



PHSDSBC

PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SECTORAL BARGAINING COUNCIL

ARBITRATION AWARD

Case No: PSHS132-15/16

Commissioner: Samuel Baron

Date of award: 2 December 2016

In the matter between:

NOMFUNeko MBEBE AND 2 OTHERS

(Union/Applicant)

and

DEPARTMENT OF HEALTH- EASTERN CAPE

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. This matter was finalized on 19 November 2016 at the premises of the Department of Health- Eastern Cape in Engcobo. The parties requested 7 days to submit written closing arguments and they duly obliged.
2. The Applicants, Mess. Nomfuneko Mbebe, Nobuntu Fipaza and Ntombizine Aldin was represented by Advocate Mbulelo Makiwane, instructed by Mr. Zukisa Ntelezi, an attorney from a firm of attorneys, namely Ntlezi and Co, which is based in Mthatha.
3. The Respondent, the Department of Health: Eastern Cape, was represented by Ms. Vuyiseka Myoli from the office of the state attorney.
4. The Applicants prayed for their reinstatement into their respective positions in the event that I find in their favour.

ISSUE TO BE DECIDED

5. I am required to determine whether the dismissal of the Applicants were procedurally and substantively unfair and if not, determine the appropriate remedy.

BACKGROUND TO THE DISPUTE

6. The Applicants were all based in All Saint Hospital in Engcobo in different capacities. Ms. Mbebe was employed as a financial clerk, Ms. Fipaza as a staff nurse and Ms. Aldin as an administration clerk with different salary scales.
7. They were dismissed following a disciplinary enquiry on charges relating to the assault of a security Ms. Busisiwe Nwelane and several other charges which read as follows:

Allegation 1

Assault an employee whilst she was on duty: On 7th of February 2014, at All Saints Hospital, you assaulted one of the security guards while she was on duty.

Allegation 2

Un-authorized presence at the scene of assault, at and awkward time, with the intention to endanger the life of an employee: On the 7th of February 2014, you were found in the Hospital premise/scene, at an awkward time (during the night) with the intention to assault an employee, and as you being in the area, at that time, you managed to assault the employee

Allegation 3

Possession of dangerous weapons within the premises of the Employer with the intention of endangering the life of another person: On the 7th of February 2014, at All Saints Hospital, you were in possession of dangerous weapons (plank and shambok) which you used to assault an employee.

Allegation 4

Threatened to assault other guards who were on the scene to rescue a female guard from your attack: On the 7th of February 2014, during the night, you threatened to assault the Security Guards while you they were trying to stop you from assaulting a female guard

Allegation 5

Un-lawful taking and possession of a Company Spray-Gun and a Cap.: On the 7th of February, at All Saints Hospital, you were one of the persons who forcefully took Spray-Gun and a Cap which is one of the assets required for the security of the Hospital.

Allegation 6

Prejudices the Administration and efficiency of the Security Services at All Saints Hospital: On the 7th of February 2016, at All Saints Hospital, you conducted yourself in a manner that prejudiced the Administration, discipline and efficiency of the Hospital, including the Department of Health.

Allegation 7

Refusal to comply with the suspension condition as outlined in your letter of suspension: You portrayed signs of gross insubordination by refusing to comply with suspension conditions as prescribed in your letter dated 24th of February 2014, as a result your action has interfered with the potential witnesses and the entire investigation.

SURVEY OF ANALYSIS AND ARGUMENT

Respondent's case

8. **Ms. Busisiwe Nwelane**, the complainant, testified that she was working at All Saints Hospital as a security official since 2014. Her duties were to guard around the hospital, the personnel houses, the cars as well as the hospital itself.
9. On the 7th of February 2014, she was on night shift duty. She received as "WhatsApp" message from Mr. Geliba, who enquired about her whereabouts. Mr. Geliba is the husband of Ms. Fipaza. Later on, he sent another message stating that he is out of the house and that he wanted to meet with her. She responded that she could not meet him. She then went back to her post and saw someone with the clothes of Mr. Geliba following her, but it was not Mr. Geliba. During that period, her phone also rang and she saw it was Mr. Geliba's number, but she did not answer. The person then caught up with her and dragged her towards the houses. Ms. Aldin then appeared, carrying a whip (sjambok) and she whipped her.
10. Ms. Aldin then shouted and called Ms. Mbebe, who also approached her and was carrying a plank. Ms. Fipaza also had a plank. Ms. Fipaza then hit her and cut her on the forehead as well as on the upper lip. Ms. Aldin then took the pepper spray from her hip and sprayed her in the eyes. If Ms. Aldin used that pepper spray effectively, she would have been blind today.
11. She testified further that Mr. Poswayo came to the scene because he heard her scream and intervened. Other guards also appeared on the scene and were then told that they would also be assaulted. Ms. Nwelane then testified that she ran away and hid in the bushes when she received a call from her supervisor, Mr. Qolombane. He came and he took her to the hospital due to the injuries that she suffered. But when she got at the hospital's out patients department, the Applicants were waiting there. Mr. Qolombane then took her home and she went to the doctor the next day.

12. Ms. Nwelane explained that Mr. Geliba was her boyfriend. She however never visited him at his house. She mentioned further that she knew it was Ms. Fipaza who sent her the WhatsApp messages because Ms. Fipaza mentioned this when she was assaulting her. Ms. Nwelane added that all three Applicants assaulted her. According to her, the wounds on her forehead and upper lip were caused by Ms. Fipaza. The bruises were caused by Ms. Mbebe and the sjambok marks on her back was caused by Ms. Aldin.
13. Ms. Nwelane did not dispute under cross-examination that Ms. Geliba was married to Ms. Fipaza and that they were staying together on the hospital premises. It was further put to her that Ms. Fipaza will testify to the effect that she called her back (to the phone which Ms. Fipaza thought belonged to Vice) and that she (Ms. Nwelane) replied, but this was denied by Ms. Nwelane. Ms. Nwelane further denied that she went into the house of Ms. Fipaza. She also denied that she was shocked to see Ms. Fipaza instead of her husband.
14. It was further put to Ms. Nwelane that Ms. Fipaza will testify that Ms. Nwelane sustained the injuries inside the house when Mr. Geliba assaulted her with a wooden spoon, but she strongly disagreed.
15. **Mr. Mhlangabezi Poswayo** testified that he was on duty as a security official on the day in question. He was watching Ms. Nwelane as she left him and saw a person with a red t-shirt following her. He did not take much notice of that but after 15 minutes, he heard a scream and he discovered that it was Ms. Nwelane being assaulted. She was being grabbed by Ms. Fipaza's son and assaulted by Ms. Fipaza and Ms. Aldin.
16. He and the other security officials then tried to intervene, but it was difficult to do so. Ms. Nwelane however managed to escape and she ran away. He then phoned the supervisor and told him what had happened.
17. Mr. Poswayo was cross-examined regarding his statement that was taken and he acknowledged that there was a slight difference in the time frames he mentioned in the statement and what he was testifying at the arbitration.
18. He denied that the assault of Ms. Nwelane took place inside the house of Ms. Fipaza, he reiterated that he saw her being assaulted in the street. He also stated that he saw the wound of Ms. Nwelane's upper lip. He reiterated that she was already assaulted when he got there, so he was not aware of a man with a red shirt that had assisted her.
19. **Mr. Andile Mqolombane** testified that he was a supervisor at the security firm at the time of the incident. He received a call that Ms. Nwelane was assaulted and he went down to where the alleged incident occurred, but she was not there, nor were the Applicants. He found her in a park just behind the clinic.

When he took a look at her injuries, he decided to take her to the outpatients department at the hospital, but the Applicants were already there and he decided to rather take her home.

20. After he has done that, he went back to Mr. Geliba's house to find out what happened with regards to the assault and also what happened with the cap and pepper spray that was in Ms. Nwelana's possession. He was told to come the next morning, which he did and he found Ms. Fipaza there. Ms. Fipaza however said that she did not have the cap and instead of the pepper spray, gave him Doom.
21. He testified that he was shown by Ms. Nwelane where the incident occurred and it was about 100 metres from the house. He saw the blood in the street.
22. Mr. Mqolombane stated under cross-examination that Ms. Nwelane was injured although she did not want to be taken to the outpatients department. He however did not phone the police. It was put to him that the Applicants would testify that Ms. Nwelane was sprayed with Doom, to which he responded that he was not on the scene the incident happened. With regards to the photo's he testified that it was taken that same night of the incident.
23. **Mr. Unathi Sixalangile** testified that he was working at the gate at the All Saints Hospital on 22 February 2014. Mr. Gebu (the hospital CEO) explained to him that there is a car that is not supposed to enter into the hospital because Ms. Fipaza was suspended. He phoned his manager regarding this instruction and his manager requested that Mr. Gedu put it in writing. The security officers were discussing this document when the car of Ms. Fipaza approached the gate.
24. It was decided that a Mr. Giba, another security guard, will phone Mr. Gebu and Ms. Fipaza followed him to the guardhouse. When Mr. Giba came back, we said that he was told by Mr. Gebu that he must follow the instructions not to allow the Applicants access to the premises.
25. He testified further that Ms. Fipaza forcefully entered the hospital premises. Ms. Fipaza then went back to the boom gate and opened the gate for a Toyota Quantum bus that were standing outside the gate. All the security guards were surprised at the actions of Ms. Fipaza because it was only the security officials that were allowed to open the boom gate.
26. **Mr. Gebu**, the hospital CEO also testified regarding the fact that he received the report of the assault and requested Ms. Fipaza to write a statement which she refused to do. He also mentioned that he became aware of other incidences of assault that occurred in the hospital. One involving a male and female nurse

was handled by the matron and he was told by the matron that the matter was resolved amicably. The other issue was still under consideration.

27. Mr. Gebu was not in a position to shed any light on the charges that the Applicants faced because he had no first-hand knowledge thereof.

Applicants' case

28. **Ms. Nobuntu Fipaza** testified that she was employed as a staff nurse since 28 August 1984. She stated that she was dismissed on 22 April 2015, but it is common cause that this date was when the MEC for Health informed all the Applicants via a letter that their appeals have failed and that the sanction of dismissal was upheld.

29. She testified that she first got to know Ms. Nwelana on 7 February 2014. This was the date the incident that led to her dismissal occurred. She saw a missed call on her husband's phone from a family friend by the name of "Vice". She then sent him a "WhatsApp" message to find out if there was something wrong. It was established later that this message was not sent from Vice's phone, but from the phone of Ms. Nwelana (Ms. Fipaza's husband save the number under the name of Vice on his phone). Ms. Nwelana then send a message back and said that she missed her husband and wanted to know if she can come to her house and whether his wife is at home. The Applicant stated that her husband was in the house at the time, sleeping.

30. After two hours Ms. Nwelana send another message that stated that she will come to her husband's home and she waited, thinking that it was Vice. The victim then entered the house and went straight to the bedroom and took her husband by the shoulder to wake him up. The Applicant stated that she then grabbed a wooden spoon and beat the victim with it, whilst the victim was spraying her with pepper spray. The two of them were then fighting over the wooden spoon.

31. The Applicant then testified that she went outside and Ms. Aldin and Ms. Mbebe both arrived and they stopped the fight together with the other security guards. The other security guards were 3 females and 1 male.

32. The Applicant mentioned that she was called in afterwards by Mr. Gedu the CEO of the hospital and he asked her to write a statement, which she refused to do. She told Mr. Gedu that she first wanted to consult with her union NEHAWU.

33. Ms. Fipaza then testified regarding the procedural issues and testified that the first disciplinary enquiry was held on 20 May 2014. She was unable to recall clearly all the dates the disciplinary enquiry was held, but she stated that she never had any opportunity to state her side. She also mentioned that they lodged an appeal but were never called to an appeal hearing for their side to be heard. They were issued with the letter referred to earlier stating that the appeal had failed.
34. Ms. Fipaza then mentioned other incidences of assault that occurred inside a ward of the hospital and stated that those employees were never dismissed. They were simply called into the CEO's office but were never called to a hearing and dismissed. She was not a witness to these incidents, but were informed regarding that.
35. Ms. Fipaza denied that she was guilty of the other offences as stipulated in the charge sheet. With regards to Charge 2, she testified that she never had a dangerous weapon in her possession. She only had a wooden spoon she took from the kitchen. On Charge 3, Ms. Fipaza stated that she never threatened the security guards, they only arrived when she was done with Ms. Nwelana. Also, on Charge 4, Ms. Fipaza denied that she was in possession of the spray gun and cap of Ms. Nwelana. According to her, all the Applicants were charged with that same misconduct, so not all of them could be guilty of that charge.
36. On Charge 5, Ms. Fipaza testified that she was provoked by the security guard and that she was therefore also not guilty of that charge. With regards to Charge 6, Ms. Fipaza mentioned that the witnesses called by the Respondent never testified on this charge, except Mr. Gebu, who was at his house sleeping
37. Under cross-examination, it was put to Ms. Fipaza that the disciplinary hearing was first set down for 20 May 2014, postponed to 27 June 2014, again to 23 July 2014. The parties again agreed that the hearing be postponed for 30 and 31 July 2014. It was then further postponed 8 August 2014 and finally to 9 and 10 September 2014. Ms. Fipaza agreed that she attended the hearing on 9 September.
38. It was further put to Ms. Fipaza that she voluntarily left the hearing on that day, to which she responded that she was instructed by her union representative to leave.
39. With regards to the injuries that were sustained by Ms. Nwelana, Ms. Fipaza mentioned that she was not aware of the injuries. She however did not deny that the photos in the Respondent's bundle of documents were that of Ms. Nwelana.
40. **Ms. Nomfuneka Mbebe** testified that she was employed since 1990 as a finance clerk by the Respondent. She stated that she was unhappy with the fact that she was suspended for a period of 8 months. In terms

of Collective Agreement 1/2003, the disciplinary hearing should have been finalized within 60 days. She also mentioned that the Chairperson was biased. According to her, the Chairperson did not apply his mind and only listened to Mr. Bebula, who represented the Respondent in the disciplinary enquiry.

41. Due to their unhappiness with the Chairperson and other issues, they requested a pre-arbitration hearing to deal with the allegations against them. She reiterated that they were never allowed an opportunity to state their cases. Only one witness testified for the Respondent and she was accused by Mr. Bebula of trying to bribe a security guard not to testify in the hearing.
42. Ms. Mbebe testified further that on 7 February 2014, Ms. Aldin went out of the house first. She then came back, but did not say anything. Ms. Mbebe then mentioned that she then heard a scream and went outside. She saw Ms. Fipaza outside and asked her what was happening, to which Ms. Fipaza responded, "my man, in my house". According to Ms. Mbebe, she then tried to stop the fight between Ms. Fipaza and Ms. Nwelana and so did Ms. Aldin.
43. Ms. Mbebe denied that she was guilty of the charges preferred against her. On Charge 2, she mentioned that she did not have anything in her possession; she was just a visitor. On Charge 3, she stated that she stated to the security guards that she was not part of the fight; it was Ms. Fipaza and Nwelana who were fighting.
44. Ms. Mbebe stated further that on Charge 4, the Respondent evicted her and she saw no reason why she should be removed from her place. She was told that the suspension letter was issued by the district manager, but the security guards at the gate refused to hand her the letter.
45. Ms. Mbebe acceded under cross-examination that they appeared 6 times at the disciplinary hearing. She also conceded that the hearing was not at all times postponed by the Respondent, but that the Applicants' representative also at times requested a postponement. She also reiterated what the other Applicants' testified that the Chairperson did not apply his mind and that they were suspended for too long.
46. Ms. Mbebe agreed further that they made an application for the matter to be escalated to a pre-arbitration hearing and that they then left the disciplinary hearing. She mentioned further that the Resolution 1/2003 does not apply to a security guard, but only to employees of the State.
47. When asked what she was doing at Ms. Fipaza's house, she stated that she was there for a meeting. On the day the assault occurred, she saw Ms. Fipaza and Ms. Nwelana holding each other, but she did not want

to call it a fight. She also mentioned that she did not notice any injuries on Ms. Nwelana and did not see any blood on her. She further denied that Ms. Aldin shouted “here is the whore”.

48. On a further question on the issue of the spray-gun, Ms. Mbebe denied that she saw it. She also did not know what Ms. Nwelana was wearing that day. That day was also the first day she saw Ms. Nwelana as well as Mr. Poswayo. She only knew Mr. Poswayo from being a security guard; they never had any disagreements.
49. **Ms. Ntombizine Aldin** testified that she was employed since 1 February 2009 as an administration clerk. She testified that she was dismissed on 2 December 2014, but that she only received the letter of dismissal on 5 January 2015.
50. She reiterated that they requested the Chairperson for the matter to be heard on another level, but her representative stated to the Chairperson that if he could not apply his mind to the facts in terms of Resolution 1/2003, they will leave the disciplinary hearing, which they did.
51. Ms. Aldin denied that she assaulted Ms. Nwelana. She was in the house that day and she heard a scream and went outside. She saw Ms. Fipaza and Ms. Nwelana with a wooden spoon in their hands. They were in front of the house at that time. She then tried to prevent the fight between the two.
52. Ms. Aldin denied any guilt on the other charges that were brought against her that led to her dismissal. The reason she was suspended was because she was the Branch Secretary of NEHAWU and there were things that management did that she did not agree with. The relationship between the union and management was thus not good at the institution.
53. Ms. Aldin admitted under cross-examination that she was not dismissed by the management of All Saints hospital. She also testified that she saw the blood on the forehead, upper lip and on the chin of Ms. Nwelana.
54. She further denied that she was carrying a sjambok on that day and that the two witnesses who testified to that were thus lying.

ANALYSIS OF EVIDENCE AND ARGUMENT

55. Section 188 of the Labour Relations Act 66 of 1995, as amended (“the Act”), provides that a dismissal must be for a fair reason (substantive fairness) and must be effected in accordance with a fair procedure (procedural fairness).
56. The Applicants’ challenge to the fairness of the procedure is based on their allegation that it took a long period of time (some eight months) for the disciplinary hearing to be completed and that the letters of dismissal were issued long after the due date. Also, the Applicants requested the disciplinary hearing to be converted into a pre-arbitration hearing, but the Chairperson of the disciplinary hearing did not apply his mind to their request and was allegedly biased.
57. Paragraph 7.2 of Resolution 1 of 2003 set out the guidelines to be followed when serious misconduct is alleged to have taken place. It provides as follows:
- (a) *The employer may suspend an employee on full pay or transfer the employee if*
 - (i) *The employee is alleged to have committed a serious offence; and*
 - (ii) *The employer believes that the presence of an employee at the workplace might jeopardize any investigation into the alleged misconduct, or endanger the well-being or safety of any person or state property.*
 - (b) *A suspension of this kind is a precautionary measure that does not constitute a judgment, and must be on full pay.*
 - (c) *If an employee is suspended or transferred as a precautionary measure, the employer must hold the disciplinary hearing within a month or 60 days, depending on the complexity of the matter and the length of the investigation. The chair of the hearing must then decide on any further postponement.*
58. It is common cause that the Applicants were suspended for some eight months before such suspension was uplifted. This suspension was on full pay. The alleged misconduct regarding the assault on Ms. Nwelane occurred on 17 February 2014 and some of the other charges relate to an incident that occurred on 22 February 2016. It is further common cause that the first sitting of the disciplinary hearing was scheduled for 20 May 2014. In other words, the employer did not hold the disciplinary hearing within a month or 60 days. There are several reasons for the delay in the finalization of the disciplinary hearing.
59. Firstly, the employer launched an investigation to determine whether a disciplinary hearing should be held and the hospital CEO, Mr. Gebu requested Ms. Fipaza to write a statement. She refused to do so and wanted to consult her union. The statement was not forthcoming, which caused a delay in the investigation. In that sense, the Applicants were themselves a cause for this delay prior to the charges being proffered against them.

60. Secondly, the investigation was generally going to be a long one given the amount of people involved in the incidents that took place on the dates referred to above. The resolution is clear that the holding of the disciplinary hearing is dependent on the complexity and the length of the investigation. Statements of at least 8 people had to be taken who were either involved or would serve as witnesses. Against that background, the holding of the disciplinary hearing on 20 May 2014 was not an inordinate delay.
61. The Resolution further provides that the chairperson may decide on any further postponements. The hearing sat on several days and the reasons for the postponements were not all on the side of the employer; some were caused by the Applicants themselves. Whatever the reasons for the postponements, the chairperson exercised his discretion to postpone the hearing.
62. Also, the Applicants did not testify as to what prejudice they suffered due to the delay. I doubt there were any, with them being suspended on full pay as well as receiving their salaries once their suspensions were uplifted. The Applicants' decision to leave the disciplinary hearing because the chairperson did not make a decision with regards to their request to substitute the hearing with a pre-arbitration hearing (now called "inquiry by arbitrator"), was to their own detriment.
63. Employees waive the opportunity to state a case in response to allegations of misconduct if they abandon a properly constituted disciplinary hearing without proper cause. The chairperson was not empowered to make a decision regarding a pre-arbitration hearing anyway. To thus argue that he did not apply his mind to this issue is incorrect. In terms of the applicable section of the Act, namely section 188A, both parties had to consent to the inquiry by arbitrator and thereafter a request had to be made to the Council for the appointment of an arbitrator. At the very least, the Applicants should have waited for the chairperson to make a ruling on the issue before leaving the hearing and trying to raise this issue at a level outside the confines of the hearing.
64. Thus, having assessed the basis of the Applicants' challenge to the procedural fairness of the dismissal, that challenge must fail, primarily on the basis that no prejudice was visited upon them. I thus find that the dismissal is procedurally fair.
65. In determining substantive fairness, I must consider Item 7 of the Code. The following aspects require consideration:

- (a) *Whether or not the employee contravened a rule or standard regulating conduct in, or in relevance to the workplace; and*
- (b) *If the rule or standard was contravened, whether or not-*
 - (i) *The rule was a valid or reasonable rule or standard*
 - (ii) *The employee was aware, or could reasonably have been aware of the rule*
 - (iii) *The rule or standard has been consistently applied by the employer; and*
 - (iv) *Dismissal was an appropriate sanction for the contravention of the rule or standard*

66. The Applicants challenged the substantive fairness of the dismissal on the basis they are not guilty of the charges. They are in other words saying that they did not breach any workplace rule. I thus have to determine afresh whether the Applicants are indeed guilty of the allegations brought against them and if I find as such, determine whether the sanction of dismissal was appropriate under the circumstances.

67. I further need to determine whether the Respondent acted inconsistently by failing to dismiss other employees who allegedly made themselves guilty of the same misconduct.

68. The Applicants were aware that assault of another person while on duty constitutes an act of misconduct in terms of the Resolution. I mention this because it came across on the evidence of the Applicants that they tried to make the argument that the Resolution is not applicable to a person not working for the state. They were however *au fait* with the Resolution and they themselves testified to this effect. I am thus saying that in the event that I find them guilty of the assault charge, that argument falls away.

69. I will deal with the assault allegation first and make some general observations first. There can be no doubt that Ms. Nwelana was assaulted. The photos and the J88 forms completed by the doctor the day following the incident is evidence enough of that. I have no reason to second guess the doctor's observations despite protestations from the Applicants. According to the doctors' report, Ms. Nwelana suffered wounds on her forehead, her upper lip and left side of her chin. She further suffered bruises on her body caused by a sjambok.

70. Ms. Fipaza's version that she thought that she was chatting to a certain Vice on her husband's phone is rejected. Vice would definitely not have told her husband that he was missing him, wanted to see him and asked where his wife was. She was acutely aware that she was talking to Ms. Nwelana and she lured Ms. Nwelana in the direction of her house.

71. It is for that reason that I cannot accept the further version of Ms. Fipaza that she only saw for the first time that it was Ms. Nwelana when Ms. Nwelana was in her house next to her husband's bed. Ms. Fipaza probably thought that if she put a version forward that she assaulted Ms. Nwelana inside her house, she would not suffer any consequences as a result. Be that as it may, she agreed that she assaulted Ms. Nwelana.
72. When she was asked whether she noticed any injuries on Ms. Nwelana, Ms. Fipaza answered in the negative. Yet Ms. Aldin testified that she saw the blood coming from Ms. Nwelana's forehead and upper lip, totally contradicting Ms. Fipaza's evidence. This severely taints Ms. Fipaza's evidence and I cannot find it credible. Since Ms. Fipaza acceded to assaulting Ms. Nwelana, I find her guilty of the first allegation.
73. Ms. Nwelana testified that Ms. Mbebe also hit her with a wooden object, likely a plank. Ms. Mbebe also denied this and also testified that she never saw Ms. Nwelana being injured at all. Again, this is in direct contradiction of Ms. Aldin's evidence. It is highly improbable, almost impossible, for her to not have seen the blood or the wounds on Ms. Nwelana's face, because on her own version she tried to separate Ms. Nwelana and Ms. Fipaza. Like Ms. Fipaza, Ms. Mbebe also did not put up a credible version and it is also rejected. I thus also find her guilty of the assault charge.
74. Ms. Nwelana testified that Ms. Aldin used a sjambok to beat her and also sprayed her with her own pepper spray. Ms. Aldin did not deny the injuries that were sustained by Ms. Nwelana and in fact described the exact location of the injuries on Ms. Nwelana's face as it was written in the J88. Mr. Poswayo, whom the Applicants did not know personally, also testified that he saw Ms. Aldin specifically beat Ms. Nwelana with the sjambok, again in line with the description of the injuries on Ms. Nwelana's body in the J88. Mr. Poswayo had no reason whatsoever to implicate Ms. Aldin and Fipaza and it is improbable that he could thumb-suck the use of a sjambok whereas he did not see it.
75. Mr. Poswayo also noticed the injuries on Ms. Nwelana's upper lip and face, consistent with the evidence of Ms. Nwelana and Ms. Aldin as well as the photos and the J88 form. On the balance of probabilities therefore, I find Ms. Aldin also guilty of the first allegation.
76. Where the assault occurred becomes an academic exercise, but I suspect that it happened in the street and not in Ms. Fipaza's house. Mr. Poswayo stated that he was watching Ms. Nwelana and she never went into Ms. Fipaza's house. Mr. Poswayo as well as Ms. Nwelana was clear that the assault took place in the street. It is difficult to bring into question the version of these two witnesses. Ms. Nwelana was honest about her relationship with Ms. Fipaza's husband. Her evidence is consistent with all the other evidence that was presented. She also never changed her version during cross-examination. Ms. Poswayo also admitted to

have made mistakes in the time-frames he put in his statement, but that does not negate his strong evidence on this specific issue.

77. Ms. Fipaza's evidence on the other hand, sometimes lacked logic and coherence. She stated that she thought it was Vice that was in the house. Yet she knew very well that she was not chatting with Vice. Also, she did not challenge the evidence that someone who was dressed as her husband dragged Ms. Nwelana in the street to the vicinity of her house. In all probability therefore, the assault must have taken place in the street before Ms. Fipaza's house.

78. The Applicants raised an issue of inconsistency and alleged that other employees also fought in the hospital premises but were never dismissed. It is trite law that it was required from the Applicants to put sufficient evidence on the table to allow the Respondent to properly respond to that allegation. To that end, the following passage from the Labour Court judgment in *SA Municipal Workers Union on behalf of Abrahams and Others v City of Cape Town and Others (2011) 32 ILJ 3018 (LC)* finds application:

"This situation is, in my view, akin to the question of inconsistency where an employee alleges inconsistency. The employee must show the basis thereof, for example he must reveal the name of the concerned employee and also the circumstances of the case. Failure to do so may lead to a finding that no inconsistency exists or was committed by the employer. This situation never shifts the onus from the employer to the employee to prove that there is no inconsistency".

79. It might well be true that Mr. Gebu admitted that there were an issue relating to an assault that took place and Ms. Fipaza did mention the names of the employees involved. But what is lacking here is the circumstances surrounding the other matter which allegedly gave rise to the inconsistency challenge. Ms. Fipaza did not call the employees involved in order for such circumstances to be scrutinized. The allegation thus lacked particularity.

80. The reason that the circumstances surrounding similar offences is that inconsistency should be considered in conjunction with each employee's personal circumstances as well as the circumstances relating to the incident in question. In other words, the element of consistency should not be viewed in isolation. I also find this dictum in *Hullet Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry and Others (2008) 29 ILJ 1180 LC* useful:

"It is evidently clear from the ratio of Irvin and Johnson that when deciding the issue of parity, the gravity of the misconduct of the employee who seeks to rely on that principle should receive serious attention. In this case, as indicated earlier the employee was found guilty of the serious offence of dishonesty and dismissed, whereas Mr. Cassim was found guilty of a lesser charge of failing to follow company policy

81. I am in no position to determine the seriousness or otherwise of the offence that occurred in the matter involving the other employees and no amount of speculation by the Applicants will suffice unless the pertinent facts are placed before me. What I am certain of, is that in this matter, the assault was of an extremely serious nature. I am in agreement with Ms. Myoli that the attack on Ms. Nwelana was planned by the Applicants. The balance of probabilities favours that assertion. It was not a spur of the moment act of blind rage caused by Ms. Fipaza catching Ms. Nwelana in bed with her husband.
82. Even if the Applicants established inconsistency, it was held in the matter of *SACCAWU & Others v Irvin & Johnson (1999) 8 BLLR 74 (LAC)* that the employees cannot profit from a manifestly wrong decision in the name of inconsistency. I thus find that the challenge of inconsistency should fail.
83. The second allegation against the employee clearly stems from the same action as the first charge and it is simply a duplication of the first one. No evidence was led that the Applicants were required to seek permission to be on the hospital premises, especially since two of them stays on the premises. I thus cannot find the Applicants guilty of that charge.
84. The third allegation likewise is a duplication of the first charge. The plank or sjambok are in itself not dangerous weapons, but was used in the course of the assault. The Respondent should not isolate the use of the plank and sjambok as a separate matter as if the carrying of a sjambok and plank is an offence warranting the dismissal of the Applicants.
85. The fourth allegation relates to the threatening of the security guards whilst they were allegedly tried to stop the Applicants from assaulting Ms. Nwelana. The security guards who were allegedly threatened were not named. The evidence was very vague on this aspect and it did not name specifically which of the Applicants did the threatening and what was said to the security guards. I thus cannot find the Applicants guilty of this allegation.
86. The evidence regarding charge 5 is that Ms. Aldin took the pepper spray and sprayed Ms. Nwelana in the face. No evidence was led against the other Applicants on this aspect. Ms. Fipaza made a valid point that not all of them could be guilty of this offence because not all of them could possibly have taken one pepper spray gun and one cap. At best, Ms. Aldin should be only one found guilty of this offence because she used the pepper spray on Ms. Nwelana. In the circumstances however, this charge on its own would not warrant the dismissal of Ms. Aldin.

87. Again, charge 6 is just another unfair splitting of the charges as it stems from the one action i.e the assault of Ms. Nwelana. My view is that is in any event not serious enough to, on its own, warrant the dismissal of the Applicants.
88. Charge 7, which was only brought against Ms. Mbebe and Ms. Fipaza, related to the fact that they were grossly insubordinate by failing to adhere to the instruction in their suspension letter not to enter the premises of the hospital. Employees are not obliged to follow unlawful instructions. The instruction to exclude them from the premises where they stay, was not lawful. There was no court order accompanying such an instruction. The question is how they were then supposed to enter the premises if the security officials barred them from doing so. In the circumstances, even if the two Applicants were not supposed to open the gate themselves, the Respondent dealt with them harshly and unlawfully and in my view, their actions were justified. There is no way they could have dealt with the matter via the courts at that stage as was suggested by Ms. Myoli.
89. In the end, the primary charge which I find the Applicants guilty of is the assault of Ms. Nwelana. There was a definite nexus between the incident and the workplace, so the Respondent was within its full right to discipline the Applicants, even though the incident occurred outside working hours. The incident occurred on the premises of the Respondent and involved a service provider of the Respondent. The negative consequences for the Respondent is glaringly obvious. The question that remains is whether the sanction of dismissal was appropriate under the circumstances.
90. Assault in the context of the workplace is a serious offence and is identified in the Code of Good Practice: Dismissal contained in the Act as an offence which may warrant a dismissal in the first instance. As I said, the nature of the assault was extremely serious. It was a predetermined, planned and vicious attack on the victim. The Respondent cannot be seen to condone such violence on its premises.
91. I am mindful of the fact that the Applicants, especially Ms. Fipaza, had long service with the Respondent, but that fact cannot mitigate for the serious offence they were involved in and in which Ms. Fipaza played a leading role.
92. My assessment of the evidence and the circumstance surrounding this case is that dismissal was justified. A lesser sanction would not have sufficed.
93. In the circumstances therefore, I make the following award:

AWARD

94. The dismissal of the Applicants, Mess. Nomfuneko Mebe, Nobuntu Fipaza and Ntombizine Aldin by the Respondent, The Department of Health- Eastern Cape, was procedurally and substantively fair.

95. The application is dismissed and the Applicants are not entitled to any relief.

Signature:  _____

Commissioner: **Samuel Baron** _____
Sector: **Public Health** _____