



ARBITRATION AWARD

Case no: **PSHS638-22/23**

Commissioner: **Isaiah Nyathi**

Date of award: **08 March 2023**

In the matter between:

NEHAWU OBO MABUSELA MALOSE RICHARD

Applicant

and

DEPARTMENT OF HEALTH- LIMPOPO

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. This arbitration was held on the 16th February 2023 and 03rd March 2023 at Mokopane Hospital, Limpopo Province.
2. The Applicant was represented by Freddy Chilidzi Phupheli, an official of NEHAWU.
3. The Respondent was represented by Moses Ramafasi, an official of the Respondent.
4. The interpreter was Seanatso Riba.
5. The proceedings were held in English and recorded.

BACKGROUND TO THE ISSUES

6. The Applicant was employed on 01 January 2011 as an Assistant Nurse and earning a salary of R13 664-25.
7. The Applicant was dismissed on 29 October 2020.
8. The Applicant was facing misconduct based on an allegation of assault in that on or about 23 April 2022, or any date incidental thereto, at or near Mokopane Regional Hospital, he assaulted Mr Ben Bonoko (Patient) at male ward, and whilst he knew or ought to have known that it was unlawful to do so.
9. The Applicant is challenging the substantive fairness of his dismissal.
10. The Applicant submitted bundle A and the Respondent submitted bundle B.
11. The Applicant prayed for reinstatement.

ISSUE TO BE DECIDED

12. The existence of the dismissals was not in dispute, the substantive fairness of the dismissals was in dispute. I am therefore required to determine whether the Applicant was guilty of the alleged misconduct, if not so, to determine the appropriate relief thereof.

THE RESPONDENT'S CASE

TEBOGO MATHOME MAGALE was sworn in and testified under oath as follows:

13. She testified that she works at Mokopane Hospital. On 01 January 2022, she was a medical intern.
14. She referred to bundle B, page 26, which contained a death certificate for one Bonoko Ben, identity number 4302085324081, the deceased was one of the patients which she went to see during her call sometime time in 2022.
15. When she arrived at the patient's bed, she noticed some frozen blood on the beard of the patient. She asked him what happened, and the patient told her he was beaten up by a male employee in the ward and poured with cold water. The patient appeared to be very agitated and angry.
16. She examined the patient further and noticed that his nasal breach was swollen and there was evidence of bleeding. That was the only time she managed to see him as a patient.

MPHO JOHN MOHLALA was sworn in and testified under oath as follows:

17. He testified that he knows the Applicant, he saw him whilst he was in the ward where he was a patient. He also knew the name of the deceased but not in person.
18. Further testified that he knew the Applicant was in the ward where the deceased patient was and that he was taking care of the patient.
19. He testified that something unusual happened in that ward whilst he was asleep in the early hours of the morning. He heard the sound “thwa” and he saw that the Applicant had slapped the patient with an open hand. Whilst this was happening, they were busy changing the patient’s nappy.
20. . At the time he was admitted as he had a fractured hand and leg. He was very uncomfortable because the patient was an elder.
21. NB: under cross examination, the Witness disclosed new evidence, that the Applicant had slapped the deceased for the second time and further stated that a lot of Witnesses who were in the ward witnessed that because the screen was not put up. He also mentioned that he saw blood coming from the deceased.
22. The Respondent closed its case.

THE APPLICANT’S CASE

MABUSELA MALOSE RICHARD testified under oath as follows:

23. The Witness testified that he was bathing a patient and after he knocked off, he received a phone call which notified him that there were allegations against him that he had assaulted a patient. It was after 7pm and he was asleep.
24. He further testified that, on the day of the incident, he went to work between 04H00 am to 06H00 am.
25. Whenever he bathes patients, he takes his utensils, bathing towels, sheets, bath water and also pulled the screen for privacy.
26. He indicated that, the person who called him and told him of this allegation was one Motlhatho, who is now deceased and was the supervisor.
27. He further testified that he was surprised as on that day, as he was bathing the patient, he discovered that he had a bleeding nose and he cleaned it.

28. He denied having slapped or assaulted the deceased.

ANALYSIS OF EVIDENCE AND ARGUMENTS

29. Section 192 of the Act provides that:

1. ***In any proceedings concerning any dismissal, the employee must establish the evidence of the dismissal. The existence of the dismissal in this matter is in dispute in that it is the Respondent's case that the Applicant was not dismissed but the contract ran out by effluxion of time.***
2. ***The onus therefore is upon the Applicant to prove the existence of the dismissal.***

30. In ***Stellenbosch farmers Winery Group & Another v Martell KieSA & Others (2003) (1) SA 11 (SCA)*** the court held that where a commissioner is faced with two conflicting versions before him, the commissioner must make a finding on the credibility of witnesses and on the probabilities of the two versions, to determine where the truth lies. The question that should be answered is whether the probabilities favour the party that bears the onus of proof. The court further held that the credibility of a witness is in an extricable manner bound to the consideration of the probabilities of the case. Therefore, the arbitrator should resort to credibility where the possibilities fail to point to which version embraces the truth more.

31. It is incumbent upon me to immediately deal with the fundamental issues, i.e the Respondent's case, which was premised on two witnesses, the first being Doctor Tebogo Mathome Magale and which can be summarized as follows:- She informed the proceedings that the deceased had informed her that he was assaulted with fists by an employee of the Respondent, and further that she observed blood on his beard and his nasal breach was bloody.

32. What is fundamental about this testimony is that the Witness did not implicate the Applicant, neither did the Witness say the deceased referred to the Applicant.

33. The Respondent further called one Mpho John Mohlala, who under oath, stated that he heard a "thwa" sound and saw the Applicant had slapped the elderly person with an open hand. He further testified that the Applicant was with another person, changing the deceased napkin/pampers. He concluded by saying he felt uncomfortable because he felt the deceased was an elder person.

34. The evidence of the first Witness is obviously hearsay evidence, and ordinarily, should be excluded, unless if I am of the opinion that it should be admitted, in the interests of justice, as per averments of our case law.
35. According to this witness, the information she obtained was that the deceased was assaulted with fists. We do not have any evidence to point out who might have assaulted the deceased, because no one was implicated.
36. Even If one were to attach any weight to the evidence, it appears that it will not be helpful in that, one will not know what purpose it will serve because it points to no one. No one was implicated in that regard. The statement that the deceased said he was assaulted by an employee of the Respondent is not sufficient, it could refer to any person.
37. No attempt was made, either by the initiator, or anyone, to clarify or place any relevance of the evidence.
38. I am satisfied that such evidence has got no material relevance or effect to these proceedings and it is best left ignored.
39. It then leaves the Respondent's case to be dependent upon Mr Mohlala's evidence, but there are serious inconsistencies or glaring challenges which calls upon the reliability and credibility of the witness.
40. The onus to prove the case lies with the Respondent. The witness raised new information only when he was under a relentless cross examination, he then suddenly mentioned that the deceased was slapped for the second time with open hands. No attempts was made by the Respondent to clarify this very crucial anomaly in terms of why did he fail to say so under oath when he was giving testimony.
41. The fact that he saw blood only emerged under cross examination. The other issue is that he testified to the effect that there was also a nurse and a doctor when the Applicant was attending to the patient. We do not have the evidence of a nurse nor evidence of the doctor confirming that they, at some stage, were together with the Applicant on the date in question.
42. These are the serious and material aspects which have got a bearing on the credibility of the witness. In terms of the demeanor of the witness, it was not impressive. If, indeed, according to the testimony by the witness of the Respondent, there was no screen around the patient/deceased to create privacy, and that everybody who was there in that ward witnessed all that he alleged happened, then

that in itself was a necessary trigger to obligate the Respondent to produce additional witnesses to corroborate the evidence tendered by the witness.

43. Notwithstanding the fact that a nurse is said to have been part of the proceedings of that day, such a person should also have been called to assist these proceedings. The nurse was not called and no reasons were advanced as to the failure thereof.
44. Whilst cognizance should be taken that the deceased cannot testify and a certain Mr Motlhatho cannot testify as it is said that they are both deceased, it is in the nature of these proceedings that the Respondent should have taken sufficient measures to ensure that its case is solidified by other possible witnesses, especially when it is said that, according to Mohlala, screens were not put up and as such, everybody could see what transpired.
45. I cannot find any reason, why the Respondent failed to at least get a single witness to corroborate what Mohlala had witnessed. I do not deem it necessary to deal with the issues of the differences which are apparent of fists vs slaps or open hand assault because I have made a finding to the effect that the evidence by the first witness should not be accepted as it is hearsay and in addition there was no basis was created that the interests of justice required same.
46. Consequently, therefore, I am satisfied that on a balance of probabilities, the evidence of this witness, whose credibility was highly questionable, unsubstantiated and not corroborated, should be rejected and thus Respondent's case falls to be dismissed.
47. It is therefore my finding that the Respondent has failed to prove the substantive fairness of the dismissal of the Applicant.

RELIEF SOUGHT

48. The Applicants had prayed for reinstatement as relief.
49. I find such a request to be appropriate under the circumstances based on the facts alluded to above, although it is up to the Respondent to redeploy the Applicant if it is deemed necessary, but in the circumstances, he should be reinstated.

AWARD

50. I find that the Respondent has failed to established its case against the Applicant and as such I find that the Applicant's dismissals was substantively unfair.

51. I order that the Respondent should reinstate the Applicant. The Applicant must report to work on 24 March 2023 at Mokopane Regional Hospital at 07H00.
52. As a result of the reinstatement, I order that backpay should be paid in the amount of R59 706-12 calculated at R13 664-25 per month from the day he was dismissed 29 October 2022 to the date of this award, 08 March 2023.
53. The total amount due is payable by Respondent on or before 15 April 2023.
54. The abovementioned amount shall earn interest in terms of section 143(2) of the Labour Relations Act 66 of 1995.



Isaiah Nyathi