



# ARBITRATION AWARD

Case No: **PSHS975-19/20**

Commissioner: **Maureen de Beer**

Date of award: **16 June 2020**

In the matter between:

**HOSPERSA obo Samuel Edward Coetzee**

(Union/ Applicant)

and

**Department of Health- Western Cape**

(Respondent)

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## **Details of hearing and representation**

1. This matter was arbitrated on 3 February 2020 and 8 June 2020 at the Western Cape College of Nursing in Athlone. The dispute concerned an alleged unfair dismissal based on misconduct.
2. The applicant in this matter, Mr. Samuel Edward Coetzee, was represented by Mr. Thobelani Sokhela of the Health and Other Services Personnel Trade Union of South Africa (HOSPERSA). The respondent, Department of Health-Western Cape, was represented by Mr. Mvuzo Ngqame from its legal services department.
3. The arbitration was held in English and was manually and digitally recorded.

## **Background**

4. The applicant was appointed as a food services supervisor in the main kitchen of Red Cross Children's Hospital. He was employed as of 5 October 2016 and earned a salary of R161 247.00 per annum. On 11 November 2019 the applicant was dismissed for removing state property from his work premises without permission on 8 September 2019. He received his unsuccessful appeal outcome on 18 November 2019 and referred an unfair dismissal dispute to the Public Health and Social Development Sectoral Bargaining Council (the PHSDSBC) on 22 November 2019. The matter remained unresolved at Conciliation on 9 December 2019.
5. The applicant denied that he was guilty of the allegations against him and that dismissal was inappropriate as a sanction. Procedural fairness was not disputed.

## **Issue to be decided**

6. I am required to decide whether the dismissal of the applicant was substantively fair. Should I find that his dismissal was unfair, I am required to award appropriate relief in favour of the applicant. The outcome desired by the applicant is that of reinstatement.

## **Survey of evidence**

### **The respondent's case**

7. Ms. Melanie Coetzee was the first witness to testify in support of the respondent's case. During her evidence she also commented video evidence submitted during arbitration. Coetzee was a food services manager and senior of the applicant. She testified that his notice to attend hearing reflected that he took a mop but that it was in fact two brooms. She was not aware that the applicant ever bought mops which he stored in the kitchen. It was never brought to her attention. When goods are brought into the hospital proof of purchase must be produced. The applicant never showed any slips of brooms to her. He submitted till slips of other items bought at Woolworths and MTN airtime. None of the slips contained any brooms. In the surveillance footage the applicant carried two brooms in his left hand as he and a security supervisor (known

as Mr. Bongani Williams) walked towards the parking area, from the mortuary side of the hospital. The brooms were different to the brooms used in the kitchen. The brooms used in the kitchen were blue, broader and longer than the ones carried by the applicant. The brooms which the applicant carried were part of stock the hospital received to evaluate. Cleaning companies will normally send stock to evaluate. The items are not sent back to the supplier and thus she assumed that it becomes the property of the institution. The applicant was not given the brooms to use in the kitchen.

8. The other items, alleged to have been removed, Coetzee identified on a trolley which was pushed out of the kitchen by Williams. Coetzee identified one 10kg packet of potatoes; a Busy Corner meat box; a 5kg box of hake fillets; 10kg maize meal; 10kg rice; packets of spaghetti; 1kg of cornflakes; and tins of Saldanha Pilchards. Coetzee identified that the documents on pages 26 to 34 of the respondent's bundles contained issue vouchers which are printed by the main provision store when they ordered goods during the time of the incident. The dates reflected on the documents were 27 August 2019 and 4 September 2019. She was able to identify the following in various quantities: 500g packets of spaghetti; 10kg packs of long grain white rice; 10kg packs of corn meal; and 1kg boxes of cornflakes. On another document (contained on page 35 of the respondent's bundle) 300kg potatoes were received from MFJ Foods (Pty) Ltd on 3 September 2019, along with other fruit and vegetable items. On 5 September 2019 40 5kg boxes fish (and other stock) were received from a supplier, Blaauwberg Meat Specialities.
9. Every day a supervisor will complete a excel spread sheet to indicate what they have used for the day. Coetzee found a number of discrepancies in respect of the stock items which were used. During cross-examination she also indicated that the supervisors will use bin cards to report movement of goods. She also confirmed that the bin cards, issue lists and spreadsheets are used to monitor the stock. On 27 August 2019 40kg of potatoes was left on the previous day; an entry was made of 40kg that was issued. The amount was not clear, as it reflected that a "3" was written in the place of the "4". The bin card then reflected that 10kg potatoes were then left. Coetzee indicated that it was incorrect because if 40kg was issued, the balance should have been zero. On 7 and 8 September 2019 the balances were also unclear for Coetzee.

During the time of the incident she found quite a few discrepancies. She gave examples. On 7 September 2019 30kg rice were issued in terms of the bin card. The issue list showed that 20kg rice was issued. The amounts must be the same. It appeared to her as if the figures were changed. For 8 September 2019 it was recorded that 8 cornflake boxes were issued but the bin card reflected that 9 were issued. The bin card and the issue list must reflect the same amounts. In cross-examination she admitted that she previously also picked up discrepancies but that staff will then prove to her what they have done.

10. Her further testimony was that she never saw Williams entering the kitchen with any items. It was also not possible for him to enter the kitchen with all the items. It was heavy items and a trolley would have been needed to convey it from his car to the kitchen. It did not make sense to her to carry items such as potatoes, oranges, maize meal, rice etc to the kitchen. It was non-perishable items, which he could have kept in his car. It also did not make sense to her that Williams would bring in goods which were similar to the products they used. In cross-examination she admitted that some of the items can be found in a normal grocery shop but not the goods such as the Busy Corner boxes. In re-examination she also said that the fish boxes will also not be sold in stores, as it is catering boxes. Williams was a security officer and not authorised to enter the kitchen. Williams was also not wearing uniform that day, which is required when they are on duty. She assumed that he was off duty that day.
11. Further in cross-examination it was also put to Coetzee that Williams most likely entered the kitchen from the back entrance with his goods. Coetzee disagreed and said that at that time it was already 18h30; that the back entrance was used to receive goods; that at that time no goods were delivered and that the back entrance was locked. Coetzee confirmed that she was not at work that day but that it is common practice that the back door is only used for goods to be delivered and that at the time the alleged incident took place supervisors would have locked it. It is a security risk to keep the back door open. 8 September 2019 was also a Sunday and no deliveries are done on that day. The gate should be closed.

12. The video footage showed Williams leaving the kitchen with several items on a trolley. He is then seen packing items in his car's boot and in the back passenger side of the vehicle. Williams returned the empty trolley to the kitchen. Williams and the applicant left the kitchen together subsequent to the applicant locking it. The applicant carried a carrier bag in his one hand and two brooms in his other hand. When the applicant and Williams arrived with the car at the security gate, the boot was checked and they left.
13. The second witness for the respondent was Sandra Cupido. At the time of the indecent she was appointed as assistant director for support services. Her duties included overseeing security, the kitchen, waste management, porters, cleaning contracts, telecommunication, etc. The alleged theft incident was reported to her and she then went to view the video footage. On the footage she saw Williams (who was the acting head of security) and the applicant coming out of the hospital and walking towards Williams' car. The applicant had two brooms in his possession and a plastic bag. Goods were then placed into Williams' car. She checked the footage as of 6h00 in the morning and was not able to find Williams entering the kitchen with any goods. She checked the footage on the front side of the kitchen and the back entrance. The items she saw were a bag of potatoes, maize meal, rice, two boxes and other items. She found it strange that Williams would store the items in the kitchen when he had an office of his own. It was further her evidence that the two brooms the applicant had in his hand was part of sample items given by the supply chain to use in the store for testing. Such items are the property of the hospital. She further said that when you bring items to the hospital, it must be declared. She once brought chairs onto the premises which she had on her bakkie. She had to declare it because she was going to bring those items back out of the facility again. She also said that there is a huge sign at the gate indicating that items must be declared. The security will also ask if you have goods to be declared. The Public Relations manager normally sends emails to familiarise staff with its policies. She was not able to verify whether the applicant received such emails. In cross-examination she conceded that she was not able to say whether those exact brooms (which were carried by the applicant) were issued by supply chain as samples. Cupido confirmed that for the purpose of the evidence against the applicant, only video evidence where the alleged incident took place which,

was used. She was not able to say whether the back footage was still available. The footage was too long to use everything.

14. The third witness for the respondent was Sherril Reijnders. She was a clinical procurement specialist at Red Cross Hospital. She dealt with tenders and contracts. Samples are normally received which are issued to supervisors to evaluate. Once the evaluations are finished, opened or used samples are not sent back to suppliers. Mostly unopened and unused samples are sent back to suppliers. She was shown a picture where the applicant left the building with 2 brooms on 8 September 2019. She indicated that the brooms could be samples due to the manner in which the clear plastic bags were wrapped on top. They would normally insert an evaluation sheet in the plastic bag for the assessment of the item. She confirmed that brooms were issued to the applicant to evaluate. She was not able to say which supplier provided the brooms which were seen in the possession of the applicant (on the picture/ footage). She was also not able to confirm whether the specific brooms belonged to the hospital.

### **The applicant's case**

15. The applicant was the only witness to testify in support of his case. It was his evidence that he never removed any unauthorised items from the premises of the respondent. He indicated that on the day of the alleged incident and as per the video footage, he was carrying his shopping bag from Woolworths and two brooms which he purchased the day before from a vendor. According to his knowledge it was never required to report any items brought into the hospital. Security will normally search people to see whether they have goods in their possession which does not belong to them, when they leave the premises. At the pedestrian gate your person gets search but if you drive out, your car gets searched. In cross-examination he said that when you enter the premises security will just look into your bag. No sticker is placed on the items. There is no declaration procedure. In re-examination he said that to him declaring of an item means that you have shown the items to security. When he entered the premises with his brooms the security said that it was fine that he could go in. The vendors do not give proof of purchase. He bought the brooms the previous day. He was then not able to take it home because he had other items he bought from Shoprite.

16. It was his assumption that Williams entered the kitchen through the back. When he entered the kitchen Williams already stood there with a box he was busy tearing. He described the box as a brown box and illustrated it to be about 60cm x 60cm in size. The box had various items in. Some of the items were hanging out and the heavier ones were on the bottom. Williams asked him for a trolley which he gave him. He then unpacked the goods. He saw oranges and a bag of cooked chicken. The applicant then went to lock the back entrance door. When he returned he saw maize meal and potatoes. He then pushed the trolley out of the kitchen. Food is kept in the storage area and according to the applicant he manages it when he is on duty. At the time he saw Williams it was already after 17h00 and the storage area was locked. The key is placed in an envelope which he leaves in a drawer for the staff of the next day. In his conversation with Williams he told him that he needed a trolley to take the goods to his car. He did not ask him where he got the goods from. His area was already locked. He thought that it was not his business to ask him where he got the goods from. In cross-examination he said that it only occurred to him subsequently that he should have asked Williams where he got the items from.

17. He identified the goods as contained in the respondent's bundle in pages 15 – 22 (where clear pictures were illustrated of the alleged goods on the trolley). According to the applicant those pictures were taken in the storage area, where the items are stored. He gave evidence of where the specific items are stored in the storage area. He further testified that security officers are allowed in the kitchen. It will normally be for inspection purposes and the security officers will do checks when an alarm goes off.

18. He further testified that the day of the alleged incident he failed to write up the rice on the issue document for the food of the mothers. He further said that it was tradition at Red Cross Hospital that mothers will get a breyani meal on a Sunday. He issued all the other ingredients for that meal (curry, garlic, ginger, green peppers, lentils, mixed herbs and turmeric). His colleagues normally check stock the following day. Where an item was issued and not written up, he will be asked to write it up and rectify it. It is normally not an issue when stock issued are not written up. They just remind each other to write it up and sign it off. The applicant said that he made an error on the bin



card of 7 and 8 September 2019 when he forgot to write in the amount of potatoes issued. In terms of the bin card document for rice, 180kg of rice was received on 5 September 2019; 20kg was issued on that same day and the balance was 160kg. The following day 20kg was issued and 140kg was left. On 7 September 2020 30kg was issued and the balance reflected 140. On 8 September 2019 20kg was issued and the balance showed 90kg. He confirmed that certain numbers were changed on the document. In cross-examination the applicant was asked why there were three occasions on the document where the amounts were changed. The applicant said that he did not know and that it was his colleague (Francina) who wrote there. It was pointed out to the applicant that he never signed on the required spaces on the bin card of 7 and 8 September 2019 (where the amounts issued and balances were recorded). The applicant said that the completed sections were not his handwriting. He sometimes makes an error by failing to write things on. It seemed to him that the amounts which was reflected and amended for 7 and 8 September 2019 were written by someone else and not him. He gave the amounts to his colleague to fill in but he never got around signing it. He admitted that it sounded strange that on the day he forgot to sign similar goods were found on Williams. Why was crossed-questioned to explain why he never wrote down rice that was issued to the mothers on the 8 September 2019 (on the issue sheet). He said that his answer was the same as before, he did not deliberately fail to sign. It was put to him that he did that to conceal his actions, as the items were exactly the same as those in the trolley of Williams. His reply was that only some of the items were the same. He further testified that the potatoes that were on the trolley of Williams were not the same potatoes they used in the kitchen (as per the footage). It was pointed out that this was never put to the witnesses of the respondent. He answered that gave his notes to his representative. His representative determines the questions he wants to ask. He confirmed that the maize meal on the trolley was the same as what was used on the kitchen. There was a box which looked the same as the beef cube box but it could have been viennas as well. He saw a box of cornflakes but did not see the pilchards.

19. It was further put to him that the video evidence showed that Williams came in and out of the kitchen. The applicant said that he was there to speak to a food service aid. He was only later seen with Williams because he gave him an opportunity home. The



footage showed that the boot was searched by security. Should they have seen something suspicious they would have stopped them. The applicant confirmed that he was disciplined for a charge of theft in 2015. He however insisted that the never issued the goods to Williams which he had in his possession. The storage was already closed and the keys were deposited.

20. The respondent argued that it proved on a balance of probabilities that the applicant was guilty of misconduct and that dismissal was appropriate as a sanction. It was argued on behalf of the applicant that the respondent's case was based on speculation. There was no proof that the items on the trolley belonged to the respondent. It was also argued that there was no conclusive evidence that the goods were removed from the kitchen. The respondent failed to properly prove how many stock it had, how many was used and how many was in its store room. The applicant was unfairly dismissed and must be reinstated.

### **Analysis of evidence and arguments**

21. In the Labour Relations Act 66 of 1995, as amended (the LRA), Item 7 in Schedule 8: Code of Good of Good Practice, Dismissal (the Code), gives guidance in respect of the reasons relating to dismissal and indicates that any person who is determining whether a dismissal for misconduct is unfair, should consider:

- (i) Whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and
- (ii) If a rule or standard was contravened, whether or not-
  - (a) The rule was valid or reasonable;
  - (b) The employee was aware, or could reasonably be expected to have been aware, of the rule or standard;
  - (c) The rule or standard has been consistently applied by the employer; and
  - (d) Dismissal was an appropriate sanction for the contravention of the rule or standard.

22. The applicant was dismissed for removing state property without permission. There were two types of property which the respondent alleged the applicant took without authorisation. It was firstly alleged that he took two brooms and secondly that he removed food products/ or items with Bongani Williams, who was a security officer employed at the hospital.
23. It is stipulated in section 188 of the LRA that a dismissal relating to conduct or capacity is unfair, if the employer fails to prove that the reason for dismissal is fair. The applicant disputed that the items were the property of the respondent. It was testified by the applicant that the brooms was his property and that the food items was the property of Williams.
24. In respect of the brooms it was the evidence of Coetzee that the applicant never told her that he bought brooms. He also failed to show her any proof of purchase for the brooms. She said that the brooms were samples given by to the hospital and thus the property of the hospital. Cupido also testified that the brooms she saw in the applicant's possession were supplied by supply chain for testing and the property of the hospital. In cross-examination she however said that she was not sure whether those brooms were part of the samples issued. Cupido further said that goods must be declared. She assumed the applicant was aware of the policy because there was a large notice at the security entrance emails sent by the public relations manager. Reijnders said that the brooms could have been samples due to the manner in which the plastic was wrapped on the top of the brooms. She was not able to say whether the specific brooms in the footage belonged to the hospital. The applicant denied that there was a policy to declare goods. He however indicated that he showed the brooms to security the previous day. It is the onus of the respondent to prove that the brooms were the property of hospital. Two of the respondent's witnesses indicated that they were not able to say whether the brooms were in fact samples and/ or the property of the hospital. Taking into account the reliability of the witnesses and the possibility that the brooms could have been the property of the applicant, I am satisfied that the respondent was not able to prove that the brooms were the property of the hospital.

The applicant has thus not committed misconduct when he took the two brooms home on 8 September 2019.

25. In respect of the food items alleged to have been the property of the hospital, it appears as if the evidence of the respondent was circumstantial evidence. In *Komape v Spoornet (Pty) Ltd and Others* [2008] ZALC 72 the court held that in assessing circumstantial evidence one should always consider the cumulative effect of all the items of evidence before you. In assessing the inference to be drawn from the facts, one should look at the totality of the evidence and weigh it on a balance of probabilities. The inference must be through a careful survey of the connection between the facts and their relationship to the offense alleged to have been committed.
26. In assessing the evidence, Coetzee identified the following goods on the trolley which was pushed by Williams: a pocket of potatoes; a busy corner meat box; a box of hake fillets; a 10kg pack of maize meal; a 10kg pack of rice; packets of spaghetti; a 1kg box of cornflakes; and tins of Saldanha Pilchards. At one point she also mentioned oranges. She also testified that the same items were received as stock during the time of the incident at the hospital. The applicant's evidence was that he only saw maize meal, cornflakes, a meat box, cooked chicken, oranges and a different pocket of potatoes from what was used in the kitchen. The applicant also said that the meat box did not necessarily have meat in it and that it could also have been viennas. The latter, the cooked chicken and different pocket of potatoes was never mentioned to the respondent's witnesses during cross-examination. Coetzee also picked up stock discrepancies on 7 and 8 September 2019 in respect of the documents used to capture stock which was issued and used. These discrepancies were in respect of potatoes, rice and cornflakes. According to the applicant mistakes are common in their department. Staff will normally remind each other to rectify mistakes. He further indicated that he forgot to write up the rice he used and issued that Sunday but that he wrote up all the other ingredients. Coetzee also pointed out a few amounts/ or quantities which were changed. The applicant said that he never made those changes and that it was not his handwriting. Coetzee, as well as Cupido indicated that they viewed the video evidence. Neither of them saw Williams entering the kitchen with any goods. Coetzee indicated that Williams would have needed a trolley to push all those

stock into the kitchen. It was heavy items. It did not make sense to her that he would want to store the non-perishable goods in the kitchen (which had the same items). Cupido also found it strange that he would want to store his goods in the kitchen when he had his own office. Coetzee confirmed that some items can be found in a normal shop but not the larger items such as the meat and fish boxes. Cupido also testified that she viewed the footage of that entire day in respect of the front and back entrances of the kitchen. She never saw Williams entering the kitchen via the back entrance. She thus only submitted the footage which was of relevance. The applicant testified that it was a possibility that Williams entered through the back. When he saw him; he was already in the kitchen with his goods. Coetzee said that it was not possible that Williams could have entered through the back, as that entrance was used for delivery of goods and that on Sundays there were no deliveries. This was not disputed by the applicant. The applicant also failed to dispute that Williams was not wearing his required uniform that day. The applicant indicated that it was not his business to question the goods Williams had with him. He gave him the trolley upon his request.

27. There has been no evidence to suggest that Williams brought his own goods into the kitchen. The applicant could not with certainty say that Williams entered from the back. Based on evidence it was also improbable that he used the back entrance. Two witnesses confirmed that there was no need for him to bring his goods into the kitchen. His car was in the parking area and he had his own office. There were so many items on the trolley. It was thus impossible that all those items would have fitted in the box as described by the applicant during his evidence. Williams had the same items in his possession as that which is used in the kitchen. Why would the applicant not question Williams about it? He was in a senior position and it would have been expected of him to do so. The applicant's case was that the goods belonged to Williams. He failed to call Williams to testify. The respondent made out a prima facie case that the items on the trolley of Williams were in fact the property of the hospital. In *Tshishonga v Minister of Justice and Constitutional Development and another* (2007) 28 ILJ 196 (LC) the court said that an adverse inference must be drawn if a party fails to testify or place evidence of a witness who is available and able to elucidate the fact as this failure leads naturally to the inference that he fears that such evidence will expose facts unfavourable to him or may even damage his case. Weighing up the evidence as a

whole I am satisfied that the only inference I can draw is that the goods or food items which was on the trolley pushed by Williams came from the kitchen. The goods thus belonged to the Red Cross Children's Hospital. The applicant was aware that Williams was in possession of this property. He gave him a trolley to transfer the goods from the kitchen to his car. He also drove with him in his car. The applicant has acted in concert with Williams and has thus made him guilty of removing state property without permission. I note from the footage that the security checked the boot. It is possible that he failed to do a proper check. He also did not check inside the car, as Williams also placed items inside his car and not just the boot.

28. The only substantive issues which were disputed was the fact that the applicant did not contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and dismissal was not an appropriate sanction for the contravention of the rule or standard.

29. I have considered that fact that the applicant was employed for a period of three years, which was a short period. His conduct amounted to dishonesty; was serious and detrimental to the employment - relationship. The applicant was in a position of trust and colluded with a security official who was supposed to protect the property of the hospital. Based on the latter I am satisfied that dismissal was an appropriate sanction. The applicant's dismissal was substantively fair.

## **Award**

30. The dismissal of the applicant, Mr. Samuel Edward Coetzee, was substantively fair.

31. The applicant's claim of unfair dismissal is hereby dismissed.

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**Commissioner Maureen De Beer**