



PHSDSBC
PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Arbitrator: Mr T. Ndzombane

Case No: PSHS844-16/17

Date of Award: 27 January 2017

In the matter between:

PSA OBO MZAMADODA KENNETH MADLAVU

(Applicant)

and

DEPARTMENT OF HEALTH- WESTERN CAPE

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The arbitration hearing was scheduled for and heard on 19 January 2017; under the auspices of the Public Health & Social Development Sectoral Bargaining Council at Hermanus Provincial Hospital in Hermanus. The applicant; Mr Madlavu, was represented by a Union Official, Mr Pool from PSA. The respondent, Department of Health –Western Cape, was represented by a Senior Labour Relations Officer, Mr Ngqame.
2. I proceeded with the matter in terms of Section 138(5) (b) (i) of the Labour Relations Act 66 of 1995, as amended (“the Act”). The proceedings were digitally recorded and typed notes were taken. Both parties submitted bundles of documents which are not in dispute and are admitted as they purport to be.

BACKGROUND

3. The applicant was employed by the respondent on 18 December 2006 as a Warehouse Clerk in Hermanus. He earned a monthly salary of R14000.00 [fourteen thousand rand] prior to his dismissal on 26 October 2016. Towards the end of February 2016 he lost his access tag and he reported such to the help desk however he was informed there were no access tags available at that stage. On 27 March 2016 he was not at work, it was a Sunday and he could not have accessed the store room on the day in question.

4. On 20 May 2016 the applicant resigned from his wife's company known as MN Akue Enterprises. At the time he signed a disclosure form on 4 May 2016 he was not aware that that he was listed as a director at MN Akue Enterprises. He believes that his dismissal was substantively unfair. If, he succeeds with the matter he requests to be reinstated retrospectively. The applicant does not challenge the procedural fairness of his dismissal.
5. The respondent stated that the applicant was charged with the following misconduct:
 - a. Charge 1: *"You allegedly made yourself guilty of an act of misconduct as contained in Annexure A of the Disciplinary Code and Procedures for the Public Service, read with the Fraud Prevention Plan 2015/16-2016/17 in that you while not on duty on or about 27 March 2016 without permission removed various goods from the stores at Hermanus Hospital (see attached list) with the intention to permanently deprive the Department of such property consequently caused financial loss to the Department to the amount of R20093.75"*.
 - b. Charge 2: *"You allegedly made yourself guilty of an act of misconduct as contained in Annexure A of the Disciplinary Code and Procedures for the Public Service, read with the Fraud Prevention Plan 2015/16-2016/17 when you failed to disclose to the Employer on 29 April 2016 that you have an interest in MN Akue Enterprises, a service provider to the Department when you was a member of the Quotation Committee that considered the bid of MN Akue Enterprises"*.
6. At the disciplinary hearing the applicant was found guilty on both charges and a dismissal sanction was meted out because the charges are viewed in a very serious light.

ISSUE TO BE DECIDED

7. I am required to determine whether or not the applicant's dismissal was substantively fair.

SURVEY OF RESPONDENT'S EVIDENCE AND ARGUMENTS

8. **Mr Rando Willemse** stated that he is employed by the respondent as Store Man at Hermanus Hospital and he presented the following evidence under oath. He is responsible for safe keeping of the stock in the store room and of issuing goods. On 21 and 22 March 2016 there was stock taking in the store. Every item was counted and registered on the inventory.
9. On 11 April 2016 he was busy issuing goods to a chief user whereby he discovered some discrepancies on one of the items. The info care milk's quantity on shelf did not correspond with the quantity on bank card. The quantity did not correspond with the total number of items on the shelves. He reported to this discrepancy to his Supervisor, Mr Glen Bucchianeri who then asked him to do a full count of all items in the

store. He then counted the items and found a lot of discrepancies on different items. In addition, he asked Mr Bucchianeri to double check his counting who then confirmed the discrepancies. According to him someone managed to get access to the store room on 27 March 2016.

10. There are two ways to access the store. The first one is through the usage of the access tag outside to the doors. The second one is through using the lifts to the store room. The investigation revealed that three employees' access cards were used to access the store. The access cards belonged to the applicant, an intern Luzuko Peter and the late Mlondolizi Sigodi. Both the applicant and Luzuko Peter were working at Supply Chain and Stores respectively. Whilst Mr Sigodi worked at the workshop. All these employees did not work weekends.
11. There is a lockable gate before one enters the store room and the key is always kept in the drawer at Supply Chain office. Both the applicant and Luzuko Peter had access to this key. The applicant's access card was used to access the store room on 27 March 2016 which was a Sunday and the store was accessed between 17:10 to 20:03 through the store lift. There are no cameras installed in that vicinity. He is not aware whether the applicant had reported that his access card was lost. Mr Luzuko Peter had access card which was used by a Ms Hannah Bishop but he did not have a key for the gate.
12. This access card had access to the store on 27 March 2016 at 19:18 until 21:22. There were lot of movements in and out of the stores. Mr Mlondolizi Sigodi's access card was used from 17:08 until 21:16. There were lot of movements in and out of the stores through this card.
13. On 29 March 2016 he discovered that the store's key was missing. He checked all the drawers in the office but he could not locate it. He then informed his supervisor who called Mr Luzuko Peter. The following day, Mr Luzuko Peter who was on leave came and checked one of the drawers and found the key. He was surprised because he had checked the drawer the previous day but the key was found by Mr Luzuko Peter. There seven employees who had access to the key for the gate. Mr Sigodi has since passed away and Mr Luzuko Peter's internship expired in May 2016.
14. **Mr Glen Bucchianeri** stated that he is employed by the respondent as a Senior Administrative Officer at Finance and Supply Chain and he presented the following evidence under oath. On 11 April 2016 he became aware of the stock losses. The investigation revealed that three access cards were used on 27 March 2016 which was a Sunday. All three employees were not supposed to be at work on the day in question. All these items were stolen in the stores as per this control sheet. The stock count was done for all the cycles.

On 27 March 2017 at 17:10 to 20:03 and on various periods the applicant's access card shows its access to the store.

15. It was his first time to hear that the applicant lost his access card at the disciplinary hearing. At no stage the applicant reported such to him. The policy states that if a person has lost a card such should be reported immediately to the supervisor and to the help desk. This is done for security reasons because anyone could access the hospital which might poses danger to employees or to the property of the hospital. The applicant did not report his access card was lost to him and the same access was used after the incident for a long period.
16. On 30 March 2016 the applicant was on duty and he used the same access card to access the hospital. The applicant only reported that his access card was lost to the help desk on 2 June 2016. In May 2016 he bought new fifty access cards as they could no longer used old cards. At the time the applicant received a new tag there were no more old cards and they have stopped reprogramming them.
17. The new card issued to the applicant would only record new information onwards and it could not show old information of him. Mr Luzuko Peter's access card was re-issued to Dr Hannah Bishop in April 2016. The practice was that all used cards should re-issue and reprogramed for employees who have lost their access cards or for new employees. It has transpired that a reprogramed access card only deletes the old name of a person but the previous information gets automatically transferred to a new employee. They have since stopped re-issuing of old cards. Employees are not allowed to share their access cards with their fellow employees.
18. The administration entrance is the one next to the lift and around the maternity ward which leads to store lift. There is a gate to the store and to access it one needs a key. Inside the store there are two metal doors. The key was kept in the drawer at Supply Chain office. All employees in the supply chain office have a key for the locked gate.
19. Mr Mlondolozzi Sigodi had passed away before the disciplinary action was taken against him even though he was suspended. Mr Luzuko Peter was an interim and his contract expired on 9 April 2016. A criminal case was opened against Mr Luzuko Peter because he is no longer working for the respondent. None of the three employees reported that their access cards were missing.
20. On 29 March 2016 it was discovered that the key was misplaced and this was reported to him. Subsequent to that he contacted Mr Luzuko Peter who was on leave and he enquired about the key from him. However,

Mr Peter arrived at work the following day and he found the key in one of the drawers. Mr Peter did not have a key of the gate because he was not permanent member as only permanent staff had keys for the gate.

21. A service provider, MN Akue Enterprises, was given a tender to supply the department with toner cartridges and this was awarded to it on 4 May 2016. Prior to awarding the tender the applicant was part of the Quotation Committee whereby he declared that he did not have any interests to the bidding companies. This was done in writing and he signed this declaration.
22. It later transpired that the applicant lied about in his declaration that he had no interest in MN Akue Enterprises because at that time he was listed as one of the directors. The applicant only resigned as a director of MN Akue Enterprises on 20 May 2016.
23. At one stage the applicant approached him to sign an application for his wife to do remunerative work outside the department because someone gave his wife a BEE Status of ten thousand rand to be part of a company. He refused to sign it because the applicant's wife did not work for the respondent and there was no need for her to make such an application. He cannot trust the applicant any more as such has irretrievable broken down. The department has suffered a financial loss as a result of the applicant's actions.

SURVEY OF APPLICANT'S EVIDENCE AND ARGUMENTS

24. **Mr Mzwamadoda Kenneth Madlavu** stated that he is the applicant in this matter and he presented the following evidence under oath. He was employed as Procurement Clerk and part of his duties were buy outs. Around February 2016 he lost his access card and he reported it to help desk manned by Ms J. Appolis. At that stage he was informed that there were no available access cards. However, he did not need the access card to move around to perform his duties because he used the main entrance to come in and out. If, he needed to go to the stores he would borrow the access card of Ms Appolis.
25. On 27 March 2016 it was a Sunday and he was at home and he does not know who used his access card on that particular day. He was not at work on that day. As an employee who worked at supply chain office and he had accessed to the office and had to a key for the office. In addition, he had the knowledge as to where the key was kept which was always placed in a drawer. He was not at work on that day and he denied that he participated to any stock loss. As an employee he could easily access the main entrance without an access card. He agrees with his supervisor if he wanted to work over time he would make a request for that and would only work when permission was granted.

26. The companies are automatically scored through a computerised methodology and the data is available. In July 2015 his wife was approached by a Mr Frank to join one of his companies MN Akue Enterprises for BEE status. There was an offer of ten thousand rand for the partnership. At that stage his wife was his girlfriend even though they stayed together. She asked him for an advice with regard to the offer which he advised her to accept it. Subsequent to that she gave his personal details to Frank because they stayed together.
27. In April 2016 he received a phone call from a SARS official who indicated that he had interest in MN Akue Enterprises but he questioned the official about this allegation and he demanded to be provided with the written details of such. Subsequent to that he asked his wife about the matter who informed him that she gave his personal details and identity number to Frank. Thereafter, they approached Frank who confirmed that he was one of the directors of MN Ekue Enterprises.
28. He then asked to be removed as a director of the company. On 20 May 2016 he signed a resignation letter. Prior to receive a phone call from SARS he was not aware that he was part of any company. He admitted that he was part of the Quotation Committee and he had signed a declaration that he had to interest in the bidding companies. He could not manipulate any compliance for this company.
29. He also did not know that his wife was part of this particular company because Frank has four companies.
30. **I will refer to cross-examination and closing arguments where necessary in my analysis.**

ANALYSIS OF EVIDENCE AND ARGUMENT

31. The respondent bears the onus in terms of Section 192(2) of the Labour Relations Act 66 of 1995, as amended ("the Act"), to prove on balance of probabilities that the dismissal was effected with a fair procedure and a reason. The applicant does not challenge the procedural fairness of her dismissal.
32. In determining the fairness of dismissal I must consider item 7 of the Code of Good Practice on Dismissal. The Code states that an arbitrator must consider whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to the workplace; and if a rule or standard was contravened, whether or not the rule was a valid or reasonable rule or standard; the employee was aware, or could reasonably be expected to have been aware, of the rule or standard; the rule or standard has been consistently applied by

the employer and dismissal was an appropriate sanction for the contravention of the rule or standard and the CCMA arbitration Guidelines.

33. It is not disputed that there is a rule in the workplace regulating dishonesty. The employment relationship is based on honesty and integrity which means that the rule is a reasonable one. The applicant does not dispute that he was aware of the rule. In addition, the applicant does not challenge that the rule is not applied consistently by the respondent in the workplace.
34. I am required to determine whether the applicant lied about his directorship in MN Akue Enterprises when he declared that he had no interest on 4 May 2016 and that he was involved in removing the respondent's property without permission on 27 March 2016. The definition of dishonesty is best given in the two cases below. In **Nedcor Bank Ltd v Frank & others (2002) 23 ILJ 1243 [LAC]**; the court held that dishonesty entails *'a lack of integrity or straightforwardness and, in particular, a willingness to steal, lie, cheat or act fraudulently'*. The definition is well simplified in the Canadian case of **Lynch & Co v United States Fidelity & Guaranty Co (1971) 1** at 37 to 38 (Ont Sc) Fraser J, *"Dishonesty is normally used to describe an act where there has been some intent to deceive or cheat. To use it to describe acts which are merely reckless, disobedient or foolish is not in accordance with popular usage or the dictionary meaning"*.
35. The respondent is therefore called upon to discharge the onus on balance of probabilities, in that; the dismissal was effected for a fair reason. In my view, in weighing the probabilities, one has to assess logic, sense and the context of the dispute in its entirety. If, therefore one cannot make a finding based on the above factors the credibility of the witnesses should enter the fray. It should be remembered that one cannot evaluate one aspect of evidence in isolation to the entire evidence.
36. In assessing evidence I will follow the principle laid down in **Hoffmann & Zeffertt: The South African Law of Evidence 4th Ed at page 562** comments as follows *"The degree of proof required by the civil standard is easier to express inwards than the criminal standard, because it involves a comparative rather than a quantitative test. On the whole it is not difficult to say one thing is more probably than another, although it may be impossible to say how much more probably. So the civil standard has been formulated by Lord Denning as follows: "it must carry a reasonable degree of probability but not so high as is required in the criminal case. If, the evidence is such that the tribunal 'we think it is more probably than not;" the burden is discharged, but if the probabilities are equal it is not"*.
37. I will first deal with the first charge which relates to the removal of the respondent's property without permission. It is common cause that the access cards of the applicant, Messrs Peter and Sigodi were used

to access the stores on 27 March 2016. Apparently, all these employees were not contracted to work weekends unless permission was granted to work overtime. I must say that the respondent only relies on the usage of the access cards on the day in question to make up its case.

38. I believe that rules are made to protect both the employer and the employees. So the fact that there is a rule governing the reporting of access cards such is meant to protect parties involved. It is therefore of utmost important that both parties adhere to the rules of the game. Failure to adhere to the rules one does such to his or her peril and the consequences such failure should be accepted by the wrongdoer.
39. Under cross-examination the applicant admitted that he had not informed his supervisor, Mr Bucchianeri about his lost access card. Moreover, the applicant failed to provide these proceedings that his access card was indeed lost in February 2016. Obviously, this places the applicant's case in a difficult situation because he had a duty to prove that indeed his access card was lost prior to the incident. Had the applicant reported his lost access card to his supervisor I do not believe that he would have even charged for this particular misconduct.
40. In addition, the applicant did not challenge the evidence that he reported for duty on 30 May 2016 and he used his access card to access the workplace. Obviously, this evidence disproves the notion that the applicant might have lost his access card prior to the incident. The applicant did not give a satisfactory explanation as to why he only received the access card on 2 June 2016. Logic dictates that if the applicant had reported the loss in February at least he would have received his card in February or early March 2016. This is so because Dr Bishop who joined the respondent on 18 April 2016 indeed she received her access card. Having considered the evidence before me I find it improbably that the applicant lost his access card in February 2016.
41. It is very strange that the access cards of both Messrs Peter and Sigodi were used on the day in question and it could not have been a co-incident that they too never reported that their access cards were lost. In my view, the applicant ought to have addressed this connection and link to the removal of the respondent's property. I have also taken into account that the applicant's company was involved in supply of goods which shows the motive as to why the applicant would have been involved in this type of conduct. Having considered the evidence before me I find on balance of probabilities that the applicant was involved in removing of the respondent's property without permission on 27 March 2016 which caused financial loss to the respondent.
42. I turn to charge 2 which relates to the allegation of false declaration that the applicant did not have an interest in MN Akue Enterprises. The applicant led evidence to the effect that in July 2015 his wife was approached

by a Mr Frank offering her shares in this company which she accepted it. I find it very strange as to why the applicant's personal details were required because if he was not part of it there was no need for his details.

43. It appears that Mr Frank was transparent and honest to them when he approached the applicant's wife to make the offer such an extent that the applicant found it fit to advise his wife to accept it. It does not make sense therefore that the applicant would have been listed as a director with his wife without his knowledge. I asked if the applicant would open a criminal case against Mr Frank, the answer was negative. This also shows that the applicant was aware of his involvement in this enterprise.
44. I am also not convinced that the applicant was not aware that his wife is a director at MN Akue Enterprises. For the above reasons I find it highly probable that the applicant was aware that he was a director at MN Akue Enterprises when he signed a declaration of interest on 4 May 2016.
45. I am bound to follow the judgement of **Hulett Aluminium Pty Ltd v Bargaining Council For the Metal Industry & Others [2008] 3 BLLR 241 (LC)** at paragraph 42 where the court stated that *"turning to the issue of the seriousness of the offence, the presence of dishonesty tilts the scales to an extent that even strongest mitigating factors, like long service and a clean record of discipline are likely to have minimal impact on the sanction to be imposed. In other words, whatever the amount of mitigation, the relationship is unlikely to be restored once dishonesty has been established in particular in case where the employee shows no remorse. The reason for this is that there is a high premium placed on honesty because conduct that involves corruption by the employees damages the trust relationship which underpins the essence of the employment relationship"*.
46. In the light of the principle laid in *Hulett Aluminium supra*, it will normally be unfair to require an employer to retain in its employment someone who is correctly found guilty of misconduct involving dishonesty and whom it does not trust. **Grogan** at page 246 described *"dishonesty as a generic term embracing all forms of conduct involving deception on the part of employees...However, in employment law, a premium is placed on honesty because conduct involving moral turpitude by employees damages the trust relationship on which the contract is founded"*.
47. The applicant did not lead any mitigating factors for consideration but I have taken into account the gravity of misconducts, the fact that he is unemployed, his bare denials of his involvement in these misconducts, which outweighs any explanation given. There is no remorse on the part of the applicant as he embarked on denialism without giving any reasonable explanation of his involvement.

48. In **De Beers Consolidated Mines Ltd V CCMA & Others (2000) 21 ILJ (LAC)** at 1058F –G it was stated *“Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise”*.
49. I therefore find that there is no compelling evidence submitted to require me to interfere with the sanction of the respondent as the actions of the applicant were destructive in nature and had gone to the heart of the employment relationship which is based on honesty and trust. The fact that she lied in the declaration form he had breached this fundamental principle. I have also taken into account that he occupied a very important position at procurement which requires trust and honesty beyond reproach.
50. Having considered the evidence before me I find on balance of probabilities that the respondent has discharged the onus that the dismissal of the applicant was for a fair reason. Consequently, the dismissal is substantively fair.

AWARD

51. I find that the applicant’s dismissal was substantively fair.
52. The application is hereby dismissed.

A handwritten signature in black ink, appearing to read 'Thuthuzela Ndzombane', enclosed within a hand-drawn oval border.

Arbitrator: Thuthuzela Ndzombane