



# ARBITRATION AWARD

Commissioner: **M Mbuli**

Case No: **PSHS504-20/21**

Date of award: **12 March 2021**

In the matter between:

**NUPSAW OBO BLESSED MLEBUKA**

(Applicant)

and

**DEPARTMENT OF HEALTH- KWAZULU NATAL**

(Respondent)

---

## **DETAILS OF HEARING AND REPRESENTATION**

1. This matter was placed on the roll before me for arbitration on 26 February 2021 at Clairwood Hospital. The Applicant was represented by Mr. M. Memela, a union official from the National Union of Public Service and Allied Workers (NUPSAW), and the Respondent was represented by the Human Resources Manager, Mr. S.C. Nene. The parties were given seven (7) days within which to file written closing arguments. The proceedings were mechanically recorded.

## **PRELIMINARY ISSUES**

2. The Respondent's representative applied for the Applicant's previous employer, Moses Kotane Hospital (North West Province), to be joined as a party to these

proceedings, as they can provide clarity on whether the Applicant resigned or deserted.

3. After considering the submissions from both parties, I made a ruling that there was no need to join Moses Kotane Hospital (North West Province) as a party to this dispute, as they do not have any interest in this matter and they will not be affected by the outcome of this arbitration.

### **JURISDICTION AND ISSUES TO BE DECIDED**

4. No other preliminary or jurisdictional issues were raised and the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC) has the required jurisdiction to hear the matter. I have to decide whether the employee's dismissal was procedurally and substantively unfair. The Applicant seeks re-instatement in the event that the award is made in her favour.

### **BACKGROUND TO THE DISPUTE**

3. All the following issues are common cause and were agreed upon before the commencement of the arbitration process. The Applicant applied for a position of a Staff Nurse that was advertised by the District Office and, on 24 July 2020, she was invited to attend an interview at Inkosi Albert Luthuli Hospital. The Applicant was offered a fixed-term contract to work at Clairwood Hospital, starting from 01 September 2020 and ending on 31 March 2021, at a salary of R14 281.75 per month, with certain conditions.
4. The Applicant's employment contract clearly indicates, and I quote from the employment contract (page 15 of bundle A) "*Your appointment is subject to the verification of information mentioned below. In the event of misrepresentation on your CV and other misdemeanours that were not disclosed, the offer of employment will be withdrawn:*

- *Criminal records checks*
  - *Citizen verification*
  - *Financial record checks*
  - *Qualification and registration certificate/study verification and*
  - *Previous employment (experience) verification/reference check”*
5. On 23 September 2020, the Applicant was called to the Human Resources Department and informed that her employment contract was withdrawn. She was then given a letter confirming that. The reason given for the said withdrawal was that the persal system indicates that she deserted her duties at Moses Kotane Hospital (North West Province).
6. Both parties handed in bundles of documents which were marked “A” “B” and “C” respectively and I was enjoined by both parties to accept the documents for what they purport to be and consider them to the extent that it may be required for the purpose of this award.

### **The Respondent’s case**

7. The Respondent’s only witness, Mrs. Gloria Thembisile Robson, testified under oath that she is employed at Human Resources (HR) Department, as a Supervisor. The Applicant was allocated to the Clairwood Hospital by the District Office. She was informed by one of her subordinates. (Miss. Z.R Bekwa) that she was not able to process the Applicant’s employment on the persal system because the Applicant was blocked. They conducted an investigation and discovered that the Applicant once worked at Moses Kotane Hospital (North West Province). They then decided to call Moses Kotane Hospital, where the Applicant was previously employed, to try and find out what the reason was that the Applicant was blocked on the persal system. They did not get an answer. They then communicated with Edwin James, who is a Persal Controller, who

sent them a document from persal (page 6 of bundle C) which indicates that, according to the system, the Applicant deserted her duties at Moses Kotane Hospital and that is the reason the persal system did not want to accept her employment. She then called the Applicant to her office and, accordingly, informed her that they could not process her appointment on the persal system for the above-mentioned reason. The Applicant denied that she deserted her duties at Moses Kotane Hospital (North West Province) and indicated that she resigned on 31 January 2014. She then advised her to go back to Moses Kotane Hospital (North West Province) and sort the issue with them as this might have an impact on her future prospects of employment. She then gave the Applicant a letter confirming the withdrawal of the employment contract (page 13 of bundle A).

8. Under cross-examination, Mrs. Gloria Thembisile Robson testified that the Applicant was never dismissed but her appointment was withdrawn due to the fact that they were not able to process her application on the persal system due to the fact that the system indicated that she deserted her duties at Moses Kotane Hospital. When she was asked if the Applicant was ever given an opportunity to explain her situation before the decision to withdraw her appointment was taken, she responded by stating that the Applicant was indeed given such an opportunity; she even offered the Applicant a telephone in her office to call Moses Kotane Hospital to clear the matter with them. When she was asked why they believed that the Applicant deserted her duties at Moses Kotane Hospital, her response was that the persal system indicated so, and the letter that they received at later from Moses Kotane Hospital, also confirmed that. When it was put to her that the Applicant will testify that she never deserted her duties at Moses Kotane Hospital, but resigned, and also that she was never given an opportunity to give her side of the story before a decision to withdraw her application was taken, she responded by reiterating her earlier testimony that, according to the system, the Applicant deserted her duties. She also repeated her earlier testimony that the Applicant was given the opportunity to give her side of the story before a decision to withdraw her application was taken.

### **The applicant's case**

9. The Applicant testified under oath and stated that, during the year 2013, while she was employed at Moses Kotane Hospital (North West Province), her family came under threat as a result of the business her husband was engaged in, and she reported her situation to her Unit Manager, Mr. Masenyana. On 31 January 2014, she decided to resign from Moses Kotane Hospital (North West Province) for reasons related to the safety of her family. She handed in a resignation letter to her Unit Manager and her resignation was with immediate effect. In 2020, she applied for the positions that were advertised by the department by filling in the application form (Z83) and she also attached her CV and was called to attend an interview at Inkosi Albert Luthuli Hospital on 24 July 2020. Two weeks later, she noticed that she had a missed call on her cellphone and, when she called the number, she was informed that she needed to report at Clairwood Hospital to start her work on 02 September 2020. After a week, she was called to the Human Resources Department, where she was offered her employment contract.
  
10. On 23 September 2020, while off-duty, she was requested to immediately report at the HR Department as there was a challenge regarding her appointment. That is where she met Mrs. Gloria Thembisile Robson. At the HR Department, she was asked if there is anything that she wanted to declare, and her response was to the negative. She was then informed that her employment could not be processed because the persal system indicated that she deserted her duties at Moses Kotane Hospital. She told Mrs Robson that she never deserted at Moses Kotane Hospital (North West Province), but resigned. Mrs Robson gave her the telephone to call Moses Kotane Hospital to clear her situation, but nobody answered her call. She then gave her a letter (page 13 of bundle A) and asked her to sign. She advised her to try and get proof that she did not desert her duties. She came back after some few days and submitted her certificate of service (page 16 of bundle C) from Moses Kotane Hospital, as proof, but that was not accepted by Mrs Robson.

11. She further testified that the reason her CV indicates she last worked at Moses Kotane Hospital in December 2013, and not on 31 January 2014, as indicated on her Certificate of Service (page 16 of bundle C), was that, for the whole month of January 2014, she did not work and went to the hospital on 31 January 2014 to resign because of her family problems.
  
12. Under cross-examination, she insisted that she never deserted her duties at Moses Kotane Hospital, but resigned on 31 January 2014. When she was asked why her CV indicated that her last day at Moses Kotane Hospital was 12/2013 if she resigned on 31 January 2014, her response was that she meant to record the last day she reported for duty was 31 December 2013; she then resigned on 31 January 2014. When it was put to her that she did that in order to mislead the Respondent into believing that her last day at Moses Kotane Hospital was December 2013, and not 31 January 2014, she denied that that was her intention. When she was asked why she did not see the need to go to Moses Kotane Hospital to clear the issue with them after she was informed by the HR Department that the system indicated that she deserted her duties, her response was that Moses Kotane Hospital is very far, and she did not have the financial resources to go there. When she was asked where she got the certificate of service (page 16 of bundle C), she stated that she collected it in 2016 when she visited the hospital.

### **ANALYSIS OF THE EVIDENCE AND ARGUMENTS**

13. It is common cause that the Applicant was offered a fixed-term contract to work at Clairwood Hospital, starting from 01 September 2020 and ending on 31 March 2021, with conditions as recorded in paragraph 4 above. One of those conditions is "*Previous employment (experience) verification/reference check*". The Applicant's appointment contains a clause which states that her appointment is subject to the "verification of information and, in the event of misrepresentation on your CV and other misdemeanors that were not disclosed, the offer of employment will be withdrawn". It is also common cause that the reason for the

withdrawal of the Applicant's appointment was due to the fact that the Respondent was not able to process her application on the persal system, as it recorded that the Applicant deserted her duties at Moses Kotane Hospital.

14. The LRA protects employees against unfair dismissal. However, our law makes allowance for a contract of employment coming to an end without it amounting to a dismissal. One example of such a situation would be where the contract of employment is entered into with the clear understanding that it would come to an end if certain conditions are not met. This principle was clearly outlined in the case of *Nogcantsi v Mnquma Local Municipality & others* (2017) 38 ILJ 595 (LAC), where the court stated that the employer is entitled to include a condition in a contract of employment that a person's appointment is subject to a positive vetting and screening process and, if the outcome is negative, the contract will terminate automatically. In this case, as in the current case, the Applicant freely and voluntarily agreed to the vetting process and to an automatic termination if it yielded a negative result, but it must also be noted that the condition is material to the Applicant's suitability for the position of a Nurse, whose integrity need to be without blemish.
15. The Applicant's employment contract makes it very clear that her appointment is subject to the verification of information that is provided by her and that negative outcome thereof could result in the withdrawal of the employment offer or, to put it differently, an automatic termination of the employment contract. When the HR department at Clairwood Hospital tried to process the Applicants employment on the persal system, they unable to do so because the Applicant was blocked. During the investigation that ensued, it was discovered that reason why she was blocked, was because she had deserted her duties at Moses Kotane Hospital on 31 December 2013.
16. The Applicant's testimony is fraught with confusion. Whereas, on the one hand, she claims to have resigned from Moses Kotane Hospital on 31 January 2014, she, however, admits that she never tendered her services to the Hospital in the

month of January. Even her CV records her last day at work as 12/2013 which, in my opinion lends credence to the argument that she deserted. I also cannot ignore the fact that the Applicant appears to have been deliberately deceptive when she recorded her last day of employment with her previous employer, as 12/2013 knowing very well that she resigned on 31 January 2014. Even after the Applicant was informed of the outcome of the verification process, she was given the opportunity to clear the issue of her termination records with her former employer, Moses Kotane Hospital, as it fell within her responsibility to do so. If the Applicant felt strongly that the information that was provided by Moses Kotane Hospital was not the true reflection of what happened, she should at least went there to try and clear the issue with them knowing very well that this was affecting her employment with the Clairwood Hospital. To be honest, I find the Applicant's version of events confusing and misleading. The Applicant has failed to convince me as to why her termination was captured as desertion, instead of resignation, by her previous employer, if indeed she resigned prior to termination of her employment, which appears to have taken effect on 31 December 2013.

17. From the evidence, it is my conclusion that the Application was not dismissed. I make the following award:

#### **AWARD**

18. I find that the withdrawal of the Applicant's appointment does not amount to dismissal.
19. The Applicant's claim is dismissed.



---

**M Mbuli**