



# ARBITRATION AWARD

Panellist/s: Lufuno Lawrence Ramabulana  
Case No.: PSHS25-11/12  
Date of Award: 30-Nov-2011

In the ARBITRATION between:

DENOSA obo Malamule, B.G

(Union / Applicant)

and

Department of Health - Limpopo

(Respondent)

## DETAILS OF THE HEARING AND REPRESENTATION

- 1 The arbitration hearing was heard at the Respondent's premises in Evuxakeni Hospital in Limpopo.
- 2 The matter was heard for the last time on the 14/11/2011 and both parties agreed to file their closing arguments in writing and before the 22 November 2011. I received the closing arguments as agreed between the parties.

## ISSUES TO BE DECIDED

- 3 The only issue to be decided was the suspension of the applicant for a period of three months applicant was found guilty in the disciplinary tribunal of the respondent and suspended without pay for three months.
- 4 The suspension of the applicant follows a disciplinary hearing held on various allegations of misconduct, however applicant was found guilty on the allegations of dereliction of duties in failing to report an assault by colleagues on a psychiatric patient Johannah Ndhambi and for providing false statement about the incident.
- 5 As the above suspension was not in dispute the respondent bears the onus of establishing the fairness of the actions taken by them, it was however in dispute that the actions taken in the disciplinary process and

the sanction was in line with the prevailing disciplinary code of the respondent, this aspect of the disciplinary process needed not to be determined further as there was sufficient consensus.

- 6 The only issue that needed to be determined was the committal of the offence by the applicant and she is found guilty parties were in agreement the sanction must stand and if found not guilty, that had the effect of cancelling both the process and the outcome that was taken by the respondent

## **THE RESPONDENT'S VERSION**

- 7 Respondent's version comprised of opening address, a bundle of documents and written closing arguments as stated earlier.
- 8 The respondent also called two witnesses in Dr Martha Mmatlala Mabeba and Vongani Josephina Ngobeni.
- 9 The testimony of Dr Mabeba dealt mostly with justification on why the alleged assaulted patient cannot appear at the disciplinary hearing and the nature of Johannah Ndhambi's illness.
- 10 Largely her evidence was accepted and for my part as the arbitrator I accepted her version. I however will not dwell much on her evidence as she did not witness the assault and only heard about it when it was reported to her.
- 11 She also examined the patient and saw visible assault mark and referred the patient Johanna Ndhambi to the doctor in charge.
- 12 Vongani Josephina Ngobeni was at the time of the assault a patient herself in the institution and was discharged on the 01/02/2011 having been admitted on the 10/03/2010 according to her she witnessed the fight.
- 13 There were two fights and she saw both fights, in the 1<sup>st</sup> fight, she saw the patient Johanna Ndhambi assaulting the nurse over an incident about a chair. She recalled applicant coming and stopping the assault on the nurse and putting Johanna Ndhambi into her court bed and closing it, in a split rush came in three nurses (Mabasa, Harmonia, and Shuma Happy)
- 14 The three went straight to Johanna Ndhambi took her off the bed and started assaulting her, they assaulted Johannah Ndhambi until she started turning out her tongue and her eyes changing sideways.
- 15 Whilst this was happening applicant left for the duty room which is close by, Vongani believes applicant saw this incident.
- 16 Under cross examination the witness conceded when the second fight applicant was at the duty room and it is possible applicant may not have witnessed or heard the fight.

## **SUBMISSIONS BY THE APPLICANT**

- 17 The submissions by the applicant comprised of the opening, the testimony of the applicant and closing arguments.

- 18 Applicant in her submission recall seeing one fight and in that incident she found the patient on top of the nurse, in fact she recall hearing screams and shouting from patience as she was away from the scene and on observing she found the patient assaulting the nurse (Pertunia Matye) and the nurse bleeding from the chin. At the time Johannah Ndhambi was on top of the nurse and busy assaulting her seriously.
- 19 She went to them and shouted at Johanna three times and Johanna stopped the assault immediately, she moved her to her court bed and as the Nurse Pertunia was bleeding she attended to her and in order arrest the bleeding.
- 20 She did not observe any injuries on Johanna hence she did not attend to her.

## **ANALYSIS OF EVIDENCE AND FINDINGS**

- 21 The conviction of the applicant was based largely on the testimony of Vongani Johanna Ngobeni, who was herself a psychiatric patient for a period of time and the report done by the applicant on the incident, the report is on page 62 of the bundle.
- 22 The report talks of one fight and to an extent consistent with what the applicant testified at the arbitration. Applicant dispute there was a second fight.
- 23 A visit at the ward concern, informed me that indeed, it is reasonably possible that from the duty room one would be in a better position to hear what might be happening in the ward, if a second fight took place, i am of the opinion applicant would reasonably be able to hear or detect it.
- 24 Informed by the observation in the ward, i assume applicant was in the duty room when the fight started hence she was able to hear that something is amiss with the patient and indeed the nature of the patient in the ward are capable to cause the type of noise described by the applicant and Vongani.
- 25 The bundle of documents submitted by the respondent contain what transpired at the disciplinary hearing however, I was unable to find evidence that suggested, another person may have witnessed the second or the first fight/s, the majority of the persons interviewed either were told by someone or heard the fight somehow.
- 26 It is clear from the evidence submitted that the chairperson of the disciplinary hearing found applicant guilty on the strength of Vongani Johanna Ngobeni, interestingly in the chairperson's finding there is also no mention of the 2<sup>nd</sup> fight.
- 27 The chairperson was very critical of the Nurse's (Pertunia Mathye) attitude in allowing the patient to be on top of her whilst the patient was assaulting her. He criticised her for not screaming for help, his conclusion was that applicant only started helping out on seeing that her colleague was being assaulted and bleeding.
- 28 I however see these matter in a different light and cannot make a finding on why she did not scream but it is more probable that she thought it appropriate to wade off the attack and might not have had time to

scream as the attacker was on top of her and it may be possible she might have been limited from screaming by the weight of the patient who was on top of her. Depending on her strength and fighting abilities, it is possible she may not have wished to be seated on top by someone beating you worse off by a mentally challenged person who may for that reason not be able to appreciate the wrongfulness of her actions.

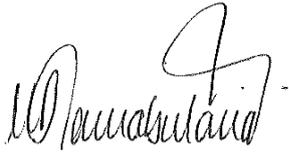
- 29 I think the evidence by Dr Mabeba which largely was uncontested is enough to convince me that Johannah Ndhambi's psychiatric illness is extremely serious, hence my conclusion she may not have been able to appreciate her actions.
- 30 Evidence was also led to the effect that, a fight broke out after the patient Johanna Ndhambi was asked to carry a chair. From this evidence, it is clear that Johanna Ndhambi was an aggressor we also heard she is violent by her nature and has previously attacked several nurses before this incident.
- 31 It was also undisputed that the applicant saw the fight and intervened by putting the patient to her bed, the witness Vongani Johannah Ngobeni testified to the effect that soon thereafter this fight, three nurses came running and went straight to the patient Johanna Ndhambi, took her off her bed and assaulted her. Applicant on seeing the three coming she went to the duty room. This testimony of Vongani was changed several times as she also testified to the effect that, when the second fight broke out, applicant was at the duty room.
- 32 I am of the view that, this piece of the witness's evidence, should be approached with utmost caution first because of the inconsistencies and contradictions contained therein whilst under oath and secondly Vongani having been committed to a Psychiatric Hospital at the time suggest she also suffered mental challenges and her evidence should for that reason be carefully analysed and should not just be accepted on face value. It is probable she may not be capable of providing an accurate account of what transpired on the day.
- 33 I find no reason why the applicant would not have been capable of intervening in the second fight if she was able to stop the first fight. On the basis of the evidence provided I find it difficult to accept that there was a second fight on that day and to accept the only version of the respondent as provided by Vongani for reasons I alluded to above.
- 34 It is my finding that the incident on the 10/07/2010 was well and reasonably recorded by the applicant who reported about the fight, the extent of the injury, and what she did as a responsible Nurse on that day.
- 35 In light of the above I accept the version of the applicant to the effect that only one fight broke out on that day. I also accept that she acted reasonably and executed her duties well and responsibly and probably avoided serious injuries on the nurse.

## **AWARD**

- 36 **The guilty finding by the chairperson of the disciplinary hearing is overturned and substituted with the finding of not guilty on all the charges.**
- 37 **Applicant's suspension and the final written warning issued to her are also overturned and cancelled.**
- 38 **The Department is also ordered to pay back the applicant's salary deducted as a result of the suspension as follows.**
- 39 **R11 656, 50 x 2 = R23313, 00.**

40 The amount stated in paragraph 32 above must be paid to the applicant within a period of 21 days from the date of the award.

Done and dated at Pretoria on this the 30<sup>th</sup> Day of NOVEMBER 2011.



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Lufuno Ramabulana

Panellist: PHSDSBC