



# ARBITRATION AWARD

Commissioner: **Bhekinhlanhla Stanley Mthethwa**

Case No: **PSHS1236-19/20**

Date of award: **31 August 2020**

In the matter between:

**NUPSAW obo Mbatha, Sibusiso Vincent**

(Union / Applicant)

and

**Department of Health- KwaZulu Natal**

(Respondent)

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## **Details of hearing and representation**

1. The matter was scheduled for arbitration at King Edward VIII Hospital in Durban on 4 June 2020 and it remained part heard; it was heard again on 30 June 2020 and 12 August 2020. Mr. M Memela, a trade union official of NUPSAW appeared on behalf of Mr. Sibusiso Vincent Mbatha (hereinafter referred to as the Applicant) and Ms. G Mncube who is a Labour Relations Officer represented the Department of Health- KwaZulu Natal (hereinafter referred to as the Respondent). The proceedings were digitally recorded.

2. Having presented their respective cases, parties agreed to submit heads of arguments by 19 August 2020 and they did so.

### **Preliminary points**

3. There were no preliminary points raised.

### **Issues to be decided**

4. I have to decide whether or not the respondent committed “any unfair disciplinary action in issuing the applicant with a final written warning and suspended him for one month without pay”, as contemplated in section 186, (2), (b) of the Labour Relations Act 66 of 1995, (“the Act”), as amended.

### **Background to the issue**

5. The applicant was employed as a Chief Artisan. He is currently earning R32 000 in monthly remuneration. The allegations against the applicant were that on 15 February 2018 he demonstrated insolence behaviour in that he attempted to assault his colleague, Mr. Mbeje by wagging and pointing a finger to his face and shouting at him.
6. Subsequent to those allegations the applicant was charged and appeared before a disciplinary enquiry. Eventually, the applicant was found guilty and dismissed. He appealed against the dismissal, and the dismissal was reduced to one month’s suspension without pay coupled with a final written warning valid for the period of six months.
7. In the belief that the respondent’s conduct amounted to an unfair labour practice, the applicant referred a dispute to the Council for conciliation. The dispute was not resolved within 30 days. Thereafter, the applicant submitted a request for the

matter to be resolved through arbitration and the dispute was scheduled for arbitration as indicated above.

8. The applicant sought his suspension and the final written warning to be declared unfair and be awarded compensation as provided for in section 193 read with section 194 of the Act.
9. On the other hand, the respondent contended that there were valid reasons to suspend the applicant and issue him with a final written warning after being charged and found guilty for insolent behaviour and threatening his colleague. The respondent, sought, as a remedy, that the matter be dismissed.

### **Survey of evidence and arguments**

10. All the witnesses gave evidence under oath. The applicant testified in support of his case. The respondent led the evidence of Messrs. Michael Mbeje and Khumbulani Ngobese.
11. The applicant testified that he was employed as a Chief Artisan. Amongst others; he was responsible for controlling and supervising the functions of the Maintenance Department. He was reporting to Mr. Dladla and Mr. Mngomezulu was reporting to him. He was brought to turnaround the workshop in light of the difficulties experienced. Leading to the incident (February 2018) that occasioned his suspension employees were not performing their duties in a normal manner. There was a work stoppage and the employees had put a demand to the management that they want personal protective equipment.
12. On 15 February 2018 he went out to ensure and oversee that job cards have been executed. Firstly, he met Mr Botha and asked him how the things were panning out. Mr Botha informed him that they were running short of spares. He moved over and found Messrs. Mbeje and Masikane sitting next to the tea room. He then posed

the same question to Mr. Mbeje. In response Mr. Mbeje stated that he was running short of the spares and he had reported the matter to his supervisor, Mr Mngomezulu.

13. Thereafter, he posed the same question to Mr. Masikane. However, Mr. Masikane told him that he was tired. He advised Mr. Masikane that it would have been better if he had offered the same answer as Mr. Mbeje. Surprisingly, Mr. Mbeje stood up and advanced towards him. He was expecting Mr. Mbeje to hit him. However, Mr. Mbeje pushed him and retorted that “musa ukungikhulumela mina”. Thereafter, Mr. Ngobese intervened and pushed Mr. Mbeje towards the tea room. At the time Mr Ngobese was saying “wenzani ufuna ukusibonisani?”. Nevertheless, he did not retaliate. He formed a view that Mr. Mbeje did not hear what he said to Mr. Masikane hence he attacked him.

14. He decided to go and report the matter to the Labour Relations Department. While he was on his way to the Labour Relations Department he received a call from Mr Dladla who advised him to go and report the matter to the Security Department and he did so.

15. This was not the first incident where Mr. Mbeje behaved in this manner. On 10 February 2017 Mr Mbeje threatened him. In this instance Mr. Dladla recommended that Mr. Mbeje should tender an apology for his unbecoming behaviour. He accepted Mr. Mbeje’s apology and moved on.

16. Mr. Mbeje testified that he was employed as an Artisan: Plumber. On 15 February 2018 his supervisor, Mr. Mngomezulu instructed him to go and establish what was happening in the kitchen. Upon arrival he found that there was a water leak. He then came back to Mr. Mngomezulu; however, he found that Mr. Mngomezulu had gone out. He took a toolbox and waited for Mr. Mngomezulu. Few minutes later, the applicant came and went to Mr. Allan Botha. Thereafter, the applicant asked him why he was sitting there. He told the applicant that he was waiting for Mr Mngomezulu. The applicant then went to Mr. Masikane and posed the same

question. In response, Mr. Masikane stated that he had just arrived from the college. Thereafter, the applicant came back to him, and stated that “Mr. Masikane you are like this person, who does not want to work” at the time, he was pointing at him. He was shocked since the applicant was shouting and instructing him to go and work. Mr. Ngobese intervened and pushed him away from the applicant. In fact, it was the applicant that was an aggressor in that instance.

17. The applicant also stated that he had power to dismiss him. He was disappointed by the applicant’s conduct since the incident happened in front of other employees. He did not know any other incident that occurred between him and the applicant prior to the incident of 15 February 2018.

18. He was not aware that the applicant was employed to turn around the workshop.

19. Mr. Ngobese testified that he was employed as a Trades Man Aide. On 15 February 2018 he found Mr. Mbeje sitting on the toolbox in the workshop. Mr. Mbeje was with Messrs. Masikane and Siyabonga Ngidi. Messrs. Masikane and Siyabonga Ngidi were leaning against the wall units next to the entrance while Mr. Mbeje was sitting on the toolbox. He went pass them on his way to the gents. On his way back from the gents he saw the applicant talking to Mr. Masikane; however, he could not hear their discussions. After passing them he overheard the applicant saying” like this one, who does not want to work” pointing at Mr. Mbeje. He also overheard the applicant telling Mr. Mbeje to go and work. From where his locker was situated; he could clearly see what was happening between Mr. Mbeje and the applicant. Although there were wall units on the way but he could see what was happening since there were in the middle of the entrance.

20. After this incident the applicant went to his office. Mr. Mbeje then went to Mr. Dladla’s office but he could not find Mr. Dladla. He then accompanied Mr. Mbeje to the Labour Relations Department to report the incident.

21. In closing Ms. Mncube contended that the applicant had abused his power and authority. The applicant had been warned not to communicate directly with the employees. It was so because there were direct supervisors that were responsible for direct supervision of the employees and these supervisors were reporting to the applicant. Therefore, there was no point for the applicant to supervise the employees in the manner that he did. The applicant failed in his responsibilities to lead the employees in a professional manner expected of somebody in his position. Accordingly, the applicant was guilty of insolent behaviour towards Mbeje; as such his case should be dismissed.
22. Mr. Memela submitted that it should be found on a balance of probabilities that Ngobese came between Mbeje and the applicant and pushed Mbeje away from the applicant. This proves that the aggressor was Mbeje. The available record also points to the fact that Mbeje's version ought not to be accepted over that of the applicant. Therefore, the applicant's suspension and a final written warning should be set aside. Consequently, the applicant should be awarded compensation equivalent to six months' salary for his suffering due to the loss of his salary, and also as solatium for hurt feelings.

### **Analysis of evidence and arguments**

23. Section 186 (2) (b) of the Act sets out the meaning of unfair labour practice as follows, "Unfair labour practice' means any unfair act or omission that arises between an employer and an employee involving... – the unfair suspension of an employee or any other unfair disciplinary action short of dismissal in respect of an employee" ..
24. It is trite that an employee who alleges that she/he is the victim of an unfair labour practice bears the onus of proving the claim on a balance of probabilities. The employee must not only prove the existence of the unfair labour practice but she/he must also prove the underlying facts she/he is relying on and that the conduct of

the employer is unfair (see *Grogan Dismissal, Discrimination and Unfair Labour Practices* (August 2005) Juta page 43).

25. Our courts have established a principle that the fairness required in the determination of an unfair labour practice must be fair to both employee and employer (see *National Union of Metalworkers of SA v Vetsak Co-Operative Ltd & others* 1996 (4) SA 577 (SCA) 589C–D; *National Education Health & Allied Workers Union v University of Cape Town & others* (2003) 24 ILJ 95 (CC) paragraph 38).
26. In this instance the applicant was convicted for demonstrating insolent behaviour in that on 15 February 2018 he attempted to assault his colleague, Mr. Mbeje; and wagging and pointing a finger to his face and shouting at him.
27. In his plea explanation the applicant stated that he did not threaten Mbeje in any manner. In fact, it was Mbeje who was an aggressor and pushed him on 15 February 2018. According to the applicant he did not retaliate. In support of this contention the applicant testified that at the time of the incident he was talking to Masikane. He only asked Mbeje the work progress and moved over to Masikane. While he was talking to Masikane; he observed Mbeje aggressively advancing towards him. He was expecting that Mbeje would land a fist on his face. However, Mbeje only pushed him. Immediately, Ngobese came between them and pushed Mbeje back. Ngobese further stated that “uwenzani ufuna ukusibonisani?”
28. On the other hand, Mbeje testified that the applicant asked him why he was sitting and not working. He advised the applicant that he was waiting for Mngomezulu. Thereafter, the applicant walked over to Masikane and told him that he was like Mbeje who did not want to work. The applicant further shouted at him and directed him to go and work. He moved back because he feared that the applicant could assault him. Thereafter, Ngobese intervened and pushed him (Mbeje) back. He then went to Dladla’s office to report the matter.

29. It is important to note that both parties gave different versions concerning what transpired on 15 February 2018. Therefore, I need to compare both versions tendered by parties to determine which version is more probable. According to the applicant it was Ngobese who pushed Mbeje back. This version was also confirmed by Mbeje himself. Notably, this version was denied by Ngobese. In my view there was no reason why both the applicant and Mbeje would lie regarding who pushed who.
30. It was never disputed that prior to the incident of 15 February 2018 Mbeje had demonstrated violent and insubordinate behaviour towards the applicant. It was also not challenged that the management was aware that workshop staff had developed a culture of not wanting to work. Hence the applicant was tasked by the management to introduce a turnaround strategy at the workshop, which was met with resentment and rejection from the staff members in that Department.
31. Therefore, it could have not been a co-incident that Mbeje, Masikane and Ngidi were all found on the same spot doing nothing. However, that confirms the veracity of the management report which was presented in this arbitration and both Mbeje and Ngobese failed to challenge its content. The report clearly states that the applicant was brought to the Maintenance Department to turn around its fortunes. It further stated that employees were loafing around in the workshop and not doing what they were employed to do. This report was damning concerning the conduct of the employees in that Department. It indicated that employees in the Department did not want to work hence the applicant was brought to change the situation. Therefore, it is not surprising that there were employees (Mbeje and Ngobese) in that Department who conspired to get rid of the applicant.
32. I therefore find the version of the applicant clear and consistent concerning what transpired on 15 February 2018; whereas the evidence of Mbeje and Ngobese was inconsistent, illogical and lacking in credibility. By way of example, it was never put to the applicant that Ngobese will come and testify that he did not push Mbeje. When Ngobese was asked to provide explanation regarding this discrepancy; he

dismally failed to do so. If indeed the applicant was the aggressor it would have been him (applicant) who was going to be pushed away from Mbeje; not the other way around. Furthermore, Ngobese had a difficulty in explaining how he could have been able to see who the applicant was pointing his finger at when he was facing his locker whilst the applicant, Mbeje and Masikane were behind him. This is why where the versions of these two witnesses (Mbeje and Ngobese) where it contradicts the applicant's version; I accept applicant's version without any reservation.

33. Accordingly, the evidence of Mbeje and Ngobese which seeks to portray the applicant as an aggressor should be rejected since they demonstrated a demeanour that they were not credible and honest witnesses. (a) Their evidence showed bias in light of their relationship (as colleagues) to protect each other; in order to sustain a well-documented culture of loafing in the workshop; (b) there were internal and external contradictions in their evidence as described above. I therefore find their testimony to be highly improbable.

34. Accordingly, I am persuaded that the respondent committed an unfair labour practice within the meaning of section 186 (2) (b) of the Act. The evidence before me clearly evinced that the applicant did not demonstrate insolent behaviour towards his colleague, Mbeje. Therefore, it was grossly unfair to issue the applicant with a final written warning and suspended him without pay for one month and that was done on capricious and arbitrary grounds.

## **Relief**

35. As a remedy; the applicant sought that his suspension and the final written warning be declared unfair and be awarded compensation as provided for in section 193 read with section 194 of the Act. I am mindful of the fact that the final written warning had expired and expunged. However, I need to consider what would be

the appropriate relief under the circumstances. In my view compensation would be an appropriate relief.

36. In terms of section 194(4) of the Act, “the compensation awarded to an employee in respect of an unfair labour practice must be just and equitable in all the circumstances, but not more than the equivalent of 12 months’ remuneration. Section 195 of the Act states that “an order or award of compensation made in terms of this chapter is, in addition to and not a substitute for, any other amount to which the employee is entitled to in terms of any law, collective agreement or contract of employment”.

37. In this instance, I have considered the length of suspension and that the applicant was put in danger to be dismissed for duration of the final warning without a valid reason. Furthermore, the resultant financial prejudice suffered by the applicant as a result of this sanction against him and the stigma of being arbitrary painted with a tainted brush. I view 5 months compensation just and equitable under the circumstances.

38. In the circumstances I make the following award:

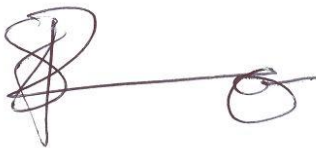
## Award

39. I find that the applicant (“Mbatha Sibusiso Vincent”) has established existence of an unfair labour practice for being issued with a final written warning and suspended for one month without pay.

40. The respondent’s guilty finding as well as the sanction of a final written warning and suspension for one month without pay are hereby set aside.

41. I further order the respondent to pay the applicant compensation equivalent to 5 months in an amount of One Hundred and Sixty Thousand Rands (R160 000.00) ( $R32000.00 \times 5 = R160\ 000.00$ ) as a solatium for committing unfair labour practice against the applicant on or before the close of business on 30 September 2020.

42. No order as to costs is made.



Bhekinhlanhla Stanley Mthethwa