



ARBITRATION AWARD

Commissioner: **Charles Oakes**

Case No: **PSHS5-24/25**

Date of award: **19 October 2024**

In the matter between:

PSA obo Sanele Simelane

Applicant

and

Department of Health -KwaZulu Natal

Respondent

DETAILS OF HEARING AND REPRESENTATION

1. This is an award of an arbitration held on 04 October 2024. The Applicant was represented by Mr Mkhize from the Public Service Association. The Respondent was represented by Mr Sanele Ndabeni from the Labour Relations Department of the Respondent.

ISSUE TO BE DECIDED

2. I must decide whether the dismissal of the Applicant was procedurally and substantively unfair.

BACKGROUND TO DISPUTE

3. The Applicant is Mr Sandile Simelane. The Respondent is the Department of Health- KwaZulu Natal. The Applicant was employed by Nkandla Hospital, an institution falling under the auspices of the Department of Health, KwaZulu Natal. He was charged with various counts of misconduct, was found guilty, and dismissed. He challenged the fairness of his dismissal at the arbitration.

SURVEY OF EVIDENCE

4. The first witness to testify was Mr Msabenkosi Nicholas Cebekhulu who testified under oath as follows:
 5. He was the chairperson of the Applicant's disciplinary hearing. He testified that the disciplinary hearing of the Applicant was not held at the workplace of the Applicant, that is, Nkandla Hospital. He testified that the Applicant was informed that the venue was going to be at King Cetswayo District. The venue was on the notification to attend the disciplinary hearing. He testified that the Applicant did not object to the venue when he received the notification. The Applicant was provided with transport to and from the hearing. He testified that witnesses were being threatened and it necessitated a venue change. He testified that the Applicant's representative objected to charge 1 at the disciplinary hearing, particularly to the use of the words "you contravened Paragraph 217 of the Constitution of the Republic of South Africa". The charge was then amended and the words "you contravened Paragraph 217 of the Constitution of the Republic of South Africa" were removed from charge 1.
6. The next witness to testify was Mr. Mandla Mkhize who testified under oath as follows:
 7. He is employed at the Respondent's head office in Pietermaritzburg as Assistant Director of Forensic Investigations. His duties are to conduct investigations into fraud, corruption, and maladministration at any of the Respondent's facilities, and institutions across the province. He testified that he was appointed to investigate irregularities in the procuring of goods and services at Nkhandla Hospital. He interviewed potential witnesses. He testified that he interviewed Miss Ndimande regarding the incident which resulted in the Applicant being charged with charge one. Miss Ndimande was the Applicant's subordinate. Ndimande informed him that she was required to order sterile gloves. She followed the procedure set out in circular G69/2018 and contacted approved contractors to source sterile gloves. The approved contractors were Sebenzani Trading 622 cc and Liamed Supply Solutions (Pty) Ltd. She contacted the latter contractors who informed her that they were unable to

supply sterile gloves as they (Sebenzani Trading 622 cc and Liamed Supply Solutions (Pty) Ltd) disagreed with the Respondent's head office regarding pricing.

8. She relayed this to the Applicant who advised that she contact other institutions to establish how they were sourcing sterile gloves. She (Ndimande) contacted Kwamagwaza Hospital, Ekombe Hospital, and Eshowe Hospital. She was informed by the institutions that they requested quotes from contractors. They (Nkandla Hospital) followed suit, received quotes from contractors, and awarded a contract for gloves to a contractor. He testified that the procedure followed by the Applicant was flawed as he failed to inform the Quotations Awarding Committee that the contract had expired with approved contractors and that the committee needed in these circumstances to obtain written approval from head office to source the sterile gloves outside of contract. The contract lapsed on 16 July 2021 and the Quotation Awarding Committee met on 19 July 2021. He testified that the Applicant is a member of the Quotation Awarding Committee. He believes that the Applicant and the awarding committee purposely waited for the contract to lapse. In addition to this, the Respondent had an agreement in place with approved contractors that they would pay R72-90 per box of gloves. However, when the contract was awarded, it was awarded for R162-00 per box of sterile gloves.
9. This resulted in an over expenditure of around R106 824-00. The Applicant failed to inform the Quotations Awarding Committee of the agreement the Respondent had in place to source sterile gloves for R72-90 per box.
10. Regarding charge 5, he testified that the Applicant was charged with issuing an order to a company known as Umcedo Kasagodi Trading without obtaining proper approval for the service provider to contract with the hospital for an amount of R486 496-00 when the actual contract was budgeted for R180 000-00. The Applicant failed to obtain approval for the additional R306 496-30 which resulted in an unauthorized over expenditure.
11. He testified that the Respondent commissioned the construction of a flu clinic during the COVID-19 pandemic to screen patients before entering the hospital. It was agreed that all Hospitals would do so on a budget of R180 000-00. The Applicant's department was responsible for procuring the services of a contractor. As per internal procedure, the Quotations Awarding Committee would award the contract by issuing a certificate for an amount of R180 000-00. The Applicant who sits on the Quotations Awarding Committee failed to inform other members of the committee that the budget for the building was R180 000-00. The committee approved the building of a flu clinic for R486 496-30. The net result was that the Respondent ended up overspending to the tune of R306496-30. On inspecting the building, they found many building defects. The roof was flat whilst it was supposed to be constructed at a slope. This resulted in the roof leaking. They found nails sticking out and the doors of the toilets were not closing properly. As a result, people sitting in the waiting area could see

people in the toilets. There was no extraction fan installed and the steel used to construct the building was not galvanized. As the procurement expert, the Applicant was enjoined to inform the committee members that approval was needed to increase the amount of the contract. More importantly, the Applicant was enjoined to inform the awarding committee of the R180 000-00 budget. He didn't do so.

12. The next witness to testify was Nondumiso Cele who testified under oath as follows:
13. She worked as acting Chief Operating Officer at Nkandla Hospital from 01 October 2021 to 30 September 2022. After conducting rounds at Nkandla Hospital, they identified issues that needed investigation. They particularly found problems with the construction of the flu clinic. They discovered that there were many infrastructure problems with the structure of the flu clinic. There were problems with electric cables, doors, holes in the building, and spacing in the waiting area. It was supposed to accommodate 20 people at a time but could only accommodate 10 people for covid 19 testing. The roof was leaking, nails were exposed, and no ramp was built for disabled persons. There was no toilet for disabled persons and doors were unpainted.
14. The Respondent had allocated R180 000-00 to build the flu clinic, however, R486 000-00 was spent on the clinic. The amount spent was well over budget. They discovered that the Non-Stock Items form was prepared by the maintenance department as it fell within the maintenance department. She testified that the Applicant failed to inform the awarding committee of the budgeted amount of R180 000-00 when they met to award the contract for the construction of the flu clinic. The Applicant as the person from the Supply Change Management (SCM) department was aware that the contract was budgeted for R180 000-00 and was enjoined to inform the awarding committee of the same.
15. She testified that the maintenance department drew up a Non-Stock Item (NSI) form wherein the budgeted amount is stated. The NSI was then taken to the Cash Flow Committee which will determine whether there are funds to carry out the project. The SCM would then advertise calling for quotes from companies. They would get the quotes and compile a file of quotes which was taken to the Quotations Awarding Committee. If the benchmark is R180000-00 and the contractor's quote is above the budgeted amount, then the file would be taken back to the cash flow committee to check if the quotes are affordable. This procedure was not followed. When the quote was obtained for R486 000-00, the file was not taken back to the Cash Flow Committee to see if it was affordable. The Applicant as SCM Supervisor was supposed to take it back to the Cash Flow Committee.
16. The next witness to testify was Sandile Simelane who testified under oath as follows:
17. He started working for the Respondent in September 2006. He was employed as a Supply Chain Clerk Supervisor at the time of his dismissal.

18. He testified that the accusation in charge 1 is that during the period of 22 June 2019 and 19 July 2021, at Nkhandla Hospital he failed to obtain proper approval for the procurement of sterile gloves out-of-contract. He testified he was not employed at Nkandla Hospital on 22 June 2019. He was in employment at Kwamagwaza Hospital.
19. He testified that he was not involved in the procuring of sterile gloves. He testified that the process of procuring begins with the completion of a replenishment form. The replenishment (pages 58 and 59) form for the procurement of sterile gloves was completed by Miss Ngcobo the Administration clerk and approved by Mr Buthelezi who is a supervisor and his (Applicant's) equal. Mr Bekwa also signed off on the replenishment form. Mr Bekwa was the Finance Manager and the supervisor of him and Mr Buthelezi. He was not involved in ordering sterile gloves. He was involved when the contract with the approved contractors expired at the stage that the Quotations Awarding Committee sat to consider the quotes submitted. The contract was awarded to Zulu Nomangadi Supply for R324000-00.
20. He testified that Circular G69/2018, had expired with approved contractors. Miss Ndimba, the CEO, the Systems Manager, Mr Mthembu, Dr Hlophe, and himself were members of the awarding committee. Miss Ndimbe, as CEO, was the accounting officer who signed off on the order for sterile gloves.
21. She should have received the most severe penalty. He testified that the Respondent was inconsistent when issuing sanctions. Miss Ndimba received a three-month suspension without pay, Dr Hlophe received a final written warning, and Mr Mthembu, the Systems manager, received a final written warning valid for three months. He was, however, dismissed from the workplace. There was no contract in place to regulate who they contracted with. It was therefore unfair to charge him in respect of the procurement of sterile gloves. The decision to award the contract was a collective decision of the Quotations Awarding Committee and not his alone.
22. Regarding charge two he testified that he pleaded guilty because there was no written approval in the form of a letter from the Director. He was taking responsibility for his section. He testified that it was his first offense and expected leniency from the chairperson. Regarding charge 3 he did not commit financial misconduct of R106 824-00 as the contract with the approved contractors had expired.
23. He testified that in terms of charge 4, it was not his responsibility to inform the Quotations Awarding Committee of any problems experienced in procuring of sterile gloves. The charge arose out of a replenishment form which was not completed and approved by him.
24. Regarding charge 5 he testified that he did not issue the order to erect a flu clinic. It was issued by Zethu. He was told by his supervisor, Mr Bekwa to prepare a file of quotes received. The contract

was then awarded by the awarding committee. He does not sit alone on the awarding committee. Ikweghwe, Mr SL Mthembu, and Mr CB Bekwa all sat on the awarding committee with him. Dr Ikweghwe was the chairperson of the awarding committee. Dr Ikweghwe was not charged with misconduct, and neither was Mr Bekwa charged. He was charged together with Mr S.L. Mthembu.

ANALYSIS OF EVIDENCE

25. The Applicant was accused of misconduct at the workplace and five charges were preferred against him. The charges directly relate to his conduct as a Supply Chain Supervisor within his department and his duties insofar as he is allowed to approve the procurement of goods and services. It was alleged that he failed to obtain the requisite approval from head office to procure sterile gloves out of contract. In another charge, he was accused of failing to adhere to instructions set out in Circular G69/2018 which requires that he contract for goods and services from approved contractors. The third charge accuses the Applicant of failing to take appropriate steps to prevent financial misconduct, which resulted in a loss to the Respondent totaling R106 824-00. The fourth charge accuses the Applicant of failing to notify members of the Cash Flow Committee and the Quotations Awarding Committee of a running contract to procure sterile gloves and to inform the Respondent of difficulties he experienced in obtaining gloves from approved contractors. Lastly, he was charged with issuing an order to Umcedo Kasogodi Trading without obtaining proper approval to award a contract for R486 496-30 when the actual contract was budgeted for R180 000-00.
26. In deciding whether a dismissal was fair consideration must be made to whether:
- a. There is a rule in place regulating the conduct for which the Applicant was dismissed.
 - b. The rule is known or could reasonably be expected of the employee to be aware of the rule.
 - c. Whether the rule was breached.
 - d. Whether the rule was consistently applied and
 - e. Whether the sanction applied was appropriate.
27. It was not disputed that there are rules in place, regulating how goods are procured at Nkhandla Hospital where the Applicant worked. It was also not disputed that there is a rule requiring the Applicant to obtain approval should Nkandla Hospital deem it necessary to deviate from the procurement procedure set out in Circular G69/2018. The Applicant also did not deny that he was aware of Circular G69/2018. He confirmed this much when he gave evidence in his defense. I am satisfied that it is reasonable to have in place rules regulating how the procurement of goods is carried out. The rationale behind such rules is to serve as a safeguard of Public Funds and to ensure that

service delivery is extended to the poor and vulnerable, especially in far-flung rural communities such as Nkhandla where the hospital is situated.

28. I now turn to consider whether the Applicant committed the offenses for which he was charged. I find it convenient to begin with an assessment of the evidence around charge one.
29. It is imperative to have an understanding of the offense alleged in charge one to outline the charge in question.

30. Charge 1 states the following:

“During the period from 22nd June 2019 to the 19 July 2021 at Nkandla District Hospital, you failed to obtain proper approval from Head Office for the procurement of non-sterile gloves out of contract and which should have been in accordance with a system that is fair, equitable, transparent, competitive and cost effective.”

31. The main question to be answered here is whether the Applicant obtained the requisite approval for the procurement of non-sterile gloves out of contract. The first problem that arises concerning the charge is the timeframe alleged in charge 1 of when the offenses occurred. The Applicant testified that he was not in the employ of Nkandla Hospital on 22 June 2019 as alleged in charge 1. He testified that he was in the employ of another institution, KwaMagwaza Hospital on 22 June 2019. There was no evidence provided by the Respondent to gainsay the version of the Applicant in this regard. This however does detract from the pivotal allegation that the Applicant failed to obtain approval to contract with unapproved contractors. I say so as the contract was awarded on 19 July 2021. The Applicant was employed at Nkhandla Hospital on 19 July 2021 and was part of the committee that awarded the contract for the supply of sterile gloves.
32. I pause here to consider the meaning of the phrase ‘out of contract’. In the context of the present matter, the phrase refers to the limitation placed on procuring goods from contractors who are not listed and approved by the Respondent. For instance, in the present matter, the approved contractors for sourcing sterile gloves were Sebenzani Trading 622 cc and Liamed Supply Solutions (Pty) Ltd. Contracting with any other contract would be deemed to be ‘out of contract’. This is the essential allegation against the Applicant.
33. In considering the evidence at hand I am required to examine the probabilities, credibility, and reliability of the evidence presented. In the present matter, documentary evidence is pivotal in assessing the probabilities arising out of the evidence. To this end, regard must be had to the processes and responsibilities attached to the SCM department. The SCM department is essentially responsible for the procuring of goods and services. The procuring of goods involves the completion of a Replenishment form which states the amount of goods that need to be ordered and the pricing of the goods. The replenishment form must be signed by the clerk completing the form

and the person approving the order. The Finance Manager would also then sign approving the order. Ordinarily, this would be done by the Applicant as he was the supervisor responsible for the procurement of goods. This, however, did not take place when the sterile gloves were ordered. He was not involved from the outset. I must pause here to state that the Applicant is not the only supervisor in the SCM department. Mr Buthelezi was also a supervisor within the SCM department. He is the equal of the Applicant in the SCM department.

34. This brings me to a consideration of whether the Applicant failed to obtain proper approval to purchase sterile gloves. I must quickly state that it is common cause that the approved contractors were unable to supply sterile gloves because of a standing dispute the contractors had with the head office around the pricing of sterile gloves. The gloves therefore had to be sourced elsewhere. The uncontroverted evidence shows that the order was not processed or approved by the Applicant. Nowhere in the Replenishment form does he appear to have approved the order. The replenishment form was completed by Miss N.V. Ngcobo and approved by Mr C.V. Buthelezi. More importantly, it was then approved by the most senior person in the SCM department, that is, the Finance Manager, Mr Bekwa. The order then went through all stages until it reached the Quotations Awarding Committee. The Quotations Awarding Committee was made up of the Applicant, Miss Ndimba, the CEO, the Systems Manager, Mr Mthembu, and Dr Hlophe. Of importance is that by this stage the groundwork had already been done and completed regarding the procurement of sterile gloves. Implicit here is that the awarding committee looks at the quotes and awards the contract to a contractor. I must here return to the charge in question. The charge does not in any way reference the awarding committee, except that the Applicant failed to obtain approval for the purchase of sterile gloves out of contract. In this regard, there is no evidence that he was involved in procuring gloves from the outset and his role in the awarding committee was not his decision alone. Important here is that the order was approved by Mr Buthelezi and Mr Bekwa, the Finance Manager. The Applicant was not charged with awarding the contract but rather that he approved the contract in question. The contract was approved by the time it reached the awarding committee. The awarding committee was tasked with choosing a contractor from the list of contractors who submitted quotes in the procurement file. This they did. Nonetheless, they (the awarding committee) were charged with misconduct. I find no evidence that the Applicant had approved the order for the sterile gloves. The Applicant's representative argued that the Respondent acted inconsistently in meting out sanctions to members of the awarding committee. From the point of view of consistency, it is clear that the other awarding committee members all received disciplinary sanctions short of dismissal, and he (Applicant) was dismissed. The Respondent was unable to provide evidence of why they distinguished between him (Applicant) and other members of the awarding committee when applying

different disciplinary sanctions. The Respondent accordingly acted inconsistently in dismissing the Applicant in respect of Charge 1 whilst applying sanctions of short of dismissal in respect of the other members of the Quotations Awarding Committee.

35. I now turn to charge two. Charge 2 states the following:

"In your capacity as SCM Supervisor, you failed to adhere to the instructions of Circular G69/2018 that any deviations from the provisions of the contract conditions must be approved by the Director: Supply Chain Management in writing of the challenges you were facing as an institution to place orders with Sebenzani Trading 622 cc and Liamed Supply Solutions (Pty) Ltd hence you could not obtain proper approval to deviate from the provisions of the contract but instead you proceeded to procure out of contract ."

36. The allegation in this charge differs slightly from charge 1 in that it alleges that the Applicant failed to obtain *written approval (my emphasis)* that he was deviating from sourcing gloves from approved contractors. The Applicant explained that he pleaded guilty to this charge as his section did not have written approval from the Director of Supply Chain Management. What mitigates in favour of the Applicant is that he was not directly involved in procuring the sterile gloves. I must stress that the incident in Charge 2 is the same incident referred to in Charge 1. The Applicant as stated earlier was involved in awarding the contract and not approving the same as alleged. The order for the sterile gloves was approved by Mr Buthelezi and Mr Bekwa, who both failed to obtain the necessary approval. I am therefore satisfied that it would be unfair to apply a sanction of dismissal in respect of Charge 1 in these circumstances.

37. I now turn to Charge 3.

38. Charge 3 is linked to the same incident alleged in Charge 1 and Charge 2. The only difference is that the allegation is that he failed to take appropriate steps to prevent the incurrance of financial misconduct for R106 824-00. The evidence in this regard is that the awarding of the contract for sterile gloves out of contract led to financial misconduct.

39. Charge 3 states:

"You further contravened Paragraph 45(c) of the Public Finance Management Act, No 1 of 1999 by failing to take appropriate steps to prevent the incurrance of financial misconduct for the amount of R106 824-00 in the form of irregular and unauthorized expenditure within SCM department."

40. The charge implies that the Applicant failed to prevent misconduct thereby indirectly acknowledging that the Applicant was not directly involved in acts of misconduct relating to the procurement of sterile gloves, but rather that he failed to prevent misconduct committed by someone else.

41. There was no evidence led by the Respondent that the Applicant failed to prevent misconduct which led to a loss of R106 824-00. All the evidence relates to the Applicant failing to obtain approval for the purchase of sterile gloves out of contract.
42. Charge 4 continues with the general allegation relating to the sterile gloves, except that the allegation is that the Applicant failed to inform the Cash Flow Committee and awarding committee that the Respondent had a standing contract with approved contractors.
43. The evidence is clear in this regard. The members of the Quotations Awarding Committee and Cash Flow Committee are high-ranking employees within Nkandla Hospital who all received Circular G69/2018 when it was emailed to them. This is common cause. There was no need for the Applicant to remind the committee members as they were aware of G69/2018. There was also no policy, rule or duty on the Applicant to inform them of G69/2018.
44. Lastly and most importantly, the contract had expired with the contractors when the sterile gloves contract was awarded. Implicit in this is that there were no approved contractors in place when the contract for sterile gloves was awarded by the awarding committee.
45. I now turn to charge 5.
46. Charge 5 states:

"In you (sic) capacity as the Supply Chain Supervisor, you contravened Paragraph 11 (f) and (g) read with Paragraph 14 (a) and (f) of the Public Service Regulations, 2016 through your actions of issuing the order to Umcedo Kasogodi Trading without obtaining proper approval for the actual project for the service provider to contract with the hospital for an amount of R486 496-30 when the actual project was budgeted for R180000-00, and you further failed to execute your duties as a Senior SCM official professionally and competently by failing to obtain approval for the additional R306 496.30. which led to the institution incurring irregular and unauthorized expenditure of same during the construction of the flu clinic which was handed over in July 2021."
47. The Applicant testified that he did not issue the order for the building of the flu clinic to Umcedo Kasogodi Trading and that he informed the awarding committee that the project was budgeted for R180000-00. He testified that the other awarding committee members informed him that they would award the contract and later establish from the Cash Flow Committee if there was a budget available to increase the contract amount. Both Mr Mkhize and Mrs Cele who gave evidence in this regard on behalf of the Respondent, were not directly involved in the awarding process and were not privy to what transpired at the awarding process. The only witness who was present was the Applicant. His evidence stands unchallenged in this regard. I must accept that he did not issue the order in question and that he had informed the awarding committee of the budgeted amount for the project. There was no evidence to gainsay his version in this regard.

48. The awarding committee members and the Applicant were however charged with misconduct. The Applicant was dismissed. However, Dr Ikweghue was not charged with misconduct, and neither was Mr Bekwa charged. The Respondent failed to demonstrate that they had reason to differentiate between the Applicant and Dr Ikweghue and Mr Bekwa when deciding to mete out discipline. I must pause to state that Mr Bekwa was the Finance Manager and the Applicant's senior. Dr Ikweghue was the chairperson of the awarding committee. It does not make sense that they were not disciplined.
49. On an assessment of the facts alone, I am satisfied that the dismissal of the Applicant was substantively fair.
50. The Applicant also complained that the dismissal was procedurally unfair. The two main issues in this regard were the venue where the disciplinary hearing was held and the amendment made to Charge 1. It is common cause that the disciplinary hearing was held away from the workplace of the Applicant. It was held at King Cetswayo District in Empangeni. The Applicant argued that this was procedurally unfair because the disciplinary procedure requires that the hearing be held at the workplace. Mr Cebekhulu testified that he was the chairperson of the disciplinary hearing of the Applicant. He testified that the Applicant was informed of the venue on the notification to attend the hearing that the venue was going to be at King Cetswayo District. He testified that the Applicant did not object when he received the notification. The Applicant was provided with transport to and from the hearing. He testified that witnesses were being threatened and this necessitated a venue change.
51. I do not believe that the Applicant suffered any prejudice in the change of venue. The position would have been different if he had to incur transport costs in going to King Cetswayo.
52. The second challenge raised to procedural fairness was that the Respondent amended charge 1 and refused an application to postpone the disciplinary hearing to allow the Applicant time to prepare for the new amended charge. The amendment of charge 1 did not change the charge fundamentally. The charge remained the same except that the words "you contravened Paragraph 217 of the Constitution of the Republic of South Africa" were removed from the charge.
53. There was therefore no reason to postpone the disciplinary hearing.
54. I therefore find that the dismissal was procedurally fair.
55. Lastly, the Applicant has requested reinstatement retrospectively. I find no reason why the Applicant should not be reinstated to the workplace. The Applicant earned R55 293-38 as his salary. He was dismissed on 20 December 2023. The Applicant has been without employment for 8 months and 13 days. The backpay must be calculated as follows: $R55\ 293-38 \times 8 = R442\ 347,04$. The 13 days must be calculated as follows: $R55\ 293-38 \text{ divided by } 26 \text{ days} = R2\ 125,19 \times 13 \text{ days} = R27\ 627,47$. The total to be paid to the Applicant is $R442\ 347-04 + R27\ 627-47 = R469\ 974,51$.
56. I accordingly find as follows:

AWARD

57. The Respondent, Department of Health, KwaZulu Natal is ordered to reinstate the employee, Sanele Simelane to its employ on terms and conditions no less favourable to him than those that governed the employment relationship immediately prior to his dismissal.
58. The re-instatement in paragraph (55) is to operate with retrospective effect from 20 December 2023.
59. As at the date of the award the remuneration due to Sanele Simelane because of the retrospective operation of the re-instatement, amounted to R469 974,51 minus such deductions as the employer is in terms of the law entitled or obliged to make.
60. The amount referred to in paragraph (57) is to be paid on or before 04 November 2024.
61. Sanele Simelane is to tender his services to the employer on 04 November 2024.

C. Oakes

Charles Oakes