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# AWARD

Panelist/s: A.N MAFA  
Case No.: PSHS 260-11/12  
Date of Award: 7 MAY 2012

**In the matter between:**

**HOSPERA obo NYATHI G**

(Union / Applicant)

And

**DEPARTMENT OF HEALTH & SOCIAL DEVELOPMENT (GP)**

(Respondent)

**Union/Applicant's representative** : S. Khanyeza  
Hospersa

**Respondent's representative** : Mr. Doda  
Department of Health and Social Development (GP)

## **DETAILS OF HEARING AND REPRESENTATION**

- [1] This matter was set down for arbitration on the 13 and 14 March, 11 and 12 April 2012 at 10:00am at Bank of Lisbon Building 14<sup>th</sup> Floor, Cnr. Sauer and Market Streets, JOHANNESBURG.
- [2] Both parties attended the proceedings.
- [3] The Applicant Gladys Nyathi was represented by Ms. S. Khanyeza of Hospersa and Mr. M.P Doda represented the Respondent. The proceedings were electronically recorded and detailed handwritten notes were also taken which form part of the record.

## **PRELIMINARY ISSUES**

- [4] No preliminary issues were raised throughout the proceedings.

## **SURVEY OF EVIDENCE AND ARGUMENTS**

### **RESPONDENT'S CASE**

- [5] **ELIZABETH MENOE WAS THE FIRST WITNESS.**
- [5.1] She was employed by the Department of Health at Mofolo Clinic as a Senior Provisioning Admin Clerk and at the time of the incident she was responsible for procurement. According to her she places her order at Auckland Park and they only order at Hillbrow Pharmacy when it is an emergency. The normal procedure to place urgent orders will be to phone them so that the following day the order is ready.
- [5.2] A day before she would write a transport slip to Lillian Ngoyi and she would accompany the driver from Lillian Ngoyi to Hillbrow. She will be having a VA2 (internal requisition) and emergency form completed a day before. When she gets to Hillbrow she will look for the person she spoke to and at that time the staff would have been packed already and give that person VA2 which is signed and authorized from the clinic and the pharmacist at Hillbrow will also have to sign it at the bottom.
- [5.3] She will then go to the security officer in charge and give him the VA2 who will check the staff and if the security is satisfied he will issue a pass-out form and sign it. She does not sign the pass out but only have to provide her ID from there onwards she will proceed to the gate where the security will also recount the number of boxes and re-check the registration number of the car and when they are done they will be released.
- [5.4] The witness identified a document shown to her as VA2 and testified that even though is her duty to complete it she did not complete that one. According to her the document was not properly completed in that on the Column of (offices) it should not reflect Johannesburg Metro and her names are not properly captured and it should have been signed as she normally signs her documents according to her. The date is also wrong on the document. There should also be a date stamp on the form which is not reflected.

- [5.5] She testified that the emergency order is done 24hrs because Auckland Park might not have the stock. She testified further that the VA2 reflects that the stock was requisitioned on the 18 September 2009 and on page 18 it reflects that it was collected on 8 October 2009 which she found it strange because emergency orders are supposed to be collected within 48 hours. Page 22 reflects an emergency order which was also not followed properly. The Matron who purported to have signed the form she is not allowed to order them. According to her the driver cannot go alone or even if she is alone she must go via Mofolo Clinic to collect the VA2 to see what she was expected to collect.
- [5.6] She testified further that the Security Check form is completed by a number of officials including herself, pharmacist and the security at the pharmacy and security at the gate. She testified that she did not sign the form on the day in question. She testified that the Applicant's details was not supposed to appear on the documents if she was the one who placed an order.
- [5.7.] During the cross examination the witness testified that she left the Respondent on the 1<sup>st</sup> August 2011 and her testimony was to clarify the process and also clear her name. She further confirmed that the VA2 was wrongly completed and even if she would be the one who completed it and that on the 8 October 2009 when the incident took place she was at work. It was also confirmed by the witness that she knows Applicant from Lilian Ngoyi Transport Department as a driver. It was further her contention that drivers do not carry VA2's and that she never accompanied Applicant to Hillbrow Pharmacy on the order referred to above which was wrongly completed.
- [5.8.] She testified that she started working at Mofolo Clinic from 1 August 2006 and although she doesn't know all nurses at Mofolo Clinic, B. Nyembe and M. Thota from Transport Department are unknown to her. She further contended that as much as she only complete her part on the form, the driver cannot complete or sign for stock.
- [5.9.] Under re-examination she contended that at Mofolo Clinic she was the only person to complete VA2 and that even if the form shown to her from the bundle is written emergency, the order was not an emergency order. The witness also insisted that the driver would not sign the form if she was present at work. The witness could however not explain why the form has a part where the driver's details are included but insisted that Applicant could have been charged because she was the driver of the bakkie in which the stolen stock was found.

[6] **ADOLPH TIYANE NGOMANE WAS THE 2<sup>ND</sup> WITNESS TO RESPONDENT**

- [6.1] He is employed as a Supervisor at Gaza Security at Hillbrow even at the time of the incident his duties were to supervise employees to do their work correctly and assisting them at Hillbrow Clinic. He identified people appearing on page 33 of the bundle as himself, on the left, in the middle his operation manager and on the right a security officer who does the patrolling. The photos taken reflects the boxes of stolen tablets. According to him they took the boxes from the gate after arresting the culprit.
- [6.2.] On the 8 October 2009 he was at gate 3 busy checking people and cars going in and out with his supervisor Miriam Jele. While he was busy on that day a white car approached with registration numbers GGD972G and they requested to search the car and allowed it in. After it went in another white private car came which was accompanying the bakkie but cannot remember the registration numbers. The person who came in with the bakkie came back with a private car and they asked him why he is driving out with a private car. At that time the bakkie was loading boxes.

- [6.3] When they interrogated the person who came out with a private car he told them that they work together and his colleague will come with the bakkie. According to him when the bakkie came in for the first time there were two people in it being Gladys and Richard and Gladys was driving (Applicant). The person who was trying to go out with the private car is the Applicant. They refused Applicant to go out with the private car because if they wanted to change cars they would have done that outside the premises. They then started to suspect that something might be wrong. When the bakkie came out they asked for pass outs and he was given two pass outs being one for Mofolo and the other for Diepkloof. The other pass out was signed by a sister from Mofolo Clinic. When they tried to call the clinic to confirm if indeed they ordered the staff using the numbers appearing on the pass-out it was not working.
- [6.4] They then requested the Clinic to give them the correct number of Mofolo Clinic and they requested to speak to Richard whose name appeared on the pass-out being the person in charge and they were told that there is no one by the name of Richard and they did not order any stock and knew nothing about VA2. They then went back to the gate and informed the Applicant that there is a problem with the papers and said she doesn't know because she is not placing orders. At the same time Richard came walking and they told him the same story and he said he doesn't know the Applicant and left. They then took Applicant to their office, and asked the official from the district pharmacist to come and check the VA2 and said it doesn't correspond by dates.
- [6.5] They then called the police and on their arrival they ask them to call the person who dispatched the tablets to clarify. According to him the Applicant tried to bribe them and they refused. The person who came to clarify the VA2 is Oupa and informed them that it was wrong and asked them to go back to collect the correct VA2. The police asked to accompany him and on their way Oupa confessed to him that they actually stole the items and he is leaving the premises. At that time the Applicant was at the security offices. He then went back to the gate and told the police that Oupa told him that they stole the items and he doesn't want to be arrested and left and we could not chase him. He is familiar with the security check form on page 18.
- [6.6] According to him it is used by security officer at the pharmacy exit point. The security officer will always have the form. The person who dispatch the stock has to take them to the security point and it is at the stage that is completed by the Sister; the Pharmacist and Security. The part where it indicates for "Security Use Only" the details of the person must produce an ID. The receiver must also sign the document, the security officer would then give the person who collects the items the form so that he / she produce it at the gate. According to him the driver who signed for the stock is the Applicant and they were surprised because for Diepkloof the Sister signed and for Mofolo Clinic the driver is the one who signed. In terms of form on page 18 Applicant is the one who received the items.
- [6.7] Under cross examination the witness confirmed that he was on duty when the incident happen and posted at gate 3 in the office. He also confirmed that among others he also supervise the security officers at the pharmacy and that on the day in question 3 security officers were posted at the pharmacy and 1 at the gate. It was also contented by the witness that the reason why they took pictures standing next to the boxes was evidential purposes. He also confirmed that the picture was taken in their office which is approximately ± 5 meters from gate 3. The witness also testified that on its way out the bakkie was not driven by Applicant but by an unknown person who also did not give them a pass-out and at the time Applicant was with them at the gate with a private car. It was also confirmed by the witness that the boxes were not found in the car driven by Applicant.
- [6.8] He also confirmed being the one who called Mofolo Clinic and spoke to the person responsible to issue orders and her name is Elizabeth. The witness also contented that it was not necessary for him to bring with him the occurrence book because he know exactly what

he wrote in it and still recall the incident. It was also confirmed by the witness that his version differs with that of Mojela on the issue of pass-out but insisted that even if he wrote a statement it would differ with Mojela's statement because they might have observed the incident differently.

[6.9] He also confirmed that he never came across a situation where a driver would produce a VA2 and drive without a sister. The witness confirmed further that the number of boxes loaded in the bakkie to Mofolo Clinic was 22 and they only became aware that they were stolen after making inquiries at Mofolo Clinic. It was also not disputed by the witness that Applicant could also sign the form although he insisted that Applicant drove a different car on her way out. The witness did not however want to acknowledge the letter referred to him on page 35 confirming that the Applicant as not wrong in signing because the letter was not there when Applicant signed.

[6.10] During re-examination the witness insisted that he saw the letter referred to on page 35 for the first time at arbitration hearing, It was also confirmed by the witness that the basis for arresting Applicant was that she is the one who signed for the goods and at a later stage the driver of the bakkie was also arrested.

**[7] CHUMANI MAKAPELA WAS THE 3<sup>RD</sup> WITNESS FOR RESPONDENT**

[7.1] He is employed by [former GSCC] Department of Finance and was appointed in the matter as an investigating officer in November 2009. He could not proceed because of the influx of work at the time and only started with the investigation the following year and finalise them in March 2010. They had engaged the prison to enable them to arrange for hearing as Applicant was in jail and could only start with the hearing in August 2010.

[7.2.] To be precise the hearing was on the 4<sup>th</sup> August 2010 and a *point in limine* were raised in the hearing. It was delay by the employer and explanation was given to them. Applicant together with her representative decided to walk out and the hearing proceeded in their absence. The hearing had to proceed because the reasons put forward by the employer were valid to enable them to proceed. He could not remember what happened on the 2 dates being the 14<sup>th</sup> and 15<sup>th</sup> July 2010.

[7.3] He further preferred the charges as appearing on page 14 of bundle because of the prima facie evidence available at the time. In respect of charge1 the evidence he gathered suggested the commission of the offence.

[7.4] The witness confirmed his appointment as an investigating officer in the matter during cross examination and familiar with the relevant applicable prescripts. He testified that he was informed of the matter in November 2009 and could not finalise the investigations timeously because of the work load. He confirmed the findings of his investigations being that the VA2 purported to be of Mofolo Clinic is unknown to them and the names of people appearing on it are unknown. He however confirmed the VA2 reflected on page 21 of annexure "D" to be the correct VA2.

[7.5.] He confirmed receiving the VA2 on page 19 from Mojela and Ngomane at the Hillbrow Pharmacy Security gate and document on page 21 from Mofolo Clinic while also doing his investigations. The witness disputed a possibility of a sister by any other name but Elizabeth being the only person responsible to complete the VA2 in the section. He also

confirmed that his recommendation was that Applicants Richard and Oupa be charged, they were immediately arrested and charged criminally and he was the one who formulated charges against them internally.

[7.6.] He also confirmed that Richard was not dismissed and insisted that there was no inconsistency in that each case has to be viewed on its own merits. The witness also confirmed seeing a letter on page 35 of the bundle for the first time. According to him he did not see any need to interview the suspects as there aren't any specific rules on how to conduct a investigations. It was also contended by the witness that in as much as the applicable resolution, on the matter it was impossible because they were all in prison.

**[8] KLAAS MOTONG WAS THE 4<sup>TH</sup> WITNESS TO RESPONDENT**

[8.1] He was the Presiding officer in the case. He authorized the document as per pages 5-13 being a report of the Presiding. He was requested around May to preside on the matter at Hillbrow Community Centre. They could not hold a hearing then because it came to their attention that the alleged employee was convicted and imprisoned. They then had to make arrangements with the prison to hold a hearing. On the arranged date they could not hold a hearing because other employees were to be transferred from other prisons.

[8.2.] The matter had to be postponed because Applicant representative also indicated that he was not prepared as the prison authority were giving him problems in consulting with Applicant. The representative of other two employees, Mr Mbatha (PSA) was requested to assist Mr. Shilakwe the representative for Applicant to access prison. Around August the matter reconvene. According to him points in limine were raised before they proceeded by Mr. Shilakwe in that Applicant does not remember the actual incident, the prison environment was not conducive and it took long for the employer to charge her. He then gave the employer an opportunity to respond and according to employers investigations started in December and could not be finalized because other witnesses were on leave and had finalize the investigations the following year.

[8.3.] It was the employer's case that the delay was not deliberate. Having to weigh the submission by both parties he ruled that the matter proceed, Mr. Shilakwe's response was that they were not happy with the ruling and that as the Chairperson he may be in cahoots with the employer. They requested that the matter be stood down which he did. When they came back they indicated that they were leaving and left wherein Applicant was also taken back to the cells by prison authorities. He then advised the employer that he is proceeding with the case and the employer presented their evidence hence the findings.

[8.4] During cross examination the witness contended that his decision to arrive at the finding to dismiss was informed by the evidence presented to him and corroborated. He also confirmed that he works together with Mr. Makapela and found Applicant guilty on theft, bribery and fraud. The witness insisted that he complied with the prescripts of the applicable Resolution and confirmed also that when Applicant representative was leaving Applicant was also at the same time escorted back to the cells and could not inform her of her rights because she left together with her representative.

[8.5] According to him he would still dismiss even if the letter referred to on page 35 was present. The witness further confirmed that according to the evidence presented to him the bakkie was driven by Mr. Mola when it comes and by Applicant on its way out. He also confirmed having not captured Mr. Mogomane's evidence in his report and having presided over other two cases.

## APPLICANT'S CASE

### [9] GLADYS NYATHI WAS THE FIRST WITNESS

- [9.1] She is the Applicant and referred the dispute because she feels she was unfairly dismissed. When she went to Hillbrow it was not on her own accord but the roaster changes after every 3 months. She would know that she must go to collect orders from instructions from her supervisor and Richard will also sign for orders that supposed to go to the Clinic. On or about 8 October 2009 she left Lillian Ngoyi driving a bakkie to Hillbrow Clinic and when she arrived at the gate they found security together with Richard and she completed the forms. She then stood on a queue at the pharmacy. There were 2 cars, one from Lands and the other from Chiawelo. After the two cars loaded she drove the bakkie next to the pharmacy and Richard went inside the pharmacy.
- [9.1] The boxes came wherein 15 was for Diepkloof and 22 Mofolo. The security called her after those boxes were put outside the pharmacy by the name of Raymond Nkosi. While standing at the pharmacy door there were 3 more security, two men and one lady, and they demanded her I.D. She then refused and told them she is not allowed to give it to anyone. The male security then informed her that it was a new law that when one come to collect medication they have to produce their I.D.
- [9.2.] The security then told her he thought she was still new and she told him she is being around and Sister Nongoma also confirmed that. It was a new law for one to produce ID when collecting medicine. She then told them she had a driver's license with her and they told her it was fine as it had ID number as well. They then said she must wait outside and wait for Richard to count boxes and count with him. He loaded 15 boxes for Diepkloof and 22 Mofolo. The security then brought two pass-out forms one for Diepkloof and one for Mofolo. She then reversed the car and drove toward the gate together with Sister Nongoma.
- [9.3.] Actually before they could reach the gate they were stopped by a lady security and she asked for the pass-outs. They then gave both pass-outs to her. Her name is Miriam and she took them and said she was coming back. While waiting for her they parked the car on the side road to avoid blocking traffic. When she came back she told her that what was loaded in the bakkie was not supposed to go out. She then said she only signs to confirm that she have loaded the boxes and ask the lady that they go back to the pharmacy and clarify the issue. She then said she was going to call the police and she said to the lady security she can do whatever as she did not load boxes in the bakkie. She then called Transport Department informing them of her problem. Her supervisor asked to speak to the person who said was going to get her arrested and she gave her the phone. She testified that her supervisor told her that the medicine has to go where it supposed to go. She then went to call the police.
- [9.4.] Her supervisor then sent Mathews Tlhatlha and Vusi Mhlongo to assist her. On their arrival trying to find out from Miriam what happened. Miriam did not want to talk to them and told them she knows how to do her job. The police then came to the scene and they were told that she stole the boxes. When they asked if she is the one who loaded the boxes they were told that it was Richard Mola. The police then indicated that they don't know why she should be arrested if there was a pass-out and called the Pharmacist. The Pharmacist told them that some of the boxes that they ordered were not there so they put them in the bakkie to be dropped at Mofolo.

- [9.5] The police came back for the second time took statement from Miriam and that is how Applicant was arrested. She was released on a R2000.00 bail on the same night. The following day after attending Court she went back to work and continue to work normally for about 7 to 8 months without anything being said at work. They were sentenced to 12 months all three of them. While serving a sentence about 4 months Maggy Chabalala came to prison. She told her she came to give her a letter to attend a hearing and asked her which union does she belongs to and told her its HOSPERSA and asked her to inform them.
- [9.6] They visited her in prison and she linked them with her child to give them the documents and statements. A hearing was arranged but could not proceed because of logistical arrangement and another date was arranged. On the same date that was arranged the hearing could not proceed because her employer came late and union said they must escort her back to the cells.
- [9.7] On the third occasion the matter proceeded in her absence with the union excused. It was after the arguments between her union and the employer where the union requested the escort to take her back and doesn't know what transpired thereafter. According to her it was Richard Shilakwe from HOSPERSA who told the escort to take her back. She was the first to leave the hearing room as the rules of the prison dictates that prisoners should be escorted first. She testified that her supervisor is the author of page 35 which was written after her arrest. They were asked to make statements by Mrs. Gasa together with Nyembe. According to her she wrote her statement on 12 October 2009 as per page 37 of the bundle and Nyembe's statement is as per page 35.
- [9.8] During cross examination the Applicant confirmed that she has been employed as a driver for about 29 years. She confirmed that on her way out of Hillbrow Clinic she was driving with sister Nongoma in the bakkie and that Richard was driving the private car that Sister Nongoma came with because it had emergency goods to deliver.
- [9.9] She testified that after she was released on bail it took the Respondent ± 9 months to convene a hearing. She further confirmed that it was her first time to collect goods from Hillbrow Clinic and she didn't know who was in possession of the VA2 and has never seen it before. She contended that she was not carrying any document when going to collect the goods and that her duty is to follow instructions and she would not know if the goods she collects are emergency or not.
- [9.10] The witness insisted that she signed the documents because the medication she was loading was going out and she would not take responsibility if anything happens as he does not open the boxes. At a later stage the witness acknowledged being familiar with emergency orders and testifies that if boxes are many they cannot be emergency orders. The witness confirmed that Belinda Nyembe is the one who gave her instructions to collect the boxes as her supervisor even though she is not an ordering clerk.
- [9.11] She further contended that she referred the security to the pharmacist and assistant pharmacist as the people who loaded the boxes. She also testified that the ordering is not done between the clinic and Transport Department but their department would receive a fax of medicine to be collected and they would then collect the order. She denied also the fact that she attempted to leave driving a private car.
- [9.12.] Under re-examination the witness confirmed that her supervisor would not tell her who placed the order and on the day in question she was only instructed to collect the order and was not told if it was emergency.

**[10] BELINDA NYEMBE WAS THE SECOND WITNESS**

- [10.1] She is employed as a supervisor at Lillian Ngoyi and Applicant was employed as a driver. According to her Applicant was dismissed in April 2011. There was an incident at Hillbrow Pharmacy which led to her dismissal. On or about 8 October 2009 they made a roaster for 3 months and Applicant was allocated to collect medication from Hillbrow pharmacy to other nine clinic.
- [10.2] On the same date Applicant called her and told her that she was about to be arrested on her way out at Hillbrow gate. She then requested to speak to the person and explain to her that Mofolo one of the clinic where they do deliveries. She testifies that after the roaster period expires the new driver cannot refuse to load boxes that were ordered previously and is always accompanied by an assistant. According to the rules Richard was supposed to sign for all the medication to avoid going back if any shortage.
- [10.3] The duty of the driver is to only calculate the boxes loaded belonging to one of the clinics she delivers to. After trying to explain to the police/ security they insisted that they are arresting her even if she explained to them. She also told them that it was wrong for them to demand a driver's license as they are not traffic officers. She testified that she only became aware of the existence of page 18 after it was referring to her. The procedure when collecting medication is that the clinic will come with transport requisition and VA2. Where there is a sister she will accompany them but where there is not Richard will sign, especially for previous orders.
- [10.4] According to her Applicant was right in collecting those boxes as Richard will have to sign when there is no requisition. She testified that she wrote a letter as per page 35 because the police said they came from Pimville to steal and she was explaining the procedure and also her senior, Gasa wanted an explanation. She was never called to any of the hearings including the one of the Applicant.
- [10.5] During cross examination the witness confirmed that as a supervisor and transport officer, she would dispatch the car when a need arises from clinics irrespective of whether there is a requisition or not. The witness denied the fact that a trip authorization is always necessary before dispatching a government vehicle and testified that on the day in question Sister Nongoma came with her order and on her arrival at Hillbrow Pharmacy, the Pharmacist assistant requested them to pick up the other order. She confirmed further knowing the VA2 and contended that she wouldn't know it is emergency order.

**ANALYSIS OF EVIDENCE AND ARGUMENTS**

- [11] The Labour Relations Act requires that a dismissal be effected in accordance with a fair procedure. Procedural fairness is the yard stick against which the employer's pre- dismissal actions are measured.
- [12] Normally, an employer should conduct an investigation to determine whether there are grounds for dismissal. The employer should notify the employee of the allegations using a

form and language that the employee shall reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employer should be entitled to a reasonable time to prepare a response and to the assistance of a trade union representative or fellow employee. After the inquiry, the employer should communicate the decision taken, and preferably furnish the employee with a written notification of that decision.

- [13] The factual matrix of this matter is that Applicant was charged for having allegedly committed an act of misconduct in terms of the disciplinary code and procedure for the Public Service in that upon or about the 8 October 2009 she collected items from the central pharmacy Hillbrow CHC with a fraudulent VA2 under the pretense that she was collecting the items for Mofolo CHC.
- [14] On the 14<sup>th</sup> of July 2010 a hearing was scheduled at the Department of Correctional Services and had to be postponed at the request of Applicant Union Representative, Mr. Shilakwe on the basis that he could not get access to the prison facility where his member was held in order to consult. The hearing was then postponed until the 4<sup>th</sup> August 2010 and both parties attended the proceedings. Several points in limine were raised by Mr. Shilakwe including that the charges against Ms. Gladys Nyathi be dismissed on the basis that the case is old, that discipline must be prompt and that Ms. Nyathi cannot remember anything about the incident and that even the venue was not conducive to a fair hearing.
- [15] The presiding officer having dismissed all points in limine Mr. Shilakwe then informed the hearing that since they are not happy with the ruling of the presiding officer not to dismiss the case, they decided not to participate in the proceedings but to be excused from the hearing.
- [16] In my investigation of the conduct of the Respondent in proceeding with the hearing in the absence of both the Applicant and her union representative I cannot find any procedural unfairness. I find the Applicant's argument that she was not informed of her rights after the union representative staged a walk out misplaced in that in her own evidence the Applicant confirmed during arbitration that she was escorted first in line with the rules of the prison authorities.
- [17] I am persuaded to accept the presiding officer's explanation that he could not have explained her rights to her as she already left and the union official walked out soon thereafter. In my view, the conduct of the union representative and the Applicant respectively constitute a waiver of their right to be heard which cannot in anyway be attributed to the Respondent party.
- [18] As to the ruling made by the presiding officer to proceed with the hearing I am convinced that he applied his mind to the evidence presented by both parties and cannot find any unfairness in his ruling. I therefore find that the disciplinary hearing held against Applicant was conducted in a procedurally fair manner.
- [19] Having made a finding referred to above, I must further determine whether the dismissal of the Applicant is fair or not. Herein I am not given the power to consider afresh what I could do, but simply to decide whether the Respondent deed was fair. In so doing it is my duty to consider all relevant circumstances of the case.
- [20] The uncontested evidence represented by the Respondent during the disciplinary inquiry is that Applicant committed an act of misconduct as listed in annexure A" of the Disciplinary Code and Procedure for the Public Service, which reads as follows;- "*Steals, bribes or commits fraud*". *In that upon or about the 8<sup>th</sup> of October 2009 she collected items from the Central Pharmacy at Hillbrow CHC with fraudulent VA2 under the pretence that she was collecting such items on behalf of Mofolo CHC.* Witnesses were called and corroborated the

allegations made by the Respondent. In his findings the presiding officer found that the Respondent through its witnesses were able to prove that Ms Gladys Nyathi, Applicant was the driver of government vehicle number GGD972G loaded with unlawful medication apprehended at the gate of Hillbrow CHC. He also found that the Respondent was able to prove that Mofolo Clinic never ordered medication and that both the VA2 and the pass-out submitted by Applicant were fraudulent.

- [21] On balance of probabilities, I am convinced that the presiding officer considered the evidence presented before him in arriving at a guilty verdict. I am convinced that no other reasonable person would have come to a different verdict in the light of the *prima facie* case being made.
- [22] In as much as I am aware that arbitration is a hearing *denovo*, I have to consider the evidence presented during the arbitration in the light of the totality of circumstances and decide whether the decision to dismiss was fair.
- [23] In the present case, I have carefully considered all the evidence before me. In as much as I would generally not attach much weight to the evidence presented by the Applicant during arbitration proceedings given the fact that she waived her right to present such evidence during the internal disciplinary hearing, I deem it appropriate to weigh the evidence in totality, the gravity of the misconduct against her length of service, previous disciplinary record, personal circumstances, the nature of the job and circumstances of the misconduct.
- [24] Despite the seriousness of the misconduct, I am of the view that the sanction of dismissal was not fair under the circumstances. As at the date of dismissal the Applicant had an unblemished record of 33 years equal to her length of service with the Respondent which should count in her favour. It could not also be proven during the disciplinary hearing that Applicant personally gained financially as a result of the misconduct and as such the Respondent's loss should be regarded as potential in nature. I have as well considered the fact that Applicant was almost due for pension at the time her services were terminated and of the view that in these circumstances progressive discipline would suffice.
- [25] I am further persuaded by the fact that there was no actual evidence that the tenets of trust and good faith that existed between herself and the Respondent had been rendered irretrievable. The aforesaid is informed by the fact that the Applicant did not present her case during the hearing and that her supervisor testified in her favour during the arbitration proceedings.
- [26] Taking into account the totality of circumstances, I am of the view that a sanction short of dismissal was appropriate under the circumstances.

## **FINDING**

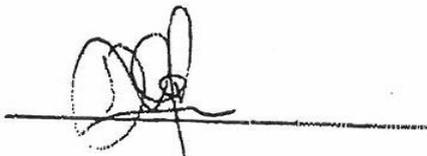
- [27] I therefore find that the dismissal of the Applicant Gladys Nyathi was substantively unfair.

## **AWARD**

- [28] The dismissal of Applicant, Gladys Nyathi is procedurally fair and substantively unfair.  
[29] I therefore order the Respondent, Department of Health and Social Development – Gauteng to reinstate the Applicant, Gladys Nyathi prospectively without any back payment.

- [30] I further make an order that Applicant be issued with a final written warning effective for twelve (12) months from the date of reinstatement.
- [32] The Respondent is ordered to comply with paragraph 29 and 30 above within fourteen (14) days after receiving this award
- [31] I make no order as to costs.

**DATED AT PRETORIA ON 7<sup>th</sup> day of MAY 2012.**

A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a solid horizontal line.

*Archibald Ngoako Mafa*

Panelist : *Archibald Ngoako Mafa*  
Sector : *Public Health & Welfare*