



ARBITRATION AWARD

Case No: **PSHS955-23/24**

Commissioner: **William Richard Pretorius**

Date of award: **11 April 2025**

In the matter between:

PSA obo Qwebi, Unathi

Applicant

and

Department of Health – Eastern Cape

Respondent

Details of hearing and representation

1. This arbitration regarding an alleged unfair dismissal due to misconduct was held at the Pharmaceutical Depot in Mthatha on 30 April 2024, 7 – 8 August 2024, 22 – 23 October 2024, 20 – 22 January 2025 and 25 – 27 March 2025.
2. Both parties filed their written closing arguments on 3 April 2025 as agreed which is regarded as the last day of these proceedings for the purpose of issuing the award.
3. The applicant, Mr. Unathi Qwebi, attended and was represented by Mr. Lihle Mlungwana, an official from the Public Service Association of South Africa (PSA). The respondent was represented by its employee, Mr. Zolani Mpongwana, an Assistant Director from Labour Relations.
4. These proceedings were recorded digitally and in writing. Ms. Nomabizulo Jali was appointed as the interpreter (isi-Xhosa) by with the Council.
5. The parties utilised a common bundle of documents which were accepted on what it purported to be with the rights of the parties reserved to challenge the authenticity of documents where and when necessary.

Issue in dispute

6. I must determine whether the dismissal of the applicant was both procedurally and substantively fair, if not, I must determine appropriate relief in terms of section 193 read with 194 of the Labour Relations Act 66 of 1995 as amended (the LRA).
7. The applicant's relief of retrospective reinstatement with back pay was opposed by the respondent.

Background

8. The Mthatha Pharmaceutical Depot (the Depot) is a warehouse for both pharmaceuticals and surgical sundries and supplies medicines to 14 sub-districts.
9. The applicant was employed as a General Assistant (GA) by the respondent and he earned a basic salary of R12,278.13 per month at the time of his dispute.
10. The applicant was dismissed on 23 January 2024 after he was found guilty on the following allegations subsequent to the disciplinary hearing which commenced on 19 August 2021:

"CHARGE 1: PREJUDICE OF THE ADMINISTRATION AND OR EFFICIENCY OF THE DEPARTMENT OF HEALTH.

It is alleged that on or about 17 February 2020 you prejudiced the administration and or efficiency of Eastern Cape Department of Health in that the stock that was delivered was counted for institutions that dependent on it for its operations.

CHARGE 2: FRUITLESS AND WASTEFUL EXPENDITURE

In that the Dept of Health has incurred a loss of tablets with the value of approximately R120.000 which is tantamount to wasteful expenditure."

11. The applicant referred an alleged unfair dismissal dispute to the Council on 25 January 2024.

Survey of evidence and arguments

12. The respondent led the evidence of five (5) witnesses; whilst the applicant and two (2) other witnesses testified in his case. All the witnesses testified under oath.
13. The testimonies led by all the witnesses are fully captured on the record of proceedings. What follows in this award is a concise summary of the material and relevant evidence and arguments on the issues I must determine in terms of section 138 of the LRA.

Respondent's case

14. **Adv. Horatius Ntanjana (Ntanjana)**, the chairperson of the disciplinary hearing, testified to the following effect:
- 14.1 The delay in finalising the disciplinary case was justified because of the complexity of the allegations and the limitations resulting from the Covid-19 period. He stated that he was unable to comment on the delays following his report on findings and recommended sanction that was submitted to the Head of the Department.
- 14.2 He confirmed during cross-examination that the applicant was found guilty on charge 1 regarding prejudice of the administration and/or efficiency of Department of Health and charge 2 regarding fruitless and wasteful expenditure.
15. **Mr. Marshall Ndyoko (Ndyoko)**, Senior Manager: Fraud Management Unit, testified in the following terms:
- 15.1 His Unit was mandated to conduct an investigation into the alleged theft of Mifepristone tablets from the Mthatha Pharmaceutical Depot during 2020. He was satisfied, based on the video footage of 17 February 2020 and statements obtained from various employees, that the applicant and Messrs Gola and Ngcuka were responsible for the unauthorized removal of three boxes of Mifepristone tablets from the Tablets sections to the ARV section where one box in questions went ultimately missing. Under cross-examination, he confirmed that the applicant was not interviewed during the investigation.
16. **Mr. Malibongwe Mdodi (Mdodi)**, the Investigation Officer, testified as follows:
- 16.1 He confirmed that there was reasonable and sufficient evidence to substantiate that the missing Mifepristone tablets were removed without authorisation by the applicant, Gola and Ngcuka. He indicated that Mr. Macanda (Macanda) showed him the video footage and identified the employees who handled the boxes. He was told by Macanda that the boxes contained the missing Mifepristone tablets.
- 16.2 He confirmed during cross-examination that the applicant was not interviewed, because he (the applicant) was on suspension. He was unable to account for the missing goods return voucher and supplier delivery note to show that the Mifepristone tablets were delivered. He was unsure at what section the applicant was working at the time of the incident. He corroborated Ndyoko's evidence that only one Standard Operating Procedure (SOP) was provided during the investigation by Macanda. He admitted to omissions he made regarding some of the affidavits of witnesses.

17. **Mr. Xolile Macanda (Macanda)**, the Manager of the Mthatha Pharmaceutical Depot, testified to the following effect:
- 17.1 The Mifepristone tablets in question are used in the termination of unwanted pregnancies and given the high risk of it being stolen, the management had decided that it must be stored in the strongroom. The newly appointed Receiving Pharmacist for the strongroom, Ms Ndungane, did not know of the procedure that the Mifepristone tablets were supposed to be stored in the strongroom as a result it was mistakenly delivered to the Tablets section where the applicant worked.
- 17.2 He pointed out that after the Assistant Manager of the warehouse, Ms Morrow, reported that the Mifepristone tablets were missing, they subsequently viewed the video footage on 21 February 2020. After viewing the footage of 17 February 2020, they came to the conclusion that the applicant and two other employees, i.e., Gola and Ngcuka were involved in the unauthorised removal of the tablets. He called the employees and asked them to cooperate in finding the missing box but they refused.
- 17.3 The applicant was aware of the SOP but failed to report the deviation of the unauthorised boxes of Mifepristone tablets which ultimately resulted in one of the boxes being missing.
- 17.4 It was clear from the video footage that the applicant was the mastermind in organizing Gola and Ngcuka to remove the missing box of Mifepristone tablets as they (Gola and Ngcuka) were not allowed in the Tablets section. The applicant's conduct had destroyed the trust relationship.
- 17.5 He maintained during cross-examination that although the applicant was not listed as a responsible person in terms of the SOP it was the common understanding that he was expected to implement it. When asked when the box of Mifepristone tablets went missing, he at first said 12 February 2020 and later indicated it was on 17 February 2020 after he watched the video footage. He agreed that the receiving pharmacist at the time of the incident was not charged. He disagreed with the version that there were no SOP's in place for General Assistants (GA's).
- 17.6 He maintained that the applicant was the mastermind in the unauthorised removal of the boxes of Mifepristone tablets; despite it being put to him that he made a mistake with the number of boxes which were loaded onto the trolley jack by Gola and by pointing out the wrong bin during the *in loco* inspection from where the boxes were loaded on the day of the incident.
- 17.7 He disagreed with the version put to him that the boxes seen on the video footage did not contain Mifepristone tablets. He was unsure when the box of Mifepristone tablets went missing.

18. **Ms. Nontutuzelo Montanga (Montanga)**, a pharmacist at the Mthatha Pharmaceutical Depot, testified in relation to the MEDSAS report. She confirmed that whilst the Depot ordered 500 Mifepristone tablets only 480 units (3 boxes) were delivered and received. She maintained this version under cross-examination with a detailed explanation of the processes which resulted in the compilation of the MEDSAS report.

Applicant's case

19. **Mr. Unathi Qwebi (the applicant)**, testified to the following effect:

- 19.1 There were no SOP's in place for GA's and he was not aware of the rule to report deviations to the responsible pharmacist. He denied that he was responsible for the counting of stock or that he had seen or removed the Mifepristone tablets as alleged in charge 1 neither was he guilty of wasteful expenditure as alleged in charge 2. At the time of incident, he was working at bin no 5 and not bin no 6 as pointed out by Macanda during the *in loco* inspection.
- 19.2 He received the notice of outcome of appeal more than three years after he was issued with notice of the disciplinary hearing. He was never provided with an explanation regarding the delay in finalising his hearing. None of the other employees implicated in the investigation report were disciplined, which he believed was unfair.
- 19.3 He denied during cross-examination that he handled boxes containing the Mifepristone tablets. He confirmed that he gave one box Ngcuka who was from the ARV section. He called Gola to collect the other boxes because he (Gola) was working in Liquid section. He maintained that he was not aware that he should have reported the matter to his manager as there was no SOP in place for the GA's. He disagreed with the version that he was the mastermind behind the unauthorised removal of the Mifepristone tablets on 17 February 2020.
20. **Mr. Sibukele Gola (Gola)**, an employee at the Mthatha Pharmaceutical Depot, testified:
- 20.1 There were no SOP's for GA's in place and it was normal practice for employees to collect items from other sections. He pointed out during cross-examination that two of the four boxes loaded onto the trolley jack by him belonged to the Liquid section where he worked and the other two boxes belonged to Injection section. He returned the boxes to the Liquid section and thereafter he took the other two boxes to the Injection section. None of the boxes contained Mifepristone tablets.

- 20.2 He disagreed with the version that the applicant was involved in the unauthorised removal of the box of Mifepristone tablets. He pointed out that the other employees implicated in the investigation report were not disciplined.
21. **Mr. Nceba Ndlangwane (Ndlangwane)**, an employee at the Mthatha Pharmaceutical Depot and shop steward, testified that none of the other employees mentioned in the investigation report have been disciplined which was unfair to the applicant. There were no SOP's in place to assist employees in doing their work.
22. Turning to the written closing arguments of the parties, the respondent argued in essence that the applicant was part of a syndicate which was responsible for the loss of the Mifepristone tablets which prejudiced and dented the image of the Department in that the tablets could not be delivered to the clinics in need and resulted in wasteful expenditure. The applicant was aware of the rule and was guilty of the misconduct charged and dismissed for.
23. The applicant, on the other hand, argued that his dismissal was procedurally unfair, considering the provisions relied on in Resolution 1 of 2003 and that the respondent has waived its right to discipline him due to the long delay. The dismissal was substantively unfair, because the respondent has failed to present a *prima facie* case against the applicant. The applicant also contested the admissibility of the video footage and the investigation report.

Analysis of evidence and arguments

24. Every employee has the right in terms of section 185 of the LRA not to be unfairly dismissed. The dismissal of the applicant is not in dispute which means that in terms of section 192 of the LRA, the onus is on the respondent to prove, on a balance of probabilities, that the dismissal of the applicant was fair.
25. The Labour Court in ***Department of Home Affairs and General Public Service Sectoral Bargaining Council and Others Case no: JR281/17 [2019] (LC)***, in the dealing with the issue of an arbitration being a hearing *de novo* held:

"[80] The Commissioner cannot disregard the record of the disciplinary proceedings purely because he is hearing the matter for the first time. The record of the disciplinary proceedings could also be used to assess whether the dismissal of the employee was effected in accordance with a fair procedure. Most importantly, the commissioner must test the totality of the evidence submitted by the employer against the guidelines on dismissal set out in the LRA Code of Good Practice: Dismissal."

26. The applicant challenged both procedural and substantive fairness of his dismissal. I will first deal with the question of whether the dismissal was effected in accordance with a fair procedure?
27. It is settled law that public authorities are also regulated by administrative law and where a procedure and remedy is prescribed either by legislation or collective agreement in the public service, the public authority, as *in casu*, has to apply it.
28. In ***Highveld District Council v Commission for Conciliation, Mediation and Arbitration and Others (2003) 24 ILJ 517 (LAC)***, the Court held:
- “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.”
29. The applicant’s misconduct occurred on 17 February 2020. He received the final determination on appeal only on 23 January 2024, one month short of four years. The respondent failed to give a plausible explanation for the continued delay beyond the Covid-19 period relied on by Adv. Ntanjana.
30. It is clear from the objective facts before me that the applicant’s disciplinary process was not completed within the shortest possible timeframe as provided for in terms of PSCBC Resolution 1 of 2003: The Disciplinary Code and Procedure for the Public Service (the Resolution) given the excessive delay which was largely unaccounted for.
31. The applicant argued that due to the extensive delay, the respondent had waived its right to pursue disciplinary proceedings against him. I am unconvinced, because there is no evidence before me to show that the respondent intended to abandon the appeal which is the final process in disciplinary proceedings in terms of Resolution 1 of 2003 nor was there evidence to show potential prejudiced suffered by the applicant.
32. Given the above, I find that the respondent has failed to discharge the onus to prove that the dismissal was procedurally fair.

33. In terms of substantive fairness, the parties were in dispute over the contravention of the rule; its awareness, reasonableness and consistent application as well as the appropriateness of dismissal as a sanction, considering Item 7 of the LRA Code of Good Practice: Dismissal (the Code).
34. The Labour Appeal Court in **Workforce Staffing (Pty) Ltd and Siyabulela L Mjoli and Another (JA 32/23) [2024] ZALAC 9**, held *inter alia* that where the onus rests on the employer, as in this case, and where there are two mutually destructive versions, that party can only succeed if it satisfies the Court on a preponderance of probabilities that its version is true and accurate and therefore acceptable and that the other version by the employee is therefore false and falls to be rejected. It is only where a consideration of the probabilities fails to indicate where the truth probably lies, that recourse is had to an estimate of relative credibility apart from the probabilities. [my underlining]
35. The Labour Appeal Court in **EOH Abantu (Pty) Ltd and Commission for Conciliation, Mediation and Arbitration and Others (JA4/18) [2019] ZALAC 57 (EOH Abantu)** held in setting the principles involved in the formulation of disciplinary charges that the charges must be specific enough for the employee to answer them; arbitrators must not adopt too formalistic and technical approach and the categorisation by the employer of the alleged misconduct is of less importance.
36. Central to the two allegations levelled against the applicant was his involvement in the missing box of Mifepristone tablets, considering the principles in **EOH Abantu**. In other words, whether the applicant is guilty of the alleged misconduct, depends on whether the Mifepristone tablets were part of the boxes which were removed from the Tablets section on 17 February 2020 as seen in the video footage?
37. The respondent relied on the rule as contained in its Standard Operating Procedure (SOP) on picking and packing of orders at Mthatha Pharmaceutical Depot which states *inter alia* that *unauthorised items must not be picked from the shelves and when there are deviations between the picking list and what is on the bin, the pharmacist must be contacted immediately.*
38. I am unpersuaded that the applicant was aware, or could reasonably expected to have been aware, of the aforementioned rule, because the respondent has failed to show that the SOP on which Macanda relied was applicable to General Assistants (GA's), let alone that it was unsigned to confirm its implementation. The applicant's version that there was no SOP in place was corroborated by Gola and Ndlangwane.
39. An adverse inference is drawn from the fact that the respondent failed to call any of the available supervisors of the GA's or one of the Pickers and Packers in the Tablets Section to corroborate Macanda's version.

40. There is no need to make a finding regarding the issue of the reasonableness or validity of the rule as the parties did not deal with it in their evidence.
41. There was an issue raised by the applicant which emanated from the investigation report regarding the absence of a supplier's delivery note to confirm that the Depot received the Mifepristone tablets. I am persuaded by the testimony of Montanga that the Mifepristone tablets were delivered and received by the Depot, based on her detailed explanation of the internal processes which ultimately resulted in the MEDSAS report.
42. On the issue of registration of the Depot, I prefer Macanda's version that the Depot was duly registered as a pharmaceutical institution; whilst the Nelson Mandela Academic Hospital was accredited to provide training to the employees of the Depot. In any event nothing much turned on the applicant's argument as it relates to the real issue before me, namely the dismissal of the applicant.
43. Turning to whether the applicant contravened the rule, it is trite that an employer bears the onus to prove, on a balance of probabilities, that the misconduct was indeed committed by an employee concerned. Where the employer is suspicious that the employee, through the latter's movements or conduct, may have some dishonest intentions, the employer cannot justifiably rely on that suspicion as a ground to dismiss the employee for misconduct because suspicion, however, strong or reasonable it may appear to be, remains a suspicion and does not constitute misconduct. There needs to be tangible and admissible evidence to sustain a conviction for the misconduct in question.
44. It is settled law that the test for evaluating circumstantial evidence, as in the case before me, is to establish the most probable inference to be drawn from the proven facts and to examine the facts to establish that they are true and proven.
45. It is a fact that Macanda was unable to identify any of the boxes which were handled by the applicant, Gola and Ngcuka. The applicant's version that the missing Mifepristone tablets were not part of the boxes seen on the video footage was corroborated by Gola who loaded the boxes on the trolley jack. Gola pointed out under cross-examination that two boxes belonged to the Liquid section and the other two boxes to the Injection section. An adverse inference is drawn from the fact that the respondent did not call or subpoena Ngcuka as a witness to confirm the contents of the box he was allegedly given by the applicant.
46. Macanda relied on the findings in the investigation report that the Mifepristone tablets were mistakenly sent to the Tablets section where the applicant worked, instead of the strongroom. However, the investigation report did not include the material evidence listed under par. 4.3 in relation to the "Transit In

Section distribution register for Tablets section" which would have proven that the Mifepristone tablets were erroneously sent to the Tablets section instead of the strongroom.

47. An adverse inference is drawn from the fact that the respondent failed to call any of the relevant and available witnesses identified in the investigation report, namely Ms. Ndungane, the Pharmacist in charge of Transit In section, Ms. Nocuze, the Post Basic Pharmacist in the Tablets Section, Ms. Mbiza and Mr. Njongo who worked under the supervision of Ms. Ndungane to corroborate Macanda's material assertion. As it stands, there are no objective facts which placed the Mifepristone tablets in the Tablets section after it was received on 12 February 2020. This is fatal for the respondent's version.
48. Macanda's testimony that Gola and Ngcuka were not supposed to be at the Tablets section was disputed by the applicant on the basis that it was a daily practice and that there were no SOP's in place which prohibited such conduct. The applicant's witnesses, Gola and Ndlangwane corroborated his version in this regard. An adverse inference is drawn from the fact that the respondent did not call any witnesses to corroborate Macanda's version.
49. Macanda's suspicion that the incident took place when other employees were on lunch would have carried more weight in the absence of CCTV cameras, considering that it is a proven fact that all employees were aware of the CCTV cameras. Having viewed the video footage, I am persuaded that the body language of the applicant, Gola and Ngcuka did not show suspicious conduct in that they did not attempt to hide any of the boxes handled.
50. Macanda was unable to confirm under cross-examination when the box of Mifepristone tablets went missing. At first, he said it was reported missing on 12 February 2020, but when asked about the video footage of 12 February 2020; he changed his version that it went missing on 17 February 2020 after they watched the video footage on 21 February 2020. An adverse inference is drawn from the fact that the respondent failed to call Ms. Morrow to confirm Macanda's version as she was the one who reported the missing Mifepristone tablets to him.
51. Given the above, I am satisfied that the video footage was inconclusive to conclude that the respondent's version was the most probable.
52. Given the above, it is mind boggling to comprehend how the investigators, relying on the same video footage, could have come to the conclusion that the applicant, Gola and Ngcuka were responsible for the unauthorized removal of the boxes in question; whereas Macanda was unable to identify any of the boxes seen in the video footage as containing the Mifepristone tablets. In this regard, Mdodi confirmed that Macanda told him that the boxes seen in the video footage contained the Mifepristone tablets in question.

In other words, Mdodi, as an experienced investigator, accepted Macanda's version on the face of it without having heard the version of the other party to establish whether it was the case.

53. Notwithstanding the above findings in relation to the video footage and the investigation report, I find no merits in the applicant's closing arguments to disturb my rulings made on the admissibility of these matters during this arbitration.
54. Considering the totality of the evidence and inferences drawn, I am persuaded that the respondent's version of events through the eyes of the video footage and its witnesses was outweighed on a scale of probabilities by the version of the applicant and his witnesses.
55. I say so, because it cannot be persuasively said that the boxes identified in the video footage contained the missing Mifepristone tablets, considering that Macanda was unable to identify any of the boxes and no evidence was led to show that the boxes in question were indeed mistakenly delivered to the Tablets section. Macanda's indecisiveness regarding when the box of Mifepristone tablets went missing and the fact that he pointed out the incorrect bin from where the applicant was working during the *in loco* inspection underlined the respondent's desperation to label the applicant at all costs as the mastermind in relation to the missing tablets without any tangible evidence.
56. More importantly, the failure of the respondent to call relevant and available witnesses identified in the investigation report has made it difficult to accept the respondent's version as the most probable. It is clear from the proven facts that the box of Mifepristone tablets could have went missing on any day between 12 February 2020 and 17 February 2020, and this could have happened either in transit to the strongroom or to the Tablets section where it could have been handled by a number of different Pickers and Packers.
57. On the other hand, the applicant's version was more probable, because he was able to give an account of the boxes handled on the day of the incident as supported by his witnesses with no material contradictions in relation to his original written statements shortly after the incident.
58. In light of all the above reasons, it will be unfair to find the applicant guilty on mere suspicion. I find that the respondent has failed to discharge its onus to prove that the applicant was guilty of the misconduct charged and dismissed for. The respondent has thus failed to discharge its onus to prove that the dismissal was substantively fair.
59. The applicant was seeking retrospective reinstatement with back pay. In terms of section 193 of the LRA, the primary relief for a dismissal which is both procedurally and substantively unfair, as in this case, is reinstatement. There are no reasons before me why the relief sought by the applicant should not be

awarded, considering that the respondent, on a preponderance of the probabilities, has failed to show that its version was most probable and the applicant is still unemployed. It is settled law that there is no limit when awarding back-pay as it is not the same as compensation referred to in section 194 of the LRA. Back-pay is calculated from the date of dismissal (23 January 2024) until the date of this award, i.e., 14 months and 19 days.

60. I, therefore, deem it appropriate to make the following award and order:

Award

61. The dismissal of the applicant, Unathi Qwebi, by the respondent, Department of Health- Eastern Cape, was both procedurally and substantively unfair.
62. The respondent is ordered to pay the applicant back-pay in the amount of R179,669.95 (one hundred and seventy-nine thousand six hundred and sixty-nine rand and ninety-five cents), calculated as $(R12,278.13 \times 14 \text{ months}) + (R409.27 \times 19 \text{ days})$, minus any such deductions the respondent is obliged to make in terms of law, by not later than 30 June 2025.
63. The respondent is ordered to reinstate the applicant into its employ on terms and conditions no less favourable than those that were applicable before his dismissal on 23 January 2024.
64. The applicant must report for duty at the Mthatha Pharmaceutical Depot within 48 hours of being notified of this award.
65. There is no order as to costs.



William Richard Pretorius