ARBITRATION AWARD

Panellist/s: **Ananthan Sanjivi Dorasamy**
Case No.: **PSHS433-11/12**
Date of Award: **20-Jun-2012**

In the ARBITRATION between:

In the ARBITRATION between:

NEHAWU obo DLANGAMANDLA A & 1 OTHER
(Union / Applicant)

and

DEPARTMENT OF HEALTH: KZN
(Respondent)

Union/Applicant's representative	: MR B E VILAKAZI
Union/Applicant's address	: P O BOX 239 EMPANGENI 3880
Telephone	: 035 792 6614/5
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Respondent's representative	: Ms N A GUMEDE
Respondent's address	: PRIVATE BAG X 9051 PIETERMARITZBURG 3200
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INTERPRETER	: Ms N ZONDI

DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration proceedings commenced at 10H00 on the 7 June 2012 at the Ngwelezane Hospital Boardroom in Empangeni. Mr B E Vilakazi of Nehawu of the PSA represented the applicants and Ms N A Gumede represented the respondent. After discussing the matter the parties agreed as follows:
2. No oral evidence would be led.
3. The applicant/ employee will serve its Heads of Arguments on the commissioner and respondent on or before 11 June 2012
4. The respondent will serve its answering Heads of Arguments on the commissioner and applicant on or before 15 June 2012. THE RESPONDENT SUBMITTED HOA ON THE 19 JUNE 2012.

APPLICANT'S SUBMISSION

5. This is our submission in the form of Heads of Arguments where we are challenging the Procedural and Substantive Fairness of the dismissal of the applicants by the respondent. Before we tender our arguments we like to start by narrow down the issues in dispute as well as the issues of common cause.

ISSUES OF COMMON CAUSE:

6.1. The applicant (Dlangamandla, A.) was employed by the respondent on the 15th May 2006.

6.2. The applicant (S.P. Gumede) was employed by the respondent on the 22nd May 2006.

6.3. The applicant (Dlangamandla, A.) was employed by the respondent as Mortuary Technician.

6.4. The applicant (S.P. Gumede) was employed by the respondent as Pathology Officer (Mortuary Driver).

6.5. The applicant (Dlangamandla, A.) was earning R13368.25 before he was dismissed by the respondent.

6.6. The applicant (S.P. Gumede) was earning R8284.25 before he was dismissed by the respondent.

6.7. Both the applicants were dismissed by the respondent on the 01st September 2011.

6.8. The representative of the respondent and the representative of the applicants had a pre-hearing meeting which resulted to an agreement where applicants pleaded guilty in all charges with an exchange of the sanction of Final Written Warning and Three (3) Months Suspension Without Pay suspended for Three (3) years.

ISSUES IN DISPUTE:

7.1. Whether or not the chairperson of the hearing had a jurisdiction to overturn the pre-hearing agreement by issuing a sanction of dismissal without hearing the evidence as oppose to the proposed sanction.

7.2. Whether or not the sanction of dismissal was issued appropriately.

PROCEDURAL FAIRNESS

8. The hearing took place on the 31st March 2011 and was finalized on the said date. The sanction of dismissal was issued on the 27th May 2011 which is almost two (2) months away from the date of the disciplinary hearing. According to the disciplinary code and procedure of the Public Service, Section (7,3)(o) which says "The chair must communicate the final outcome of the hearing to the employee within five (5) days after the conclusion of the disciplinary enquiry and the outcome must be recorded on the employees personal file".
9. In this case it took the chairperson of the hearing almost two (2) months to communicate the decision to the applicants without any explanation through his findings for the delay, let alone the fact that the plea bargain agreement had been tendered before him which reduces the complexity of the matter. Therefore Resolution 1 of 2003 as amended is a Collective Agreement signed at the PSCBC and both parties cannot deviate from it. The excessive delay by the chairperson of the hearing to communicate his findings constitutes procedural unfairness.

SUBSTANTIVE FAIRNESS

10. The chairperson of the hearing arrived to the decision of dismissal against the applicants without hearing the merits of the matter due to the fact that there was a plea bargain agreement which was entered to by both the applicant's representative and the respondent representative. This assertion is collaborated by the findings of the chairperson of the hearing on "Bundle B' page (14) paragraph (21). The chairperson's conduct was irregular by the fact that he considered the portion of the plea bargain agreement in so far as the guilty plea is concerned and abandoned the proposed sanction, yet he never instructed the parties to provide oral and documentary evidence to inform him when he made his findings.
11. The representative of the respondent during the disciplinary hearing was appointed in terms of Resolution 1 of 2003, disciplinary code and procedure, therefore his mandate was to represent the respondent including in the pre-hearing agreement. This assertion is also collaborated by the findings of the chairperson on "Bundle B" page (13) paragraph (8).
12. The chairperson further acted irregularly when in his findings identified that there were gaps in the presentation made in the form of pre-hearing agreement but never subject the parties to lead evidence in addressing those gaps. Therefore one can draw a conclusion that the chairperson of the hearing based his findings on assumptions.
13. The chairperson of the hearing further conceded that most probably a different enquiry would have arrived at a different conclusion when evidence can be presented. Therefore his assertion can suggest that his finding might be improper because he never heard any evidence and further to that one might ask a question where does he based a sanction of dismissal as an appropriate sanction.

14. The chairperson of the hearing had no jurisdiction in overturning the pre-hearing agreement because in the Criminal Justice the Prosecutor and the Defense entered into plea bargain and both of them presented that plea bargain before the Judge for consideration and where the Judge in unhappy the adjustments can be made. In Labour Law there are no pieces of Legislations which seeks to suggest that the chairperson of the hearing can or cannot overturn the decision of the pre-hearing agreement. However precedents has been set in the Dept. and is also conceded by the chairperson of the hearing on "Bundle B" page (13) paragraph (8) that it is common knowledge that pre-hearing meetings and agreements are acceptable.

15. The sanction issued against the applicants was not appropriate due to the following circumstances.

15.1. There was a pre-hearing agreement where both parties reach a common ground on misconduct as well as the sanction.

15.2. In terms of pre-hearing agreement the Applicants showed remorse by admitting guilt.

15.3. The applicants were not precautionary suspended during the disciplinary hearing which demonstrates that the relationship of trust was not irreparable broken.

15.4. The respondent never considered the clean record of the applicants in so far as misconduct is concerned.

15.5. In terms of Labour Relations Act 66 of 1995, Section (3), Subsection (2), "The courts have endorsed the concept of corrective or progressive discipline. This approach regards the purpose of discipline as a means for employees to know and understand what standards are required of them. Efforts should be made to correct employee's behavior through a system of graduated disciplinary measures such as counseling and warnings."

15.6. In terms of Resolution 1 of 2003, Section (2,1) the principle says "The disciplinary hearing is a corrective measure and not punitive one."

16. The Constitutional Court in Sidumo & Another v Rustenburg Platinum Mines Ltd & Others [2007] 12BLLR (CC) at paragraph (78) held that

[78] "In approaching the dismissal dispute impartially, a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that had been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employees challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee's conduct, whether additional training and instruction my result on the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long service record. This is not exhaustive list."

17. Therefore we are contending the dismissal sanction as not an appropriate sanction as the chairperson did not considered the circumstances tendered before him which did not comply with the precedents set

by the case of Sidumo & Another v Rustenburg Platinum Mines Ltd & Others [2007]12 BLLR (CC).

RELIEF SOUGHT

18. We are appealing and praying to the reasonable decision maker to consider our arguments as well as circumstances tendered before him and find the dismissal of the applicants procedural and substantively unfair.
19. We also appeal to the commissioner to order a re-instatement of the applicants to the same conditions of employment as they were before they were dismissed.
20. On the issue of re-instatement retrospectively we like to address the commissioner to the fact that the applicants has been dismissed since the 01st September 2011, which means it is almost eight (8) months the applicants were not at work and without remuneration. In terms of Resolution 1 of 2003, the respondent disciplinary code and procedure prescribed that suspension without pay shall not be more than three (3) months. In terms of the Labour Relations Act 66 of 1995, Section (193) the commissioner has powers to issue an order to reinstate and compensation. Therefore since we contend that the sanction of dismissal was not appropriate we are appealing to the commissioner to order the compensation for the months that are above than those prescribed in the respondent's disciplinary code. The case reference: UNISA v Solidarity obo Marshall & Others [2009] 5 BLLR 510 (LC).

RESPONDENT'S SUBMISSION

21. The applicants declared a dispute alleging unfair dismissal. The matter was set down for arbitration on the 7 June 2012.
22. The common cause issues raised from paragraph 1.1 to 1.8 in the applicant's Heads of Arguments are correct.
23. The issues in dispute in paragraphs 2.1 to 2.2 are correct.
24. On the issue of procedure it is correct that the sanction was not communicated five days after hearing. The reason for that is that the Presiding Officer afforded parties time to prepare their mitigating and aggravating factors.
25. The hearing took place on 31 March 2011. The parties submitted their arguments in April 2011. The Presiding Officer had to consider arguments and apply his mind. He managed to finalise his report on 10 May 2011 then forwarded it to the employer. The employer had to do administration and sanction letters were signed on 24 May 2011.
26. The respondent submits that the disciplinary hearing was not finalised on 31 March 2011 because parties were still required to submit their written arguments. Furthermore the disciplinary code and

procedure section 7.3 (o) does not indicate what happens if the sanction is not communicated within five days.

27. The respondent submits that the investigating officer entered into plea bargaining without the mandate from the manager who appointed him therefore the investigating officer acted ultra vires. This is confirmed by the affidavit from the relevant manager (Annexure A). Section 105 and 105 A of the Criminal Procedure Act states that a prosecutor who authorised in writing by the National Director of Public Prosecution may negotiate and enter into agreements in respect of a plea of guilty. It was not the case with the investigating officer.
28. It is worth mentioning that the disciplinary code and procedure does not make a provision for plea bargaining and a sanction of suspension suspended for a number of years. The investigating officer and applicant's representatives applied what is provided for in the Criminal Procedure Act 51 of 1977. The disciplinary code is not meant to imitate court proceedings.
29. The disciplinary code which is a collective agreement stipulates the possible sanctions that a presiding officer can pronounce. Clause 7.4 (a) i-vii of the disciplinary code and procedures stipulates the different sanctions that can be pronounced by the chair of the hearing. Sanctions are:

    Counselling;

    A written warning valid for six months;

    Suspension without pay for no longer than three months;

    Demotion;

    A combination of the above; or

    Dismissal.

    The three months suspension without pay suspended for three years that they agreed on is not on the list. The parties can therefore not deviate from a collective agreement.
30. The presiding officer has the powers to decide on the case whereas the investigating officer has to present the case for a presiding officer to pronounce an appropriate sanction.
31. The respondent submits that the chairperson heard the case found the applicants guilty and afforded parties an opportunity to prepare and submit their mitigating and aggravating circumstances. He then concluded that the appropriate sanction was dismissal.
32. The applicants were represented and their statements clearly indicated that they committed this serious offence.
33. The presiding officer could not hear any evidence because the applicants admitted to the charges.
34. The respondent submits that the presiding officer's conduct was not irregular in any way because the applicants admitted to the charges and he afforded them an opportunity to make written mitigating

factors.

35. The presiding officer indicated that he considered the matter at length, the seriousness of the offence together with mitigating factors. The respondent's argument is that there was nothing that was binding on him to the pre hearing minutes. He had powers and authority to deviate from it.

37. In Wium v Zondi & others (2002) 11 LC 7.22.2 J 3854/00 it was held that where the presiding officer is not empowered to make a final decision but only a recommendation a more senior level of management can override the recommended penalty and substitute it with a more severe penalty. In this case the presiding officer had powers to override the sanction agreed upon by the parties because of his position, powers and seniority to the investigating officer and the hearing. The disciplinary code states that the Presiding officer pronounce the sanction which makes it binding.

38. The applicants were not precautionary suspended because there were no reasons for that. Their presence at work could not jeopardize the investigation.

39. The respondent further submits that the posts that were occupied by the applicants have been abolished.

40. The applicants committed a very serious offence as indicated on the charge sheet. They left a body in the vehicle and the following day it was decomposed when it was discovered in the vehicle. This was a very traumatic experience for the family who came to identify the body of their beloved one and the body was not found at the mortuary.

41. The respondent that the commissioner rules that the dismissal was procedurally and substantively fair.

ANALYSIS OF EVIDENCE AND ARGUMENTS

42. .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.

SPECIAL NOTE

43. The parties convened a pre-hearing meeting and the following was recorded and signed by the employer and union representative:

PRE-HEARING MEETING

Both parties have embarked on a pre-hearing meeting before the actual hearing with the intention to narrow down the issues in dispute as well as the issues of common cause. After lengthy discussions both parties have reached the following consensus;

1.

Both parties acknowledge the seriousness of the misconduct.

2.

Both parties also acknowledge the bad image caused by the incident.

3.

Both parties also acknowledge that based on the oral evidence through investigation and documentary evidence that misconduct was not committed intentionally.

4.

Both parties also agreed that such incident was a human error.

5.

Both parties also agreed that they are certain aspect within the content of the charges that are in dispute and they are others that are not in dispute.

6.

Both parties agreed that the Officer's Charges will plead guilty on all charges with an exchange that the appropriate sanction will be Final Written Warning valid for six (6) months and three (3) months suspension without pay Written warning which will be suspended for three (3) years.

44. The presiding officer Mr L L Mashaba recorded the following in his decision:

OUTCOME OF DISCIPLINARY HEARING

INTRODUCTION

1. This is the disciplinary enquiry of Mr AM Dlangamandla and Mr SP Gumede employed at Mtuba Forensic Mortuary. AM Dlangamandla is employed as a mortuary technician and SP Gumede as a driver. They appeared in the hearing simultaneously and were both represented by one representative.
2. It is noteworthy that on carefully studying each charge sheet the basis of the alleged misconduct is the same; as a result the charges leveled against the two officers were almost similar but not the exact mirror image. Charge 1 and 3 differed in wording/phrasing.

SCOPE OF THE ENQUIRY

3. The disciplinary enquiry was procedurally constituted as according to Resolution 1 of 2003.
4. The enquiry was duly entrusted with the jurisdiction to hear and decide on the matter of alleged misconduct, Mtuba Forensic Mortuary v AM Dlangamandla and SP Gumede [2011].

ENQUIRY PROCEEDINGS, EVIDENCE PRESENTATIONS AND ARGUMENTS

5. The representative requested to brief the hearing on the pre-hearing meeting they had with the investigating officer before the officers charge could plead guilty or not guilty.
6. The representative brought to the knowledge of the hearing that they had their own contestation of the charges that they were charged with.

7. In summary both parties had reached common ground in the following issues:-
   a) Both parties acknowledge the seriousness of the misconduct;
   b) Both parties also acknowledge the bad image caused by the incident;
   c) Both parties also acknowledge that based on the oral evidence through investigation and documentary evidence that misconduct was not committed intentionally.
   d) Both parties also agreed that such incident was human error.
   e) Both parties also agreed that there are certain aspect within the content of the charges that are in dispute and there others that are not in dispute.
   f) Both parties agreed that the Officers charges will plead guilty on all charges with an exchange that the appropriate sanction will be final written warning valid for six (6) months and three (3) months suspension without pay which will be suspended for 3 years.
8. It is common knowledge that the pre-hearing meetings are in acceptable practice in matters of disciplinary hearings. Involved parties do reach valid agreements during such meetings.
9. The representative proposed that the agreements they have reached in a pre-meeting be adopted as is and thus technically put the hearing to rest. Therefore in his view there was no need to present mitigating factors and aggravating factors.
10. The pre-hearing meeting in my knowledge is not a disciplinary hearing and does not equate or replace the actual hearing. It is another avenue allowed to find common ground on matters in dispute about the case to be heard, it is known that a guilty party can plea bargain during a pre-hearing meeting.
11. The admission of guilt during pre-meeting does not sum up the process such that then both parties will then decide the sanction, the sanction remains a responsibility of the presiding officer in the hearing after having heard the mitigating factors and aggravating factors as well as carefully studying the nature of allegations that were leveled against officers.

PLEADING

12. The officer charged pleaded guilty to the charges.

Findings, Aggravating and Mitigating Factors

13. The officers charged were found guilty by their own admission.
14. The investigating officer in his aggravating factors had cited the seriousness of the misconduct by the officers charged.
15. Further to that the investigating officer had indicated that arising from the pre-hearing meeting he agrees with the sanction that they proposed in the pre-meeting.
16. ……
17. ……..

18. The fact that Karee Funeral Services at times do assist in off loading bodies does not to me explain why it did not happen that day, it also puzzles me why then the officers charged neglected their duty as well.
19. ……
20. ……..
21. The charges leveled against the officers at a glance can be called ”gross negligence” after studying the facts presented in the hearing and also the minutes of the pre-hearing meeting in my mind I am convinced that the hearing did not hear all the facts of what transpired, there are gaps in presentation ie refer para 15 where it is claimed there were reasons as to the action but they are not clearly stated.

SANCTION

22. The presiding officer after considering the whole matter at length, the seriousness of the offence, the image of the department and the mitigating factors have come to recommend the following sanction to be implemented to both officers charged.
    a) Dismissal as of immediate effect.
23. The chair of the enquiry accepts the facts that it is human to err and most probably a different enquiry would have arrived at a different conclusion with the presented evidence. Therefore the officers charged have a right to appeal the sanction within 5 working days of receiving the sanction.

THE ALLEGATION :

45.The applicants were charged as follows:

CHARGES:

The alleged misconduct and the available evidence is that:

1. It is alleged that on the 18th of December 2010 during the performance of your duties you left the body of a black (African) female unattended in the Mortuary Vehicle KZN 27455. You failed to carry out a lawful instruction without reasonable cause.
2. It is alleged that on the 18th of December 2010 you furnished a false sworn statement in the execution of your duties.
3. It is alleged that on the 18th of December 2010 you falsified documents by recording the body to the mortuary as admitted.
4. It is alleged that on the 18th of December 2010 you did not clean the vehicle after off-loading the bodies. By this act you endangered lives of self and other staff by disregarding the safety rules.
5. It is alleged that on the 19th of December 2010 you interfered with the body in question by cleaning it off maggots before the body was seen by the doctor/ pathologist thus destroying evidence.

- In the course of what you were doing you willfully/ intentionally/ negligently committed gross negligence
- By your actions you brought the Department of Health into disrepute.

THE ALLEGATION THAT THE APPLICANT'S DISMISSAL WAS PROCEDURALLY UNFAIR

46. The applicants contend that the matter was finalised at the bi-lateral meeting between his union and the employer. The respondent challenges this interpretation. The issue then revolves on the principle of double jeopardy.

47. In order to determine the appropriate interpretation I will turn to the Code of Good Practice, Fair Procedure and certain decided cases.

Fair Procedure

(1).Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.

48. Since the dismissal had been established the respondent/ employer had the onus to prove that the procedure and reason for the dismissal was fair.

49. Now I turn to the facts in the case. The applicants faced certain allegations related to a body collected by the applicants but left in the vehicle until the next day.

50. The employer representative and the applicant's representative met before the hearing and agreed on their presentation to the presiding officer of the hearing. The long and short of their agreement was that the applicants would plead guilty and would receive a sanction less than dismissal.

51. At the hearing the presiding officer accepted the agreement and the following areas raises concerns as to his role.

52. The presiding officer had to advise the applicants of the dangers of pleading guilty and that he was not obliged to follow their agreement. There is no recording in his report.

53. The presiding officer if he was not sure or had concerns about the agreement ought to have advised the parties of his role and that he required evidence to base his conclusions. He did not request any further evidence but he states in his report that there gaps in the evidence. It was

incumbent of him to solicit the evidence. Further he concedes that and accepts the facts that it is human to err and most probably a different enquiry would have arrived at a different conclusion with the presented evidence.

54. The fact that the employer representative entered into the agreement with the applicants it cannot be argued that he did not have a mandate. Unfortunately his manager ought to have followed the proceedings and by the respondent's submissions there was a gap before the sanction was announced. His manager could have aborted the proceedings and there is no evidence before me that the representative was disciplined for his actions.

55. Further the presiding officer's delay in announcing the decision was not in accordance with the collective agreement and this brings into question the procedural aspect of the dismissal. Clearly the collective agreement binds the parties to the agreement and if the time frame must be adhered to otherwise non action/decision making causes it to lapse. There was no reasonable explanation for the delay in announcing the decision.

56. As a consequence of the above I find that the procedural aspect of the dismissal to be unfair.

APPROPRIATENESS OF SANCTION

57. The next aspect to be dealt with is what sanction would be appropriate in the matter. I do not believe that allegations against the applicants warranted dismissal. The applicants consented to the plea of guilt with the proviso that they would not be dismissed. The proposed sanction by the parties again ought to have been questioned by the presiding officer and it should have been brought in line with the disciplinary code which is a collective agreement stipulates the possible sanctions that a presiding officer can pronounce. Clause 7.4 (a) i-vii of the disciplinary code and procedures stipulates the different sanctions that can be pronounced by the chair of the hearing. Sanctions are:

Counselling;

A written warning valid for six months;

Suspension without pay for no longer than three months;

Demotion;

A combination of the above; or

Dismissal.

The three months suspension without pay suspended for three years that they agreed on is not on the list.

58, It may have been appropriate for the presiding officer to have considered a sanction less than dismissal. I say this because the applicant pleaded guilty alleging that it was due to human error and that it is human to err but they ought not to get off because they are not altogether with clean hands. A

further aspect that was not considered was the role that the undertaker Karee Funeral Services played in the collection and storage of bodies.

59. I have taken into account the guidance provided for in the County Fairs Foods case And Sidumo & another v Rustenburg Platinum Mines Ltd & others in arriving at my decision to interfere with the employer's sanction.
60. As a consequence of the above I determine that the dismissal of the applicants was both procedurally and substantively unfair.
61. As a consequence of my findings above I order that the applicants be re-instated but elect that the effective date of re-instatement shall be later than the date of dismissal and that as a result of the applicants not being with clean hands they forfeit remuneration and benefits for the period between the date of dismissal to the date of re- instatement. The date of re-instatement into posts that were similar or like those undertaken by the applicants prior to their dismissal. The re-instatement shall be from the 9 July 2012 and the applicants must report for duty on this date at their previous place of employment and the respondent to place them in suitable positions.
62. Further I have considered the issue of costs and do not believe that either party act frivolously or vexatiously and therefore determine that neither party should be saddled with a cost order against it.

AWARD

63. I find that the applicants dismissal were procedurally and substantively unfair.
64. The respondent must re-instate the applicants as from the 9 July 2012 and the applicants must report for duty on this date at their previous place of employment and the respondent to place them in suitable positions.
65. The applicants forfeit their remuneration and benefits for the period between the date of dismissal to the date of re- instatement
66. No order for costs is made.
67. This file should be closed.

DONE AND SIGNED IN DURBAN ON THIS 20 DAY OF JUNE 2012.

signature

Arbitrator: Anand Dorasamy