



# ARBITRATION AWARD

Commissioner: **Mr T. Ndzombane**

Case No: **PSHS397-20/21**

Date of award: **24 November 2020**

In the matter between:

**MOMELEZI MGU**

(Applicant)

and

**DEPARTMENT OF SOCIAL DEVELOPMENT- WESTERN CAPE**

(Respondent)

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## **DETAILS OF HEARING AND REPRESENTATION**

1. The arbitration hearing was scheduled for and heard on 17 November 2020, under the auspices of the Public Health & Social Development Sectoral Bargaining Council at the Department of Social Development offices in Cape Town. The applicant, Mr. Momelezi Mgu, represented himself. The respondent, Department of Social Development–Western Cape, was represented by a Senior Labour Relations Officer, Ms Arendse. I proceeded with the matter in terms of Section 138(5) (b) (i) of the Labour Relations Act 66 of 1995, as amended ('the Act'). The proceedings were digitally recorded and handwritten notes were taken. The respondent submitted a bundle of documents which was accepted and admitted as it purports to be. Mr. Anthony Nondala was the translator for English to IsiXhosa. On the conclusion of the proceedings the applicant elected to submit oral closing arguments whilst the respondent requested to submit such on 20 November 2020. Although the applicant has already led his closing arguments, I have given him the opportunity to also submit written closing arguments if he finds that there is a need to do so.

## **BACKGROUND**

2. The applicant stated that he was employed by the respondent as a Child and Youth Care Worker on 01 July 2017 and he was stationed at Lindelani Centre in Stellenbosch. He earned an annual salary of R140958.00 [one hundred and forty thousand nine hundred and fifty-eight rand] prior to his dismissal on 02 September 2020. He admits that he assaulted a 10-year-old boy, Frank Bailey, because he was unruly. The intention was to prevent Frank Bailey from stabbing other children. There was no intention on his side to hurt him. He was remorseful about his actions. If he succeeds with the dispute, he requested to be reinstated and the sanction of dismissal be substituted with six months suspension without a salary.
  
3. The respondent stated that the applicant was charged with the following misconduct:  
Charge 1: “it is alleged that you are guilty of misconduct, in that, on or about 31 March 2020, you assaulted Frank Bailey, a resident at Lindelani Child and Youth Care Centre, by inter alia unlawfully and intentionally kicking him on his leg and slapping him in his face”.
  
4. The applicant’s conduct contravenes the Children’s Act, respondent’s policies and the standard operating procedures. The trust relationship between the parties is irretrievable broken down.

## **ISSUE TO BE DECIDED**

5. I am required to determine whether or not the applicant’s dismissal was substantively fair.

## **SURVEY OF RESPONDENT’S EVIDENCE AND ARGUMENTS**

6. Ms. Ilse Newman stated that she is employed by the respondent as a Social Worker and she presented the following evidence under oath. During the incident she was working at Lindelani as a Reliever for an employee who was on leave. On 31 March 2020 Mr Sylvester came to her office and reported that a nurse wanted to see her. She asked him as to what was the problem. His response was that it was about Frank Bailey. She then thought that Frank Bailey was refusing to take his medication. Upon her arrival at the nurse office she found Frank Bailey crying. The nurse informed her that the applicant had hit Frank on the face. Frank confirmed that she was slapped five times on the face and was also kicked by the applicant. The nurse informed her that there were no marks that can prove that he was kicked as well. Her observation was that there was a hand

mark on the face which was leading to his head, the face was red, blue and purple and the eyes were red. She sought permission from the manager to take photos of the injuries which was granted. She took these pictures which are submitted in these proceedings. The matter was reported to relevant authorities. At the time of the incident Frank was between 8 to 10 years old. As employees they are not allowed to physical abuse children as stipulated in the Children's Act. If a child is unruly there are ways as to how to control and restrain the child. There is no justification to hit the child.

7. Mr. Zahir Fernandez is a 13-year-old boy and he resides at Lindelani Youth Centre and he presented the following evidence under oath. On 31 March 2020 Frank Bailey asked for permission to attend to the bathrooms which was granted. Luciano sat on the place of Frank. Upon Frank's return he asked Luciano to move but Luciano refused. A fight ensued whereby Frank kicked Luciano on the face. They then hit each other on their bodies and faces. The applicant intervened to stop the fight but Frank was unruly as he did not co-operate. At one stage Frank had a pencil in his hand as he wanted to stab Luciano but the applicant overpowered him by taking it. The applicant managed to restrain Frank by sitting him on the floor. However, Frank started swearing at the applicant by using vulgar language which included the P-word. It was at that stage that the applicant became angry and slapped Frank five times on the face and kicked him. Eventually, Frank sat down and cried.
  
8. Mr. Christopher Sampson stated that he is employed by the respondent as the Child and Youth Care Supervisor and he presented the following evidence under oath. He has been at Lindelani Youth Centre for a period of nine years. The core duties of a child care worker are to supervise children, to provide them with basic needs, to safeguard them. The centre is governed by the Children's Act. In terms of the standard operational procedure's employees are not allowed to physically touch a child or hit a child or act inappropriately towards a child. Employees are trained and equipped as to how to control an unruly child. They are trained to deal with violence and riot as how to restrain a child. There are different techniques which are applied to refrain a child. As Frank had an object in his hand the applicant could have easily talked him down, if such is not successful, he should have taken the pen from the child. He could have grabbed the child and told him that he would release him if he complies with the instruction. He was informed of the bruises on the face of Frank. If the applicant felt that the situation would be out of hand, he should have used a radio to call for a backup. Or the applicant should have called

other employees which are stationed adjacent to him for assistance. The applicant could have easily taken Frank to the kitchen. There were lot of options that were available to him to deal with the situation.

9. Mr. Frank Bailey stated that he is a 10-year-old boy and he presented the following evidence under oath. On 31 March 2020 he went to the bathroom. Upon his return he found that Luciano had taken his place. He asked him to move without any success. He then kicked Luciano on the face and the fight ensued between them. He then went to a room to fetch a pencil. The applicant took the pencil and sat him down. He decided to fight again however the applicant told him not to go to Luciano but he insisted with his actions. The applicant put him on the floor but he did not want to listen. The applicant then smacked him five times on the face and kicked him. At that stage he was no longer fighting with Luciano. After the applicant beat him, he felt angry and sad. His face was red and the leg was painful. Employees are not allowed to bit children at the centre even if they are naughty. He reported the matter to Shakir.
10. Ms. Desire Bougaard stated that she is employed by the respondent as the Centre Manager and she presented the following evidence under oath. Her duties are to appoint staff, to make sure they comply with standard operation procedures, to oversee the management and the running of this facility. The centre is the guardian of the children. It housed between 10-year olds to 17-year olds. Some of the children are referred to them by the Courts. And others street children which are referred to them in terms of form 36. The centre is a primary care giver as per the Children's Act. Their general duties are to safeguard the children, to provide health and physical protection, to give emotional support and not physically harm the chidden, to protect them from any kind of abuse, to provide reading programmes, to escort to and from school and to provide health facilities to them. These requirements are provided for in terms of section 32 of the Children's Act. The centre has standard operating procedure which provides as to how to deal with children. Employees are not allowed to touch or physically abuse children even hugging is not allowed. The techniques are used as the last resort to control and restrain a child. At the time of this incident she was on leave. Under no circumstances they are allowed to smack children because such a conduct is a criminal offence. The applicant contravened the Children's Act and the department's policies. Courts trust them with the children that they are protected. The applicant failed his primary duty to protect the child. She cannot trust him with the children again. If he were to be reinstated the children

would feel that their voices are ignored and they are not protected. This would send a negative message and would set a bad precedent. Frank was not safeguarded and protected by the applicant. There was no reason to break the law. The children are there for protection and not abuse.

## **SURVEY OF APPLICANT'S EVIDENCE AND ARGUMENTS**

11. Mr. Momelezi Mgu stated that he is the applicant in this matter and he presented the following evidence under oath. He worked at Lindelani Youth Care Centre at Stellenbosch for a period of three years. At the time of this incident he had a clean disciplinary record. The training was given to him to control and restrain an unruly child. However, if the situation is uncontrollable, he was not given further training in this regard. He used techniques to control and restrain Frank on the day in question. But Frank was unruly and uncontrollable. As part of controlling him he applied minimum force to restrain him by slapping him three times. He denies that he kicked him. His radio was not working on that day hence he could not call his supervisor. Other employees were far from him hence he could not call them for assistance. He could not leave the children unattended. There is no view from the kitchen to the rest of the room hence he did not take him there. In addition, there are chairs and pads that Frank could have used to hurt himself in the kitchen. He elected to sit Frank down next to him. In retrospect he admits he should have taken Frank to the kitchen to defuse the situation. At that stage he thought the best decision was to sit him down next to him. Frank was unruly and was going up and down. He begged him to stop fighting but he was unruly. He decided to slap him three times on the face but the intention was not to hurt him instead he wanted to control him. His fear was to prevent Frank from hurting other children or hurting himself. He had applied all the techniques which included to talk him down. He admits that he was wrong and is remorseful. There are other two employees who assaulted children at the centre but they were not dismissed instead they were given three to six months suspension without pay. He believes that his dismissal was unfair instead he should have received a six months suspension without pay instead of dismissal.

12. I will refer to cross-examination and closing arguments where necessary in my analysis.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

13. The respondent bears the onus to prove on balance of probabilities that the dismissal was effected with a fair procedure and for a reason in terms of Section 192(2) of the

Labour Relations Act 66 of 1995, as amended (“the Act”). The applicant does not challenge the procedural fairness of his dismissal. In this regard I must consider item 7 of the Code of Good Practice on Dismissal. The Code states that an arbitrator must consider whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to the workplace; and if a rule or standard was contravened, whether or not the rule was a valid or reasonable rule or standard; the employee was aware, or could reasonably be expected to have been aware, of the rule or standard; the rule or standard has been consistently applied by the employer and dismissal was an appropriate sanction for the contravention of the rule or standard and the CCMA arbitration Guidelines. In *Sidumo and another v Rustenburg Platinum Mines Ltd and Others* (2007) 28 ILJ 2405 (CC), the Court stated that “in terms of the LRA a Commissioner has to determine whether a dismissal is fair or not. A commissioner is not given the power to consider afresh what he/she would do, but simply to decide whether what the Employer did was fair. In arriving at a decision, a Commissioner is required to defer to the decision of the Employer. What is required is that he/she must consider all the relevant factors and circumstances. Amongst the factors relevant to the determination of factors are: the general vulnerability of Employees to unfair decision making; the importance of security of employment; the importance of the rule that was breached; the reasons for establishing the rule including its reasonability; the harm caused by the Employee’s conduct; the impact that it had on the trust relationship; effect of setting a precedent; the reason why the Employer imposed the sanction of dismissal; the basis of the Employee’s challenge to the dismissal, whether additional training and instruction may result in the employee not repeating the misconduct; the effect of dismissal on the employee and the employee’s service record”.

14. It is not disputed that there is a rule governing assault in the respondent’s establishment. Physical abuse is when someone hurts or harms a child or a young person on purpose. It includes hitting with hands or objects for example by slapping and punching. It occurs when a parent or care giver commits an act that results in physical injury to a child or adolescent. Obviously, the rule is reasonable because it is meant to protect children who are in the custody of the Centre. Evidence shows that the applicant was aware of the rule including legislations that govern this matter. The applicant is of the view that the dismissal was too harsh because he did not have the intention to hurt the child. Initially it was not the applicant’s case that the rule, in the workplace, is applied inconsistently but this issue was introduced to the last witness of the respondent. Because the

applicant is a layperson, I allowed him to deal with the matter. However, he failed to bring any evidence to show that indeed the respondent is unfairly applying the rule or it is selective the way it applied the rule. He referred these proceedings to the incidents of the two employees whereby he claimed they had assaulted children in the Centre but were not dismissed. Instead according to him they received three to six months suspensions without pay. The difficulty about his case he failed to produce a charge sheet in order to be compared with the one he faced. He also failed to show which charges these employees were found guilty of. Although the respondent appears to be aware of these incidents but it did not the charges that were faced by these employees and what they were found guilty of. For the above reasons the applicant failed to prove that the respondent applies its rules inconsistently.

15. The respondent bears the onus to discharge the onus on balance of probabilities that the dismissal was for a fair reason. In my view, in weighing the probabilities, one has to assess logic, sense and the context of the dispute in its entirety. If, therefore one cannot make a finding based on the above factors the credibility of the witnesses should enter the fray. It should be remembered that one cannot evaluate one aspect of evidence in isolation to the entire evidence. I will therefore assess and determine this dispute based on these principles laid out in *Hoffmann & Zeffertt: The South African Law of Evidence* 4th Ed at page 562 whereby the comments are as follows “The degree of proof required by the civil standard is easier to express inwards than the criminal standard, because it involves a comparative rather than a quantitative test. On the whole it is not difficult to say one thing is more probably than another, although it may be impossible to say how much more probably. So, the civil standard has been formulated by Lord Denning as follows: “it must carry a reasonable degree of probability but not so high as is required in the criminal case. If, the evidence is such that the tribunal ‘we think it is more probably than not;’ the burden is discharged, but if the probabilities are equal it is not”.
16. The Children’s Act of 2005 defines abuse in relation to a child, to mean any form of harm or ill-treatment deliberately inflicted on a child, and includes.... assaulting a child or inflicting any other form of deliberate injury to a child or exposing or subjecting a child to behaviour that may harm the child psychologically or emotionally. Section 9 of the Children’s Act states that in all matters concerning the care, protection and well-being of a child the standard that the child ‘best interest is of paramount importance, must be applied. Assault is also a common law crime which if it occurs it should be reported to

the South Africa Police Service for investigation and prosecution. In *Telkom Ltd v CCMA & Others* (JR1538/09) ZALCJHB 21, “the court defined assault as an unlawful invasion of the person’s physical integrity carried out without the person’s consent or permission. The strength of the force used by the perpetrator is irrelevant”.

17. It is common cause that the applicant was dismissed for assaulting one Frank Bailey who is a resident of the Centre. The issue that is at stake here is whether there are any justification reasons or any reasonable explanation which led to his action. It should be borne in mind that these children that become resident of the Centre are vulnerable and troubled children. Most of the time they come from broken families and have been exposed to abuse. The Centre acts as their protection place and is required to safeguard their needs. As reflected in the Children’s Act their protection and needs are of paramount importance. They are there to receive care and protection. It is common cause that Frank Bailey was involved in a fight and he was unruly on that day. The applicant provided these reasons as justification for his actions which I need to assess them. He claimed that he could not place Bailey in the kitchen because it was not safe but he later conceded that in retrospect he should have done so. Secondly, he could not call his supervisor for a backup because his radio was faulty. However, this was never reported to the authorities. He stated that he could not call his colleagues because they were far from him. But he did not dispute the evidence that at the time he slapped Bailey there was no fight that was ongoing. The question that should be asked is what then prompted the beating of the child. It is not disputed that Bailey was using vulgar language on the day. It appears that some of uncouth words were directed to the applicant. Evidence shows that such made him angry. It is clear to me that the applicant slapped Bailey because he directed vulgar towards him. I am therefore convinced that he did not slap Bailey because he wanted to defuse the fight instead, he slapped him for being rude towards him. This explains why the applicant did not ask for a backup because he was in control of the situation. As the matter stands there is no valid or justifiable reason for his action. He was employed to protect the child not to subject him to physical abuse.
18. It is clear that the actions of the applicant were destructive in nature and had gone to the heart of the employment relationship. In *De Beers Consolidated Mines Ltd V CCMA & Others* (2000) 21 ILJ (LAC) at 1058F–G it was stated “Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise”. The applicant’s actions were gross and unacceptable. to slap the child five times and kicked him is not

in line with the principles of controlling and restraining. He had contravened both the Children's Act and common law crime. Any mitigating factors are outweighed by the aggravating factors. He should consider himself lucky that there are no criminal charges against him. I have also taken into account the mitigating factors which are outweighed by the aggravating circumstances. On the evidence submitted before these proceedings there is no basis for me to interfere with sanction of dismissal meted out towards the applicant. Consequently, the applicant's dismissal is substantively fair.

**AWARD**

19. I find that the applicant's dismissal is substantively fair.

20. The application is hereby dismissed.

A handwritten signature in black ink, appearing to read 'Thuthuzela Ndzombane', enclosed within a faint, irregular rectangular border.

**Thuthuzela Ndzombane**