**PHSDSBC**PUBLIC HEALTH AND SOCIAL DEVELOPMENT
SUPPORT CENTRE FOR SA

ARBITRATION AWARD

Commissioner: Bhekinhlanhla Stanley MthethwaCase No: PSHS402-18/19Date of award: 22 August 2019

In the matter between:

PSA obo Sithembiso Ndumo

(Union/ Applicant)

and

Department of Health- KwaZulu Natal

(Respondent)

Details of hearing and representation:

1. The matter was scheduled for arbitration on 12 September 2018 at East Boom Community Health Centre in Pietermaritzburg. The case remained part heard and it was heard again on 6 November 2018 at Msunduze Health District Office in Pietermaritzburg. Thereafter, the matter was heard on 21 January 2019, 8 & 9 April 2019 and 29 July 2019. Mr. C Ngubane, a trade union official from PSA represented Mr SB Ndumo (hereinafter referred to as the Applicant) and Mr. TM Madlala who is an Assistant Manager: Labour Relations represented the Department of Health- KwaZulu Natal (hereinafter referred to as the Respondent). The proceedings were digitally recorded.



2. Having presented their respective cases, the parties agreed to submit heads of argument by 5 August 2019. Thereafter, the respondent applied for extension until the 12th of August 2019 to submit its heads of argument.

Preliminary points:

3. At the commencement of the arbitration the respondent's representative raised *point in limine* in that the Council lacks jurisdiction to arbitrate this matter. According to the respondent's representative the applicant's services were terminated in terms of 17 (3) of the Public Service Act, 1994 ("the PSA"). The applicant's services were terminated after he had been absent from work for about 60 days. The applicant's dismissal was effected by operation of law. Accordingly, the respondent did not effect the dismissal of the applicant. For this reason, the Council lacks requisite jurisdiction to arbitrate this application.
4. On the other hand the applicants' representative contended that the Council has the requisite jurisdiction to hear this matter. The provisions of section 17 were not applicable in this case because the applicant had reported his absence and the respondent was always aware of the applicant's health condition and his whereabouts. The respondent sought to apply section 17 of the PSA to avoid consequences of dismissal without following fair procedures.
5. After hearing submissions from both parties, I issued *ex tempore* ruling wherein I ruled that parties should lead oral evidence to outline all the relevant issues that led to the termination of the applicant's contract of service. I further ruled that the respondent had a duty to begin to lead evidence to prove that there was no dismissal, instead, the applicant's services were terminated by operational of law.

Issues to be decided:

6. I have to determine whether or not the Council has jurisdiction to arbitrate this dispute; if yes, I will go further to determine whether or not the termination of the



applicant's contract of employment constitutes dismissal, if the finding is in the positive; I have to determine whether or not such dismissal was substantively and procedurally fair.

Background to the dispute:

7. The applicant was appointed as a Lay Counselor on 1 January 2007. He was earning R132 000 per annum when he left employment. He continued in that capacity until the 28th of July 2017 when his services were terminated in terms of 17 (3) of the PSA.
8. In the belief that the respondent was applying the provisions of 17 (3) of the PSA incorrectly, the applicant referred an alleged unfair dismissal dispute to the Council for conciliation. The dispute was not conciliated within 30 days of the referral. Thereafter, the applicant submitted a request for the matter to be resolved through arbitration and the dispute was scheduled for arbitration as indicated above.
9. The applicant sought reinstatement as a remedy.

Survey of evidence and arguments:

10. All the witnesses gave evidence under oath. The respondent led evidence of Ms. Duduzile Anna-Marie Gwamanda, Ms. Angela Crescentia Thandi Khumalo, Dr. Sheldon Chetty and Mr. Zithulele Henry Mthethwa. The applicant also testified.
11. Ms. Gwamanda testified that she was employed as an Operational Manager at East Boom Community Health Centre. She was managing and controlling the attendance register of the Unit. On 26 May 2017 she realized that the applicant had signed the attendance register but he was not at work. She then called the applicant on his mobile phone it was then that the applicant informed her that he was in Hammersdale attending to his child. According to the applicant his child



was hit by the vehicle and ran away. Thereafter, the applicant did not report for duty and she then marked him absent from work. The applicant was absent without authority for the entire period between 26 May 2017 and 28 July 2017 which was about 42 days. She reported the matter to the Human Resource Department in the beginning of June 2017. Between 29 May 2017 and 28 July 2017, the applicant was sending her text messages concerning his absence. She received the first text message on or about 29 May 2017; amongst these text messages the applicant stated that he was sick. She received a sick note from the applicant that covered a period between 3 July 2017 and 7 July 2017. However, it was not true that the applicant called her during his absence. The applicant only reported for duty sometime in July 2017 and his services were terminated at the end of July 2017.

12. Ms. Khumalo stated that she was a Nursing Manager at East Boom Community Health Centre. On 26 May 2017 the applicant had signed the attendance register but he was not seen at work. When Ms. Gwanda called the applicant; he advised her that he was in Hammersdale attending to his child who had been knocked by the car. On 30 May 2017 Ms. Gwamanda informed her that the applicant was present at work but he failed to sign out on the attendance register. The applicant also reported for duty on 17 and 18 July 2017. Thereafter, the applicant did not report for duty between 19 July 2017 and 28 July 2017. The applicant's absence was not authorized. She did not receive any sick note for the duration of the applicant's absence. She was seeing the applicant's sick notes for the first time in this arbitration. Employees were expected to call the Operational Manager if they were sick; however, it was acceptable to send a text message because employees might not have airtime to make calls. It was a norm in the Unit that any sick note that was granting an employee more than 3 days sick leave would be investigated by a Medical Manager.
13. In terms of the respondent's abscondment procedure where an employee is absent without authority on the 3rd day the respondent shall commence the



abscondment process. In this instance the abscondment procedure was not followed.

14. Mr. Mthethwa testified that he was employed as a Human Resource Manager. Ms. Gwamanda reported to him that the applicant had been grossly absent from duty. When Ms. Gwamanda reported the matter to him 34 days had already gone by. He then tried to call the applicant on his mobile phone; however, there was no answer. It was not the first time where the applicant would just disappear nonetheless; in the past when he called the applicant on his mobile phone would answer. In September 2016 the applicant was absent without permission. In that instance the applicant was absent for about 3 months; eventually his salary was stopped.
15. This time around on 26 July 2017 he issued the applicant with an ultimatum to report for duty immediately failing which his services would be terminated in terms of section 17 (3) of the PSA. The applicant acknowledged receipt of the ultimatum letter on 27 July 2017 and he was expected to report for duty on this day. The applicant came to his office at 08h30 on 27 July 2017. If the applicant had intended to come to work he would have reported at 07h30 and sign the attendance register. On 28 July 2017 the termination letter in terms of section 17 (3) of the PSA was issued. Afterwards the applicant made representation to the Head of the Department but he was not reinstated.
16. It was true that the respondent flouted abscondment procedure in terminating the applicant's services.
17. Dr Chetty testified that he was holding Bachelor of Medicine and Bachelor of Surgery degree and Bachelor of Science Honours degree. He was employed as a Medical Manager/Chief Executive Officer at East Boom Community Health Centre.



18. A medical doctor when she/he is consulted by a patient is expected to carry out a clinical assessment on a patient before making a diagnosis. A medical practitioner would then consult his/her patient on the basis of a diagnosis. The clinical assessment would determine whether or not a patient requires re-assessment. The purpose of re-assessment is to establish whether or not is there any improvement on a patient's condition. In terms of the Health Professions Council of South Africa's ("the HPCSA") recommendations a medical practitioner should give a patient at least 3 days sick leave. The Ethical Conduct of HPCSA requires that on a second review/assessment if the condition of a patient does not improve a patient should be referred to the next level of health facility which could be a specialist or a hospital.
19. In terms of the Ethical Conduct of the HPCSA a valid medical certificate should have (a) medical practitioner's name, (b) medical practitioner's address, (c) details of a patient, (d) date and time a patient was examined, (e) diagnosis, period of incapacity and (f), the name of a medical practitioner who issued a sick note must be printed at the bottom and signed by that medical practitioner.
20. Looking at the sick notes issued to the applicant during his absence they do not have the name of a medical practitioner at the bottom; for that reason, these sick notes were invalid. Secondly, these sick notes do not have the medical practitioner's practice number, as such, that make the sick notes invalid. Thirdly, on 10 July 2017 the applicant was issued with a sick note for 11 days commencing on 10 July 2017 until 21 July 2017; that sick note was not in accordance with the HPCSA Code of Ethics. The manner in which the medical practitioner was giving days to the applicant was wrong and reckless. It was so because there was no management of the applicant's sickness.
21. Mr. Ndumo testified that he had never been absent for 30 days without reporting his absence. During his absence he was always in contact with his supervisor reporting his whereabouts. Between 26 May 2017 and 26 July 2017, he was reporting for duty; on other days he was booked off. His supervisor did not call



him after 3 days of his absence in preparation of commencing the abscondment procedure. The respondent did not follow abscondment procedure during the period in question. During the period of his absence he was reporting his absence through telephone calls and text messages. He personally handed in a medical certificate covering a period between 10 July 2017 and 21 July 2017. On 26 July 2017 he did not report for duty but he called his supervisor Ms. Gwamanda and reported that he was not coming to work.

22. On 26 May 2017 he was on duty and he left at 11h00 after receiving a message that his child had been knocked by a vehicle. He then reported to sister Phuthi and left because Ms. Gwamanda was not around at the time. He reported for duty between 29 May 2017 and 2 June 2017. During this period, he found that he had been marked absence and he went to Ms. Gwamanda and laid complaint that he had been marked absence. However, on 30 May 2017 he signed the attendance register.
23. On 27 July 2017 he met Mr Mthethwa who informed him that he was about to dispatch a termination letter to him. Later that morning Mr Mthethwa issued him with a termination letter and directed him to leave the company premises. In his view the termination letter was invalid because 17 (3) of the PSA has been repealed.
24. In closing Mr Ngubane contended there was no abscondment as anticipated in section 17 of the PSA; as such, the applicant was dismissed as contemplated in the Labour Relations Act.
25. Mr. Madlala argued that the applicant was not dismissed but his employment was terminated by operation of law. At all relevant times during the applicant's absence the respondent did not know his whereabouts; this is why the respondent took it that he had absconded.



Analysis of evidence and arguments:

26. The onus to prove that the Council has no jurisdiction to arbitrate rests on the party that alleges that the Council has no jurisdiction. Rule 22 of the Council's Rules provides as follows:

"If during the arbitration proceedings it appears that a jurisdictional issue has not been determined, the panelist must require the party that raises the jurisdictional point to prove that the Council does not have jurisdiction to arbitrate the dispute".

27. In this instance the respondent contended that the Council lacks jurisdiction to arbitrate this matter. In support of its contention the respondent stated that the applicant was not dismissed but his services were terminated by operation of law. On the other hand; the applicant's contention was that the Council has requisite jurisdiction to arbitrate this dispute. The applicant's contention was premised on the basis that at all material times the applicant reported his absence, submitted medical certificates and on other days he was at work. The applicant further argued that the termination letter was invalid since the respondent failed to follow abscondment procedures as outlined in the Human Resource Circular 81 of 2008 ("HRM Circular 81 of 2008"). Lastly, the respondent could not rely on the provisions of 17 (3) of the PSA because they have been repealed.
28. Let me start with the last issue since it was easy as ABC; there is no substance in the applicant's contention that the provisions of 17 (3) of the PSA have been repealed. Instead, section 17 (5) of the PSA was amended by section 25 of Act 30 of 2007 hence you have the current section 17 (3) of the PSA.



29. Now let me turn to the merits of the case. Firstly, I wish to state upfront that HRM Circular 81 of 2008 is binding to the respondent and its employees. HRM Circular 81 of 2008 provides that the abscondment procedure shall be followed on the 3rd day of the employee's absence. First of all, the supervisor shall call an employee's home telephone number and keep record of time and date of the call and the person who received the call. If an employee fails to report for duty and there is no valid reason for his/her absent at the expiry of the 3rd day or cannot be contacted the supervisor should hand over the matter to the Human Resource Office to take the necessary steps.
30. Once the matter has reached the Human Resource Office; the Human Resource Office must send a registered letter to the last known address obtainable from the employee's personal file within 7 working days from the last day that employee reported for duty. The letter should inform the employee to return to work with immediate effect and/or contact the Human Resource Manager. In case there is no response received after the delivery of the registered letter, the supervisor together with a witness from the Human Resource Office may be sent to the employee's last known residential address to try and locate the employee, if deemed necessary. As soon as the calendar month expires, the salary of the employee in question must be terminated immediately on PERSAL. Thereafter, the employee's contract will be deemed to have been terminated. A registered letter informing the employee of his/her termination of service due to abscondment in terms of 17 (3) of the PSA must be sent to the employee's last known address within 7 working days from the end of the calendar month of absence.
31. In the present dispute there was no attempt whatsoever to follow the above procedure. Secondly, there was no sound and valid reason advanced by the respondent to deviate from these policy guidelines. The respondent only drafted a letter informing the applicant to report for duty with immediate effect on 26 July 2017. Despite that the said letter was not dispatched to the applicant's last known address, the applicant reported for duty on 27 July 2017 and was issued with the



ultimatum and on 28 July 2017 was issued with the termination letter contemplated in section 17 (3) of the PSA.

32. In *Hospersa & another v MEC for Health in KwaZulu/Natal* (2003) 12 LC 8.17.1 the court held that the provisions of section 17 of the PSA must be used sparingly and only when the Code could not be invoked and when the employer has no other alternative. For example; where the employer is unaware of the whereabouts of the employee and cannot be contacted. Or, if the employee makes it quite clear that she/he has no intention of returning to work.
33. In my view in this instance the respondent could not rely on the provisions of section 17 of the PSA to terminate the applicant's services. It is for this reason that the Council has requisite jurisdiction to arbitrate this dispute. Accordingly, it is my finding that the applicant's termination falls within the scope of section 186 of the Labour Relations Act 66 of 1995 ("the Act").
34. As much as the respondent contended that the applicant was absent from work for more than one calendar month there is no evidence to support this contention. It is so because the applicant signed the attendance register on 26 & 30 May 2017; granted the applicant only signed in on both days and did not signed out. However, in my opinion this should not raise eyebrows because in the same attendance register, the applicant was not the only employee that did not sign out. By way of example, there were days where Williams did not sign out on the attendance register.
35. Granted; there was no evidence in support of the applicant's version that he was at work between 31 May 2017 and 2 June 2017 but at all relevant times he kept his supervisor, Gwamanda posted on his condition and whereabouts. Gwamanda herself confirmed that she received text messages from the applicant between 29 May 2017 and 28 July 2017. Furthermore, she confirmed under

cross-examination that she received a sick note from the applicant covering the period between 3 July 2017 and 7 July 2017. According to Khumalo it was acceptable to report absence through text messages. Furthermore; Khumalo testified incontrovertible that Gwamanda informed her that the applicant was present at work on 30 May 2017. In the same vein Khumalo's version that the applicant was at work on 17 and 18 July 2017 was not challenged. Importantly, this was the respondent's own witness.

36. In my view, this is a clearly confirmation that there was no absence for one calendar month as contemplated in section 17 (3) of the PSA. However, it is true that the applicant was absent without permission but the respondent was aware of the applicant's whereabouts and his medical condition. For me; it is neither here nor there that the medical certificates presented by the applicant were invalid. These medical certificates were the indication that the applicant had never had intention not return to work as the respondent wanted me to believe.
37. This is why it could not be true that the applicant absconded or deserted, in the sense that he actually indicated that he did not intend to return to work, or even that he acted in a manner that could be construed as implying that position. The evidence before proves the opposite: he texted Gwamanda and submitted a medical certificate(s) that indicated a willingness to come back to work. The respondent's contention that it believed that the applicant had absconded was not supported by the evidence.
38. To regard the employee as having absconded, the employer would have to show that it had justifiable grounds to believe that the employee was not only absent, but that she/he had no intention to return to work. This flies in the face of the evidence produced in these arbitration proceedings. By wrongly accepting that the applicant had repudiated his contract, the respondent effectively dismissed the applicant. Therefore; the applicant was justified in concluding that he had been dismissed within the provisions of section 186 of the Act; and unfairly so



since there was no valid or fair reason for the applicant's dismissal. The respondent did not charge the applicant for absenteeism; or any other misconduct for that matter, instead the respondent assumed that the applicant had absconded or abandoned his job. Accordingly, it follows that the applicant's dismissal was substantively unfair. The applicant was just presented with a termination letter on 28 July 2017; as such, the dismissal was also procedurally unfair.

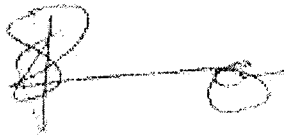
39. In terms of the Act, I am required to reinstate an employee who had been unfairly dismissed unless I believe that there are other compelling reasons not to do so. Both parties did not lead evidence on the feasibility of reinstatement. Accordingly, I order the applicant's reinstatement since there was nothing preventing this option.

Award:

40. It is my finding that the applicant's termination falls within the ambit of section 186 of the Act; accordingly, the Council has the requisite jurisdiction to arbitrate this dispute
41. It is also my finding that Mr. Sithembiso Ndumo was dismissed and his dismissal is substantively and procedurally unfair in terms of the provisions of the Act as set out in the Code of Good Practice for Dismissals read in conjunction with Resolution no: 1 of 2003 concluded at the Public Service Co-ordinating Bargaining Council.
42. I therefore order Department of Health- KwaZulu Natal to reinstate Mr. Sithembiso Ndumo to his former position with effect from the date of his dismissal (28 July 2017) on terms and conditions of employment that were applicable to him prior to the dismissal.



43. I further order that Mr. Sithembiso Ndumo must report to the premises of the respondent at East Boom Community Health Centre in Pietermaritzburg on 1 October 2019, at 08.00am and on or before that day the Department of Health must pay him the amount of R264 000.00 (two hundred and sixty four thousand Rands) in back pay which is equivalent to 24 months' remuneration calculated at the rate of remuneration at the time of his dismissal (R11000x24).
44. I also order the Department of Health to restore all the benefits as they would have been accorded to the applicant had he not been dismissed on the above date (e.g. provided fund, medical aid, if applicable) and make the necessary deductions from his back pay and forward those to the relevant authorities.
45. No order as to costs is made.



Bhekinkhlanhla Stanley Mthethwa

