



# ARBITRATION AWARD

Panellist/s: Lungile Matshaka  
Case No.: PSHS146-11/12  
Date of Award: 30-May-2012

In the ARBITRATION between:

HOSPERSA obo Monitshwale, S.A  
(Union / Applicant)

and

Department of Health & Social Development - Limpopo  
(Respondent)

**Union/Applicant's representative:** \_\_\_\_\_  
Union/Applicant's address: \_\_\_\_\_

Telephone: \_\_\_\_\_  
Telefax: \_\_\_\_\_

**Respondent's representative:** \_\_\_\_\_  
Respondent's address: \_\_\_\_\_

Telephone: \_\_\_\_\_  
Telefax: \_\_\_\_\_

## **DETAILS OF HEARING AND REPRESENTATION**

1. The arbitration hearing was held in the Offices of the Department of Health in Polokwane on 8 May 2012. It took place under the auspices of the Public Health & Social Development Sectoral Bargaining Council. Mr R Chabalala, trade union official of HOSPERSA, represented the Applicant, while Mr M V Ngoasheng, Assistant Manager-Labour Relations, represented the Respondent.
2. Both parties requested to make submissions in writing without leading any oral evidence and I duly consented, as the merits of the case are common cause.

## **ISSUE TO BE DECIDED**

3. I am required to determine whether the Applicant's dismissal sanction was appropriate, and if not, to determine an appropriate one.

## **BACKGROUND TO THE ISSUE**

4. The Applicant was employed in 1987 as Grounds Man / General Worker attached to the Logistics Unit of Capricorn District Offices. He appeared in disciplinary hearing and faced the following charges leading to his dismissal:

### **CHARGE ONE**

#### **Corruption**

5. *You are charged with misconduct of corruption in that on or about October 2008 or any period incidental thereto, while at or near your designated place of work or any place*

*incidental thereto, you wilfully or intentionally received R450-00 or any amount incidental thereto from Ms Margaret Kedibone Sekhaolelo in exchange of employment at the Department of Health and Social Development for your benefit or that of any other person while you knew or ought to have known that it is illegal to do so.*

## **1<sup>ST</sup> ALTERNATIVE TO CHARGE ONE**

### **Misrepresentation of information**

6. *You are charged with misconduct of misrepresentation of information in that on or about October 2008 or any period incidental thereto, while at or near designated place of work or any place incidental thereto, you wilfully or intentionally and / or corruptly received R450-00 or any amount incidental thereto from Ms Margaret Kedibone Sekhaolelo in exchange of employment at the Department of Health and Social Development for your benefit or that of any other person while you knew or ought to have known that it is illegal to do so.*

## **CHARGE TWO**

### **Gross Dishonesty**

7. *You are charged with misconduct of Gross Dishonesty in that on or about October 2008 or any other period incidental thereto, while at or near your designated place of work or any place incidental thereto, you wilfully or intentionally and / or corruptly received R450-00 or any amount incidental thereto from Ms Margaret Kedibone Sekhaolelo in exchange of employment at the Department of Health and Social Development for your benefit or that of any other person while you knew or ought to have known that it is illegal to do so.*

## **CHARGE THREE**

### **Bringing the name of the Department into disrepute**

8. *You are charged with misconduct of bringing the name of the Department into disrepute in that on or about October 2008 or any period incidental thereto, while at or near your designated place of work or any place incidental thereto, you wilfully or intentionally and / or corruptly received R450-00 or any amount incidental thereto from Ms Margaret Kedibone Sekhaolelo in exchange of employment at the Department of Health and Social Development for your benefit or that of any other person while you knew or ought to have known that it is illegal to do so.*
9. The Respondent submits that the finding as well as the sanction pronounced by the Presiding Officer befits the transgression and prays that the matter should be dismissed with costs.
10. On the other hand the Applicant's only contention is that the sanction of dismissal by the Respondent was too harsh and prays that it be set aside and be replaced by an alternative as the commissioner may deem fit and appropriate.

## **SUBMISSIONS BY PARTIES**

### ***The Respondent's submissions***

11. The Respondent has made the following submissions:-
12. The Applicant has shown no remorse throughout the internal disciplinary hearing that could have persuaded the presiding officer to impose a lighter sanction. Throughout the disciplinary the Applicant continued to take the view that the allegations brought against him were lies. It was only at this forum (arbitration) that he conceded that he had committed the said misconduct hence only the severity of the sanction is being contested.
13. In the above regard I am referred to a Labour Appeal Court case of **De Beers Consolidated Mines (Pty) Ltd v CCMA (2000) 21 ILJ 1051 (LAC)**. The court went so far to state that "... *it would be difficult for an employer to re-employ an employee who*

*has shown no remorse.” It further stressed that “... acknowledgement of wrong doing is the first step towards rehabilitation. In the absence of a recommitment to the employer’s workplace values, an employee cannot hope to re-establish the trust which he himself has broken.”*

14. The Respondent further submits that it cannot be expected to impose a lenient sanction for misconduct which is very serious and which even according to the Code of Good Practice warrants dismissal.

15. I am further referred to a case of **Central News Agency v Commercial Catering and Allied Workers Union (1991) 12 ILJ 304 (LAC)** whereat the Labour Appeal Court held that *“the trust which the employer places on the employee is basic and forms the substratum of the relationship between them. A breach of his duty goes to the root of employment and the relationship between the employer and the employee.”*

16. I have also noted the comments of the Acting Judge Tip in **Standard Bank of South Africa Ltd v CCMA & Others 1998 6 BLLR 622 (LC)**. He had this to say:

*“It was one of the fundamentals of the employment relationship that the employer should be able to place trust in the employee ... A breach of this trust in the form of conduct involving dishonesty is one that goes to the heart of the employment relationship of it.”*

17. It is therefore the Respondent’s submission that the Applicant is the master of his own misfortune and as such this case should be dismissed with costs.

### ***The Applicant’s submissions***

18. The Applicant submits that the Presiding Officer’s argument that the relationship between the Applicant and the Respondent was irreparably damaged is refuted by the

upliftment of the precautionary suspension the Applicant on 16 November 2010 that enabled him to resume his duties.

19. It is further submitted that the Respondent was under no pressure to bring back the Applicant to work and had had all the time of more than 11 months to finalise the appeal without the Applicant returning to the same work station if his presence at work was considered inappropriate. In the Applicant's point of view this further suggests that the damaged relationship was a self created fear which could not be substantiated by facts.
20. The long service of the Applicant with a clean record from 1987 to the date of dismissal i.e. 8 April 2011 should not have been thrown away as if he never had a positive contribution to the Respondent.
21. Further, the dismissal sanction is so excessive compared to the damage caused to the relationship between the Respondent and those who were as well attempting to corrupt the Applicant.
22. Further, the position of the Applicant (Groundsman / General Assistant) is not so influential to the extent that he can be viewed as dangerous to the business of the Respondent. This was proved by the fact he observed the conditions set out in his return to work on 17 November 2010.
23. It is therefore on the above basis that the Applicant submits that the dismissal sanction of the Applicant is too harsh and equal to crushing the whole house to kill a rat. It is therefore the Applicant's prayer that the sanction be set aside and / or replaced by an alternative as the commissioner may deem fit.

## **ANALYSIS OF SUBMISSIONS**

24. Section 188(1) of the Labour Relations Act, No. 66 of 1995 stipulates two requirements for a fair dismissal for misconduct. In the first instance, it requires that the dismissal

must be substantively fair. It does this by requiring that there must be a reason for dismissal namely, misconduct, and that the reason must be fair. In the second instance, the section requires that a dismissal for misconduct must be procedurally fair.

25. It is now trite according to **Sidumo and another v Rustenburg Platinum Mines Ltd and others 2008 (2) BLCR (CC)** that when a commissioner of the CCMA is called upon to decide whether dismissal as a sanction is fair in a particular case he or she must not apply the reasonable employer test, must not in any way defer to the employer, and must decide that issue on the basis of his or her own sense of fairness.

26. It is further worth noting that the Labour Appeal Court has cautioned in **Fidelity Cash Management Service v CCMA and others [2008] 3 BLLR 197** at paragraphs [98] – [100] as follows:

*“It will often happen that in assessing the reasonableness or otherwise of an arbitration award or other decision of a CCMA commissioner, the court feels that it would have arrived at a different decision or finding to that reached by the commissioner. When that happens, the court will need to remind itself that the task of determining fairness or otherwise of such a dismissal is in terms of the Act primarily given to the commissioner and that the system would never work if the court would interfere with every decision or arbitration award of the CCMA simple because it, that is the court, would have dealt with the matter differently. Obviously, this does not in any way mean that decisions or arbitration awards of the CCMA are shielded from legitimate scrutiny of the Labour Court on review.”*

27. Turning to the present case, it is common cause that the merits are not in dispute but the dismissal sanction on the basis of a damaged relationship. The Applicant's argument is premised on the fact that the Respondent uplifted his suspension on 16 November 2010 and enabled him to resume duties on 17 November 2010, almost 12 months after the sanction was imposed. This according to the Applicant suggests that

that the damaged relationship was self created and could not be substantiated by facts. Further, the Applicant argues that his clean and long service record should not have been thrown away as if he never made any contribution to the Respondent.

28. I have noted the presiding officer's comments in relation to trust. In his reflection he has the following to say:

29. *"It is trite that it is an implied term of the contract of employment that the employee will act in good faith towards his/her employer and that he/she will serve his/her employer honestly and faithfully."*

30. He went on to state that *'as per Code of Good Practice: Dismissal – Schedule 8 of the LRA No. 66 of 1995, the gravity of misconduct was taken into consideration together with the nature of the job and the circumstances of the infringement itself'*. He further made reference to the case of **Donato v Kawena Distributors Pty Ltd, CCMA Arbitration Award under case no. FS7548**, where it was decided that an employee who fails to comply with the employer's policies/procedures, results in a breakdown of a relationship of trust between the employer and the employee. The presiding commissioner held that the sanction of dismissal was appropriate and justified.

31. Further, that almost five individuals were the Applicant's victims, according to the presiding officer's finding, makes it also clear to me that the Applicant in failing to comply with the Respondent's policies and procedures resulted in an irreparable breakdown of the relationship of trust between himself and the Respondent. It must further be noted that until the Applicant had exhausted all the internal avenues, that he was enabled to resume duties before the final decision, does not at all imply that the trust relationship was intact. Furthermore, the presiding officer made it clear that the dismissal sanction was subject to appeal within five (5) working days of the receipt of the finding.



32. On a balance of probabilities and taking what has been highlighted into account in my own sense of fairness I am unable to find fault with the dismissal sanction imposed on the Applicant.

### **AWARD**

33. I find that the dismissal sanction imposed on the Applicant, A S Monitshwale (Mr), was appropriate. The matter is hereby dismissed.

A handwritten signature in black ink on a light green background. The signature is stylized and appears to be 'L. Matshaka'.

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Lungile Matshaka

**PHSDSBC Panellist**