



# ARBITRATION AWARD

Commissioner: **Lindiwe Makhanya**

Case No: **PSHS344-19/20**

Date of award: **6 December 2020**

In the matter between:

**NUPSAW obo NTOMBIFUTHI ZANELE NGCAKU**

(Applicant)

and

**DEPARTMENT OF SOCIAL DEVELOPMENT- KWAZULU NATAL**

(Respondent)

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## **DETAILS OF HEARING AND REPRESENTATION**

1. This matter was scheduled for arbitration before me on 31 October 2019, 27 January 2020, 17 March 2020, 16 September 2020, 20 October 2020 until 26 November 2020 when it was concluded at the Respondent's premises in Durban. It was held under the auspices of the Public Health and Social Development Sectoral Bargaining Council ("the council") PHSDSBC in terms of section 191(5) (a) of the Labour Relations Act No.66 of 1995, as amended ("the Act").
2. The Applicant, Ms. Ntombifuthi Zanele Ngcaku, was represented by Mr. M. Memela, Union Official from Nupsaw, and the Respondent, Department of Social Development, was represented by Mr. S. Mdladla, from Labour Relations. The proceedings were digitally recorded.

## **PRELIMINARY ISSUES, JURISDICTION, and ISSUES TO BE DECIDED**

3. No preliminary or jurisdictional issues were raised, and Public Health and Social Development Sectoral Bargaining Council has jurisdiction to hear the matter.
4. The dispute is whether the dismissal of the Applicant was substantively unfair.

## **BACKGROUND TO THE DISPUTE**

5. The Applicant commenced her employment with the Respondent on 01 November 1992 and was employed as a Deputy Director, Records Management. She was dismissed on 17 May 2019. At the time of her dismissal, she was earning a monthly salary of R52,224.50. The matter was referred to as an unfair dismissal dispute related to misconduct to PHSDSBC. The Applicant sought retrospective reinstatement in the event that the award is made in her favour.

## **SURVEY OF EVIDENCE AND ARGUMENT**

6. Both parties presented a bundle of documents, the Applicant's bundle was marked "A" and the Respondent's bundle was marked "E". Both parties submitted written closing arguments on 2 December 2020.
7. The Applicant was found guilty and dismissed based on four charges, charges 3, 4, 5, and 6 as per (Bundle "E172", page 1 to page 3).
8. Charges 3; pertains to the false traveling claims estimated to the value of R59,778.08 and fixed daily allowance claim for using private accommodation amounting to R22,591.91.
9. Charge 4; pertains to the false claim and incidental expenses amounting to R594.16, for private accommodation amounting to R853.10
10. Charge 5; pertains to the approval of fuel claims for Mr. T.J. Modupo amounting to R215,953.55 without authority contravening Treasury Regulations 8.2.1
11. Charge 6; pertains to contravening Clause C 4.5 of the Code of Conduct for the Public Service, in she is alleged having claimed to have traveled using her private transport to Vulamehlo Service Office on 29 May 2014 whereas she knew she did not attend such meeting, unduly benefiting from state funds amounting to R1,297.80
12. The Applicant challenged inconsistency in terms of charge 3, 4, and 6.



## THE RESPONDENT'S CASE

13. Mr. Ntokozo Mchunu testified that he is working as a Director at the Respondent and had been appointed as an investigator. According to him, the Applicant had approved fuel claim forms for Mr. Modupo ranging from the period 4 March 2013 until 31 August 2015 when she had no authority to do so. The Applicant was subsequently dismissed as she contravened the Treasury Regulations: PFMA, clause 8.2.1 which states that 'an official of an institution may not spend or commit public money except with the approval (either in writing or by duly authorised electronic means) of the accounting officer or a properly delegated or authorised officer.
14. During an investigation, he had checked all relevant files and interviewed the Supervisor for Mr. Modupo, Mr. Mbhele who had denied giving authority to the Applicant to approve the fuel claims for Mr. Modupo. Both Modupo and the Applicant were signing each other's claim which led to a loss amounting to R215 953.55.
15. When Modupo was served with the charges he resigned immediately as he knew he had been doing something wrong.
16. Under cross-examination, he disputed that the Applicant was given authority by Mr. Mbhele to approve Modupi's travel claim forms as the Applicant and Modupi did not work for the same directorate and each directorate had its own budget. In this case, where Modupo was working, Mbhele was the custodian of the budget.
17. He conceded that another employee may sign a claim of another employee, but authority ought to be sought before doing so. The Applicant was not issued with any authority to sign.
18. When asked the reason why the finance department paid all the claims without checking if the authority to sign had been given, he said it was not the responsibility of the finance department to do such, its duty was to check if the claim was valid in terms of the calculations.
19. The majority of the claims were falsified. Modupo had not undertaken most of the traveling which was the reason why the responsibility manager had been tasked to do such duties because he would be in a position to confirm if the travel had taken place or not.

20. During the re-examination, he stated that Mr. Ngcobo whom the Applicant was claiming to have given her authority to sign for Modupi's claims had left the Respondent in 2012. He maintained that all the claims were performed without authority.
21. Ms. Prudence Thenjiwe Zondi, a Director in Records management and Auxiliary services. She used to supervise the Applicant from the year 2012 until 2018. She had a professional relationship with the Applicant and had authorised the Applicant's trips.
22. She pointed to Bundle E134, E135, E146, and E172, where there are claims for Mr. Modupo which were approved by the Applicant. She had never delegated the Applicant to sign for Modupi's travel claims as Modupo worked in another directorate.
23. In her department whenever she was absent and approval was required, she would ask a Director in another component to sign on her behalf, as this is permissible. She would call or send text messages to that Director.
24. She had initiated the investigation after realising that the Applicant's travel claims were not coming to her office for her approval. The matter was referred to the treasury to verify the information and the report indicated that there were irregularities for the Applicant and Modupo's claims.
25. Irregularities were discovered in that some claims were approved without being signed by her as a responsibility manager, there were other claims by the Applicant when she did not reach the destination. The outcome of the forensic investigation for Modupo was that his claims were not supposed to be approved by the Applicant as she was not delegated to do so.
26. The Applicant and Modupo were not authorised to approve each other's claims. She was not aware of any Deputy Directors who were signing for each other's claims without given authority to do so.
27. During cross-examination, she reiterated that there was no authority given to the Applicant or Modupo to sign for each other's claims. Only responsibility managers were authorised to sign for claims, if they were not available, they would have to authorise someone to sign claims.

28. She disputed that there was any personal vendetta against the Applicant but emphasized that she initiated an investigation because she had observed irregularities in her department.
29. She reiterated that she could not have authorised Modupo and the Applicant to sign for each other because Modupo was not her subordinate, he worked in a different section.
30. During re-examination, she maintained that the Applicant had no authority to sign for Modupo's travel claims.
31. Mr. Mphiliseni Tobias Mazibuko, employed by the Respondent as a Director in HR administration since September 2002. He pointed to page 18, Bundle "E173", where there is a transfer letter for Ms. Dlamini. He conceded that Ms. Dlamini was transferred to the information management section but it was not based on an allegation of misconduct, if it were so, it would have been a precautionary transfer. He was not made aware of the nature of misconduct as his role was to implement the sanction. Dlamini's transfer letter appreciated her contribution to the department, if it were a precautionary transfer the content would be different. The letter is signed by the MEC suggesting that it was not a precautionary transfer letter as such issues were handled only by the internal managers.
32. He also referred to page 22, Bundle "E173" where there is a transfer letter for Ms. Cele. Cele was transferred to the Labour Relations department after there was an audit query but it was not due to misconduct.
33. Under cross-examination, he reiterated that he did not know the nature of the misconduct that had been levelled against Ms. Dlamini as he was responsible for implementing the sanction.
34. He denied that Cele's transfer was due to misconduct that was related to the claim for the trip which she had not undertaken.
35. There was no re-examination.
36. Advocate Zandile Shandu, Acting Director Legal services for the Respondent testified that one of her main duties is to draft contracts and defend the Respondent in litigation matters including debt and recovery.
37. After a forensic investigation had revealed that there was a fraudulent claim for subsistence and traveling (S and T), the recommendation required the Respondent to institute disciplinary action, debt recovery, and lay criminal charges against the

Applicant. Shandu's colleague, Mr. Hlabisa who had dealt with this matter previously had been on leave so Shandu was required to consult with the Applicant.

38. She referred to Bundle "E173" on pages 1 and 4 where there is a letter of demand addressed to which the Applicant signed. She denied making any promise to the Applicant that if she had paid the money she was not going to be disciplined.
39. The Applicant had come to her office and took a letter of demand and acknowledgment of debt. The amount owed was R141 509.88. She said she was unable to pay for 12 months. She requested her to write a letter of motivation to the head of the legal department and request payment arrangements. The Applicant's request was approved, an agreement was entered into for the Applicant to pay the debt for 36 months.
40. Under cross-examination, she reiterated that she never promised the Applicant that she would not be charged if she paid the money and that she only advised the Applicant to write to the HOD if she was requesting to pay more than 12 months. The Applicant's request was granted in which she was to pay an amount of R3930.83 per month.
41. During the re-examination, she emphasized that nothing prevents the Respondent from instituting the disciplinary action whilst it is recovering the money from the Applicant.

## **THE APPLICANT'S CASE**

42. Ms. Ntombifuthi Zanele Ngcaku testified that she did not dispute charges 3, 4, and 6. According to her, for charge 5, the authority had been given to her by her previous supervisor, Mr. WD. Ngcobo whilst she was still under the Communication department. During Ngcobo's tenure, all Deputy Directors had been authorised to sign for each other in his absence.
43. After she left the communication department to join the auxiliary department which was under the new management of Mr. T.P. Zondi, she continued to sign for other Deputy Directors. There was no communication from Zondi to say she was no longer allowed to sign the claims.
44. It was common practice that Deputy Directors were signing for each other so her dismissal had been unfair.

45. She referred to pages 3 and 8, Bundle "A", fuel Claims for Mhlongo who was Deputy Director that had been approved by another Deputy Director.
46. There is inconsistency in terms of how the Respondent had applied the rule for charges 3,4 and 6 in that Mrs. Dlamini and Mrs. Cele did commit similar misconduct but they were not dismissed. Both of them had claimed for trips which they did not undertake. Cele was reprimanded by her supervisor and paid the money and was later transferred to another department. Dlamini used to claim for traveling whilst she was using a subsidized vehicle. When she was caught, she was subjected to a disciplinary hearing and had to pay back the money and was transferred to the information management section.
47. Page 96- 100, Bundle "A" is the memorandum regarding the implementation of the sanction for Dlamini where she was transferred due to misconduct.
48. The Applicant claimed that she was dismissed due to a sour relationship she had with her former supervisor Zondi as she was part of the employees who had lodged a grievance against Zondi as seen on page 55, Bundle "A".
49. Shandu had promised her that if she paid the money the charges would fall away.
50. Under cross-examination, she did not dispute that she committed the misconduct as per charges 3, 4, and 6 however she was disputing charge 5 as she was authorised by Mr. Ngcobo to sign for Modupo. She admitted that Zondi had not given her and Modupi authority to sign for each other's claims.
51. When the Applicant was asked if the transfer letter for Dlamini was as a result of the precautionary transfer, and if so, what was the reason for the MEC to draft the letter and thank her for her contribution to the department, she was unable to provide an answer. The Applicant also admitted that she did not have documents indicating the nature of the misconduct that Dlamini had committed but insisted that Dlamini had been using her vehicle not the state vehicle when she claimed for fuel.
52. She maintained that Advocate Shandu had called asked her to her office to inform her that if she signed the acknowledgment of debt, she was not going to be charged.
53. She conceded that she was familiar with PFMA but when asked about the Treasury regulations: PFMA on page 1, Bundle "E170", she denied having any knowledge of the document.

54. She also conceded that Dlamini had been transferred to the information technology department during the year 2009 and that Dlamini had received her sanction during March 2012.
55. During the re-examination, she maintained that Dlamini was not dismissed for submitting false claims whereas she was dismissed.
56. Ms. Thandi Veronica Khumalo testified that she is employed as a Clerk under the Records Management section. The Applicant's dismissal was due to her sour relationship with Zondi. When she nominated the Applicant for the service excellent award for the best employee, Zondi had suggested that the whole team had to be nominated because the Applicant did not work alone. It was not a normal practice that when an individual is elected then someone changes it.
57. Under cross-examination, she conceded that she did not work directly with the Applicant and Zondi. The Applicant and Zondi were on the same premises whereas she was based at the eThekweni cluster.
58. Zondi did not want the Applicant to be nominated for the best employee award which made her believe they did not have a good relationship. She could not provide a specific answer when she was asked about her relationship with Zondi but said Zondi had not called her to be part of the forum that nominated the team for the service excellent award.
59. During the service excellence award event, Zondi collected the award alone and did not invite her and the team, this made her bitter. She admitted that when she claimed for S and T, her supervisor would appoint someone to sign on her behalf.
60. During the re-examination, she reiterated that there was bad blood between the Applicant and Zondi because Zondi had not allowed her to be nominated for the award.
61. Ms. Thandekile Sarah Mkhwanazi testified that she is employed as a Records Officer based in Pietermaritzburg and that the Applicant was her supervisor. She stated that the Applicant was dismissed due to a bad relationship she had with Zondi. She used to get confused as to who was her direct supervisor due to the behaviour of Zondi. At times Zondi would give her instructions in the presence of the Applicant.

62. She worked with records and noticed that employees who were on the same level were signing for each other when their supervisors were not available but there was no authority document accompanying such claims. She also pointed to pages 55- 57, Bundle “A”, where there is a memorandum of grievance. The grievance was against Zondi by nine staff under records management including the Applicant. The Applicant was sent to request a meeting with Zondi which Zondi refused. She believed that this might have been the reason the Applicant was dismissed. Their grievance was ignored.
63. According to her, employees at the Respondent do not get dismissed for fraudulent claims, instead, they are charged and made to pay back the money and transferred to another directorate.
64. During cross-examination, she maintained that Zondi was not allowed to delegate to her as the Applicant was her direct supervisor. At one stage she was invited to a meeting by Zondi with the service provider. When she brought the Applicant to that meeting, she was reprimanded by Zondi which made her believe that there was a sour relationship between the Applicant and Zondi. Also, when the Applicant asked questions Zondi prevented her.
65. She maintained that she had never seen any letter of authority being attached to the claims when employees of the same level sign for each other.
66. She reiterated that employees do not get dismissed for false claims. She, however, conceded that she did not have access to labour relations files and would not know if no one had ever been dismissed for committing such misconduct.
67. During the re-examination, she maintained that she has never seen a document authorising employees to sign for each other. She continued to say it may exist but she never saw it as the claims are not accompanied by any other document.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

68. I have taken note of section 185 of the LRA which states that “every employee has the right not to be unfairly dismissed.” I read this section together with section 192(2) of the Act in terms of which the employer bears the onus to prove on a balance of probabilities that the employee’s dismissal was fair.

69. The Applicant challenged her dismissal as substantively unfair in that the Respondent had been inconsistent in terms of the application of the rule for charges 3, 4, and 6. The procedure was not in dispute.
70. It was common cause that the Applicant had submitted false claims between the period March 2013 until September 2015 as per charge 3, 4, and 6.
71. In terms of charge 5, the Applicant disputed that she had committed any misconduct as she claimed that she had the authority to sign for Modupo. On the other hand, the Respondent argued that the Applicant had not been given authority to sign for Modupo's claims.
72. At the outset, it is necessary to make some comments about the credibility of the witnesses. I found that the witnesses for the Respondent gave testimony which was impressive and credible and remained consistent under cross-examination. The same cannot be said for the Applicant and her witnesses, they contradicted themselves on numerous occasions. At first, the Applicant testified that she had been given authority to sign other Deputy Director's claims but later stated that other Deputy Directors signed for each other without authority. Mkhwanazi testified that no one had ever been dismissed for submitting false claims but at cross-examination, she conceded that she had no access to Labour Relations file, so she would not know if no one had ever been dismissed for this misconduct.
73. I will first deal with the issue of inconsistency. It is trite law that the Applicant bears the duty to raise the issue of inconsistency in proceedings and once it has been raised the Respondent bears the onus to establish consistent sanction. The Applicant contended that the Respondent had not acted consistently in applications of its rules because Dlamini and Cele had committed similar misconduct as her in that they had submitted false claims but they were not dismissed, instead they were charged, paid back the money, and transferred to another section.
74. Mazibuko admitted that Dlamini had received a sanction which he was asked to implement, however, he was not made aware of the nature of the misconduct. He also highlighted that Dlamini's transfer was in the year 2009 whereas the sanction was in 2012 meaning that she was not transferred due to misconduct. Also, Dlamini's transfer letter appreciated her services which suggests that it was not a precautionary transfer. I agree with the Respondent that Dlamini's transfer was not

linked to the misconduct which she was charged for because the Applicant's testimony suggests that once a false claim has been discovered, an employee is charged, pay back the money, and transferred to another section. Dlamini was charged two years later after she had been transferred to another section.

75. The Applicant's testimony revealed that she did not know the nature of the misconduct that Dlamini had committed when she received the sanction. This is so because the charge for Dlamini does not appear on the documents presented by the Applicant.

76. The facts around the misconduct committed by Dlamini and that of the Applicant which is submitting false claims could not be confirmed as being similar because there were no other documents presented which explain the nature of misconduct which Dlamini had committed except the sanction letter. The letter refers to the recovery of an amount of R3566.65 from Dlamini by the Respondent, it is by no means suggesting that it was a false claim. Dlamini was not called to testify in this regard and the Respondent denied these allegations. There was no evidence presented that talks to the issue of Cele, except mere allegations by the Applicant which were not substantiated. Cele was also not called to testify.

77. A concrete allegation identifying who the persons are who were treated differently and the basis upon which they ought not to have been treated differently must be set out clearly. This principle was set out in the *National Union of Mineworkers, obo Botsane v Anglo Platinum Mine (Rustenburg Section)* ( JA2013/42) (2014) ZALAC 24: 35 IJL 2406. I find that the Respondent has succeeded in carrying out the onus that rested upon them in that there was no inconsistency in the application of the rules in terms of false claims.

78. Turning to charge 5. I have taken note of five guidelines that need to be considered in Item 7 of Schedule 8 of the code of good practice in the LRA in cases of Dismissal for misconduct.

79. Whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace. The Applicant claimed that she was given authority to sign for other Deputy Directors by Ngcobo whilst she was still in the communications section and that when Ngcobo left during the year 2012, she was not made aware that she was no longer allowed to sign and approve the claims. The Respondent argued that the Applicant had no authority to sign and approve

the claims as this was against the rule. Although the Applicant denied any knowledge of Treasury Regulations: PFMA clause 8.2.1, her evidence suggests that she knew that to approve the expenditure of the Respondent, she needed to have authority, hence she referred to Ngcobo as a person who had appointed her in his absence. I accept that the rule was contravened because she approved the claims without being given authority.

80. Whether or not the rule was a valid or reasonable rule or standard. The testimony of Mchunu and Zondi revealed that each directorate had its own budget and that only the responsibility managers had a right to give authority to someone else to spend a budget. This is so because only the responsibility manager would be able to confirm if the traveling had taken place or not. Also, the Applicant and Modupo did not work in the same section which means that the Applicant would not have known if Modupo's claims were legitimate. I accept that the rule was valid in that Mbhele and Zondi ought to have authorised Modupo and the Applicant to sign for each other in their absence.
81. Whether the employee was aware or could reasonably be expected to have been aware of the rule or standard. The Applicant's testimony revealed that she was aware of this rule. The Applicant claimed that Ngcobo had given her the authority to sign for other Deputy Director's claims in his absence. The Applicant was aware that no claims may be approved without any authority given. Therefore, I accept that the Applicant was aware of this rule.
82. Whether the rule or standard has been consistently applied by the employer. None of the parties raised this issue with regards to charge 5.
83. Whether dismissal was an appropriate sanction for the contravention of the rule or standard. The Applicant argued that it was common practice for Deputy Directors to sign for each other. She presented Mhlongo's fuel claims which had been approved by another Deputy Director. This was not disputed by the Respondent but stated that authority had to be sought in terms of Treasury Regulations. This evidence corroborated with that of Khumalo who testified that her supervisor would appoint someone to authorise claims if she was unavailable. Also, the Applicant did not bring Mhlongo to corroborate with her testimony that her claims were signed without authority given.

84. Mkhwanazi indicated that she had never seen an authority document accompanying the claims since she worked with records. Zondi testified that in her absence she would call or send text messages and appoint another Director from another section to sign on her behalf. The testimony of Mchunu suggests that there was no policy in place for finance to verify whether the person who signed and approved the claim had been given authority or not. Ngcobo had ceased to be an authorised officer or a properly delegated official in 2012 when he left the Respondent. I fail to understand why the Applicant would refer to someone who was no longer the responsibility manager during the period in question.
85. When the Applicant signed for Modupo's claims there was no authority given by Modupo's supervisor, Mbhele, as he was the custodian of the budget. It is startling how the Applicant would have known Modupo's claims because she was not his supervisor, she would not have known his work schedule.
86. The Applicant claimed that Advocate Shandu promised her that she would not be charged if she paid the money. This was disputed by Shandu stating that nothing stopped the Respondent from proceeding with the disciplinary enquiry whilst recovering monies. One of Shandu's duties was to recover money on behalf of the Respondent, she was not responsible for labour relations issues so she had no say in terms of charging employees for misconduct. I accept the Respondent's argument because if the Applicant did not do anything wrong, she would not have signed acknowledgment of debt.
87. The Applicant claimed that she was dismissed because Zondi had a personal vendetta against her. Khumalo testified that when Zondi did not approve the nomination of the Applicant for the service excellent award it was clear to her that they did not have a good relationship. I do not accept this testimony as true because Khumalo did not work with both of them and the fact that she said she was bitter for not being made part of the forum is an indication that she had some unresolved issues with Zondi.
88. On the part of Mkhwanazi, her testimony was that she worked with both the Applicant and Zondi and that she had observed that they did not have a good relationship, as Zondi excluded the Applicant in one meeting with the service provider which made her believe that they had a bad working relationship. She also believed that the Applicant was dismissed because she had taken part in the

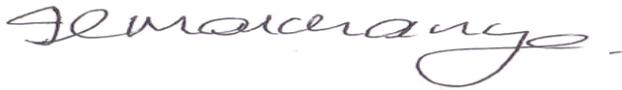
grievance against Zondi. I also do not accept the testimony of Mkhwanazi as true because the Applicant was the only person who was dismissed out of nine employees who had lodged a grievance against Zondi. There is a possibility that Mkhwanazi could still be upset that the grievance against Zondi was never attended to. If the Applicant did not commit the misconduct, she would still be employed as Zondi would not have found anything against her. Zondi said that she had a professional working relationship with the Applicant and insisted that she initiated the investigation due to irregularities that were later confirmed by the forensic report. It is my view that there was no personal vendetta against the Applicant. The Applicant's actions resulted in her dismissal; she is the author of her misfortune.

89. I was astonished that the Applicant and Mkhwanazi continued to defend the issue of submitting false claims as a practice in that they appeared not to see anything wrong with employees who abuse State funds.
90. During this arbitration, the Applicant showed no remorse in all the charges that were preferred against her, as serious as they were in that they involved a large sum of money. The Applicant argued that her dismissal was unfair because it was common practice that when false claims had been made, the employee would not be dismissed. It must be noted that the Applicant had been submitting these false claims and approved Modupo's claims for three years. If Zondi had not initiated the investigation, the Applicant would still be committing these misconducts. This is not expected from someone who held a senior position as a Deputy Director and had subordinates looking up to her.
91. In *Zondo JP held in Toyota SA Motors (Pty) Ltd v Radebe & Others* (2000) 21 ILJ 340 it was held that a Commissioner must only interfere with the sanction imposed by the employer if it shocks and alarms. In the circumstances, I am unable to interfere with the sanction imposed by the Respondent as it is not shocking nor alarming. The Applicant's dismissal was warranted.
92. It is my view that the Respondent has succeeded in carrying out the onus that rested upon it. I, therefore, find that the dismissal of the Applicant was an appropriate sanction. I am satisfied, having regard to the evidence and the arguments presented, that the dismissal was both procedurally and substantively fair.

## **AWARD**

93. The dismissal of the Applicant was substantively and procedurally fair.

94. The Applicant's claim is dismissed.



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**LINDIWE MAKHANYA**