



ARBITRATION AWARD

Panellist: Bhekinhlanhla Stanley Mthethwa
Case No.: PSHS326-11/12
Date of Award: 28 March 2013

In the ARBITRATION between:

NEHAWU obo Simangq Kunene

(Union / Applicant)

And

Department of Health and Social Development: GP

(Respondent)

Union/Applicant's representative: P. Matjika & D.Melk
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Details of hearing and representation:

1. The matter was scheduled for arbitration hearing on 13 February 2012 and remained part heard and it was heard again on 7 November 2012 and 1 March 2013 at the offices of the Department of Health, in Johannesburg. Messrs. P. Matjika and D. Melk trade union officials from NEHAWU appeared on behalf of Mr. S. Kunene (hereinafter referred to as the Applicant) on different dates and Mr. M. Lelaka represented the Department of Health and Social Development (hereinafter referred to as the Respondent). The proceedings were digitally recorded.
2. Having presented their respective cases, parties agreed to submit written arguments by 11 March 2013 but only the respondent did so.

Preliminary point:

3. At the outset of the arbitration hearing the applicant's representative raised *point in limine* in that the affidavit of a deceased could not be admitted in these proceedings. He further contended that the affidavit was deposed by Mr. Mazwi Barnabas Pasiya for the purposes of the criminal case, as soon as he passed away the said case was removed from the Court roll.
4. On the other hand the respondent's representative argued that Mr. Pasiya's affidavit should be admitted on the grounds that Mr. Volly Adoons was present when it was made and he was going to lead evidence in this arbitration hearing.
5. After hearing arguments from both parties I issued *ex tempore* ruling and determined the application in the following terms:
 - (a) *The affidavit of late Mazwi Barnabas Pasiya is admissible in these proceedings and my reasons for the ruling would form part of my award.*

Issues to be decided:

6. I have to determine whether or not the applicant's dismissal was substantively and procedurally fair.

Background to the issue:

7. The applicant was appointed on 1 December 2008 as a Ward Clerk and he was based at Chris Hani Baragwanath Hospital. He was earning R5 600.00 in monthly remuneration when he left employment. He continued in that capacity until the 27th of July 2011 when his services were terminated for an alleged misconduct.

Summary of evidence and arguments:

8. All the witnesses gave evidence under oath. This is a summary and it reflects all the relevant evidence and arguments heard and considered in deciding this matter. The respondent led evidence of Messrs. Volly Adoons, Gabriel Sibusiso Vilakazi and Ms. Kedibone Cornelia Maphunye and the applicant also testified. Their evidence may be summarized as follows;

Respondent's case:

9. The respondent contended that the applicant was dismissed for misconduct in that he was selling jobs to the community. Mr. Mazwi Barnabas Pasiya was the middle man between the community and the applicant. As a result of the commission of the said offence the applicant was charged, found guilty in *absentia* and dismissed. It is on this basis that the respondent contended that the applicant's dismissal was both procedurally and substantively fair.

The respondent called three witnesses in support of its case.

First witness – Volly Adoons

10. Mr. Adoons testified as follows;
11. He was employed as the Deputy Director for Labour Relations at Chris Hani Baragwanath Hospital. The applicant was charged for fraud in that between February and April 2010 he fraudulently took monies from the public promising to give them employment, while he knew he had nothing to do with recruitment since he was employed as a Ward Clerk. In the alternate he was charged for misrepresentation in that between February and April 2010 he acted as a Recruiting Officer for Chris Hani Baragwanath Hospital by asking a member of public (Mr.Pasiya) to collect monies from the job seekers with a promise of offering them jobs. The applicant knew very well that he had nothing to do with human resource or even employment processes since he was a Ward Clerk.

12. The second charge was that the applicant acted grossly dishonestly between February and April 2010 when he conducted himself in an unacceptable manner by giving false information to the public members with an intention of personal gain. The applicant was also charged for putting the respondent into disrepute between February and April 2010 when he displayed an unacceptable conduct to the member of the community with an intention to dent the image of the respondent.

13. After being charged the applicant was suspended on 29 October 2010. When the applicant was suspended he gave 681 Motswaledi Street as a forwarding address. That place was just behind Chris Hani Baragwanath Hospital. This was the address used to notify the applicant of the disciplinary hearing. He was accompanied by the security guard to serve the notice to attend the disciplinary hearing at the same address. He found the gate locked and spoke to the neighbour who told him that there was no gentleman staying at that address. Instead, there was a granny and three girls living there. They were also told that the granny had gone to KwaZulu/Natal. They then requested the neighbour to sign the applicant's notice to attend a disciplinary hearing. The neighbour refused to sign the notice on the basis that she did not want to have conflict with her neighbours. He also called the applicant on his cellphone but it was off. Upon arriving at the office he sent a text message to the applicant informing him of the disciplinary hearing. The applicant did not make any enquiries during his suspension. There was no alternative address provided by the applicant.

14. On 19 April 2010 there was a gentleman that was brought to his office by Tshidi Mofokeng and he introduced himself as Mazwi Barnabas Pasiya. Mr.Pasiya informed him that he was self-employed and he knew Kunene. He further explained that their relationship with Kunene was based on recruitment. Kunene was also connected to the Chief Executive Officer ("the CEO"). Mr. Pasiya further informed him that there were people that were gathered at the Recreation Hall and there were reporting for duty. According to Mr. Pasiya they were gathering on Kunene's instruction to come for induction course. Mr. Pasiya also informed him that he had paid for his kids to be employed by Kunene. He had enquired about a discount from Kunene since he was to bring all three of his children. However, Kunene informed him that it was R3000 for each person. He also required money to be separated and put in different envelopes; he wanted each envelope to contain R3000 for one person. Kunene told him that more people were required. When he heard that more people were needed he went to the church to recruit more people. In the church he recruited about 70 people and each gave him R3000 and he handed that money over to Kunene in separate envelopes. He was mainly communicating with Kunene on his mobile phone. On 19 April 2010 Kunene was not responding and his mobile phone was on the voicemail.

15. He then took Mr. Pasiya to the Chief Executive Officer to convey the same story. The CEO suggested that they should go and address people that were gathered in the Recreational Hall. They find people angry and uncontrollable. They then called the Crime Organised Unit to come and assist in addressing those people. Eventually, the police took statements from those people and opened a case. They also managed to explain to those people that they were not selling jobs. Some of those people told them that they were called by Lizzie from Human Resources Department to come and commence duties on 19 April 2010 and others said they were called by Kunene.
16. During the disciplinary hearing Mr.Pasiya testified that at first he had organised thirteen people from the church; and he called Kunene who instructed him to bring the money to the hospital. He met Kunene at the hospital parking and he gave him thirteen envelopes each containing R3000 which amounted to R39 000. At the next meeting he handed over R30 000.00 for twelve. Subsequent to that he gave Kunene R51 000.00 for seventeen people and the target was reached.

Second witness – Gabriel Sibusiso Vilakazi

17. Mr. Vilakazi testified as follows;
18. He was the Assistant Director in Human Resources. He was mainly dealing with labour relations issues. In the present dispute he was appointed as an Initiator. He did preliminary investigations with Mr. Volly Adoons. The applicant was charged for fraud, misrepresentation, gross dishonesty and bringing the respondent to disrepute. The applicant had collected monies from the public and those monies were collected by Mr. Pasiya. There was an affidavit to that effect which was deposed by Mr. Pasiya. According to Mr. Pasiya the money was given to the applicant at different times. During the investigations Mr. Pasiya confirmed his affidavit to him.
19. According to Mr. Pasiya he was collecting R3000 from each person. At one stage he gave the applicant R30 000.00. At another time he handed over R51 000.00 to the applicant. He got applicant's cellphone number from Lizzy who told him that the contact person was Simanga. The whole amount collected and handed over to the applicant amounted to R210 000.00.
20. The applicant was precautionary suspended and Mr. Adoons delivered a notice to attend a disciplinary hearing to his house. He did not get hold of the applicant and his neighbour refused to accept the notice of his behalf. The disciplinary hearing was conducted on 11 January 2011.

Third witness – Kedibone Cornelia Maphunye

21. Ms. Maphunye testified as follows;
22. She was appointed as a chairperson in the applicant's disciplinary hearing. Mr. Volly Adoons informed her that when the applicant was suspended he left a contact telephone number. But the applicant was not reachable on the mobile phone provided. She also called the applicant before commencing with the hearing. She proceeded with a hearing in the absence of the applicant after satisfying herself that he was properly notified of the hearing. The hearing was held on 11 January 2011.
23. The respondent called Messrs. Barnabas Pasiya and Volly Adoons as witnesses during the hearing.
24. Mr. Pasiya testified that his wife informed him that there was somebody selling job at Chris Hani Baragwanath Hospital. He then requested the person's telephone numbers from his wife. His wife obtained the contact numbers from her colleague, Lizzy. His wife and Lizzy were working at Helen Joseph Hospital. Mr. Pasiya then called the applicant who confirmed that he was charging R3000 person looking for the job. The applicant informed him that there were 43 vacant posts to be filled. According to Mr. Pasiya he had three kids that were looking for the job; as such he arranged R9000 for his kids and paid the same to the applicant. He arranged further thirteen people from the church. He then called Kunene and they met at the parking lot at Chris Hani Baragwanath Hospital. He handed thirteen envelopes over to the applicant containing R3000 each. Subsequently, he gave the applicant R51 000.00 for seventeen people. Mr. Kunene then informed Mr. Pasiya that there would be an induction course in April 2010. They were in constant contact with Mr. Kunene. Eventually, they agreed that people should meet at BP Petrol Station next to Chris Hani Baragwanath Hospital and move to the Recreation Hall. On the day of the induction course the applicant called Mr. Pasiya and informed him that the course has been cancelled. He called the applicant back several times on his cellphone but it was on voicemail. He then went to the applicant's office but found it locked. He went to the next door office and found a lady who took him to the CEO office. He eventually met the CEO at about 14h00 and that stage people were very angry.

Applicant's case:

25. It was the applicant's case that his dismissal was substantively and procedurally unfair in that he was not afforded an opportunity to defend himself. He was not served with a notice to attend a disciplinary hearing. The notice reflects that the hearing was held on 10 January 2010 but in fact it was conducted

on 11 January 2011. The notice to attend was issued 3 January 2011 which was outside the prescribed period. At the end of the disciplinary hearing he was not afforded an opportunity to mitigate the sanction. The applicant was convicted on indirect evidence since there was no victim of the alleged scam was called to testify. The respondent also failed to call Lizzy to come and corroborate Mr. Pasiya's testimony. It was on this basis that that the applicant contended that his dismissal was both substantively and procedurally unfair.

The applicant testified on his own and did not call any witness.

26. The applicant testified as follows;
27. He became aware of the charges against him on 29 October 2010 when he was suspended from work. He was staying at 681 Motsoaledi Squatter Camp. He did not receive any message that there were people looking for him. His cellphone number was 079 220 5551 and he did not switch it off during the entire period of his suspension. He did not know Mr. Barnabas Pasiya. It was not true that he promised members of the public jobs. He did not know the reason for his dismissal.
28. He was not identified by any person that he took the money from him. He did not receive any money from the public members. His office was located inside the maternity ward.
29. On 7 February 2011 he received a letter through a registered mail which was informing him that his suspension was lifted on 3 January 2011. He was on vacation leave between 13 April 2010 and 15 April 2010. On 19 April 2010 he was also on vacation leave.

Analysis of evidence and arguments:

30. In terms of section 188 (1) of the Labour Relations Act dismissal is not unfair if the employer proves that the reason for dismissal was for a fair reason based on the employee's conduct (and that the dismissal was in accordance with a fair procedure).
31. In this instance the applicant was charged for fraud in that between February and April 2010 he fraudulently took monies from the public after promising to give them employment. In the alternate he was charged with misrepresentation in that between February and April 2010 he acted as a Recruiting Officer for Chris Hani Baragwanath Hospital by asking a member of public (Mr. Pasiya) to collect monies from the job seekers with a promise of offering them jobs.

32. The second charge was that the applicant acted grossly dishonesty between February and April 2010 when he conducted himself in an unacceptable manner by giving false information to the public members with an intention of personal gain. The applicant was also charged for putting the respondent into disrepute between February and April 2010 when he displayed an unacceptable conduct to the member of the community with an intention to dent the image of the respondent.
33. In defence; the applicant's representative contended that Mr. Barnabas Pasiya's affidavit could not be admitted after his demise. The affidavit was obtained for the criminal case and after his death that case was removed from the Court roll. In support of this contention it was submitted that the applicant could not be convicted on hear say evidence and this is what makes the applicant's dismissal substantively unfair.

Legal Principles

34. In terms of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988, hearsay evidence may be admissible. The factors to be considered are the following:
- (c) the court having regard to:
- (i) the nature of the proceedings;
 - (ii) the nature of the evidence
 - (iii) the purpose for which the evidence is tendered;
 - (iv) the probative value of the evidence;
 - (v) the reason why the evidence is not given by the person upon whose credibility the probative value of such evidence depends;
 - (vi) any prejudice to a party which the admission of such evidence might entail; and
 - (vii) any other factor which should in the opinion of the court be taken into account
35. In **Foschini Group v Maldi & others [2010] 7 BLLR 689 (LAC)** the court held that the rule against the admission of hearsay is no longer an absolute one in our law, by virtue of the provisions of section 3(1)(c) of the Law of Evidence Amendment Act 45 of 1988. Therefore, if it is in the interest of justice hearsay evidence should be generally heard and admitted. In the present case, had I refused to admit the affidavit of the deceased and hear evidence arising out of that affidavit the applicant would not have been placed on defence at all. Accordingly, it is clearly desirable in the interest of fairness between management and its employees that all the material evidence concerning the conduct of an employee should be heard so that the arbitrating commissioner should have the benefit of the accused employee's

response to the allegations. Refusing to admit hearsay evidence in this instance would have obstructed this arbitration hearing and that would have not been in the interest of justice. Therefore, it would have impeded a fair and proper ventilation and exploration of the alleged offences against the applicant.

36. Having determined that Pasiya's affidavit is admissible in line with the provisions of the Law of Evidence Amendment Act 45 of 1988 I must determine what weight to be attached to his evidence. I am mindful of the fact that the allegations made against the applicant are serious and could lead to dismissal. Therefore, to attach undue weight to such allegations could have a most prejudicial effect upon the applicant.
37. Amongst others, section 3(1)(c) (v) of the Law of Evidence Amendment Act 45 of 1988 provides that the presiding officer should take into account what was the reason for the witness's non-appearance in the proceedings? In other words, why is the evidence hearsay? Where the reason for the non-appearance is death, surely the arbitrator should not disregard hearsay evidence and attach little weight to it. Precisely because the witness has died and he could not come and produce evidence in person.
38. Secondly, I should consider under which circumstances was the hearsay evidence made? Was it given under oath? Was it delivered openly at formal proceedings? Was the evidence given to a person who testified at the arbitration proceedings? Was the statement when given open to challenge by the accused?
39. In the present case, I am much more comfortable to attach considerable weight to Pasiya's affidavit since it was given under oath in the presence of Adoons. Furthermore, it was given under oath before Maphunye in a disciplinary hearing. This affidavit was clear and consistent Thirdly, are there any aspects of the evidence directly led before the arbitrating commissioner which corroborate the hearsay evidence? Lastly, did the person implicated by the hearsay statement testify before the arbitrating commissioner? What was the intrinsic quality of his or her evidence?
40. Having taken into account all the above factors I hold a view that the applicant's defence should be rejected for the following reasons. He failed (a) to alert any of the respondent's witnesses that he would come and deny that he knew Pasiya. At no (b) stage where the applicant hinted that he would come and testify that he did not receive monies from Pasiya. It was never (c) put to Adoons that when he was texting and calling the applicant he was using a wrong number, instead of 072 220 5551.

41. Accordingly, in my view the applicant's version is highly improbable. It is my conclusion that Pasiya had no reason to fabricate a version that Simanga Kunene was selling jobs at Chris Hani Baragwanath Hospital. This version was corroborated by both Maphunye and Adoons who were present when Pasiya was testifying in the disciplinary hearing. The applicant was unable to explain why out of multitude of employees employed at Chris Hani Baragwanath Hospital Pasiya singled Simanga Kunene out and make a statement under oath that he was selling jobs. This is why I find applicant's testimony lacked all conviction and substance. He was also ill at ease in giving evidence, and had a thoroughly unconvincing demeanour. He appeared to be modifying his version as the case was progressing; this is why he failed to put his version to the respondent's witnesses. This is also what made his version come across as highly improbable.
42. Therefore, when the surrounding facts put together they outweigh the evidence of the applicant on material facts, accordingly, I find on balance of probabilities that the applicant was the person that received monies from the deceased. As such, I confirm guilty verdict pronounced by the respondent.

The allegation that the applicant's dismissal was procedurally unfair

43. On a preponderance of the probabilities from the evidence led in this arbitration hearing I found no procedurally defects in the dismissal for the followings reasons; as much as the applicant disputed that the notice to attend disciplinary hearing was delivered to his residential address I do not find any reason why Volly would fabricate his testimony. Both in his evidence-in-chief and cross-examination he repeatedly stated that he delivered the notice to the applicant's residential address and the hearing was held on 11 January 2011. He consistently testified that he delivered the notice in the company of a security guard and there was a trip authority to that effect. There was no dispute that the address used by the respondent was the correct residential address supplied by the applicant.
44. Therefore, it is my finding that the notice to attend disciplinary hearing was served to the applicant and the hearing was conducted on 11 January 2011 despite the incorrect date reflected on the notice. Accordingly, the applicant was properly notified of the hearing and the respondent was entitled to proceed with a hearing on 11 January 2011 in the applicant's absence.
45. The hearing could have not been postponed indefinitely simple because the applicant was not found from his residential address. The applicant should appreciate that the respondent had a business to run; therefore, the respondent could not be expected to leave disciplinary issues hanging forever. The

applicant's contention that he was not afforded an opportunity to defend himself does not hold water and it must be rejected. Accordingly, it is my conclusion that the applicant was given an opportunity to defend himself but he failed to take up the offer.

46. Accordingly, I am satisfied that the respondent followed a reasonably fair procedure in respect of the dismissal of the applicant.

Appropriateness of sanction:

47. Both parties did not address the status of the employment relationship. However, in my view the nature of the offences (fraud and gross dishonesty) was sufficient to strain the relationship between the parties. Secondly, it could be very difficult to enforce discipline in the workplace if the applicant could be reinstated. In fact that would make a mockery of the respondent's disciplinary code and the discipline in the workplace.
48. The applicant had been in the respondent's employment for almost 2 years. I think that does not constitute a lengthy record of service and it does not warrant special consideration in mitigation. Therefore, in light of the offences committed by the applicant I am unable to find that there were any factors to warrant a finding that the dismissal was unfair. In my view no employee that can expect to be forgiven after committing heinous deeds the applicant was charged and convicted for in the public institution. I am mindful of the hardships this dismissal might have brought to the applicant, but having weighed up the above factors I believe that the dismissal was for a fair and valid reasons.
49. Having taken all the factors into consideration as required by schedule 8 of the Labour Relations Act and the case of ***Sidumo & another v Rustenburg Platinum Mines Ltd & others [reported at [2007] 12 BLLR 1097 (CC) – Ed]***, I find that the gravity of the offences committed by the applicant is one that under the circumstances warrants dismissal.
50. I must now make an appropriate award in the circumstances.

Award:

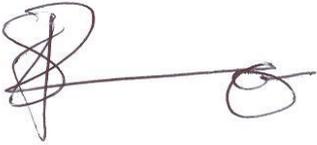
51. I find Mr. Simanga Kunene's dismissal both substantively and procedurally fair.

52. Mr. Simanga Kunene is not entitled to any relief.

53. No order as to costs is made.

DONE AND SIGNED IN JOHANNESBURG ON THIS 28TH DAY OF MARCH 2013.

Arbitrator: Bhekinhlanhla Stanley Mthethwa

A handwritten signature in black ink, consisting of a large, stylized initial 'B' followed by a horizontal line and a smaller, circular flourish at the end.

Signature