

**Nursing and Midwifery Council
Fitness to Practise Committee**

**Substantive Order Review Hearing
06 May 2021**

Nursing and Midwifery Council
Virtual Hearing

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| Name of registrant: | David Makabayi |
| NMC PIN: | 99H0477E |
| Part(s) of the register: | Registered Nurse – Sub Part 1 Adult Nursing – 26 August 2002 |
| Area of registered address: | Staffordshire |
| Type of case: | Misconduct |
| Panel members: | Dale Simon (Chair, Lay member) Mark Gibson (Registrant member) Alex Forsyth (Lay member) |
| Legal Assessor: | Peter Jennings |
| Panel Secretary: | Amira Ahmed |
| Nursing and Midwifery Council: | Represented by Vanya Headley, Case Presenter |
| Mr Makabayi: | Not present and not represented |
| Order being reviewed: | Suspension order (2 months) |
| Fitness to practise: | Impaired |
| Outcome: | Striking-off order to come into effect at the end of 6 June 2021 in accordance with Article 30 (1) |

Decision and reasons on service of Notice of Hearing

The panel was informed at the start of this hearing that Mr Makabayi was not in attendance and that the Notice of Hearing had been sent to Mr Makabayi's notified email address on 6 April 2021.

The panel took into account that the Notice of Hearing provided details of the substantive order being reviewed, the time, date and venue of the hearing and, amongst other things, information about Mr Makabayi's right to attend, be represented and call evidence, as well as the panel's power to proceed in his absence.

Ms Headley, on behalf of the Nursing and Midwifery Council (NMC), submitted that it had complied with the requirements of Rules 11 and 34 of the 'Nursing and Midwifery Council (Fitness to Practise) Rules 2004', as amended (the Rules).

The panel accepted the advice of the legal assessor.

In the light of all of the information available, the panel was satisfied that Mr Makabayi has been served with notice of this hearing in accordance with the requirements of Rules 11 and 34.

Decision and reasons on proceeding in the absence of Mr Makabayi

The panel next considered whether it should proceed in the absence of Mr Makabayi. The panel had regard to Rule 21 and heard the submissions of Ms Headley who invited the panel to continue in the absence of Mr Makabayi. She submitted that Mr Makabayi had voluntarily absented himself.

Ms Headley referred the panel to the email dated 6 May 2021 from Mr Makabayi which stated:

"Thank you for your emails"

I apologise for delayed response, I feel worn out and compelled to reluctantly throw in the towel.

It is a decision out of character but I now feel best to let go despite my passion for the profession. I will live to regret my misfortune but have to move on bravely.

I am sorry for not rising above my challenges and my thanks to all that gallantly Tried [sic] to support me out of my ordeal.

My thanks again go to all of you.”

The panel accepted the advice of the legal assessor.

The panel has decided to proceed in the absence of Mr Makabayi. In reaching this decision, the panel has considered the submissions of Ms Headley, the email from Mr Makabayi, and the advice of the legal assessor. It has had particular regard to any relevant case law and to the overall interests of justice and fairness to all parties. It noted that: no application for an adjournment has been made by Mr Makabayi; there is no reason to suppose that adjourning would secure his attendance at some future date; and there is a strong public interest in the expeditious review of the case.

In these circumstances, the panel has decided that it is fair, appropriate and proportionate to proceed in the absence of Mr Makabayi.

Decision and reasons on review of the substantive order

The panel decided to impose a striking off order to take effect at the end of the current suspension order.

This order will come into effect at the end of 6 June 2021 in accordance with Article 30(1) of the ‘Nursing and Midwifery Order 2001’ (the Order).

This is the seventh review of a substantive order originally imposed on 2 February 2018 by a panel of the Fitness to Practise Committee. At that time, a conditions of practice order was imposed for a period of 12 months. This was reviewed on 25 January 2019 and a six month suspension order was imposed. On 22 July 2019, a further six month suspension order was imposed. This order was reviewed and extended for a period of four months on

27 January 2020. On 28 May 2020, a further six month suspension order was imposed. On 30 November 2020, a further three month suspension order was imposed. This order was reviewed on 2 March 2021 and a two month suspension order was imposed.

The current order is due to expire at the end of 6 June 2021.

The panel is reviewing the order pursuant to Article 30(1) of the Order.

The charges found proved which resulted in the imposition of the original substantive order were as follows:

'That you, a Registered Nurse working at Kettering General Hospital NHS Foundation Trust:

1. *Between approximately 19.30 and 23.30 on 26 December 2014:*
 - a) *Did not follow the treatment plan in place for Patient A in that you:*
 - i. ...
 - ii. *Did not administer 40mg IV furosemide, or in the alternative did not record that you had administered it. **PROVED***
 - iii. *Did not ensure an ECG was performed or perform an ECG, or in the alternative did not record that you had done so. **PROVED***
 - iv. *Did not chase up the chest x-ray. **PROVED***
 - v. *Did not chase up a review of the patient by the SHO. **PROVED***
 - b) *Failed to undertake NEWS observations and/or record Patient A's NEWS scores on their observation chart at half hourly intervals after 19:30. **PROVED***
 - c) *Failed to record the care provided to Patient A in one or any of the following:*
 - i. *Daily Care Prescription. **PROVED***
 - ii. *Clinical notes. **PROVED***

d) *Failed to escalate Patient A's condition to the nurse-in-charge or a doctor. **PROVED***

2. ...

And, in light of the above your fitness to practise is impaired by reason of your misconduct.'

The sixth reviewing panel determined the following with regard to impairment:

"The panel considered whether your fitness to practise remains impaired.

The panel noted that the last reviewing panel found that your insight was insufficient. Today's panel was of the view that your insight was still developing. It acknowledged your attendance today as helpful, and noted your emerging awareness of accountability as a nurse and the importance of clear communication in patient care. However, the panel noted that you had not yet addressed your specific clinical failings regarding the charges found proved in your case. The panel considered that to be a key part of your finished reflective piece that you had undertaken to provide.

The panel also acknowledged that you submitted evidence of having completed some training and that you referred to having read online articles relating to nursing. However, it noted that the training did not relate to the specific areas of clinical concern in your case and that you had not compiled a list of training or of specific articles or books you had read, as recommended to you by the previous panel. The panel therefore concluded that your insight remained limited, and that, in all the circumstances, your fitness to practise remains impaired.

The panel next considered whether you had remediated your practice. It noted that you appeared to have not fully disclosed these regulatory proceedings to your employer. The panel considered that your employer may be a valuable support to you in remediating your practice, but would be unable to do so without a full understanding of the circumstances of your case.

The panel further noted that you had not worked as a nurse for nearly five years now, and that you would be required to complete a return to practice course before you were able to renew your registration. It considered that the passage of time since you last practised as a nurse presented an increased risk of harm to patients.

The last reviewing panel determined that you were liable to repeat matters of the kind found proved. Today's panel has received no substantive information to suggest that this was no longer the case. In the light of this, this panel determined that you are liable to repeat matters of the kind found proved. The panel therefore decided that a finding of continuing impairment is necessary on the grounds of public protection.

The panel has borne in mind that its primary function is to protect patients and the wider public interest which includes maintaining confidence in the nursing profession and upholding proper standards of conduct and performance. The panel determined that, in this case, a finding of continuing impairment on public interest grounds is also required.

For these reasons, the panel finds that your fitness to practise remains impaired.”

The sixth reviewing panel determined the following with regard to sanction:

“The panel first considered whether to take no action but concluded that this would be inappropriate in view of the seriousness of the case. The panel decided that it would be neither proportionate nor in the public interest to take no further action.

It then considered the imposition of a caution order but again determined that, due to the seriousness of the case, and the public protection issues identified, an order that does not restrict your practice would not be appropriate in the circumstances. The SG states that a caution order may be appropriate where ‘the case is at the lower end of the spectrum of impaired fitness to practise and the panel wishes to mark that the behaviour was unacceptable and must not happen again.’ The panel considered that your misconduct was not at the lower end of the spectrum and that a caution order would be inappropriate in view of the issues identified. The panel

decided that it would be neither proportionate nor in the public interest to impose a caution order.

The panel next considered whether a conditions of practice order on your registration would be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be proportionate, measurable and workable. The panel bore in mind the seriousness of the facts found proved at the original hearing and concluded that a conditions of practice order would not adequately protect the public or satisfy the public interest. The panel was, for the same reasons outlined by the previous reviewing panel, not able to formulate conditions of practice that would adequately address the concerns relating to your misconduct.

The panel considered the imposition of a further period of suspension. It gave careful consideration to the usefulness of such an order, noting that you had been given a number of opportunities to provide evidence that you had developed your insight fully and that you had remediated your practice, but had failed to do so without cogent reasons. However, based on your oral evidence today, the panel was of the view that your insight was developing, and was willing to accept your promise that your reflective piece would be completed by the next hearing.

The panel therefore was of the view that a brief suspension order of two months would allow you further time to fully reflect on your previous failings and to submit your completed reflective piece to the NMC. The panel concluded that a further two month suspension order would be the appropriate and proportionate response and would afford you adequate time to further develop your insight and remediation.

The panel determined therefore that a suspension order is the appropriate sanction which would continue to both protect the public and satisfy the wider public interest. Accordingly, the panel determined to impose a suspension order for the period of two months would provide you with an opportunity to engage with the recommendations of this panel. It considered this to be the most appropriate and proportionate sanction available.

The panel was of the view that the next reviewing panel in this case may be assisted by:

- *A completed reflective piece;*
- *A statement from your line manager or mentor which confirms that they have read the outcome letter from today's hearing and will report on your progress in remediating the specific areas of concern in your practice, namely:*
 - *Record keeping;*
 - *Medication administration;*
 - *Patient observations; and*
 - *Escalation*
- *A statement from your line manager or mentor which confirms that they are willing to continue to support you;*
- *Up to date records of all training undertaken together with certificates, including training in the specific areas of concern:*
 - *Record keeping;*
 - *Medication administration;*
 - *Patient observations; and*
 - *Escalation*
- *A record of any other continuous professional development, such as journal articles or online training.*

The panel went on to give substantial consideration to a striking-off order. However, on balance, the panel was persuaded that you might benefit from what may be a final opportunity to demonstrate that you have taken steps to develop your insight and to remediate your practice.

This suspension order will take effect upon the expiry of the current suspension order, namely the end of 6 April 2021 in accordance with Article 30(1).

Before the end of the period of suspension, another panel will review the order. At the review hearing the panel may revoke the order, or it may confirm the order, or it may replace the order with another order.”

Decision and reasons on current impairment

The present panel has considered carefully whether Mr Makabayi’s fitness to practise remains impaired. Whilst there is no statutory definition of fitness to practise, the NMC has defined fitness to practise as a registrant’s suitability to remain on the register without restriction. In considering this case, the panel has carried out a comprehensive review of the order in light of the current circumstances. Whilst it has noted the decision of the last panel, this panel has exercised its own judgement as to current impairment.

The panel has had regard to all of the documentation before it, including the NMC bundle and the email from Mr Makabayi. It has taken account of the submissions made by Ms Headley on behalf of the NMC. She submitted that Mr Makabayi has shown no evidence of remediation, despite the recommendations of the previous reviewing panel, which was described as a possible last opportunity. She submitted that given this is the seventh review and there is still no evidence of remediation the panel may feel that the risk that Mr Makabayi presents to the public and/ or wider public interest has not diminished.

Ms Headley submitted that it is a matter for the panel whether Mr Makabayi’s fitness to practice is still currently impaired.

The panel heard and accepted the advice of the legal assessor.

In reaching its decision, the panel was mindful of the need to protect the public, to maintain public confidence in the profession and to declare and uphold proper standards of conduct and performance.

The panel considered whether Mr Makabayi’s fitness to practise remains impaired.

The panel noted that the last reviewing panel gave Mr Makabayi the opportunity to provide a detailed reflective piece and that this still has not been provided. It noted that Mr

Makabayi explained in his email dated 6 May 2021 that he feels 'worn out' and apologised for his delayed response.

The panel noted that Mr Makabayi has been given multiple chances to remediate his practice and still has not done so. The panel determined that there has been no evidence of remediation since the last review hearing and Mr Makabayi has not shown any further insight. The panel therefore decided that there is still a risk of repetition of Mr Makabayi's previous actions and a finding of continuing impairment is necessary on the grounds of public protection.

The panel has borne in mind that its primary function is not only to protect patients but also to meet the wider public interest which includes maintaining confidence in the nursing profession and upholding proper standards of conduct and performance. The panel determined that, in this case, a finding of continuing impairment is also required on public interest grounds

For these reasons, the panel finds that Mr Makabayi's fitness to practise remains impaired.

Decision and reasons on sanction

Having found Mr Makabayi's fitness to practise currently impaired, the panel then considered what, if any, sanction it should impose in this case. The panel noted that its powers are set out in Article 30 of the Order. The panel has also taken into account the 'NMC's Sanctions Guidance' (SG) and has borne in mind that the purpose of a sanction is not to be punitive, though any sanction imposed may have a punitive effect.

The panel first considered whether to take no action but concluded that this would be inappropriate in view of the seriousness of the case. The panel decided that it would be neither proportionate nor in the public interest to take no further action.

It then considered the imposition of a caution order but again determined that, due to the seriousness of the case, and the public protection issues identified, an order that does not restrict Mr Makabayi's practice would not be appropriate in the circumstances. The panel

considered that Mr Makabayi's misconduct was not at the lower end of the spectrum and that a caution order would be inappropriate in view of the issues identified.

The panel next considered whether a conditions of practice order on Mr Makabayi's registration would be a sufficient and appropriate response. The panel is mindful that any conditions imposed must be proportionate, measurable and workable. The panel bore in mind the seriousness of the facts found proved at the original hearing and the lack of substantive progress towards remediation since that time. It concluded that, in the present circumstances, a conditions of practice order would not adequately protect the public or satisfy the public interest. The panel was, for the same reasons outlined by the previous reviewing panel, not able to formulate conditions of practice that would adequately address the concerns relating to Mr Makabayi's misconduct.

The panel next considered imposing a further suspension order. The panel noted that Mr Makabayi has been given indications by successive panels as to the sort of material he should provide in order to demonstrate insight and steps towards remediation. After a period of years the panel at the sixth review hearing, in response to Mr Makabayi's submissions at that hearing, extended the suspension order for two months to give Mr Makabayi a further opportunity to produce, among other material, a reflective piece. Mr Makabayi has not demonstrated full insight into his previous failings, and has neither attended the present hearing nor produced any reflective piece or other material for this panel's consideration, despite the previous panel's giving him time to do so.

The panel was of the view that considerable evidence would be required to show that Mr Makabayi no longer posed a risk to the public. The panel determined that a further period of suspension would not serve any useful purpose in all of the circumstances. The panel determined that it was necessary to take action to prevent Mr Makabayi from practising in the future and concluded that the only sanction that would adequately protect the public and serve the public interest was a striking-off order.

This striking-off order will take effect upon the expiry of the current suspension order, namely the end of 6 June 2021 in accordance with Article 30(1).

This decision will be confirmed to Mr Makabayi in writing.

That concludes this determination.