ARBITRATION AWARD

PHSDSBC
PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

Case No: **PSHS597-16/17**
Commissioner: **Anna Maria Fourie**
Date of award: **11 December 2017**

In the matter between:

DENOSA obo Maleshoane Alinah Pule (Union/ Applicant)

and

Department of Health Free State (Respondent)

DETAILS OF HEARING AND REPRESENTATION

[1] The Applicant referred an alleged unfair dismissal dispute for arbitration in terms of section 191(5)(a) of the Labour Relations Act, No 66 of 1995, as amended (the LRA). The matter was set down for arbitration at Bophelo House, Bloemfontein, on 21 November 2016. The arbitration sat over several dates and was ultimately finalised on the 29th of November 2017. The Applicant was present and was represented throughout the arbitration proceedings by Mrs Fransman-Hendricks from DENOSA. The Respondent was represented by their Senior Labour Relations Officer, Mr Molokoane.

[2] The proceedings were recorded electronically and I also took notes by hand. The proceedings were conducted in English. There was no need for an Interpreter.

ISSUE TO BE DECIDED

[3] It was not in dispute that the Applicant was dismissed. In terms of section 192(2) of the LRA, the Respondent had to prove on a balance of probabilities that the dismissal was fair.

BACKGROUND

[4] The Applicant was employed by the Respondent as a Professional Nurse and Midwife at National Hospital in Bloemfontein since 1 January 2012. She was dismissed on 1 August 2016. She earned R17 500.00 per month. She sought to be reinstated.

[5] The dispute emanated from the Applicant's duty at the maternity ward of the National Hospital on 15 January 2014. She challenged the fairness of her dismissal on both procedural and substantive grounds.

[6] In terms of procedural fairness, the following issues were in dispute:

[6.1] The disciplinary hearing was conducted in 2014 and she was dismissed. She appealed against the outcome of her dismissal, but she was eventually only informed on 1 August 2016 that her dismissal was upheld.

[6.2] Both the Chairperson of the disciplinary hearing and the Appeal Authority did not apply their minds to the facts.

[7] In terms of substantive fairness, the following issues were in dispute:

[7.1] The Charges against her were not proven.

[7.2] It was not clear how the Chairperson arrived at the outcome.

[8] The Applicant was charged and dismissed on the following charges:

[8.1] “On 15 January 2014, you failed to take proper care and or assessment of patient Me Nyapotse M, as there were no vital signs taken to check if the patient needs help immediately or not and this is tantamount to negligence.”

[8.2] “On 15 January 2014, you contravened the National Health Care Act of 2003 chapter 2(5) when you refused to assist a patient Me Nyapotse M by chasing her away and alleging that she will have to go to Pelonomi Regional Hospital because of her gestational age.”

[8.3] “On 15 January 2014, you conducted yourself in an improper, disgraceful and unacceptable manner in that you did not treat patient Me Nyapotse M and or assess her to check whether she require emergency treatment, and same amount to contravention of Regulations Relating to Scope of Practice of Persons who are Registered or Enrolled under the Nursing Act, 1978, Chapter 3, paragraph 3(a) – (v).”

[8.4] “On 15 January 2014, you demonstrated abusive or insolent behaviour towards patient Me Nyapotse M by being rude and saying or telling her that she was smelling (of) faeces.”

SURVEY OF EVIDENCE AND ARGUMENT

[9] Both parties submitted bundles of documents into evidence. All together there were four bundles of documents, marked “A”, “B”, “C” and “D”. The Respondent called four witnesses in support of their case. The Applicant testified, but no other witness testified on her behalf. Mrs Fransman-Hendricks submitted that a witness was subpoenaed to testify in support of the Applicant’s case. However on the day that the witness had to testify at the arbitration, she advised the Applicant that she was not going to attend the proceedings. It was the suspicion of Mrs Fransman-Hendricks that the Respondent had influenced the said witness not to attend. This was naturally disputed by the Respondent.

RESPONDENT'S EVIDENCE AND ARGUMENT

Matsheliso Evon Nyapotse, the aggrieved patient, testified as follows under oath:

[10] On 15 January 2014, she experienced stomach pain and when she urinated, she noticed that she was bleeding. She called for an ambulance, explained the situation to the ambulance staff and was transported to National Hospital where she was taken to the Maternity ward. The ambulance staff explained the situation to the sister in charge. There were four sisters in the ward. The sister in charge only asked her what the problem was, but did not check her. The sister looked at her clinic card and told her that she would only give birth in June, but she informed the sister it would be the first week in April. The sister then told her she smelled of faeces. She told the sister that she was in pain, but the sister told her that she was difficult and had to leave. She then returned to the ambulance and once it was in motion, she asked for a bedpan to urinate. While urinating, the baby fell into the pan. The ambulance then returned to the hospital where the crew called another sister to assist her. The said sister called the sisters from earlier and the sister who told her to leave was amongst them, it was the Applicant. The Applicant told her she was a fool as she did not know she was in labour. She was told to go (walk) into the hospital. The Ambulance Driver came with the bedpan and the Applicant came to assist her and gave her an injection. The Applicant asked her whether she wanted the baby to be buried or cremated and she told the Applicant that she could do as she saw fit. Another sister then advised the Applicant that there was paperwork to be signed and she was then admitted. The next day she noticed that everyone else had their beds cleaned, but her bed was not cleaned. The staff coming in informed her what had happened. Her bed linen was then changed and she was given a drip and a catheter. The student nurse assigned to sit with her informed her that her baby had died. She was not aware of it. She was advised by Sister Tau to file a complaint. The hospital offered her sessions with a psychologist. She had been seven months pregnant when she gave birth. At the time that the ambulance fetched her from her house, the baby was still kicking. When she was admitted to hospital, a student told her that she had high blood pressure. She felt hurt as a result of the bad treatment she was given by the Applicant. When the Applicant told her to sign,

she thought it was for her admission. She does not know what happened to the baby.

[11] Under cross-examination she submitted that she lived in Brandfort. She could not recall whether she was given a second pad for the pelvic bleeding in the ambulance. It was put to her that when the Applicant wanted to assist her, she refused to get onto the bed. She disputed it. She was not told to get onto a bed. It was put to her that she would not give a urine sample as she mistook the sister's comment about a bed on which someone had just given birth for an insult, namely that she was smelling of faeces. She submitted that she was only told that they did not want difficult people. It was put to her that the Applicant would testify that she told her that she was not in labour. She disputed it.

[12] It was further put to her under cross-examination that she refused to be examined and that she was, due to the week of her pregnancy, re-directed. She disputed that she refused assistance. It was put to her that the Applicant told her of the potential risk due to the week of her pregnancy and that she might have to go to Pelonomi. She insisted that the Applicant only told her to leave and that she had said nothing regarding Pelonomi. It was put to her that she was re-directed to casualties, she disputed it. She submitted that she did not know that she could give birth at seven months' pregnant. She submitted that if the Applicant treated her in time the baby could have been saved. Instead, the Applicant chased her away.

[13] She submitted that the baby was not shown to her after the delivery. It was put to her that the Applicant asked her whether she wanted to see the baby. She denied it and said the Applicant only asked her whether she wanted a funeral or a cremation. It was put to her that she signed for incineration of the baby. She insisted that she signed to be admitted. Later she submitted that she was dizzy when she signed and that she did not know what she signed. She submitted that the Applicant made her sign. When asked whether she did not know what she signed, she said that she signed for admission and not for cremation. Still later, she said that she only signed to get out of the face of the sister. She submitted that, to date, she did not know

where the child is. She submitted that she also did not make any attempt to enquire from the hospital what happened to her baby.

[14] It was put to her that, according to the records, the baby had already been dead when it was delivered. She disputed it. She insisted that she was not informed what happened to the baby and that she did not know where the baby was. It was put to her that four sisters were on duty at the time. When asked why she only accused the Applicant, she submitted that the Applicant was the one who had chased her out and later she said that she only knew the Applicant's name.

Pitso Peter Kokoana, the Emergency Care Officer, testified as follows under oath:

[15] He attended to the call by Ms Nyapotse on 15 January 2014. She complained of lower abdominal pain and pelvic bleeding. They gave her a pad for the bleeding and transported her to hospital. Upon entering the labour ward, they found the Applicant in charge. The Applicant had a look at the patient's file and patted her on the thigh, remarking that she smelled of faeces. The patient denied it. The Applicant also told them she did not want difficult people. She then said that the patient had to be transferred to Pelonomi. He accepted the order as the Applicant was in charge.

[16] They then left with the ambulance, but before reaching the gate, the Applicant requested a bedpan to urinate and whilst urinating, she delivered the baby. They made a u-turn and the asked help from a sister who stood outside. She fetched other sisters, including the Applicant and they assisted the patient in the ambulance. He took the bedpan with blood, water and the baby, to the labour ward. The patient was escorted into the ward – she walked.

[17] Under cross-examination it was put to him that the Applicant re-directed the patient to casualties and not to Pelonomi. He disputed it, insisting that he was never instructed to take the patient to casualties. It was further put to him that the patient would not co-operate. He disputed it. He could not say whether the patient responded to the Applicant that she was not in labour during the issue with the smell of faeces. He submitted that it was an issue between the Applicant and the patient.

[18] He submitted that when the bedpan with the baby was handed to him, the nurses told him that the baby was not alive. He could also not see any breathing. He submitted that the patient was not "ok" after the delivery, but strong enough to walk into the ward.

Bishnu Raj Dawadi, Consultant Family Physician, testified as follows under oath:

[19] When a pregnant patient complains of abdominal pain and vaginal bleeding, there are a few general possibilities in terms of dealing with the patient. It may be that the patient is in labour – this could only be established with an examination. It could be that the placenta is separating before the baby is out. There could also be non-labour related problems that could cause pelvic bleeding. History taking would form part of the assessment of the patient. This would entail that detailed information regarding the pregnancy, pain and bleeding must be obtained. The most important thing in order to make a diagnosis, is an examination, which could be physical, by means of ultrasound, blood tests or an investigation in theatre. The diagnosis would determine whether the patient should be transferred to another hospital or not. Referring a patient without having done an examination, would mean that you would not know what you are referring. It is important that a medical professional make the call to redirect. As the person redirecting takes the responsibility. It is important also to ensure that the patient is stable before being redirected. Whether or not there would be any point in referring or redirecting a patient, can only be determined by means of an examination to establish exactly what the position is.

[20] A macerated still born baby, is a baby that has been dead inside the uterus. One could determine this by the appearance of the skin, which would have a brown discoloration, it would be peeling and the baby would look swollen as if having absorbed water. Without examining a patient, it is risky to redirect as the situation might be a time-bomb and you would not know the time that it would blast. Referring a patient without an examination, means that one exposes the patient to risk. This would include the mother and the baby, as one would only be able to tell the baby's condition after the delivery. Even if it was established prior to delivery that the baby

was dead, the delivery could still be accommodated at National Hospital if no complications were anticipated.

[21] It is expected of a professional nurse or midwife to do the following when examining a pregnant patient:

- Taking the history of the patient
- Taking the vital signs of the mother
- If the baby is viable, the baby's heart rate should be taken
- Determine whether the patient is in labour and if so, the stage of labour
- Determine whether the assistance of a doctor is required.

[22] If a pregnant patient smells of faeces, it could be a sign of labour and it would be necessary to do an assessment. It would not be wrong to tell a patient that she is smelling of faeces, but the manner in which it is said is important and furthermore, it should be explained to the patient. One could not rely on a patient's word that she is not in labour. It is very difficult for a patient to know that, especially if it is not a full-term pregnancy. The only way to confirm is by doing an examination. Nurses know how to do this. The conduct of the Applicant when the patient came in for the first time in this instance amounted to poor management. In terms of the records of the second time that the patient had come in, there was no mismanagement. However, he could not tell about the communication. There was no record of what happened when the patient first came in. The general rule is that what was not recorded was not done.

[23] Under cross-examination, he would not commit to comment on ward management. He submitted that it often happened that patients would not co-operate. However, it was important to still assess the patient, therefore, one should call another nurse to try to assess the patient. If a patient was offended by him, he would call someone else or someone in charge. It was put to him that testimony would be led that all other professionals were busy at the time. He insisted that, even if a patient would not co-operate, one could not just leave the patient. He insisted that, since there was bleeding, the patient should have been assisted. Anal pain without bleeding would be a different story. However, this patient was seven months' pregnant, she had anal pain and she bled. He conceded that a patient could not be forced to co-

operate. However, a patient who did not want treatment could sign that she refused treatment.

[24] He confirmed that not the entire scope of practice of a registered midwife was applicable to this matter, but only those that he had mentioned in his testimony.

Dikeledi Yvonne Shounyane, Professional Nurse and Area Manager: Trauma and Emergency, testified as follows under oath:

[25] She was the Chairperson in the Applicant's disciplinary hearing. An assessment was important as it would assist to make an appropriate decision. It would be an emergency if a pregnant patient was bleeding. The bleeding would have to be attended to. The patient might be redirected, depending on the outcome of the examination. If a patient refused to be examined or did not co-operate, it would be expected of the nurse to call the matron or a senior person or a doctor to assist. Base on the evidence presented to her in the disciplinary hearing, she was of the view that the Applicant's conduct was improper. In terms of the fourth charge, she looked at paragraph (a) of the Scope of Practice, as that paragraph was the one she based her decision on.

[26] It was inappropriate to redirect the patient, given the history. She did not pick up any sign of remorse on the part of the Applicant. She regarded the misconduct in question as serious, which was why she recommended dismissal. She considered that the patient delivered a macerated baby and how it affected the patient. She insisted that a professional needed to confirm the story of the patient by checking and assessing. Regarding charge 4, she submitted that she could not consider the parts of the Scope of the Practice that were not applicable to the situation.

[27] She reiterated that bleeding in a pregnant patient was a dangerous sign and insisted that one could not just leave a patient simply because the patient was not co-operating. It was immaterial whether the patient was redirected or referred to another hospital. The signs and symptoms the patient presented with required emergency treatment. Furthermore, the issue of paper work for transferring a patient

was immaterial. The Applicant should have alerted casualties if she redirected the patient there. However, this was not done. Furthermore, a nurse could not just accept what a patient said. A nurse should confirm where the pain emanated from. The life of the patient and the baby could be in danger and the Applicant should have asked for assistance.

[28] Relating to the treatment after the patient delivered, a trolley or wheel chair should have been availed to the patient. However, the fact that the Applicant asked for assistance when she struggled at some point and the fact that the patient was referred to a psychologist, was good care.

APPLICANT'S EVIDENCE AND ARGUMENT

Maleshoane Alinah Pule, testified as follows under oath:

[29] It was expected of her as midwife to handle all maternity-related cases, including the illness of mother, baby and deliveries. On the night of 15 January 2014, she was on night duty and allocated admissions, first stage and ante-natal. Admissions entailed that one had to receive patients and determine where they should go. Ante-natal related to pregnant women who were not in labour, but complained of ailments. First stage related to women who were in the first stage of true labour. She met the patient who was brought in by Emergency Care Officers. She took the ante-natal clinic card and looked at the patient's history. She asked the patient what the problem was and the patient told her that she had anal pain and that she was bleeding. The patient was leaning on a bed that was soiled by another patient earlier. She asked the patient to get onto the other examination table. The patient refused. She then asked the patient to go to the toilet and bring her a urine sample, but the patient also refused to do this. Furthermore, the patient would not show her the pad so that she could see what the blood looked like. She then went through the ante-natal card and based on the patient's complaint and the length of her pregnancy, she asked the patient whether she knew what labour pain felt like. The patient told her that she was not in labour and that she only had anal pain. The patient also told her that she had a child.

[30] She explained to the patient that she was twenty six weeks' pregnant and even if she was going to give birth, she would be transferred to another hospital. However, since she was only experiencing anal pain, she would redirect her to casualties in the same hospital. The patient then walked out of the maternity ward with the Emergency Care Officers and went back to the ambulance. A few minutes later she received a call that there was a patient and she went out with another nurse. She found the same Emergency Care Officers outside of the ambulance and the same patient inside the ambulance with two other patients. The patient stood over a bed-pan with stretched legs. There was a foetus in the bed-pan with the umbilical cord still attached to it. She asked for a surgical blade and cut the cord. The patient then got out of the ambulance. The Emergency Care Officers walked with the patient and she carried the bed-pan with the foetus. Upon entering the hospital, she made the patient sit on a bed and she took the bedpan with the foetus to the sluice room. She then returned to the patient to finish the after-birth examination. She put on gloves and used forceps to pull out the placenta after she gave the patient an injection meant to control bleeding. She struggled with the placenta and called a colleague to assist. It then came out. She took care of the patient and then put her in a wheel chair and took her to the ante-natal room where women who did not give birth yet were. There was no private cubicle. She then returned to put the baby in a bucket with a label on and into the fridge. She then returned to the patient and told her that the baby was not alive. She asked the patient whether she wanted the baby to be buried or incinerated. The patient signed for the baby to be incinerated. One copy of this document was placed on the patient's file, one on the specimen and one given to the patient.

[31] She did not take the vital signs of the patient, but she could do a vital assessment with her senses and she looked at the history of the patient. To enable her to take vital signs, the patient must be put in a comfortable position. However, the patient would not get onto the bed to enable her to do so.

[32] She explained to the patient that if the baby was born small, National Hospital did not have the facility to care for the baby. If she was able to examine the patient, she could have detected the condition in which case she could have called the doctor to

assist ad arrange for transfer to another hospital. The patient was not referred, she was only redirected to another section.

[33] She could not diagnose the health need of the patient as the patient would not co-operate with her. After the delivery, she could give the patient post-partem treatment. She did not see anything wrong with referring to faeces. It was part of the delivery process and she could not use medical terms lest the patient would not understand her. The purpose of asking it would be to assist the patient - that is - to give her the correct treatment. The patient would be able to tell her why she smelled if she asked.

[34] Under cross-examination she submitted that she was appointed as a professional nurse in 2012. She was not in a supervisory position as all of them in maternity were midwives. Student midwives would report to the professional nurse who was the shift leader. Her training included how to deal compassionately with patients. She submitted that the patient did not refuse treatment as if she did, she would not have returned. However, the patient would not co-operate. She agreed that bleeding during pregnancy was dangerous.

[35] She submitted that she asked the patient for the pad, but the patient told her that the pad was thrown out of the window on the way to the hospital. The Emergency Care Officers told her the pad was thrown away. It was put to her that it was strange that the patient would not co-operate after travelling by ambulance to the hospital from Brandfort and without any provocation. She submitted that people behaved like that.

[36] When asked who took out the placenta, she said that she called for assistance so they could help the patient to get the placenta out to avoid further complications. She submitted that the placenta spontaneously came out.

[37] She submitted that she did not smell faeces on the patient. She would not say that the other witnesses were lying, as they did not hear where the smell of faeces came from. When asked whether it was possible that the Emergency Care Officers could have confused the issue of re-direction and referral, she submitted that the

Emergency Care Officers clearly knew what re-direction was. When the question was repeated, she said that it was probable that they confused the information they received regarding Pelonomi and being re-directed to casualties. She conceded that the patient did not receive the care she should have the first time that she came in. However, when she came in the second time, she received proper treatment.

ANALYSIS OF EVIDENCE AND ARGUMENT

Procedural Fairness:

[38] The Applicant challenged the procedural fairness of her dismissal in essence on the long delay from the date on which she was charged until the date on which she was informed that her dismissal was upheld. She also claimed that the Chairperson of the hearing was biased in that she found her guilty of only one of the regulations in the scope of practice whereas she was charged with the entire scope of practice of a midwife.

[39] The Respondent called the Chairperson of the disciplinary hearing to testify. She is also a professional nurse. She testified that she had taken all of the evidence before her into consideration in coming to a conclusion. She also testified that she found that the misconduct of the applicant in as far as charge 4 was concerned, only related to paragraph (a) of the scope of practice. The said paragraph reads as follows:

"3. The scope of practice of a registered midwife shall entail the following scientifically based acts or procedures which apply to the practice of midwifery and which relate to the mother and child in the course of pregnancy, labour and the puerperium:

"(a) the diagnosing of a health need and the facilitation of the attainment of optimum physical and mental health for the mother and child by the prescribing, provision and execution of a midwifery regimen or, where necessary, referral to a registered person or by obtaining the assistance of a registered person, as the case may be;"

[40] It is not clear how the Chairperson was biased in that she found that the Applicant was only guilty of a transgression of paragraph 3(a) in as far as this charge is concerned. Surely, being found guilty of all of the sub-paragraphs would be far more

severe than being found guilty on only one of the sub-paragraphs. In any event, the question rather is whether the Applicant was indeed guilty of the alleged misconduct. However, I could not find any indication in the evidence before me that the Chairperson had failed to apply her mind to the issues before her.

[41] Neither of the parties paid attention to the issue of the delay in outcome of the appeal. However, I accept that the Respondent did not dispute the allegation that the appeal outcome was only made known to the Applicant some twenty two months after it had been signed off. No evidence was presented to me to indicate that the Applicant suffered any prejudice as a result of the delay. I thus regard the procedural irregularity as minor.

[42] With regard to the issue that the outcome of the appeal was based on facts different than the outcome of the disciplinary hearing, I take note that the outcome of the appeal was apparently based on the entire scope of practice of midwifery. However, the outcome remained unaffected. The question is thus whether the Applicant was in effect prejudiced by this issue. I do not believe that she was prejudiced any more than she might have already been as a result of her dismissal.

Substantive Fairness:

[43] The Applicant challenged the substantive fairness of her dismissal on essentially one ground, namely that the charges against her were not proven.

[44] All of the charges emanated from a single incident. The Respondent called two witnesses who were present during the incident, namely the patient and the Emergency Care Officer who took her to hospital. The other two witnesses for the Respondent testified about accepted practice when treating pregnant patients. The Applicant, on the other hand, was a single witness.

[45] From the evidence it was not in dispute that the Applicant did not examine the patient when she first came to the hospital. The Applicant's excuse for her conduct was that the patient would not give any co-operation, which made it impossible for her to

examine the patient. The question is now whether this excuse of the Applicant would suffice to justify her failure. The expert witness called by the Respondent, dr Dawadi testified on what was expected of a professional nurse when a patient came into the maternity ward. It was clear from his testimony that it was not sufficient for a nurse to simply rely on the word of a patient without confirming the condition of the patient prior to making any decisions in terms of what assistance would be appropriate. Although he acknowledged that it might not be possible to examine a patient who did not want to co-operate, he made it very clear that it was not an excuse to turn a patient away. His testimony was clear that the Applicant should have called for assistance from a colleague or a senior person to intervene. This testimony of dr Dawadi was confirmed by the Chairperson of the disciplinary hearing, who happened to be a professional nurse since 1978.

[46] The Applicant had a long explanation of how difficult the patient was when she initially entered the ward and exactly how she refused to co-operate. However, it was very clear from the evidence that the Applicant, being a professional nurse, was duty-bound to give proper care to the patient. She failed to do so. At the least resistance, she gave up and redirected the patient to casualties. She failed to appreciate the seriousness of the situation and did not make any effort to obtain assistance from a colleague or a senior person to examine the patient. She acknowledged under cross-examination that bleeding during pregnancy was a sign of danger. Yet, despite the fact that it was reported to her by both the patient and the Emergency Care Officer that the patient had been bleeding, she did not take the necessary care to examine the patient in order to make a diagnosis. She relied upon the patient's word that she was not in labour, without confirming for herself that it was not the case. The testimony of dr Dawadi was clear that the only way to determine whether a pregnant woman was in labour was to do a physical examination. I am of the view that the Respondent discharged the onus of proving on a balance of probabilities that the Applicant was guilty of the charges in paragraphs 8.1 and 8.3 which goes hand in hand. The Applicant's excuse for her conduct can simply not justify her failure. She should have taken charge of the situation by at least calling in assistance from a colleague. Instead, it appears as though she got upset with the patient and decided to send her away without properly

assessing her condition in order to determine what kind of treatment would be the best in the circumstances. She should have known that the patient could have potentially been in labour. The signs were there and I want to say, it is probably commonplace that pelvic bleeding and lower abdominal pain during advance pregnancy, certainly spells possible trouble. A professional nurse should be even more aware of this and should take proper care to assist a patient presenting with such symptoms.

[47] Whether the patient was chased away by being referred to Pelonomi, is the crux of the second charge. The Respondent's evidence in this regard was not clear. Neither the patient nor the Emergency Care Officer appeared to be certain of the facts in this regard. The patient's testimony was that the Applicant merely told her that they did not want difficult people and that she was not directed to Pelonomi or to Casualties at National Hospital. The Emergency Care Officer however testified that the Applicant told them that the patient had to go to Pelonomi. This is a contradiction in the case of the Respondent. The Applicant's case on the other hand was not too clear either. She testified in chief that she told the patient that if she was in labour she would be transferred to a different hospital due to the stage of her pregnancy, but since she was not in labour, she would redirect her to casualties at the same hospital. Under cross-examination, she submitted first that the Emergency Care Officers would not be confused between redirection and referral as they clearly knew what those were. However, just after she said that they were probably confused due to what she had explained regarding Pelonomi. Be that as it may, the burden of proof, in terms of section 192(2) of the LRA, was on the Respondent to show that the Applicant was guilty of the misconduct as accused. It is trite that where the probabilities are even, the party who does not carry the burden of proof, should be given the benefit of the doubt. In this regard, I thus am of the view that the Respondent failed to discharge the onus of proving that the Applicant chased the patient away and referred her to Pelonomi.

[48] As far as the charge in paragraph 8.4 is concerned, I understood the testimony of dr Dawadi as well as the Chairperson of the disciplinary hearing as supportive of the Applicant's case that it is normal for faeces to be part of the delivery process. This

however, should also have been a sign of alert to the Applicant. Be that as it may, the question is whether this was at all mentioned to the patient. The patient testified that the Applicant told her she smelled of faeces. This was confirmed by the Emergency Care Officer. The Applicant's version was that she did not tell the patient that she smelled of faeces, but the patient mistook her comment that she should not get on a bed that was soiled by another patient for the Applicant saying that she smelled of faeces. The patient then got upset and would not co-operate at all. When the Applicant was cross-examined, she said that she would not say that the other witnesses lied about the issue of the faeces. I found the Applicant's account of the patient's lack of co-operation rather unlikely. Firstly, I cannot see how a woman in advance stage of pregnancy who had travelled by ambulance from a neighbouring town would arrive in hospital for assistance due to lower abdominal pain and pelvic bleeding and then refuse to co-operate with the medical staff who try to assist her. This simply does not make any sense. Whether the patient said she was in labour or not is immaterial. The fact of the matter is, the patient went to hospital to seek help as she was in pain and she was bleeding. It is not for the patient to diagnose her own condition. That is the responsibility of the medical staff attending to her. Secondly, the issue of the pad being thrown away, was never put to the Emergency Care Officer when he testified in the arbitration. It was also not put to the patient that she had allegedly said that the pad had been thrown out of the window. Furthermore, if there was bleeding, in all likelihood, the patient would still be wearing a pad when she arrived at the ward and she could have simply been asked to change the pad for a clean one and the Applicant would then be in a position to assess the severity of the bleeding.

[49] On a balance of probabilities, I am of the view that the Respondent discharged the onus of proving on a balance of probabilities that the Applicant did not properly assist the patient and that she was in all likelihood rude to her.

[50] A lot of evidence was led regarding the timing of death of the baby and also what followed on the delivery. The Applicant was not charged for that. However, I do believe that the Applicant and the patient would want some closure on this issue. I have heard the testimony of an expert witness in this regard. The conclusion I made

based on the undisputed testimony of the expert witness, was that the Applicant did not cause the death of the baby. However, due to her failure to execute her duties properly, she put the patient at risk. She also did not know when she failed to assist the patient whether the unborn baby was still alive and might have been in distress. Although her conduct did not cause the death of the baby, things could have been different if the baby had been alive and in distress. This time, the Applicant was not responsible for a death. However, the possibility was not anticipated by her and this made her grossly negligent in the execution of her duties. The question thus is whether the Respondent should be expected to put up with the risk of employing a professional nurse and midwife who demonstrated her failure to take proper care in the execution of her duties. The consequences could be grave indeed.

[51] With regards to the events following the delivery, I wish to state that it appeared from the evidence that the Applicant at that stage assisted the patient. A lot of allegations were made by the patient regarding the failure of the staff to inform her of the situation and that she was not aware what she had signed for. I accept that the patient was traumatised as a result of the events. However, I fail to understand how any mother could testify, almost three years after the incident, that she still does not know where her baby is and that, to date she did not enquire about the whereabouts of the baby. How is that possible for a mother? I simply cannot believe that testimony of the patient. Furthermore, I find it equally unlikely that the patient was not very aware of the fact that she had given birth to a stillborn baby. She must have seen the baby in the bedpan. She was asked about burial or incineration and her testimony was that she told the nurse that the latter would know what the best was. No expert evidence was presented to support the patient's testimony that she did not know what happened. Again, the Applicant was not specifically charged for this issue, but I do believe that, given the special circumstances and the evidence presented, that both the Applicant and the patient would want closure on this issue as well.

[52] In terms of the appropriateness of the sanction, I had regard to the principles laid down by the Constitutional Court in the well-known matter of **Sidumo and another v Rustenburg Platinum Mines Ltd & others (2007) 28 ILJ 2405 (CC).** Considering

the totality of the facts, the Applicant indeed made herself guilty of serious misconduct. Her conduct had consequences, namely that a patient gave birth in an ambulance and thus was severely prejudiced and traumatised. Her conduct could have even more serious consequences if the situation was slightly different. The fact of the matter is that, being an experienced midwife, she failed to take proper care of a patient and she failed to appreciate the potential disastrous consequences of her failure to do her duty. Given the general state of Public Health Services in the Country, which is well publicised, it cannot be expected of the Respondent not to take proper action in a case like this. The Applicant's basis for her challenge to the dismissal was in essence that the patient would not co-operate. As I indicated before, this excuse does not fly. The Applicant did not make any attempt to get assistance, which she should have done. The question is, can corrective measures cure such behaviour? I do not believe that it could in this instance. The Applicant persisted with her version until the very end of the arbitration. She did not show any remorse or even compassion for the loss of the patient. Considering the fact that the arbitration had to be postponed at some stage due to the Applicant herself giving birth, one would expect more compassion from her for the Applicant. Given all of these considerations, I am of the view that dismissal was the appropriate sanction.

[53] In light of the above, I found that the Applicant's dismissal was substantively fair and procedurally unfair, merely because of the delay in the communication of the outcome of her appeal to her. This was a minor procedural irregularity and based on item 139 of the CCMA Guidelines on Misconduct Arbitration, published under GN R224 in GG 38573 I do not believe that the Applicant is entitled to compensation.

AWARD

[54] The Respondent, **Department of Health Free State**, dismissed the Applicant, **Maleshoane Alinah Pule**. The dismissal was substantively fair, but procedurally unfair. Due to my finding that the procedural irregularity was minor, no compensation is granted to the Applicant.

[55] I make no order as to costs.

Signature: 

Commissioner: Anna Maria Fourie