



# ARBITRATION AWARD

Panellist/s: Silas Ramushwana  
Case No.: PSHS 194-11/12  
Date of Ruling: 12 July 2012

In the ARBITRATION between:

**MOABELO M F**

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(Union / Applicant)

and

**DEPARTMENT OF HEALTH-LIMPOPO**

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(Respondent)

**Union/Applicant's representative:** Mr. Maake Kganyago-Attorney

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**DETAILS OF HEARING AND REPRESENTATION**

1. This is the award in the arbitration between Moabelo MF, the applicant and Department of Health-Limpopo, the respondent.

The arbitration was held under the auspices of the Council in terms of Section 191(5) (a) of the Labour Relations Act 66 of 1995, as amended (the Act). The award is issued in terms of section 138(7) of the Act.

2. The arbitration hearing took place on the 3<sup>rd</sup> of July 2012 at the Provincial Head Office, Polokwane, Limpopo. The applicant was represented by Mr Maake Kganyago, attorney whilst the respondent was represented by Ms N Mafunda from the Labour Relations. The process was manually and electronically recorded.

### **ISSUE TO BE DECIDED:**

3. The issue to be decided is whether or not the dismissal of the applicant in terms of Section 191 of the LRA was substantively and procedurally fair.

### **BACKGROUND OF THE DISPUTE:**

4. It was common cause that applicant was employed by the respondent as a Deputy Manager; Liaison Services on 1 July 2002 earning R13 140, 50 per month and was dismissed on 18 April 2011.
5. In the belief that his dismissal was unfair, applicant referred an alleged unfair dismissal dispute to the Commission in terms of section 191 of the LRA.
6. The applicant is challenging both the substance and procedure of his dismissal.
7. The applicant sought, as a remedy, retrospective reinstatement as provided for in section 193 read with section 194 of the LRA.
8. The respondent, on the other hand, contended that it had fair reasons to terminate his services.
9. The respondent, sought, as a remedy, that the matter be dismissed.

## **SURVEY OF ARGUMENTS & EVIDENCE:**

10. All witnesses gave evidence under oath. This is a summary of evidence presented. . Bundles of documents were submitted by both parties. Their evidence may be summarized as follows;

### **RESPONDENT'S CASE**

**The respondent called two witnesses in support of its case.**

12. **Mr Piet Bambo** testified as the Communication Officer: Department of Social Development: Capricorn District. He knew and worked with the applicant. He came to realise the applicant's absenteeism from 2008 as the District Manager had communicated it to them. It is his evidence that the applicant was not signing the attendance registrar as required per Annexure C of the respondent's bundle. The District Manager approached them about the applicant's whereabouts. The District Manager requested for his residential address and a letter was delivered to his father as he was not available. The letter which was delivered to the applicant's father was a Termination letter as per Annexure B dated the 12<sup>th</sup> of May 2008.

Cross-examination: He confirmed that the applicant was working at Seshego as their work entails working at the outskirts. All other team members were signing the attendance register at the office but the applicant was not. It is his evidence that the applicant was supposed to sign the attendance register before he goes to Seshego. He stated that he could not remember the date on which the applicant absconded but the letter he delivered to his family house was dated the 8<sup>th</sup> of May 2008. He was asked as to why there was no other person who signed the letter as a witness; he stated that it was not applicable.

13. **Ms A D Kekana**, former Deputy Manager, Corporate Services, testified that the applicant was reporting to the District Manager, Mr Sihlaku. In 2008 January there was

a settlement after there was a dispute to reinstate the applicant. The applicant absconded and they waited for the doctor's certificates but in vain. After the applicant was not reporting for work she was then instructed to freeze his salary on May 2008. At a later stage she heard that the applicant was requesting for a transfer.

14. Cross-examination; She confirmed that the applicant had approached her several times enquiring about the salary. She informed him that his enquiry went to the Head Office and the matter was with the Salary Change Control. The salary took time to be paid as the applicant had absconded.

#### **APPLICANT'S CASE:**

**15. Mr MF Moabelo** testified in his capacity as the applicant .that he was reporting for work at the District Office reporting to Mr Sihlaku, the District Manager. His position was at the Capricorn District based at Seshego Hospital. In March 2008 after he was reinstated there was a problem concerning his salary and he started going to the Head office for follow-up with the payment. It is his evidence that he did not have a good relationship with his supervisor and it was provided as part of the settlement that he should be transferred to another department. As to the fact that he should report directly to Mr Sihlaku, there was no document instructing him to do such at all. He stated that it would be impracticable for him to report at the Head Office and then go to Seshego. He disputed the fact that his father did receive the letter from the department and that the signature was not his father's signature. It is his submission that the attendance register submitted by the respondent was intended for the Heads of Departments. The applicant submitted that he was working for a period of three months without an income and he was once chased by Mr Sihlaku from his office. It is his version that Mr Sihlaku had a personal vendetta against him due to the fact that he had won a case against the department.

**16. Under cross-examination**, the applicant stated that he signed an attendance register at the Communication Office and he did not have a copy as it is a state

document. Further that he had lodged a grievance against Mr Sihlaku to the HOD as well as with the MEC but was with no success. He stated that the proof that he was reporting for work at Seshego would be with his supervisor in the form of weekly report. The applicant stated that the issue of transfer was a verbal agreement and was not reduced in writing as he could not work well with Mr Sihlaku.

**17. Mr James Mankge**, former Shop steward for NEHAWU, testified that he represented that applicant when he was unfairly dismissed. The applicant was reinstated and it was agreed that he should be transferred as he did not have a good relationship with Mr Sihlaku. He had tried to meet with Mr Sihlaku to address the grievance but he was not cooperating as his attitude was too bad towards the applicant. Mr Sihlaku had a very sour relationship with the applicant.

**18. Under cross-examination**, he confirmed that the matter was also escalated to the MEC for intervention. Mr Sihlaku once stated that he could not discuss anything which relates to the applicant.

## **ANALYSIS OF ARGUMENTS & EVIDENCE:**

19. The Respondent bears the onus of proof in terms of Section 192(2) of the Labour Relations Act, Act 66 of 1995 as amended, (LRA) that the dismissal was substantively and procedurally fair. Parties in this dispute agreed that there was a dismissal and I'm required to determine whether the Applicant's dismissal was substantively fair or not. The applicant is not challenging both the substantive fairness and procedural defects. The point of departure in this dispute will be to focus on the provisions of Section 188(1) of the Labour Relations Act No. 66 of 1995 as amended which stipulates two requirements for 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 reason must be fair. In the second instance, the section requires that a dismissal for misconduct must be procedurally fair.

20. It is important to note that my scope is to determine whether the dismissal of the applicant was for a fair reason or not and I am not required to defer to the decision of the employer. In cases of this nature, I am guided by Item 3 (5) of the Code of Schedule 8 of the LRA which reads as follows:

"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.”

21. It was the respondent's evidence that the applicant absconded after there was an agreement to reinstate him. The applicant was stationed at Seshego Hospital and was supposed to report at the District office as per the attendance register submitted as part of evidence where his team members had signed. It was also testified that indeed the applicant was at some stage not paid and had made enquiries and due to the fact that he absconded there was a delay in payment. The respondent's witness testified that the District Manager investigated the absenteeism and sent him to deliver a termination letter. On arrival at the applicant's home, the applicant was unavailable and a letter was handed over to the applicant's father who signed and the letter was submitted as part of the evidence.

22. The applicant's version was that he was never absent from work. He was working at Seshego Hospital and it was going to be impracticable for him to report at the Office first and later goes to Seshego. He then stated that he reported at the Communication Office and that the attendance register submitted was for the Heads of Departments. It was his contention that the signature alleged to his father's, was not his father's signature. The reason for his dismissal was that his supervisor did not like him after he won the case against the department.

23. The applicant was asked to provide with proof in that he was reporting at the Communication office and had said that the attendance register is the property of the state. He was further asked for any proof to show that he was indeed reporting or working during the period regarded as absconsion by the respondent. The applicant could not produce any weekly reports and claimed that they were with his supervisor. It is noted that the applicant had a grievance against his supervisor and that he was not paid at some stage. There is nothing before me in a form of oral evidence or documentary evidence, which shows that the applicant was at work during the period which the respondent had submitted that he had absconded. It is absurd to believe that the respondent would decide to terminate the services of the applicant given the evidence before me. It is trite law that if an employee is absent from work without notifying the employer for more than three days, it would be taken as the employee having been absconded.

22. Having carefully considered evidence led and documents produced during the arbitration hearing I am of the view that the provisions of section 17 (5) of the PSA are applicable in this case. This was established through the evidence of the respondent's witness. It was testified indisputably that the applicant was absent for a long period after he was advised to report for duty. I find these respondent's witnesses to be accurate and credible. What impressed me was that they both reacted impressively to an exacting cross-examination by the applicant representative. The pressure placed upon them elicited no damaging inconsistencies. Therefore, in my view they had no motive against the applicant; as such they had no reason to fabricate their testimony. By

contrast, the evidence of the applicant was unimpressive. Although the applicant was an assertive and emphatic witness; his version lacked logic and was contradictory.

23. The provisions of section 17(5) of the PSA have received attention in a number of decisions of the courts. In **Phenithi v Minister of Education & others (2006) 27 ILJ 477 (SCA)** the court dealt with the provisions of section 14(1)(a) of the Employment of Educators Act 76 of 1998 (“the EEA”), which has similar provisions as those of section 17(5) of the PSA. The court held that when an employee is dismissed in terms of the deeming provision the employer does not commit an act or take a decision because the discharge is by operation of the law. At paragraph 19 the court specifically said: “As to the ground that s 14(1)(a), read with s 14(2), violates the appellant’s fundamental right to fair labour practices in terms of s 23(1) of the Constitution, it is not clear what ‘act’ of the employer is alleged to be allowed by the section ‘without considering the substantive and procedural aspects of the case’. It would not be out of place to interpret the word ‘act’ to mean ‘to decide to terminate or discharge’, to which the answer again is that the employer takes no decision to terminate an educator’s services under s 14(1)(a) of the Act. The discharge is by operation of law. In my view, the provisions create an essential and reasonable mechanism for the employer to infer ‘desertion’ when the statutory prerequisites are fulfilled. In such a case there can be unfairness, for the applicant’s absence is taken by the statute to amount to a ‘desertion’. Only the very clearest cases are covered. Where this is in fact not the case, the statute provides ample means to rectify or reverse the outcome.”

24. If I were to apply the same principle established in the above judgment I must find that there was no dismissal as anticipated in section 186 of the LRA. Accordingly, I find that the applicant was not dismissed within the meaning of section 186 of the LRA, instead, he absconded and the deeming provisions of section 17 of the PSA were invoked.

25. Accordingly, in my view the applicant’s termination of his contract of employment does not fall within the scope of section 186 of the LRA. As such, the applicant is excluded from the remedies provided for in section 193 and 194 of the LRA.

26. In the circumstances I make the following award:

**Award:**

27. **Mr M F Moabelo** was not dismissed by the **Department of Health-Limpopo**; instead his services were terminated by the operation of the law; as such there was no unfairness to be determined.

28. Accordingly, the applicants' application is dismissed.

29. No order as to costs is made.



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**Panellist: Silas Ramushwana**