



ARBITRATION AWARD

Case No: **PSHS799-17/18**

Commissioner: **Catherine Willows**

Date of award: **18 August 2017**

In the matter between:

SAPSU obo M L MASHUMI

(Union/ Applicant)

and

DEPARTMENT OF HEALTH- EASTERN CAPE

(Respondent)

DETAILS OF HEARING AND REPRESENTATION

1. The matter was set down for arbitration at Frere Hospital Boardroom, Frere Hospital, East London, Eastern Cape on the 16th May 2017; 29th June 2017 and 8th August 2017.
2. The Applicant, Mr M L Mashumi attended the proceedings and was represented by Mr T Maheneza, an Official of SAPSU of which the Applicant is also a member.
3. The Respondent, Department of Health- Eastern Cape, was represented by Mr P Melane, a Manager within the Labour Relations Department of the Respondent.

4. The matter was finalised on the 8th August 2017 where after the parties agreed to submit their respective closing arguments by 17th August 2017. Closing submissions were received and have been utilised in consideration of this Award.
5. The proceedings were digitally recorded and hand-written notes are on hand.
6. Mrs N Jali provided interpretation services on 29 June 2017 and 8th August 2017.
7. Both parties submitted bundles of documents to be utilised in the presentation of their respective cases. These were articulated as “Applicant Bundle” and “Respondent Bundle”.

ISSUE TO BE DECIDED

8. The Applicant has referred a dispute to the Bargaining Council relating to unfair dismissal. I am required to determine whether the dismissal of the Applicant by the Respondent was substantively fair.
9. The issues were narrowed as follows: no procedural fairness was challenged. Substantive fairness was challenged on the basis whether the Applicant was guilty of the charges levelled against him.

BACKGROUND

10. The Applicant was employed by the Respondent from 4 February 1987 and at date of dismissal, being 15 July 2016, he was employed as Supervisor Medical Records, Frere Hospital, East London.
11. The Applicant was notified of charges of misconduct levelled against him on 18 February 2015. The charges were:

Charge 1: *It is alleged that you contravened the provisions of Annexure A of PSCBC Resolution 1 of 2003 and provisions of Code of Conduct in that on the 17th October you assaulted Ms Mantyi whilst she was in execution of her duties.*

Charge 2: *It is alleged that, on the 17th October 2014 at about 10:00AM you contravened PSCBC Resolution 1 of 2003 in that you assaulted Ms Mantyi in front of the patient while she was in execution of her duties, thus bringing the name of the institution into disrepute.*

Charge 3: *It is alleged on the 17th October 2014, you failed to make use of disciplinary processes and opted to violent action by assaulting Ms Mantyi,*

12. The Applicant was found guilty of the charges and subsequently dismissed on 15 July 2016 with denial of appeal process being issued on 9 October 2016.

SURVEY OF ARGUMENTS

13. Parties presented their positions their cases both verbally and in writing, the last submitted on the 8th August 2017. The below is a summary of what is contained in their submissions.

ARGUMENT FOR THE RESPONDENT

1st witness: Ms Ncumisa Mantyi

14. Ms Mantyi testified under oath that she is a Ward Clerk and had been so since 2007. The Applicant had been her supervisor from 1 October 2014 until his date of dismissal.

15. On the 17th October 2014, she arrived at work at 7:00AM and at 10:00AM she was doing her filing as per usual. The Applicant was on duty but he stepped out as he had some arrangement whereby he would take his girlfriend home. She was about to ask to go on “tea” but the Applicant asked to see her.

16. They walked to the lifts and when they were on their way there, a patient asked to see her but she explained that she was busy and would come back to her. The Applicant asked her what she was doing and when she asked him to explain, he stated all "*this up and down in the department*". She responded by saying "*how would you know you aren't here*".
17. The Applicant then raised his arm and hit her on her arm. She quickly moved away from him and raised up her hands in defence. She walked quickly away from him as she feared he would continue to hit her. She went back to the Medical Records office and stated that he had hit her as he had followed her back to the office.
18. She then went to the Labour Relations Department whereby she asked for a grievance form and completed it and submitted same on even date. She stated that she was afraid as she believed he would continue to hit her and that nothing similar had ever happened in the past between them.
19. Before the Applicant knew they were from the same "*clan*" he had proposed that they have a love affair. The witness stated that she did not point any fingers in his face and only raised her hands in defence.
20. In October 2016 whilst she was working night shift in the maternity ward, the Applicant came to see her and apologised for what he did and requested her to speak to Labour Relations about the incident. Under cross-examination, the witness stated that she had reported the Applicant's frequent "*disappearances*" from work to her supervisor, but heard that he had some arrangement that he was allowed to take his girlfriend home during working hours.
21. Her "*problem*" was that the Applicant was questioning her whereabouts and he wasn't present.

2nd witness: Ms Nomahlubi Tshevu

22. Ms Tshevu testified under oath that she resides in Cape Town and on the 17th October 2014 at about 10:00AM she visited Frere Hospital in order to obtain her medical records.
23. Reception had directed her to medical records on the 1st floor. On her way, there she had met the “*lady*” (Ms Mantyi) who had assisted her before and she requested her help again. She stated that she must wait as she was busy. Ms Mantyi was talking to a gentleman and they were standing by the window near the lifts.
24. Ms Mantyi had her back to her and the gentleman was facing her. She stated that it looked like they were in conflict as the gentleman was angry and he raised his arm and beat Ms Mantyi on her arm. Ms Mantyi raised her hands in defence and quickly moved away.
25. She stated, “*it looked like she was trying to defend herself*”. She furthermore stated that as per her observation, if she hadn’t moved away, he would have continued assaulting her. Both Ms Mantyi and the Applicant were wearing hospital uniform and this did not make her feel safe.
26. She stated, “*I saw him assaulting her, he cannot deny it*”. Under cross-examination, the witness confirmed that Ms Mantyi raised her arms in defence, trying to protect her face. She was shocked by what she saw and will never come back to the hospital again.
27. Ms Mantyi apologised to her for what she saw and the witness stated that when she attends to a hospital, she doesn’t expect to see a woman being beaten by her employer.
28. She did not care what they were talking about, and that the “*boetie was aggressive*”.

29. In closing, the Respondent's representative submitted that the Applicant had failed to utilise dispute resolution and grievance procedures available to him in dealing with Ms Mantyi and her alleged conduct.

30. It was furthermore motivated that as per the findings in **ECCAWUSA obo Nkosi & Another v Wimpy Kempston City (1988) 3 BALR 278 (CCMA)** and **ECPE 3125-05 NUMSA obo Hani v General Motors SA** "*assault by employees on their co-workers are regarded in a particular serious light, as the intention to repudiate the employer's authority at the workplace can be inferred*".

31. Based on such, the Respondent requested that the application of the Applicant in terms of unfair dismissal fails.

ARGUMENT FOR THE APPLICANT

1ST witness: Mr M L Mashumi

32. The Applicant stated under oath that on the 17th October 2014, in the morning, he called aside Ms Mantyi to try and reason with her about her conduct as she would often leave her section (the filing room) without informing him. He needed to "talk some sense into her" as there had been concerns raised from her colleagues.

33. On the morning of the 17th October 2014, Ms Mantyi had announced that she was going for a tea break, but she had not finished her filing from the day prior. The Applicant stated that as there were no offices in the filing room, he asked to speak to her outside in the passage as he felt such a place would be suitable. When he questioned her as to why she was not completing her work, she accused him of being unfair on her and not supporting her.

34. The Applicant stated that Ms Mantyi was shouting and pointing her finger at him, to which he responded by asking her to not do so as he was not standing far away from her. She then screamed "assault" and moved away from him.

35. The Applicant stated that he went back to the filing room and did not mention anything to his colleagues as he regarded it as a private discussion. He furthermore stated, and displayed such in the inspection in loco, that it would not have been possible for anyone to see have seen him and Ms Manyti's interaction in the passage way as there was a pillar blocking the view.
36. Under cross-examination, the witness strenuously denied assaulting Ms Mantyi and did not know why she would make such allegations about him or why she was supported by Ms Tshevu.
37. On the date of the incident he had reported Ms Manyti's behaviour to Ms Nxelewa, the Head of the General Administrative Department. After the internal disciplinary enquiry had been completed, he did attend to Frere Hospital and sought Ms Mantyi out to apologise to her "*for things getting out of hand*".
38. However, he stated that by apologising, it was not admitting guilt. In retrospect, he stated, he should have dealt with her unruly behaviour and sought the assistance of Labour Relations.
39. In closing, the Applicant's representative submitted that the Respondent's witnesses were "*drilled*" to a made-up version of the events of the 17th October 2014. Three conflicting versions emerged from the evidence of the Respondent's two witnesses which supported the allegation that Ms Mantyi was never assaulted.

ANALYSIS OF EVIDENCE AND ARGUMENT

40. The respondent bears the onus in terms of Section 192(2) of the Labour Relations Act 66 of 1995, as amended ("the Act"), to prove on balance of probabilities that the dismissal was effected with a fair procedure and a reason. The Applicant does not challenge the procedural fairness of his dismissal.
41. In determining the fairness of dismissal, I must consider item 7 of the Code of Good Practice on Dismissal. The Code states that an arbitrator must consider whether or

not the employee contravened a rule or standard regulating conduct in, or of relevance to the workplace; and if a rule or standard was contravened, whether or not the rule was a valid or reasonable rule or standard; the employee was aware, or could reasonably be expected to have been aware, of the rule or standard; the rule or standard has been consistently applied by the employer and dismissal was an appropriate sanction for the contravention of the rule or standard and the CCMA arbitration Guidelines.

42. The Respondent is therefore called upon to discharge the onus on balance of probabilities, in that; the dismissal was effected for a fair reason. In my view, in weighing the probabilities, one has to assess logic, sense and the context of the dispute in its entirety. If, therefore one cannot make a finding based on the above factors the credibility of the witnesses should enter the fray. It should be remembered that one cannot evaluate one aspect of evidence in isolation to the entire evidence.

43. In assessing evidence I will follow the principle laid down in **Hoffmann & Zeffertt: The South African Law of Evidence 4th Ed at page 562** comments as follows “*The degree of proof required by the civil standard is easier to express inwards than the criminal standard, because it involves a comparative rather than a quantitative test. On the whole it is not difficult to say one thing is more probably than another, although it may be impossible to say how much more probably. So the civil standard has been formulated by Lord Denning as follows: “it must carry a reasonable degree of probability but no so high as is required in the criminal case. If, the evidence is such that the tribunal ‘we think it is more probably than not;’ the burden is discharged, but if the probabilities are equal it is not”.*

44. The dispute of fact is whether or not the Applicant assaulted Ms Mantyi on the 17th October 2014. Ms Mantyi gave evidence as to interaction that she had with the Applicant whereby he struck her. This was corroborated by that of Ms Tshevu, who witnessed the incident. The Applicant, attempted in an inspection in loco to cast doubt on whether Ms Tshevu would have witnessed the incident as her view would have been blocked by a large cement pillar at the entrance to the passage way. What I

observed on the 8th August 2017 at such inspection, was that the passageway was at the entrance to the paediatric Ward and that it was as such, a busy part of the hospital. I was not convinced that the cement pillar would have obstructed any view. The Applicant, in converse to that of Ms Manyti and Ms Tshevu, testified that he never raised any hand to Ms Mantyi on the day in question, and that even though he had approached her later on after the completion of the internal disciplinary enquiry to apologise, such was not an admittance of any guilt on his part.

45. When a dispute of fact emerges, one assesses the credibility and cogency of the two competing witnesses' version of events.

46. The Guidelines provide a list of factors to consider when determining whether a witness is reliable (in item 56.2). The Labour Courts often refer to the following quote from **Stellenbosch Farmers Winery Group Ltd & another v Martell et Cie & others 2003 (1) SA 11 (SCA)** when setting out the proper approach to be adopted in making decisions on the facts of a matter -

“On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So, too, on a number of peripheral areas of dispute which may have a bearing on the probabilities? The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court’s finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness’ candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness’ reliability will depend, apart from the other factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities

she had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of the assessment of (a) (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be a rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail." (At paragraph 5).

Masilela v Leonard Dingler (Pty) Ltd (2004) 25 ILJ 544 (LC):

"The credibility of the witnesses and the probability and improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of the respondent's version, an investigation where questions of demeanour and impressions are measured against the contents of a witness' evidence, where the importance of any discrepancies or contradictions is assessed and where a particular story is tested against facts that cannot be disputed and against the inherent probabilities, so that at the end of the day one can say with conviction that one version is more probable and should be accepted, and that therefore the other version is false and may be rejected with safety".

47. In determining the probabilities, one assesses the probabilities and improbabilities of the version on the disputed facts and determines which is the more probable version overall.

48. Ms Tshevu was a particularly eloquent and convincing witness. Not only did she describe the incident in detail, but also of the effect of having witnessed a hospital employee assault a fellow female colleague had on her and her sense of safety in

such place. She corroborated the version of Ms Mantyi on all material aspects and I do not suspect either of having any other ulterior motive to give false evidence.

49. It is also important to note that I observed that Ms Mantyi is particularly small in stature, and her height and size is dwarfed by that of the Applicant.

50. The Applicant did not call any witnesses to substantiate his version of events, in particular that of Ms Nxelewa, the Head of the General Administrative Department, to whom he alleged he reported Ms Mantyi's behaviour on the day in question.

51. On a balance of probabilities, his version is not probable and I find that on the evidence led, he did indeed strike Ms Mantyi and assault her.

52. I consequently therefore find that there is no compelling evidence submitted to require me to interfere with the sanction of the Respondent as the actions of the Applicant were expressly prohibited and had a disastrous effect on public perception of the Hospital in which the incident took place.

53. In **De Beers Consolidated Mines Ltd V CCMA & Others (2000) 21 ILJ (LAC)** at 1058F –G it was stated "*Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a sensible operational response to risk management in the particular enterprise*".

54. Having considered the evidence before me I find on balance of probabilities that the respondent has discharged the onus that the dismissal of the applicant was for a fair reason. Consequently, the dismissal is substantively fair.

55. In the premise, I deem it reasonable to make the following award:

AWARD

56. I find that the dismissal of the Applicant, Mr M L Mashumi, by Department of Health-Eastern Cape, the Respondent, was substantively fair.

57. The application for unfair dismissal is hereby dismissed.

58. I make no order as to costs.

Signed:



Catherine Willows

Commissioner / Panelist