



ARBITRATION AWARD

Case No: **PSHS728-18/19**

Commissioner: **Thando Ndlebe**

Date of award: **20 April 2020**

In the matter between:

DENOSA OBO BAITHEI MARIA KWAGILE

APPLICANT

and

DEPARTMENT OF HEALTH- FREE STATE

RESPONDENT

DETAILS OF HEARING AND REPRESENTATION

1. The matter was heard by me as an arbitration process on 23 March 2019, 9 May 2019, 10 May 2019, 27 November 2019, 28 November 2019, 29 November 2019, 15 January 2020 and 5 March 2020 in Thaba Nchu. The Applicant was present and was represented by Mr. Mahoje an official of the Democratic Nurses Organization of South Africa (“Denosa”) in the proceedings.
2. The Respondent was represented by Ms. Makoa, its Assistant Director of Labour Relations.

3. The submitted bundles of documents and same were admitted as evidence and marked as Applicant's Bundle "A1 to A8" and Respondent's Bundle "B". The parties agreed to submit written closing arguments to the Council by the 25 March 2020.

ISSUES TO BE DECIDED

4. I am required to determine whether or not the Respondent unfairly dismissed the Applicant, both procedurally and substantively. In the event I find in favour of the Applicant, that I order retrospective reinstatement as relief.

BACKGROUND TO THE DISPUTE

5. The Applicant was appointed by the Respondent on 1 April 1980. The Applicant held the position of Professional Nurse Grade 3 (General Nursing) at a basic monthly salary of R38 062.07 at the time of dismissal on 11 September 2018.
6. The relief sought by the Applicant was that the Council order the Respondent to reinstate her retrospectively.

RESPONDENT'S EVIDENCE AND ARGUMENTS

7. Dr. Seobi Tlale testified under oath as follows:
8. He was on duty at Dr. Moroka hospital on the 26 May 2016. He never saw the Applicant on the 26 May 2016. The wife of the patient in question was located close to the dressing room. Nurses Ms. Siyale and Ms. Monnane came through into the dressing and he left them there. It was not wrong for the Nurses to intervene on the day of the incident. He never spoke a bad manner towards the patient in question, his wife or his son.
9. Under cross-examination Dr. Tlale responded as follows:

10. He has been a medical doctor for twenty-four (24) years. When assisting a patient, a doctor has to determine the medical history of the person. He does not know if the patient, namely Mr. Finger, was in pain. He asked the patient what was wrong and he advised that his catheter was blocked. A symptom of a blocked catheter would be discomfort because of the blocked urine. In so far as pain is concerned, it depends from patient to patient. He had not started with an examination of the patient, but was busy with his medical history. It is not true that the patient was in pain and he did not want to be examined.
11. He left the patient with a Nursing Sister. He did not argue with the patient. He did not expect a patient who was in pain to provide a proper answer. He did not fail to perform his duties as a medical doctor in so far as the patient in question was concerned. He never provoked the patient. It is not possible to obtain a medical history from a patient who is unconscious, unless there is collateral information from the family. It is not correct that he must calm a patient who wants to fight as there is nothing that one can do.
12. He did not kick or push Mrs. Finger. The statement as found at page 53 in Bundle "A-1" was his reference to the action of the patient's son when he opened the sliding door of the consulting room. He felt ridiculed by the actions of the patient's son. He did not argue with the patient. The nurses intervened during the incident in question and when the nurses intervened, the war of words subsided. He was angered by the incident but allowed the nursing staff to intervene and he went to visit other patients.
13. He is registered with the Health Professional Council of South Africa ("HPCSA"). He conducted himself on the 26 May 2016 in the interest of the well-being of the patient. He allowed himself to be accessible to the patient. He requested the patient to allow him to see what was wrong. He applied his mind when he dealt with the patient. He is aware of the complaint by Mrs. Finger as appearing at page 1 in Bundle "A-3". The Respondent never requested him to respond to Mrs. Finger's complaint. He did not see the Applicant at the dressing and consulting rooms. It is incorrect that he started a fight on the 26 May 2016. He never instigated a fight between himself and Mr. Finger.

14. He does not have a history of fighting with patients. He once pulled a certain Mr. Maduna to the office of the Chief Operating Officer because of what he had said. He was with Dr. Tlobane on the day relating to the incident of Mr. Maduna. The Applicant's conduct was not proper in so as Charge 1 is concerned. He heard the Applicant uttering the words in SeSotho namely, "O sele doctor oo, ha reyeng police station and open a case" but loosely translated in English as follows; "this doctor is silly, go to the police station and open a case". The Applicant's latter mentioned utterance was not proper. Complaints at the hospital are handled by Sister Litheko. He never proved the patient. Mr. Maduna was present at the hospital on the day in question as a civilian and not as a patient. He does not have a history of provoking people.

15. Ms. Maggie Litheko testified under oath as follows:

16. In her role a Customer Care Officer, she is responsible of complaints within the hospital. She received the complaint relating to the incident of the 26 May 2016 from Mrs. Finger. She attended to the Complaint's Book on the 27 May 2016 and when saw the complaint she then telephoned Mrs. Finger and requested her to come to the hospital. Mrs. Finger did not come to the hospital and she then telephoned her again. On the second occasion she could not get hold of Mrs. Finger but the phone was answered by her son. She then informed Mr. Finger, (hereinafter referred to as Mr. Finger Junior), that she needed to speak to Mrs. Finger. She advised the Chief Operating Officer about her aforementioned actions. Mrs. Finger did not come to the hospital and she closed the file.

17. The Respondent acted on Mrs. Finger's complaint. The Office of the Chief Executive Officer followed up on Mrs. Finger's complaint as an investigation was conducted to deal with the matter. It is therefore not true that the Respondent did not act on the complaint. The Respondent once disciplined two nurses, namely Ms. Thutela and Ms. Mapota, at the Paediatric Ward who were involved in an argument in the presence of patients. The Respondent was not expected to act against the Applicant the same way it did with the other two Nurses.

18. Under cross-examination, Ms. Litheko, responded as follows:

19. The Respondent took disciplinary action against the abovementioned two nurses. She was told by an Acting Matron that disciplinary action was taken. The Applicant passed by the area where the two nurses were arguing. She never saw a fight between the two nurses. She cautioned the two nurses not to argue in front of patients on the day of their incident as a Professional Nurse responsible for Customer Care.
20. She is aware of the Charges that resulted in the dismissal of the Applicant and she also participated at her disciplinary hearing. She was not involved in the disciplinary action relating to Nurse Thuthela and Nurse. Maphote. She was present in the Paediatric Ward when the latter mentioned incident took place and the Applicant was an Acting Supervisor in the same ward. She was involved in the matter relating to the Applicant in so far as she dealt with Mrs. Finger's complaint. She was told by Sister Motshumi that the two nurses were disciplined. The warnings that were issued against the two nurses were not on the Respondent's letterhead. She is not involved in disciplinary hearings of employees.
21. She telephoned Mrs. Finger on the 27 May 2016 and Mr. Finger Junior answered. Mrs. Finger never advised that she was not going to come to the hospital a later stage as she was looking after her husband. She normally responds to customer complaints within a period of five (5) days after being aware of them. She does not know if Dr. Tlale kicked Mrs. Finger as she never discussed this with her. On whether customer complaints result in employees being charged for misconduct; in the event Mrs. Finger came to her, she would have spoken to the relevant doctor and the manager who would have determined if discipline was necessary. She is not aware of the incident between Mr. Maduna and Doctor Tlale.
22. She did not receive a complaint from a member of the public about the Applicant's action of the 26 May 2016. She never touched the two nurses when they argued. She asked the Applicant to assist during the incident as she was their Acting Supervisor, but the Applicant never helped to separate them. The two nurses exchanged words and there was no physical fight between them. The disciplinary action of Final Written Warnings against the two nurses was valid.

23. Ms. Nombuyiselo Irene Siyale testified under oath as follows:

24. The document as appearing at page 55 in Bundle “A-1” is her statement. On or about 21h46 on the 26 May 2016, Mr. Mosala who is a Porter informed her that a patient left the hospital without a medical file being opened. The patient in question, namely Mr. Finger, was at the parking area. Dr. Tlale went to the dressing room. She then observed that Dr. Tlale was with the Finger family and that voices were raised. In her capacity as a Professional Nurse her duty was to intervene and deal with disagreements peacefully. She even told the Finger family that they could lodge a complaint against the staff that were on duty. It was not her duty to say that a person is “silly”.

25. When a Nurse says that other staff members are silly such conduct builds mistrust between the nurses and members of the public. A nurse cannot insult other staff members just because he or she believes that his or her family is not treated well. It was improper for the Applicant to insult Dr. Tlale and Ms. Morena on the 26 May 2016. The Applicant made matters worse as she did not assist to solve the problem. The Applicant was adding fuel to the fire. She was expected to teach the Finger family about the Respondent’s policies. She was expected to help the Finger family members. The Applicant’s involvement was putting petrol into a fire. When a Professional Nurse says that another nurse is silly, that means that official is not competent.

26. The environment on the evening of the 26 May 2016 was not stable, as there was a state of fear and the other patients were listening to the words that were exchanged. She had to request that members of the South African Police Services come to the hospital. The Applicant attacked her when she started to call the police and held the telephone unit. The questions of the Applicant were all improper conduct and she was delaying patients. He requested Dr. Tlale to assist the patient. Dr. Tlale tried assist Mr. Finger but the latter did not want to hear him.

27. There were patients and other staff members when the Applicant uttered the word “oo sele doctor oo”. The Applicant was not helping when she said Dr. Tlale was silly. It is a bad attitude to insult a colleague, it is disrespectful and it is not professional.

28. She requested Ms. Morena to call the police because Mr. Finger Junior was aggressive and he had stated that he would hit Dr. Tlale. She was scared that Mr. Finger Junior would end up assaulting Dr. Tlale. She is not trained to deal with an aggressive person and the police are trained to deal with such situations. It was not incorrect for her to summon the police to the hospital as there is an inter-departmental relationship between the Respondent and the former. It was not proper for the Applicant to stop her from using the Respondent's telephone as she wanted to report the incident to the Senior Matron.
29. The Applicant's actions on the 26 May 2016 were not respectful. The Applicant wanted to slap her on the evening in question. In as much the patient was angry the Applicant did not have a right to nearly slap her. The Applicant was expected to behave in a professional manner. The Applicant never advised her family to listen to Dr. Tlale. The Applicant did not even show an interest in the patient's problem.
30. Under cross-examination, Ms. Siyale, responded as follows:
31. The patients and the Finger family were present when the Applicant stated that staff members were silly. The incident of the 26 May 2016 involving the Applicant took place over a period of approximately fifteen (15) minutes or longer. It was at that stage that the Applicant insulted her. The Applicant was present at the consulting room. She does not why Dr. Tlale never saw the Applicant on the evening of the incident in question. The Applicant was at the area of the incident and she was not in uniform as she was off-duty.
32. The incident between Dr. Tlale and the Finger family started at the dressing room and the Applicant was also present therein, but it later moved to another room. The fight only stopped when the police arrived and the police left with Mr. Finger Junior. The Matron was present at the time the police left the hospital. The Applicant did not have to tell the Finger family to fight directly; by saying one party is bad that implies that the other person is wrong. Instigation can be indirect. The Applicant made the situation worse as she was part of the fight. She went to the dressing room as she heard raised voices. The voices were that of Finger family and Dr. Tlale.

33. It was the Matron, Ms. Motshumi, who assisted Mrs. Finger to register a complaint. It is incorrect that the fight was caused by Mr. Finger not being properly dealt with by Dr. Tlale. It is not true that the patient became angry because of a delay to attend to him by Dr. Tlale, because she attended to the patient as soon she saw him. The Applicant told her that the patient had not been attended to. She went with the Applicant to the consulting room to find the patient, but he was at the parking area. He never heard Dr. Tlale saying that things are expensive, referring to the catheter. It was Mrs. Finger who wrote her complaint. The Applicant kept on saying Dr. Tlale was silly. She was outside the dressing room when she heard the Applicant uttering the latter mentioned words.
34. The Applicant wanted to slap her and as she had to put away her face. It is not correct that when the Applicant found her she was sitting down and not helping any one as she had just helped a baby. She was the first person to come to the assistance of the Applicant. It is not true that the patient was not treated fairly. The incident took place at the dressing room and she never said that it took place at the consulting room. Advocacy means that a nurse must concentrate on the patient who is supposed to receive service. It is not advocacy when a nurse goes to hospital in order to threaten doctors and nurses.
35. The Applicant did not have a right to act in an improper manner even if she believed that the Finger family was frustrated. The Applicant stopped her in using the land line and she ended up having to use her personal cell phone to call the police. In the event the Applicant was unhappy about the incident relating to the Finger family she could elected one of the following; follow the complaints procedure, telephone the Matron-In-Charge or report the matter to the Chief Executive Officer. There was no need for the Applicant to approach Ms. Morena and ask her as to why she was calling the police. The Applicant was not on duty on the 26 May 2016. Whether the Applicant was not duty or not, she was not supposed to bad mouth other colleagues.
36. Ms. Monnye Ruth Mokatsanyane, testified under oath as follows:
37. She received the documents as found at page 15 in Bundle “B” from staff only to find out that it was written to her, the Head of Nursing and the Chief Executive Officer. Staff complained that the Applicant was telling lies, that she was a bully and that she was

rude. A staff meeting was then organized by management. The Applicant was always undermining and harassing her. She once showed a list of complaints by staff against the Applicant to the Head of Nursing. The Applicant was competent as a nurse but her conduct was unprofessional. She cannot remember any employee that conducted herself or himself badly the way the Applicant did. It was correct for the Respondent to discipline the Applicant. The Applicant was not charged for misconduct by the Respondent in respect of staff complaints as appearing at page 16 in Bundle "B".

38. Under cross-examination, Ms. Mokatsanyane, responded as follows:

39. She was the Operational Manager of the Paediatric Ward. The Applicant used to harass her. The Applicant did not harass her on the 8 May 2015. The Chief Executive Officer called a staff meeting as a response to the list of complaints from staff on the Applicant. She received complaints from staff after the 26 November 2015. The Applicant was competent as a nurse but the issue was her conduct. The document at page 83 in Bundle "B" is proof that she was once appointed as an Acting Operational Manager by the Respondent. The Applicant acted on numerous occasions as an Operational Manager as she was the only Senior Professional Nurse available.

40. Ms. Keneilwe Machecha testified under oath as follows:

41. She was the presiding officer in the internal disciplinary hearing that led to the dismissal of the Applicant. She was appointed by the Respondent's Head of Department to chair the disciplinary hearing. She never saw the dismissal letter of the Applicant as it is issued by the Head of Department as the chairperson only makes a pronouncement in her hearing report. She communicated the disciplinary hearing report to both parties. She applied her mind before issuing the final disciplinary hearing report. It is not possible that she was biased or did not consider all the evidence at the end of the disciplinary hearing.

42. Under cross-examination, Ms. Machecha, responded as follows:

43. She complied with the provisions of the Public Service Act as found at paragraph 7.3 in Bundle "A-4". She communicated the outcome of the disciplinary hearing within five (5) days of the hearing. She wrote to the Applicant. She does not have a copy of the letter that she issued to the Applicant. It is not correct that she did not apply her mind before issuing the report because of a presence of a grammatical error as appearing in paragraph of Bundle "A-4". She cannot remember if a digital copy of the hearing was requested from her.
44. She considered closing arguments from both parties. The analysis part of the hearing is a combination of both evidence and arguments. She referred to the closing arguments in the hearing report. She remembers saying that Charge 3 should be excluded from the proceedings. She was not biased during the disciplinary hearing. She applied her values in the report. The fact that she used the word "flabbergasted" in her report does not mean she was biased. It is not correct that she did not consider both versions in her report. Evidence was presented by Ms. Phajane, Ms. Morena and also in terms of the patients satisfaction survey that the conduct of the Applicant was unacceptable.
45. She did consider that the Applicant had a clean disciplinary record by the time she was charged by the Respondent. In as much the Applicant's actions did not result in a loss of life, in her own testimony she stated that the patient was suffering from a cancer. In the event the Applicant behaved properly then the patient would not have died. She considered the evidence of Mr. Finger Junior to the effect that the family had to leave the hospital because of mismanagement from nurses.
46. In as much the Applicant had a clean disciplinary record, every misconduct cannot be treated the same. She considered the Applicant's mitigation factors during the disciplinary hearing. The sanction of dismissal was reasonable. In the event the Applicant helped the situation, the patient would not have left the hospital without being attended to.

APPLICANT'S EVIDENCE AND ARGUMENTS

47. Mr. Mitswi Finger testified under oath as follows;

48. He was in Bloemfontein on the 26 May 2016 and received a telephone from his mother. He was advised by his mother that there was a problem with his father's catheter. He was fifteen (15) minutes into Thaba Nchu by bus as he had to collect his motor vehicle from home. When he arrived home, he asked his mother to speak to the Applicant for assistance. He then travelled to the hospital with his mother and ailing father. Mr. Finger was moved into the hospital through a wheel chair. They waited a long time at the hospital's Casualty Ward for assistance. He then decided to transport his father to a hospital based in Bloemfontein. When he and his family got to the motor vehicle outside the hospital, they met the Applicant. The Applicant advised them he would go inside the and check what was happening.

49. The Applicant later came back outside the hospital with Sister Seritini and a wheel chair. He transported his father on the wheel chair to a consulting room. He then went outside to switch off his motor vehicle completely. He heard a noise on his way to the consulting room. He was then told by another person that a doctor had just insulted his father. He went to Dr. Tlale and asked him why he had insulted his father. Dr. Tlale then stood up, took off his spectacles and stethoscope and said something.

50. Dr. Tlale was on a standing position and their voices were raised. It was at this time two Sisters came and held on to the Dr. Tlale. It was his sister and mother who held on him. The room they were at was also filled with other patients. He kept on asking Sister Siyale as to why she was allowing the incident to happen. He was advised by Sister Siyale that there were process for such incidents. He was told that police were coming to the hospital. In the process of Dr. Tlale being released by the nurses, he walked towards him and tried to kick him. At that stage he was being held by Mr. Maduna, and Sister Siyale. Dr. Tlale kicked his mother on the hip and his father was crying. The Applicant was with his father.

51. Police arrived at the hospital and he told them what happened. He advised the police that he was taking his father to a hospital in Bloemfontein. He realized that his father

would not make it to Bloemfontein and he decided to take him to Botsabelo Hospital where he was attended to. He later learnt that the Dr. Tlale had opened a criminal case of assault against him. It was his mother who opened a criminal case against the Dr. Tlale. The criminal cases were later dismissed by the Courts.

52. Mr. Finger died of some illness and without anyone from the hospital visiting the Finger family in order to apologize for what happened on the 26 May 2016. He took the matter to the Human Rights Commission and reported the Dr. Tlale to the HPSCA. He believes that his mother is affected by the incident and he does not know where to take her when she becomes sick.

53. It was Sister Monnane who advised him that Dr. Tlale had insulted his father. The persons who were present at the dressing room besides him were as follows; Sister Monnane, his father and another person. The Applicant was not present at the consulting room. It is not true that the Applicant shouted at the doctor and nurses as she was not in that room. There was no fighting or instigation. It is not correct that Mr. Finger wanted to assault Dr. Tlale as he was not in a good state of health as he was suffering from prostate cancer

54. Dr Tlale did not have a right to insult Mr. Finger. Dr. Tlale was expected to relieve Mr. Finger from the catheter. Mr. Finger's catheter was inserted on him outside Dr. J.S Moroka Hospital in an ambulance two days before the evening of the incident. It was inappropriate for Dr. Tlale to ask Mr. Finger many questions. The Applicant did not instigate anyone. He only saw the Applicant trying to help Mr. Finger. The only words he heard from the Applicant was when she said there were police coming. He was the one who instigated a fight.

55. It was not the first time he was frustrated by the service standards at the hospital. In March 2016 he arrived with his family at the hospital at 22h00 and they left the next morning at 04h00 without being assisted. He had terrible service experiences at the hospital. Mrs. Fingers filed a complaint with the hospital but no one from management followed up.

56. It is not correct that the actions of the Applicant resulted in the passing away of Mr. Finger. A doctor cannot be told what to do by a nurse. Mr. Finger passed away on 6 November 2016. The Applicant was being treated at Botsabelo Hospital at the time of his death. The Applicant was trying to help the Finger family.

57. Under cross-examination, Mr. Finger responded as follows:

58. He only had a contact twice with the Applicant on the day of the incident; the first time was at the gate and the second time was at the cubicle. The persons that were at the dressing-room were him, Sister Monnane, his late father and another nurse. In the event the Applicant instigated a fight, he would have been aware of same. He never saw the Applicant instigating anyone. It is not true that the Applicant argued with Sister Siyale. The Applicant did not encourage him to have an altercation with Dr. Tlale. It was the Applicant who asked him to be calm.

59. Ms. Erichua Jansen, testified under oath as follows:

60. She met the Applicant in 2011 when she joined the hospital as a Medical Social Worker. She left the Respondent in 2018. She was responsible for the mental well-being of both staff and patients. She had a professional relationship with the Applicant in order to help patients within the hospital and beyond. The Applicant was a co-operative person. The Applicant was very helpful in assisting with administrative functions relating to child abuse cases. The Applicant once assisted her to call police in a case that involved a young mother who refused to breast-feed her child.

61. The Applicant applied the Respondent's policies relating to the Paediatric Ward. The Applicant once gave her a lecture on not to leave medical trolleys unattended. The Applicant was patient and at times that can be viewed as being overbearing and that is not a bad thing. She was directly involved in the complaint of the complaint as found in page 43 in Bundle "B". The latter mentioned complaint was a blatant lie. There were complaints that were made against the Applicant.

62. Under cross-examination, Ms. Jansen responded as follows:

63. The Applicant is a fantastic person, but her people skills have to be improved. The Applicant is not rude all the time. In the event rudeness was a measure, then there will only be five (5) Nurses at the hospital. In the event there was an issue with her being rude, she should have been sent for training. In the event an employee makes a mistake, there must be corrective measures put in place. She was not present in the meeting of the 26 November 2015.

64. Problematic conduct must be dealt with professionally. Staff members did not have the ability or qualifications or ability to make a judgment call to the effect that the Applicant could not change. Team building has worked in the past. In terms of the Employment Assistance Policy, progressive discipline is encouraged. The then Chief Executive Officer, Ms. Moroka, did not refer the Applicant to her. In the event management did not have confidence in her, the Applicant's matter should have been referred to Bophelo House. In the event an employee does not admit that she has a problem, he or she must be forced to take part in the Respondent's Employee Assistance Programme. Counselling was an option that could have been implemented on the Applicant. The Applicant was not fairly dealt with by the Respondent. Dismissal is not a corrective measure as it is the last measure. Counselling and leave without pay are all corrective measures.

65. Ms. Ruth Finger, testified under oath as follows:

66. On the 26 May 2016 her husband's catheter was blocked. It was Dr. Thekiso who gave Mr. Finger an injection and referred him to Dr. J. S Moroka Hospital. Dr. Thekiso further advised that the catheter must be removed at the ambulance and that he be moved to the National Hospital. The family brought Mr. Finger him to Dr. J.S Moroka Hospital because of a blocked catheter. A porter they met at the hospital took the Applicant to a consulting room and went to get his file.

67. The family and Mr. Finger waited at the consultation for a long time until Mr. Finger Junior arrived. Mr. Finger then decided that they travel to Pelenome Hospital in Bloemfonten and they met the Applicant as they were approached the motor vehicle. The Applicant had travelled to Dr. J. S Moroka Hospital as she had told her that her

brother was sick. The Applicant forced the family to go back to the hospital. Another nurse then arrived outside and took them to the consulting room.

68. Mr. Finger and his family waited a long time again up until the Applicant went to the doctors and told them that the patient was in pain. Dr. Tlale came to the family and Mr. Finger and he (Dr.) had a bad attitude. Dr. Tlale informed Mr. Finger that his catheter had blocked because he had sat on it. Dr. Tlale asked how did the catheter block as it was inserted a day ago and that he must not give him shit as catheters are bought. Mr. Finger was told by Dr. Tlale that the pipes do not come from his mother. This is when an argument ensued. A white nurse came and told them that a doctor is supposed to ask questions. Nurse Monnane then also came through and said that she knew who the patient was and that it was her uncle.

69. Dr. Tlale then went to another room. She could not hear what the doctor was saying and she then saw the Applicant. She thinks that Mr. Finger Junior was informed by Nurse Puleng Mannane that his father was insulted by the doctor. She was with the Applicant at this time. Mr. Finger Junior then went to the doctor and she does not know how things started. She saw security personnel coming into the hospital

70. She saw a nurse with Dr. Tlali. Sister Siyale grabbed Mr. Finger Junior and security officers were next to the doctor. She stood in the middle of the doctor and Mr. Finger Junior in order to keep them away from each other. Dr. Tlale then kicked her on the hip. Sister Siyale took her son to the passage and advised him not to cause trouble and that there were processes to deal with such issues. Sister Siyale managed to calm his son down. She then went to her husband who was with the Applicant. Mr. Finger Junior then joined them and he took his father.

71. The police arrived and his son told that he was leaving and if they wanted to ask anything they must speak to her. The police were apparently called by Sister Moramane. The Applicant then asked Sister Moramane if it was necessary to call the police. She was advised by the police that she must visit the police station the next day. She was later advised by another nurse to lodge a complaint. The nurse said she must write a complaint in the Complaint's Book. She then took a lift home in the Applicant's motor vehicle. The nurse that had requested her to lodge a complaint

walked her out of the premises and asked her to forgive the hospital. She proceeded to open a criminal case at the police station against Dr. Tlale on the same evening.

72. The Applicant did not instigate any fights on the evening of the incident in question. The Applicant was not present when Dr. Tlale had an argument with his son. She never heard the Applicant insulting Dr. Tlale. Mr. Finger never said to Dr. Tlale that he must not ask him shit. She lived with Mr. Finger for approximately fifty (50) years but he never used vulgar language. There was no way that Mr. Finger would have approached Dr. Tlale for a fight as he was in pain.

73. The Applicant asked a nurse as to whether it was necessary to call the police. Members of the public were present when the doctor used vulgar language. She never saw the Applicant conducting herself in an improper manner. The Applicant did not instigate any fights and never treated members of the public badly. It was Dr. Tlale who treated the members of the public with a bad attitude. Nurse Litheko only telephoned her once and she did not go to the hospital as she was looking after her husband. Mr. Mojaki telephoned her and stated that he would visit her at home but he never did.

74. Under cross-examination, Mrs. Finger responded as follows:

75. She does not know if the Applicant was with another nurse at the telephone room. She would not know if the Applicant had instigated any fight as she was not with her all the time. She would not know if the Applicant conducted herself badly against her colleagues as she was not there. She saw police officials on the evening of the incident. The Applicant telephoned Dr. Molakoane using her cell phone.

76. It was Dr. Tlale who used abusive language in SeSotho. The word “oo sele” is not comparable to what the doctor said. Nurse Litheko telephoned her once. She cannot say if the Applicant conducted herself badly as she does work at the hospital. She did not see the Applicant conducting herself in an improper manner. She never saw the Applicant stopping nurses to help Mr. Finger. The Applicant did not instigate Mr. Finger

Junior as he came angry already as he heard from Nurse Monnane that Dr. Tlale had insulted his father.

77. Ms. Mary Eboh testified under oath as follows:

78. The Applicant once assisted her to bring her child to life when they visited the hospital. She then submitted a positive note commending the Applicant in the Client Satisfaction Survey. She could not receive proper assistance from other nurses at the hospital. The Applicant was never rude to her.

79. Under cross-examination, Ms. Eboh responded as follows:

80. She wrote the comment in the Survey on 27 September 2016. She was not at the hospital on the 26 May 2016. She cannot say as to what happened on the 26 May 2016. She never saw the Applicant being rude.

81. Mr. Benedict Gaorekwe Maduna testified under oath as follows:

82. On the 26 May 2016 he was at the hospital on behalf of his grandfather and was with Mr. Mashoto. He then saw Mr. Finger, the patient, entering the hospital. Mr. Finger Junior went to a room where his father was located and they were there for thirty (30) minutes. The family wanted to leave the hospital but the Applicant arrived and advised them not to leave as she was going to talk to nurses. Mr. Finger Junior went to his motor vehicle. Mr. Finger Junior came back and within a few minutes they heard a noise but they did not take much of it.

83. The noise became louder and they stood up to see if they could not control the noise. They noticed that there was a fight between Dr. Tlale and the Finger family. Mr. Finger Junior was angry at that stage. Dr. Tlale kicked Mrs. Finger under the rib. We tried to stop Mr. Finger Junior and he was the one who held him. Mr. Finger Junior told him that Dr. Tlale had insulted his father. They tried to calm the situation but there was no vulgar language used. The colleagues of the Applicant asked her as to why she should

come to the hospital whilst not on duty and without consulting doctors. The Applicant did not appear to be angry.

84. Dr. Tlale wanted to fight and it was not the first time he had him. Dr. Tlale once pulled him with his clothes to the office of the Chief Executive Officer. He reported the matter to the Member of the Executive Council and his advice was that he must lodge a complaint. He then opened a criminal case with the South African Police Services, but nothing happened.

85. Under cross-examination, Mr. Maduna responded as follows:

86. He does not know the occupation of Mr. Mashoto within the hospital. The Applicant met the Finger family at the corridor. He was with his brother when he held on Mr. Finger Junior. It is possible that Mrs. Finger was mistaken when she gave testimony to the effect that Mr. Finger Junior was held by Nurse Siyale because there were many people there. He did not hear the Applicant uttering the word “o sele” towards Dr. Tlale.

87. He was not at the telephone room on the 26 May 2016. He is not aware if there was a struggle between the Applicant and Nurse Siyale. He is not aware that the Applicant tried to slap Nurse Seale. He cannot say if the Applicant acted in an unprofessional manner on the day of the incident. He is not sure if the police met Mr. Finger Junior outside. He cannot tell if Mr. Finger Junior met the police at the corridor because he could not see where he was sitting. He is not sure if he saw Mrs. Finger speaking with the police. He restrained Mr. Finger Junior not to fight with Dr. Tlale. There were nurses when he restrained Mr. Finger Junior but he could not tell who they were.

88. Ms. Baithei Maria Kwagile (the Applicant) testified under oath as follows:

89. On the 26 May 2016 she was at home and received a telephone call from Mrs. Finger who told her that there was problem with Mr. Finger’s catheter. She then went to the house of the Finger family but they were not there. She telephoned Mrs. Finger and she stated that they had already left as they were already at the hospital. She then drove on her motor vehicle to the hospital and met the Mr. Finger and Mrs. Finger at

the entrance of the Casualty Ward and that they were leaving the hospital. The reason they were leaving the hospital is because they did not receive medical help. She then saw Dr. Tlale as he was coming from lunch.

90. She told the Finger family not to leave. She saw that the patient was not feeling very well. She was told by the family that the patient had pain around the abdomen and that the catheter was inserted the previous night by the Emergency Medical Services staff. She then went to a cubicle where Dr. Tlale and Nurse Morena as they did not have a patient they were attending to. She told Sister Siyale, the senior in charge, that she must not be surprised to see her as she was with her family.

91. She told Sister Siyale about Mr. Finger. She also informed Nurse Monatse about Mr. Finger as she appeared to be interested and they both went to the patient. When they got to Mr. Finger he was still complaining about his abdomen. She waited with Mr. Finger Junior at the counter for the patient's file. She was informed by Mr. Finger Junior that he was told by Nurse Monnane that Dr. Tlale was fighting with his parents. She then heard a noise at the dressing room and when she got there the patient was still restless. The patient told her that he was in pain and he could not pass urine.

92. She was later told by Nurse Morena that she was going to call the police. When she asked her why she wanted to call the police, the nurse informed her it was because the Finger family was fighting with Dr. Tlale. Nurse Morena telephoned the police and she heard her saying that they must come fast. The police arrived at the hospital and asked who was involved in the fight. She told Ms. Morena what she was doing was wrong and told her that she could have given the patient water and panado. She also told the Senior of Casualty that what Nurse Morena was not correct and that the nurses should have telephoned Nurse Motshumi.

93. She tried to telephone Nurse Motshumi and told her that she was off duty but she was at the hospital. Nurse Motshumi initially said that she could not pick her call earlier as she was talking to Nurse Siyale and said she was on her way to the hospital. When she told Nurse Siyale that it was wrong for Nurse Morena to telephone the police, she agreed with the latter. She then told Nurse Siyale that she was going to telephone Dr.

Molokoane, the MEC of the Respondent in order to make him aware of what they were doing. She made two calls to Dr. Molokoane, but he did not answer. At a later stage Mr. Dihlokanyane from Labour Relations came to her and asked her why did she call the MEC.

94. She told Sister Motshumi everything that happened and advised her that the patient was helped by someone from the Casualty Ward. Sister Motshumi requested an oral report from Mrs. Finger and advised her to write a complaint at the Complaint's Book. She transported Ms. Finger home after she had completed writing the complaint. She then heard that Mr. Finger went to Botsabelo Hospital and that was where he received proper medical attention.

95. She worked at the Casualty Ward for three (3) years in the past and patients are attended at the ward according to how critical they are. Thirty minutes was too much for the patient to wait for medical assistance. Triage was not done when Mr. Finger arrived at the hospital. Mr. Finger explained to her that he was in pain and he was sweating. No comprehensive health assistance was provided to the patient. The nurses did not comply with 27 of the Constitution of the Republic of South Africa when they telephoned the police.

96. The version by Sister Siyale was not true when she said that she heard her saying "o sele". She was at the OPD Counter when the altercation took place. She never uttered the words "o sele doctor lo". Dr. Tlale never saw her in the dressing room. She never insulted any one on the 26 May 2016. She did not struggle with Sister Siyale on a land telephone line. It was Nurse Morena who used the telephone room and it is her who used the landline to call the police. She asked Nurse Morena why she wanted to call the police whilst they were at the dressing room before they moved to the telephone room. Nurse Siyale was not present when she was with Nurse Morena at the telephone room. Nurse Siyale only joined her at the dressing room and this was where she informed her that it was wrong for Nurse Morena to call the police.

97. It is not true that she instigated a fight between the Finger family and Dr. Tlale. She only questioned the nurses as to why the police were being called to the hospital. She

did not shout on the evening of the incident. There were no members of the public when she spoke to Sister Siyale and Nurse Morena. She advised Sister Siyale to telephone Sister Motshumi. She did not treat her colleagues in a bad attitude by calling Dr. Molokoane, the MEC. She never tried to slap Sister Siyale. She showed Sister Siyale that she was trying to call Dr. Molokoane.

98. The Chief Executive Officer called two meetings because staff of the Paediatric Ward were having problems with her conduct. She was on duty on the 8 November 2015 and as she was about to leave she noticed that Nurse Phajane was not on duty and she reported same Sister Ivy Kgare. She reported the absence of Nurse Phajane in order for her to be replaced by another staff member as there was a shortage of personnel. It was not wrong for her to report that the nurse in question was absent. She is aware that the matter was then escalated to the Nursing Manager.

99. The incident of the 8 November 2015 was part of the discussion in the meeting of the 26 November 2015. The view by Nurse Phajane that she was not approachable was not true. In the meeting of the 26 November 2015 it was resolved that staff must not tell lies, that training must be done and that victimization must not be done. She cannot remember a copy of a letter found at paragraph 15 in Bundle "B" whereby staff sent their complaints to the trade union and Ms. Mtshayi from Labour Relations. The latter mentioned letter contained general statements as she had reported to management that staff was ganging against her.

100. There was another meeting held by management on the 19 January 2016 wherein the issues of November 2015 were discussed. In the latter mentioned meeting the Chief Executive Officer stated that he was aware that staff was telling lies. The Chief Executive Officer also said that there will be a meeting of Professional Nurses so that issues do not pile up.

101. She is aware about a complaint concerning a nurse known as Nurse Ntsho who was assaulting staff and she was not charged for misconduct. She had a clean disciplinary record before the two charges that resulted in her dismissal. There was never a complaint against her before she was charged by the Respondent. The Respondent never attended to the grievances she lodged. A copy of a grievance she

filled in 2016 can be found at page 72 in Bundle “A”. The other grievances she submitted to management can be found at pages 74 and 78 in Bundle “A” and they were not attended to by the Respondent.

102. The document as appearing page 91 in Bundle “A” is a copy of an Assessment on Admission Form and it is used at the Paediatric Ward to admit patients. The latter mentioned must be filled by a Professional Nurse but not by an Assistant Nurse. The Assistant Nurse only takes vital signs.

103. She was appointed by Sister Mokatsanyane to act in her position of Operations Manager on numerous occasions as confirmed in the copies of letters as found at pages 83 to 90 in Bundle “A”. The two nurses that Nurse Litheko was referring to in her testimony were howling, going at each other and they started fighting. She told the nurses that they were not supposed to argue in front of lodger mothers. In the event the fight could have been known by management, they could have been dismissed. The two nurses were not dismissed. The document as appearing at page 59 in Bundle “B” is not official document as it does not on the Respondent’s letterhead.

104. Nurse Mapote and Nurse Thuthela had an argument as the former told the latter that she was silly. The version of Nurse Litheko that she passed by as the two nurses were fighting in not correct; as she had to control her (Litheko) as she was screaming. The version by Ms. Jansen that she was not treated fairly within the hospital is correct. She is not aware that Mr. Maduna was once dragged by Dr. Tlale to the Office of the Chief Executive Officer.

105. Under cross-examination, Ms. Kwagile responded as follows:

106. She was at the hospital on the 26 May 2016 as she was called by the wife of Mr. Finger. She did not fight with anyone but spoke to Nurse Siyale and advocated about service. She did not disrespect anyone. Police were called on the evening in question and in the event she was involved in a fight, she should have ended up in jail. There was no complaint that she was fighting. She took her phone and called Dr. Molokoane

and that irritated some people. There was nothing written on file to the effect that she disrespected colleagues.

107. She never uttered insulting words directed at Dr. Tlale. She was not present when Dr. Tlale was insulted. Dr. Tlale could have lodged a complaint as the police were there. Sister Motshumi and Sister Siyale were there and they did not say anything. There is no footage that showed that she misbehaved on the 26 May 2016. Mr. Dihlakanye came and asked to see her phone and saw that she did not make any calls. Mr. Dihlakanye then said he was sorry about what happened. Mr. Dihlakanye was sent by the Respondent from its Labour Relations Department.
108. She did not insult anyone but merely advocated for proper medical care. The main thing that irritated everyone was that she telephoned the MEC. She was not informed that the incident of the 26 May 2016 was reported to the Respondent. She responded on the request by Mrs. Finger and advocated for the family. She only saw at a later stage that there was an investigation.
109. Sister Siyale and Dr. Tlale did not write a complaint about her at the Complaints Book. There was supposed to be a written report. The Chief Executive Officer called her and wanted to know if she telephoned the MEC. She told the Chief Executive Officer that the nurses did not know what to do on the evening of the incident of the 26 May 2016. The Respondent did not attend to the incident immediately but left it unattended for many months.
110. No official came to her and raised issues relating to the incident of the 26 May 2016. Dr. Tlale, Sister Siyale and Sister Motshumi were supposed to have written complaints about her conduct. She was insulting on the evening in question but was not fighting. It was Dr. Tlale who was fighting with the Finger family. She took care of the patient by comforting him. She used her cell phone to call Dr. Molokoane. She told Nurse Morena that it was wrong for her to call the police. It is normal first to try and help the patient first. A sub-ordinate cannot stabilize a patient. A sub-ordinate cannot make a final decision. In as much Nurse Morena could have received an instruction from Sister Siyale to call the police, she was not supposed to take the final decision.

111. She did not make the situation for Nurse Morena unbearable. It was Dr. Tlale who made the situation unbearable by insulting a patient. She did not make Sister Siyale's work situation unbearable. A report was supposed to have been made by the Respondent to the effect that she made the work of her colleagues unbearable.
112. It is not correct that she acted in an unprofessional manner on the 8 May 2015. There was no proper complaint lodged against her relating to the 8 May 2015. There was no truth in respect of the complaints that were raised by staff as they could have used official forms to raise same. The meeting of the Chief Executive Officer was about all the staff of the Paediatric Ward. It is not true that letters were written to the Respondent's Labour Relations Office and the trade union after the meeting of the Chief Executive Officer. All the issues that were raised by staff were resolved in the meeting that was called by the Chief Executive Officer.
113. Staff ganged up against her because she always followed procedure. In so far as allegations of harassment against her as found in page 15 in Bundle "B" are concerned, same was supposed to have been reported immediately and legal documents were supposed to be used. The Labour Relations Act and policies provide that allegations of harassment must be reported within seven days or immediately. The incident was not supposed to be reported after a year.
114. The complaints that were made to the Chief Executive Officer were submitted incorrectly. Complaints must be filled by staff individually. All the issues that were raised by staff were resolved. She was trusted by the hospital's management, hence she acted as a manager on many occasions. She always conducted herself properly within the workplace. The two nurses who fought were supposed to have been charged for misconduct by the Respondent. The nurses did not use a proper form to lodge the grievance and none of them spoke to her about their complaints. She lodged grievances within the employer but their receipt was not acknowledged by the Respondent. A grievance can be lodged by an employee before, during or after he or she has been charged with misconduct by the Respondent. She did not lodge the grievances in order to cover herself.

115. The Respondent did not provide her with an investigation report before she was charged for misconduct. Mr. Dihlakanye never informed her that he was conducting an investigation. It is strange that Dr. Tlale was not charged by the Respondent. She did not disrespect any employees on the evening in question. It is Dr. Tlale, Sister Siyale and Nurse Morena who conducted themselves in a bad manner on the 26 May 2016. The police were called to arrest Mr. Finger but said they could do so as he was sick. It was unfair for the Respondent to dismiss her for the two charges.

ANALYSIS OF EVIDENCE AND ARGUMENT

116. In terms of section 138(7) of the Labour Relations Act 66 of 1995 (as amended), I am required to issue an award with brief reasons, and what follows hereunder is a summary of the evidence and arguments that I regard as necessary to substantiate my findings and determination of the dispute. In my analysis I have considered all the evidence and closing arguments that have been presented to me by both parties.

The charges

117. The charges that led to the dismissal of the Applicant as set out at page 34 in Bundle “A” are as follows:

Charge 1

That you are allegedly guilty of misconduct in terms of the Disciplinary Code and Procedure in that on or around the 26th May 2016 you have while on duty conducted yourself in an improper, disgraceful and unacceptable manner when you instigated fights against your colleagues at Casualty treating members of the public with bad attitude while you were there accompanying a member of your family and you treated your colleagues with disrespect and making the working conditions unfavourable for them.

Charge 2

That you are allegedly guilty of misconduct in terms of the Disciplinary Code and Procedure in that on or around 08th November 2015 and 26th May 2016, you contravened the code of conduct of the Public Service paragraph C.4.4.9 (an employee executes his or her duties in a professional and competent manner) when you failed to execute your duties in a professional and competent manner, when you have been rude, disrespectful and making the working conditions unbearable to your colleagues in the presence of the patients.

118. The Applicant's main issues in terms of procedural fairness were narrowed at the commencement of the arbitration proceedings as follows: that the chairperson of the disciplinary was biased, that the outcome of the disciplinary hearing was not issued within the prescribed period of five (5) days and that the appeal process was not finalized within the prescribed period. The issues that were raised by the Applicant in respect of substantive fairness were as follows; that the Respondent was inconsistent in applying its disciplinary procedure and that the sanction of dismissal was too harsh.

Procedural fairness

119. The Respondent argued in its closing arguments that the following requirements for procedural fairness should be met, namely:

- An employer must inform the employee of allegations in a manner the employee can understand,
- The employee should be allowed reasonable time to prepare a response to the allegations,
- The employee must be given an opportunity to state his or her case during the proceedings,
- An employee has the right to be assisted by a shop steward or other employee during the proceedings,
- The employer must inform the employee of a decision regarding a disciplinary sanction, preferably in writing- in a manner that the employee can understand,
- The employer must give clear reasons for dismissing the employee, and

- The employer must keep records of disciplinary actions taken against each employee, stating the nature of misconduct, disciplinary action taken and the reasons for the disciplinary action.

120. The Respondent argued that procedural fairness was complied with all the above-mentioned elements during the disciplinary enquiry of the Applicant. In terms of Resolution 1 of 2003, the Appeal Authority did not comply with the 30 days as stipulated in the Collective Agreement, but the reason for same by the Appeal Authority for not holding the hearing in time was that the Members of the Executive Council were changed in the process. It was submitted by the Respondent that the Applicant was given an offer to take early retirement by the Member of the Executive Committee when it considered that the Applicant was about to be eligible for pension. The Respondent argued that the Applicant refused to accept pension route and because of the seriousness of the acts of misconduct involved, dismissal was confirmed.

121. The Applicant in its closing arguments submitted that Clause 7.3 of Resolution 1 of 2003 dictates that “the chair must communicate the final outcome of the hearing to the employee within 5 working days after the conclusion of the disciplinary hearing”. Mr. Mahoje for the Applicant further submitted that the last sitting of the disciplinary hearing was on the 17 August 2017 and parties submitted their Closing Arguments on the 25 August 2017 but no outcome was communicated to the Applicant. According to the Applicant she was only served with the dismissal letter not attaching the ruling or outcome of the disciplinary hearing on 25 October 2017 but dated 19 October 2017 as found at pages 32 and 33 in Bundle “A”.

122. It was the contention of the Applicant in its Closing Arguments that the procedural defects in so far as the disciplinary hearing were raised in her appeal application as found in page 29 of Bundle “A-1”. According to the Applicant she lodged her appeal application within the prescribed time-frame of five (5) days in line with paragraph 8.2 of Resolution 1 of 2003, but her application was not promptly attended to by the Respondent. The Applicant’s argument is that the Respondent therefore did not comply with established procedures as far as the disciplinary hearing and the appeal process were concerned.

123. The questions that come to my mind in so far as the abovementioned delays are as follows: did the Applicant during the arbitration proceedings adduce evidence to support her claim in this regard and whether she suffered any material prejudice as a result of same. The Applicant did not provide any evidence on issues relating to the delay relating to the issuing of the final disciplinary hearing report. In as much I note that there was a delay relating to the issuing the disciplinary hearing outcome report and the dismissal letter, I do not agree that same amounted to material procedural fairness defects. The Applicant did not suffer any financial prejudice within the Respondent as she continued her work without any hindrance or loss in salary and benefits. I would have been swayed to agree with the Applicant that the defects were material for instance if the Respondent would have either suspended her without pay or demoted after the finalization of the disciplinary hearing.

124. In the matter of *ECCAWUSA obo JAFTA v Russells Furnishers* [1998] 4 BALR 391 (CCMA) it was held that “the mere fact of a delay cannot in itself be fatal to the fairness of the employer’s actions, in the absence of any indication as to how and why that delay unfairly prejudiced an employee”. It is trite law that minor procedural lapses by an employer do not necessarily result in a procedurally unfair dismissal. It was the testimony of Ms. Machecha that she issued the outcome of the disciplinary hearing to the Head of Department of the Respondent timeously. I find the version of Ms. Machecha in this regard reliable.

125. The Applicant argued that the chairperson of the disciplinary hearing was biased in her assessment of the evidence that was presented to her. The biasness claim was stated to have been in favour of the Respondent’s version. The Applicant however could not identify in Bundle “A-4” (the disciplinary hearing report) areas where this alleged biasness could be identified. Ms. Machecha, the chairperson of the disciplinary hearing, wrote under paragraph 7 of the hearing report as found at page 14 in Bundle “A-4” that in “Charge 3, one recognizes the error as presented by the Employer’s Representative although I hold a strong opinion that the alleged charge was not entirely nor holistically based on the dates as mentioned on the charge itself, therefore I ruled that the date entered on the satisfaction surveys on the said dates cannot be used as a casting stone or peremptory towards rendering the charge null and void”. I

find that the fact that the chairperson elected to make a determination to exclude Charge 3 during the disciplinary hearing was a clear indication that she did not have biasness against the version of the Applicant.

126. The Applicant through Mr. Mahoje argued that Ms. Machecha was biased in coming to a decision to dismiss the Applicant. Ms. Machecha in her testimony submitted that she considered all the evidence that was presented during the disciplinary hearing. I must state that I do find fault on the grammatical errors that were identified by Mr. Mahoje in her disciplinary hearing report. Be that as this may, grammatical errors can only be equated as to what they are. Grammatical errors cannot be interpreted or viewed to mean that an author of a document has not applied his or her mind when that person presided over a disciplinary hearing. I expected the Applicant to prove this biasness claim during her testimony, but she did not do so.

127. In the matter of *NUFAWSA obo Matiti v Svencraft CC* [2006] JOL 18717 (BCFMI) it was held that a reasonable apprehension of bias arises when the chairman sits or presides over matters concerning himself or person with whom he associates; in matters in respect of which he has prior personal knowledge or experience; matters in which he has an interest in the outcome; or matters in which he has bias or an inclination in respect of the parties. I cannot find that the chairperson of the disciplinary had any interest in the outcome of the hearing, prior personal knowledge or experience to justify the allegation of biasness. It is worth mentioning that Ms. Machecha was seconded from the Free State Province's Department of Police, Roads and Transport to chair the hearing as confirmed at page 19 of Bundle "A-4", implying that she probably had no knowledge of the issues relating to the matter that she presided over.

128. I therefore find that the Applicant was afforded a fair process to present her version in a disciplinary hearing chaired by an independent person who was not linked to the Respondent. In so far as the delays relating to the issuing the disciplinary hearing report and the finalization of the Applicant's appeal application are concerned, I cannot find same to be material procedural errors for reasons mentioned above. I am satisfied that the Respondent has complied with the principles of procedural fairness that were outlined in the locus classicus decision of *Avril Elizabeth Home for the Mentally*

Handicapped v CCMA & Others [2006] 9 BLLR 833 [LC] where it was held that “the employer was merely required to conduct an investigation, give the employee or his representative an opportunity to respond to allegations after a reasonable period and thereafter to take a decision and give the employee notice thereof”.

129. I find the dismissal of the Applicant procedurally fair.

Substantive fairness

130. The Applicant’s testimony was that she did not conduct herself in an improper manner, that she not conduct herself in a disgraceful and unacceptable manner and that she did not instigate fights on the evening of the 26 May 2016. The Applicant however conceded that she was off duty on the 26 May 2016 but that she was at the hospital as she was in the company of the Finger family, who are her relatives. Mrs Finger testified that she telephoned the Applicant as she wanted her to accompany the family to Dr. Moroka Hospital as her husband had a blocked catheter.

131. It was the version of the Applicant that she found the Finger family outside the hospital leaving as they did not receive medical assistance from the nursing staff. The Applicant then advised them that she was going inside the hospital to find out what was happening and she later came out with a nurse who was pushing a wheel chair. The Applicant conceded that she went to Sister Siyale for assistance as she was not busy with a patient.

132. Sister Siyale testified that the Applicant used uttered words directed Dr. Tlale. Dr. Tlale testified that he did not see the Applicant on the 26 May 2016 but heard her saying “o sele doctor lo”. The Applicant denied uttering insulting words or acting in a manner that was disrespectful towards her colleagues on the 26 May 2016. Mrs. Finger, Mr. Finger Junior and Mr. Maduna testified that the Applicant did not act in a disrespectful manner.

133. Sister Siyale stated that the Applicant nearly slapped her as she was trying to telephone the police.

134. The Applicant conceded that she confronted Nurse Morena by asking her as to why she was telephoning the police. The version of the Applicant in so far as interfering with Nurse Morena and Sister Siyale is highly improbable if one considers the testimony of Ms. Siyale as recorded at page 5 in Bundle “A-4”. Paragraph 2 at page 5 in Bundle “A-4” reads as follows; “I saw the security coming in and I went to call the matron. Apparently, the security could not assist, I went into the office to make a call, as I went into the room, I found Me. Kwagile and Me. Morena. She was shouting at Me. Morena why is she calling the police as you are just new here. I continued making the call. Me. Kwagile turned towards me she then slapped me on my face and said what you are doing. I said I am calling the police, I went to reach for the phone, she grabbed it out of my hands and we struggled with the phone. I then out my cell phone and call the matron (Me. Motsumi)”.

135. The fact that the Applicant conceded under oath that she did confront Ms. Morena about calling the police is an admission that she was interfering with the work of her colleagues whilst “not on duty”. Who gave the Applicant the right to interfere on the decisions that were made by Sister Siyale and Nurse Morena in dealing with the incident involving Dr. Tlale and the Finger family? Did the Applicant’s (Finger) family deserve special attention just because they were with a Professional Nurse at the hospital? The Applicant argued that there was no (video) footage of what transpired between her and the nurses on the 26 May 2016. Be that as it may, absence of a footage cannot on its own be the only consideration as to whether or not she conducted herself in an unprofessional manner on the evening of the 26 May 2016. The testimony Ms. Jansen shed more light in this regard on how the Applicant conducted herself at work at times, as I will outline hereunder.

136. Ms. Jansen testified during her examination-in-chief that the Applicant “can be at times over-bearing”.

137. Ms. Jansen further stated during cross-examination that the Applicant’s “people skills have to be improved” and that “she is not rude all the time”. The testimony by Ms. Jansen clearly indicated to me that the allegations of misconduct as couched in Charge 1 are highly probable. In the event the Applicant did not concede that she

questioned Sister Siyale and Nurse Morena on how they were conducting their duties on the evening of the 26 May 2016, I would agree with her that she did not conduct herself in an unprofessional manner.

138. Mr. Finger Junior stated that she was informed by a nurse that his father was insulted by Dr. Tlale and that this made him angry. Dr. Tlale denied insulting Mr. Finger. Mr. Finger Junior and Mrs. Finger testified that Dr. Tlale kicked the latter “on the hip”. On the hand Mr. Maduna testified that Dr. Tlale kicked Mrs. Finger “under the rib”. Mr. Maduna stated that he was present when the altercation between Dr. Tlale and Mr. Finger ensued. In as much I am not a specialist in human anatomy, I do not agree that a hip is located under a rib in a human body. I therefore find the version of Mr. Maduna in so far as the alleged “assault of Mrs. Finger by Dr. Tlale” highly improbable and unreliable.

139. The Applicant’s version was that she was advocating for proper medical service on the evening of the 26 May 2016. I do agree with Applicant’s understanding of advocacy. In the event the Applicant was acting as a “medical services advocate” on the evening in question, it would have been a different scenario all together if she advocated for other patients as the Casualty Ward. I find that the Applicant’s main focus on the evening of the 26 May 2016 was to make sure that Mr. Finger received “preferential treatment at all costs”. On a balance of probabilities one can deduce from the evidence by Sister Siyale that the Applicant insulted her colleagues on the evening in question.

140. Nurse Litheko stated that there were two nurses, namely Nurses Mapote and Thutela who were once involved in a verbal altercation and they were issued with Final Written Warnings. The Applicant argued that the Respondent was not consistent in the application of its disciplinary procedures as those two nurses were not dismissed. In my view the Applicant failed to prove how the incident of the of the two nurses was “comparable” to her actions relating to Charge 1. In the matter of *ABSA Bank Ltd v Naidu & Others* [2015 36 ILJ 602 [LAC] the Court cautioned that although the element of consistency is an important factor to take into account in the determination of fairness in dismissal, it is only one of the factors to be taken into account in the process

and it is by no means decisive of the outcome. The Court further held that the fact that another employee has committed a similar transgression in the past and was not dismissed cannot and should not be regarded as a license to every other employee to commit very serious offence. The parity principle was never intended to promote or encourage anarchy in the workplace.

141. The Applicant did not challenge the version of the Respondent that she was an Acting Supervisor of the two nurses that were issued with Final Written Warnings. In the event the Applicant found their actions to be improper; what actions did she take? It was the testimony of the Applicant that an official known as Nurse Ncho was not dismissed for assaulting staff, but no other evidence was provided to give credence to this other claim of inconsistency again. In other words, the Applicant did not provide further particularities for its inconsistency claims. In the matter of *NUM obo Botsane v Anglo Platinum Mine* [2014] 35 ILJ 2406 [LAC] the Court held that as a matter of practice, a party, usually the aggrieved employee, who believes that a case of inconsistency can be argued ought, at the outset of the proceedings, to aver such an issue openly and unequivocally so that the employer is put in a proper and fair terms to address it. A general allegation is never good enough. A concrete allegation identifying who the persons are, why they were treated differently and the basis upon which they were treated differently must be set out clearly, introducing such an issue in an ambush-like fashion, or as an afterthought, does not serve to produce a fair adjudication process”.

142. The Applicant submitted that the sanction of dismissal was too harsh as she was innocent and that she was a good employee. Ms. Mokatsanyane and Ms. Eboh both testified how well the Applicant performed her duties. Ms. Mokatsanyane further submitted that she appointed the Applicant as Acting Operations Manager on numerous occasions. So, does it follow that an employer has “to look the other way” when a good performing employee has been found guilty of serious misconduct after a fairly conducted disciplinary hearing? Should a long serving employee be given a second chance when he or she has been found to be guilty of serious misconduct?

143. The principle in so far as appropriate sanction is concerned is that “the penalty must fit the offence” and that the employer must consider alternatives before electing to dismiss the employee. Ms. Machecha in her disciplinary hearing report wrote at page 16 in Bundle “A-4” that “Item 3(4) of the Code of Good Practice provides that generally it is not appropriate to dismiss an employee for a first offence except if the misconduct is serious and of such gravity that it makes a continued employment relationship intolerable must be judged objectively. The employee’s attitude to the misconduct and its effect on the relationship are factors, are amongst others, to be taken into account”.
144. Was it therefore fair for Ms. Machecha to recommend a sanction of dismissal for Charge 1 and for the Respondent to confirm same? Ms. Machecha stated in her disciplinary hearing report that the Applicant did not show any remorse during the proceedings. Ms. Machecha wrote in the report as found at page 17 in Bundle “A-4” that “all the way though the disciplinary hearing the employee maintained that she was not responsible for the misconduct and that it was premeditated. The employee’s conduct smacks and lack remorse. This makes it even more difficult to bestow some level of trust on the employee. Indeed, the employer has established on the balance of probability that the trust relationship between the parties has irretrievably broken down”. Ms. Mokatsanyane and Ms. Siyale also testified that they found the conduct unprofessional on the evening of the 26 May 2016.
145. The Applicant had approximately thirty-six (36) years as the time of the commission of the misconduct on the 26 May 2016. The Applicant was employed by the Respondent in a responsible position and she had acted as an Operations Manager on numerous occasions. I tend to agree with the version of Sister Siyale that the presence of the Applicant at the hospital made matters worse.
146. In the matter of *Rubric Consulting (Pty) Limited v Dixon & Others* JR 1972/14 [LC] (handed down on 4 May 2016) the Court held that “when determining the substantive fairness of a dismissal each case must be determined on its merits i.e. a certain type of misconduct may be more damning in one industry as opposed to another”. I find that the Applicant was employed in public health sector which is highly sensitive for

and who caters mainly for citizens who cannot afford private health care. In the event the Applicant had issues with how Dr. Tlale and the other nursing staff who provided “poor medical services”, she supposed to follow applicable procedures. I also hereby record that the Applicant’s claim that she was charged and dismissed by the Respondent for the incidents relating to the 26 May 2016 is far-fetched to say the least, as she did not provide any corroborating evidence to support this allegation.

147. I therefore find that the Respondent sanction of dismissal was substantively fair for all the reasons mentioned above and in accordance with Item 7 Schedule 8 of the Code of Good Practice: Dismissal in the Labour Relations Act 66 of 1995 (as amended).

AWARD

148. I find the dismissal of the Applicant by the Respondent procedurally and substantively fair.

149. The Applicant’s claim is dismissed.

150. I make no order as to costs.



THANDO NDLEBE