

ARBITRATION AWARD

Case No: **PSHS710-18/19**

Commissioner: **Raymond Jonathan**

Date of award: **18 September 2020**

In the matter between:

NEHAWU obo Mildred Thoko Mlonyeni

(Union/ Applicant)

and

Department of Social Development - 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 Boardroom of the Department of Social development in Butterworth on 26 August 2019. The proceedings were digitally recorded. The Applicant, Ms. Mildred Thoko Mlangeni was represented by Mr. Z Twala a trade union official from the National Education, Health and Allied Workers Union (NEHAWU). The Respondent, Department of Social Development- Eastern Cape was represented by Mr S Bunguzana 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 after two weeks since both of them would be involved in arbitration hearings the following week and will not

have an opportunity to compile the closing arguments. This request was granted and they agreed that their submissions would be made on or before 9 September 2020. 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 21" while the applicant submitted a bundle of documents marked "1 to 29" 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 as a procurement clerk and was dismissed on

- 4.2 The applicant was a level 5 employee at the time of her dismissal

- 4.3 The applicant was dismissed for the following reasons:

- 3.3.1 Fraud: during September 2016, you submitted the falsified quotations for the rendering of security services at Mnquma Area with the intentions to defraud the Department.

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

- 4.4.1 The applicant was charged for alleged misconduct which took place in September 2016 whereas the documentary evidence presented is

date October 2016 and therefore she cannot be found guilty of misconduct which took place in October 2016.

4.4.2 The applicant did not commit any misconduct but acknowledge that her password was utilized to generate the order of the procurement system by the intern whom she trained on procurement processes. She has never seen the fraudulent quotations which was utilized to source the security services. The procurement was done by Mr Mashiyi who was trained by her.

4.4.3 The respondent did not conduct a proper investigation in order to establish the origin of the fraudulent quotations. The chairperson was also biased in that her evidence was not considered by the chairperson.

The applicant challenged his dismissal on the following procedural grounds:

4.4.4 The incident was not investigated by the respondent. The applicant was not supplied with the memorandum which accompanied the quotations.

- 3.5. The applicant submitted that I should find her dismissal to be unfair and requested retrospective reinstatement with full back pay as relief.
5. 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

6. 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

7. The respondent's first witness, Ms. Nomvuyo Rosemond Nyaku testified that she is an Assistant Director: Finance. She received a memorandum on 30 September 2016 for the procurement of security services from the applicant. On 3 October 2016 she found that the applicant supplied her with four fraudulent quotations in support of her request. She then initiated an investigation on her findings.
8. The second witness, Mr. Lizalise Mhlauli testified that he is an investigator in the employ of the respondent. He investigated the allegations of fraudulent procurement allegations against the applicant. He found that the quotations attached to the memorandum in support of sourcing security services was fraudulent.

APPLICANT'S EVIDENCE AND ARGUMENT

9. The applicant, Ms. Mildred Thoko Mlonyeni testified that she was a level 5 procurement clerk stationed at the Butterworth district office. She was not involved with the procurement of security service forte district in September 2016 but it was done by her intern, Mr. Mshiyi. She shared her username and password with him and her was at the stage of his training that he could work without her supervision. This is support by the fact that he assisted Ms Fosi to pay NPO's using her login details while she was on sick leave.
10. The second witness of the applicant Mr. Siphonati Mashiyi testified that he was an intern who was placed in the applicant's office for a period of time. He was reassigned to another office in August 2016 and was therefore not in procurement in September 2016. He assisted Ms. Fosi with payment by utilizing the applicant's login details before August 2016.

ANALYSIS OF EVIDENCE AND ARGUMENT

11. 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.
12. The applicant was dismissed for the following misconduct charge: *Fraud: during September 2016, you submitted the falsified quotations for the rendering of security services at Mnquma Area with the intentions to defraud the Department.*
13. The defence of the applicant was that she was not involved in the procurement process for security services in her area for the month of October 2016 but the intern whom she trained has done the transaction in its totality. She was also dismissed for an incident which took place in September 2016 but all the evidence of the respondent points indicates that the transaction took place in October 2016 and she can therefore not be guilty of that incident.
14. 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...’
15. At the commencement of the arbitration proceedings the parties agreed that it is common cause that the quotations (A4 to A7) for security services was fraudulent. They also agreed that the applicants BAS username was utilized to generate the transaction on the accounting system. They also agreed that it is prohibited to share usernames and password amongst employees.

16. In essence the applicant acknowledged that the transaction/memorandum to obtain security services for the district for the month of October 2016 contained four fraudulent quotations and that her username was user to capture the transaction of the accounting system. She however was not part of this transaction but the intern, Mr. Mashiya whom she was training obtained these fraudulent quotations. She had to share her username and password of the accounting system with him since she was required to train him on BAS and the only way to do this was to give him access to the system. She further argued that she can in any event not be guilty of the misconduct which she was accused of since the charge alleged that the transaction took place in September 2016 but all evidence presented supported the fact that the transaction took place in October 2016. She further argued that the respondent did not provide her with any of the supporting documentation which she required to prepare herself.

17. The evidence of evidence of the respondent through Ms. Nyaku as that she is stationed at the Regional office in East London while the applicant is stationed in Butterworth. The applicant, as procurement clerk, first needs to submit all procurement transaction memorandum and quotations for verification and recommendation by her before a transaction is scanned and loaded on the BAS system for her recommendation and approval. It is required that procurement should take place at least a week before the actual services is rendered or actioned. It is also not permitted to share your security username and password for the BAS accounting system with anyone. If a person's username is utilized than it can be assumed that that person has actioned the transaction.

18. Ms. Nyaku testified that she received a memorandum with its twelve quotations attached on 30 September 2016. This was for the procurement of security services of four sites within the district which was to commence from 1 October 2016. She checked the quotations for verification and noted that some of the quotations are lacking vital information and that the transaction could not be recommended with the identified shortfalls. She made copies of the document and returned the memorandum to the applicant by asking the applicant manager to hand it to her. She also phoned the applicant and informed her about the returned memorandum and which is the gaps which she identified on the

quotations. The applicant enquired from her what she was expecting her to do since the services were required the following day. She informed the applicant that she is required to get the suppliers to complete the quotations properly and resubmit the memorandum. This discussion was never disputed by the applicant other than to allege that Ms. Nyaku always phoned her intern, Mr. Mashiyi.

19. She received a telephone call from the applicant in the afternoon at approximately 16h50 of 30 September 2016 on her cellular phone and she informed her that she was still at the office and that she was waiting for the suppliers to return the corrected quotations. She informed the applicant that she already left the office and that she would not be able to assist her at that time of the day. The applicant however got angry with her and made unfounded allegations. She however informed the applicant that it was the applicant who was late with the procurement processes.
20. On 3 October 2016 she drafted an email to the applicant wherein she expressed to her that she did not appreciate the manner in which she addressed her on the 30 September 2016 and copied her manager and the applicant's manager on the email. She received a telephone call from Mr. Mashiyi that same morning who informed her that he was requested by the applicant to phone her and that she was requesting she to recommend the memorandum which was already scanned and loaded on the BAS accounting system. She accessed the memorandum on the system and noticed that the only thing which was done was for the identified gaps on the quotations to be rectified but the totals were not adjusted since the services were not required on 1 October 2016 anymore but on 3 October 2016 and therefore it should be cheaper to provide the service. She phoned the applicant again and informed her that the quotations totals were required to be adjusted.
21. It was at this stage that she remembered that the assets of the respondent were exposed since there was no security services rendered by a service provider. She then took it upon herself to phone the service providers in order to assist the applicant by utilizing the copies of the quotations which she made on Friday

30 September 2016. She however discovered that one supplier was in Bloemfontein and the other in Qwa Qwa. They informed her that they do not know that company which she was referring to and that they do not own companies. The other two companies telephoned went straight to voicemail. This concerned her since the province only source service under her mandate in the province and does not go outside. She also noted that the quotations A4 to A7 looks fraudulent since the stamps looked similar. She informed her manager about her findings and an investigation was initiated.

22. The applicant's witness, Mr. Mashiyi testified that the applicant shared her password with him and that he assisted Ms. Fosi to pay Non-Profit Organisation in June 2016 while the applicant was on sick leave. He was however removed from the applicant office and placed in another office within the finance section in August 2016 since he had to gain knowledge of the whole finance process for the purposes of his studies. He was therefore not in the applicant's office during September 2016 when security services were sourced and that he has never seen the quotations presented to him.
23. The whole defence of the applicant was built around her allegations that Mr. Mashiyi handled the transaction and that she was not involved in any way. The applicant's own evidence however points to the fact that Mr. Mashiyi could not have been involved in any procurement transaction after August 2016 since he was not in the office. Ms. Nyaku also testified about two phone calls between her and the applicant on 30 September 2016 and another on 3 October 2016. This evidence was not disputed except that the applicant alleged that Mr. Mashiyi was dealing with that transaction. The applicant's own evidence disputed this defence since her own witness testified that he was not in her office anymore. She was the only person in the procurement office at the time of these procurement proceedings and she did not provide us with any other person's name who could have sourced the quotations, drafted the memorandum or who could have spoken to Mr. Nyaku. The only person who could have sourced the quotations and followed the procurement process for the sourcing of security services for October 2016 was the applicant. I therefore find that respondent has established on the balance of probabilities that the applicant submitted the

fraudulent quotations in support of sourcing security services. This finding is supported by the fact that the transaction was loaded on the BAS accounting system by utilizing the applicant's username and password.

24. The applicant argued that she should never have been dismissed since the evidence of the respondent support the fact that she submitted the memorandum and quotations in October 2016 and not September 2016. This argument cannot stand since the undisputed evidence of the respondent was that the applicant submitted the memorandum for the procurement of security services on 30 September 2016. The process of procurement therefore started in September 2016. The applicant in her own statement (A20) indicates that she was involved in drafting the memorandum for the signature of the Area Manager. In any event the applicant was aware of the procurement transaction which was investigated even if the respondent made a mistake with the months.

25. The applicant also alleged that the respondent did not provide her with the memorandum and other documents. The undisputed evidence was that the applicant had the documents in her possession before her dismissal since she scanned and loaded the documents on the BAS accounting system. The documents were returned to her by Ms Nyaku on 30 September 2016. It would have been helpful that this documents to have been submitted but the applicant conceded that the transaction was loaded with fraudulent quotations on the BAS System.

26. The next question is whether the respondent has established that the evidence supports the misconduct for which the applicant was dismissed for. The respondent charged the applicant with fraud: in that she submitted fraudulent quotations to source security services. The type fraud which the applicant was charged with is explain to mean that she utilized fraudulent quotations. It is common cause that the quotations (A4 to A7) is fraudulent in that it was never sourced from the suppliers. I therefore find that this argument should also fail.

27. There was no argument from the applicant that a person who submitted fraudulent quotations during the procurement process are not guilty of misconduct. The existence and the knowledge of the rule was not disputed. I therefore find that the respondent has established that the applicant is guilty of the charged levelled against her.
28. The final question is whether the sanction of dismissal is appropriate. The applicant made herself guilty of dishonesty. She did not resent any mitigating circumstances but I have considered her age and that she was in the employ of the respondent for more than 20 years at the time of her dismissal. I have also considered that the applicant did not show any remorse but blamed a young person who was not in her office when the misconduct was perpetrated. Procurement fraud cannot be tolerated since what she has done was to prevent other business to fairly contest the provision of services and indirectly or directly favoured specific service providers. There is no mitigation which would justify her actions and I therefore find that the respondent has established that the dismissal of the applicant is appropriate.
29. The respondent has established that the dismissal of the applicant is substantively and procedurally fair.

AWARD

30. The dismissal of Mildred Thoko Mlonyeni is substantively and procedurally fair.
31. The applicant's claim is dismissed and she is not entitled to any relief.
32. There is no order of costs.



Raymond Jonathan