2020 -10- 23

ARBITRATION AWARD

PHSDSBC

Commissioner: **Bhekinhlanhla Stanley Mthethwa**

Case No: **PSHS1134-19/20**

Date of award: **22 October 2020**

In the matter between:

PSA obo Zama Hendricks Ntshalintshali (Union/ Applicant)

and

Department of Health- KwaZulu Natal (Respondent)

Details of hearing and representation:

1. The matter was scheduled for arbitration at Vryheid District Hospital in Vryheid on 3 and 4 September 2020 and it remained part heard; it was heard again on 7 and 8 October 2020. Mr. M Shibe, a trade union official of PSA appeared on behalf of Mr. Zama Hendricks Ntshalintshali (hereinafter referred to as the Applicant) and Mr. TD Ntshangase who is an Assistant Director: Labour Relations represented Department of Health- KwaZulu Natal (hereinafter referred to as the Respondent). The proceedings were digitally recorded.

2. Having presented their respective cases, parties agreed to submit heads of argument by 15 October 2020 and they did so.

Preliminary points:

3. There were no preliminary points raised.

Issues to be decided:

4. I have to decide whether or not the dismissal of the applicant was substantively and procedurally unfair.

Background to the dispute:

5. The applicant was appointed as a Data Capturer on 1 April 2014. He was earning R13 871.10 in monthly remuneration at the time of his dismissal. He continued in the said capacity until the 15th of January 2020 when his services were terminated for allegedly committing a variety of offences.

6. In the belief that his dismissal was substantively and procedurally unfair, the applicant referred a dispute to the Council for conciliation. The dispute was not resolved at conciliation and the conciliating commissioner issued a certificate indicating that the dispute remained unresolved after the conciliation process on 5 February 2020. The applicant thereafter submitted a request for the matter to be resolved through arbitration and the dispute was scheduled for arbitration as indicated above.

7. The applicant sought reinstatement as a remedy.

Survey of evidence and arguments:

8. All the witnesses gave evidence under oath. The respondent led the evidence of Mr. Sifiso Zulu and Dr Thobile Happiness Ndlovu. The applicant also testified and called Mr. Mwiniseni Joel Nene as a witness.

9. Mr Zulu testified that he was employed as an Operations Manager and was based at Hartland Clinic at the time of the incident. On 7 May 2018 he received a text message from the applicant reporting that he had lost his brother and requested to go and bury him. Since he was on vacation leave he advised the applicant to complete the necessary forms with the acting supervisor. It was his testimony that when he came back from vacation leave, he found that the applicant had not completed the relevant forms. Instead, the applicant had fraudulently signed the attendance register from 7 May 2018 to 11 May 2018.

10. He then called the applicant to discuss the matter. However, there was no agreement hence he regarded the applicant's conduct as fraudulent because he had signed the attendance register as if he was present at work. It was not true that he had discussions with the applicant on 6 May 2018 concerning the death in his family. In fact the discussions took place on 7 May 2018. He was on duty on 7 May 2018; however, he could not remember when he went on vacation leave.

11. Although he (Zulu) signed the attendance register between 7 May 2018 and 11 May 2018, he was not at work. The applicant was also not at work between 7 May 2018 and 11 May 2018. All data capturing performed between 7 May 2018 and 11 May 2018 was performed by the employees of the non-governmental organisation deployed in the facility. He personally logged into the applicant's computer using the applicant's password and instructed non-governmental organisation employees to capture data.

12. He also charged the applicant for being absent from work between 30 May 2018 and 1 June 2018. He charged the applicant because the acting supervisor, Ms BG Phakathi and the Chief Executive Officer ("the CEO"), Dr Ndlovu informed him that the applicant was not at work. He was also advised by PC Masondo that the applicant was not at work between 29 May 2018 and 30 May 2018. Ms

Phakathi was at work on 29 May 2018 and was day off on 30 May 2018. The CEO also informed him that the applicant was not at work and he had attended an Imbizo at Dumbe and he refused to sign a leave without pay form for this period. When he discussed the matter with the applicant, it ended up ugly. The applicant warned him that he should not stand in his way; otherwise he would encounter problems. The applicant also openly stated that he would not obey his instructions.

13. He was verbally abused and threatened by the applicant on 4 June 2018. He also observed the applicant handling a woman in an aggressive manner on 13 June 2018. That woman ended up crying. He then confronted the applicant for what he did to the lady. Thereafter, the applicant called a person and informed that person over the phone that he (Zulu) was troubling him and he should come and kill him. This incident was witnessed by Ms Sheila Mtshali and other employees in the facility. That made him to feel unsafe and he reported the matter to the South African Police Service. He also reported the matter the management because he felt unsafe.

14. It was not true that one could not make telephone calls from inside the Clinic; as much as other networks could not make calls, but others did. Where the applicant was standing on the day, the network signal is very good.

15. He had a very good social and working relationship with the applicant; however, when he charged the applicant, he was doing so to ensure that the applicant was performing his responsibilities and to change his behaviour. Therefore, it would be wrong for the applicant to think that he had a vendetta against him.

16. The applicant was doing as he pleased at work. On 2 July 2018, 5 July 2018, 16 July 2018 and 19 July 2018 the applicant left his workstation early without permission and never came back. He saw the applicant taking a taxi on one of the days when he left the Clinic without permission. This is why he issued the applicant with a written warning. However, the applicant tore that written warning

apart. The applicant did not comply with any instructions issued to him. The applicant also threatened the nurse who was in charge in his absence. Other employees in the workplace were scared of the applicant. One of the nurses had resigned due to the applicant's threats.

17. Due to the applicant's behaviour he believes that employer/employee relationship had been eroded.

18. Dr. Ndlovu testified that she was employed as the Medical Manager and the Chief Executive Officer at Dumbe Community Health Centre. The Hartland Clinic falls under her management and control. She became aware of the applicant's offences in September 2018. She took the allegations seriously, because amongst them there was an allegation of intimidation. She became aware of the incident when she called Mr Zulu into her office. Mr Zulu came into her office crying. Mr Zulu stated that he was considering resigning because he had received a death threat from the applicant. On the following day, 3 August 2018 she called the applicant into her office. She was disturbed by the applicant's conduct when she was interviewing him. The applicant did not take the matter seriously and he was laughing throughout the proceedings. In this meeting, there were Executive Committee ("the EXCO") members. They took a decision to keep the applicant at eDumbe Community Health Centre. Thereafter, the applicant was given three days to show reasons why he should not be suspended. The applicant did not make any representations and he was precautionary suspended on 8 August 2018.

19. The Provincial Head Office advised the institution to appoint Mr. VP Ndelu as the Investigating Officer. The investigation did not go well since nobody wanted to come forward with information because they were scared of the applicant. Mr. Ndelu completed the investigation in October 2018 and the disciplinary enquiry was conducted in November 2018. The applicant had a roll in the delay to commence with the disciplinary enquiry since he was unreachable.

20. It was not true that the applicant was replaced by Mr. Lindo Msibi; the applicant's post is still vacant. Filling of non-clinical posts require motivation and approval by the Head of the Department and the Premier. However, there were posts that have been filled due to the Covid 19 pandemic; as such, she did not know whether the applicant's post had been filled.

21. The applicant was not at work between 29 May 2018 and 1 June 2018. She saw the applicant on 29 May 2018 during the Premier's Imbizo at eDumbe. The applicant also rose during the Imbizo and introduced himself as a community leader. She then asked Mr. Msibi whether he was aware that the applicant was not at work. Mr. Msibi advised her that he was not aware that the applicant was not at work. Upon investigation it transpired that the applicant was not at work from 29 May 2018 until 1 June 2018. On 30 May 2018 she called the Hartland Clinic to verify whether the applicant was present on the previous day. She was advised that the applicant was not present at work on 29 May 2018. She then referred the matter for investigation and directed that the necessary steps should be taken. The applicant had signed the attendance register on these days as if he was at work. She later learnt that the second-in-charge was scared to mark the applicant absent on the attendance register because the applicant was threatening her. After observing the applicant's conduct during the incident concerning Mr. Zulu it confirmed that indeed the applicant was threatening other employees, hence they were scared of him. The conduct of the applicant was causing discomfort to other employees in the workplace. This has led to some employees resigning and/or being transferred to other institutions.

22. Mr. Ntshalintshali testified that he was employed as a Data Capturer. He had a very good working relationship with his supervisor, Mr. Zulu at work and outside the work environment.

23. He was served with a charge sheet at home on 23 October 2018 and the disciplinary enquiry was conducted on 30 November 2018.

24. It was not true that he was not at work between 7 May 2018 and 11 May 2018. In fact, he was at work and he signed the attendance register and captured data on the computer system. Mr. Zulu was also present at work during this period. It was Ms. BG Phakathi who was not at work during this period and she was on study leave. Charging him with absence between 7 May 2018 and 11 May 2018 was just a ploy to get rid of him. The CEO wanted to get rid of him because of the statement he made during the Premier's Imbizo on 29 May 2018 at Dumbe. Mr. Zulu was just used to fabricate allegations against him. The CEO had used Mr. Zulu to get at him because she was irritated by the statement, he made during the Imbizo. He rose after the Premier had undertaken to create job opportunities for eDumbe youth. He then stated that they want job opportunities already created and given to people from outside eDumbe. He further stated that in some Departments, job opportunities were given to the relatives of the managers.

25. He was permitted by Ms. Phakathi to attend the Imbizo and he was not the only employee who was permitted to attend. There were other employees that were permitted to attend the Imbizo.

26. Although there were three other employees including him (Data Capturer, Administrative Officer and the Implementation Officer) that had access to his computer, he was the only person that was capturing data. The work that was captured between 7 May 2018 and 11 May 2018 was captured by him.

27. It was also not true that he was not at work between 29 May 2018 and 1 June 2018. During this period, he signed the attendance register and performed his duties. Mr. Zulu was on leave during the period in question. These were also fabricated allegations in revenge, owing to his statement during the Imbizo. It would have been impossible for Ms. Phakathi to have informed Dr Ndlovu that he was not at work during the period in question because Ms. Phakathi was not at work on 1 June 2018 and 2 June 2018. It also does not make sense how Ms Phakathi would have known on 30 May 2018 that he would be absent on 31 May 2018 and 1 June 2018.

28. It was not true that on 4 June 2018 there was conflict between him and Mr. Zulu. In fact, there has never been conflict between him and Mr. Zulu.

29. It is also not true that on 13 June 2018 he demonstrated insolence and abusive behaviour towards Mr. Zulu. There was also no conflict between him and Mr. Zulu or a General Orderly on the day. It was not true that on the day he called somebody to come and kill Mr Zulu. Inside the Hartland Clinic there was no network signal; as such it is not possible to make a call inside the Clinic premises.

30. There is no truth in that on 2 and 5 July 2018 he left his work place before the knock off time. This is also confirmed by the attendance register that he signed on both days at 16h00 when he knocked off. However, he could not remember whether or not he was at work on 16 and 19 July 2018. Had the respondent provided him with the attendance register for these two days, he would have been in the position to remember what had happened.

31. There was no employee at Hartland Clinic that had resigned or was transferred prior to 2019 due to his conduct. Ms Phakathi was only transferred in 2019 because she had found greener pastures after completing her studies.

32. Mr Nene testified that he was working at Hartland Clinic until March 2019 as a Cleaner. He was employed under the Extended Public Works Programme ("the EPWP") for the period of 12 months and placed at Hartland Clinic.

33. He signed the attendance register like full time employees at the Clinic. The attendance register was signed and kept at Mr Zulu's office. He was at work between 7 May 2018 and 11 May 2018. Both the applicant and Mr Zulu were present at work during this period.

34. Mr Zulu and the applicant had a good social and working relationship.

35. It was not true that there was any network that had a good signal inside the Clinic. Hence people had to leave the Clinic in order to make calls.

36. It is also not true that staff members in the Clinic feared the applicant.

37. The applicant was replaced by Mrs Msibi's son who works at the Dumbe Community Health Centre.

38. In closing Mr Ntshangase contended that the applicant was missing the point if he believes that he was charged and dismissed for the remarks he made during the Imbizo on 29 May 2018. In fact the applicant was charged, found guilty and dismissed based on different offences than what he believes was the reason for his dismissal. The offences that he was convicted for are well documented. It was the applicant's conduct that strained employer/employee relationship; as such, the applicant's application must be dismissed.

39. Mr Shibe submitted that there was no evidence convicting the applicant on all charges that were proffered against him. Secondly, the respondent is precluded to discipline and dismiss the applicant after failing to comply with the provisions of clause 7.2 of Resolution 1 of 2003 concluded at the Public Service Co-ordinating Bargaining Council ("the PSCBC"). This principle was confirmed in **Van Eyk v Minister of Correctional Services & others [2005] 6 BLLR 639 (EC) as per Jones J,** it was held that the department was obliged to finalize a disciplinary inquiry within 3 months as prescribed in the collective agreement. As a result, Jones J found that disciplinary charges had fallen away because of non-compliance with the peremptory time periods in the collective agreement. Therefore, the applicant's dismissal should be found to be substantively and procedurally unfair.

Analysis of evidence and arguments:

40. It is common cause that there was a dismissal, therefore, the respondent bears the onus in terms of section 192 (2) of the Labour Relations Act 66 of 1995 ("the Act") to prove that the dismissal of the applicant was fair. Section 188 (1) of the Act provides that a dismissal is not unfair if the employer proves that the reason for dismissal was for a fair reason based on the employee's conduct (and that the dismissal was effected in accordance with a fair procedure).

41. In this instance the applicant was dismissed after being charged and found guilty for different offences. Amongst others; he was charged and convicted for taking unauthorised leave between 7 May 2018 and 11 May 2018 under the pretext that it was family responsibility leave and failed to produce the necessary documentation. He was also charged and convicted for making false entries on the attendance register between 7 May 2018 and 11 May 2018 which gave the false impression that he was on duty. As a result, this conduct was a fraudulent activity. He was also charged and found guilty for being absent at work from 30 May 2018 until 1 June 2018 without prior authority/permission from his superior. He was also convicted for demonstrating insolent behaviour, when he verbally abused his superior on 4 June 2018. The applicant was also charged and found guilty for the allegation that on 13 June 2018 he demonstrated insolent and abusive behaviour when he threatened his superior. He was further charged and convicted for failing to observe his working hours when he left his place of work and not come back on 2,5,16 and 19 July 2018.

42. In his plea explanation, the applicant stated that all allegations against him were fabricated to get rid of him. In support of this contention the applicant testified that it was not true that he was absent from work between 7 May 2018 and 11 May 2018. He further testified that there was no truth in that he was absent from work between 29 May 2018 and 1 June 2018. He also stated that on 4 June 2018 and 13 June 2018 there were no incidents that Zulu claimed to have witnessed. It was a fabrication that he had demonstrated insolence behaviour, verbally abused and

threatened Zulu on 4 June 2018. Likewise, it was a fabrication that on 13 June 2018 he demonstrated insolence and abusive behaviour and threatened Zulu. It was also the applicant's testimony that he was present at work on 2 and 5 July 2018. Nonetheless, he could not remember what happened on 16 and 19 July 2018.

43. In relation to (count one) the allegation that between 7 May 2018 and 11 May 2018 the applicant took unauthorised leave; his immediate manager, Zulu testified that he had received a text message from the applicant on 7 May 2018 informing him that his brother had passed on and he requested to go and bury him. According to Zulu they communicated through a text message because he (Zulu) was on vacation leave during the entire period. However, during cross-examination when Zulu was confronted with the attendance register signed by him for the entire period; he changed his version and stated that he went on vacation leave on Tuesday, 8 May 2018 but he could not remember when he returned to work. Nonetheless, he dismally failed to explain how he completed the attendance register if he was not at work between 7 May 2018 and 11 May 2018.

44. He (Zulu) further testified that he was informed by Phakathi who was standing in for him during his vacation leave that the applicant was absent between 7 May 2018 and 11 May 2018. When it was put to him that Phakathi was on study leave during this period he failed to provide any reasonable explanation as to how Phakathi would know what happened in her absence. However, he remained adamant that Phakathi was at work despite the attendance register confirming that Phakathi was on the study leave.

45. Therefore; when I compare Zulu and the applicant's testimony in relation to count one; I find Zulu to be a very poor witness; his evidence lacked logical conviction and it was riddled with contractions. By way of example, Zulu failed to explain why he completed the attendance register between 7 May 2018 and 11 May 2018 if he was not at work. In my view, signing of the attendance register by employees

should be understood against the background that it is meant to monitor their attendance and to manage and control their starting and knock off time. Therefore, it is illogical that both Zulu and the applicant signed the attendance register between 7 May 2018 and 11 May 2018 while they were both absent from work. I therefore reject Zulu's version in this regard. It is for this reason that I find on a balance of propensity that the applicant was at work between 7 May 2018 and 11 May 2018 and did not go on unauthorised leave as claimed by Zulu.

46. In light of my findings in paragraph 45 above count two where it is alleged that the applicant had made false entries on the attendance register between 7 May 2018 and 11 May 2018 should fall away. It is my conclusion that the applicant was present at work during the period under consideration. Accordingly, there is no substance that he fraudulently made entries on the attendance register between 7 May 2018 and 11 May 2018.

47. With regards to the allegations that the applicant was absent from work between 30 May 2018 and 1 June 2018 Zulu testified that he was informed by Phakathi, Masondo and Dr Ndlovu that the applicant was absent without prior authority/permission during the period under consideration. Phakathi also informed him that the applicant refused to sign a leave form for these days. Dr Ndlovu stated that she saw the applicant on 29 May 2018 during Premier's Imbizo at eDumbe. On 30 May 2018 she called the Hartland Clinic to verify whether the applicant was present on the previous day. She was advised that the applicant was not present at work on 29 May 2018. Upon investigation it transpired that the applicant was not at work from 29 May 2018 until 1 June 2018.

48 On the other hand the applicant testified that he was at work between 29 May 2018 and 1 June 2018. He further testified that he signed the attendance register and performed his duties. On 29 May 2018 he left the Clinic at 12h00 with Phakathi's permission to attend the Imbizo at eDumbe. According to the applicant he was charged because of the statement he made during the Imbizo at eDumbe on 29 May 2018.

49. In this instance both Phakathi and Masondo who had first hand information about the applicant's non-attendance during the period in question were not called as witnesses. Furthermore, there was no explanation advanced for this reason. Dr Ndlovu's version that she saw the applicant during the Imbizo cannot assist the respondent's case because the applicant testified that he left the Clinic at 12h00 on 29 May 2018. Although the applicant introduced the version that he had Phakathi's permission to attend Imbizo for the first time during examination-in-chief; in my view, of great importance was that the applicant signed the attendance register from 29 May 2018 until 1 June 2018. Having said that it is not clear why the charge sheet did not include 29 May 2018 as this was the day on which the applicant attended the Imbizo, instead of 30 May 2018. According to Dr Ndlovu they did not include 29 May 2018 because the Investigating Officer could not find evidence regarding this date.

50. On the other hand; it is important to note that the applicant's version in this regard is corroborated by Nene and the attendance register signed during the period in question (29 May 2018 to 1 June 2018). I therefore find the version of Nene and the applicant clear and consistent in this regard, whereas the respondent's testimony relies heavily on indirect evidence and was not substantiated by anything else. It is therefore my finding that the respondent's testimony is lacking in credibility. This is why where the testimony of Zulu and Dr Ndlovu contradict the applicant's version; I accept the applicant's version.

51. In relation to count four and five it is alleged that the applicant demonstrated insolent behaviour, when he verbally abused his superior on 4 June 2018. It is also alleged that on 13 June 2018 the applicant demonstrated insolent and abusive behaviour when he threatened his superior. In this regard Zulu testified that he was verbally abused and threatened by the applicant on 4 and 13 June 2018, respectively. On the other hand the applicant refuted the claims that he verbally abused and threatened Zulu on any of these days. Obviously, in this instance I am faced with two conflicting versions.

52. In **Stellenbosch Farmers Winery Group Ltd & Another v Martell et Cie SA & Others 2003 (1) SA 11 (SCA)** the Court held that where a Commissioner is faced with two conflicting versions, she/he must make a finding on the credibility of the witnesses and the probabilities of the two versions, to determine where the truth lies. The question that should be answered is whether or not the probabilities favour the party that bears the onus of proof.

53. In the present dispute there are two conflicting versions regarding what happened on 4 and 13 June 2018. The gist of Zulu and Dr Ndlovu's testimony is that the applicant verbally abused and threatened his supervisor, Zulu. This version sought to demonstrate the culpability of the applicant. However, the more Dr Ndlovu tried to explain the reasons why Zulu's version should be preferred over that of the applicant, the more she contradicted herself. It is for that reason that both Zulu and Dr Ndlovu's testimony should be rejected; (a) there were yawning gaps in Dr Ndlovu's version concerning when the incidents happened. According to Dr Ndlovu she became aware of the allegations in September 2018 when Zulu came to report the matter to her. She took the matter seriously because it was involving intimidation. On the following day; 3 August 2018 she called the applicant into her office to address the matter. On 8 August 2018 she placed the applicant on precautionary suspension after failing to demonstrate why he should not be suspended. Secondly, (b) I find it highly improbably that Zulu could come crying into Dr Ndlovu's office in September 2018 in light of the passage of time between 4 June 2018, 13 June 2018 and September 2018. Thirdly, (c) both Zulu and Dr Ndlovu completely failed to present logical versions regarding these allegations. Fourthly, (d) there were no sound reasons why the charges were only brought against the applicant on 23 October 2019 if Zulu felt unsafe way back in June 2019. The last but not least both Zulu and Dr Ndlovu demonstrated a demeanour that they were not credible and honest witnesses.

54. On the other hand the applicant's version was that he did not verbally abuse and threaten Zulu on 4 and 13 June 2018. It was just a fabrication that he

displayed insolence towards Zulu and verbally abused him. Secondly, he could have not made a call inside the Clinic because of the network issues. This version was corroborated by Nene, when he testified that inside Harland Clinic, the network signal is very poor; as such you cannot make a call while inside the Clinic premises. The applicant and Nene further testified that there is no spot in the premises where there was a good network signal; irrespective of which network you are using. Despite rigorous cross-examination from the respondent's representative that did not elicit discrepancies in their testimony and both the applicant and Nene held to their version in this regard. This should on the balance of probabilities prove that Zulu could not have heard the applicant telling someone over the phone to come and kill him (Zulu). The applicant maintained throughout this arbitration that all allegations against him were fabricated in revenge due to his remarks he made during Premier's Imbizo at eDumbe. Obviously, all available evidence favours this version. It is for this reason that I find the applicant to be a credible and honest witness.

55. The applicant was also charged and convicted for failing to observe his working hours when he left his place of work and not come back on 2,5,16 and 19 July 2018. In relation to these allegations Zulu testified that on one of the days he saw the applicant taking a taxi. The applicant did not dispute that he was seen taking a taxi during working hours. However, the applicant disputed that on 2 and 5 July 2018 he failed to observe working hours. According to the applicant he observed working hours on 2 and 5 July 2018 hence on both days he signed out on the attendance register at 16h00. He further testified that he could not remember what happened on 16 and 19 July 2018 in the absence of the attendance register for that week.

56. The onus is on the respondent to prove that the applicant failed to observe his workings hours on 2,5,16 and 19 July 2018. The question that should be answered is whether or not the probabilities favour the respondent since it bears the onus of proof. In this instance the respondent failed to discharge the onus that the applicant failed to observe his working hours during the period in

question. Zulu could not tell amongst these four days which day exactly he saw the applicant taking a taxi. He also failed to give any reasonable explanation why on 2 and 5 July 2018, the applicant signed out at 16h00 if he had left his workstation at 12h00 and 10h30 respectively.

57. Therefore, there is no evidence convicting the applicant on the allegations that he failed to observe his working hours on 2,5,16 and 19 July 2018. I also find it highly improbably that Zulu had issued the applicant with a written warning for leaving his workstation on these days and the applicant tore it apart. In my view the applicant's testimony accords with the entries made on the attendance register on 2 and 5 July 2018. Therefore, the facts and probabilities recounted above lead to only one probable conclusion; that the applicant observed his working hours during the period in question. Accordingly, I find on a balance of probabilities that the applicant observed working hours on 2,5,16 and 19 July 2018 hence he signed out on the attendance register at 16h00 on 2 and 5 July 2018.

58. The applicant also challenged procedural fairness of his dismissal. In this instance the applicant's challenge cut across both the substance and the procedure. The applicant's main concern was that the respondent failed to prosecute its case within 60 days as outlined in clause 7.2 of Resolution 1 of 2003 concluded at the PSCBC. Therefore, the respondent had waived its right to discipline the applicant.

59. Resolution 1 of 2003 is regarded as the Disciplinary Code in the public service. The said Resolution is a collective agreement that is binding on the state as an employer (in this instance department of health) and its employees. Clause 7.2 of Resolution 1 of 2003 provides that the employer may suspend an employee on full pay or transfer the employee if; (1) the employee is alleged to have committed a serious offence; and (2) the employer believes that the presence of an employee at the workplace might jeopardise any investigations into the alleged misconduct, endanger the well-being or safety of any person or state

property. (3). A suspension of this kind is a precautionary measure that does not constitute a judgment, and must be on fully pay. (4). If an employee is suspended or transferred as a precautionary measure, the employer must hold a disciplinary hearing within a month or sixty days, depending on the complexity of the matter and the length of the investigation. The chairperson for the hearing must decide on any further postponement.

60. The respondent dismally failed to demonstrate that it did not contravene its own Disciplinary Code. Clearly, the respondent failed to conduct a disciplinary enquiry within a month or sixty days of the applicant's precautionary suspension. However, in my view that does not necessarily mean that there is a procedural defect in the applicant's dismissal. The applicant's rights were clearly spelt out on the notice to attend the disciplinary enquiry and he was afforded a fair opportunity to state his case.

61. As much as the respondent failed to comply with certain provisions of its Disciplinary Code that did not prejudice the applicant. For example, the respondent's failure to conduct a disciplinary enquiry within a month or sixty days from 8 August 2018 did not prejudice the applicant's case simply because it was conducted after the expiry of a month or sixty days. What is important is the procedure employed by the employer in effecting the dismissal.

62. The case of *Van Eyk* that the applicant relied upon is distinguishable from the present case in that case there was a peremptory timeframe in Resolution 1 of 2001 that regulated how and when the disciplinary measures should be brought against an employee. Without any shred of a doubt parties intended that disciplinary measures shall fall away after three months from the completion of the investigation if there was non-compliance with clauses 7.1 and 7.4 of that collective agreement. The time frames for bringing disciplinary proceedings against employees are set out as follows; clause 7.1 provides that an investigation should be finalised within two weeks from the date that an incident

has come to the attention of the employer. If the time frame cannot be met, the parties must be informed accordingly with reasons for the delay.

63. Clause 7.4 provides that the formal disciplinary hearing should be finalised within a period of 30 days from the date of finalisation of the investigation. If the time frame cannot be met, the parties involved must be informed accordingly with reasons for the delay. If the employer, without good reason, fails to institute disciplinary proceedings within a period of 3 months after completion of the investigation, disciplinary action shall fall away."

64. When *Jones J* found that the disciplinary charges had fallen away because of the employer's non-compliance with the peremptory time periods in the collective agreement he was doing so in terms of the above provisions of Resolution 1 of 2001.

65. Therefore, it is important to note that in Resolution 1 of 2003 there are no equivalent provisions to clauses 7.1 and 7.4 of Resolution of 2001. Accordingly, the applicant cannot rely on the principle coming out of *Van Eyk* judgment. Proper and correct interpretation and application of clause 7.2 of Resolution 1 of 2003 does not preclude the respondent to prosecute its case simply because a month or sixty days have expired from the date of precautionary suspension. Instead, the employee concerned could challenge precautionary suspension that goes beyond a month or sixty days. Therefore, to follow the same approach as outlined in Resolution 1 of 2001 would be dangerous and inimical in the workplace. If that approach could be approved in this instance it would be a promotion of chaos and anarchy in the public service. An employee could not commit a heinous offence and augur that the disciplinary measures should fall away simply because the employer did not comply with the timeframes in clause 7.2 of Resolution 1 of 2003. Such practice could not be accepted in a workplace; most importantly, if such workplace is a public institution funded through the tax payers' money. The service delivery which is the core of the public service could be severely compromised and undermined.

66. In this instance, I would like to align myself with the approach confirmed by Labour Appeal Court in **Highveld District Council v CCMA and Other (2002) 12 BLLR 1158 (LAC).** The court held that: "Where the parties to a collective agreement or an employment contract agree to a procedure to be followed in disciplinary proceedings, the fact of their agreement will go a long way towards proving that the procedure is fair as contemplated in section 188 (1)(b) of the Act. The mere fact that a procedure is an agreed one does not however make it fair. By the same token, the fact that an agreed procedure is not followed does not in itself mean that the procedure actually followed was unfair.....When deciding whether a particular procedure was fair, the tribunal judging the fairness must scrutinize the procedure actually followed. It must decide whether in all the circumstances the procedure was fair."

67. The Labour Court took this principle further in **Lekabe v Minister Department of Justice and Constitutional Development (J1092/08) (2009) ZALC 18, (2009) 30 ILJ 2444 (LC) in para 16,** Molahlehi J held that : "in my view it could never have been the intention of the parties that clause 2.7(2)(c) of the SMS Handbook should take away the right of an employer to discipline an employee on the expiry of the 60 (sixty) days from the date of suspension". It is important and worth noting that clause 7.2(c) of Resolution 1 of 2003 of the PSCBC) is effectively identical to clause 2.7(2)(c) of the SMS Handbook. Therefore, the applicant's contention that the respondent had waived its right to discipline him must fail.

68. Having applied my mind to all the relevant factors in this dispute, I find that the dismissal of the applicant was substantively unfair and procedurally fair.

69. I have paid due attention and consideration to the applicant's prayer of reinstatement as a remedy; accordingly, based on the evidence presented by both parties I do not find any credible evidence that the employer/employee relationship has been eroded as stated by Zulu and Dr Ndlovu. Accordingly, I am satisfied that reinstatement is an appropriate remedy under the circumstances.

70. In the circumstances I make the following award:

Award:

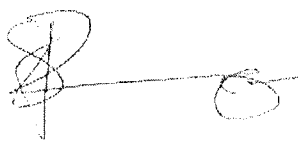
71. I find the dismissal of the applicant substantively unfair and procedurally fair in terms of the provisions of the Act as set out in the Code of Good Practice for Dismissals read in conjunction with Resolution 1 of 2003 concluded at PSCBC.

72. I therefore order the respondent to reinstate the applicant to his former position or any other suitable position with effect from date of dismissal (15 January 2020) on terms and conditions of employment that applied to him prior to his dismissal.

73. I further order the applicant to report to the premises of the respondent at eDumbe Community Health Centre on 1 December 2020, at 08.00am and on that day the respondent must pay the applicant an amount of R124 839.90 (one hundred and twenty four thousand, eight hundred and thirty nine rand and ninety cents) in back pay, which is equivalent to 9 month's remuneration calculated at the rate of remuneration at the time of his dismissal. Parties attention is drawn to the provisions of section 143 (2) of the Act.

74. I also order the Department of Health to restore all the benefits as they would have been accorded to Mr Zama Hendricks Ntshalintshali 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 other deductions such as tax and forward those to the relevant authorities.

75. No order as to costs is made.



Arbitrator: Bhekinhlanhla Stanley Mthethwa