



ARBITRATION AWARD

Panellist/s: Ananthan Sanjivi Dorasamy
Case No.: PSHS20-11/12
Date of Award: 20-Oct-2011

In the ARBITRATION between:

PSA OBO MABIKA A D

(Union / Applicant)

and

DEPARTMENT OF HEALTH: KZN

(Respondent)

Union/Applicant's representative	: MR D GOVENDER
Union/Applicant's address	: POBOX 4011 DURBAN 4000
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Respondent's representative	: Ms N A GUMEDE
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INTERPRETER	: Ms P M HUNSLEY
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DETAILS OF HEARING AND REPRESENTATION

1. The matter concluded on 11 October 2011 at the Zululand District Boardroom in Ulundi. Mr D Govender of the PSA represented the applicant and Ms N A Gumede represented the respondent.

RESPONDENT'S OPENING STATEMENT

2. The applicant was charged with misconduct, appeared before a presiding officer, was found guilty and dismissed, thereafter his appeal was dismissed.

The respondent prays that there was no unfair dismissal and that the matter be dismissed.

APPLICANT'S OPENING STATEMENT

3. The applicant was unfairly dismissed and challenges both the procedural and substantive aspects of his dismissal and seeks re-instatement and compensation.

ISSUE TO BE DECIDED

4. I am to decide whether the dismissal of the applicant was procedurally and substantively fair. Should I find in favour of the applicant then I am required to consider what remedy would be appropriate in terms of s 193 and 194 of the Labour Relations Act. Should I find against the applicant, then the matter would be dismissed.

BACKGROUND TO THE DISPUTE

5. The applicant was a driver and was charged as follows:

1. Mr Mabika Andile Dave, Persal number 63303396 on the 20th August 2010 after 22hours at night he entered at Nkonjeni District Hospital premises with his vehicle registration NRB 12347 making a loud noise with his car radio. He was not working at the time, not expected to be in the premises more special it was during Public Sector Strike.

According to the Disciplinary Procedure:

- (a) His action constitutes disturbance to patients and internal residential inside the Government Premises.
- (b) He willingly fully assaulted Finance and Systems Manager, his senior Manager Ms N P Thabethe who was official standby, delegated by the CEO as a responsible person to monitor PEACE, SAFETY OF THE WORKERS, PATIENTS, GOVERNMENT PROPERTIES AND PREMISES DURING THE STRIKE.
- (c) His action was strongly defamation of character to the Senior Executive

Manager especially in the month of August that was a women's month.

6. As it was established that a dismissal had taken place (s 192 (1)), the respondent bore the onus to prove that the dismissal was substantively and procedurally fair (s 192 (2)).

The respondent produced a bundle of documents (bundle) and after offering it to the applicant it was accepted.

7. The respondent prays for a decision that the dismissal of the applicant was fair and that the dismissal be upheld.
8. The applicant challenges the procedural and substantive aspects of his dismissal and wanted to be re-instated with back pay.

SURVEY OF EVIDENCE AND ARGUMENT

RESPONDENT'S EVIDENCE

RITA SMANGELE KHOZA

The salient points of Ms Khoza's evidence are as follows:-

9. She works at Nkonjeni hospital as a security guard at the gate.
10. On the 20 August 2010 she was working night shift.
11. There was a call that Mr Shandu received from Ms Thabethe asking them to come because of a noise coming from a radio and they went there and found there was a noise caused by a car radio.
12. It was the applicant's car and he was inside the employee's house and they went in and asked him to turn down the volume but he refused. They asked him to come out but he refused and they pulled him out and found that he was under the influence of alcohol and he was swearing at them and Ms Thabethe.
13. They took him away and Ms Thabethe was walking behind them. At the chapel he kicked and slapped Ms Thabethe. They asked him for a reason for hitting Ms Thabethe but he was still swearing and they took him to the gate where he was still swearing and they asked him to go out of the premises but he refused and they handcuffed him.
14. They placed him in the guard room but he went out through the window and they saw him running. He ran back to the employee's house and her colleagues went there and the police arrived and took him away. Ms Thabethe wrote a statement at the police station.
15. The police took him from Mapholoba's (Mr Ngcobo) house.

16. She asked the applicant to switch off the radio because it was making a loud noise at the hospital and it was not allowed in the hospital. As the security officer she viewed the conduct of the applicant as not good as he was swearing at them.
17. The police took a statement from her and she went to court to give evidence but does not know what happened in the case.

Under cross-examination she stated:

18. On the day she did not see the applicant entering the gate. If he was making a noise at the gate they would not have allowed him to come in. Employees are allowed to come in after work if they state where they are going.
19. She heard the radio but did not know where it was coming from.
20. When they arrived at the premises (park homes) Ms Thabethe was standing at her house door and did not go to Mapholoba's house. They spoke to Mr Mapholoba who said that it was the applicant who was causing the loud noise.
21. They went away while the radio was still on and it was still on when they took him away. He said that he was with his girlfriend who would take his keys.
22. When he was outside Ms Thabethe asked him to shut up because he was disturbing the patients. They were holding him while taking him to the gate but he turned and hit Ms Thabethe. He called her a black girl and that she doesn't earn much and does not have money.
23. He was handcuffed because he was fighting and hit Ms Thabethe

NELISIWE PRASIDANCE THABETHE

The salient points of Ms Thabethe's evidence are as follows:-

24. At the time of the incident she was employed at Nkonjeni hospital as the Financial Assistant Manager and knows the applicant. On the 20 August 2010 she was appointed officially by the CEO for the weekend as hospital manager.
25. At night she was in her room, it was during the strike and everything was going well. At about 22h00 she listened to the news as it was women's month and she wanted to hear about the festivals. She heard loud noise outside from a radio and thought that the person did not know the rules and opened her door and saw the white golf, the applicant's car and asked the person standing near the car to call the applicant. The applicant came out and she asked him to reduce the volume and he replied that she must not go crazy for him and that he was drunk.

26. She called switchboard and asked the security guards to talk to him and asked them to remove him as it was late.
27. The security guards came and she was standing at her door. She told the guards to tell the applicant to leave the hospital premises but he did not agree. They took him out of the house but he refused to go to his car. She was following because he was refusing to leave the hospital and was using vulgar language.
28. While they were behind the chapel and he was refusing to leave she went closer and asked him to take the instructions given by the guards and leave but he jumped and hit her on the cheek and kicked her on her right leg and bladder.
29. The guards held him and asked him the reason for beating his manager and they took him away. She went to the switchboard and called the SAPS and asked them to assist her. Then because she was in pain she told the night super Ms Qwabe that the applicant had beaten her and that she was in severe pain and she gave her an injection and pills.
30. The police arrived and because the applicant had run away from the gate in handcuffs they went to Mr Mapholoba's house and found him there. They went to the police station where she wrote a statement.
31. The park homes are close to the maternity ward. As a manager she viewed his conduct as very bad and he did not behave well. She was very hurt and she felt that she had lost her dignity as manager. It happened in the month of August, women's month and will always recall the incident as it was an unhappy event for her and will be with her for the rest of her life.
32. The employer made a good decision to dismiss him to show other employees not to hit another employee irrespective of the position of the employee and it teaches others a lesson as well. The relationship between them before the incident was good.
Under cross examination she stated:
33. The relationship between her and the applicant was good at all times but after the incident and when she sees him she gets upset as she has flash backs of the incident.
34. The only thing she wanted was to reduce the noise.
35. The applicant would say that he was drunk and went to visit Mr Mapholoba and when he was asked by him to switch off the radio he did as asked and when the guards came he told them that there was no noise as he had put the radio off.

36. The guards asked him to leave but he refused because he was an employee of the institution. He (applicant) would say that the guards man handled him and she called him a drunkard and taunted him calling him all sorts of names and said that she would have him dismissed. Ms Thabethe denied the version of the applicant. Further as a result of her doings he became agitated and he turned his hand and hit her face and denies kicking her.
37. In the criminal court he was found guilty and was to pay a fine of R 3 000.00 or 5 months imprisonment wholly suspended for five years. She produced the court document confirming the conviction and sentence.

APPLICANT'S EVIDENCE

COSMOS BHEKIZENZO DLAMINI

The salient points of Mr Dlamini's evidence are as follows:-

38. On the 20 August 2010 he was at Mr Ngcobo's park home and at 22h00 the applicant came in his car, parked it and brought alcohol. He walked in and they heard noise and Mr Ngcobo asked him to switch off the radio and he went back to his car. A minute later the security guard walked inside and ordered the applicant to leave the premises and when he asked for a reason, they dragged him out. The guards did not take him out.

Under cross examination he stated:

39. The guards came to the park home because he was making a noise by playing his music loud. He left after the incident and does not know if the applicant took alcohol.

LUCKY BONGINKOSI SHANDU

SPECIAL NOTE

Mr Shandu had testified at the disciplinary hearing and in court that the applicant car radio was switched on but changed his version and was thereafter withdrawn as a witness.

BONGANI ENOCK NGCOBO (MAPHOLOBA)

The salient points of Mr Ngcobo's evidence are as follows:-

40. On the 20 August 2010 he asked the applicant to buy him alcohol.
41. The park homes are close to the wards. When the applicant arrived he asked him to switch off his radio and he went and switched off the radio and came back.
42. He knows Ms Thabethe and she lived in the park home next to him and she could have heard the radio.

43. When the applicant came back the guards came and asked him about the radio and he said that he had switched it off and they told him that he was not needed there but he was not willing to leave and they handcuffed him and took him out. Mr Dlamini left after that because he was unhappy and he remained in his park home. After some time the applicant returned and was in handcuffs.

Under cross examination he stated

The noise from the radio was high.

ANDILE DAVE MABIKA

The salient points of Mr Mabika's evidence are as follows:-

44. He was employed by Nkonjeni hospital as a driver for 4 years and earned R 6 800.00 at the time of his dismissal.

45. He went to the hospital because Mr Ngcobo had asked him to buy something for him. He went to the hospital at 22h00 and went past the security gate and at the time he was drunk and his radio was playing loudly. He parked his car in front of Mr Ngcobo's door and the wards are about 100 metres away.

46. He went inside and Mr Ngcobo asked him to switch off his radio and he did as he was told. Then the security guards knocked on the door and asked him about the noise and he said that his radio was off. They said that they wanted him out but he refused to leave the premises as he was not making a noise.

47. He did not see Ms Thabethe but when the guards grabbed him and took him out she was following them, taunting him and telling him that she will send a report on the Monday and get him fired.

48. He swung his hands and she got hit on her face and because he was drunk he could not remember kicking her. It was an accident.

49. The guards handcuffed him and took him to the gate and put him in a room and he tried to escape from the toilet because he was pepper sprayed and he wanted to get air. He managed to get out and went to check his car. He sat at Mr Ngcobo's house until the police came and took him away. It was a Friday and he was released on bail on the Monday.

50. In court he was represented by a Legal Aid lawyer and was told not to hit anybody again. He was found guilty.

51. He gave up alcohol, goes to church and his girlfriend left him because of the incident.

Under cross-examination he stated:

He cannot recall kicking Ms Thabethe and was sorry for what had happened.

CLOSING ARGUMENTS

RESPONDENT'S CLOSING ARGUMENTS

The salient aspects of the respondent's closing arguments are recorded below.

52. The respondent called two witnesses , Ms Khoza the security guard who stated that she and other guards attended to a call made by Ms Thabethe who was the senior manager on call on that day and who reported that there was noise from a radio in the hospital. She testified that on her arrival with other security guards she and Mr Shandu got inside Mr Ngcobo's park home and Mr Shandu spoke to Mr Ngcobo about the noise and he advised them that it was from the applicant's car.
53. They asked the applicant to switch off the radio but he refused to comply and he was taken out of the park home.
54. Ms Thabethe testified that she asked the applicant to switch off the radio but he refused to comply hence she called the security to intervene. If he complied then there was no need for Ms Thabethe to call the security. She stated that the noise was loud and noise is not allowed in the hospital premises.
55. The evidence of Mr Ngcobo and Dlamini that the applicant switched off the radio immediately after he arrived on the instruction of Mr Ngcobo is not the correct version as Ms Khoza stated that on their arrival at the park home they spoke to Mr Ngcobo about the noise and he advised them that it was from the applicant's car.
56. It is also not correct that the reason the guards went to Mr Ngcobo's park home was to move the applicant out of the hospital but to attend to the high volume of noise reported by Ms Thabethe.
57. Ms Khoza stated that the applicant assaulted Ms Thabethe and this was corroborated by Ms Thabethe who was the victim. Assault is a serious offence that warrants dismissal. Ms Thabethe was responsible to ensure that everything was in order within the hospital therefore she had all the right to ask the applicant to switch off the radio. She had to do this in the interest of the patients.
58. The applicant was inside the park home and he could have complied with the instruction and because he was not co operative the guards had to handcuff him. The applicant stated that when the guards came they asked him about the noise and he said that he had switched his radio off. This version is contrary to that of Mr Dlamini
59. Ms Khoza stated that Ms Thabethe was always saying to the applicant to take the

instruction from the guards. There was no nagging words used by her as alleged by the applicant. The applicant said that he could not recall kicking Ms Thabethe but recalls moving his hands that resulted in her being slapped. Ms Khoza stated that the applicant slapped and kicked Ms Thabethe to such an extent that the guards asked him for the reason for beating his manager.

60. The court found him guilty of assault and the test used there is beyond reasonable doubt.

61. His behaviour was unbecoming and unacceptable. He assaulted his manager calling her names, defaming her character during the month of August the month is special month dedicated to women.

62. The finding and sanction is appropriate in the circumstances and the applicant's dismissal was procedurally and substantially fair and the respondent prays that the matter be dismissed.

APPLICANT'S CLOSING ARGUMENTS

The salient aspects of the applicant's closing arguments are recorded below.

63. The applicant faced three charges of misconduct, was found guilty and was dismissed. There is no certainty as to how the presiding officer dealt with the question of sanction whether it was cumulative of all three counts.

The issue to be decided is whether or not the applicant committed the offences and if so under the circumstances was the sanction appropriate. The relief sought is retrospective re-instatement.

64. The respondent called Ms Khoza the security guard and Ms Thabethe the complainant in the matter. The applicant testified in his defence and he called Mr Dlamini a professional nurse and Mr Ngcobo a laboratory manager who is in the employ of the respondent for 28 years.

65. Before dealing with the evidence it is necessary to record some of the common cause issues;

- (1) The applicant was not on duty on the 20 August 2010 the day of the allegations;
- (2) The allegations relates to incidents that took place after hours;
- (3) The applicant was drunk;
- (4) The applicant was on the premises visiting Mr Ngcobo;
- (5) On Ms Thabethe's evidence the applicant was man handled when he was escorted;
- (6) Ms Thabethe followed the applicant when he was being escorted by the guards.

66. At this stage charges A and C will be dealt with. In charge A Ms Thabethe in her evidence in chief says that it was about 22h00 and she was listening to the radio news when she heard the noise from the applicant's car radio. The crisp issue is was there a noise and if so did it constitute a nuisance.

The applicant admitted that when he entered the institution his radio was switched on and when asked by Mr Ngcobo to switch it off he did so. Mr Ngcobo conceded that the sound could be heard by Ms Thabethe due to the close proximity of the living quarters.

67. Ms Khoza said that they got a call about the noise and when she got there she noticed that the noise was coming from the applicant's radio. He was in the house and refused to come out and they had to pull him out and escort him away. This evidence must be treated with caution as it is neither here or there. She does not say how loud the noise was, was it causing a disturbance, and who was causing a disturbance and most importantly if they escorted him away who then put the radio off. Since there is no such evidence the evidence of the applicant and his witnesses that he switched off the radio before the guards came must be accepted.

68. As argued by the respondent why will Ms Thabethe phone and that she did is not disputed but what must be taken into consideration that there was an intervening period. The period in which she made the call, and subsequent the applicant switching the radio off. If there was a person standing by the car it is strange that Ms Thabethe as a manager will not know the person and why was he not called to testify.

It is on this basis that the applicant is not guilty of this charge.

69. The third charge is charge C and the action was strongly defamation of character. This charge is not understood, in fact should be placed as a non starter as the respondent did not lead evidence on this charge. All Ms Thabethe said was that she lost her dignity as a senior manager. The applicant had undermined her and it was women's month and she will always remember the incident on women's month. Ms Khoza said the applicant was swearing compared to Ms Thabethe saying that the applicant used vulgar words. There are no specifics at all what the defamation is about. There are no sufficient particularities and therefore the applicant is not guilty of this charge.

70. Finally the second charge remains. Charge "B "he assaulted Ms Thabethe..... Prior to the incident Ms Thabethe stated and the applicant confirmed that there existed a good relationship between them.

At this juncture mention need to be drawn to two aspects:

Firstly the introduction of the charge sheet the very last sentence “he was not working at the time Public sector strike.”

Second aspect Ms Thabethe was on special duty to monitor the public sector strike and on her version if anything was wrong she should have phoned the police.

71. Ms Khoza stated that they handcuffed the applicant and he escaped and went back to the living quarters and they did nothing.
72. Ms Thabethe was at risk and it is here that the conduct of the applicant must be looked at. If the assault was wilful how did he escape and was alone and he would have pursued Ms Thabethe. But what did he do , he went to lock up his car and then go back to Mr Ngcobo’s premises and it is only then the police came and apprehended him.
73. The applicant swung his hand and unintentionally not wilfully struck Ms Thabethe on her face. He does not remember kicking her nor does he deny it. On the evidence presented an inference must be drawn that Ms Thabethe had indeed taunted the applicant and he was provoked and that is the reason he unleashed towards her. Do we believe that Ms Thabethe walked with them without uttering a word and the guards are controlling the applicant. What reason did she have to accompany them. Clearly there was this intention and it was to remove him from the premises because he was not wanted there at the time of the strike. That is more fully stated in the introduction of the charge sheet and nobody was wanted there.
74. The applicant admits that in any event his conduct was wrong, expressed remorse, given up alcohol and attends church regularly. He has paid the price for his actions in that he was incarcerated over the weekend, has a criminal record and if the offence is repeated he will go to jail.
75. The above is important because as we know in the Sudumo v Platinum Mines case that important question was asked can the offence be repeated and can it be repeated in case of his suspended sentence in the criminal court. Also the price he paid was that the relationship with the mother of his child has broken off with him as a result of this incident.
76. The applicant is a young man whose conduct on the night under the circumstances must be condoned on account of diminished responsibility. It is common cause that he was drunk on the night.

77. The complainant Ms Thabethe as the aggrieved person believes that the dismissal was a good and fair decision to this extent in *Edcon vs Pilimer CCMA and Reddy* where it was clearly stated that the respondent had to lead evidence whether the trust relationship was broken or not and no evidence was led in this regard. The applicant states that the trust relationship is not broken as he was not suspended, remained and fulfilled his duties until his dismissal. Ms Thabethe is not at the institution any more as she has been transferred to Pietermaritzburg.
78. There is no impediment for the applicant not to be retrospectively re-instated.

ANALYSIS OF EVIDENCE AND ARGUMENT

79. This matter was cited as an unfair dismissal dispute in terms of Section 191 of the LRA and the issue to be decided was whether the dismissal of the applicant was procedurally and substantively fair. At the outset I must record that I was impressed by Mr Govender's representation of the applicant even though he replaced the original representative. He raised certain pertinent points that needs to be explored and directions must be provided before I deal with the merits of the matter.

THE ALLEGATION THAT THE APPLICANT'S DISMISSAL WAS PROCEDURALLY UNFAIR

80. I have taken cognizance of the decision in **Sweeney/ Transcash [2000] 6 BALR 712 (CCMA)** where the commissioner held that arbitration hearings constitutes a rehearing *de novo* on the merits. The award must accordingly be based on evidence led at the arbitration, not on the record of the disciplinary hearing. Further an arbitration is a new hearing which means that the evidence concerning the reason for the dismissal is heard afresh before the arbitrator. The arbitrator must determine whether the dismissal is fair in the light of the evidence admitted at the arbitration. The arbitrator is not merely reviewing the evidence considered by the employer when it decided to dismiss, to determine whether the employer acted fairly. This does not prevent the arbitrator from referring to any enquiry record in so far as it is admitted as evidence in the arbitration.

The Code of Good Practice: Dismissal promotes progressive discipline, it distinguishes between single acts of misconduct that may justify the sanction of dismissal and those that may do so cumulatively. The Code identifies gross dishonesty, wilful damage to property, endangering the safety of others, assault and gross insubordination as examples of what may constitute serious misconduct that may justify dismissal as a result of a single contravention.

81. In this matter it is clear from the documents submitted by the respondent and the evidence tendered that the following may be reasonably gleaned.

The applicant was given a notice to attend a disciplinary hearing, attended the hearing, was found guilty and received his letter of dismissal. He challenges the procedural and substantive aspects of their dismissal.

82. In terms of the guidance provided in the *Avril Elizabeth Home for the Mentally Handicapped v CCMA* as per *A van Niekerk AJ* the following is of importance:

Where there is no established procedure in the work place the standard required is the one referred to in the Code. This requires no more than the following:

- (a) The conduct of an investigation;
- (b) Notification to the employee of any allegations that may flow from that investigation; and
- (c) An opportunity, within a reasonable time, to prepare a response to the employer's allegations with the assistance of a trade union representative or fellow employee; and
- (d) Communication of the decision taken including the reason for the dismissal; and
- (e) A reminder of rights to refer a dispute to the CCMA or to a bargaining council or to dispute resolution procedures established in terms of a collective agreement.

In deciding whether a procedure was fair commissioners should not adopt an overly technical approach and should bear in mind that the purpose of the recommended procedure is to provide an opportunity for dialogue and reflection regarding whether a fair reason for dismissal or some other sanction exists.

As a consequence of the above I do believe that the employer had miss-conducted itself in respect of the procedural aspect of the dismissal. Therefore I determine that the procedural aspect of the dismissal to be fair.

THE ALLEGATIONS AGAINST THE APPLICANT:

83. The applicant was a driver and was charged as follows:

Mr Mabika Andile Dave, Persal number 63303396 on the 20th August 2010 after 22hours at night he entered at Nkonjeni District Hospital premises with his vehicle registration NRB 12347 making a loud noise with his car radio. He was not working at the time, not expected to be in the premises more special it was during Public Sector Strike.

According to the Disciplinary Procedure:

- (c) His action constitutes disturbance to patients and internal residential inside the Government Premises.
- (d) He willingly fully assaulted Finance and Systems Manager, his senior Manager Ms N P Thabethe who was official standby, delegated by the CEO as a responsible person to monitor PEACE, SAFETY OF THE WORKERS, PATIENTS, GOVERNMENT PROPERTIES AND PREMISES DURING THE STRIKE.
- (c) His action was strongly defamatory of character to the Senior Executive Manager especially in the month of August that was a women's month.

84. In the main the applicant's charges relate to noise emanating from his car radio and assault on Ms Thabethe the manager in charge of the hospital on that night.

85. In respect of the charge related to the noise this is the trigger that sparked the incident. The applicant alleges that he was drunk when he drove into the hospital premises during the public service strike at night and he switched off his radio on being told to do so by Mr Ngcobo. The respondent's witnesses Ms Khoza and Thabethe dispute this version and stated that as the radio had been loud it caused a disturbance and after Ms Thabethe had requested the applicant to turn down the volume and that request was refused she called the security guards. Ms Khoza the security guard who went to Mr Ngcobo's house confirmed that the radio was still switched on. This resulted in opposing versions being tendered and to determine what would be the probable version the following are recorded:

- i. There is no ulterior motive tendered in evidence that either Ms Thabethe or Ms Khoza had any benefit or reason to implicate the applicant or to state that the radio was switched on besides stating the events that unfolded on the night.
- ii. The applicant's witnesses Mr Dlamini, Ngcobo and Mr Shandu would of choice favour the applicant's version. It was interesting to note that Mr Shandu confirmed at the court hearing that the radio was switched on and may have swayed the court's decision but elected to change his version at the arbitration until he was withdrawn as a witness.

As a consequence thereof I am inclined to prefer the version of the respondent over that of the applicant that the radio was switched on and had constituted a noise that was not acceptable inside the hospital premises.

86. This may be regarded as a minor charge that may not have resulted in the sanction of dismissal but the more serious contravention is that of the assault on Ms Thabethe by the applicant. The applicant does not deny that while he was resisting arrest and flinging his hands that he struck Ms Thabethe on the face. He could not recall kicking Ms Thabethe but stated that he does not admit or deny that it may have taken place. Here again I turn to the evidence of witnesses that were present on the night. None of the applicant's witnesses followed him to the guard house. Therefore the version of Ms Khoza and Ms Thabethe must be regarded as what had occurred. They corroborated the version that the applicant had assaulted Ms Thabethe.
87. Ms Thabethe was the senior official in charge of the hospital on the night and the assault was perpetrated in the presence of the guards and in the month dedicated to women.
88. As a consequence of the above it is established that the applicant had assaulted Ms Thabethe and therefore the charge was established.

***The Code of Good Practice guides on fair reasons for dismissals
Dismissals for Misconduct***

(4) Generally, it is not appropriate to dismiss an employee for first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Example of serious misconduct, subject to the rule that each case should be judged on its merits, are gross dishonesty or wilful damage to the property of the employer, wilful endangering of the safety of others, physical assault on the employer, a fellow employee, client or customer and gross insubordination.

THE APPROPRIATENESS OF THE SANCTION

89. In respect of the reason for the dismissal, this is best left to the discretion of the respondent and in this case, it was justified in taking action against the applicant because his improper conduct was not acceptable and the fact that he escaped while in handcuffs and went back to Mr Ngcobo's room and later being arrested by the police and his conviction at the criminal court does not advance his case of diminished responsibility because he had ample opportunity to correct his action.

Some of the grounds that ought to have necessitated corrective action were that he was with his girl friend who as a result of his action on the night has decided to terminate her relationship with him although he had given birth to his child. The Code of Good Practice in respect of Dismissals lists assault as one of the grounds of the sanction of dismissal for the first occurrence.

90. Therefore I find that the reason for the dismissal was fair.

AWARD

91. I find that the applicants' dismissal was procedurally and substantively fair.

92. The dismissal is confirmed.

SIGNED AND DATED AT DURBAN ON THIS 19 DAY OF OCTOBER 2011.



**COMMISSIONER
A S DORASAMY**