



**PHSDSBC**  
PUBLIC HEALTH AND SOCIAL DEVELOPMENT  
SECTORAL BARGAINING COUNCIL

# ARBITRATION AWARD

Commissioner: **Archibald Ngoako Mafa**

Case No: **PSHS149-17/18**

Date of Award: **2 August 2017**

In the matter between:

**NEHAWU obo MadikaneS.S**

(Union / Applicant)

and

**Department of Health – North West**

(Employer/ Respondent)

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## **DETAILS OF HEARING AND REPRESENTATION**

1. This matter was set down for arbitration before me on 18 July 2017 at Klerksdorp Hospital. Both parties attended the proceedings.
2. The Applicant was represented by Mr. T.E Mbeba, a union official from NEHAWU and Mr. Adoons M the Respondent.
3. The proceedings were digitally recorded and detailed handwritten notes were also taken which form part of the record.

## **PRELIMINARY ISSUES**

4. None

## **ISSUES TO BE DECIDED**

5. Whether a finding of guilt against Applicant is fair or not.
6. Whether dismissal as a sanction was appropriate or not.

## **BACKGROUND TO THE ISSUE**

7. The Applicant is employed by the Respondent as a Driver at Klerksdorp Hospital complex.
8. As at the date of his dismissal on the 9<sup>th</sup> May 2017, he was earning a monthly salary of R7500.00.
9. The applicant was initially charged with four counts and charged three was withdrawn by the respondent during the disciplinary hearing.
10. The outcome of the disciplinary hearing was a guilty verdict and dismissal as a sanction.
11. The charges preferred against applicant were as follows:
  - Unauthorized use of state vehicle on the morning of 26<sup>th</sup> September 2016 between 3am and 4am.
  - Fleeing a scene of the accident involving a state vehicle where a pedestrian member of the public was injured.
  - When you reported the accident to the employer you gave false information regarding the circumstances of the accident.
12. The applicant pleaded guilty to all the charges leveled against him and only challenges the severity of the sanction being a dismissal.

## **SURVEY OF EVIDENCE AND ARGUMENT**

13. Both parties agreed not to lead *viva voce* evidence on the basis that material facts to the dispute are common cause and presented oral arguments.

## **RESPONDENT'S ORAL SUBMISSIONS**

14. It was submitted on behalf of the respondent that at the time of the accident applicant was on duty and in lawful possession of state vehicle.
15. The applicant was on a night duty and assigned to do any of the official duties that will require transport.
16. It was submitted that applicant left his work station around 3am and was involved in an accident with a state vehicle.
17. It is contended by the respondent that one person was seriously injured and two reports submitted reflect different scene of accident.
18. The respondent submits that in the report submitted by the applicant no-one was injured.
19. The damages on the vehicle amount to R19 322.28 and the injured person was admitted for 5 days in hospital.
20. As at the time the applicant was charged he had a written warning which had expired which demonstrate that he was aware that his conduct was wrong.
21. When he struck a pedestrian the number plates fell on the ground as he flew the scene of the accident until it was picked up by the mother of the injured pedestrian and took it to the police station.
22. It was submitted that the rampant abuse of the state resources by the applicant undermines the integrity and ability of the state to perform its constitutional and legal responsibilities by providing necessary services.
23. The applicant's conduct as it is submitted disabled the state to use its vehicle as it was parked for over 2 months at the police station.

## **APPLICANT'S ORAL SUBMISSSIONS**

24. It was submitted on behalf of applicant that he was on the official trip when the accident took place.
25. It is submitted that from the hospital to where applicant resides is a distance of almost a kilometer and applicant has a medical condition as he is diabetic and the accident happened on his way to fetch his medication form home.

26. It was submitted that on his way to his house there is a tavern which is well-known as being gang riddled where people are killed and shot at.
27. The applicant submitted through his representative that in the early hours that morning while on his way to his place he came across a gang armed with pangas and while he tried to negotiate a u-turn he hit one of them.
28. He then immediately went to report the matter at Klerksdorp Police Station where he was advised that because of jurisdiction he should report it in Jourberton.
29. It was submitted that applicant also reported the matter immediately to his supervisor.
30. It was submitted that applicant fled the scene of accident because his life was threatened.
31. It was conceded that applicant gave two different accounts of the accident when it was reported but later withdrew the incorrect statement because people under shock behave differently.
32. He is the first offender and the victim is known to him. He sent elders to go and apologize on his behalf and also paid his hospital expenses.
33. It was contended that applicant paid damages to the car, a sole breadwinner with 4 kids and his wife is unemployed.
34. The applicant is diabetic and he holds a leadership position as chairperson of NEHAWU Branch.
35. It was contended that applicant was recently blessed with a new baby, 42 years old and started working at Klerksdorp Hospital since 2012.
36. He does not have matric and chances of securing another employment are limited. He also has debts and a child that is at university.

### **RESPONDENT'S REPLY**

37. It was contended by respondent representative that the medical condition of applicant was never raised during the disciplinary hearing and appeal.
38. It was insisted that there is no report withdrawing a report on how the accident happened and the fact that he was attacked was also never reported to the police.
39. The fact that applicant offered to pay damages or hospital bills cannot take away the seriousness of his conduct.

## **ANALYSIS OF EVIDENCE, ARGUMENTS AND FINDINGS**

40. In arriving at my findings, I took into account oral arguments presented by both parties.
41. The factual matrix in this matter is that applicant was found guilty for unauthorized use of state vehicle on the morning of 26th September 2016 between 3am and 4am, fleeing a scene of the accident involving a state vehicle where a pedestrian member of the public was injured and that when he reported the accident to the employer he gave false information regarding the circumstances of the accident.
42. The applicant pleaded guilty on all charges and the sanction was a dismissal.
43. In terms of Resolution 1 of 2003 when an employer invokes the provision of Clause 6 of the resolution the misconduct justifies a more serious form of disciplinary action.
44. Herein, it was not disputed that the charges preferred against the applicant are serious in nature.
45. As a point of departure, a dismissal will only be fair if it is motivated by a fair reason and effected in accordance with a fair procedure.
46. The provisions of item 3(4), 3(5) and 3(6) of the Code of Good Practice: Dismissal provides the following:
- Item 3(4) provides that *'generally, it is not appropriate to dismiss an employee for the first offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable'*.
  - Item 3(5) provides, in turn, that *'when deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances), the nature of the job and the circumstances of the infringement itself'*.
  - Item 3(6) provides that *'the employer should apply the penalty of dismissal consistently with the way in which it has been applied to the same or other employees in the past, and consistently as between two*

*or more employees who participate in the misconduct under consideration’.*

47. In **Sidumo & another v Rustenburg Platinum Mines Ltd & others [2007] 12 BLLR 1097 (CC)** paras 78–79 the Court held that commissioners should decide on sanction impartially in the following manner (per Navsa AJ for the majority):

*‘In approaching the dismissal dispute impartially a commissioner will take into account the totality of circumstances. He or she will necessarily take into account the importance of the rule that has been breached. The commissioner must of course consider the reason the employer imposed the sanction of dismissal, as he or she must take into account the basis of the employee’s challenge to the dismissal. There are other factors that will require consideration. For example, the harm caused by the employee’s conduct, whether additional training and instruction may result in the employee not repeating the misconduct, the effect of dismissal on the employee and his or her long-service record. This is not an exhaustive list.*

*In terms of the LRA, a commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair. In arriving at a decision a commissioner is not required to defer to the decision of the employer. What is required is that he or she must consider all relevant circumstances’.*

48. In **Motsamai v Everite Building Projects (Pty) [2011] 2 BLLR 144 (LAC)** it was held that it is the commissioner who has to determine what a fair sanction should be having regard to all the fact presented to him including the seriousness of the offence.

49. One of the purposes of **Resolution 1 of 2003** is to promote acceptable conduct.

50. Acceptable conduct within the working environment includes an instance where a state property is made available to employees by their employers to be used for work-related purposes, unless the employee obtains permission to use it for other purposes.

51. In *Ndlala v Value Truck Rental* [1995] 9 BLLR 138 (IC) it was held that employees who use company vehicles for private purposes may be dismissed if there is a clear rule prohibiting such use.
52. In *MEWUSA obo Sibisi v Pressure Die Casting (Pty) Ltd* [2003] 8 BALR 842 (MEIBC) it was held that actual injury is not a requirement for wilful endangering of the safety of others but an act that could reasonably have had the result.
53. Herein, applicant was found guilty of acts of misconduct that has an element of dishonesty.
54. By pleading guilty applicant, in my view, acknowledged that he was aware of the rule against unauthorised use of a state vehicle and a possibility of being dismissed if found guilty.
55. In as much as his personal circumstances and the circumstances of the misconduct may at times mitigate against dismissal, the applicant cannot hide behind the fact that he pleaded guilty, has a clean record, a sole breadwinner, his medical condition and the fact that he paid the damages and hospital expenses.
56. His personal circumstances must also to be weighed against those that aggravate them.
57. In my view, applicant was aware of the consequences of his actions and the fact that he misrepresented the circumstances and scene of the accident and that he flee the scene of accident is indicative of his dishonest character.
58. If he was able to misrepresent the circumstances of the accident under oath, I find it difficult to even accept his explanation of his conduct on the day in question.
59. Even if I were to accept that he reported it, he lied about the location of the accident when in fact he knew that a person go injured and was left helpless.
60. In my view, applicant nearly ran away with murder. I find his conduct on the night in question not only constituting misconduct but a criminal offence.
61. It remains the respondent's prerogative to determine the nature of misconduct that warrants dismissal as a sanction and herein I find the aggravating circumstances more compelling than the mitigation factors.
62. In my view, the decision by the respondent to dismiss applicant under the circumstance is not out of the band of fairness.

63. Accordingly, I find on a balance of probabilities the respondent's version more probable than the version of the applicant which renders his dismissal both procedurally and substantively fair.

## **AWARD**

64. The dismissal of the applicant is both procedurally and substantively fair.

65. I make no order as to costs



Signature: \_\_\_\_\_

Commissioner: Archibald Ngoako Mafa

Sector: Public Health & Social Development