



ARBITRATION AWARD

Panelist/s: PRINCE KEKANA
Case No: PSHS 407-10/11
Date of award: 28 March 2013

In the ARBITRATION between:

NEHAWU obo MPHO SHUBANE
(Union / Applicant)

And

DEPARTMENT OF HEALTH AND SOCIAL DEVELOPMENT - GAUTENG
(Respondent)

Union/Applicant's representative: Ms. NTOMBI MAHLANGU
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DETAILS OF HEARING AND REPRESENTATION

- [1] This is the award in the arbitration between Mr. Shubane, the employee, and Department of Health, the employer.
- [2] The arbitration was held under the auspices of the PHSDSBC in terms of section 191(5) (a) of the Labour Relations Act 66 of 1995 as amended (the Act).
- [3] The arbitration hearing took place on 7 February 2013 and 12 March 2013 at the Bank of Lisbon Building in Johannesburg.
- [4] The employee was present and Ms. Mahlangu, a union official, represented him. Mr. Siphwe Mazibuko, the Labour Relations Officer, represented the employer.

ISSUES TO BE DECIDED

- [1] Whether the dismissal of the employee was procedurally and substantively unfair.

BACKGROUND TO THE DISPUTE

- [2] Mr. Shubane was employed on 1 February 2008. At the time of dismissal he was an Assistant Director at EMS in Ekurhuleni. He was dismissed on 12 August 2010 after a disciplinary hearing.
- [3] The employee was charged and found guilty of (a) Fraud in that he submitted a quotation of R39 159. 00 alleging that it was from Ecomed Medical CC. He enabled Cozma Medical Equipment CC to obtain the tender at a lower price of R34 656.00 and (b) Storing pornographic and obscene material in the employer's laptop.
- [4] The employee pleaded guilty to both charges.
- [5] The employer submitted a bundle of documents numbered from page 1 to 18 and it was admitted into the record as annexure A. The employee submitted a bundle of documents numbered from page 1 to 19 and it was admitted into the record as annexure B.
- [6] Parties agreed to submit closing arguments on 15 March 2013.

SURVEY OF EVIDENCE AND ARGUMENT

The employer's evidence and arguments

- [7] The employer called three witnesses. **Mr. Nkosinathi Maseko** testified that he was the Chairperson at the employee's disciplinary hearing. The employee's representative was absent at the commencement time. The employee asked to contact the representative and could not find him. The employee elected to proceed without representation. The charges were read to the employee and he pleaded guilty. The employee was found guilty on his plea. Both parties were asked to submit mitigating and aggravating factors. The employer submitted aggravating factors. The employee, however, send a letter through the union, Nehawu. The union asked to change the employee's plea of guilty to not guilty. The union alleged that the employee pleaded guilty because he thought that the employer would give him a suspended sentence. He could not change the plea because he had already found the employee guilty that is why he asked for mitigating factors.
- [8] He found the charges to be very serious and recommended that the employee be dismissed. During cross examination he testified that the employee was a manager and was literate. He therefore assumed that the employee understood the disciplinary hearing process and the charges proffered against him. The employee was not coerced to proceed without his representative. The employee did not state that he did not understand the charges. The employee did not ask for postponement.
- [9] **Mr. Greg de Freitas** testified that he was the Sole Owner of Ecomed Medical C.C. The quotation on page A10 reflects his company. His company did not make the quotation. The author of the document, Dumisane Mlaudzi, has never been employed by his company. They did not make any quotation to the department around July 2009. The quotation in the bundle was different from their quotation format because (a) the font was different, (b) the prices were different and (c) the postal code was omitted from the postal address
- [10] **Ms. Phumzile Hlatswayo (Phumzile)** testified that she was the Personal Assistant to the employee. The employee informed her that quotations were required in Midrand to repair oxygen cylinders. She was instructed to phone Cozma to acquire their quotation. She received the Ecomed quotation from Cozma

and handed it to the employee. The employee did the motivation and asked her to make the copies.

- [11] The employer argued that the evidence against the employee was overwhelming. The evidence proved that he elected to plead guilty without any pressure. The witness proved that the Ecomed quotation was fraudulent. Another witness testified that she was asked by the employee to source the fraudulent quotation. The employee did not dispute Phumzile's evidence that she was asked to phone Cozma for a quotation. The employee deliberately omitted to put his version to Phumzile.
- [12] The employee stated that he pleaded guilty on moral grounds. He failed to explain what "moral grounds" meant. His union wrote letters which clearly stated that he was guilty. The employee was guilty of fraud and his dismissal was fair.

The employee's evidence and arguments

- [13] The employee testified and did not call any witnesses. Mr. Mpho Shubane testified that he was the Assistant Director at EMS in Germiston. He was responsible for EMS in Ekurhuleni. On 25 February 2010 he pleaded guilty to both charges. He did not understand the charges. He thought if he showed remorse he will receive a lenient sanction.
- [14] He proceeded without his union representative because he could not attend due to transport problems. He was asked by the chairperson to email his mitigation.
- [15] He was not aware that the quotation was fraudulent. He received the fraudulent quotation from Phumzile. He instructed Phumzile to source two quotations. She was aware that he had the Cozma quotations. Phumzile informed her that she could only find one supplier. The Cozma quotation was received from the CEO's office. The Deputy Director Finance was dismissed for recommending his submission but reinstated on appeal.
- [16] He did not store any pornographic material on his computer. During cross examination he testified that he erred by not putting his version to Phumzile. He also omitted to verify the quotations he sent to the CEO's office.
- [17] The employee argued that his dismissal was procedurally unfair because the Chairperson did not assist him. He was also not told what the consequences of his plea were. He pleaded guilty with the understanding that he will be given lighter sanction. The charges were not read to the employee. He was just asked to plead.

The employee did not know what he was pleading to and stated that he pleaded guilty on moral grounds.

- [18] The employee was entitled to union representation and he was deprived of it. The employee proceeded without a representative because the Chairperson asked him who was going to pay his fees for the day. The Chairperson did not answer the letter from the union which asked that the plea be changed.
- [19] The employee took responsibility as a manager to save his job. He stated that he was remorseful to save his job. The employee's plea of guilty on moral grounds was ambiguous. The employee did not understand the implications of his guilty plea.
- [20] The fraudulent quotation was sourced by Phumzile and not the employee. The employee testified that he did not know the procedure to be followed. He asked the CEO to draft a submission. He did not know that the quotation was fraudulent. He was not properly trained on procurement. He had been in that position for 19 Months. He did not commit any fraud because he did not approve any supplier.
- [21] The employer failed to prove that it suffered any loss. The department failed to prove that the employee benefited from this transaction. The employer has failed to prove on balance of probability that there was any fraud committed by the employee.
- [22] The rule was not applied consistently because Phumzile was not charged. Maweni was reinstated. Mr. Mpho Lebeloane signed the RLS01 but was not charged. The employee had two dependent children. He is 50 years old and will find it difficult to find employment.
- [23] His dismissal was unfair and he should be reinstated retrospectively.

ANALYSIS OF EVIDENCE AND ARGUMENT

- [24] It was common cause that the employee was dismissed. The employer had the onus to prove, on a balance of probabilities, that the dismissal was fair. There was no evidence to prove possession of pornographic material and I dismissed that charge.
- [25] The employer called three witnesses who corroborated each other. They were thoroughly cross examined and their version did not change or contradict. They were credible witnesses and I found their version probable. The employee testified and did not call any witnesses to corroborate his version. The version that he put

to witnesses changed when he testified. He also gave new evidence which was not put to the witnesses. He stated that he wanted to change his plea from guilty to not guilty because he thought that the employer would be lenient. At that stage the employer had made no pronouncement on the sanction. The employee's version is fraught with contradictions and fabrications. I found his version improbable.

[26] The employee alleged that his dismissal was procedurally unfair. The employee was appointed as an Assistant Director. He however stated that he did not understand the charges. This version is insincere. He received the charges before the date of the disciplinary hearing. The charges were drafted in simple English. He did not inform the Chairperson that he did not understand the charges. I found that he understood the charges perfectly.

[27] The employee also stated that the charges, which he did not understand, were not read to him. He said he did not understand the charges, implying that he read them. I found that it was probable that the charges were read to the employee.

[28] He further stated that the Chairperson proceeded with the hearing in his representative's absence. His representative was irresponsible because he did not phone the hearing to alert the Chairperson that he would be absent. His representative did not advise the employee to ask for postponement. The employee did not ask for postponement. The Chairperson had no obligation to ensure that the employee was represented. The employee, and not the Chairperson, decided to proceed without his representative.

[29] The employee further alleged that the dismissal was procedurally unfair because the Chairperson did not assist him. He did not ask for any assistance from the Chairperson. The Chairperson did not know what assistance he needed. The Chairperson had an obligation to be impartial in the hearing. The employee's failure to ask for assistance could not be blamed on the Chairperson.

[30] He also alleged that he was not told what the consequences of his plea were. He did not ask what the consequences of his plea were. The Chairperson was within his right to assume that the employee is pleading guilty because he committed the offence and was prepared to face the consequences. I found that the dismissal was procedurally fair

[31] The employee was charged with fraud. Fraud is defined as unlawfully making, with intent to defraud, a misrepresentation which causes actual prejudice or which is potentially prejudicial to the employer. In this particular case the fraudulent

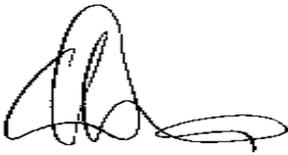
document was discovered before any payments could be made. There was however potential prejudice on the employer.

- [32] The employee pleaded guilty. His defense was that it was on moral grounds. He further stated that he thought that the employer would give him a lighter sanction. He however did not mitigate the sentence. Instead he withdrew his plea before any sanction was made by the employer. His conduct is immoral to say the least. He did not plead guilty because of his innocence. His plea of guilty and the attempt to change the plea is the employee's consistent inconsistency.
- [33] The employee did not put it to Phumzile that he asked her to source two quotations. He also did not put it to her that she informed him that she could not source the second quotation. He also did not put it to her that she was aware that he had a Cozma quotation. This new version was probably fabricated.
- [34] The employee conceded that the Ecomed quotation was fraudulent. He ordered Phumzile to phone Cozma for a quotation. He alleged that he received an Ecomed quotation instead. He did not question Phumzile why she produced an Ecomed quotation when he asked her to phone Cozma. He did not peruse the documents he submitted to his CEO. His evidence was that the submission to the CEO was drafted by the CEO and the quotation was sourced by Phumzile. The only thing he was required to do was at least to verify the quotations that he personally submitted to the CEO.
- [35] The employee was the only one who submitted fraudulent quotation and the employer could therefore not be inconsistent. Even if the employer was inconsistent, the employee's misconduct could not be excused because of the error that the employer had made.
- [36] I found that the employee's dismissal was substantively fair.

AWARD

[41.1] The dismissal of Mpho Shubane by The Department of Health was procedurally and substantively fair. The dismissal is upheld and the employee's claim of unfair dismissal is hereby dismissed.

Dated at Johannesburg on this the 28th day of March 2013.



Prince Kekana
Sector: **Public Health**
