



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Commissioner: **KM Moodley**

Case No: **PSHS971-16/17**

Date of Award: **29 June 2017**

In the matter between:

PSA obo Kubheka CE

Applicant

and

Department of Health- Kwazulu Natal

Respondent

DETAILS OF THE HEARING AND REPRESENTATION

1. The Arbitration commenced on 21 February 2017 at the VIP Lounge, King Edward Hospital, Durban and after several sittings, was finally concluded on 9 June 2017.
2. The Applicant was represented by PSA official, M N Mbambo. The Respondent, Department of Health- Kwazulu Natal was represented by its official, P S Shezi.
3. The proceedings were mechanically recorded and all witnesses testified under oath.
4. I am satisfied that the parties have been correctly cited and that the PHSDSBC has jurisdiction to hear this matter. No Points In Limine were raised by either of the parties.
5. The Applicant tabled a bundle of documents, i.e. Bundle A and the Respondent tabled a bundle of documents, i.e. Bundle B, which bundles were introduced and accepted as evidence by both parties.

6. No objection was raised to Commissioner Moodley presiding over the Arbitration.

ISSUE TO BE DECIDED

7. The issue to be decided is whether the dismissal of the Applicant, substantively and procedurally, was unfair, and if so what the remedy should be.
8. Applicant sought reinstatement to his previous post, with retrospective effect and with full back pay.
9. The Respondent disputed that the dismissal of the Applicant was unfair and sought to have this matter dismissed.

COMMON CAUSE ISSUES

- 1) It was not in dispute that the Disciplinary Inquiry proceeded in absentia after the Applicant had walked out of the disciplinary proceedings.

ISSUES IN DISPUTE

- 1) Whether the Applicant assaulted the two student nurses, Maduna and Gumede, or whether the student nurses were the ones who assaulted the Applicant.
- 2) By proceeding with the Disciplinary Inquiry in the absence of the Applicant, the Respondent had, or had not acted unfairly.

BACKGROUND TO THE DISPUTE

10. Applicant was appointed by Respondent on 1 January 2011 as a Professional Nurse at the Addington Hospital and at the time of his dismissal, the Applicant was earning a salary of R17, 558, 00 per month.
11. On 19 May 2016, the Applicant was charged with misconduct in that, it was alleged that he physically assaulted two student nurses, Ms Maduna and Ms Gumede.
12. On 5 August 2016 the Applicant together with his representative, appeared before a first sitting of the Disciplinary Inquiry. The matter was postponed to 17 August 2016 by agreement between the parties.
13. The disciplinary inquiry reconvened On 17 August (the second sitting). The Applicant was present but was unrepresented. He then telephoned his representative who advised him to walk out of the proceedings.

14. The disciplinary inquiry then proceeded in the absence of the Applicant. The Applicant was found guilty and subsequently dismissed. He then appealed against the sanction but the appeal was also unsuccessful.
15. He then referred the dispute to the Bargaining Council.

SURVEY OF EVIDENCE AND ARGUMENTS

RESPONDENT

WITNESS 1: D Subban – Chief Security Officer (Addington Hospital):

16. Subban testified that he knew the Applicant well, as the Applicant lived at the residence of the Addington Hospital. The Applicant had been involved in other untoward incidents at the hospital residence.
17. He testified that on 9 December 2015, the two student nurses, Gumede and Maduna came to his offices at the security complex, escorted by hospital security officers. The security officer informed him that Maduna and Gumede had been assaulted.
18. Subban had noticed that:
- “She was very emotional, she was crying. There was discoloration in her face. Her hair was upset, and her uniform was a little dirty. You could say that she was involved in some sort of struggle. Her uniform was also creased.”*
19. Maduna and Gumede had told him that they were on their way to the nurse’s home when they met the Applicant. The Applicant had caught Maduna by the hand, and a struggle between them ensued. The Applicant then slapped Maduna. Gumede tried to intervene and separate them, and she was also assaulted in the process. The kitchen staff then came and called for help.
20. He then advised Maduna to seek medical attention, and that both Maduna and Gumede should report the matter to SAPS.
21. Subban recalled that there were many untoward incidents in the hospital Nursing Home, concerning the Applicant, for example,
- The Applicant allowed unauthorised visitors to sleep in his room contrary to hospital policy, thereby exposing the other nurses to danger.
 - The Applicant and his friends had consumed excessive alcohol in the braai area of the hospital and KZN Security had to be called out unnecessarily, to attend to this matter.

- The Applicant and two other nurses attempted to assault the hospital security guard and in the process, they broke the boom armrest.
- In one instance Subban had to physically remove the Applicant and the nurses from the Hospital premises because of their behaviour.
- Subban also received several complaints from the nursing home that the Applicant was repeatedly consuming alcohol on the premises.

22. According to Subban, “Kubheka is notorious at Addington Hospital.”

WITNESS 2

N Maduna – Student Nurse (Addington Hospital)

23. She testified that she had met the Applicant before and occasionally she would see him. He then invited her on Facebook and they ended up chatting. Eventually he asked her out but she declined.

24. She related an incident, (incident 1) where she had received certain Whatsapp messages from the Applicant, saying things like “I’m ugly, I’m black”, and that he was only ‘joking’ when he was asking her out. She, together with Gumede, went to the ward in which the Applicant was working, She had only intended to ask him what he had meant by these messages. The Applicant did not respond, but simply walked out of the ward. He then sent her a Whatsapp message stating,

“What you just did, I’m going to kick you when I see you.”

25. She did not respond to that message.

26. She testified that on 9 December 2016, (incident 2) she and her colleague, Gumede were walking in the corridor when they saw the Applicant walking in front of them. He then started walking slowly so they went around him. It was then that the Applicant pulled her hair stating,

“Didn’t I tell you that I was going to catch you?”

27. She further testified that *“...he pulled me by my hair and pushed me to the wall and I fell. He started kicking me whilst I was on the floor.”* She then tried getting up but ended up on the floor, as he did not let her get up. He kept her down on the floor and she then became hysterical.

28. A member of the kitchen staff tried to shield Maduna from the Applicant and was shouting, “leave her, leave her”, but the Applicant continued to attack her.

29. During this time, she also heard Gumede screaming and calling for help. The Applicant then walked towards Gumede who began screaming loudly.
30. The Applicant then left.
31. Maduna and Gumede then went to the matron's office to report the matter and thereafter to the security department.
32. They did not write out their statement at that time as Maduna was still in pain. (She had excruciating abdominal pain.) The next morning, they wrote out their statement for Subban.
33. On 10 December 2016 she was admitted at Crompton Hospital for internal bleeding. She remained in hospital and was only discharged on 18 December 2016. A medical certificate from Compton Hospital was produced.
34. She then reported the matter to SAPS where a case of assault was then opened. A SAPS official together with Maduna, and Gumede then met with the Applicant, where the Applicant apologised for what he had done to Maduna and Gumede.
35. The Applicant then proposed that if they drop the charges, the Applicant would then tell the 'truth' to the matron. The Applicant also offered to buy/replace the uniform that was damaged during the incident. Maduna and Gumede then agreed to withdraw the charges against the Applicant.
36. The details of this meeting were not recorded.
37. When Maduna and Gumede found out that the Applicant did not keep up to his promises, they reopened the case (Case No 248/1/2016).
38. Maduna believed that the incident in the passage was a follow up to the threat made by the Applicant in the ward a week earlier.

WITNESS 3

Z Gumede – Student Nurse (Addington Hospital):

39. Gumede testified that she knows the Applicant as he is a staff member at Addington Hospital.
40. She stated that a few days before 9 December 2015, there was an exchange of words between Maduna and the Applicant in the ward, with Maduna saying to the Applicant “....say it to my face”. The Applicant responded by telling Maduna that “....you need to go to a Pysch”. At this incident, there was no shouting or screaming or whatever.
41. When they left the ward, Maduna showed Gumede a Whatsapp message from the Applicant stating, “When I see you, I'll catch you”.

42. On 9 December 2015, she was with Maduna walking in the passage leading to the dining hall. The Applicant was walking in front of them and when he turned his head, he saw them coming towards him. When they got closer, the Applicant turned around to face them. They then walked around him.
43. The Applicant then grabbed Maduna by the arm and said to her in isiZulu
“I told you I’m going to catch you”.
44. He then grabbed her by the arm and slapped her. She then stumbled and tripped on fell on the floor. She tried to get up from the floor by grabbing onto his shirt. I then noticed that he kicked her. I saw her get up on her feet and he continued to hit her. She tried to shield herself and I began screaming for help.
45. A member of kitchen staff then grabbed her away from the Applicant. The Applicant continued to attack Maduna but she pushed him away. Maduna’s uniform was torn and dirty as she was on the ground.
46. It was at this time that the Applicant slapped Gumede.
“I shielded my face and he moved my hands away from my face and slapped me two or three times.”
47. The Applicant then picked up her student card from the floor and threw it at her face, saying, “voetsak” and then he walked away.
48. Gumede and Maduna then went to the matron’s office and reported the incident to the Matron.
49. Maduna and Gumede then opened a case with SAPS. They then went to Subban to make a statement, but as Maduna wasn’t feeling well at the time, he advised them to come back the next day.
50. On 10 December 2016, Gumede went to see Maduna who was still in bed.
51. Maduna had then told her that she was still feeling sore, especially in the abdominal area where she had cramps. She then told Maduna to see a doctor.
52. They made statements with Subban.
53. Gumede further testified that at a meeting at SAPS held with Maduna’s parents, and the Applicant present, the Applicant admitted that he was not provoked as he wrote in his statement, and he admitted that his statement was false. He promised to go to HR to admit the truth if Maduna and Gumede withdrew the charges against him. Maduna and Gumede reluctantly agreed to this
54. Because the Applicant did not honour his agreement, Maduna and Gumede decided to reopen the case at SAPS because *“....our reputations were at stake”.*

55. Gumede further testified that as she was present with Maduna throughout the incident, she saw everything that happened before her. (“I was there from the beginning to the end and I saw everything.”) . Throughout this incident, she did not see Maduna fighting back.

WITNESS 4

S Nene – Assistant Director – Labour Relations (Addington Hospital):

56. Nene testified that he was the Chairperson of the disciplinary inquiry. At the ‘first sitting’ of the disciplinary enquiry held on 1 August 2016 the Applicant’s representative applied for a postponement which was duly granted.

57. A date for the ‘second sitting’ was then agreed upon by both parties. This date was proposed by Mr Gumbi, the representative of the Applicant, and was agreed to by the Respondent. Although Nene had a prior commitment scheduled for 17 August 2016, he cancelled that commitment in order to accommodate the disciplinary inquiry. The date agreed to at the ‘first sitting’ was 17 August 2016.

58. On 17 August 2016, the disciplinary enquiry reconvened. The Respondent was represented but the Applicant was alone and unrepresented. Nene then allowed the Applicant 2 hours within which to seek a representative or a suitable alternative. Nene then received a call from one Mr Gumbi who told him that he was in Port Shepstone at that time and could not attend the disciplinary inquiry.

59. The Respondent strongly opposed any further postponement and Nene was then left to make a ruling on this matter.

60. Before Nene could make a ruling, Gumbi informed the Applicant “...*please walk out, there is no need for you to be there.*” Gumbi’s instruction to the Applicant was made on speaker phone in the presence of everyone present.

61. Nene then told the Applicant, “if you walk out, I will continue with this matter”

62. The Applicant simply banged the door and walked out before Nene could make a ruling. Nene then proceeded with the disciplinary inquiry in absentia.

63. The Applicant was subsequently found guilty and dismissed, as assault is a dismissible offence and the Applicant had shown no remorse.

64. Nene testified that no formal application for postponement was made by the Applicant and that at no stage whatsoever did he ever request closing arguments from Gumbi.

APPLICANT

WITNESS 1

B Gumbi (Professional Nurse – PSA Shop Stewart – King Edward Hospital)

65. Gumbi testified that he knew the Applicant very well as they were close.
66. The Applicant had told him that he was attacked by two student nurses at work, and that he had told one of the nurses that she was a psycho and that she needed help. The Applicant also informed him of another incident, when he was walking in the passage to the nurse's home.
67. The Applicant told him that the nurses were "*poking him from the back*". One of them tried to scratch him on the face. He also had a cut on his lip and the buttons on the shirt that he was wearing were missing
68. Gumbi then advised him to report the incident.
69. Gumbi then testified that he represented the Applicant at the disciplinary enquiry held on 5 August 2015 where the request for a postponement was granted. They then agreed on a date for the second sitting of the disciplinary inquiry.
- "We then agreed upon another date." "I knew that we agreed on a date. I knew about the date at the first disciplinary inquiry as both parties had agreed on the date. I was part of the agreement to choose another date."*
70. He testified that as the Respondent did not send out a notice for the second sitting of the disciplinary inquiry, he did not attend as he had other commitments elsewhere, which he had to attend to urgently. When he received a call from the Applicant to say that there was a sitting on that day, he informed the Applicant that he did not receive a written notice.
71. He then told the Applicant to request another date from HR. The Applicant informed him that the Respondent refused to postpone or reschedule the hearing.
72. Gumbi then spoke to the Chairperson and requested more time (+2 Hours but the chairperson refused stating that they were going to proceed with the case.
73. Gumbi then told the Applicant to leave the proceedings.
- "I told the Applicant to leave the disciplinary enquiry as it was not procedurally fair."*
74. Sometime later, he spoke to the chairperson who told him that he could still submit closing arguments in writing. Gumbi then submitted closing arguments to the chairperson but the chairperson still found the Applicant guilty of misconduct.
75. Gumbi then lodged an appeal but it was unsuccessful.

WITNESS 2

C E Kubheka – Community Nurse (Addington Hospital)

76. Kubheka, the Applicant, testified that he knew Maduna as they chatted on Whatsapp.
77. On 1 December 2015, Maduna and Gumede entered the duty room whilst he was on duty. They started talking loudly, using vulgar language at him. He stayed quiet and listened, and then told Maduna
“I think she needs a psych consult.” because of the way she was behaving.
78. He testified that he felt threatened as he didn't know why they were shouting at him. Maduna and Gumede were pointing fingers at him and using vulgar languages. He felt threatened by this and was embarrassed because it happened in front of staff members and patients.
79. He did not call for help as he tried to be calm as if he acted differently, it could have turned out unpleasant. They were not physically violent with him but were verbally abusive towards him.
80. He did not report it to security and he did not see the need to report it to SAPS.
81. A cleaner then came up to them telling them that they were not supposed to come to the ward and make a noise in front of patients and staff members.
82. She then took them to the sluice room behind the ward and they then left.
83. He then texted Maduna telling her that he didn't like what had happened.
84. On 9 December he was walking in the passage, “when two people suddenly grabbed me”, “two people who were holding hands and hooking me from the back.”
85. He turned and asked Maduna what had happened. She started grabbing him by his T-shirt. He grabbed her back and she then tried to scratch him. He pulled his face away and “...*she scratched my upper lip on the inside*”.
86. He struggled to push her away, but he couldn't as ‘*she was powerful.*’
87. A lady from the tuck shop then tried to separate them. She took Maduna away and he then proceeded on his way to the residence.
88. He then changed his T shirt as it was torn. He told Gumbe about the incident. And then went back to the ward and reported it to the sister. He continued working. Thereafter he went to the security office to make his statement (+-17h15).
89. Applicant denied that he had attacked Maduna. Neither did he send her a message saying “*I'm going to catch her*”. He denied that he ever touched Gumede, neither did he tell her to “voetsak”.
90. He testified that he did not initiate a meeting with SAPS. It was SAPS who had called him, telling him that the ladies had opened a case and it was their mothers

who wanted to speak to him. He agreed to this meeting as he knew he had done nothing wrong.

91. He testified that he did not offer to change his statement, but it was Maduna and Gumede who wanted the matter to go away. They then dropped the charges voluntarily. It was Maduna who later told him that HR had informed her that if she did not open the charges with SAPS, then HR would be taking disciplinary action against them instead.

92. Applicant testified that at the disciplinary enquiry on 3 June 2016, Gumbi, his representative was not present. He then phoned Gumbi who said he was not aware of the disciplinary enquiry being held on that day. Gumbi then told him to go to HR to ask for a postponement of to ask for more time +-2 hours as he was currently in Port Shepstone.

93. The chairperson refused to grant Gumbi more time. Gumbi then told the Applicant to leave the disciplinary inquiry, so he left.

94. When asked if there was an agreement on the date of the next sitting, the Applicant replied

“Yes, a date was agreed upon. We all agreed upon the date.”

95. It was only during incident 2 that he reported the assault to security, but he did not report to SAPS as he did not think it was necessary.

96. Applicant believed that Maduna and Gumede were trying to discredit him. “They were out to get me”. The reason Maduna resorted to assaulting him, could have been;

- Because of the long personal history that he had with her.
- She had a confrontation with his ex girlfriend previously,
- maybe it was his comments on her face book photos, or
- maybe she just wanted to prove a point by attacking him

97. He believed that Maduna needed a psych consult for her behaviour.

ANALYSIS OF EVIDENCE AND ARGUMENT

98. I found Subban, Nene and Gumede to be both credible and reliable witnesses.

They presented their evidence in a clear, concise and systematic manner. I saw no reason for them to fabricate their versions, and neither could I find anything that they would gain, if indeed they did do so.

99. I also found that the evidence of Maduna correlated substantially with the evidence of Gumede.

Procedural Fairness

100. Nene testified that the first sitting of the disciplinary enquiry was held on 5 August 2016 and all parties were present. Gumbi applied for a postponement and was it was duly granted. At the same sitting, the date for the next sitting was agreed upon by the parties. This date was proposed by Gumbi and agreed to by the Respondent. Although Nene had prior commitments on that date, he cancelled that commitment in order to agree to 17 August 2016 for the next sitting.

101. This evidence was corroborated by Gumbi, who testified that “I was part of the agreement to choose another date” “I knew that we had agreed on a date. I knew about the date at the first disciplinary enquiry as both parties had agreed upon the date.”

102. Nene’s version as further corroborated by the Applicant when he stated that agreement was reached on the date of the next sitting. The Applicant stated, “Yes, a date was agreed upon, we all agreed upon the date.”

103. The Applicants presence at the second sitting of the disciplinary enquiry, further reinforces Nene’s testimony that the date for the second sitting of the disciplinary enquiry, was agreed upon by all concerned parties.

104. It was only Gumbi who had failed to attend the second sitting of the disciplinary enquiry.

105. From this I can only conclude that Gumbi had either failed to diarise the date of the second sitting, or he had simply forgotten about the second sitting, as he then went on to commit himself to other activities in Port Shepstone. Gumbi’s actions in committing to a date for the second sitting of the disciplinary inquiry, and then engaging in other duties elsewhere in Port Shepstone on the same date, was highly irresponsible. It was his actions that placed the Applicant in the position of being unrepresented at the second sitting. Gumbi’s advice to the Applicant to walk out of the proceedings also boarded on being irresponsible.

106. Nene was generous when he granted the postponement at the first sitting. No formal application for postponement was made by Gumbi for postponement of the second sitting. Therefore the Respondent's decision to proceed with the disciplinary inquiry in absentia was not unfair and I propose to rule accordingly.
107. Similarly, Gumbi testified that Nene had allowed him, irregularly, to submit closing arguments, well after the closing of the disciplinary inquiry. However, the Applicant failed to discharge its onus in this regard as no evidence was led to prove this.
108. Nene on the other hand denied that he had granted permission to Gumbi to submit the closing arguments.
109. On a balance of probabilities, I find that the version of Nene is far more probable than the version of Gumbi. Therefore, I accept Nene's evidence that he had not granted permission to Gumbi to submit closing arguments.

Substantive Fairness

110. It is common cause that there existed some sort of a relationship between Maduna and the Applicant. At some point certain animosity arose between them which then resulted in the two incidents. The evidence of Maduna and the Applicant will therefore have to be scrutinised and weighed up carefully.

Incident 1:

111. Maduna testified that after she had received some Whatsapp messages from the Applicant, she decided to confront him as to what he had meant by his messages. When the Applicant did not respond to her confrontation, she decided to walk out of the ward.
112. Maduna's version was corroborated by Gumede who testified that there was an exchange of words between Maduna and the Applicant and that there was no shouting or screaming etc.
113. The Applicant on the other hand, testified that Maduna and Gumede started talking loudly and used vulgar languages at him.
114. He stayed quiet and listened and simply told Maduna that he thought that she needed a 'psych consult' because of the way she was behaving.
115. He testified that he felt 'threatened' because he didn't know why they were shouting at him, so much so that a cleaner had to tell them that this was not the way in which to behave.

116. As no evidence was led by the Applicant to corroborate his evidence, I accept the version of Maduna in this regard.

Incident 2:

117. Maduna testified that the Applicant pulled her hair, telling her “**didn’t I tell you that I was going to catch you?**” He pulled her by her hair and pushed her on the wall and she fell. He started kicking her whilst she was on the floor. She tried getting up and ended up on the floor and he did not let her get up. She then became hysterical. Although the kitchen staff had tried to protect her, the Applicant still tried to attack her again.

118. Gumede testified that the Applicant grabbed Maduna by the arm, telling her “**I told you I’m going to catch you**”. He then grabbed Maduna by the arm and slapped her. She stumbled back against the wall, and tripped and fell on the floor. She tried to get up from the floor by grabbing on his shirt. He then kicked her. She tried to get up on her feet but he continued to hit her.

119. Aside from some minor differences in the versions of Maduna and Gumede, I find that the version of Gumede, corroborated substantially with the version of Maduna. Therefore I accept the version of Maduna.

120. On the other hand, the Applicant testified that he felt people hooking him from behind. When he turned he found Maduna grabbing him by his t shirt. He grabbed her back and she tried to scratch him. As he turned his face away, she scratched his upper lip. He pushed her away, but he couldn’t because she was powerful. A lady from the tuck shop then tried to separate them and eventually took Maduna away. The Applicant then proceeded to the residence.

121. The Applicant came across as someone who was strong and able bodied. He had even attempted to assault the hospital security guard at some time previously. I found it hard to accept that the Applicant “struggled” to push Maduna away but that he couldn’t as “she was powerful”.

122. Other than the testimony of the Applicant, no other evidence was led to corroborate the Applicant’s version.

123. As I found Gumede to be a credible and reliable witness, and as her version corroborated substantially with the version of Maduna therefore accept the version of Maduna.

124. I therefore find that it was the Applicant who assaulted Maduna and Gumede.

Medical Attention:

125. The Applicant argued strongly that the medical certificate produced by Maduna from Crompton Hospital was lacking in detail therefore, no reliance should be placed on the medical certificate.
126. Maduna testified that she was admitted to Crompton Hospital on 10 December 2016 for internal bleeding and that she was only discharged on 18 December 2016.
127. However, a perusal of the medical certificate reveals that Maduna was treated at Life Crompton Hospital on 10 December 2016 in the hospital's casualty department. Nowhere in the certificate is it mentioned that she was admitted to hospital for treatment. The certificate reveals that Maduna will be fit for "normal duty" on 18 December 2015. Nowhere in the certificate does it mention that Maduna was "admitted" to the hospital for treatment and that she was "discharged" on 18 December 2015.
128. However, I am satisfied that Maduna did receive medical treatment at Life Crompton Hospital on 10 December 2015. However the medical certificate is silent on the nature of the treatment received by Maduna.
129. Maduna testified that she had excruciating abdominal pain and internal bleeding as a result of the assault. Gumede corroborated this evidence in that when she visited Maduna on the morning of 10 December 2015, Maduna complained of pain and cramps in the abdominal area.
130. The only likely inference that can be drawn from this is that Maduna had received medical treatment for injuries sustained on 9 December 2015.
131. To aggravate matters, Subban, a reliable and credible witness, stated that "Kubheka is notorious at Addington Hospital." Subban also stated that the Applicant was engaged in numerous untoward incidents at the hospital nursing home. The Applicant had once attempted to assault the hospital security guard and in the process damaged the boom armrest. In another incident Subban had to physically remove the Applicant from the hospital premises because of his aggressive behaviour. From these accounts it is apparent that the Applicant has a repeated tendency for violence and aggression.
132. It is therefore not unreasonable to conclude, that Maduna's injuries could only have occurred when she was assaulted by the Applicant on 9 December 2015, and I propose to rule accordingly.

CONCLUSION:

133. In the final analysis I find that the version put to me by the Respondent is more probable than the version put to me by the Applicant and therefore I accept the version of the Respondent.

134. Accordingly I find that the dismissal of the Applicant, procedurally and substantively, was not unfair.

AWARD

135. I make the following ruling:

136.1) I find that the dismissal of the Applicant, C E Kubheka, procedurally and substantively, is not unfair.

136.2) This application is dismissed

136.3) I make no order as to costs.



COMMISSIONER: KM MOODLEY