



ARBITRATION AWARD

Case No: **PSHS670-18/19**

Commissioner: **Raymond Jonathan**

Date of award: **20 March 2019**

In the matter between:

NEHAWU obo Sicelo Vuso

(Union/ Applicant)

And

Department of Health- Eastern Cape

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. A unfair dismissal dispute was referred for arbitration in terms of section 191(5) (a) (i) of the Labour Relations Act, No 66 of 1995, as amended (herein referred to as the "LRA"). The hearing was concluded at the Cecilia Makiwane Hospital in Mdantsane on 6 March 2019. The proceedings were digitally recorded. The Applicant, Mr. Sicelo Vuso was represented by Mr. Z Twala a trade union official from the National Education, Health and Allied Workers Union (NEHAWU). The Respondent, Department Of Health – Eastern Cape was represented by Mr. X Nxumalo a Labour Relations official in the employ of the respondent.
2. At the conclusion of the arbitration proceedings the parties requested an opportunity to submit written closing arguments. This request was granted and they agreed that their submissions would be made on or before 13 March 2019.

Both parties submitted their closing arguments on or before the aforementioned date.

ISSUE TO BE DECIDED

3. I am required to determine whether the applicant's dismissal was both procedurally and substantively fair.

BACKGROUND TO THE ISSUE

4. At the commencement of the proceedings the respondent submitted a bundle of documents marked "1 to 18" while the applicant submitted a bundle of documents marked "1 to 13" of which both bundles of documents content was agreed what it purports to be. The following were also agreed as common cause facts and facts in dispute:

- 4.1 The applicant was employed in January 1988 as a Senior Electrician and was dismissed on 28 August 2018.

- 4.2 The applicant earned R17000-00 per month at the time of his dismissal

- 4.3 The applicant was dismissed for the following reasons:

- 4.3.1. On 25 May 2017 at Cecelia Makiwane Hospital it was alleged that the applicant assaulted Mr ND Hoza while he was performing his duties.

- 4.4 The applicant challenged his dismissal on the following substantive grounds:

- 4.4.1 The applicant did not assault Mr Hoza but the two of them were fighting. The respondent therefore did not apply the rule consistently since the medical reports of both employees reflects injuries and therefore both employees should have been treated equally.

4.4.2 The sanction was too harsh since Mr Hoza previously assaulted Mr Myute in March 2017 but he was not sanctioned. The respondent should have acted consistently.

4.5 The applicant challenged his dismissal on the following procedural grounds:

4.5.1 The incident was not investigated by the respondent. The applicant's precautionary suspension was lifted after the conclusion of the investigation but the respondent only relied on the statements submitted by the manager.

4.5.2 Resolution 3 of 2003 provides for specific timelines to be complied with. The applicant was dismissed on 8 February 2018 and submitted his appeal within one day but only received the outcome of the appeal on 16 August 2018. The applicant rendered service for more than 300 days after his suspension was lifted.

5. The applicant submitted that I should find his dismissal to be unfair and requests retrospective reinstatement as relief.

6. Section 192 of the LRA provides that in any proceedings concerning any dismissal, the employee must establish the existence of the dismissal. After the existence of the dismissal is established, the employer must prove that the dismissal is fair. Accordingly, due to the fact that the dismissal is not in dispute, the onus was on the respondent to establish that the applicant's dismissal was substantively and procedurally fair.

SURVEY OF EVIDENCE AND ARGUMENT

7. Section 138(7) (a) of the LRA require a brief summary of evidence presented and reasons be relevant to the dispute. The following does not reflect all the evidence and arguments heard and considered in deciding this matter.

RESPONDENT'S EVIDENCE AND ARGUMENT

8. The respondent's first witness, Mr. Wandile Hoza testified that he was employed as a general assistant by the respondent. He was employed by the respondent for 30 years and was supervised by the applicant and Mr. Mashalala in the electrical workshop. He therefore had two supervisors to whom he reported to. On 25 May 2017 he had a problem with his bank which he had to resolve. He took his vehicle and proceeded to the gate at 12h30. He met the applicant at the gate and he enquired where he was going to. He informed him that he was on his way to the bank. He did not get prior permission to take his lunch early since the scheduled lunch break was only from 13H00.
9. He arrived back at work at approximately 14H00. The applicant approached him and asked where he went so early. He replied that he went to the bank since he had issues to resolve at the bank. He confirmed that he did not request any permission to go on lunch early but that he did not see any issue with it. At this stage, he noticed that the applicant was already very angry with him since the applicant was struggling to control himself since he was shaking due to his anger. The applicant told him that he must remember that he was appointed for him and that he should comply with his instructions. He interjected and informed the applicant that he was not appointed for him but that both of them was appointed for their children. It was at this stage that the applicant took a swing at him in order to hit him in the face. He was still sitting on his chair at his table when the applicant attempted to hit him. He ducked to avoid too struck by the applicant but in the process, he slipped from the chair and lost his balance. As he was falling the applicant kicked him in his face. While he was on the floor the applicant repeatedly told him that he was his boss.
10. He had a lot of respect for the applicant since the applicant was a fourth dan black belt karate practitioner and at some stage he was his sensei/instructor. He would never attack the applicant and knows it. After he was kicked a colleague entered the workshop and enquired what was happening. He informed him that he was being assaulted. He left the workshop and went to the medical emergency unit since he could feel that there was something wrong with his

face. On his way to the emergency unit, he met his manager Mr Weimers and reported the incident to him. He consulted with various specialist and his jaws had to be stabilised with wires since the applicant's kick fractured his jaw. This resulted in him not being able to eat solid foods for more than a month. He could only consume liquids.

11. He submitted a written report to Mr. Wiemers about the incident and opened an assault case against the applicant with the South African Police Service. He delayed in opening the criminal case since he wanted to give the applicant an opportunity to apologise to him and his family since the incident affected all of them. He however could not get over the fact that the applicant assaulted him. He requested to be transferred to another workshop after the applicant's suspension was lifted. He was placed at the mechanical workshop and was still working there. He is still very afraid of the applicant and does not feel safe around him. He had to undergo counselling with the Employee Assistance Practitioner (EAP) due to the assault and treatment which he had to endure from the applicant.
12. The criminal case was finalised at the magistrate court in September 2017 where the applicant was found guilty of assault and was fined and received a suspended sentence. He never assaulted any of his colleagues as alleged by the applicant. They might have had arguments and disagreements but this was resolved by Mr. Weimers, their manager.
13. The second witness of the respondent, Mr. Mlandile Ngafunwa testified that he was employed as a senior administration officer by the respondent and that he was stationed at the hospital. His office did not conduct an investigation in the true sense of the word but relied on the statements and reports which was submitted by all relevant parties. Their decision to conduct a disciplinary hearing was based on the submitted reports. The applicant was placed on precautionary suspension before his disciplinary hearing and this was lifted after the decision was taken to conduct a disciplinary hearing and the Mr. Hoza was moved to a different workshop away from the applicants place of work and supervision. The applicant was suspended after the outcome of the disciplinary hearing but this

suspension and was later lifted pending the outcome of the appeal process. His office does not have any record an incident where the applicant assaulted another official as alleged by the applicant.

14. The third witness of the respondent Mr. John Clifford Weimers testified that he was the manager of the maintenance section. Mr. Hoza approached him on the 25 May 2017 with an allegation that the applicant assaulted him by kicking him in the face. He allowed him to proceed to the emergency unit of the hospital for treatment. He later went to the applicant and enquired what took place. The applicant informed him that Mr. Hoza attempted to stab him with a screwdriver but he managed to chop it out of his hand. While Mr. Hoza attempted to pick it up again, he an attempted to kick it out of his reach. Mr. Hoza however bend in the path of his kick and he accidently kicked him in the face. He requested the applicant to submit a written statement of the incident. He received the report a few days later and he submitted it to the labour relations office for a decision. He was not involved in the final decision-making process. He was informed that the applicant attempted to apologise to Mr. Hoza for what has taken place but his apology was not accepted. The applicant also approached Mr. Hoza through a trade union shopstewart but this was also not successful. He can still work with the applicant in his personal capacity but as a representative of the respondent he must say that the trust relationship has broken down since the respondent is responsible to create a safe environment for employees.

APPLICANT'S EVIDENCE AND ARGUMENT

15. The applicants first witness, Mr. Sicilo Vuso testified that he was employed by the respondent as a senior electrician. He noticed Mr. Hoza exiting the premises gate at 12h30 on 25 May 2017. Mr. Hoza was also reporting to him thus he was within his right to asked him where he was going since it was not lunchtime yet. The security guards were busy searching his vehicle at this stage. Mr. Hoza answered him but he could not hear his response but he made a dismissive gesture over his shoulder towards him. He asked the security officer what Mr. Hoza's response was but they could not assist him.

16. He noticed Mr. Hoza returning to work at approximately 14H00 and he went to the workshop to address his early lunch with him. He reminded Mr. Hoza that he should obtain permission to take an extended lunch hour. Mr. Hoza informed him that everyone at maintenance are doing the same. He however informed him that the electrical workshop is not everybody, at this stage Mr. Hoza was standing at his desk. He picked up a screwdriver which was laying on the desk and turned towards him, Mr. Hoza step forward as to stab him but he chopped the screwdriver out of his hand. Mr. Hoza turned around and picked up an iron rod which was laying on the table. He wanted to hit him with it. Mr. Hoza was however off balance and started to stumble forward. In his motion of falling forward Mr. Hoza hit him on his thigh with the iron rod which was in his hand. He in return kicked him in the face with his safety boots. He was therefore defending himself. Mr. Hoza was about 1.5 meters away from him when he charged at him with the iron rod.

17. He realised that he injured Mr. Hoza and attempted to apologise to him on several occasions he even went to Mr. Hoza's home where he apologised to Mr. Hoza. He also approached the shopstewart to assist him in apologising for his behaviour. They went to King Williams Town to meet with Mr. Hoza's wife but this meeting was also unsuccessful.

18. He is a for the dan black belt karate expert and a few years ago Mr. Hoza was one of his students. He was hiss sensei. Mr. Hoza did not progress far in his training and stopped when he reached brown belt. He has far greater karate skills and training compared to that of Mr. Hoza. He was defending himself from an unprovoked attack but he was remorseful for the injuries which he inflicted on Mr. Hoza. He performed duties for more than 300 days after the incident and is of the view that she should have been issued with a final written warning instead of dismissal. This is based on the fact that the respondent still trusted him.

19. The second witness of the applicant testified that he was the fulltime shopstewart. The applicant approached him to assist in apologising to Mr. Hoza after the incident. He went with him to King Williams Town to meet with Mr. Hoza's wife. This meeting however did not turn out as they anticipated.

ANALYSIS OF EVIDENCE AND ARGUMENT

20. I am required in terms of section 192 to consider whether the applicant has established he was dismissed. Due to the fact that the respondent confirmed that it dismissed the applicant, the onus is on the respondent to establish a fair reason for dismissal and that it followed a fair procedure.
21. The applicant was dismissed for the following misconduct charge: On 25 May 2017 at Cecelia Makiwane Hospital that he assaulted Mr. ND Hoza while he was performing his duties. The applicant does not dispute the fact that he kicked Mr. Hoza in the face on 25 May 2017 but he submitted that they were involved in a fight and therefore not guilty of misconduct.
22. The defence of the applicant was that he and Mr. Hoza involved in a fight and therefore he cannot be guilty of assault. During the evidence of the applicant it however also transpired that the defence of self-defence are argued. I will address both defences in this analysis.
23. At the start of the arbitration proceedings I explained to both parties the importance of taking notes of the evidence of all witnesses and to put your version to a witness when you disagree with his/her evidence in order for the witness to get an opportunity to reply or respond to the conflicting version. In *Trio Glass t/a The Glass Group v Molapo NO and Others* (2013) 34 ILJ 2662 (LC) at para 41 the Court stated the following:
'... The effect of the failure to put such an important issue to the third respondent under cross-examination must mean that this evidence must be disregarded...'
24. The applicant left some important information unchallenged when both Mr. Hoza and Mr. Weimers led their evidence. Mr. Hoza testified that he was sitting on his

chair when the applicant was talking to him. This issue was left undisputed. Mr. Hoza also testified that the applicant was furious to the extent that he was shaking. He also testified that after he was kicked that the applicant continuously shouted that he was the Mr. Hoza's boss. This evidence of Mr. Hoza was left undisputed. Mr. Weimers testified that the verbal report which the applicant gave him was that he was attacked with a screwdriver and after he chopped it out of Mr. Hoza's hand the applicant wanted to kick the screwdriver further away and that his when Mr. Hoza leaned forward to pick it up but he was already kicking at the screw driver and he accidentally kick Mr. Hoza in his face. There was no mention made of an iron bar or a hit against his thigh. This was important information which the applicant should have challenged based on his defence.

25. The applicant alleged that they were fighting or at least acted in self-defence. He however is the one who made several attempts to apologise to Mr. Hoza for his actions. The actions of the applicant after the incident suggests that he was aware that he has wronged Mr. Hoza and that was the reason for apologising to him. Why would he apologise if they were really involved in a fight or if he acted in self-defence? In addition, the applicant was the senior to Mr. Hoza, he had the right in terms of seniority to level charges against Mr. Hoza. The applicant however delayed the filing of his report.

26. The version of the applicant was also inconsistent. He informed Mr. Weimers that he attempted to kick the screwdriver away and accidentally kicked Mr. Hoza in the face. This evidence of Mr. Weimers was not disputed and was not contained in his report. The applicant also testified that Mr. Hoza attempted to stab him with the screwdriver whereas he indicates in his report that he told Mr. Hoza not to point him with the screwdriver. He chopped the screwdriver out of Mr. Hoza's hand while he was pointing to him with it. There was no mention that Mr. Hoza attempted to stab him. The applicant also demonstrated that he and Mr. Hoza was about a meter and a half apart when Mr. Hoza turned and picked up an iron rod and stormed at him. While storming at him or attempting to grab him legs he slipped and was busy falling. In the motion of falling, he hit the applicant with the iron rod which was in his hand and the applicant kicked him in the face. The applicant and Mr. Hoza would have been too close to each other

for all of this to happen. If indeed Mr. Hoza charged at his legs as the applicant demonstrated, then I submitted that the applicant would have kned him in the face. The version of event of the applicant is to improbable for I to have happened.

27. The version of Mr. Hoza is more probable. The applicant felt disrespected by Mr. Hoza when he failed to ask for permission to leave the premises early. Instead of giving a proper answer to the applicant when he was asked where he was going, Mr. Hoza was dismissive towards the applicant. This angered the applicant. He confronted Mr. Hoza on his return and while already angry for the way he was answered, Mr. Hoza denied that he was appointed for the applicant. The applicant who was already enrage, hit at Mr. Hoza while he was sitting on his chair. Mr. Hoza ducked and in the process became unbalanced and fell forward off the chair. This is when the applicant used his karate skills and kicked Mr. Hoza in his face. The applicant further reminded Mr. Hoza of the fact that he was his boss. The fact that the applicant shouted at Mr. Hoza that he was his boss after the kick was never disputed. At no stage did the applicant mention that he attempted to pick Mr. Hoza up since he accidently kicked him in the face. The applicant also did not seek the advice from his manager in what action to take against Mr. Hoza who attacked him with a screwdriver and hit him with an iron rod. He instead continued with his work and waited for Mr. Weimers to ask him what happened.
28. I therefore find that the respondent established on the balance of probabilities that the applicant assaulted Mr. Hoza of 25 May 2017 by kicking him in the face. The applicant failed to establish that he was involved in a physical fight with Mr. Hoza or that he acted out of self-defence. The applicant was the aggressor during this incident and Mr. Hoza his victim. The respondent therefore has established on the balance of probabilities that Mr. Vuso has committed the misconduct which he was charged with.
29. The applicant challenged his dismissal on procedural grounds by submitting that the respondent never investigated the incident properly. The respondent however gathered sufficient information to justify the charges levelled against

the applicant. The respondent had the two reports from the parties involved with the medical certificate of Mr. Hoza. Schedule 8: The Code of Good Practice: Dismissal also suggest that the disciplinary hearing in itself is an investigation. In addition, the applicant did not submit any prejudice which he has suffered based on the alleged failure to investigate. I therefore find that the respondent had sufficient grounds to take disciplinary action against the applicant and therefore this challenge of the applicant should be rejected.

30. The applicant also suggested that based on the fact that the respondent lifted his suspension and he was allowed to continue to render services for more than 300 days that the trust relationship could not have broken down. The applicant made reference to the provisions of Resolution 1 of 2003 in support of his argument. The respondent submitted that the appeal process took time and therefore the suspension had to be lifted. Resolution 1 of 2003 does not suggest that an appeal is successful or that a party must be found not guilty should an appeal not be finalized within 30 days. The respondent had to lift the applicant's suspension based on the provisions of the aforementioned resolution. The applicant however had a duty to establish the prejudice which he suffered due to the respondent's failure to finalise the appeal within the stipulated timeframe. The respondent however took precautionary measures by moving Mr. Hoza to another workshop away from the applicant. The fact that the respondent took such a long time to finalize an appeal is not ideal. The appeal process should be prioritised by the respondent and I cannot understand why a final decision could not have been taken earlier. I however find that in the absence of prejudice that this challenge of the applicant should also be rejected.
31. The applicant submitted that the respondent should have taken corrective action against him by following progressive discipline. He submitted that he should have been issued with a sanction short of dismissal. He mentioned that he has more than 30 years' service with the respondent and this should have taken into account before terminating his services. The applicant also argued that the trust relationship between him and the respondent did not break down and therefore he should have been given another chance. He also showed remorse by taking steps to apologise to the applicant but his apology was rejected. During the

arbitration hearing the applicant argued that him and Mr. Hoza was fighting and the respondent should have acted consistently.

32. I have already made a finding of this submission of the applicant and will not repeat it. The applicant cannot argue remorse when he did not own up to the fact that he assaulted Mr. Hoza. Instead he attempted to justify his actions. The applicant also argued that Mr. Hoza assaulted Mr. Myute in 2017. He however did not submit any evidence to support his submission. The respondent submitted that there might have been an argument between employees but there was not physical assault. I have also considered that the applicant is a blue-collar worker and might be more abrasive in his approach and did not have the soft skills in applying discipline. He was however Mr. Hoza's supervisor and should have known what steps he could take to correct his action rather than to argue and physically assault him. The discipline which he acquired through practicing karate should have kicked in and he should have been aware of the damage which he could cause by licking someone with safety boots in the face. Mr. Hoza could have been worse off if the applicant kicked him against the head since the kick in his face fractured his jaw. Mr. Hoza was still visibly afraid to sit close to the applicant during the arbitration hearing. When I consider the physical superiority of the applicant against that of Mr. Hoza together with his known karate skills I still stand amazed that the applicant would come up with a fighting defence.
33. The employer has a legal duty to provide a safe working environment to all employees. The respondent had to transfer Mr. Hoza to the mechanical workshop in order to provide a reasonably safe environment for him. Mr. Hoza rendered services in the electric workshop for more than 20 years. He was the victim of the applicant. The respondent submitted that they could only utilize the applicant at the electric workshop should he be re-instated as suggested. The question however is why Mr. Hoza the victim should be inconvenienced due to the presence of the applicant. In addition, the applicant assaulted Mr. Hoza. The assault of a fellow employee or any one is a serious offence and cannot be justified. I therefore find that the respondent has established that dismissal is a

fair sanction given the misconduct which was committed. I therefore find the dismissal of the applicant procedurally and substantively fair.

AWARD

34. The dismissal of the Applicant, Mr. Sicelo Vuso, was substantively and procedurally fair.
35. The applicant's claim is dismissed.

Signature: 

Commissioner: **Raymond Jonathan**

Sector: **Public Health**