



**PHSDSBC**

PUBLIC HEALTH AND SOCIAL DEVELOPMENT  
SECTORAL BARGAINING COUNCIL

# ARBITRATION AWARD

Panellist: Queendy Gungubele

Case No: PSHS933-16/17

Date of award: 07 June 2018

In the matter between:

**NPSWU obo Ntombizakhe Yende**

(Union/ Applicant)

and

**Department of Health- Gauteng**

(Respondent)

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## BACKGROUND TO THE DISPUTE

1. This matter was part-heard 07 September 2017 and it was postponed to 21 September 2017. The matter resumed on 08 February 2018 and concluded on 07 May 2018 at Ban of Lisbon Building, Johannesburg. The parties have agreed to submit their Closing Arguments in writing within 7 days.
2. The applicant was represented by Mr Khaya S'busiso, whilst the respondent was represented by Mr Thabiso Maphunye, the Labour Relations Director

## **DETAILS OF HEARING AND PRESENTATION**

3. The applicant was employed by the respondent as a Cleaner and she was remunerated at R7 008.00 per month until her dismissal on 24 October 2016. She referred her dispute to the Bargaining Council on 19 October 2016.

## **ISSUE TO BE DECIDED**

4. Whether the dismissal of the applicant was procedurally and substantively fair and make the appropriate determination.

## **RESPONDENT'S CASE**

5. The respondent called Mr Adoons, the Deputy Director, Labour Relations, to testify and he said that he received written complaints against the applicant's conduct at work. He said that on 10 May 2016, he gave the letter of complaint to the applicant and advised her to make representations as to why she should not be charged based on the alleged misconducts within 5 working days but she never did. (See the said letter on page 3 of bundle Y). He said that they investigated the allegations against the applicant and prepared a charge sheet. They could not serve the applicant with that charge sheet on 24 June 2016, because they realized that she was absent from work without leave. They checked whether she had permission to be away from work and the Supervisor confirmed that she was not on authorized leave. He submitted that the applicant was supposed to be at work for the 7AM to 7PM day shift.
6. Mr Adoons said that it was evident that the applicant habitually absented herself from work without informing anyone and they decided to recall her salary from being paid on 30 June 2016, which was according to their internal practice that worked well for them to ensure that she came to work.
7. He argued that the applicant had no permission to be absent from work without permission and they recalled her salary because her case was not treated as a desertion. He said that the applicant, indeed, went to work on 30 June 2016 to inquire why she was not paid and he explained to her that she was reported to have

been absent from work without permission, as her Manager did not know her whereabouts. He told her that now that she was there, they had to give her the notice to attend a disciplinary hearing. He read out the charge sheet to her, informed her of her rights and asked her whether she understood the charges, whereupon the applicant replied yes but said that she would not sign. He said that Mr Dakalo was present when he wrote to indicate that the applicant refused to sign without stating any reason why.

8. Mr Adoons submitted that and they took the opportunity to give her the Notice informing her to attend a disciplinary hearing on 06 July 2017, which was 5 days prior to the hearing date.
9. Mr Adoons denied that the applicant discussed any need for a postponement with him when he issued the notice to attend a disciplinary hearing. He said that there was no verbal or written request or any agreement to postpone the hearing.
10. Mr Adoons argued, further, that if there were such an agreement, he would not have sent her a reminder via email on 05 July 2016 to the effect that she needed to attend the hearing on the set date. (See the email on page 5 of bundle Y ). Furthermore, they would have informed the chairperson of the hearing about any request for a postponement.
11. He added that the applicant was illegally absent from work by 24 June 2016 and the respondent's practice, at the time, was to recall such an employee's salary to induce her to go to work. He submitted that there were no prescripts, which obliged the employer to search for such an employee's whereabouts for being absent without permission.
12. He denied that he was aware of the allegation that the applicant went to work on 04 July 2016 to apply for leave.
13. The respondent called the second witness, Mr Mpho Molefe, the Operation Manager to testify and she said that she had a terrible and terrifying relationship with the applicant because she was rude and arrogant. She said that she became the night shift staff Supervisor and met the applicant for the first time when she went

to sign the duty roster, where after she left without informing anyone of her whereabouts. Sister Phiri found her sleeping upper panel, High Care ward at 20:00 PM. When she tried to wake her up, she refused and she called her. She found the applicant sleeping on the floor and when she woke her up, she asked Ms Mofokeng what she wanted, as she did not report to her. The applicant went on to say that she had the right to sleep for 7 hours.

14. Ms Mofokeng said that she unfortunately did not have a phone and rushed to get it but when she went back, she found the applicant on the chair. She called her to go and talk but she refused although she claimed that she was working for 12 hours.
15. Ms Mofokeng said that she called Ms Nhlabane, the hospital Night Coordinator who found the applicant sitting. She instructed her to sit in the Labour Ward where she would be visible for whenever they needed her services but the applicant said that she did not like “those people” and refused to go there. She said that the applicant’s conduct continued on numerous occasions and she even called the Cleaners’ Supervisor and Ms Hlathi but she continued not to listen to anyone.
16. She said that the applicant complained to Ms Van Rensburg that she did not like to be a Cleaner and she wanted to be a Clerk like before. She learned that the applicant had a clash with Ms Lefakane and Ms Phiri by refusing to clean the blood and saying that the former should do so themselves, as she would only go and disinfect the soiled area. She said that she was supposed to collaborate with other employees and inform them of her whereabouts while on duty but she was never a team player.
17. She also said that the applicant became disrespectful to the Operations Manager by using profane language and said who did she think she was? She added that she once beat up the Chief Matron.
18. She testified, further, that on 1 June 2017 she was in her office conducting the hand over to Sister Williams when the applicant walked in, signed and left the office without greeting them or uttering a word. Sister Williams called her, introduced herself and when she asked her who she was, she replied: “Cleaner”. She told her to inform her of her whereabouts, as the hospital needed Cleaners throughout the

night and the applicant said that she would be in a room behind the ward. Ms Molefe said that she mentioned the fact that the applicant always slept in the room she was going to and the latter went back screaming at her saying that she should never talk about her. The applicant added that the hospital was rotten due to people like Ms Molefe and said that she would “show her”. Ms Molefe said she told the applicant that she was a thief when she rudely asked her who did she think she was, pointing a finger at her demanding that she should not talk about her after she had spoken to Ms Williams.

19. The applicant reported Ms Molefe at the Labour Relations Office claiming that she called her a thief. She argued that the applicant was not paid by the hospital to sleep on duty and claim overtime because her conduct amounted to theft. When the Labour Relations Officer questioned the applicant, she conceded that she said that she had the right to sleep for 7 hours. She submitted that the applicant’s representative did not know the applicant well, as she was trying to be sweet at the arbitration.
20. Ms Molefe said that she wrote the statement regarding the applicant’s first 2 charges and that led to the applicant’s charges because she was her Supervisor for the night duty staff. However, she said she could not elaborate on how the charges were crafted because the Labour Relations Office was responsible for that.
21. She said that the applicant continued to sleep on duty since 1 November to 30 December 2016 at 22:00 to 04:00 AM, even after Ms Mhlabane reprimanded her. She added that if the applicant was only found sleeping for 1 day, they would have reprimanded her and given her the opportunity to improve. She averred that the applicant knew the truth about how she was stubborn when they tried to speak to her. She said that she continued to talk to the applicant who was obstinate and confrontational and had no alternative but to escalate the issue to her Senior, Ms Kgadimane. She said that her statement may not be having the exact dates on when she found the applicant sleeping, as she was also undergoing a very stressful period, owing to husband’s terminal illness. When she reported the applicant to Ms Kgadimane, she retaliated by reporting her to Labour Relations Office. However, she said she stood by what she had written, as it was common cause that it had

taken place. She submitted that her truthful statement could not be invalidated by the fact that she had omitted to write the dates.

22. Ms Molefe denied, further, that the applicant was only found sitting on a chair during her break. Ms Williams worked with the applicant as from January 2017. Ms Molefe confirmed that she heard the rumors and saw some pamphlets that referred to the applicant as a thief after she allegedly stole money from Boston.

23. Ms Molefe added that she first met the applicant on 7 October 2016 in ward 63, to her surprise, she had already left the ward by 11:45, and came back at 14:30. When she asked her where he as, she said: “what business do you have as I had a life outside ward 63?”. She said that she had her personal life to sort out during hospital time since she would report to HR, Labour Relations and Mrs Van Rensburg or even report sick and ask to go to a doctor. The applicant added that they did not know her, as she belonged to EFF and Ms Molefe told her that she should work in order to get paid.

24. Ms Molefe said that because she had a history with the applicant, she may not have recorded all the utterances in order to avoid her confrontational behaviour. She averred that Ms Mohlabane reprimanded the applicant on many occasions.

25. Ms Molefe also argued that the place that the applicant referred to as the Cleaners Room was for the cleaning utensils and not for her to sleep during working hours. She said that other Cleaners never used the same room but the applicant did as she pleased in defiance of everyone, including the seniors. She argued that the applicant knew the rules, as she personally inducted her on Ward 63. She said that employees worked for 12 hours, took 15 minutes tea breaks 1 full hour lunchtime whilst they as Nurses had not time to take breaks due to the pressure of work.

## **APPLICANT’S CASE**

26. The applicant called Mr Bafana Bas Mntambo, a General Worker to testify and he said that the applicant used to address them in meetings and represented them when their contracts ended. He said that as a woman, the applicant demonstrated

that she was a leader and prepared memos, conducted research and always be “on point”, in order to assist other dismissed employees who in turn offered to help her.

27. He said that the applicant was emotionally stressed when she ensured that they got reappointed and encouraged them to go back to school and to know the hospital policies in order to serve the hospital better.

28. He said that he attended one meeting where the applicant was sincerely apologetic and remorseful. When Malebo lodged a service delivery grievance and also recruited them to join the union, she always voiced out what she did not want. However, he said that he never saw the applicant’s grievance as **per** bundle Y”A”, but he thought that he knew what it was talking about. He later said that he could confirm that bundle Y”A” was the applicant’s grievance, as she used to share with them the knocks she received from HR, whilst she was not there to fight. She claimed them down when they dealt with one of the elderly contractors called Regina.

29. He said that Matron Mpho Molefe was aware of the grievance and the applicant pleaded for forgiveness when HR advised that there was no need to punish anyone, as both parties were willing to move on together. He added that the applicant was being misunderstood and they would ask for guidance from the matron and foster new relationships. He said that he was shocked to hear the rumors that the applicant was dismissed. He said that he heard about the grievance later and reiterated that he had never seen the grievance document before.

30. He submitted that he was never chosen to do what the applicant did and had nothing to do with the memorandum. He argued that although his name was not on the attendance register of the grievance meeting, the minutes thereof would confirm that he was present.

31. The applicant, Ms Nombizakhe Yende testified that she was dismissed, following the charges on page 8 of bundle Y. She said that she never pleaded guilty to all the charges and submitted that the respondent was unfair in dismissing her because she had no previous warnings and never committed any misconduct. Furthermore,

she was never given any chance to plead guilty or not guilty, as she was never given a chance to attend the hearing.

32. She added that she received the charge sheet on 30 June 2016 but was never given a chance to respond. She went to the office to explain her family problems and asked for the postponement of the disciplinary hearing. She said that she was not on duty on the day in question when she was given the notice to attend the hearing on 06 July 2016. She said that she refused to sign because she did not know the disciplinary procedures, which appeared like she was being dismissed.
33. She added that she knew that she would not be available on 06 July 2016 due to her continuous family problems, which caused her to ask Mr Volly Adoons to postpone the hearing date. She said that the lady who gave her the charge sheet called Volly when she refused to sign and she explained to the latter that she did not agree with the charges and that she would not be available on 06 June 2016, as her brother had passed away and they were under pressure. She added that she asked for more days of absence on 04 July 2016 by going to sign the Leave Forms in the company of a shop steward, after she realized that her salary was still frozen due to the fact that she had not signed the leave forms. She said that she was confused when she received the email on 05 July 2017, which she could not open the attachment despite the fact that Volly Adoons knew that she would not be available on 06 July 2016 and promised to communicate a new date.
34. The applicant said that she did not go to the hearing on 06 July 2016 because she did not know what happened there but the hearing carried on. She conceded that Volly stopped her salary to make her go to work, as her attendance at work was not consistent.
35. The applicant confirmed the fact that her salary was frozen, hence she went to inquire why she was not paid on 30 June 2016 while she had family problems. She stated that her Supervisor was aware that she was not going to work.
36. The applicant denied that Matron Mpho Molefe found her sleeping on duty because she only found her sitting on a chair elevating her legs like other employees did during tea time. When Ms Molefe found her sitting, she said: “hey wena EFF vuka,”

whereupon she replied that it was her lunch time. Ms Molefe shouted and called Sister Tlhabane who told her to go and sit at the CSI where she would be visible and she complied.

37. The applicant denied that she used to fall asleep on duty during November and December between 7 and 6AM. She never said that it was her right to sleep at work because she only sat and rested for lunch.
38. The applicant said she was truthful in her testimony and she volunteered to her Supervisor to work night shift after the latter indicated that there was a shortage. She conceded that her relationship with Ms Molefe was “not nice” despite the fact that she tried to respect her as her Supervisor. The latter was harassing her and she kept quiet but ended up having to lodge a grievance.
39. The applicant denied that she shouted, insulted, intimidated or threatened to assault her. The outcome of her grievance was to the effect that there would be peace and harmony, which caused her surprise when the accusations resurfaced after they have made peace.
40. She said that the grievance documents were incomplete, viz, the registers, the minutes and the letter that the applicant wrote to the Labour Relations Office about NEHAWU. She said that although Tumi, her witness, was present, his name did not appear anywhere in the submitted documents. She said that the formal grievance lodged against Ms Molefe was not complete on the first page and her treatment from her was only shown as a complaint. Tumi was also present when Ms Molefe said that there were placards around the hospital reflecting bad things about her and the NEHAWU marchers saying they did not want Yende, (the applicant) as they did not want EFF at the hospital.
41. The applicant said that Tumi was present at the grievance hearing where Labour Relations reconciled them but the documents were excluded for the bundle. Page 2 of bundle Y stated that Ms Molefe said that she stole the respondent’s money by claiming for 12 hours whilst she worked for 5 hours and slept for 7. She denied everything that was said above and argued that she preferred to keep quiet most

of the time lest she be accused of being disrespectful. She argued that someone else would have seen her if she were asleep and she always complained to her Supervisor called Thandi about Ms Molefe's ill treatment.

42. The applicant prayed that she be retrospectively reinstated because she had good relationships with the employees and had hopes of being a public servant for a long time. The applicant added that although she was currently employed at First Equity, she was prepared to serve notice because her loss of income with the respondent resulted in the lapsing of her policies, the accumulation of arrears on her accounts while her 66-year-old mother, brother and nephew depended on her income.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

43. It is the duty of the employer to prove that it had a fair reason to dismiss the applicant and that it had done so in accordance with a fair procedure.

## **PROCEDURAL FAIRNESS**

44. The disciplinary hearing was conducted in the applicant's absence after the applicant was issued with the notice to attend the hearing and given at least 5 days to prepare.

45. The applicant's testimony to the effect that she refused to sign because she did not know the procedures was not convincing because his witness, Mr Mngadi, was in pains takingly profiled her as someone who was empowering them with regards to being knowledgeable and being aware of the policies and procedures of the hospital.

46. There is no evidence that the applicant asked for a postponement of the disciplinary hearing, the details of which will be highlighted hereunder.

47. Mr Adoon's version to the effect that they afforded the applicant sufficient time to prepare was also probable because there is no evidence that the applicant raised the issue with regards to her inability to prepare for the disciplinary hearing.

Furthermore, she could have engaged the expertise of her union to advise her on how to respond to the charge sheet.

48. The hearing occurred while the applicant was fully aware that it would, because even after she went to apply for leave in addition to her days of unauthorized absence, Mr Adoons sent her an email to confirm that the disciplinary hearing would be proceeded with.
49. I am satisfied that the respondent followed the requisite procedures in so far as it had ensured that the disciplinary steps were not undertaken behind her back was concerned. Under the circumstances, the respondent also acted reasonably by inducing the applicant to avail herself at the workplace because although she failed to submit proof that she informed the employer of her whereabouts and the reason why she stayed away from work without authorized leave, the respondent applied tactics to ensure that she had the opportunity to know and respond to the charges. She decided to stay away from the process and the respondent had no alternative but to proceed with the hearing and dismissed her in absentia. Therefore, the dismissal was procedurally fair as the applicant knowingly opted not to challenge the charges against her.

## **SUBSTANTIVE FAIRNESS**

50. The applicant testified that she could not go to work regularly because she had family problems. However, she failed to highlight the nature of the problems she was experiencing save for alluding to the fact that her brother had passed away. She did not state as to what prevented her from obtaining a formal bereavement or family responsibility leave from the respondent in accordance with the internal procedures or the BCEA, which made provisions for any kind of leave she may have been in need of. Surprisingly, she expected the respondent to duly process and pay her full salary timeously and expeditiously so that she could continue with her unauthorized absence without any interruption? I am persuaded to believe that the respondent's method of temporarily recalling her salary was reasonable under the circumstances because there was no evidence that she would have shown up had she been paid on 30 June 2016. Her conduct justified and or validated the respondent's alleged practice of securing her presence at work.

51. I found it concerning that even when she went to ask about her non-payment, she persisted in her attitude that she was not there for anything else but for her money because she was not on duty. She allowed her personal problems to overshadow her duties and responsibilities as a Cleaner whilst she, on the other hand, expected the employer to perform its responsibilities towards her irrespective of whether she broke the Rule by being absent for more than 1 day without permission.
52. It is a startling concession on the part of the applicant that although she failed in her duty to inform the employer of her reason why she could not submit her labour to the hospital, she managed to abandon whatever kept her from work to go and demand her salary. Upon arrival, the applicant continued to refuse to co operate with the respondent in any way and endorsed her desire to stay away from work without permission. She even stated that she would not be available for the hearing, as she had family problems. She claimed that her Supervisor was aware but did not say why she elected not to ask her to attest to that crucial fact at the arbitration. Her assertion that the latter knew that she was not going to work did not automatically prove that her absence was authorized.
53. I found it absurd that on 04 July 2016, after she refused to accept the notice to attend the hearing, she decided to go and apply for further leave days in the company of a shop steward. It presupposes that she was aware that her leave may not be approved, which indicated that the applicant was not oblivious to the fact that she had acted in contravention of her duties and responsibilities as an employee. The applicant's later decision to apply for leave came as an afterthought in her bid to justify her decision not to attend the hearing on 06 July 2016. Her conduct begged the question why did she even bother to apply for leave on 04 July 2016 if she had indeed secured a postponement with Mr Adoons on 30 June 2016? The applicant knew or should have known that she was breaking the rule by not obtaining permission to be away from work, for whatever pressing reason she had.
54. On 05 July 2017, Mr Adoons pre-empted the possibility of the applicant's continued defiance and decided to email her a reminder that she was required to attend the hearing on 06 July 2016. The applicant's version to the effect that she could not access the attachment would not justify her absence from the hearing because

there was no evidence that she tried inquire about the contents thereof. Someone who received the charges that appeared to be a dismissal would have reasonably expected to suspend her family problems and consulted her union to assist her in defending her threat of dismissal by challenging the “apparent lies” against her good name. Alternatively, she could have appeared before the chairperson of the hearing and impress upon the panel that she had a postponement agreement, if indeed, it was so.

55. The applicant barely summed up the evidence of Ms Mofokeng as a lie. I found it to be highly unlikely that the latter would willy nilly fabricate her version about the applicant’s conduct. I found it probable that the applicant spent time in the room and did not appreciate when questioned about it. The applicant’s witness also stated that the applicant, though she fought on their behalf to secure their rights and interests, she was a strong and forthright person who always voiced out what she did not want. I found it difficult to believe that she would just keep quiet under any circumstances. It appears that she did not regard Ms Molefe as her Supervisor and even reported her to Thandi, who she operationally reported to. It is probable that she expected Ms Molefe to leave her alone when she lied down, slept or sat on the chair during working hours and challenged her authority, which evidently resulted in the bad blood between them. The applicant also aggravated her situation by inconsistently staying away from work without authorization.

56. Having taken cognizance of the whole conspectus of the evidence before me, I am satisfied, under the circumstances and on the balance of probabilities, that the respondent had a fair reason to dismiss the applicant.

## AWARD

57. The dismissal of the applicant, Ms Ntombizakhe Yende by the respondent, Department of Health, Gauteng, was procedurally and substantively fair.

58. This matter is dismissed.



**QUEENDY GUNGUBELE  
PHSDSBC ARBITRATOR**