



ARBITRATION AWARD

Case No: **PSHS230-23/24**

Commissioner: **M.A. Nozigwaba**

Date of award: **04 April 2024**

In the matter between:

PSA obo Sibukele Gola

Applicant

and

Department of Health- Eastern Cape

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. This arbitration was heard at Mthatha General Hospital on 28 September 2023, 21- 22 November 2023, 02 February 2024 and 18 March 2024. Mr Sibukele Gola (applicant) was represented by a PSA official, Mr Samkelo Mzuku. Department of Health- Eastern Cape (respondent) was represented by its labour relations officer, Ms Phila Si,amga.
2. The dispute is about the fairness or otherwise of the applicant's dismissal, heard in terms of sections 185(1), 186(1)(a) and 191(5)(a)(i) of the Labour Relations Act 66 of 1995, as amended (LRA).
3. The proceedings were digitally recorded.
4. Parties agreed to file written closing arguments by not later than 25 March 2024, and they both submitted as agreed. I have taken these arguments into consideration in penning this award.

ISSUE TO BE DECIDED

5. I am required to determine whether the applicant's dismissal was procedurally and substantively fair. Should I find that the dismissal was unfair I will order an appropriate relief.

BACKGROUND TO THE ISSUE

6. The applicant started to work for the respondent as indefinite employee on 3 March 2020. At the time of his dismissal, he was a pharmacy assistant (placed at Mthatha General Depot), earning a gross monthly salary of R16 221.25. He was dismissed on 20 June 2023, after he was found guilty of *'Theft / Unauthorised removal of State medication in that on 17 February 2020 you intentionally took / removed three (03) boxes of Melifelprestone tablets¹ from the Tablets Section Depot, without authorization or permission and one box containing 200g x 160 tablets got lost / stolen, with value of R120 000.00'* (page 1 of respondent's bundle A).
7. In his procedural unfairness challenge the applicant is taking issue with the fact that the respondent took unreasonably long time to institute disciplinary proceedings. The offense he was charged for is said to have occurred on 17 February 2020 but the first session of his disciplinary hearing only set on 18 August 2021. On substantive fairness challenge the applicant is saying that he is not guilty of the charge, and even if he was correctly found guilty the misconduct in question was allegedly committed by a group and singling him out displayed inconsistent application of disciplinary sanctions.

SURVEY OF THE EVIDENCE AND ARGUMENTS

8. The respondent's case is that the applicant committed a serious offense, which led to the loss of medication to the value of R120 000.00. Dismissal was the befitting sanction for this offense.
9. The applicant denying having committed the offense he was dismissed for. He further says that there was no known standard operating procedure they had to abide with when executing their activities in packing and unpacking medicine at the depot. There was therefore no known rule as to how they were expected to handle boxes of medicine. He also takes issue at unreasonable delay in charging and disciplining him, as his disciplinary hearing only commenced on 18 August 2021 for an offense said to have occurred on 17 February 2020.
10. Ms Abigale Sisanda Mbiza testified that, referring to a statement she had penned on 20 November 2023 (page H of respondent's bundle 1), on 13 February 2020 she received stock which comprised of, amongst others, boxes of Melifelprestone tablets. She handed it over to her supervisor, and thereafter the stock

¹ A drug used to medically terminate pregnancy

was sent to different sections. On the following working day, which was on a Monday (16 February) she went to the respective sections with stock control books for every section to sign for the stock received. When she handed the stock control book to her supervisor, Ms Nocuze, to confirm stock received, she was alerted that the boxes of Melifelprestone tablets were not supposed to be kept with other medication. They were supposed to be kept with high schedule medication in a highly secured strongroom. After a long search two of the three boxes were found, with one missing.

11. When inspection in loco was conducted, Ms Mbiza pointed to the isle where the pallet with the boxes of the medication in question was placed.
12. On cross examination she was asked about the reason why she only penned her statement on 20 November 2023, which was a day before she testified in arbitration proceedings. Her answer was that it was because she was alerted that the statement she had penned when investigation was conducted got lost. She was further pointed to her inaccuracies with regards to dates as 16th February 2020 was on Sunday. Her answer was that she made a mistake with dates as the incident had happened long ago. She remained adamant, however, that it was on a Monday when she had gone to have her supervisor sign the book confirming stock received. She further testified that they did not keep delivery notes of delivered items. On the question of whether she was disciplinary charged for having placed stock in an incorrect place, her answer was that she was charged and issued with a written warning sometime in 2022.
13. Mr Marshall Alex Ndyoko (senior manager at respondent's fraud management division) testified that his division got to be mandated to investigate circumstances around the disappearance of a box of Melifelprestone tablets from Mthatha Hospital Depot. The team which he led went to Mthatha and conducted the investigation, and they produced the investigation report (pages 12 to 19 of the applicant's bundle 2) which was forwarded to labour relations directorate for implementation of findings and recommendations, which had directed that certain employees be disciplinary charged. He witness testified that the investigation report recommended that the pharmacist in charge of the medical transit section, Ms Ndungane, where medication got lost, had to be charged. Ms Mbiza and Ms Njongo were also recommended to be charged for not having ensured that the medication was safely kept in the strong room. It was found that the post basic pharmacist, Ms Nocuse, had failed to ensure that the three boxes were properly acknowledged as received. With regards to the applicant and his colleagues, Mr Ngcuka and Mr Qwebi (who worked with the applicant), it was found on the strength of CCTV footage that there was evidence that they moved the three boxes of Melifelprestone tablets without authorisation from tablet

section to ARV section. The movement of the boxes was taken as an act of dishonesty by the involved officials.

14. On cross examination the witness was asked as to whether what was seen on CCTV footage had pointed to a conclusion that the applicant committed theft. His answer was that he did deprive the respondent of the missing box. He acknowledge, however, of not seeing the applicant exiting the depot with the said box. When asked whether there was Standard operating procedure (SOP) with regards to where the said medication was supposed to be kept the witness said it was there but could not point it out. He said the SOP was there as Mr Macanda had mentioned in his affidavit that the applicant and his colleagues were aware that the boxes were not supposed to be kept in the area to where they had removed them to. There is however no reference to any SOP in Mr Macanda's affidavit. It was put to the witness that at the time of the incident (17 February 2020) the applicant was a general worker, who would on daily basis be issued with verbal instructions. He would, at times, be instructed to work at tablet section. He only got appointed as pharmacist assistant on 02 March 2020, which was after the incident (reference to two payslips in pages 35 and 36 of 2). He acknowledged that in 2014 issued SOP there was no mention of general workers as officials responsible for picking and packing medication, ut he was doing it anyway before 02 March 2020, and the witness agreed. He also acknowledged that the applicant was never called to put his side during the investigation. It was put to the witness that Ms Ndungane who according to the investigation was recommended to be among the employees to be charged, was never charged and the witness could not deny that.
15. Mr Lwando Ludede (technician from Tyeks Security Services) testified about what he observed in the footage, that the applicant and his colleague are seen communicating and thereafter taking boxes. His observation about the footage is that the applicant and another employee are seen conversing, and thereafter the applicant pulls a pallet. In that pallet the witness identified two light brown boxes with stickers, and two dark brown ones, with one on top of another.
16. On cross examination he conceded that he is not the person who extracted the footage from its original source. When asked if there were any other cameras in the exit area, which would have been useful in seeing who actually exited with the box, his answer was that when he came, he was told there were no cameras at that time. On the question of the number of boxes he could see in the footage, he mentioned that there were two, one is on top of another.
17. Mr Xolile Macanda (pharmaceutical services manager) testified that his role includes managing storing distribution of medicine, He also ensures compliance with of the depot and warehouse to the requisite

standards. After having realised that there was a missing box of the three delivered boxes of Melifelprestone tablets the CCTV footage was watched.

18. The witness went through the footage, and from it he observed that the applicant, who worked at the liquid section, in the next passage, had entered the tablet section without having been permitted to do so. The applicant and Mr Qwebi are seen bending in an obscured area in tablets section, and after that the applicant pulls a pallet with three flatly put light brown boxes, plus a dark brown one placed upwards. On cross examination when pointed to the boxes which were alighted and packed at liquid section the witness firstly said he saw three light brown boxes, which he identified as Melifelprestone tablets boxes. He later on conceded that the boxes were actually two and not three. He went further and said that it is possible that the third one might have been taken out while coming before reaching the visible point where the others are seen being alighted.
19. It was put to the witness that the applicant's version is that he would receive instructions to take boxes from any section. The witness denied this and said there was an SOP which stipulated how they should work in their respective section and that high schedule medicine was to be stored in the strong room. It was further put to him that the boxes the applicant was seen pulling were not Melifelprestone tablets boxes. The witness insisted that he believed that the boxes were indeed with Melifelprestone tablets.
20. On the issue of the delay in instituting proceedings the witness testified that the delay in commencing with the applicant's hearing was as a result of COVID-19. The Country went to hard lock down from end March 2020. It was possible to move around in the middle of 2021. The levels had been reduced, but as a hospital they were concentrating more on clinical operations.
21. After the closing of the respondent's case the applicant's representative sought for what he termed absolution from the instance as he believed that the respondent had not adequately discharged its onus. The applicant was accordingly warned as per the dicta in *Klassen v CCMA and Others*² and *Minister of Safety and Security v Madisha and Others*³ that he has present his version and that there is no absolution from instance arrangement in arbitration proceedings.
22. The applicant testified that when he went to the isle and conversed with Mr Qwebi, he had responded to his call wherein he had called him to show him a box with no label. They opened it and found that it belonged to injection section. That is why it appears as opened in the footage. In the pallet, which he is

² [2005] 10 BLLR 964 (LC)

³ [2008] ZALC 106; [2009] 1 BLLR 80 (LC)

seen piling there were four boxes. Two were destined to be dropped at liquid section (which was a next isle from where they were at tablet section). The other two boxes were from injection section which he had taken for purposes of dropping them at injection section. He pulled the to the liquid section and dropped two boxes there. He then proceeded to injection section in order to drop the remaining two boxes. He denies having removed or stolen boxes with Melifelprestone tablets. On the issue of him needing authority before removing boxes from one section to another, his testimony was that there was never such a rule that a picker would first require permission to remove a box from one section to another. It was their daily activity to move boxes with medicine around. He accepts that he was stationed and placed at liquid section, but his work would not confine him in one section. In doing his picking and packing duties he would go to all units. This was the case with his colleagues as well.

23. On the issue of the respondent having waited from 17 February 2020 to August 2021 his take is that there were no justifiable reasons to wait that long. He regards this as having rendered his dismissal procedurally unfair. The applicant also takes issue at the fact that there were other employees not charged, whilst the investigation report had recommended that they be charged. On the issue of existence of other SOP besides the 2014 one in page 4 to 10 of bundle 2, the applicant testified that there was no other known SOP. When the offense he was charged of was alleged to have happened he was still a general worker. He only became a pharmacy assistant in March 2020.
24. At cross examination the applicant was referred to his statement wherein he said he was called by Mr Qwebi who alerted him that there were boxes in tablet isle which belonged to Liquid section. He had gone there to fetch what belonged to his section. There was no need to first get permission from supervisors or managers as they had always worked like that.
25. Mr Phindile Goodwill Vinindwa (former respondent's employee) testified that he is now on the employ of the Department of Correctional Services. He previously worked for the respondent as an admin clerk from 2013. He was first placed at liquid section of Mthatha Hospital Depot in 2016, and thereafter was taken to supply chain section. He was again placed at liquid section where he worked until he left the respondent 20 March 2020. His duties at liquid section at the Mthatha Hospital Depot included receiving medicines, perking, and transiting it out of the depot.
26. The witness rendered his perking and transiting of medicines not as a professional pharmacist assistant but as a mere clerk. There was never any Standard Operating Procedure which regulated the manner in which they discharged their daily duties of perking and transiting medicines. Their supervisors and pharmacists would issue out different verbal instructions on rendering of different duties at the depot. He

recalls an instance, shortly before he left, wherein a senior official from the respondent's Bisho office who told them in a meeting that SOP on Depot activities would be issued only to technicians, pharmacists and pharmacist assistants, and not to clerks untrained about pharmaceutical activities.

27. At cross examination it was put to Mr Vinindwa that Mr Macanda had given testimony about the SOP which they were supposed to follow when rendering their duties at the depot. His answer was that they were never issued with such. Instead, they would get different verbal instructions. He went further to say that they would be told by managers to render their duties with precision and care as the Depot was working towards being issued with a license so that it would be a fully-fledged pharmaceutical Depot with requisite competency. For them to Depot to be licensed there had to be SOP governing the way in which they work. General workers would be utilised in different sections as per verbal instructions, and there was never a rule that an employee had to seek permission before going to another section.
28. Mr Nceba Ndlungwane (employed as Mthatha Hospital Depot as a driver) testified that he started working for the respondent in 2007. When driving was outsourced to an external company he was utilised at the Depot Warehouse as a medicine picker. On whether there was any SOP followed and observed when rendering duties at the Depot Warehouse his testimony was that there was never such SOP issued to them as clerks assisting there. They would receive different verbal instructions on what to do.
29. On cross examination he was asked whether he recollection about the meeting wherein an official from Bisho had talked about them being only clerks who could not be issued with SOP on how to work at the Depot, and his answer was that he does not remember being part of such a meeting.
30. For the respondent it was argued that the evidence it led proved that there was a rule that employees had to seek permission before going and removing items from other section to another. The applicant was accordingly found guilty of the charge theft or unauthorised removal of medication. The offense led to critical medication not being available for use by patients in need of it. The offense was serious enough to warrant dismissal sanction. The applicant cannot plead parity principle and compare his offense with that of Ms Mbiza
31. For the applicant it was argued that the respondent failed to discharge its burden to prove the applicant stole or removed the lost medication without authority. The applicant has managed to prove that there were two boxes belonging to liquid section he had taken there and such boxes were not proven to be the said missing medication. There was never a rule that the applicant and his colleagues needed permission for them to go do work in other sections. The applicant had disputed this version from Mr Macanda's testimony. The applicant's version was confirmed by the ex-employee, Mr Vinindwa, that there was no

known rule to the effect that employees had to be granted permission to pick and peck medication in a section other than the one deployed in. The respondent had also taken unreasonable long time to charge the applicant there was no justification for the delay.

ANALYSIS OF EVIDENCE AND ARGUMENTS

32. The applicant is taking issue at the fact that his disciplinary hearing took place after more than a year from the date of the alleged offense. The respondent's defence is that hard lock down got to set in end March 2020 and as the Department hands on in dealing with the pandemic it was not practicable for it to have it heard in 2020 and early 2021.
33. Inasmuch as hard lock down got to be relaxed after July 2020 and beginning 2021 the respondent was burdened with dealing with the pandemic and could not have been in a position to expedite the sitting of the applicant's dispute. It is also noteworthy that disciplinary proceedings are taken to have commenced when investigation commences. The delay in finalising the investigation cannot be said to have been without justification. There was COVID-19 pandemic which was attended to by the respondent. In light of the aforesaid I find that there was no procedural unfairness emanating from undue delay in setting down the disciplinary hearing.
34. With regards to substance it is a fact that in the case at hand there is no direct evidence on the alleged offense. There was no witness who testified that he saw the applicant stealing or removing the said lost medication. What is relied upon is circumstantial evidence, from which an inference will have to be drawn from the account by a witness who had knowledge of the boxes of medication being at a particular isle in the depot, the video footage apparently putting the applicant at the scene where the lost boxes were and the testimony and allegation that the boxes that he and his colleague took are actually the boxes with Melifelprestone tablets. With the onus of proof in labour law matters being that of balance of probabilities, what I am enjoined to do in dealing with circumstantial evidence is to choose the most reasonable inference that corresponds with the proven facts. In *Mclead v Rens*⁴, the Court remarked as follows with regards to drawing of inference:
- 'The proved facts should be such as to render the inference sought to be drawn more probable than any other reasonable inference. If they allow for another more or equally probable inference, the inference sought to be drawn cannot prevail.'

⁴ 1997 (3) SA 1039

What needs to be established first is what facts have been proven from the evidence adduced from both sides, and then from those facts the drawing of an inference which is more probable than any other reasonable inference will be done.

35. The facts in the dispute at hand are in dispute, and in a quest to prove the most probable facts reliance will be on the dictum in *Early Bird Farms (Pty) Ltd v Mlambo*⁵ where the LAC held as follows:

'When determining whether or not an employee is guilty of misconduct, the test which should be applied is whether the version of the party who bears the onus of proof can be believed or not. This process involves comparing the version of both parties to determine which version is more probable.'

36. In ascertaining which of the version is more probable the reliability and credibility of each version will be scrutinized according to the test adopted in *Stellenbosch Farmers Winery Group Limited and Another v Martell et Cie and Others*⁶ where the SCA held that:

'On the central issue as to what the parties actually decided there are two irreconcilable versions, so too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarized as follows: To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities....in the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus succeeds in discharging it.

It will be from the facts proven, through the *Stellenbosch Winery* established criteria, that a more probable inference will be drawn.

37. On the issue of whether the boxes the applicant is seen pulling from tablet to liquid section, it has not been proven that the boxes in the pallet were the boxes of the said lost medication. The applicant's version is that he had been alerted by his colleague, Mr Qwabe that there were boxes belonging to liquid section he needed to take. He had gone there to take such boxes, which were two. There were also other two belonging to injection section. He also took those, with the intension to drop them at Injection section. Mr Macanda testified that the applicant was not supposed to be at the tablet's section and take medication without management approval. The applicant disputed that there was a need for management's approval, as it was their daily activity moving medication from one section to another. The applicant's witness, Mr Vinindwa corroborated the applicant's version in this regard. He also corroborated the applicant's version

⁵ (1997) 5 BLLR 541 (LAC)

⁶ 2003 (1) SA 11 (SCA)

that there was never a rule or SOP with this rule. On the type of medication identified in the footage the applicant disputed that such medication was the lost Melifelprestone tablets. Mr Macanda's version seemed to be not conclusive as he first said the boxes which he had taken from tablet section were three. When the boxes were dropped at liquid section Mr Macanda conceded that the number of boxes were actually 2, which got to be dropped. When looking at the said boxes it was difficult for one to comprehend with preciseness how many were they, let alone identifying what their labelling. The applicant's version, which he had provided in his statement shortly after the incident remained consistent with what he presented at arbitration. From the footage it could not be decisively concluded that Mr Macanda's version was the most probable.

38. Ms Mbiza testified that when the medication was received its pallet was placed at the isle in tablet's section, and had stayed there from Friday to the following Monday. Ms Mbiza could also not provide invoices of Goods Receipts Vouchers confirming the quantity of the tablet.
39. Having analysed the above it cannot be the inference advanced by the respondent, through video footage and its witness' testimony is more probable than the one advanced by the applicant on its his explanation of what happened in the footage and supported by his witnesses. The boxes identified in the footage cannot be conclusively said to be the said lost medication. The applicant's version is also that he had gone to the tablet isle for the purpose of taking what belonged in his liquid section. There were also a number of officials, including Ms Mbiza, who had not done what was supposedly expected of them. Finding the applicant guilty of taking the said medication on the strength of non-conclusive version as to the identity of the boxes of medication would be unfair. The applicant's propagated version of what the boxes were is also a competent version which was not surpassed by the respondent's one. In the circumstances I find the applicant not guilty of the charge he was dismissed for.
40. Coming to the relief. The applicant has prayed for re-instatement. The applicant was dismissed for an offense he should not have been dismissed for. The proven facts cannot be said to have rendered the inference propagated by the respondent more probable than the one propagated by the applicant. What would be fair in the circumstances is re-instatement with compensation for lost emoluments, as there has not been proven misconduct against the applicant.

AWARD

41. I therefore make the following award:

41.1. The applicant's dismissal was substantively unfair.

41.2. The respondent is ordered to re-instate the applicant to its employ with effect from 20 June 2023. As a result of re-instatement, the respondent is ordered to pay the applicant R154 013.40 (R16 221.25 x 9 months + R534.81 x 15 days), minus any such deductions the respondent is supposed to make in terms of the law, by not later than 15 May 2024.

41.3. The applicant is to report for duty in the respondent's premises (last place of employment) by not later than 11 April 2024.



M.A. Nozigwaba