



ARBITRATION AWARD

Panelist/s: Faith Ncumisa Bantwini
Case No.: PSHS383-10/11
Date of Award: 2-May-2012

In the ARBITRATION between:

ARBITRATION AWARD

Panelist: F.N.Bantwini
Case Number: PSHS 383-10/11
Date of Award: 30 April 2012

In the matter between

E.T. Mhlongo Att. obo Ntshangase VRM. : APPLICANT

AND

Department of Health-KZN : RESPONDENT

Union/Applicant's Representative : Mr. E.T. Mhlongo
Union / Applicant's Address : 321 Smith Street
Durban
4000

Telephone : 031 301 4201 :
Telefax : 031 301 4204

Respondent's Representative : Mr. J. Scharbot
Respondent's Address : Department of Health
Head Office of Health

the time of his dismissal. He was dismissed on 24 August 2010 for allegations of misconduct emanating from the fact that he signed twice in one document according to the chairperson's report. He challenged the dismissal by referring the dispute to the PHSDSBC through his Attorney.

SURVEY AND ANALYSIS OF EVIDENCE AND ARGUMENT

4. In terms of section 192(2) of the LRA the onus is on the respondent to prove the fairness of the dismissal of the applicant.
5. According to Mr. Schabort's opening statement the applicant was a General Manager; Supply Chain Management. He failed to adhere to some legislation and this resulted in the respondent's loss of about 250 million. The applicant did not act accordingly in his capacity.
6. **Mr.Pule Zwane**, the first witness for the respondent testified as follows:
7. He conducted a forensic audit when the respondent appointed him in May 2010. The applicant was amongst the delegation that went to Japan to visit the medical equipment company, Toshiba. Five months after the visit, Mr. Ndlela made a requisition to procure medical equipment (digital radiography equipment) worth R120 million. The applicant was acting as CFO. He signed in his position as a General Manager supporting Mr. Ndlela's requisition. The applicant also signed as CFO without vacating his position. In terms of PFMA the applicant was supposed to vacate his position. He acted as CFO on 05 December 2008 only.
8. The HOD, Doctor Mbele approved the requisition on 05 December 2008 on the basis of the recommendation of the applicant and Mr. Ndlela without going through the document (bids process). According to Mr. Ndlela's recommendation the procurement was dealt with under emergency delegations and in terms of the interim delegations. The tender was restricted to 4 suppliers, Tecmed Africa, Phillips, Siemens and GE Health. The new radiography equipment

which was being purchased was digital and it has not arrived. The existing equipment is analogue and it is still in use.

9. Section 31 of Public Finance Management Act (PFMA) stipulates that funds that have not been utilized can be rolled over to the next financial year. Techmed was paid an amount of R93 127 469, 02 and the payment was approved by Mr. Ndlela. The amount was paid 6 days after the bid was awarded to Techmed. On 24 and 26 February 2009. Some of the goods arrived at King Edward Hospital in October 2011. In terms of PFMA payment is only made when goods have been delivered. The total amount that was paid for the machines was 263 million while the approval was for R120 million.
10. Under cross-examination Mr. Zwane testified as follows:
11. The applicant signed the requisition as the General Manager SCM, supporting Mr. Ndlela because of the critical importance of the delegation. This document appears on page 57 of the respondent's bundle. The applicant was the custodian of the procedures hence his recommendation that supply chain management (SCM) procedures must be followed. The applicant was supposed to have left his position when he acted as CFO. When an official is acting on a position he has to take responsibility of the position he was acting in. This means that the document was flawed as the applicant over flouted the rules of supply chain management.
12. The applicant was the active player of the loss of the respondent's money. He was not supposed to support Mr. Ndlela's requisition. Only the CFO and HOD are supposed to invoke 701 delegations.

13. **Mr. Vishnu Kannie** the second witness testified as follows;
14. He is the Assistant Manager; Supply Chain Management and is responsible for the hospital revitalization programme. During December 2008, while he was on leave, he was called by Mr. Pillay who is the second in command in his section regarding an invitation of bids for radiology equipment. The bid according to Mr. Pillay was urgent as it was 701 delegation and it had been approved. In January, although not all the documents which were required were not available, Mr. Hawk instructed him to proceed with the bid. He then lodged a grievance because he was not happy about how the process was handled.
15. The delegation went to the relevant committees (BEC and BAC) and it was not approved by the BAC. Only 4 suppliers were called. The matter was treated as urgent and the CFO and the HOD had already signed.
16. Under cross-examination, the witness testified as follows;
17. He is occupying a position of Assistant Manager; Supply Chain Management, level 9. He never acted in a position of Chief Financial Officer and General Manager. He submitted a recommendation of 701 and 702 delegation to the CFO and the HOD. Mr. Ndlela initiated the process and it was authorized by the CFO and the HOD approved it. He (the witness) was not aware that the applicant was acting as CFO on 05 December 2008. Mr. Kevin Pillay acted in his (witness) position when he was on leave during December 2008. The recommendation went to both committees, BAC and BEC as it was approved by the HOD. The applicant was not supposed to relinquish his position for the CFO position.
18. The third witness **Ms. Rani Nadasser** testified that she was working at the Radiographic Section in Wentworth. Her duty was to advise the Departments on Radiograph Equipment. She testified that some

of the goods have not been delivered and that she sent a Technical Evaluation Team Report to the Department concerned advising them on these items.

19. In closing, **Mr. Scharbot** argued as follows:

20. The applicant acted in two capacities but did not have an authority to do so. According to Treasury Regulations, the accounting Officer must take all reasonable steps to prevent abuse of supply chain management system and investigate any allegations of improper conduct or failure to comply with and take necessary steps to remedy, alternatively, report any conduct that may constitute an offence in the South African Police Service. The delegation that was supported by the applicant did not meet the standards of urgent/emergency delegation in terms of supply management chain management delegations.

21. As a General Manager: SCM and Acting CFO, the applicant is an adviser of the HOD. He should have noted and advised the HOD that Mr. Ndlela's submissions was not in line with general delegations of 702. The applicant neglected his duties and this caused a loss to the respondent.

22. With regards to the procedure, the respondent representative advised the chairperson that the applicant had been notified via registered mail post sent to the applicant on 30 July 2010 to his last known address. A confirmation of the notification to attend a disciplinary hearing on 10 August 2010 was sent via registered mail on 30 September 2010.

23. The respondent's representative further argued that the applicant's lack of commitment to operating within the accepted norms makes the continued employment operationally too risky. The respondent finally asked for costs based on the allegations that the applicant acted in a frivolous and vexatious manner in pursuing this case.

The applicant's case.

24. According to Mr. Mhlongo's opening statement the applicant is challenging both the procedural and substantive fairness of the dismissal. The applicant was never invited to his disciplinary hearing. No notice of a disciplinary hearing was issued by the respondent. The applicant never authorized any panel; instead he signed a request to procure. The applicant dispute having committed the allegations. He seeks reinstatement on the same terms and conditions that existed before the dismissal as a remedy.

25. **Mr. Victor Reginald Mduduzi Ntshangase** , the applicant testified as follows;

26. He did not receive notice to attend the disciplinary hearing on the 10th August 2010. In the registered mail on the 30th July 2010 he received a notice of set down for the 23rd July 2010. He produced an envelope indicating that it was posted on the 30th of July 2010 with the written print on the notice, which implied that the person who addressed the envelope did so after the notice was already in the envelope. This evidence was not disputed by the respondent. There was no notice of set down produced by the Respondent for the date of 10 August 2010. The Respondent did not address the issue of Procedural fairness but did indicate during cross-examination of the Applicant that Mr. Mnyango, a Senior Official from Department of Health indicated that the offence was serious and he will be dismissed anyway.

27. On substantive fairness, the applicant's evidence was that he signed twice on 5 December 2008 directing the Infrastructure Development Clinical Support Procurement process. That was the last time he heard of this document until he was suspended and dismissed. He was not part of the process to procure these goods as this was done in the section of Infrastructure Development and not at Provincial Head Office. He further testified that he never contravened any Regulations or Act of the Employer or Treasury Regulation since it was a Department Policy that a person does not relinquish their positions if they are acting in other positions even if the positions are senior.

28. The Applicant further admitted that on the 05th December 2008 he was acting as the Chief Financial Officer (CFO) when he signed a page marked 57 of "G" Bundle. He signed in both capacities. In his testimony, he supported the submission and remarked as follows.

“The urgent part of the delegation is to be used as Delivery is only critical important”.

29. He testified further that this implied that delivery is always important since those are responsibilities of all Departments. In the position of the Chief Financial Officer, he recommended as follows:

“Subject to Procurement Process being followed”

He (the applicant) implied that the Infrastructure Development and clinical support should follow their SCM procedures, which implied that they must have told their Bid Evaluation Committee (BEC) and Bid Adjudication Committee (BAC) before anything was to be done. That was the last time he saw the document according to his testimony.

30. The applicant denied that he authorized any payments as alleged in allegation I; he denied that he authorized payment of R65 633 086-00 as alleged in allegation I and II. He stated that R.A Govender authorized these payments. He further denied he filled the VAT and serial numbers of the equipment, he could not verify anything in allegation II since he never dealt with these documents. In allegation III, he never dealt with these documents since they were handled by Infrastructure not by Head Office. It was never known who the bidders were.

31. Under cross-examination , the applicant testified as follows;

32. He was not notified about his disciplinary hearing by the respondent. He received a notice of disciplinary hearing on 05 August 2010 advising him of a disciplinary hearing which was heard on 30 July 2010. On 06 August 2010 he phoned his union as he could notice that there was something wrong with the letter. The union wrote a letter to the respondent on 11 August 2010 advising them of the error. This was reasonable.

33. On substantive issues, the applicant testified that the recommendation on page 57 was approved by the HOD as an urgent delegation not an emergency delegation as it falls under urgent delegations. He supported it based on delivery as critical important. Funds could not be rolled over as they (funds) were

from a conditional grant. Funds that could be rolled over are from appropriated funds. He acted for 3 days as CFO. He stressed to Doctor Mbele, the HOD that before she can approve the delegation, she must make sure that supply chain management processes are followed. He was sure of what he was recommending because one cannot procure without following the supply chain management processes. The applicant further testified that he was appointed by the HOD to act.

34. Under re-examination, the applicant submitted that he signed twice as he was acting as the CFO at the time when the submission was forwarded to him and there is no section that he contravened in the Treasury Regulation and Public Finance Management Act (PFMA). The applicant further submitted that he was never charged for signing twice by the respondent. With regards to the recommendation from Mr. Ndlela, he wrote *Proper procurement policies must be followed*, he meant that procurement for the machines must go via relevant committees. There are committees within the procurement section who are responsible for awarding adjudication of bids.

35. **Mr. Zenzele Mzimela**, the first witness for the applicant testified as follows:

36. He works for Ubuchule Accounts and Business Advisors Incorporative as a Director. In 1985 he was working for Kwazulu Natal Government as a Director; Financial Services. In 1996 he worked for the Department of Arts and Culture as Chief financial Officer as well as for Transnet. He had been contracted by almost all Government Departments with the exception of the Department of Transport as a Financial Accountant and has been working with the PFMA.

37. In terms of PFMA, acting is not clear but section 44 of Human Resources Policy deals with delegations. When a person is on leave, another employee can act in your position without relinquishing your position. This means that the acting employee wears 2 caps. The witness

was referred to page 57 of the bundle. The applicant signed the document as acting as CFO and also as a General Manager. This is not out of order in terms of section 38 of the PFMA. The HOD who is the accounting officer approved the document. There is nothing wrong or sinister; seemingly the matter was very urgent.

38. Under cross-examination the witness testified as follows;

39. The document on page 57 is an emergency delegation. The HOD is the accounting officer and he had discretion to sign or not to sign the document. The HOD in this case signed, approving the recommendation of the GM and the CFO. The approval of the HOD implies that there was an emergency. Signing in two capacities is proper regardless of the period of acting. Seemingly the funds were made available to the respondent in terms of Division of Revenue Act (DORA).

40. Under re-examination, the witness confirmed that it was not wrong for the applicant to sign twice in the document that appears on page 57.

41. The second witness, **Mr. Andries Mdumiseni Zulu** testified that he works for the Department of Public Works since 1982. He is now occupying a position of a Senior Manager: Asset Management. He has experience in human resources, administration, procurement, and supply chain and property management. The witness was referred to page 57 of the bundle and testified that in Government service it is normal for an acting employee to sign in his position and for the acting position. The only exception is when an official is signing an order in terms of Treasury Regulations for funds to be paid. The applicant has been unfairly dismissed if he was dismissed for signing twice in the submission that appears on page 57.

42. Under cross-examination, the witness testified that signing twice in a document referred to on page 57 is normal. In terms of section 38, 44 and 45 of PFMA, the delegation can be in writing or verbal, one has to look at the rationality of the instruction

43. In closing **Mr. Mhlongo** argued as follows:

44. The Applicant did not contravene any Regulations or policy by signing twice. The Respondent does not have any policy, which prohibits officials from signing twice if they are acting in the position. The Respondent failed to produce that policy and furthermore failed to give evidence as whether such policy exists. During the whole hearing, we have privilege to PFMA Act and Treasury Regulations but the Respondent failed to identify the section, which was contravened by the Applicant.

45. Schedule 8 Item 7 of the code of good practice in terms of the Labour Relations Act, 66 of 1999 updated 2009 provides:

Any person who is determined whether a dismissal for misconduct is unfair should consider:-

a) Whether or not the employee contravened a rule or standard regulating conduct in, or relevance to; the work place. The Respondent failed to produce the rule, which was contravened by the Applicant; therefore, we conclude that there is no rule, which was contravened.

b) If a rule or standard was contravened, whether or not-

i. The rule was valid or reasonable rule or standard

There was no rule produced

ii. The employee was aware, could reasonably be expected to have been aware of the rule or standard.

No rule produced- the Applicant as Senior Official would have known the rule if existed.

iii. The employer has consistently applied the rule or standard. The rule had never applied before since it does not exist.

iv. Dismissal was an appropriate sanction for contravention of the rule or standard. In this case, it is not because there was no rule, which was contravened.

46. The applicant's representative finally submitted that the applicant seeks retrospective reinstatement with full benefits as a remedy.

ANALYSIS OF EVIDENCE AND ARGUMENT

47. It is common cause that the applicant was charged for misconduct which emanated from allegations of authorizing payments of R93 127 469, 02 and R63 086, 00 to Tecmed Africa Pty Ltd respectively. The third count deals with disqualification of bidders; Siemens, Phillips and GE Health Care in respect of bids ZNB 302/08 to ZNB 319/08.

48. It is the applicant's case that he was never notified about his disciplinary hearing. He received a registered mail on 30 July 2010 which notified him about the disciplinary hearing of 23 July 2010. The respondent did not send a notification for the disciplinary hearing that was scheduled for 10 August 2010. No evidence was led by the respondent to refute the applicant's claim. Mr. Scharbot in his closing arguments submitted, that the respondent's representative advised the chairperson that the applicant was advised about the disciplinary hearing through a registered mail on 30 July 2012 to his last known address. A notification of the disciplinary hearing of 10 August was sent on 30 July through a registered mail.

49. With regards to substantive fairness, no evidence was led by the respondent implicating the applicant on the authorization of the amounts. According to the evidence led by the

respondent's second witness. Mr. Vishnu Khan. The payments were authorized by G.A. Govender. A schedule reflecting the amounts paid to Tecmed Africa appears on page 4 of the respondent's bundle. He further testified that the applicant had nothing to do with these payments as it was not his job to authorize payments. With regards to the third allegation, the applicant denied the allegation and no evidence was led by the respondent which implicated the applicant to this offence.

50. It is common cause that the applicant was dismissed for signing twice in a document according to the report of the chairperson of the disciplinary hearing. It is important to note that signing twice did not form part of the charges/offences which the applicant was charged for.

51. The first respondent's witness, Mr. Pule Zwane testified that it was wrong for the Applicant to sign twice in a requisition that was initiated by Mr. Ndlela. He further stated that the applicant should have asked somebody else to sign on his position as he was the Acting CFO. He alleged that by signing twice he was contravening Treasury Regulations, PFMA Act etc. there was no policy or section of the Treasury Regulation and PFMA, which was produced by the Respondent, which implied that the action of the applicant was contrary to that particular section of the Act.

52. It is the responsibility of the Respondent to prove that the Applicant contravened certain rules. There is no rule at the Department of Health, which stipulates that a person cannot sign twice except if you are making payment that means if you committed an order for service, or goods to be procured when the invoice is received the same official cannot authorize expenditure in relation to the order he initially authorized.

53. The applicant testified that he never contravened any Regulations or Act of the respondent or Treasury Regulation since it was a Department Policy that a person does not relinquish their post if he is acting in another position even if it was senior post.

54. The evidence of the applicant was corroborated by the testimony of Messrs. Mzimela and Zulu. Both witness gave expect evidence and has vast experience in the government service. Mr. Mzimela testified that it is the normal practice in the Department that the officials delegate the assignment and responsibility since the Public Service cannot come to the stand still because of the absence of an employee, others give each other an authority verbal or through emails. He said work or service delivery act would not come to a standstill because of the absence of the official.

55. Mr. Mzimela further testified that grant is not manageable in terms of the PFMA only; it is also manageable in terms of Division of Revenue Act, Act (*DORA*). He testified that conditional grant does not fall under the provision of roll over covered by item 6(4) of the Treasury Regulations read with section 30(2) (g) and 31(2) (g) of the PFMA since it is the program allocation fund with specific condition which is different from normal budget allocation. He denied that the Department lost monies because the applicant signed twice and his signing twice had nothing to do with authorizing of expenditure and payment. The HOD according to both witnesses is the watchdog of the department; she knew when to approve and not to approve as HOD.

56. Mr. Zulu testified further that signing twice is a common practice in all Departments in the Public Service, there are uniform prescripts applicable to all departments and these are, as far as this case in concerned, PFMA, Treasury Regulations and Provincial Treasury Practice note

for Supply Chain and Finance respectively. He further stated that acting is mandated in terms of section 37 of the PFMA, which reads as follows:

57. When accounting officer is absent or otherwise unable to perform the functions of accounting officer, or during a vacancy, the functions of the Accounting Officer must be performed by the Official acting in the place of that accounting officer"

58. Mr. Vishnu Kannie, the respondent's second witness also testified that the applicant was not supposed to relinquish his duties for the acting position of CFO. During his (Mr. Kannie) absence in December 2008 while he was on leave, Mr. Pillay was acting in his position and he did not relinquish his duties for the acting position.

59. It appears from the adduced evidence that the applicant did not contravene any regulations or policy by signing twice. The Respondent does not have any policy/rule which prohibits the officials from signing twice if they are acting in the post. The respondent failed to produce that policy and furthermore failed to give evidence as to whether such policy exists.

60. The applicant had a clean disciplinary record and has 27 years of uninterrupted service. Although Mr. Scharbot submitted in his closing statement that trust relationship was tarnished and it would be risky to reinstate the applicant, no evidence was led suggesting the same.

61. In terms of Section 192(2) of the LRA the onus is on the respondent to prove the fairness of the dismissal of the employees. Section 188(2) of the LRA stipulates that dismissal must be for a fair reason and in accordance with a fair procedure. The respondent has failed to discharge its onus.

62. I deem reinstatement and 12 months compensation to be just and fair. The basis of this compensation is that the respondent had no tangible reason to dismiss the applicant.

AWARD

63. I therefore make the following award:

64. The dismissal of the applicant, **Mr. Victor Reginald Mduduzi Ntshangase** by the respondent, **Department of Health-KZN** is declared to be both procedural and substantively unfair.

65. The respondent, Department of Health-KZN is ordered to reinstate the applicant **Mr. Victor Reginald Mduduzi Ntshangase** on the same terms and conditions of employment as existed prior to the date of dismissal.

66. The respondent, the **Department of Health-KZN** is further ordered to pay the applicant **Mr. Victor Reginald Mduduzi Ntshangase** **12 months** salary being the sum of R814 000,00 calculated as $R67833,33 \times 12 = R814\ 000,00$ with full benefits as back pay on 15 May 2012 less any statutory deductions.

67. The applicant **Mr. Victor Reginald Mduduzi Ntshangase** is ordered to report for duties at the respondent's workplace on 15 May 2012.

68. There is no order as to costs.



Signature

Faith Ncumisa Bantwini

PHSDSBC Panelist