



# ARBITRATION AWARD

Panellist: C S Mbileni  
Case No.: PSHS496-11/12  
Date of Award: 21 December 2011

In the ARBITRATION between:

**SAMA obo Motaung, M. M. J.**

**Applicant Party**

and

**Department of Health: Gauteng**

**Respondent Party**

**Applicant's representative:** Ms Laetitia Wolfswinkel

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## 1. Details of hearing and representation:

- 1.1 The arbitration was set down in terms of s186(2)(a) of the Labour Relations Act (the "LRA") 66 of 1995 as amended. The hearing was held on the 7<sup>th</sup> December 2011 and finalised on 14<sup>th</sup> December 2011 in the HR Boardroom, 5<sup>th</sup> Level, Steve Biko Academic Hospital in Pretoria.

1.2 Ms Laetitia Wolfswinkel, an official of SAMA appeared for the applicant, Dr. Moahloli Joshua Motaung and Ms Mpho Ramudzuli, a Labour Relations Officer from the Central Office represented the respondent at the arbitration proceedings. Ms Idah Ponko Mmoledi, the Institutional LRO at Steve Biko Academic Hospital attended the proceedings as well.

1.3 The applicant union and the respondent had called the evidence of Dr. Joshua Motaung and Professor Andrew Sarkin respectively to testify under oath without an objection. The parties submitted two bundles of documents, namely: Annexures A and B. The proceedings were mechanically recorded. Both the panellist's handwritten notes and the audio cassettes together with the arbitration award were handed to the Council for safekeeping.

## 2. The issue in dispute:

2.1 The issue in dispute is whether or not the respondent's conduct in extending Dr. Motaung's probation period was fair and just.

## 3. Survey of evidence and arguments:

### 3.1 The applicant's case and argument:

3.1.1 Dr. Moahloli Joshua Motaung had testified that he is a consultant cardiologist, responsible for clinical work, teaching both undergraduate and postgraduate students, and participation in research. Dr. Motaung further testified that all his responsibilities are discharged throughout the hospital, OPD, Cardiac ICU, Cardiology Ward as well as consultation within and outside the hospital

3.1.2 Dr. Motaung further testified that he was appointed on the 1<sup>st</sup> August 2010 on a 12-month probation period, which was supposed to end on the 31<sup>st</sup> July 2011. Dr. Motaung further testified that on the morning of the 31<sup>st</sup> August 2011, he received a call from Dr. Ribeiro inviting him to go and sign the quarterly assessment reports for the previous quarters.

3.1.3 Dr. Motaung was later given a letter dated 31<sup>st</sup> August 2011 by Mr. Piet Motsweni (Deputy Director: HR) to extend his probation period by a further 6 months [see **Annexure A, p15**]. This letter was brought 30 days after the probation period had come to an end.

3.1.4 Dr. Motaung further testified that he did not enter into a Performance Agreement as required by the PMDS Policy [see **Annexure A, p10, 7.1.2**]. He was never called by his supervisor for a performance agreement or to sign one.

3.1.5 Dr. Motaung stated that his job role, the workplan and a personal development plan (PDP) were never discussed and as far as he was concerned, they did not exist [see **Annexure A, p10, 7.1.5**].

3.1.6 Dr. Motaung further stated in his testimony that during the first quarterly report for the period 1<sup>st</sup> August 2010 to 1<sup>st</sup> November 2010, it was indicated that his general progress was unsatisfactory – he neither received any training nor any orientation [see **Annexure A, p3**] which Drs. Ribeiro and Kenoshi, as well as Dr. Motaung signed on 4<sup>th</sup> November 2010.

- 3.1.7 Dr. Motaung further testified that there are four quarterly assessment reports during a twelve-month probation period. The second report was due at the end of January 2011, third report was due at the end of April 2011 and the fourth and last report at the end of July 2011.
- 3.1.8 He also testified that the assessment on Report #. 2 which the Clinical Manager, Dr. Ribeiro signed on the 31<sup>st</sup> August 2011 had indicated satisfactory in all except general progress. Dr. Ribeiro's comments were that during Dr. Motaung's probation period neither the Head of Cardiology Department nor senior doctor was available to train him [see **Annexure B, p4**].
- 3.1.9 Dr. Motaung further testified that as far as he was concern, he was no longer under probation when the assessment report was signed on the 31<sup>st</sup> August 2011. He was not present when this particular assessment was conducted or filled. Report # 4 was done and dated the 24<sup>th</sup> August 2011. He was not present when all the three assessment reports were done and signed.
- 3.1.10 Dr. Motaung also testified that the assessment of Report # 3, he was rated unsatisfactory in terms of attendance, zeal, thoroughness and accuracy, willingness to learn, conduct as well as his general progress. However, Dr. Motaung was not present when that particular assessment was done; he did not sign the form which was supposed to have been done at the end of April 2011 but only done on 28<sup>th</sup> August 2011.
- 3.1.11 Dr. Motaung said that there was no discussion with his supervisor or clinical manager about the assessment reports except that they wanted him to sign the reports ex-post. Dr. Maroo suggested that Professor Sarkin should consult with either Mr. Ngcobo or Mr. Motsweni at HR for advice because he (Dr. Motaung) did not want to sign them ex-post.
- 3.1.12 Dr. Motaung gave evidence that he was neither counselled nor his performance assessed on the 29<sup>th</sup> July 2011 by either Dr. Maroo or Professor Sarkin. On the date referred to above, they had a meeting where clinical issues were discussed. In the last 15 to 20 minutes of that meeting, they discussed the assessment of the previous outstanding periods but the applicant declined except for the last quarter. It was at that stage that Dr. Maroo suggested that Prof. Sarkin consult Mr. Ngcobo or Mr. Motsweni for advice.
- 3.1.13 Although Dr. Motaung was willing to participate in the assessment, he indicated that he would not participate in the previous quarterly assessment but only in the last quarter. He was not invited to participate in the assessment of the last quarterly report. It was done without his participation or knowledge.
- 3.1.14 Dr. Motaung stated in further testimony that there was never a time that Dr. Maroo or Professor Sarkin counselled, trained or guided him to improve his performance. There was no time that either Dr. Maroo or Professor Sarkin ever indicated to him of his unsatisfactory performance. On the 29<sup>th</sup> July 2011, he was given a form to complete but when he produced the form, they said it was not applicable.
- 3.1.15 Dr. Motaung refuted the bulleted points as false allegations [**Annexure A, p13**]. He stated that he attended the same grand ward rounds; he had been teaching up to 4<sup>th</sup> year graduates; he was late if busy in other departments; Professor Sarkin did not do the procedures, he did them himself; he was seeing patients in ICU and taught students

when they are in theatre or he attended meetings outside the hospital to improve himself.

- 3.1.16** Dr. Motaung further testified that it did not happen that his supervisor ensured that he knew his performance and other requirements for obtaining confirmation of completing probation; only one quarterly report was done with him and there was no feedback received in terms of milestones and there was no training, counselling or other assistance to help him meet the requirements for confirmation [see **Annexure B, p11, E.2**].
- 3.1.17** Dr. Motaung described his relationship with his supervisor and colleagues as generally relating very well but they do engage in robust debates. There are 4 full-time consultants in cardiology and 2 of whom are training in cardiology excluding himself and Professor Sarkin. One of them had completed his time at the end of June 2011.
- 3.1.18** Under cross-examination by Ms Ramudzuli, Dr. Motaung testified that the normal starting time is 08:00 and once he (Dr. Motaung) arrived for work at 08:30. He would not know why Professor Sarkin wrote a letter [see **Annexure A, p13**]. He further testified that he did not agree with what Professor Sarkin had written. Dr. Motaung admitted that he received the letter on 27<sup>th</sup> July 2011.
- 3.1.19** Dr. Motaung further testified under cross-examination that he concluded that the quarterly reports reflected on [**Annexure B; p1, 2 and 4**] were done late because of the non-sequential dates that are shown there. He indicated that he was not aware of any document that says he should be present when the assessments are done.
- 3.1.20** Dr. Motaung further testified that he was present when Report No. 1 was done. In terms of the first assessment, it involved a discussion between his evaluator and himself but he would not comment on Reports No. 2, 3 and 4.
- 3.1.21** Dr. Motaung denied that his supervisor Professor Sarkin ever raised dissatisfaction with him. He said it was not true that his supervisors raised concerns with him regarding his poor work performance. He was neither invited for discussion by Professor Sarkin nor called for an assessment by Dr. Maroo.
- 3.1.22** Dr. Motaung further testified that on 1<sup>st</sup> July 2011, he was given a form which he indicated that it was not relevant. After that, he received a letter to come for a meeting on the 29<sup>th</sup> July 2011.
- 3.1.23** Dr. Motaung testified that although it was never explained to him what the purpose of probation is; his understanding is that it means to assess an employee's suitability in terms of the structure and work. He further said the employer determines the probationer's suitability in the absence of a dispute.
- 3.1.24** He described the procedure that is followed as involving quarterly assessments, identification of weaknesses and strengths, and in the event that point D is reached, the probationer is then suitable or in the event that some assessments are not done, the one that is done is good, it should cover for those that were not done provided the first one is not negative.
- 3.1.25** Dr. Motaung confirmed that he was employed on the 1<sup>st</sup> August 2010 and his probation expired on 31<sup>st</sup> July 2011. However, on 31<sup>st</sup> August 2011 he received a letter which

extended his probation period [see **Annexure A, p15**]. Following that letter, Dr. Motaung had written to the CEO of the hospital for Reports # 2, 3 and 4. He got no response and he then referred a dispute to the Council.

- 3.1.26** Dr. Motaung further confirmed going to Mr. Motsweni, Deputy Director: HR in terms of paragraph 2 of that letter but he was not available. The witness further confirmed that Annexure A, p1 and Annexure B, p9 are essentially the same. He further confirmed that he did not sign the assessment of Reports # 2, 3 and 4 because he was not in agreement with the issue that there was no improvement.
- 3.1.27** During re-examination by Ms Wolfswinkel, Dr. Motaung confirmed that he had never been reprimanded for late coming. He further confirmed that there was no training at the end of his probation period. He cooperated with the assessment but not necessarily agreeing with the assessment and he should not be held accountable.
- 3.1.28** In closing the applicant's case, Ms Wolfswinkel presented the following arguments:
- (a)** That Dr. Joshua Motaung commenced employment at Steve Biko Academic Hospital on 12-month probation on 1<sup>st</sup> August 2010 through to 31<sup>st</sup> July 2011. On the 28<sup>th</sup> July 2011, Dr. Motaung was handed a letter pertaining to unsatisfactory performance but it did not mention the extension of the probation period [see **Annexure A, p13**].
  - (b)** That the applicant responded to the allegations in writing [see **Annexure A, p12**]. On 31<sup>st</sup> August 2011, one month after Dr. Motaung's probation period had lapsed; the respondent handed him a letter extending his probation period by 6 months [see **Annexure A, p15**]. A dispute of unfair conduct by the employer; i.e. in terms of s186 (2)(a) of the LRA was referred to the Council for conciliation then arbitration.
  - (c)** That Item 8(1)(b) of the Code of Good Practice: Dismissal states that the purpose of probation is to give an employer an opportunity to evaluate the employee's performance before confirming the appointment. Item 8(1)(e) requires the employee's performance to be assessed during the probationary period and that the employer should give an employee reasonable evaluation, instruction, training, guidance or counselling in order to allow the employee to render a satisfactory service. The period of probation may only be extended for a reason that relates to the purpose of probation [see **Item 8(1)(g)**].
  - (d)** That the Public Service Act prescribes that a supervisor shall meet with the employee on a regular basis to discuss, inter alia; basic objectives, the performance assessment procedure and criteria to be used for performance assessment [see **Annexure A, p5, B.3 (a)–(c)**].
  - (e)** That the Public Service Act further places an obligation on the employer to monitor the employee's performance on a continuous basis and feedback must be given to the employee at least four times a year. This must be done orally, if his/her performance is satisfactory, or in writing if his/her performance is unsatisfactory [see **Annexure A, p5, B.4 (a)(i) and (ii)**].
  - (f)** That the policy on Performance Management and Development System (PMDS) prescribes that Performance Agreement must be entered into between all employees and supervisors within a month of appointment of the employee [see **Annexure A, p10, 7.1**]. The policy further provides for the establishment of a work plan [see **Annexure A, p10, 7.2**]. It should be noted that this requirements were not complied with by the respondent.

- (g) That the policy further provides that the PMDS will serve as the system to be used to assess probationary employees and that performance assessment must be conducted quarterly. The policy further prescribes how to manage unsatisfactory performance of employees who are still under probation [see **Annexure A, p11, 10.1**].
- (h) That the applicant indicated that he was never asked to enter into a performance agreement. Dr. Motaung initially reported to Dr. Ribeiro and then later to Dr. Maroo and Professor Sarkin was his supervisor from January 2011. In the meeting with Professor Sarkin, Drs. Ribeiro and Maroo, Dr. Motaung did not agree to retrospectively engage in the 2<sup>nd</sup> and 3<sup>rd</sup> quarterly assessments but was willing to complete the 4<sup>th</sup> quarterly assessment which was due at the end of July 2011.
- (i) That Professor Sarkin conceded that it was irregular for performance assessments to be done a month after the last day of the last quarter had lapsed but added that Dr. Motaung refused to sign the assessments retrospectively and management had to take charge. Dr. Motaung had testified that he received no guidance, training, counselling, evaluation or instruction between the end of the first probation period and the date on which the quarterly report, pertaining to the extended probation period, was conducted. His performance was deemed satisfactory [see **Annexure A, p1**]. Professor Sarkin confirmed the above.
- (j) That Professor Sarkin had numerous reasons for the correct procedures not being followed and each of his reasons related to some act or omission on the part of Dr. Motaung. He was evasive when questioned about the procedures and in turn made numerous claims about Dr. Motaung not attending meetings, coming late for work and generally not being interested in learning and developing.
- (k) That it was irregular for assessments to be done retrospectively. Assessments must be done every three months, yet the employer attempted to engage Dr. Motaung to do all of the three assessments on one day.
- (l) That the employer attempted to justify the extension by making claims about Dr. Motaung's behaviour. There are ways and means of dealing with what the employer might have felt is unacceptable behaviour. Extending an employee's probation without presenting evidence to support the extension, does not address same.
- (m) The applicant union therefore prays that the commissioner makes an award in favour of the applicant and consequently order the respondent to suspend the extended probation.

### **3.2 The respondent's case and argument:**

- 3.2.1** The respondent's only *witness* Professor Andrew Sarkin had testified that he started on the 1<sup>st</sup> January 2011 as the Head of Cardiology Department at Steve Biko Academic Hospital (SBAH). He decided to write a letter [see **Annexure B, p9**] seeking advice from HR on how to handle a series of concerns pertaining to Dr. Motaung.

- 3.2.2** Professor Sarkin further testified that SBAH is a busy hospital. He has a Departmental Time Table, they have training and teaching sessions, and they have tight protocols. They start at 07:30 to 15:30 or 08:00 to 16:00. Professor Sarkin further testified that he was not aware that Dr. Motaung, a consultant cardiologist arrived at 11:00 for four consecutive weeks and missed attendance of the grand ward round at 07:30 on Mondays. Oftentimes doctors arrive late after attending to patients.
- 3.2.3** Professor Sarkin testified that to the best of his knowledge, Dr. Motaung is permanently employed but still on probation which can be extended. The applicant had once been formally assessed, i.e. one-on-one session for August, September and October 2010.
- 3.2.4** Professor Sarkin further testified that the applicant was assessed on the 1<sup>st</sup> July 2011 [**Annexure A, p14, top para.**] and the reports were only signed in August 2011. There was a time when Dr. Motaung went overseas and Dr. Maroo said that when he returned, they would proceed with the review process. On his return, Dr. Motaung brought a Medical Certificate and HR was aware that there was no performance review for the applicant.
- 3.2.5** Professor Sarkin indicated that there were a lot of informal evaluations but never sat down to have formal appraisal. He further indicated that the bulleted points [see **Annexure A, p13**] are areas where Dr. Motaung had shortcomings; he made comments [see **Annexure B, p1**] to get some improvements.
- 3.2.6** Professor Sarkin further indicated that assistance was offered but Dr. Motaung did not want to partake in the activities. Dr. Motaung was advised to do teaching at least once a week but he would say that he is employed by the Gauteng Government. He would not arrive for the grand rounds or he would arrive late, he was obstructive and he had an attitude.
- 3.2.7** Professor Sarkin testified that he counselled Dr. Motaung by going through the points with him [see **Annexure A, p13**] one at a time. Everybody has the right to raise issues. Since he held a counselling session with Dr. Motaung in the presence of Drs. Ribeiro and Maroo on the 27<sup>th</sup> July 2011, there had been some improvement where Dr. Motaung did approximately 5 procedures but not enough.
- 3.2.8** Professor Sarkin further testified that everybody felt that Dr. Motaung's probation period should be and it was extended by six months [see **Annexure B, p2 (xii)**]. Dr. Motaung did not want to meet his supervisor when he came back from overseas for a formal appraisal.
- 3.2.9** During cross-examination by Ms Wolfswinkel, Professor Sarkin admitted that the assessments were not done quarterly because of problems they encountered. Since his tenure at SBAH, Dr. Motaung's attitude was obstructive and reluctant, he did not want to meet and engage with Professor Sarkin.
- 3.2.10** Professor Sarkin conceded that Report # 4 was done before Reports # 2 and 3; i.e. they were not done sequentially. The assessments were done on the 1<sup>st</sup> July 2011 and the dates were on the same time. The dates do not reflect what should have been the correct sequence.
- 3.2.11** Professor Sarkin further conceded that all the forms were filled on the afternoon of the 1<sup>st</sup> July 2011 with Dr. Motaung. Dr. Motaung was not keen but did not object to the time frames. Professor Sarkin said Dr. Motaung was suspended in April 2011 for probably two months. He had a rocky and erratic period with Dr. Motaung.

- 3.2.12** Professor Sarkin admitted that Reports # 3 and 4 were not done at the end of April and end of July 2011 respectively, because Dr. Motaung refused to sign any forms. A formal set down session did not happen; Dr. Motaung was aware but did not agree. The Superintendent suggested that the March period had been problematic.
- 3.2.13** Professor Sarkin further admitted that there was a marked improvement [see **Annexure A, p1**] because Dr. Motaung became involved in theatre but within a week, all kinds of things that displayed his behaviour emerged again. Professor Sarkin could not understand the reason why Dr. Motaung could not engage him as his supervisor.
- 3.2.14** In re-examination by Ms Ramudzuli, Professor Sarkin indicated that it was still his testimony that Dr. Motaung was not an easy person to deal with; that he was assessed but the dates were put later.
- 3.2.15** In closing the respondent's case, Ms Ramudzuli had presented her arguments as follows:
- (a)** That Dr. Motaung's appointment was attached to a probation period of 12 months and in terms of the prescripts governing the department, his probation was extended for 6 months due to unsatisfactory performance.
  - (b)** That it is the prerogative of management to assess the employee's performance to ascertain that it is in line with organisational standards. The employee cannot assess or comment that he/she is capable or suitable for confirmation as he/she cannot be a referee and player at the same time. Employees are protected by law not to find themselves being abused by employers when assessing their suitability and capability.
  - (c)** That the testimony of Professor Sarkin was that he had been discussing with Dr. Motaung about his shortcomings in order to meet the required performance standards and there is no evidence to suggest malice intent when extending Dr. Motaung's probation [see **Annexure B, p10, last para.**].
  - (d)** That it should be noted that Dr. Motaung contributed to the delays in the assessment of his performance. Dr. Motaung was invited for the assessment on numerous occasions and that evidence was not disputed. Dr. Motaung did not want to be corrected or shown where his shortcomings were. He did not want to sign the assessments after they had been done two weeks later but he signed Report # 1 two weeks after the first quarter had lapsed and he was happy with that.
  - (e)** That Dr. Motaung was a difficult person; he reported late for duty, he failed to report to his supervisor about the work he was doing, Professor Sarkin had to put it in writing after he had spoken to Dr. Motaung several times about his performance [see **Annexure B, p9, p10** read with **Annexure A, p1**]. Despite all this, Dr. Motaung was counselled in terms of the provision of the law [see **Annexure B, p2**].
  - (f)** That the evidence of Professor Sarkin showed that Dr. Motaung refused or he manifested reluctance to take part in the grand ward rounds on Mondays, where cases are discussed and work is planned for the whole week. There is evidence why the respondent decided to extend Dr. Motaung's probation because of his potential.
  - (g)** That the respondent has a duty to ensure that capable and suitable people are employed to serve the community efficiently and effectively and promote the mission and vision



of the current government. It is the respondent's prayer that the commissioner rules in its favour and dismisses Dr. Motaung's application.

#### 4. Analysis of evidence and arguments:

- 4.1 The applicant, Dr. Moahloli Joshua Motaung had through SAMA referred a dispute of unfair conduct by the respondent relating to the extension of his probation to the Council for conciliation and then arbitration. I am required to determine whether or not the extended probationary period by six (6) months was unfair and unjust.
- 4.2 An employer is guilty of an unfair labour practice if it commits any form of unfair conduct relating to the promotion, demotion, probation or training of an employee [see s186(2)(a) of the LRA].
- 4.3 'Unfair' implies a failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended [see **Du Toit et al *Labour Relations Law: A Comprehensive Guide* 5ed at 586**].
- 4.4 In assessing the applicant's claim of unfair conduct by the respondent, we must first establish why the respondent extended his probation and secondly, we must establish the adequacy of that reason. Fairness generally requires some correlation between the seriousness of the employee's incapacity or misconduct and the employer's action [**Grogan, *Dismissal* at 79**].
- 4.5 In **S v Trainor 2003 1 SACR 35 (SCA)** at [9], Navsa JA said: "*A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must be corroborative evidence, if any. Evidence of course, must be evaluated against the onus on any particular issue or in respect of the case in its entirety.*"
- 4.6 It is common knowledge that performance of employees on probation is managed in terms of the PMDS process as well as the Public Service probation process. The process is as follows:
- 4.9.1 The PMDS will serve as the system that is used to assess an employee during the period of her or his probation;
- 4.9.2 The performance assessment of employees on probation must be conducted quarterly;
- 4.9.3 The performance assessment form must be submitted to HR immediately following the assessment;
- 4.9.4 At expiry of the probationary period (12 months) the supervisor of the probationer must make a recommendation on whether or not appointment should be confirmed. If the probationer is not deemed suitable for the relevant post, other options such as the extension of probation, formal registration on the incapacity programme or as a last resort, dismissal, should be considered.
- 4.7 Item 8(1)(e) of the Code of Good Practice: Dismissal provides that during the probationary period, the *employee's* performance should be assessed. An employer should

give an *employee* evaluation, instruction, training, guidance or counselling in order to allow the *employee* to render a satisfactory service.

- 4.8 A proper appraisal of the employee's work performance is essential for purposes of proving that the employee failed to attain the required performance standard; gives the employer the chance not only to assess the employee's performance, but also to discuss problems that may have been identified with the employee [see **Gostelow v Datacor Holdings (Pty) Ltd t/a Corporate Copolith (1993) 14 ILJ 171 (IC)**].
- 4.9 It had been established that the respondent did not comply with this peremptory requirement of conducting assessment of Dr. Motaung on a quarterly basis [see **Clauses 4.9.2 and 4.10 above**]. The respondent had no discretion to assess the applicant on a cumulative basis such as on the 1<sup>st</sup> July 2011 for all the three quarters [end of January, end of April and end of July 2011] or given an alternative to do so [see also **Annexure B, p11 E.2 (b) and (c)**].
- 4.10 Employees must be warned before action is taken against them for poor work performance [see **Visser v Safair Freighters (Edms) Bpk (1989) 10 ILJ 529 (IC)**]. Seniority of status indicates that the employee concerned ought to have been capable of judging the employer's standards for himself [see **Stevenson v Sterns Jewellers (Pty) Ltd (1986) 7 ILJ 326 (IC)**; **Blue Circle Materials (Pty) Ltd v Haskins (1992) 1 LCD 8 (LAC)**; **Somyo v Ross Poultry Breeders (Pty) Ltd [1999] 7 BLLR 862 (LAC)**].
- 4.11 However, it has been established through documentary evidence [see **Annexure A, p4**], that Report # 1 dated 4<sup>th</sup> November 2010 was compiled by the Clinical Manager, Dr. Ribeiro and the comments were made by the CEO, Dr. Kenoshi and the applicant, Dr. Motaung signed as well.
- 4.12 In that report, Dr. Ribeiro's assessment and Dr. Kenoshi's comments clearly indicate that the applicant's shortcomings would be addressed by the new HoD, Professor Sarkin. Yet, the failure by Professor Sarkin to conduct regular assessments consequently led to Dr. Motaung's probation to be extended.
- 4.13 The employer has the prerogative to set standards it requires the employee to meet [**Eskom v Mokoena [1997] 8 BLLR 965 (LAC)**]. However, it had been pointed out by Dr. Ribeiro that there was neither any orientation nor training of Dr. Motaung and those deficiencies were to be addressed by Professor Sarkin [**Annexure A, p4**]. It had also been established that the respondent did not have a Performance Agreement with Dr. Motaung [see **Annexure A, p10 7.1.2 and 7.1.5**].
- 4.14 The Code of Good Practice: Dismissal requires employers to give probationary employees '*reasonable evaluation, instruction, training, guidance or counselling in order to allow the employee to render a satisfactory service*'. In this case, the employer is also required to prove that the employee failed to satisfy a performance standard of which he was aware [see **Majoro v Friendly Grocer (Orkney) [2002] 4 BLLR 355 (CCMA)**].
- 4.15 Generally, an employer cannot justifiably conclude that dismissal and in our case, extension of the probation is *necessary* if the employee could conceivably have met the required standard within a reasonable period.
- 4.16 In **Boss Logistics v Phopi & others [2010] 5 BLLR 525 (LC)**, the court held that the length of time an employee should be given to improve depends on the circumstances, including, but not limited to, the complexity of the job, the volume and nature of the

work, the nature of the employer's business, and the qualifications and experience of the employee.

- 4.17 The question that we have to ask is whether or not the extension of Dr. Motaung's probation was unfair. We have established that Dr. Motaung is a Medical Specialist [see **Annexure A, p18**]. We have further established that the assessment of Dr. Motaung's performance on the 1<sup>st</sup> July 2011 for Reports # 2, 3 and 4 was subjective and inconsistent with the management of the PMDS and Public Service probation processes.
- 4.18 In **Gostelow v Datacor Holdings (Pty) Ltd t/a Corporate Copolith (1993) 14 ILJ 171 (IC)**, the court stated that the purpose of an assessment was to establish the reasons for the employee's shortcomings and to apply a value judgement which is both 'objective and reasonable'. In examining Report # 2, is a carbon-copy of Report #1 except that Report #2 was signed on 31<sup>st</sup> August 2011 instead of the end of January 2011 and has no comments at all whereas Report # 1 contains comments by the CEO, Dr. Kenoshi. It is clear that the respondent's conduct was arbitrary.
- 4.19 We further established that the respondent's conduct was capricious because Dr. Motaung was not afforded an opportunity to have one-on-one discussion with his supervisor to identify shortcomings that required further improvement at the end of each quarter as provided for by the PMDS system.
- 4.20 We further established that the respondent was negligent in conducting the assessments of Report # 2 on the 31<sup>st</sup> August 2011 [**Annexure B, p4**]; Report # 3 on 28<sup>th</sup> August 2011 [**Annexure B, p1**] and Report # 4 on 24<sup>th</sup> August 2011 [**Annexure B, p2**] rather than following the assessment of the first quarter conducted by Dr. Ribeiro [see **Annexure A, p3**] and Dr. Kenoshi's comments [see **Annexure A, p4**]. The respondent's argument that Dr. Motaung was not an easy person is unacceptable and unreasonable because the respondent has the necessary instruments to deal with such behaviour.
- 4.21 We have established that 'unfair' implies a failure to meet an objective standard and may be taken to include arbitrary, capricious or inconsistent conduct, whether negligent or intended [see **Clause 4.3, p9 above**].
- 4.22 S185(b) states that every employee has the right not to be subjected to unfair labour practice. It can therefore be concluded that the only reason for extending the probation period of Dr. Motaung was for the respondent to cover up its own capricious, arbitrary and inconsistent conduct with the applicable legislative provisions.
- 4.23 In the premises, the applicant tendered incontrovertible evidence to show that the conduct of the respondent was unfair, procedurally and substantively. The reason for extending Dr. Motaung's probation is grossly inadequate and unfair.

## 5. Award:

- 5.1 I accordingly find that the respondent is in breach of the PMDS and Public Service probation requirements read with Item 8(1)(e) of the LRA and acted unfairly by extending Dr. Moahloli Joshua Motaung's probation by six (6) months.
- 5.2 I therefore grant the applicant, Dr. Moahloli Joshua Motaung the following relief:

- 5.2.1 That the respondent is **ordered** to confirm appointment of Dr. Moahloli Joshua Motaung retrospective to the date of his extended probation, i.e. 1<sup>st</sup> August 2011.
- 5.2.2 That the six (6) months extension of his probation is declared null and void and the respondent is further **ordered** to adjust his salary and benefits in tandem with the effective date of his confirmed appointment, i.e. 1<sup>st</sup> August 2011.
- 5.2.3 That the respondent is further **ordered** to take note that the confirmed appointment should be effected immediately.
- 5.3 That the parties must take note that this arbitration award is final and binding and it may be enforced as if it were an order of the Labour Court, i.e. through the Council or the CCMA.
- 5.4 That the parties must take note further that there is no order as to costs.

**Signed and dated at Johannesburg on this the 21<sup>st</sup> day of December 2011.**

Panellist:



Chris Sizili MBILENI.