EC.*

Charge 3: *Giving false statements or evidence in the execution of your duties as it relates to the submission of all petrol slips in that you made a written statement denying that you put in petrol with the government petrol card when using the government vehicle, GGW039EC to travel to Willowmore on 1 January 2016 for private purposes.*

Charge 4: *Misrepresentation of information in the execution of your duties as it relates to the submission of all petrol slips in that you failed to submit the petrol slip for 2 January 2016 to the amount of R879.80 for 71.40 litres of fuel purchased from Riverside Convenience Centre, Graaff-Reinet for Government vehicle GGW039EC using the government petrol card.*

Charge 5: *Giving false statements or evidence in the execution of your duties as it relates to the completion of the logbook in that you falsely recorded in the log book the final mileage to be 104 213 kilometres as of 5 January 2016 when the actual odometer reading of the vehicle, GGW039EC, was 104 732 kilometres (a discrepancy of 519 kilometres).*

Charge 6: *Unauthorised garaging of government vehicle GGW039EC in that on 1 January 2016 you kept the government vehicle overnight in Willowmore when you only had permission to garage the vehicle at 69 Merino Street, Kroonvale, Graaff-Reinet.*

13. The Applicant was subsequently found guilty of the aforementioned charges and dismissed on 6 February 2017.

## **SURVEY OF ARGUMENTS**

14. Parties presented their positions their cases both verbally and in writing, the last submitted on the 7<sup>th</sup> August 2017. The below is a summary of what is contained in their submissions.

## **ARGUMENT FOR THE RESPONDENT**

### **1<sup>st</sup> witness: Mr Johan Wagenaar**

15. Mr Wagenaar submitted that he is the Facility Manager for Forensic Pathology in Graaff-Reinet and that he is the Applicant's immediate supervisor and he reports to him. The witness went through a number of documentation, more specifically, the trip authority forms and logbooks all officers such as the Applicant are required to complete.

16. He explained that an Officer on standby is given an authority form which is valid for one month; the keys to a vehicle as well as the petrol card. This is in order for the Officer to do official standby duties. Also included in the witness' explanation was the logbook of the vehicle as well as the checklist for such.

17. The vehicle GGW039EC was allocated to the Applicant for the month of January 2016 as he was on standby duty. As such, the Applicant had the authority to use such vehicle for official standby duties. The witness submitted that each week, for administration purposes, he takes all the logbooks of the vehicles and petrol slips in order to correlate such.

18. On none of the forms that the Applicant submitted, was there any reflection as to any trip to Willowmore. The witness stated that when he discovered such discrepancy he

questioned the Applicant who replied that he thought the speedometer of the vehicle was broken.

19. He furthermore stated that the Applicant had only submitted to him the petrol slip dated 29 December 2015 for the amount of R347.65 His office had queried other amounts from Stannic in which they discovered that petrol had been placed in the vehicle on the 1<sup>st</sup> and 2<sup>nd</sup> January 2016.
20. The Applicant had submitted a statement to him citing *“by the time I was using the vehicle I didn’t put any petrol with the petrol card when I was travelling to Willowmore”* (page 74 of Respondent’s bundle).
21. Under cross-examination, the witness was emphatic that he did not recall a visit to his home by the Applicant and Anele Badiwe on 1 January 2016 to ask for permission to take the vehicle to Willowmore. He stated that he was not authorised to give such permission.
22. In closing, the Respondent’s representative submitted that the issue in dispute was whether the Applicant had permission to use the state vehicle for the purposes of visiting his sick child in Willowmore for 01 January and 02 January 2016. Mr Wagener, the facility manager of the Graaf Reinet Forensic Pathology Office and Mr Krelele’s manager at the time of the dismissal, was called as the only witness for the Respondent. He testified that the vehicle was allocated to the Applicant for the month of January 2016 for use on official trips only.
23. Department vehicles may not be used for private trips and he never gave the Applicant permission to utilize the vehicle for a private trip from Graaf Reinet to Willowmore (on 01 January 2016) and back (on 02 January 2016).
24. He furthermore stated that all trips in departmental vehicles need to be recorded both in the log book and in the trip authority. During the period 01 to 04 January 2016 the Applicant used the vehicle for a number of unauthorized trips which were not recorded in the trip authority form.

25. During a routine audit Mr Wagenaar discovered a discrepancy of 519 kilometers but the Applicant however denied using fuel for the aforementioned trip and also did not submit the petrol slip for such.
26. This slip was sourced from the filling station later upon request of the facility manager. Therefore, the Applicant had tried to hide evidence by not submitting the petrol slip and incorrectly capturing the mileage on the log book. As such, it is the Respondent's submission that the Applicant never requested, nor was given permission to use the state vehicle to visit his sick child in Willowmore.
27. Furthermore that he attempted to hide the trip by not entering it into the logbook or trip authority and not submitting the petrol slip to his supervisor. The Applicant's claims that he visited both Mr Badiwe's house (on foot) and then Mr Wagener's house (in Mr Badiwe's car) to obtain the permission is in direct contradiction of the tracker report which showed no period of inactivity, after dark, long enough for him to have conducted the alleged visits.
28. It is therefore submitted that the evidence of the Applicant and his witness is untrue and calculated to create confusion in an effort to obtain the Applicant's reinstatement. In the premise, the Respondent believes that it has on balance of probabilities proven that the Applicant was fairly and procedurally dismissed for misconduct.

## **ARGUMENT FOR THE APPLICANT**

### **1<sup>ST</sup> witness: Mr S Krelele**

29. The Applicant stated under oath that on the 1<sup>st</sup> January 2016 he received a call from the mother of his child that his child was sick and he was urgently needed at home. As he had commenced employment on 1 November 2015, there had been issues with payment of his salary due to "persal issues" therefore he only received a salary in February 2016.
30. Mr Badiwe who was the Deputy Director of Forensic Pathology Services, based in Bisho but resided in Graaff-Reinet, had been assisting him with money for food,

accommodation etc. The Applicant stated that he went to Mr Badiwe's house to ask for assistance but Mr Badiwe was unable to loan him money. He asked his son, Anele to drive him to Mr Wagenaar's house in the hopes that Mr Wagenaar could assist.

31. The Applicant stated that Anele Badiwe drove him to Mr Wagenaar's house in Mr Badiwe's car. When they got there, the gate was locked so Anele hooted twice and Mr Wagenaar came to the gate.
32. The Applicant stated that he explained to Mr Wagenaar his predicament to which Mr Wagenaar stated that he didn't have money to lend the Applicant, but as the Applicant was on standby duty, he could take the vehicle to Willowmore.
33. The Applicant stated that Mr Wagenaar cautioned him not to park the vehicle at the hospital where his child was admitted as it would raise questions as it was a Department vehicle with such logo. The Applicant then drove back to Mr Badiwe's house whereby he informed of what had transpired.
34. The Applicant further submitted that he did not enter in the details of the trip in the logbook as Mr Wagenaar had said that he would fix the entries as they were to utilise a new form from January 2016. He furthermore submitted that he gave the petrol slips to Mr Dlova of the Department.
35. The reason for his statement on page 74 of the Respondent's bundle was that he put in petrol before Willowmore and after Willowmore and not during. When he received the notification for the Disciplinary Enquiry, he went to Mr Badiwe's house again to which Mr Badiwe called Mr Wagenaar.
36. They discussed the matter and Mr Wagenaar had stated that he did not have a problem with the Applicant but that his wife did, as when he started working at the Department, she was no longer receiving a standby allowance.
37. The Applicant prayed for reinstatement as he had "responsibilities".

**2<sup>nd</sup> witness: Mr Anele Badiwe**

38. The witness testified under oath and stated that he resides in Graaff-Reinet and is the son of the late Mr Badiwe.
39. On the 1<sup>st</sup> January 2016, the Applicant arrived at their home to speak to his father. They spoke in his presence whereby the Applicant explained that he had a crisis and requested money to travel to Willowmore. The witness stated that his father denied the request for money but asked him to drive the Applicant to Mr Wagenaar's house to see if he could help.
40. They duly did so and when they arrived, the Applicant and Mr Wagenaar had a discussion at the gate. The witness stated that he could hear the conversation as his window was open. The suggestion was made to the Applicant that he could use the work vehicle but on provision that if the Applicant was needed, he would return immediately.
41. Mr Wagenaar cautioned the Applicant not to park the vehicle at the hospital as it would raise questions. Upon their return to Mr Badiwe's house, the Applicant relayed the conversation to which the witness stated that his father said he expected as much, as he had reprimanded Mr Wagenaar for using the state vehicle assigned for him for "golf".
42. Under cross-examination, the witness was adamant that Mr Wagenaar was lying if he stated that they did not go to his house on the 1<sup>st</sup> January 2016.
43. In closing, the Applicant's representative made reference to **Mbhele & Another v Strange Cleaning Services** whereby it was held that in dealing with the issue of assessment of probabilities, the chairperson needs to first look at the version of the employer and decide whether that version is probable. It was submitted that the evidence of Mr Wagener could not be relied on because during examination-in-chief, cross-examination and re-examination he had contradicted himself about the fact of whom collected the petrol slip from the garage.

44. During Examination-in-Chief the witness testified that he collected the petrol slip from the garage and under cross-examination he testified that he instructed the deputy transport officer who herself was not called to give evidence to that effect.
45. Although Mr Wagenaar denied that he was ever visited by the two witnesses at his home no one was called to collaborate such. As a result, evidence that was led in the proceedings that was in all probabilities to the effect that the Applicant was given authority to use the government vehicle by Mr Wagener. The evidence of Mr Wagener could not be relied on because during examination-in-chief, cross-examination and re-examination he has been contradicting himself about the fact that who collected the petrol slip from the garage.
46. The evidence of the Applicant's witness, Mr Badiwe, collaborated that of the Applicant. As such, evidence that was led in the proceedings was in all probabilities to the effect that the Applicant was given authority to use the government vehicle by Mr Wagener.
47. It was submitted that there was never any misuse of a government vehicle by the Applicant because evidence was led and collaborated by his witness to the fact that Mr Wagener did give permission.
48. In the circumstances, the sanction of dismissal was harsh and the Applicant prays for retrospective reinstatement.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

49. The respondent bears the onus in terms of Section 192(2) of the Labour Relations Act 66 of 1995, as amended ("the Act"), to prove on balance of probabilities that the dismissal was effected with a fair procedure and a reason. The Applicant does not challenge the procedural fairness of his dismissal.
50. In determining the fairness of dismissal, I must consider item 7 of the Code of Good Practice on Dismissal. The Code states that an arbitrator must consider whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to the workplace; and if a rule or standard was contravened, whether or not the rule was

a valid or reasonable rule or standard; the employee was aware, or could reasonably be expected to have been aware, of the rule or standard; the rule or standard has been consistently applied by the employer and dismissal was an appropriate sanction for the contravention of the rule or standard and the CCMA arbitration Guidelines.

51. The Applicant did not dispute the validity of the rule preventing private use of state resources and that the official petrol card is to be used for official vehicles and for official trips and confirmed that he did embark upon a private trip to Willowmore on 1 January 2016. He alleged that he had done so on the permission of his superior and that it was a crisis that he had to attend to.

52. The Respondent is therefore called upon to discharge the onus on balance of probabilities, in that; the dismissal was effected for a fair reason. In my view, in weighing the probabilities, one has to assess logic, sense and the context of the dispute in its entirety. If, therefore one cannot make a finding based on the above factors the credibility of the witnesses should enter the fray. It should be remembered that one cannot evaluate one aspect of evidence in isolation to the entire evidence.

53. In assessing evidence I will follow the principle laid down in **Hoffmann & Zeffertt: The South African Law of Evidence 4th Ed at page 562** comments as follows “ *The degree of proof required by the civil standard is easier to express inwards than the criminal standard, because it involves a comparative rather than a quantitative test. On the whole it is not difficult to say one thing is more probably than another, although it may be impossible to say how much more probably. So the civil standard has been formulated by Lord Denning as follows: “it must carry a reasonable degree of probability but no so high as is required in the criminal case. If, the evidence is such that the tribunal ‘we think it is more probably than not;’ the burden is discharged, but if the probabilities are equal it is not’.*

54. The dispute of fact is whether or not Mr Wagenaar had given the Applicant permission to utilise the vehicle, such permission having “cloaked” the trip in authority.

55. When a dispute of fact emerges, one assesses the credibility and cogency of the two competing witnesses' version of events.

56. The Guidelines provide a list of factors to consider when determining whether a witness is reliable (in item 56.2). The Labour Courts often refer to the following quote from **Stellenbosch Farmers Winery Group Ltd & another v Martell et Cie & others 2003 (1) SA 11 (SCA)** when setting out the proper approach to be adopted in making decisions on the facts of a matter -

*“On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities? The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’ candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’ reliability will depend, apart from the other factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities she had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party’s version on each of the disputed issues. In the light of the assessment of (a) (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be a rare one, occurs when a court’s credibility findings compel it in one direction and its*

*evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.” (At paragraph 5).*

**Masilela v Leonard Dingler (Pty) Ltd (2004) 25 ILJ 544 (LC):**

*“The credibility of the witnesses and the probability and improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of the respondent’s version, an investigation where questions of demeanour and impressions are measured against the contents of a witness’ evidence, where the importance of any discrepancies or contradictions is assessed and where a particular story is tested against facts that cannot be disputed and against the inherent probabilities, so that at the end of the day one can say with conviction that one version is more probable and should be accepted, and that therefore the other version is false and may be rejected with safety”.*

57. In determining the probabilities, one assesses the probabilities and improbabilities of the version on the disputed facts and determines which is the more probable version overall.

58. Mr Wagenaar provided concise testimony as to the process of allocating state vehicles to Forensic Pathology Officers for the execution of their duties. He was furthermore adamant, despite strenuous cross-examination, that he did not recall giving the Applicant permission to utilise the vehicle to embark upon a private trip to Willowmore. He submitted, that he could not have given such permission as the rules do not permit so.

59. This was in direct contradiction to the testimony of the Applicant and Mr Anele Badiwe who were similarly adamant that such meeting on the 1<sup>st</sup> January 2016 took place whereby permission was granted. Their version of events of the alleged vehicle collaborated that of each other.

60. The Applicant's recollection and version of events as to the steps he took prior to such meeting with Mr Wagenaar were somewhat vague in respect of his movements, when contrasted to the tracking report of the vehicle GGW039EC. The Applicant claimed that he visited both Mr Badiwe's house, on foot, and then Mr Wagener's house, in Mr Badiwe's car, to obtain the permission on the 1<sup>st</sup> January 2016.
61. However, the tracking report for such period, submitted by the Respondent in evidence, does not show any period of inactivity that would have allowed such visit. It was furthermore submitted by the Respondent's representative that it was unlikely that the Applicant would submit the petrol slip dated 02 January 2016, for the amount of R879,80 as he had submitted a petrol slip dated 01 January 2016 for R425,25.
62. The Applicant would have been unable to provide an explanation for, after filling the petrol tank on 01 January 2016 and driving a total of +- 40 km in terms of his trip authority and log book he would need to refuel again to the amount of R879,80.
63. It was furthermore not explained as to when Mr Wagenaar would have instructed the Applicant not to reflect such trips in his trip authority form, as by the Applicant's own evidence, he submitted such to Mr Dlova. The Applicant's version of events, even though collaborated with that of his witness, Mr Badiwe, simply does not correspond with the documentary evidence.
64. I was similarly not impressed with the Applicant when he rationalised his written statement that he never divulged putting petrol in on the way to Willowmore but that he had put petrol in *prior and after the trip*. This was in my opinion, an attempt to evade the truth on a technicality and was disingenuous.
65. The Applicant was well aware of the rules prohibiting private use of the state vehicle and that it was to be utilised for official trips only. Even if he had asked permission from Mr Wagenaar, his actions would have been prohibited regardless as he never disputed the rules regarding such.
66. The Applicant's explanation for his actions are simply not probable when assessed against the documentary and oral testimony from the Respondent. The tracking report

shows no period of inactivity that would have allowed such alleged meeting whereby permission was granted, to have taken place.

67. I consequently therefore find that there is no compelling evidence submitted to require me to interfere with the sanction of the Respondent as the actions of the Applicant were expressly prohibited and dishonest in nature.

68. In **De Beers Consolidated Mines Ltd V CCMA & Others (2000) 21 ILJ (LAC)** at 1058F –G it was stated “*Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise*”.

69. Having considered the evidence before me I find on balance of probabilities that the respondent has discharged the onus that the dismissal of the applicant was for a fair reason. Consequently, the dismissal is substantively fair.

70. In the premise, I deem it reasonable to make the following award:

### **AWARD**

71. I find that the dismissal of the Applicant, Mr S Krelele, by Department of Health-Eastern Cape, the Respondent, was substantively fair.

72. The application for unfair dismissal is hereby dismissed.

73. I make no order as to costs.

Signed:



Catherine Willows

Commissioner / Panelist