



# ARBITRATION AWARD

COMMISSIONER: JANINE CARELSE

CASE NO: PSHS435-17/18

DATE OF AWARD: 16 OCTOBER 2017

In the matter between:

**PSA obo SAMUEL TEMBINKOSI GANTSHO**

**APPLICANT**

and

**DEPARTMENT OF HEALTH- WESTERN CAPE**

**RESPONDENT**

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## DETAILS OF HEARING AND REPRESENTATION

1. The Arbitration hearing took place on 6 October 2017 at The Western Cape Nursing College in Cape Town in terms of Section 191(5)(a)(i) of the Labour Relations Act 66 of 1995, as amended, (“the Act”). The proceedings were digitally and manually recorded and the matter proceeded in English.
2. The applicant, Mr Samuel Tembinkosi Gantsho was present and represented by Mr Brandon Jacobs (Mr Jacobs), a PSA official, whilst the respondent, Department of Health, was represented by its Labour Relations Officer, Mr Ayanda Mniki (Mr Mniki).

3. Both parties handed in a bundle of documents and the applicant's bundle was marked bundle "A", whilst the respondent's bundle was marked bundle "B".

### **ISSUES TO BE DECIDED**

4. The issue to be decided is whether the respondent perpetrated an unfair labour practice involving disciplinary action short of dismissal in the form of a verbal warning in terms of section 186(2) (b) of the Act.

### **BACKGROUND TO THE DISPUTE**

5. The applicant is employed by the respondent as an Orthopaedic Footwear Technician since 2001. The applicant was issued with a written warning for insolence and disrespect on 31 May 2017 for allegedly uttering the following words to his supervisor, Mrs Brink, on 15 May 2017 in a staff meeting: " Do not allow her (Ms Hendry) to cause us to bump heads, because if that happens someone is going to get hurt. I mean, Ria (referring to Mrs Brink), think about it; if you and I bump heads; my head is much harder than yours and you will end up with a "iDuma" (Xhosa word that refers to a lump on the head such as one would get after bumping one's head)".
6. The applicant lodged an appeal against his sanction and the written warning was reduced to a verbal warning. The applicant challenges both the substantive and procedural fairness of his verbal warning and wants the verbal warning to be removed from his file.

## SUMMARY OF EVIDENCE AND ARGUMENT

### THE APPLICANT'S EVIDENCE AND ARGUMENT

7. The applicant testified under oath and stated that on the morning of 15 May 2017 his supervisor called him in her office and said that she was going to have a meeting and she further stated that she was appointed by the CEO, Ms Hendry, to oppress and suppress the employees in the department and to get rid of certain people in the department. She then convened a meeting and addressed them and said that Mrs Hendry said that the offices must be closed and everybody asked what the reason for that decision was and no reason was given. He averred that one of his colleagues, namely, Roger said she must not allow Ms Hendry to let them bump heads. He stated that this statement is used during each and every meeting if they do not see eye to eye. Due to what Mrs Brink had told him before the commencement of the meeting, he then said "Ria, do not let Ms Hendry come in between us and let us bump heads because somebody is going to get hurt". He stated that this statement emanated from the situation they were in a few years ago when they did not want to go to Mitchell's Plain and the employees stood with her and they did not bump heads. At the meeting when he uttered these words Mrs Brink did not indicate that she was uncomfortable with these words. Later on the same day at about 17:00, Mrs Brink asked him about certain HPCSA documents until about 17:45 and said that they will see each other the following day. The meeting was held on a Monday and on the following Thursday, Mrs Brink called him in and gave him an *audi* letter that stated that he was disrespectful. He stated that he told her that he did not understand the *audi* because it was vague and therefore he cannot sign it. He requested a meeting with Mrs Brink and Ms Nel on 22 May 2017 and at the meeting he told them that the *audi* was vague and that he meant no harm by saying the words in the meeting and that his colleague Roger always used those words. He stated that refused to sign the second audi because he thought that everything had been resolved at the last meeting between himself, Ms Nel and Mrs Brink.
8. He contended that Mrs Brink was given the post in order to get rid of some people in the department. He was then given a notice on 30 May 2017 to inform him that a

meeting will be held on 31 May 2017. On 31 May 2017 another meeting was held with Angelo and he was given a written warning and he appealed against the written warning and the warning was reduced to a verbal warning. He denied having uttered the words in paragraph 6 above, particularly the words iDuma and stated that he said Dumba which means to be stressed out and frustrated. He stated that people were asking questions and he did not say those words. He did not mean to harm Mrs Brink, as he knows her for more than 10 years and they had a good working relationship and it is one of the best working relationships. He stated that he avoids personal confrontations with her when it is only the two of them and he avoided it because the appeal was still on. He averred that Mrs Brink told him that she got the job to oppress the other workers in the department so that they will not be promoted and to get rid some of the elements in the department. He and Mrs Brink are professionals and besides work they chat about general things. They have a good relationship. He stated that Mrs Brink told him that she was told to give him a warning, but that she did not see the need to give him the warning. He wants fairness and wants the written warning to be taken away. He further contended that Mrs Brink told him that she was required to get rid of some people in the department and that she was merely pushing the agenda that she was hired for.

9. Under cross examination he stated that an *audi* letter is given to a person in order for the person to tell his side of the story in terms of allegations that are brought against the person. He contended that the first *audi* that was given to him was vague and he asked for more clarity on it and as a result he did not reply to the first *audi*. He stated that he did not sign the second *audi* because he had already discussed things with Mrs Brink and Ms Nel. Mrs Brink told him that it will go to Ms Nel because he did discuss it in the meeting and he did not reply in writing. He did say that “don’t let anyone come between us because someone is going to get hurt”. He said this because of what Mrs Brink told him prior to the meeting. He did not explain how a person will get hurt or who will get hurt. By saying this he did not mean physical harm. He averred that this did not create any tension between him and Mrs Brink because they had spoken freely afterwards and therefore he believes that Mrs Brink did not take it in a negative way. In Mrs Brink’s statement she stated that she was not frightened by him. That was the statement made in presence of Jan Hendrik and Angelo. He stated that theoretically it

is unlikely that Mrs Brink would give a reason why she was appointed but it happened practically. Mrs Brink admitted to saying that she was hired to oppress the employees in Ms Nel's presence. He was referred to page 7 of bundle "B" and he denied saying the words iDuma and stated that he said Dumba which means to be stressed out and in a position not to be able to answer questions. He wrote his own appeal against the sanction and not against what Mrs Brink wrote about him. He did not consider what she wrote.

10. Under re-examination he was referred to page 7 which is a response to the sanction that was given to him and he sent this to Ms Hendry. In his response he informed Ms Hendry that Mrs Brink told him that she was appointed in order to get rid of some people in the department. On 30 May 2017 he received a notice and on 31 May 2017 he was given a written warning. He stated that he was called for a meeting and not for a disciplinary hearing and therefore it was not conducted in the proper manner. A meeting was held that Mrs Brink would lock her office when she was not there and they were concerned because the phone and appointment book was in the office. When employees do not see eye to eye on an issue then the words "let us not bump heads" are referred to loosely at the meetings. He stated that the words were used when employees were moving in two different directions and somebody will get hurt, but not physically. If employees do not agree on the same thing then employee who does not agree will get hurt. He stated that an employee will get hurt if the offices are locked and they need something inside the offices. Roger said "lets not bump heads because somebody is going to get hurt".

## **THE RESPONDENT'S EVIDENCE AND ARGUMENT**

11. Ms Maria Elizabeth Wilhelmina Brink (Mrs Brink) testified under oath and stated that she is the applicant's supervisor and the Chief Medical Orthotist Prosthetist. She oversees the footwear department. She was appointed in this position on 1 December 2016. She denied that she told applicant that she was appointed to oppress and suppress the other employees and in one conversation she did inform the applicant that she was appointed to sort out the department, as there was one employee who was continuously absent from work. She stated that she was appointed properly and

that her appointment was in line with the HPCSA guidelines, as her predecessor was not authoritative and he was seldom absent from work. She was there to help staff grow, reduce absenteeism, up skill staff and turn the situation around. She indicated that the staff in her department have very little faith and respect for themselves. She was there to change the culture of the department and to promote a positive environment and get the staff to perform their work.

12. The reason why it was decided that her office be locked was because some staff illegally gained access to her emails by illegally using her password and sent emails to themselves and other staff members. These were confidential emails. She, the CEO and ASD had a meeting and decided to lock their offices because the line managers' offices were open for staff. In the past there was no need to lock the offices, however, there are confidential information on staff in the offices. Certain staff members were implicated in fraudulent activity and she did not want to mention it. She felt violated because it was a staff member that she had trusted that had committed this fraudulent activity. She stated that there is currently an investigation that is pending from the forensic auditors and those who have stolen the emails names could not be divulged in order to keep the information safe.

13. With reference to the applicant's conduct she stated that's he felt that it was necessary to draw a line because when she was appointed he challenged her appointment and acted on behalf of other staff to initiate a grievance against her appointment. He told her that she must understand that he fights on behalf of staff. He also told her that she must not take these fights personal. She stated that the applicant has a habit of making threats and that he once told her that she can do what she wants but that he has something in the pipeline and she will see. Most of the time the threats were done in private. She felt that she needed to take a stance when the applicant threatened her in the meeting because it was done in the presence of the other employees. She did take it as a physical threat. She stated that his actions were not acceptable. She is also the only woman in the department and the youngest. She stated that she feels threatened and she must be respected because she is the supervisor. She stated that felt threatened in the same way as a victim of a sexual harassment. She stated that the applicant thinks that she does not understand the language use. The applicant

thinks that he is bigger than her and that she will come second. She does not recall Mr Roger Gibson uttering the words “let us not bump heads” in the meeting. She was referred to page 4 of bundle “A” which is an *audi* letter that was given to the applicant and which he refused to sign. On the following Friday the applicant wanted a meeting with her and Ms Nel. On the following Monday morning they went to the lecture room and the applicant said that he to explain why he refused to sign it because it was vague. They then had a discussion about what transpired in the meeting and applicant said why the *audi* was vague. There was a point in the conversation where applicant was told that if he answers the *audi* then it will go away. She discussed with Ms Nel that the applicant just simply needed to apologise. If the applicant had apologised then the matter would go away. The applicant could have apologised behind closed doors, instead he stated that she must do what she must do and that she must remember that there are consequences. She denied that the applicant discussed the remarks that he made at the meeting. She stated that she followed the process by doing the *audi* and not just giving him the warning. She had given him an opportunity to engage. She stated that the applicant had essentially indicated by calling the meeting that she made a mistake with the first *audi* and that “this is what you should have done”.

14. She further testified that the applicant does not see patients although this forms part of his job description, but he refuses to see patients. He advised her to read article 17 of the Health Professional pages. She then decided to research it herself and could not find anything that the applicant referred to. When she took a screenshot of something relating thereto, the applicant indicated that it is incorrect. Whenever she spoke to the applicant then she only used business type language on Whatsapp. She cannot believe how he could have thought how the conversation could have inferred friendliness or social banter. She just required the necessary information. She stated that the applicant sent her a friendly message before the case which she thinks is inappropriate. She averred that the applicant used the word iDuma which is a Xhosa word and it can mean a bump on the head (physical) or a swelling cause by stress or thinking too much. By this the applicant meant that if she and he were to get into a shuffle of words or actions then she will come off second.

15. Under cross examination she stated that she and the applicant both started out young in 2000. She worked from 2000 to 2008 and stayed at home to look after her children and returned to work in May 2013. She averred that she understands her function as a supervisor and that her being a female has nothing to do with it. She is new in her position as a supervisor and feels unsure of herself, however, she feels comfortable with all of her subordinates. She feels nervous and tense every day the whole day. She stated that every time that she must engage it is stressful. She has had a meeting with the employees to see where they can see eye to eye. She contended that the context in which the applicant had said those words had a history behind it and it was definitely not casually said to her. She further stated that she is still getting to know when she can say something and when not to say something. She averred that the applicant is referring to other employees saying the same thing but she has never heard them saying it. It is possible that Roger may have said it and she would not be surprised that he may have said it but she cannot recall him saying it. She stated that it is untrue that Ms Hendry gave her the job and she stated that she went through the recruitment process. She stated that that is inflammatory language and places her in a bad position. Her role as dictated by Ms Hendry was to deal with staff who don't work or don't come to work and deal with those issues that has caused the department to be unproductive. She may have told the applicant this three months before the meeting on 15 May 2017.

16. She contended that she did not tell the applicant that she was there to get rid of people and the language that she used was perhaps similar. She had a professional working relationship with the applicant. She and the applicant differ in their opinions and the applicant refuses to follow instructions. She agreed that it is a normal working environment to agree and disagree. She stated that the incident occurred on a day that she was extremely vulnerable and she was angry with the applicant and his colleagues because of the privacy breach. She stated that the applicant's careful manipulation of her had been pushed too far, as it was the second time that the applicant did it in front of his colleagues. Ms Hendry had cautioned him about his behaviour and he usually does it behind closed doors.

17. She averred that when the applicant uttered the words referred to in paragraph 5 above she asked him “do you think it is appropriate?” and he laughed. She stated that the documents in her office needed to be kept confidential and that there was a telephone outside of the office which the employees could use. A centralised computer was also made available so that employees could access their emails and this was communicated during the meeting. Employees further have access to logbooks and folders and the appointment book is outside of her office and therefore there was nothing that they needed to access inside her office. She further indicated that she did inform the employees at the meeting how their decision to lock the offices would not impair their functions. She stated that it’s a build-up of things that happened between her and the applicant and that he refuses to engage in meetings on anything. He just sits and laughs and raises his eyebrows. She stated further that the applicant will engage with other staff at his desk and they will discuss sports and she assumes that they discuss her too. This has been happening for the months. She was referred to page 4 of bundle “B” which contains the first *audi* letter. It was served on the applicant on 18 May 2017 and on page 2 is the second *audi*. She interpreted the applicant’s request for a meeting regarding the *audi* to show her that she does not know what she is doing and that he will show her how it is done. She contended that the applicant refused to take receipt of the second *audi* letter. She has wifi at home and she was doing research and she wanted to get to the root of the problem when the applicant refused to see patients. She averred that the applicant intends for her to come off second best and he does not want her to be his supervisor. She stated that she is allowed to get emotional when a person threatens her because she is human. The applicant is an alpha male in her department and leads the other group of employees. He showed insolent and disrespectful behaviour in the presence of his colleagues who he leads. She again backs down in situations of conflict. After the meeting she contacted Ms Nel who was shocked and upset. She said that applicant’s conduct was unacceptable and serious and she gave him a written warning. She stated that the incident was severe enough to have given him a written warning. She stated that the breach of privacy and other factors fuelled her to act against applicant.

18. Under re-examination she stated that she felt threatened because her authority was threatened. She had a grievance against her appointment and this amongst other

things made it appear that the applicant had a plan that she would be removed from her position as a manager. She worked hard to be in that position. She felt threatened because the applicant is a shop steward who knows the law well and there is a wide range of means available to him. She felt that the applicant would find a way to get her removed as a supervisor.

19. Ms Olwyn Nel (Ms Nel) testified for the respondent under oath and stated that she is an assistant director in the Orthotist Prosthetist Centre. She denies that Mrs Brink admitted to telling the applicant that she was appointed to oppress and suppress employees in the department. Under cross examination she stated that she would not know if the applicant whether applicant's version is true on the basis that he advised Ms Hendry that Mrs Brink told him that she was appointed to oppress and suppress. She stated that what she however testified was the truth.

### **Closing arguments**

20. I acknowledge the parties' comprehensive oral closing arguments. Both parties dealt with both the procedural and substantive fairness. Essentially, each party wants me to rule in their favour. I do not wish to repeat their arguments and submissions. I have decided to deal with them in my analysis of the evidence and arguments.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

21. Section 186(2) (b) of the LRA provides that disciplinary action short of dismissal may constitute an unfair labour practice. The applicant was issued with a verbal warning and now challenges the both the substantive and procedural fairness of the verbal warning.

### **Substantive fairness**

22. The applicant bears the onus to prove on a balance of probabilities that the respondent committed an unfair labour practice that relates to the verbal warning that was given to him for allegedly acting disrespectful towards his superior and thereby displaying insolent behaviour. It is common cause that the applicant uttered the words "Do not

allow her (Ms Hendry) to cause us to bump heads. Because if that happens then someone is going to get hurt.” The rest of the words in paragraph 5 above is in dispute. The applicant’s version is that he had uttered these words to Mrs Brink because of the decision to close the offices and also as a result of the discussion he had with her prior to the meeting about her being appointed to get rid of elements in the department. The applicant’s version that this was the normal way of speaking in the department was not corroborated by any other evidence and Mrs Brink disputed that the above mentioned words were used casually in the department. Mrs Brink also disputed that Mr Gibson had said this in the same meeting before the applicant had uttered them. She stated that she would have also disciplined Mr Gibson if he had said those words. She went further to say that she would not be surprised if Mr Gibson had ever used those words but that he did not say it before the applicant had said it. Mrs Brink also denied that she had called the applicant into her office and told him that she was appointed by Ms Hendry to oppress and suppress the other employees and to get rid of certain elements in the department and the applicant did not have any other evidence to support this version because Ms Nel testified that Mrs Brink did not say this in the meeting they had on 22 May 2017, as alleged by the applicant. It is therefore clear that the applicant was an unreliable witness because his version was wholly disputed and uncorroborated. Ms Nel’s testimony supported Mrs Brink’s testimony instead.

23. The applicant’s testimony that the matter had been resolved in a meeting between himself, Mrs Brink and Ms Nel was unsupported and disputed by Mrs Brink. Moreover, if it was then he would not have received a second *audi* letter. What is more, I agree with Mr Mniki that the applicant’s conduct in refusing to sign the second *audi* letter is an indication of the applicant’s character, which is a projection of insolent and disrespectful behaviour. This evidence supports the respondent’s case that the applicant made a threat when he uttered the words “do not allow her (Ms Hendry) to cause us to bump heads. Because if that happens someone will get hurt”. Mrs Brink further stated that the applicant is a shop steward and a collective grievance was lodged against her being appointed in her post. This evidence is irreconcilable with the applicant’s version that he and Mrs Brink had one of the best working relationships. Once again, the applicant was not a credible witness.

24. The applicant was asked on several occasions for the exact interpretation of the words used and what those words meant and his version was that if two parties disagree on something one party will get hurt. The employee would explain everything and evade the question as to who will get hurt, until at the end of the re-examination he stated that the employees will get hurt if they are not allowed into the office. If this were true, it would have been the applicant's version from the onset and not at the end of his testimony. It was clear that the applicant was fabricating and adapting his version as he went along. The applicant was not a truthful witness.
25. Mrs Brink on the other hand was a very credible and reliable witness. She did not contradict herself and part of her testimony was corroborated by Ms Nel, whereas the applicant's testimony was not supported by any other evidence in its entirety.
26. I do not agree with Mr Jacobs argument that the applicant's communication to Ms Hendry wherein he alleged that Mrs Brink told him that she was appointed by Ms Hendry to get rid of employees in the department contributes to the truthfulness of the applicants version. On the contrary I find that this communication displays a direct threat to Mrs Brink's position and supports Mrs Brink's version that she feels like her position is being threatened. It is further a clear attempt to get Mrs Brink into trouble. It is submitted that the applicant's own version is destructive to his case. Furthermore, I do not agree with Mr Jacobs argument that Mrs Brink acted against the applicant because of underlying matters. Mrs Brink did indicate that the breach of privacy matter and other factors fuelled her to act against the applicant, however, that argument would only be valid if there was no substance to the dispute before me and where the applicant had not misconducted himself. It would have become apparent if Mrs Brink had acted with malicious intent against the applicant by giving him a verbal warning and I cannot make such a finding.
27. Based on the collective grievance that was lodged against Mrs Brink's appointment that was spearheaded by the applicant, I find that Mrs Brink had justifiable grounds to feel threatened in her position. This is but one incident that is not in dispute, as she alleged that there were many other incidents where the applicant had undermined her

authority. The evidence is further clear that the applicant's objective is to challenge Mrs Brink's appointment and in this context I do not believe that the words that the applicant had uttered at the meeting were merely trivial and meaningless, instead, it was insolent and disrespectful towards Mrs Brink who is his superior. This behaviour should not be tolerated.

28. Finally, who did the applicant allude to when he said: "someone will get hurt"? Based on the above mentioned findings in relation to the applicant's credibility, I find that the most probable inference that can be drawn under the circumstances is that he used the words iDuma as opposed to IyaDumba and that he had uttered the words in paragraph 5 above, as alleged by Mrs Brink. Moreover, given that the evidence is clear that he is out to challenge Mrs Brink's appointment, the most probable inference that can be drawn is that he referred to her being the one getting hurt. I find that the applicant has failed, on a balance of probabilities, to prove that the verbal warning that the respondent issued to him had been substantively unfair.

### **Procedural fairness**

29. The applicant alleged that he was merely called to a meeting and not a disciplinary hearing when given the written warning. It is trite law that a disciplinary hearing is not required when an employer intends giving an employee a written warning, unless this forms part of a collective agreement between the parties or its disciplinary code and policies and procedures. The applicant did not adduce any evidence to show that the respondent had a duty in terms of a collective agreement, the disciplinary code or any policy to initiate a disciplinary hearing against him. In this case the respondent gave the applicant an *audi alteram partem* letter that required him to answer to the allegations that were levelled against him and the applicant decided not to answer this. At the meeting where the applicant was given a written warning, he was furthermore represented by Mr Angelo Fisher, a PSA union official.

30. In ***Avril Elizabeth Home for the Mentally Handicapped v CCMA and others (2006) 27 ILJ 1644 (LC)*** the labour court held that the employer was merely required to conduct an investigation, give the employee or his representative an opportunity to

respond to the allegations after a reasonable period and thereafter take a decision and give the employee notice thereof.

31. In view of the aforesaid, I do not find the procedure to have been unfair. The applicant has thus failed to discharge the onus of showing, on a balance of probabilities, that the procedure was unfair.

## **AWARD**

32. The applicant's verbal warning was substantively and procedurally fair and did not constitute an unfair labour practice.

33. The applicant's claim is dismissed.

34. There is no order of costs.

## **COMMISSIONER**

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**Janine Carelse**