ARBITRATION AWARD

PHSDSBC
PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL

Case No: **PSHS355-16/17**
Commissioner: **Allan Kayne**
Date of award: **1 February 2019**

In the matter between:

Public Servants Association (PSA) obo Dumisani Mabizela (Applicant/ Union)

and

Department of Health- Gauteng (Respondent)

DETAILS OF THE HEARING AND REPRESENTATION

1. The applicant referred a dispute to the Public Health Social Development Sectoral Bargaining Council (the Council) in terms of section 191(1) of the Labour Relations Act 66 of 1995 (the LRA) in regard to his dismissal related to misconduct. The arbitration took place on 07 and 23 November 2018 and 23 January 2019 at the SG Lourens Nursing College, corner Theodore Hove and Soutpansberg Streets, Pretoria.

2. The applicant was represented by Mr. Archie Sigudla of the Public Servants Association (PSA), and Mr. Steven Mpyana represented the respondent.

3. The proceedings were electronically recorded, and the record was filed with the Council's administration.

4. The parties exchanged bundles of documents; the respondent's marked as "RA" and "RB", and that of the applicant as "A".

5. This award is issued in terms of s138(7) of the LRA, which requires a commissioner to provide brief reasons for his/her outcome.

BACKGROUND

6. The applicant was employed by the respondent as an Intermediate Life Support (ILS) paramedic with effect from 01 April 2009 and was based at its Bronkhorstspruit base.

7. He was dismissed for misconduct on 09 July 2015 pursuant to a disciplinary hearing, in which he was found guilty of the following charge:
'It is alleged that you committed an act of misconduct as listed in Annexure A to the Disciplinary Code and Procedure which reads as follows "Wilfully, intentionally damages state property" in that on 14 October 2014 you stabbed and damaged the tyres of government vehicles to value of R130,150.36' (sic).

ISSUE/S TO BE DECIDED

8. I must determine whether the dismissal of the applicant, by the respondent, was substantively and procedurally fair and, if not, to order the appropriate relief.

9. Procedural fairness of the dismissal is challenged by the applicant only to the effect that it alleges that the respondent failed to comply with the provisions of paragraph 7.3(o) of the Public Service Co-ordinating Bargaining Council's Resolution 1 of 2003.

10. The applicant seeks retrospective reinstatement.

SURVEY OF EVIDENCE AND ARGUMENT

11. The following constitutes a summarised version of the respective evidence of the parties and has not been captured verbatim. The fact that I have not captured all

of it should not be misconstrued that I have not taken it into account. My findings are accordingly within the context of all of the evidence tendered.

RESPONDENT'S EVIDENCE

Johannes Roland Moropodi ("Moropolodi")

12. Moropodi testified under oath that he was a Loss Control Officer employed by the respondent at its Emergency Medical Services (EMS) Head Office in Midrand and that, in this role, his duties were to register and investigate all losses incurred and to report thereon. He was mandated to investigate the incident of 13-16 October 2014 during an EMS strike where damages arose, and he visited the Ekangala Dark City Clinic base on 13 October 2014 where he was briefed by Lucky Mahlangu, the Station Manager, and the Shift Leader who was on duty.

13. Moropodi learned from Mahlangu, that he identified the 4 people who were involved and who were the ringleaders, being D Mabizela (the applicant), M Motha, ML Mahlangu and MT Mabuza, and that 13 October 2014 saw only elements of intimidation. However, on 14 October 2014, Mabizela, Motha and Mabuza went to the response vehicle with registration CY64PMGP, and Mabizela punctured its tyres with a sharp object before Mahlangu pulled him away and asked him if he was aware that what he was doing was wrong.

14. He was notified, on 15 October 2014, that the striking workers had returned to the base and that vehicles had been damaged. He arrived at the base between 17h30 and 18h00, that same day, to assess the damage of the vehicles noting that all 4 tyres of each of the vehicles, documented on page RB1, had been punctured by a sharp object. He took pictures of the damage on 15 October 2014, shortly after his arrival at the base, and was advised by Mr Matenjwa, who was on duty that day, that he identified Mabizela, Motha, Mahlangu and a lady from the Themba base as being involved. He confirmed taking a statement from Matenjwa but that it was not included in the bundle, but had been taken into account in his report.

15. He presented invoices for 8 of the vehicles to replace and refit damaged tyres amounting to R71,770.19 and explained that EMS service delivery was adversely affected as the vehicles were out of operation pending repair. This was in contrast

to the amount specified in the charge against the applicant of R130,130.36 as well as the amount calculated, during the disciplinary hearing, of R103,220.28.

16. During cross-examination, Moropodi conceded that his report and evidence were based on what he had been advised to him as part of the investigation. He confirmed that he had testified at the applicant's disciplinary hearing although, he later recalled that he had not done so.

17. He testified that Trip Authorisation Forms were to be signed by the Station Manager and that the Public Service Transport Policy provided that it should be signed by the supervisor of the employee required to utilise the vehicle as well as the official actually issuing the keys to the vehicle. He later conceded that this was not always the case and that another employee may be delegated to act in the stead of the Station Manager, and would, therefore, be required to sign under "Responsibility Manager" (sic). However, the Trip Authorisation Forms introduced into evidence had not been approved by the Station Manager, Mahlangu.

18. Moropodi was unable to comment regarding why the respondent had omitted to supply the trip sheets of 5 of the vehicles, following a request by the applicant and confirmed that these documents did not form part of his investigation. He refuted the applicant's claim that the damage to the vehicles may have been incurred before the incident.

19. He further conceded that the charge preferred against the applicant was not correct as Mahlangu had only conveyed to him how the applicant was seen puncturing a tyre on the response vehicle.

Lucky Mahlangu ("Mahlangu")

20. Mahlangu testified under oath that he was previously employed as the Station Manager at Ekangala Dark City Clinic.

21. He confirmed that on 14 October 2014 at approximately 12h00, the applicant arrived with a mob of striking workers at the base. Mahlangu was busy with his crew and noticed Mabizela, Motha, ML Mahlangu and Mabuza at the response vehicle (registration number CY64PMGP) where Mabizela was puncturing the tyres with a sharp object. He confronted him, guided him away and told him, in

isiZulu, that this was wrong and that it had consequences. He explained that he cared for the applicant and was concerned about his conduct. During their inspection between 18h00 and 19h00 that evening, he noted that the tyres of 6 vehicles had been damaged, and by 15 October 2014, the tyres of 10 vehicles had been damaged. He presumed that it might have been the applicant who did so and he proceeded to notify the Loss Control Office.

22. He further testified that, on 14 October 2014, all the vehicles were called back to the base following an anonymous tipoff that they may be attacked. They accordingly were operational between approximately 07h00 and 11h30 that day.

23. Mahlangu related that he was the manager responsible for signing the Trip Authorisation Forms and confirmed that those forms included in the bundle (pages RA16 and RA19) had not been authorised by him and accordingly ought not to have gone out, even if the trip sheets of the vehicles reflected that they did.

24. He confirmed that the damaged vehicles were towed away and that they were back in service by 18 October 2014 and that service delivery had been adversely affected as many calls could not be attended to and 58 chronic patients could not be transported to one of the respondent's facilities for their treatment.

25. During cross-examination, Mahlangu indicated that he only saw the applicant deflating the tyres of the response car (registration number CY64PMGP) on 14 October 2014, and that later, during his routine inspection, he found 4 damaged vehicles and then 6 and had concluded that Mabizela had deflated them. The response vehicle was the last one which had been deflated, and it was where he found the applicant on 14 October 2014 before he reprimanded and removed him from it.

26. Mahlangu maintained that, despite his evidence at the disciplinary hearing where he testified that the applicant had deflated the tyres of 10 emergency vehicles using a sharp object, he found him at the response vehicle (registration number CY64PMGP) and that this was sufficient proof that he might have deflated the other vehicles' tyres.

27. Although his original statement indicated that *"Mr DD Mabizela, Mr M Motha, Mr ML Mahlangu and Mr T Mabuza, I find them personally deflating the response*

vehicle registration number (CY64PMGP) tyres, I warn them that the thing that they were doing is wrong,…", Mahlangu was emphatic that only Mabizela deflated the tyres, and attributed his reference to "them" as being a mistake.

28. Asked to comment on the disciplinary hearing chairperson's finding that *"It was notable at first that most of the testimony of Mr. Mahlangu was contradicted by documentary evidence produced by the employee during the hearing. This evidence entails the trip authorization forms and trip sheets of the vehicles that were alleged to have been damaged, that these vehicles were either out on calls or on other errands. This evidence could not be disputed and was admitted as the only evidence that I could rely on."* Mahlangu reiterated that the vehicles were out and were recalled back to the base for safety and that the applicant had found them parked at the garage.

29. Mahlangu stated that, despite his previous good relationship with the applicant, he did not believe that he would be able to work with him again considering the incident and the attitude displayed by the applicant.

30. According to Mahlangu, the applicant deflated the tyres of the response vehicle (registration number CY64PMGP) while he (Lucky Mahlangu) was talking to ML Mahlangu on 14 October 2014. Mahlangu heard a sound and saw the applicant puncturing the last tyre of the vehicle, being the left front one.

31. Although the disciplinary hearing chairperson's finding confirmed that Mahlangu was recalled after the disciplinary hearing to provide additional points of clarity, Mahlangu could not recall this when questioned during the arbitration.

APPLICANT'S EVIDENCE

Dumisani Mabizela

32. The applicant testified under oath that the strike action commenced on 13 October 2014 and that they were required to join in. They accordingly left their station to go to the EMS Head Office in Midrand.

33. On 14 October 2014, they gathered at Bronkhorstpruit at approximately 08h00 for a briefing, and almost everybody from Bronkhorstspruit left for the Ekangala Dark City base, sometime between 08h30 and 09h00, arriving there at approximately

10h00. They were initially stopped at the gate, and some were permitted to enter so that they could address their colleagues stationed there. A short time later, all of the striking workers were permitted entry by security. Some employees addressed Mahlangu, the Base Manager who did not agree to release the employees to join in the strike action and to accompany them to Midrand for a 13h00 meeting.

34. Mabizela testified that he never touched a single motor vehicle's tyre on 14 October 2014 and that he could not remember any tyre being damaged by anybody. It was a peaceful interaction where they only talked, and he recalled meeting with Mahlangu. He refuted Mahlangu's evidence that he was seen bending down near the vehicles and that Mahlangu picked him up after stabbing the response vehicle's tyres. Instead, he submitted that Motha was involved in a disagreement with Mahlangu regarding the release of employees and that he had no recollection of him being picked up Mahlangu or even talking with him.

35. He sought reinstatement into his former position as his dismissal had affected him financially and emotionally, especially have 3 children, aged 12 years, 9 years and 3 years). He had sent his 2 older children to live with their grandmother as he was unable to support them as he was still unemployed.

36. Under cross-examination, Mabizela testified that no specific individual was leading the industrial action and that it involved a number of employees from the Tshwane bases whose plan was to go to the EMS Head Office in Midrand to meet. He further denied that he was at the forefront of the industrial action.

37. He denied that the striking workers had any hidden agendas to disrupt services by damaging the respondent's vehicles and maintained that they were fighting for what was right.

38. He further denied that he talked to Mahlangu on 14 October 2014 or that Mahlangu had picked him up as there was no incident.

39. According to Mahlangu, on 14 October 2014, the base's vehicles were parked under the carports, and some were at the wash bay. He estimated their distance to the vehicles to be about 3 meters. He did not notice that any of the vehicles' tyres had been deflated as there were many striking workers present. He reiterated

that they had not deflated them and that Moropodi's evidence related to information relayed to him and that he was not present at the time.

40. He agreed that, by 15 October 2014, the tyres of a number of the base's vehicles had been punctured and he confirmed that he did not know who damaged the tyres, although, it was attributable to people amongst their number. It was his position that, on 14 October 2014, he was busy engaging with the supervisor, Mr Matenjwa.

41. As a result of the incident, the Department of Health had incurred unnecessary expenditure, and service delivery had been compromised.

42. Mahlangu was unaware of any other employees who had been charged for the incident although he had nothing to do with the situation and attributed the puncturing of the tyres to the mob.

ANALYSIS OF EVIDENCE AND ARGUMENT

43. S185(a) of the LRA prescribes that every employee has the right not be to be unfairly dismissed and, s188(1) provides that dismissal that is not automatically unfair, is unfair if the employer fails to prove that the reason for the dismissal is, inter alia, a fair reason related to the employee's conduct or capacity, and that the dismissal was effected in accordance with a fair procedure. According to s188(2), any person considering whether or not the reason for the dismissal is a fair reason, or whether or not the dismissal was effected in accordance with a fair procedure, must take into account any relevant code of good practice. In addition, s138(6) of the LRA provides that, in addition to any code of good practice, a commissioner arbitrating a dispute must take into account any guidelines published by the Commission in accordance with the provisions of the LRA. In this regard, the CCMA Guidelines: Misconduct Arbitration (the Guidelines), published by the CCMA in terms of s115(2)(g) of the LRA, which became effective from 01 April 2015, are relevant.

44. Item 2(1) of Schedule 8, the Code of Good Practice: Dismissal (the Code) provides that whether or not a dismissal is for a fair reason is determined by the facts of the case and the appropriateness of dismissal as a penalty whilst Item 3(4) requires

that the gravity or seriousness of the misconduct must be taken into account in this assessment.

45. Having regard to the CCMA Guidelines as identified above, a three-stage enquiry is adopted in determining whether a dismissal was an appropriate sanction – i.e. an enquiry into the gravity of the contravention or rule; an enquiry into the consistency of the application of the rule or standard; and an enquiry into factors that may have justified an alternative sanction. This enquiry evolved from the principles set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd & others* (2007) 28 *ILJ* 2405 (CC) where the Constitutional Court [at para 78] held that:

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

Substantive fairness

46. Item 7 of the Code provides the criteria to be used in assessing the substantive fairness of a dismissal for misconduct and reads as follows:

> *"Any person who is determining whether a dismissal for misconduct is unfair should consider –*
>
> *(a) whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and*
>
> *(b) if a rule or standard was contravened, whether or not –*
>
> *(i) the rule was a valid or reasonable rule or standard;*
>
> *(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;*
>
> *(iii) the rule or standard has been consistently applied by the employer; and*

(iv) dismissal was an appropriate sanction for the contravention of the rule or standard."

47. It became clear during the proceedings that this matter related to a dispute of fact in which two conflicting versions of the events of 14 and 15 October 2014 were presented.

48. Moropodi's evidence related, on the whole, to information which had been supplied to him by others during his investigation and, as such constitutes hearsay which must be rejected. He was unconvincing as a witness for the respondent, at first stating that he testified at the applicant's disciplinary hearing and then later recalling that he did not. The only evidence from Moropodi having any bearing on this matter is the photographs which he testified to having taken on 15 October 2014 which reflect a situation where the tyres of a number of the base's motor vehicles are seen to be deflated.

49. It is also worth noting that the invoices he introduced into evidence were for the replacement of tyres in respect of only 8 vehicles and amounted to R71,770.19, and not R130,130.36 as preferred in the charge against the applicant.

50. Mahlangu's evidence relating to the incident on 14 October 2014 was largely consistent with his written statement although the latter refers to him finding Mabizela, Motha, ML Mahlangu and Mabuza *"personally deflating the response vehicle"*. This is, however, in sharp contrast to the summary provided by the presiding officer of the disciplinary hearing who captured that Mabizela came to the base with a mob of striking employees and deflated tyres of 10 emergency vehicles. This was clearly not the case as Mahlangu clarified, on several occasions that he personally only witnessed Mabizela puncturing the left front tyre of the response vehicle and that he picked him up by his shoulders and reprimanded him for this conduct, advising him that there would be consequences.

51. Mahlangu's conclusion, based on seeing the applicant puncture one tyre on the response vehicle, that he must have been responsible for the damage to the other vehicles does not hold water and is based on pure assumption. What is clear is that Mahlangu's evidence was that he personally saw the applicant puncturing one of the response vehicle's tyres.

52. Mahlangu came across as a credible witness with no axe to grind with the applicant and no ulterior motive. His evidence was that he saw himself as a fatherly figure to the applicant and addressed him upon observing his conduct on 14 October 2014.

53. While Mahlangu was adamant that he recalled all the base's vehicles on 14 October 2014, following the telephonic tipoff he received, the documentary evidence would suggest that some vehicles continued to operate, with or without the proper authorisation. Simply put, the fact that he did not sign off on some of the Trip Authorisation Forms in no way can be interpreted that the vehicles were not utilised and he is accordingly mistaken in his assertion that they all returned to the base.

54. What is clear from his evidence is that he personally witnessed the applicant puncturing one of the tyres of the response vehicle with a sharp object.

55. Mabizela's version of events notably changed between his evidence in chief and his cross-examination. At first, he could not remember any tyre being damaged and that the interaction on 14 October 2014 was peaceful; subsequently he averred that there was no incident and that he had not interacted at all with Mahlangu. He later conceded that the tyres were deflated by somebody amongst the mob of people, but denied that it was him.

56. On his own version, the space at the back of the base was relatively small, and he conceded that he was close to the vehicles.

57. In *Sasol Mining (Pty) Ltd v Nggeleni and Others* (2011) 32 *ILJ* 723 (LC), the Labour Court held, at paragraph 9, that:

> *"One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him.*
>
> *…*
>
> *The commissioner was obliged at least to make some attempt to assess the credibility of each of the witnesses and to make some observation on their demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or*

improbability. He ought then to have considered the probability or improbability of each party's version."

58. On this basis, I must consider the conflicting versions of Mahlangu and Mabizela, and their inherent probabilities. There is no doubt that the intention of the striking workers, in returning to the base on 14 October 2014 to request that the employees be released, was to hamper service delivery of the respondent, which is required to respond to emergency situations and to transport the injured and ill in order that they receive appropriate medical treatment. Removal of the Ekangala employees from the base, to accompany the striking workers, would have resulted in services being disrupted. On the other hand, I must consider Mahlangu's at times, passionate, evidence in which he sought to relate the facts about the incident, without any self-interest or reason to apportion blame to the applicant, other than what he personally witnessed. I accordingly am of the view that Mahlangu's version of events that he saw the applicant puncturing the one tyre of the response vehicle is more probable than that of the applicant's.

59. In accepting this version, the applicant wilfully and intentionally damaged state property by puncturing/stabbing the left front tyre of the response vehicle constituting a breach of a rule/standard, premised on the common law duty of an employee to act in good faith. Mabizela's conduct, in puncturing a single tyre on the response vehicle, is a serious offence. His action was deliberate and intentional and, not only resulted in unnecessary expenditure to replace the damaged tyre but resulted in the vehicle being out of operation, pending the repair, impacting the service delivery of the base and consequently, those to whom services are supplied. Whether it was a single tyre on one vehicle, amounting to an estimated R1,820.00 versus all 4 tyres on 11 different vehicles, amounting to R130,150.36, the deliberate act of misconduct was the same. In the circumstances, taking into account the provisions of Item 7 of the Code, the dismissal of the applicant by the respondent was substantively fair.

Procedural fairness

60. Item 4(1) of the Code provides the guidelines to be used in assessing the procedural fairness of a dismissal as follows:

"Normally, the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision."

61. Although the respondent submitted that there were no irregularities during the disciplinary process which may have impacted on its procedural fairness, it failed to address the applicant's contention that it did not comply with the provisions of clause 7.3(o) of Resolution 1 of 2003 of the Public Service Co-ordinating Bargaining Council which requires that, in conducting a disciplinary hearing, *"the chair must communicate the final outcome of the hearing to the employee within five working days after the conclusion of the disciplinary enquiry,…"*.

62. It was not disputed that the applicant's disciplinary hearing concluded on 16 March 2015 and the findings thereof were communicated to the parties only on 04 June 2015. The sanction was subsequently communicated to the parties only on 09 July 2016, well outside of the provisions of the resolution included in the collective agreement, and no reasons explaining the departure were provided.

63. Item 67 of the CCMA Guidelines: Misconduct Arbitration, however, provides that:

"When deciding whether a disciplinary procedure conducted in terms of a collectively agreed procedure involves any procedural unfairness, the arbitrator should examine the actual procedure followed. Unless the actual procedure followed results in unfairness, the arbitrator should not make a finding of procedural unfairness in a dismissal case."

64. In the circumstances, the unexplained delay was just that; an unexplained delay. There was no prejudice suffered by either of the parties and no apparent unfairness experienced by either the applicant or respondent, despite the respondent's non-compliance. Guided by Item 67 of the Guidelines, a finding of procedural unfairness

is unwarranted. Accordingly, the dismissal of the applicant was effected in accordance with a fair procedure.

65. I, therefore, find that the respondent has discharged the onus in proving the applicant's dismissal was fair.

AWARD

66. The dismissal of the applicant, Dumisani Mabizela, by the respondent, Department of Health- Gauteng, was both substantively and procedurally fair.

67. The applicant's claim is accordingly dismissed.

68. There is no order as to costs.

Allan Kayne