



# ARBITRATION AWARD

Panelist: John Cheere Robertson  
Case No.: PSHS 309-10/11  
Date of Award: 27 January 2013

**In the MATTER between:**

**NEHAWU obo C Madolo**

(Union / Applicant)

and

**Department of Health (EC)**

(Respondent)

<b>Union/Applicant's representative:</b>	<u>Mr S Mandla</u>	<u>Mr T Damoyi</u>
Union/Applicant's address:	<u>NEHAWU PROV OFFICE</u>	<u>NEHAWU REG OFFICE</u>
	<u>10 ST JAMES ROAD</u>	<u>1st Floor Office 105</u>
	<u>Southernwood</u>	<u>Metropolitan Place</u>
	<u>East London</u>	<u>Corner Leeds &amp; Craister Street</u>
		<u>Mthatha, 5099</u>
Telephone:	<u>043 743 2876</u>	<u>047 531 2647</u>
Telefax:	<u>043 743 8623</u>	<u>047 531 2980</u>

<b>Respondent's representative:</b>	<u>Mr B Mcanyana</u>
Respondent's address:	<u>Department of Health: EC</u>
	<u>Private bag X 0038</u>
	<u>Bhisho, 3605</u>
Telephone:	<u>083 378 0225</u>
Telefax:	<u>047 568 6005 / 086 594 1694 / 086 634 2859</u>

## **DETAILS OF HEARING AND REPRESENTATION**

- 1 This matter was heard over several days during the period 28 April 2011 to 14 December 2012. Initially Mr B Mjebeza, then Mr S Mandla and finally Mr T Damoyi all of NEHAWU represented Mr C J Madolo (applicant). Mr B Mcanyana represented the Department of Health: EC. The parties submitted written closing arguments by 14 January 2013.

## **ISSUE TO BE DECIDED**

- 2 The issue to be determined is whether or not the applicant was unfairly dismissed and dependent thereon, appropriate relief.

## **BACKGROUND TO THE ISSUE**

- 3 The applicant employed as a general assistant at St Barnabas Hospital, Libode was charged with misconduct as follows:

*"It is alleged that you contravened the provisions of Annexure A of the PSCBC Resolution 1 of 2003 in that on the 01/05/2009 at about 22h00 without permission you were found in possession of some (2 creosoted poles and 5 rolls of netting wire) and at the same time you were caught throwing them over the fence, although you were having no authority to do so."*

- 4 He was found guilty and dismissed after a disciplinary inquiry and his appeal failed, the date of his dismissal being 28 June 2010. He referred a dispute to the PHSDSBC claiming that he was not guilty and should not have been dismissed.

- 5 At the arbitration it was common cause that the 5 rolls of netting wire did not form part of the charge. The applicant pleaded not guilty. Essentially the applicant's case, as put in opening statements and cross-examination, was that:

- 5.1 He had entered the hospital premises on the evening of 1 May 2009 to buy airtime. There were two places one could buy airtime namely from the sisters at pediatrics and the patients in the male ward. He was accompanied by a student nurse one Mr Mali whom he met at the main gate.
- 5.2 Mr S Sotshozi and Mr Xhelo (security guards) had framed him with the theft of the items in question. Mr Sotshozi and Mr Xhelo had incriminated him out of revenge as he had earlier had a quarrel with Mr Xhelo. Another security guard Mr Sikwayo who was off duty at the time in question was aware (before the day of the incident) of the plot that Mr Sotshozi and Mr Xhelo had hatched to teach him a lesson.
- 5.4 They had met him on the night in question next to the entrance of the pediatric ward and later the other security guard Mr Mavuso had joined them. The security officers in question had not arrested him on the evening in question.
- 5.5 He denied that he had been found by Mr Sotshozi, Mr Xhelo and Mr Mavuso in the area at the back of the mortuary/stores and near where the creosote poles were stored, or that he had stolen them.

6 The respondent denied the applicant's allegation their case being that three security guards Mr Sotshozi, Mr Xhelo and Mr Mavuso had apprehended the applicant in the act of removing creosoted poles and passing them through the iron railing of the perimeter fence in the area behind the mortuary/stores and where the poles were stored in an old reservoir.

7 Procedural fairness was not placed in issue. As relief the applicant sought that he be reinstated and the respondent that the status quo remain.

## **SURVEY OF EVIDENCE**

### **The Respondents' Submissions**

8 The respondent led the testimony of:

**Mr S Sotshozi** employed, at the time in question as a security guard, by Dikha Security who provided a security service to St Barnabas Hospital.

**Mr M Mange** the security supervisor employed by Dikha Security

**Mr S G Ncume** an Artisan Plumber employed at St Barnabas Hospital by the Department of Health who was on call on the night of 1 May 2009 as he was overseeing the entire maintenance section that weekend.

9 Mr Sotshozi testified to the following effect. He was on duty on 1 May 2009 and had seen people in the vicinity of the stores area, but outside the perimeter fence. Although it was dark he was still able to make out that there were 2 persons and that they were crossing to and fro in the street.

10 The time was between 8pm and 9pm, although closer to 9pm. He suggested to his two colleagues that they patrol the area. On arrival at the area of the stores they divided up so as to cover the whole area one lower down on the side of the mortuary, another between the mortuary and the boiler and he from the workshop side. He arrived first on the scene. On arrival at the scene (that is the area behind the stores and mortuary and where creosote poles were stored in an old reservoir) he saw that the applicant was passing poles to two others outside the perimeter fence. The persons outside were pulling the pole through the iron railing of the perimeter fence and the applicant was carrying a pole. When he saw Sotshozi who shouted at them, the applicant dropped the pole and the others beyond the fence ran away. The applicant was dressed in a blue two-piece work suit and wore gumboots. He asked Madolo what he was doing there and Madolo said he must keep quiet and said he would give him "anything" he responded that he needed nothing and arrested him.

11 He made Madolo move from the area, which was dark and waited in a lighted area for Xhelo and Mavuso to arrive. When they arrived they called their supervisor, Mr Mange, and then together with Madolo they waited at the top guardhouse for Mr Mange. On his arrival Mr Mange called Mr Ncume the hospital maintenance supervisor.

12 The poles remained at the scene during the time they took Madolo to the guard house and later, on their arrival, the police went to inspect the scene. He could not recall who but one of the security guards retrieved the pole

from outside the fence and it and the one inside were taken to the bottom security entrance area on Mr Mange's instruction.

- 13 On it being put to him he denied that Mavuso was not with him or that Mavuso later joined them near the pediatric ward he denied meeting Madolo there.
- 14 After they arrested Madolo, they kept him at the top guardhouse. Later on Madolo asked if he could go to his place to get something warmer to wear. Mr Ncume said they should allow him to go and so they released him. The applicant returned and later when the police had not yet arrived he, Madolo went home on his own accord.
- 15 The police arrived at approximately 00h15. On their arrival the police went to Madolo's place and arrested him.
- 16 He was aware that airtime was sold at night in the pediatric ward and male ward, however that was far from where he caught Madolo. He denied that Mavuso was not at the scene or that he and Mr Xhelo found Madolo next to the entrance to pediatrics or that Mavuso joined them there later. On his arrival at the area behind the mortuary/stores, Madolo was stealing poles and he arrested him. He also denied that they had incriminated Madolo out of revenge because of an argument between Madolo and Xhelo and knew nothing about this, as far as he knew there was no quarrel between them.
- 17 He and Madolo were not friends but he knew him well enough to greet when he passed by. Although they came from the same area he and Xhelo did not come from the same village. He knew Mr Sikwayo, another security guard, who was not on duty on the night in question and further, that prior to the incident, there was no plot between him and Xhelo to teach Madolo a lesson, so Sikwayo could not have been aware of any such plot.
- 18 Mr Mange testified to the following effect. On 1 May 2009 he was on duty and had done a routine patrol with N Bantwini. They had started at the top gate, beyond the mortuary – patrolling around the workshop, boiler and clinics.
- 19 They noticed drag marks on the ground in the area where the netting wire was kept and in the area at the back of the boiler they saw that the number of poles normally stored there had diminished. There were also footprints and drag marks and the grass had been flattened.
- 20 He had then warned the security officers on duty to be on the lookout and keep a careful watch. The night shift arrived at 19h00 and he warned them to be on the lookout and explained his earlier observations. Mr Mavuso was the acting supervisor for the shift and the rest of the shift comprised of security officers, Mr Xhelo, Mr S Sotshozi and Ms N Cingo. He then did a patrol with Mavuso to show him his observations, patrolled the whole site and returned to the main gate.

- 21 At about 20h15 he left the site to go home and change into warmer clothes and told the supervisor he would be returning. His house was about a 10-minute walk away. Shortly before 21h00 security officer Mavuso phoned him to report they had arrested a suspect. He returned to the top gate arriving shortly after 21h00 and found Madolo dressed in a 2 piece overall, wearing gumboots and sitting on a chair surrounded by security officers Sotshozi, Xhelo and Mavuso, who told him they had caught him stealing the poles (between where the poles were stored and the perimeter fence) and that he was taking poles from where they were stored and passing them through the grates in the fence to others outside and that the others had run away. He had checked the scene with Mavuso while Sotshozi and Xhelo remained with Madolo in the guardhouse.
- 22 Madolo had pleaded with him not to phone the hospital and the police and said he would pay for the poles. He had however phoned Mr Ncume the senior foreman and the police. Mr Ncume arrived at 22h00 and he like Mange was shocked to find out that a hospital employee was stealing their property. The police arrived shortly after 24h00 and he went with them to Madolo's rooms, which was just across the main road. Madolo had already been released on the basis that Mr Ncume had already seen him and been informed of the incident. The police arrested him, returned with him to the site and he was told of the offence he committed and was taken away.
- 23 The police had said that they should keep the two poles as evidence and they had been moved to near the dispensary near the 1<sup>st</sup> guardroom, where they still were. They also wanted statements from the two security officers who were first on the scene, although Mavuso had also been on the scene at the time, and he had accordingly taken statements from Sotshozi and Xhelo.
- 24 As far as he was aware a lady used to sell airtime from a shack in front of the stores however she closed up shop at around 15h30 / 16h00 and had stopped selling airtime long ago. He was not aware that cigarettes were sold after hours on the hospital premises and he did not buy airtime at the hospital at night. When he returned after 21h00 no one had been selling airtime, it was quiet and they were the only ones there. Madolo had entered the hospital premises after 20h00 (according to the gate records).
- 25 He was not aware of any tensions between his staff and Madolo and was not aware of any conspiracy as alleged by Madolo. However he questioned why Madolo would then beg him not to phone the police or hospital. He had recorded Madolo's request in his written statement as the applicant had pleaded with him. He did not do this in respect of Sotshozi and Xhelo as Madolo had pleaded with them. In any event they were in the guardroom and were bound to have heard Madolo pleading with him.

### **The Applicant's Submissions**

- 26 Mr Madolo testified to the following effect. At the time in question he was employed by the hospital as a property caretaker.
- 27 He was aware of the charges against him, pleaded not guilty and denied that he was in possession of the poles.

- 28 On 1 May 2009 he entered the main gate, and waited at the guardroom for a person who was supposed to meet him there to give him some money / leave the cash at the guardroom for him. He chatted to the guards and none had seen this person or the money. He asked the whereabouts of the person who sold airtime in the hospital. Thereafter he went to buy airtime at the pediatric ward so he could phone the person in question.
- 29 On his way back after purchasing and loading airtime, he met the two security guards Sotshozi and Xhelo at the corner of the pediatric ward (this was a far way from where he was alleged to have been caught with the poles). They told him that at about 7pm their manager had asked them if they had seen him and that they must phone him when they did "so he could discuss what he wanted to do with Madolo
- 30 He then called Mange as he thought it was about the money and that it may have been left with. Mange told him to wait and that he was coming to the hospital. Security guard Mavuso then arrived and said that as he did not want the other security guards at the main guardhouse to hear what they were going to say, they should go to the top gate guardhouse to which they then went. On arrival they seated themselves and Mange arrived about 5 minutes later. Mange confirmed that he the applicant was Madolo and remained standing and requested that they assist with regard to the issue of dustbins going missing in the offices of the institution. The applicant was of the view that Mange was asking his assistance in that he had previously been a security guard and subsequently had assisted them even though he now worked for the hospital.
- 31 Mange then left them sitting at the top gate / guardroom and went into the institution returning with Mr Ncume and they then talked about their work.
- 32 Time passed and nothing was being done so he asked if he could go to his place to get a jacket. Mange said he should not as they were waiting for the police and Ncume said they should not talk about it and that he could go and get his jacket. In re-examination, in connection with the respondent's allegation that he had admitted the theft and begged Mange not to phone the police, and asked if there had been the opportunity to say something to Mange without the other security guards hearing – he stated there had been no time as Mange didn't even sit down, he had entered through the one door and exited through the other and in any event he would not have thought about that as he had not been arrested. When he left to get his jacket Mange Ncume and Xhelo also went out. Xhelo with a torch outside the hospital (as if he was looking for something) and Mange and Ncume were inside the premises.
- 33 He returned to the top gate guardroom and sat with Mange, Mavuso, Xhelo, Sotshozi and Ncume. Approximately an hour later at about 24H00 he said he had to go and sleep as he had work the next day. They told him he should wait for the police and he responded that if there was anything the police wished to discuss with him he would be at his place and he left. He denied the security guards had arrested him or that he had pleaded with Mange and said he would pay for the poles. He also denied having been shown the poles in question. Put to him

that he had pleaded with Mange not to phone the police and admitted guilt, he responded that he did not promise to bribe Mange and in any event had he been caught stealing poles he would rather bribe the person who caught him.

- 34 Later he was awakened by two police officers accompanied by Mange, at his door. The police told him that they were arresting him as he was suspected of having stolen poles and 5 rolls of netting wire from the hospital and he was then taken in the police vehicle and arrested. He was given bail when he attended in court and on his next appearance he was told that as there were no witnesses the matter was struck from the roll.
- 35 He stated that the two poles lying outside the dispensary were not from the same lot of poles stored behind the mortuary. The poles had been there when he was a security guard and they had used them to secure parking bays for management. Prior to that they had used pallets, which had been more difficult to move, hence the use of the poles, in other words the poles had nothing to do with the case. In this regard Mange had lied when he said that the poles were the ones that had been stolen. In his view the security guards had not arrested him and in any event he had phoned Mange
- 36 He had only become aware at the inspection in loco that the respondent alleged that the poles at the dispensary were the stolen ones. Mange lied about this at the inspection in loco and he denied this was the case. In cross examination asked if these poles were similar to the ones stored in the old reservoir he said they were because they had been taken from the store of poles in the reservoir in the 1<sup>st</sup> place. He denied that he had been caught in the act of stealing poles and stated that it would have been impossible for anyone to take poles from the site in question, as it was very dark there at the time.
- 37 He took issue with Sotshozi and stated that in his view it would have been impossible to see someone behind the mortuary / boiler area as it was more than 120 meters away and it was dark. In any event the wall impeded the view. Explained to him that Sotshozi's testimony was to the effect that he had seen people in the street crossing to and fro in the vicinity of the mortuary, he stated that in his view Sotshozi would nevertheless have been unable to see clearly, and as there was a shebeen nearby the street would have been busy. Had there been people there as claimed by Sotshozi, why hadn't he then gone to that area instead of going behind the mortuary in the hospital premises and disagreed that in terms of the service level agreement between the hospital and the security company, security guards were not allowed in the street outside the hospital premises.
- 38 In his view all the employer's witnesses had lied about what happened and he was not guilty.
- 39 He agreed that he had purchased treated poles to build his own house; but this was earlier in the year and had nothing to do with the hospital poles.

40 He denied having being caught stealing poles and that one of the poles was lying outside the fence at the time in question. In his view Mange and Sotshozi had conspired against him.

### **ANALYSIS OF EVIDENCE**

41 **Discrepancies between what was put by his representative in opening statements and in cross-examination of the respondent's witnesses compared to the applicant's subsequent testimony e.g.:**

- Mr Sotshozi and Mr Xhelo had framed him for the theft of the items in question arising out a quarrel he had had with Mr Xhelo, of which another security guard Mr Sikwayo was aware. In his testimony the applicant suggested that Xhelo was jealous of him because he had got the job at the hospital, which he and Xhelo had applied for and later stated that in his view Mange and Sotshozi had conspired against him.
- He had come to the hospital to buy airtime, whereas in his testimony he said he came to the guardhouse to collect money from someone who was supposed to give it to him at the guardhouse and that when this person didn't arrive he decided to buy airtime and asked the security guards where the person who sold airtime was and he then went to get airtime. In his testimony he did not refer to being accompanied by Mr Mali as per his case as put by his representatives

42 **The failure by his representatives to put important aspects of his case to the respondent's witness e.g.:**

- That he had arrived at the main gate on the night in question to meet someone who was supposed to give him money / collect the money if dropped off and that he had spent time chatting with the security guards in guard room.
- That the security guards, on his version, on meeting him, on his return from buying airtime had told him to phone Mange, which he had then done, and Mange told him he was coming to the hospital and that he must wait for him.
- It was the applicants' testimony that on being told by security guards to phone Mange, he had done so, thinking this was in connection with the money that should have been left at the gate, and Mange told him to go to the top gate and would come shortly. Mavuso had then said they must go to the top gate guardroom as he did not want the other security guards to hear what they would discuss
- That Xhelo had applied for the same job which he the applicant had got and that Xhelo was accordingly jealous of him. Although Xhelo did not testify, according to the applicant Mange had to move him to another posting because of this and this was not put to Mange, who on the applicant's version would have been aware of this.
- The applicant appears to suggest that he was **not** dressed in a two piece overall and gumboots. All the respondent's witnesses testified that he was and this was not disputed, in fact a question was put in cross examination to the respondent's witnesses that there was nothing exceptional about this, as where he had to walk, from his house, was slippery terrain.
- That Mange when he arrived at the top gate guardroom had asked their assistance *in tracing the loss of dustbins in the institution* was not put to Mange or any of the respondent's witnesses

- In his testimony the applicant stated that the poles at the dispensary had nothing to do with the incident and in fact had been there when he was a security guard, before he started work at the hospital, and were used to secure parking for management and were still used for this purpose. This was not put to any of the respondent's witnesses and arose for the first time during the testimony of the applicant. His reason that these had been pointed out at the inspection in loco, at which stage he first became aware that they were the poles in question, does not answer why this was not put to the respondent's witnesses who testified after the inspection in loco.

43 The above discrepancies and failure to put important aspects of his version of events, leads inescapably to the inference that the applicants' instructions given by him to his representatives initially, were subsequently tailored by him in the giving of his testimony in an attempt to avoid culpability. In addition his version as testified to in regard to these aspects was not tested by way of cross-examination of the respondent's witnesses and accordingly no weight can be attached to these aspects of the applicant's version.

44 **Inconsistencies in the applicant's testimony e.g.:**

- Initially it was the case from his testimony that Madolo spent time in the top guardhouse with the security guards, Mange and Ncume, whereas in re-examination asked if there was any time when he could have spoken to Mange without the security guards hearing what he said, he responded that there had been no time, Mange walked in the one door and out the other.
- Initially he stated that the poles outside the dispensary were not from the store of poles in question and later in cross-examination said they were.

45 The applicant denied the security guards had arrested him and part of his denial was based on the fact that he had not been arrested according to procedure, as he understood an arrest should be effected. In my view the testimony of Mr Sotshozi as to how he dealt with the applicant qualifies as an arrest. The fact that he was allowed to go home to fetch a jacket and then later when the police did not arrive, does not in any way change the fact that he had been apprehended and arrested. The security guards and management knew him, a member of the hospital management had seen him and the fact that they treated him in such fashion was in all probability because they knew him and in any event they would have had no control over when the police would arrive.

46 **Various individuals referred to by the applicant were not called and who if called would have corroborated the applicant on material aspects of his version of events e.g.:**

- **Mr Mali** to say he accompanied him to get airtime (the reason why he could not have stolen the poles).
- **The individual** who was supposed to drop off money at the main guardhouse (the reason for him going to the hospital in the first place at such time, yet in his case as put he had gone to the hospital to get airtime).
- **Mr Sikwayo**, another security guard, who according to the applicant was aware of the argument between him and Mr Xhelo, which led to Xhelo and Sotshozi hatching a plot to frame him. Although he changed his

version in this regard by testifying that it was Sotshozi and Mange who framed him (the reason why he was arrested).

- **Any of the other security guards** to corroborate his version that the poles in question were not those at the dispensary and that these had long been in use to reserve parking bays for management and were still so being used. (To discredit the employee's witnesses and bolster his claim that he had not stolen the poles). Even here the applicant changed his testimony. Initially he said the poles were not from the store of poles in question, yet later agreed they were.

Mr Madolo testified solely as to his version of events. No reasons were given for the failure to call the witnesses mentioned above and given the importance allocated them by the applicant in respect of his version of events and had they been called, on his version, they would have corroborated him, I am of the view that this failure impacts negatively on the credibility of his version of events.

- 47 Mr Sotshozi, Mr Ncume and Mr Mange's testimony corroborated one another in certain respects where there was an overlay of evidence to which they testified. They all maintained their versions under cross-examination. Mr Mange and Ncume were not aware of the sale of airtime after hours and said so, while Mr Sotshozi admitted that he was aware that this happened after hours. The fact that Mange and Ncume did not know about this does not reduce the credibility of their evidence. I have no hesitation in accepting them as reliable witnesses.
- 48 During the inspection *in loco* it was established that one could see the area where Sotshozi alleged people were crossing the street and area (in the street) opposite the back of the mortuary / boiler. Had the security guards attempted to arrest those in the street, they would have been seen long before they reached the area and escaped. Not only that but any person in the vicinity within the grounds of the institution could also make their escape. The security guards had been alerted to the disappearance of the poles and their decision to investigate by splitting up and to approach the area in question within the hospital grounds is logical.
- 49 The fact that it was dark behind the mortuary / boiler in the area where the poles were, in no way makes it impossible to steal the poles, in fact the opposite is the case, as the darkness would make it more difficult to see anyone stealing the poles.
- 50 The poles at the dispensary, which came from the store of poles in question were of a diameter such that they would pass through the grill work in the perimeter wall and therefore consistent with Mr Sotshozi's testimony that one pole was lying outside the boundary (the people on that side of the fence having run away when the applicant was apprehended). This was also corroborated by Mange who testified that on advice from the police he instructed the security guards to remove the two poles in question, one inside and one outside and place them at the main guardhouse and which were now behind the guardhouse near the dispensary. The applicant's testimony that these poles were used for the reservation of parking bays was raised only during his testimony, was not corroborated and was opportunistic on his part

51 In summary the respondents' witnesses impressed as reliable, their evidence was consistent and corroborated each other in areas of overlap. The applicant was a sole witness and testified on his behalf. He did not call several people who according to his version of events could have corroborated him and gave no reason for not calling them. His case as put by his representatives differed markedly from that to which he testified on. Material aspects of his case were not put to the respondent's witnesses, no weight can be attached to these allegations as the respondent was not afforded the opportunity to deal with them by way of cross examination of its witnesses. The applicant's testimony was not only inconsistent but the version of events improbable.

52 I find that the applicant was an unreliable witness and accordingly reject his version of events. The respondents' evidence follows a logical sequence of events and was supported by three separate witnesses who maintained their testimony under cross-examination. I find on a balance of probabilities that the version of the respondent properly reflects what happened on the night in question and that the applicant was caught in the act of stealing creosote poles belonging to the hospital and is guilty as charged. Theft runs contrary to the duty of an employee to take care of the employer's property. It involves dishonesty and goes to the root of the employer/employee relationship and no employer can be expected to retain as a member of their staff someone who has stolen their property. The sanction of dismissal is accordingly appropriate.

53 I make the following award.

**AWARD**

54 The applicant, C Madolo, is found guilty as charged

55 The sanction of dismissal is an appropriate sanction and the applicant remains dismissed from the respondent (Department of Health: Eastern Cape) as from 28 June 2010



Panelist: JOHN CHEERE ROBERTSON

Sector: PUBLIC: HEALTH & WELFARE