



**PHSDSBC**

PUBLIC HEALTH AND SOCIAL DEVELOPMENT  
SECTORAL BARGAINING COUNCIL

# ARBITRATION AWARD

Panellist: THUTHUZELA NDZOMBANE

Case No: PSHS853-16/17

Date of award: 04 October 2017

In the arbitration between:

**NEHAWU OBO EVA OTTO**

(Applicant)

and

**DEPARTMENT OF HEALTH-WESTERN CAPE**

(Respondent)

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## DETAILS OF HEARING AND REPRESENTATION

1. The arbitration hearing was scheduled for and heard on 08 March 2017 and 13 September 2017, under the auspices of the Public Health and Social Development Sectoral Bargaining Council at Radie Kotze Hospital in Piketberg. The applicant, Ms Eva Otto, was represented by a Union official, Mr Mzinyathi from NEHAWU. The respondent, Department of Health-Western Cape, was represented by a Senior Labour Relations Officer, Mr Mniki.
2. I proceeded with the matter in terms of Section 138(5) (b) (i) of the Labour Relations Act 66 of 1995, as amended ("the Act"). The proceedings were digitally recorded and typed notes were taken. Both parties submitted bundles of documents which are not in dispute and were admitted as they purport to be.
3. On 13 September 2017 the respondent submitted orally arguments in closing its case whilst the applicant requested to submit such on 19 September 2017. However, the

applicant's representative, Mr Mzinyathi requested an extension to submit the arguments on 25 September 2017 and such was duly granted and he had since dully complied.

## **BACKGROUND**

4. The applicant was employed by the respondent on 1 September 2009 as a Professional Nurse and she was placed at Radie Kotze Hospital. She earned a monthly salary of R23, 000.00 [twenty-three thousand rand] prior to her alleged unfair dismissal on 5 September 2016. According to her at the time of her dismissal she was a shop steward and there was no consultation done with the union prior to be charged. The charges were not served to the union as well.
5. At the disciplinary Mr Adams a shop steward asked for the postponement of the hearing because he was not prepared to proceed with the matter but the request was declined. On 5 September 2016 she received the outcome of the hearing whilst she was on leave. She was not allowed to present mitigating factors at the hearing. She denies that she assaulted a client in the hospital but she admitted having had an altercation with the client.
6. She was employed by the respondent for twenty years with a clean disciplinary record. Moreover; she has two children which are depended on her. If she succeeds with this dispute she requested to be retrospectively reinstated.
7. The respondent stated that the applicant was charged with the following misconducts:
  - a. *Charge 1: that you allegedly made yourself guilty of an act of misconduct as contained in Annexure "A" of the Disciplinary Code and Procedures for the Public Service Resolution 1 of 2003, in that you on 19 March 2016, while you were on duty, you assaulted a patient, Ms S. Jantjies when you hit her on the face.*
  - b. *Charge 2: that you allegedly made yourself guilty of an act of misconduct as contained in Annexure "A" of the Disciplinary Code and Procedures for the Public Service Resolution 1 of 2003, read with C.2.3 of the Code of Conduct for the Public Service, in that you on 19 March 2016, while on duty, brought the department in disrepute when you displayed disrespect towards a patient, Ms S. Jantjies, when you demonstrated improper behaviour towards her.*

8. The applicant was found guilty on these charges and the respondent views them in a very serious light hence the sanction of dismissal was meted out. The respondent believes that the dismissal was both procedurally and substantively fair.

### **ISSUE TO BE DECIDED**

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

### **SURVEY OF RESPONDENT'S EVIDENCE AND ARGUMENTS**

10. **Ms Sophia Jantjies** stated that her child was admitted in the hospital for a period of two weeks and she presented the following evidence under oath. Because of the admittance of her child she had a responsibility to stay in the hospital until her child was discharged. On 19 March 2016, in the morning, she breast-fed her child and thereafter she made her to sleep as part of the procedure. After that she went to children's ward to watch a television and she stood there at the door but watching the television. The applicant approached her and instructed her to express milk into a cup. Her response was that her child did not take the formula milk.
11. After that the applicant asked her as to how old she was. Her response was that she was 88 years old. She then decided to go to back to her child and sat there. To her surprise the applicant followed her who again asked her as to how old she was. She gave the same answer that she was 88 years old.
12. At that time Ms van Wyk who works for the hospital was busy cleaning inside the room where she sat. Without any notice the applicant slapped her on the left side of the face and she nearly fell over her baby. She cried loud and the applicant left the room. She went to the passage and made noise in that if she could find the applicant she would beat her up. Because she was upset she took her child and wanted to leave the hospital and to go to the police station to report the matter. However, Sister Van der Merwe stopped her and took away her baby. Ms Van der Merwe also pleaded with her to sit down and be calm.

13. It later transpired that the applicant had phoned the police and reported that she was abusing the baby. Upon the arrival of the police she wanted to explain to them but they did not give her a chance to do so. A social worker also arrived and she told him as to what had happened. The social worker informed her to go back to the ward and leave the applicant alone. She heeded the call and went back to the ward. After that she fetched her child from Sister Van der Merwe but she was still crying and unhappy about the incident.
14. Dr. Makhane discharged her in the afternoon but at that stage there was no public transport in the area. She had to go to the police station to ask for a lift to be taken to her house. At the time she was slapped by the applicant the doctor was not in the area. There were two people who observed her beating which were a woman and the cleaner. Although she was assaulted she did not try to fight back.
15. At the time of the incident she was 21 years old and her child was one month old. During her first week stay at the hospital she had a good relationship with everybody. Only this incident that had created a problem for her.
16. **Ms Marria Van Wyk** stated that she is employed by the respondent as a Cleaner and she presented the following evidence under oath. She has been with the hospital for a period of twenty-eight years. Prior to this incident she had a good relationship with the applicant. On 19 March 2016, in morning, the complainant and the applicant had an argument. This argument revolved around that the applicant was asking the complainant as to how old she was. The complainant's response was that she was 88 years old. Whilst she was busy cleaning in the room she saw the applicant slapping the complainant very hard on the face who nearly fell over the child. This incident shocked her and she decided to leave the room. In her 28 years with the respondent this type of incident never occurred. Another patient Ms Boois was present at the time of the incident but Dr. Makhane was not there.
17. **Ms Albertha Van der Merwe** stated that she is employed as Assistant Nurse and she presented the following evidence under oath. Prior to this incident she had a good relationship with the applicant. On 19 March 2016 the complainant came to the casualty section and she was a creaming, crying and shouting. She told her that she was slapped by the applicant. She saw the complainant's face was red. She took the baby away from

her because the complainant wanted to leave the hospital. It was clear that the complainant was upset.

18. To her surprise this incident was posted on Facebook and people were talking about it on the streets. The information might have gone out because there were people who were present and who witnessed the noise and crying of the complainant. The applicant's behaviour was unacceptable. No one is allowed to beat patients hence patients are always right. She works with old patients, pregnant women, casualty patients and as nurses they should have sympathy and empathy towards them. At one stage a patient grabbed her by her hair and another one clapped her but she never retaliated instead she continued to help them.
19. **Ms Maria Whittles** stated that she is employed by the respondent as a Manager for the Hospital and she presented the following evidence under oath. There is a two weeks work schedule which shows as to how personnel will work for a certain period. She was not aware that the applicant was a shop steward and this information was never communicated to her. The relationship between the management and the unions is that when a union elects a shop steward and such should be communicated to the management.
20. According to their records only Mr Adams was communicated to the management as a shop steward for NEHAWU. There are no minutes given to her to show when the applicant was elected as an extra shop steward at the institution. As the per work schedule on the day the applicant attended the union's meeting she was on her off days.
21. A patient in an institution has rights. The department has core values which are to care, responsible and respect for patients. One should be responsive and take initiative if there is problem and cry to find a solution. The patients' rights and their safety are of importance to them. The patients should be protected always whilst there are in the institution. There are psychiatric patients in the hospital which are difficulty but they cannot beat them.

22. A person who brings a child to the hospital cannot be treated differently to the child. The person gets admitted as well. The physical well-being of the complainant was not respected. According to reports and witnesses the applicant slapped the complainant. There is a written procedure if there is an incident they will investigate it but if the institution cannot handle it, it will be referred to the district. It is not acceptable to assault a person and it is not accepted to do so outside of the institution. This incident affected other employees negatively because it was not properly resolved by the applicant.
23. The applicant failed to display courtesy, empathy, dignity, tolerance towards the complainant. Nurses are given orientation and are to promote Bato Pele principles which cover the core values. All these values are within the laws and they work as a guideline. There are subordinate employees who reported to the applicant and how she would supervise them if she does not follow these values. The core ethical values are binding upon all employees. She cannot trust the applicant especially with psychiatric patients who are very difficult. Sometimes these patients would assault nurses as they do not know what they are doing. She believes that the sanction of dismissal towards the applicant was fair.
24. **Mr Zamayedwa Mbodlana** stated that he is employed by the respondent as Assistant Director in the District within the HR section and he presented the following evidence under oath. At the disciplinary hearing he was an initiator. There was no request made for the postponement of the hearing but however, Mr Adams mentioned that he was not prepared to proceed. Both parties were given an opportunity to present mitigating and aggravating factors which they did. On the day he received the outcome report of the hearing from the presiding officer he immediately emailed it to the applicant's representative, Mr Adams. Moreover, he also made phone calls to Ms Whittles to make sure that documents were printed and handed over to Mr Adams. He did not double check whether such was done. The notice to attend the hearing is a standard practice and all the rights are stipulated there. There was no evidence that the applicant was a shop steward hence the union was not consulted.

## **SURVEY OF APPLICANT'S EVIDENCE AND ARGUMENTS**

25. **Ms Eva Otto** stated that she is the applicant in this matter and she presented the following evidence under oath. She had a clean disciplinary record prior to this incident.

She denies that she assaulted the patient, Ms Jantjies on 19 March 2016. On that day, in the morning, Ms Jantjies was chaotic and assaulting everyone around her. Dr. Makhane wanted to discharge her from the hospital but the weight of the child was not right. Moreover, Dr. Makhane also wanted to show Ms Jantjies as to how to feed the baby with a cup.

26. She proceeded to look for her and she found her outside the building smoking. There was altercation between them as Ms Jantjies shouted at her and she also retaliated by shouting back. But, she is sorry about her retaliation because she does not conduct herself like that. She realized that she could not properly communicate with her because she was violent. However, she decided to call police and a social worker to speak to her because Ms Jantjies was neglecting the child. Upon the arrival of the police she reported the matter. At no stage Ms Jantjies told the police that she assaulted her.

27. The child did not have a “*stoeel*” for two days and the weight was not up to standard. In the afternoon Ms Jantjies was discharged because she was calm. The baby was the patient in the hospital and not the mother. She was worried about the baby because Ms Jantjies did not want to feed her. She gave her an advice as to how to breast feed the baby. As from 06h00 am on 19 March 2016 Ms Jantjies was shouting to everybody.

28. If a person breast feeds a baby lot of energy is used but if one feeds a baby with a cup the baby will just swallow it. At the time of the incident Ms Van Wyk was cleaning the room with her back against them and she was also singing. Dr. Makhane was standing in the passage across them. She just touched Ms Jantjies on the shoulder to make sure that she sat on the bed. Ms Jantjies screamed and clapped her hands and she demanded to go home. But, the baby was not ready to leave because the weight was not right. She is sorry that she shouted back at her and it is not her character to shout.

29. She did not receive the outcome of the disciplinary hearing as she became aware of such on 5 September 2016. She does not work for the shop steward instead she worked for the respondent. The respondent’s witnesses lied at these proceedings when they testified that she assaulted Ms Jantjies and had a red face. She maintained that she did not assault the client. Ms Jantjies was very violent and no one could talk to her. Ms Toontjies is very calm and very spiritual hence she went to call her. She is not on

Facebook hence she did not see the posting of this incident. She was provoked by Ms Jantjies when she said she was 80 years old.

30. She denies that she assaulted Ms Jantjies and she had a clean disciplinary record of twenty years. She is a single parent with two children. She stays at her parent place and she is unemployed.

31. **I will refer to cross-examination and closing arguments where necessary in my analysis.**

### **ANALYSIS OF EVIDENCE AND ARGUMENT**

32. 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 for a reason.

33. The applicant claims that she was a shop steward and her union was not consulted prior to her to be provided with the charges. In **BIFAWU & another V Mutual and Federal Insurance Company Ltd [2006] 2 BLLR 118 (LAC)**, *“the court considered the fact the employer had failed to consult with the union before taking disciplinary action against its shop steward. The court held that this would not automatically render a dismissal procedurally unfair as long as there is no prejudice suffered by the employee”*.

34. The applicant did not present any evidence that she was prejudiced by the non-consultation. I do not understand as to why the applicant did not provide the union with the charges if she wanted to be represented by a union official. Be that as it may she was represented by a shop steward at the hearing. The union failed to provide these proceedings with evidence that the applicant was elected as a shop steward and such was communicated to the respondent. On the second day of the arbitration sitting the applicant elected to abandon this issue.

35. I then turn to the issue as to whether the applicant was given the opportunity to present mitigating factors at the hearing. The minutes of the disciplinary hearing shows that the applicant was given the opportunity to submit mitigating factors and she had done so. Based on this evidence the applicant elected to abandon this issue as well.



36. It is common cause that the applicant's representative was served with the outcome of the disciplinary hearing. It does not make sense therefore that there is an argument that this was not done. As the matter stands it is clear to me that the outcome of the disciplinary hearing was served to the applicant's representative who had a duty to give them to the applicant. Failure by the applicant's representative to give the outcome of the hearing to the applicant such blame cannot be put on the door step of the respondent.
37. I then turn to the substantive dispute which 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.
38. It is not disputed that there is a rule governing assault in the respondent's establishment. Obviously, the rule is a reasonable one because it is meant to bring harmony in the workplace. There is no dispute that this rule is applied inconsistently. It is the applicant's case that she did not assault Ms Jantjies on 19 March 2016 instead she tapped her on the shoulder. The respondent therefore bears the onus to discharge it on balance of probabilities that the dismissal was for a fair reason.
39. In my view, in weighing the probabilities, one must 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.
40. I will therefore assess and determine this dispute based on these principles laid out in **Hoffmann & Zeffertt: The South African Law of Evidence 4<sup>th</sup> 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".*

41. It is common cause that the applicant was dismissed for assaulting one Ms Jantjies whose child was admitted in the hospital for a period of two weeks. It is the respondent's case therefore that the applicant assaulted Ms Jantjies but she refutes such allegations instead she proffered that she only tapped her on the shoulder. I am therefore required to determine whether the applicant had assaulted Ms Jantjies on 19 March 2016.

42. The difficulty about the applicant's case is that she never put this assertion to the respondent's witnesses that they were lying when they led evidence to the effect that she assaulted Ms Jantjies. Moreover, she never put to the witnesses that she only tapped Ms Jantjies on the shoulder as opposed to assaulting her. The applicant also failed to put to Ms Jantjies that she was aggressive and disruptive as from 06h00 am on the day in question. The applicant only brought this evidence for the first time in her evidence. It will be unfair of me if I were to consider this evidence because it was not put to the witnesses of the respondent in order to allow them to respond to it. By implication failure to do so has compromised her case.

43. It is common cause that the applicant and Ms Jantjies had altercation on the day in question regarding the feeding of the child. Obviously, the response of Ms Jantjies was sarcastic when she answered that she was 88 years old which was not the case. However, her actions cannot lead to her to be assaulted. I find it very interesting that the applicant did not report to Dr. Makhane or to the management that Ms Jantjies was abusing the child instead she elected to call the police and the social worker. One can only deduce in her actions that she wanted the police to arrest Ms Jantjies and the social worker to take away the child. If indeed this had happened this would have worked into her favour as the chances of Ms Jantjies reporting the matter to the management would be very slim. Unfortunately for her Ms Jantjies was not arrested and the hospital management had to intervene and deal with the matter accordingly.

44. I find the evidence of both Ms van Wyk and Ms Jantjies to be consistent, make sense and credible in the circumstances. The evidence shows that she slapped Ms Jantjies on

the face and she nearly fell over the child. This shows that the assault was severe as there was strong force used. This evidence is consistent with that of Ms Van der Merwe which shows that the other side of the face of Ms Jantjies was red. I find it difficult that both Ms van der Merwe and Ms van Wyk who had a good relationship with the applicant could come and lie against applicant knowingly that her employment security was in jeopardy.

45. The applicant's evidence is a mere denial and she did not provide any other evidence to rebut the respondent's case. For the above reasons I am convinced that the applicant assaulted Ms Jantjies on 19 March 2016. In **Telkom Ltd v CCMA & Others (JR1538/09) ZALCJHB 21**, "the court defined assault as an unlawful invasion of the person's physical integrity carried out without the person's consent or permission. The strength of the force used by the perpetrator is irrelevant".
46. Having considered the whole evidence I find on balance of probability that the applicant indeed had assaulted Ms Jantjies. In light of the Telkom's case supra it is immaterial and irrelevant as to the strength of force used. However, in this case, evidence shows that there was strong force used to slap Ms Jantjies as she nearly fell over the child.
47. I have also taken that the assault occurred in a public institution where people need to trust it for their safety. It is not disputed that the incident was posted on Facebook. Obviously, this has tarnished the name of the respondent. Ms Jantjies must contend with the fact that she has to attend this institution when she is sick and where she was assaulted.
48. The actions of the applicant were destructive in nature and had gone to the heart of the employment relationship. 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*".
49. I have also considered the mitigating factors which are outweighed by the aggravating circumstances. The mere fact that the applicant denies having assaulted Ms Jantjies also indicate that she is not prepared to own up to her actions. It is clear to me that she is not remorseful about her indiscretions and she is not willing to be rehabilitated. On the

evidence submitted before these proceedings there is no basis for me to interfere with sanction of dismissal meted out towards the applicant. Consequently, the applicant's dismissal was procedurally and substantively fair.

### **AWARD**

50. I find that the applicant's dismissal to be procedurally and substantially fair. The application is hereby dismissed.

A handwritten signature in black ink, enclosed in a faint rectangular box. The signature is stylized and appears to read 'Thuthuzela Ndzombane'.

**Panellist: Thuthuzela Ndzombane**  
**Sector: Public Health**