



# ARBITRATION AWARD

Commissioner: Pieter Venter

Case No: PSHS357-18/19

Date of award: 21 February 2019

In the matter between:

**JOHN RADINTOANA NDABA**

Applicant

and

**DEPARTMENT OF HEALTH- FREE STATE**

Respondent

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## DETAILS OF HEARING AND REPRESENTATION:

- 1 The arbitration hearing took place on **19 February 2019** at the offices of the Respondent in Frankfort.
- 2 The Applicant was present whilst the Respondent's representative, Mr Nhlapo, was absent from proceedings.
- 3 I decided to proceed with the arbitration hearing in terms of section 138 (5)(b)(i) of the Labour Relations Act, 1995 as amended (hereinafter referred to as "the LRA") read with rule 30 (1)(b)(i) of the Rules for the Conduct of Proceedings before the CCMA.
- 4 Prior to the hearing both parties submitted applications (of some sort) concerning a possible postponement of the mater.

## **BACKGROUND TO THE DISPUTE:**

- 4 The matter was scheduled in terms of Section 191 of the LRA. The dispute related to an alleged unfair dismissal committed by the Respondent.
- 5 The matter was postponed in November 2018 on request of Mr Nhlapo (Labour Relations Officer of the Respondent). He was not ready to proceed and no witnesses were in attendance. I accommodated him and granted a postponement. I also issued a subsequent ruling and warned parties not to cause a delay in the finalisation of the matter.
- 6 At that stage the Applicant had an attorney who represented him namely Mr. Boshoff.
- 7 During the course of last week I was provided with a letter from Mr Boshoff. It was sent to the Bargaining Council and Mr Boshoff indicated that he would not be able to attend these proceedings on 19 February 2019 at 09h00 as he had a CCMA matter in Gauteng. I subsequently issued a ruling in which I did not grant an indulgence for reasons mentioned in the ruling.
- 8 Mr. Boshoff was not in attendance on 19 February 2019 and preferred to attend the CCMA matter in Gauteng. He did so at his own peril.
- 9 On the evening before proceedings (18 February 2019) I was informed by Mr. Nhlapo that he was ill for some days now and that his colleagues would either attend to the matter or request a postponement. I advised him to communicate same via the Bargaining Council.
- 10 On the morning of proceedings (19 February 2019) I received an email from the Bargaining Council concerning Mr. Nhlapo's absence. A medical certificate was attached to the email. The medical certificate was issued by a Dr de Wit on 18 February 2019.
- 11 The medical certificate was not accompanied by any application but I nevertheless regarded it as an application for postponement of the matter. I considered the medical certificate and decided not to grant postponement. My reasons were as follows:

- a) On the previous sitting Mr Nhlapo was, to say the least, ill-prepared and could not proceed due to the absence of his witnesses and the like. I granted him an opportunity to get his house in order.
- b) In a 2006 judgment handed down by the Labour Appeal Court in *Mgobhozi v Naidoo NO & Others* [2006] 3 BLLR 242 (LAC), the matter of medical certificates was addressed. An employee whose dismissal for misconduct was upheld by the CCMA submitted a review application to the Labour Court 31 weeks outside of the time limit. He gave the reason for his late referral by claiming that he had been suffering from stress and depression, and he attached two medical certificates to his application in support of this claim. The court considered the medical certificates, without affidavits from the doctors, to be hearsay evidence. The court stated that the absence of an affidavit from the doctors led to the inference that they were not prepared to defend the certificates under oath. The court also noted that medical certificates were widely abused - and for this reason, are regarded as hearsay evidence unless accompanied by a supporting affidavit from the doctor. It should be noted that the judgement related to the Rules of the Labour Court where affidavits are required during an application but the principle remains the same.
- c) In *NUMSA obo Mahlalela v Kusile Fabrications* (2013) 34 ILJ 3021 (BAC) a medical certificate was also regarded as hearsay evidence. The reason for this was that it contained spelling mistakes and was difficult to read. The medical practitioner was also not practicing at the address provided in the medical certificate.
- d) The Health Professions Act 56 of 1974 issued ethical rules relating to medical practitioners. Rule 16 stipulates as follows:
- (1) A practitioner shall grant a certificate of illness only if such certificate contains the following information –
- (a) the name, address and qualification of such practitioner;
- (b) the name of the patient;

(c) the employment number of the patient (if applicable);

(d) the date and time of the examination;

(e) whether the certificate is being issued as a result of personal observations by such practitioner during an examination, or as a result of information which has been received from the patient and which is based on acceptable medical grounds;

(f) a description of the illness, disorder or malady in layman's terminology with the informed consent of the patient: Provided that if such patient is not prepared to give such consent, the practitioner shall merely specify that, in his or her opinion based on an examination of such patient, such patient is unfit to work;

(g) whether the patient is totally indisposed for duty or whether such patient is able to perform less strenuous duties in the work situation;

(h) the exact period of recommended sick leave;

(i) the date of issue of the certificate of illness; and

(j) the initial and surname in block letters and the registration number of the practitioner who issued the certificate.

(2) A certificate of illness referred to in subrule (1) shall be signed by a practitioner next to his or her initials and surname printed in block letters.

(3) If pre-printed stationery is used, a practitioner shall delete words which are not applicable.

(4) A practitioner shall issue a brief factual report to a patient where such patient requires information concerning himself or her.

e) I made two attempts to phone Dr Wit's room but the number was unavailable as my calls were directed to voice messages. I was therefore unable to verify any details on the medical certificate.

- f) The medical certificate did not comply with Rule 16 of the Health Profession Act described above. I was unable to read what was written as it was illegible. Various requirements of Rule 16 were therefore not met.
- g) I therefore regarded the medical certificate as hearsay evidence and it was not supported by an affidavit by any person.
- h) I therefore proceeded in the absence of Mr Nhlapo and/or the Respondent.

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

- 12 I am called upon to determine whether an employment relationship was in place between the parties, whether the Applicant was dismissed and whether or not such dismissal was fair and in compliance with section 188 of the LRA.

### **EVIDENCE BY PARTIES:**

#### **Evidence by Applicant:**

**John Radintoana Ndaba** testified, under oath, that:

- 13 He was employed as a Trace Man on 17 July 1988. He had no previous convictions and earned R 10 228-54 per month.
- 14 He explained that he was accused of transporting stolen livestock in a government vehicle on 27 August 2015. He testified that he was on duty and that he had authority to use a government vehicle. He travelled to Bethlehem to do a delivery and on his way back he picked up two persons. He off-loaded them in town and heard later that they had stolen meat in their possession.
- 15 He explained that he had no knowledge of the crime that was apparently committed and that he did nothing wrong. A disciplinary hearing was held and he was dismissed on 18 June 2018. He explained that there was a workplace rule in place and that he was aware of the rule. He had no problem with the rule but merely denied contravening the rule.

- 16 He denied any wrongdoing and explained that he was not guilty of any misconduct. He was satisfied that a hearing was conducted.
- 17 The Applicant explained that he was unemployed and that he had dependants. She sought reinstatement. There was no outstanding salary or statutory payments issues to be determined.

**ANALYSIS OF EVIDENCE AND ARGUMENT:**

- 18 I have only the uncontested evidence of the Applicant and have no reason not to regard his evidence as truthful and reliable. The Applicant gave a clear and precise recollection of the events and stated, under oath, that he did not commit any misconduct and the Respondent had no reason to dismiss him. He appeared to be a reliable witness and there were no contradictions in his evidence.
- 19 The Applicant testified that he was appointed in a permanent position on 17 July 1988. I am therefore firstly convinced that there was an employment relationship between the parties.
- 20 The Applicant was aware of a workplace rule against misuse of a government vehicle and explained that the rule was fair. He was however of opinion that he did nothing wrong and that he was falsely accused. He denied any wrongdoing and testified that he did not steal anything and did not misuse a government vehicle. He was therefore not guilty of any misconduct. She also testified that he was dismissed on 18 June 2018 after a disciplinary hearing was held.
- 21 In terms of Schedule 8, Item 7, Code of Good Practice of the LRA, it would normally not be appropriate to dismiss an employee for a first or minor offence, except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable. Examples of serious misconduct, subject to the rule that each case should be judged on its own merits, are gross dishonesty or wilful damage to the

property of the employer, wilful endangering of the safety of others, physical assault to the employer or fellow employer, client or customer or gross insubordination.

- 22 When deciding whether or not to impose the penalty of the dismissal, the employer should in addition to the gravity of the misconduct, consider factors such as the employee's circumstances, the nature of the job and the circumstances of the infringement itself. A commissioner must apply his or her own sense of fairness and make a value judgment in this regard and take all circumstances into account (See *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC)).
- 23 A commissioner is compelled to consider the following factors:
- a) Was there a workplace rule in place?
  - b) Was the rule reasonable?
  - c) Was the employee aware of the rule?
  - d) Was the rule contravened?
  - e) Was the rule applied consistently?
  - f) Was dismissal an appropriate sanction?
- 23 The Applicant is aware of a workplace rule against misuse of government vehicles and has no issue with consistency. He explained that he did not contravene the workplace rule and committed no misconduct. His dismissal is therefore without any apparent reason and is substantively unfair.
- 24 The Applicant explained that a hearing was held and that it was fair.
- 25 The dismissal is therefore procedurally fair.
- 26 The Applicant sought reinstatement and I have no reason not to award reinstatement. Arrear salary is calculated as follows:

$R\ 10\ 228-54\ \text{per month} / 4.33 = R\ 2\ 362-24\ \text{per week} / 5 = R\ 472-44\ \text{per day}$

June 2018:  $R\ 472-44 \times 9\ \text{days} = R\ 4\ 251-96$

July 2018 March 2019: R 10 228-54 X 9 months = R 92 056-86

**TOTAL: R 96 308-82**

**AWARD:**

27.1 The dismissal of the Applicant was **substantively unfair and procedurally fair**.

27.2 The Respondent, The Department of Health Free State, is ordered to **reinstate** the Applicant, John Radintoana Ndaba, into the same or similar position and on the same terms and conditions of employment than those that existed prior to his dismissal.

27.3 The reinstatement is to be effected by **01 April 2019** and the Applicant must report for duty on the same day.

27.4 The Respondent is furthermore ordered to pay **arrear salary** to the Applicant in the amount of R 96 308-82.

27.5 The abovementioned payment is to be effected by not later than **15 April 2019**.

A handwritten signature in black ink, consisting of a large, stylized capital letter 'P' followed by a horizontal line extending to the right.

Signature:

**PM Venter**