

**IN THE PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL**

**(Date of Award:16 November 2011)**

**CASE NUMBER:PSHS 136-11/12**

**In the matter between-**

**DENOSA obo N.R. MAPHOLO**

**APPLICANT**

**And**

**DEPARTMENT OF HEALTH**

**AND SOCIAL DEVELOPMENT: LIMPOPO**

**RESPONDENT**

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**ARBITRATION AWARD**

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**CONSTITUTION OF THE COUNCIL**

Adv. Russell Moletsane

Arbitrator

**ON BEHALF OF THE APPLICANT**

Mr. S.C Khoza

Union Official

**ON BEHALF OF THE RESPONDENT**

M.V. Ngoasheng

Labour Relations Manager

**DATES AND PLACE OF THE PROCEEDINGS**

23 August 2011; 27 & 28 October 2011

Polokwane

**DATE OF SUBMISSION OF THE WRITTEN CLOSING ARGUMENTS**

07 November 2011

## **DETAILS OF HEARING AND REPRESENTATION**

1. The arbitration hearing took place on 23 August 2011 and as well as on 27 and 28 October 2011 in Polokwane at the offices of the Department of Health and Social Development in Polokwane.
2. The Applicant was represented by Mr. S.C. Khoza of the trade union DENOSA and the Respondent was represented by Mr. M.V. Ngoasheng - the Labour Relations Manager.

## **ISSUES I AM REQUIRED TO DECIDE**

3. The Applicant accepts that his dismissal was procedurally fair.
4. However, the Applicant challenges the substantive fairness of his dismissal.
5. I am therefore required to determine whether the dismissal of the Applicant was substantively unfair.

## **BACKGROUND COMMON CAUSE FACTS**

6. The Applicant was dismissed on the 7<sup>th</sup> of April 2011 following disciplinary and appeal hearings.
7. The Applicant was employed as an Auxillary Nurse at Thabamooopo Hospital having commenced his duties initially in 1983.
8. Prior to the Applicant being dismissed in 2011, he was dismissed in 1986 and returned (re-employed) in 1991.

9. When the Applicant was dismissed in 2011, he was dismissed for misconduct allegedly committed in 20 October 2006. He was found guilty on charges 1,2 and 4. Charges read as follows:

### **Charge 1**

9.1. You are charged of misconduct of **sexual assault** in that on or during October 2006, near or at Thabampo Hospital whilst on official duty, you **unlawfully and intentionally forced sexual intercourse** with a cleaner employee named Letisa Maria Chabalala in or around the bathroom (ward D) without her consent.

### **Charge 2**

9.2. You are guilty of misconduct of **engaging in actions that are in conflict with the execution of your official duties** in that on or during October 2006, at or near Thabampo Hospital whilst on official duty you engaged in **sexual intercourse** with a cleaner named Letisa Maria Chabalala in or around the bathroom ( ward D) whilst having knowledge that it was unethical and unprofessional to engage in such actions.

### **Charge 4**

9.3. You are charged of misconduct of **intimidation and or inflicting threats** in that on or about October 2006 near or at Thabampo Hospital bathroom (Ward D), you

intentionally and or unlawfully **threatened and intimidated** Letisa Maria Chabalala by telling her that if she discloses to anyone that you **Sexually assaulted/raped her you will kill her** whilst you knew or reasonably expected to have known that you were not supposed to have done so.

10. The Applicant and his alleged victim worked in the same Ward.
11. While the alleged incidents occurred in October 2006, the Applicant was only brought to the disciplinary enquiry on 05<sup>th</sup> of November 2009, some three years later. However, the Applicant does not challenge the delay in prosecuting him.
12. While the Applicant was at some stage suspended, his suspension was lifted.
13. The alleged victim had been transferred from the Department of Agriculture in Giyani to the Department of Health and Social Development in Polokwane and she was not happy with the transfer. She was employed as a cleaner.
14. The distance from Giyani to Polokwane is roughly 300kms.
15. At the time of the alleged incident, the Applicant was fifty two years (52) old while the alleged victim was fifty six (56) years old.
16. The alleged victim has now retired and is no longer working for the Respondent.
17. At the time of his dismissal the Applicant was earning R10698-49 gross per month.

## **RESPONDENT'S CASE**

18. Three witnesses testified for the Respondent.

**Maria Chabalala**

## The First Incident

She testified that in October 2006 while herself and her colleagues were having lunch in a room, the Applicant asked them where the level 4's were and they ( her and fellow colleagues) replied to say they were writing exams. Later the Applicant came back and requested her to follow him. She followed him as she had thought he was going to show her some work to be done.

In the toilet (situated in the ward) the Applicant instructed her to bend over and he took out her underwear. The Applicant told her not to make noise. Then the Applicant had sexual intercourse with her. After he was done, he told her that should he hear anything about this incident, he would kill her.

She was afraid of telling anyone including people she was staying with.

She was taken by the lady from Giyani to the Clinic but she did not tell the lady of the incident.

She was taken to the Clinic because she was tired and had cramps.

However, at the clinic, she told them she had run out of the high blood\_pressure\_tablets. She did not see if the Applicant has used protection or not.

## The Second Incident

She testified that on another day she was carrying a bucket, and the Applicant saw her and followed her. In the toilet, the Applicant did the same thing ( raped her).

After the second incident she was rushed to the hospital. She also reported the matter at the police station.

During her sleep, she heard voices from the people that she would be killed and she then decided to catch a taxi and left her work. She was no longer comfortable going to work.

One Doctor Dondo gave her tablets after telling him she was scared.

Her supervisor took her to the Psychologist at the same Hospital she worked at.

At the police station, the police told her there was no evidence. She then asked the Social Worker for the transfer back home and the Social Worker recommended that she should be transferred back to Giyani.

In the toilet, while she was being raped, she could not see if the Applicant was using any protection as she was facing backward and the Applicant penetrated her from behind.

In both incidents, she did not scream as the Applicant told her not to make noise and she was afraid as she did not know what the Applicant was carrying.

She only reported the matter (after three months) after someone encouraged her to do so. At a later stage she informed her co-worker (Sarah Molepo).

Before the incidents, the relationship with the Applicant was fine.

After the incident, she went for medical check-up at Lebowakgomo hospital and she did not develop a discharge. She did not consent to the sexual intercourse and previously the Applicant proposed love to her.

### **Cross-Examination**

19. Under cross-examination, she conceded that she did not apply for the transfer and she was not happy at being transferred to Polokwane.
20. Under cross-examination, she conceded that she wanted to be transferred back to Giyani.
21. Under cross-examination, she stated that when the Applicant proposed love to her, she told him she was old and that she was having a child born in 1969 and that the Applicant was young.
22. When asked if the Applicant was of the same age with her would she had accepted the proposal she stated that she would have found a different response to say no.
23. Under cross-examination, she conceded that when she reported the matter to the police one police officer told her she was not mentally well.
24. She concedes that before the incident, the Applicant had not delegated her for duties.

25. When asked if the Applicant was holding any weapon, she stated she did not see what he was holding.
26. When asked if the Applicant grabbed her by hard, she stated she only grabbed her in the toilet.
27. When asked if she can call her colleagues to testify for her that during lunch, the Applicant came to call her and instructed to follow her she stated her colleagues said they did not see the Applicant instructing her to follow him.
28. She conceded that there was a nurse in the vicinity and the patients were sitting under the tree.
29. She concedes that had she shouted / screamed people could have heard her. Also, she told the doctor about high blood pressure and not about rape. Also, she reported the incident after only three months.
30. She stated that she was encouraged by the Psychologist to report the matter at the police station. She also confided to her younger brother (Richard).
31. She concedes that one Sister Ngwane (who she confided with) told her it was not the Applicant that raped her but it was her who raped the Applicant.
32. When asked if the Applicant used vicks she stated he used vicks because he was having difficulty in penetrating.
33. When it was put to her that the Applicant did not rape her she insisted he raped her.
34. When it was put to her that it is strange that her colleagues did not see the Applicant calling her, she stated maybe they felt asleep.

35. When it was put to her that she fabricated the story because she wanted to be transferred back to Giyani, she stated it was not true. However, she accepted that she wanted to go back to Giyani.

### **Re-Examination**

36. During re-examination, she stated that as a result of the rape, she developed rush.

### **Another Cross-Examination**

37. During cross-examination on the rush she developed, she stated she did not tell the police about the rush.

### **Arbitrator`s Clarification**

38. When I sought clarification as to what made her to be afraid to scream, she stated she thought he (the Applicant) was carrying a gun and thought he would shoot her in the toilet. Also, she developed a discharge.

39. When asked during cross- examination about why she did not mention the discharge and rush during her evidence, she stated she did not know it was important.

**Robert Teunissen (Principal Clinical Psychologist)**

He testified that his job entails providing psychological services at Kensani Hospital.

The victim was referred to him during the first half of 2009 by a doctor with a summary of depression.

He sat with the victim in the office and she explained she was not well and that she had a problem in sleeping, she explained that she was sexually assaulted.

The victim said she was bothered by the fact that her colleagues did not take her seriously and were not supportive.

He took her work but he did not do a psychological assessment.

He arranged a meeting between herself and her colleagues he did not recommend therapy or counselling as the purpose of the meeting was to allow the victim to provide her side of story relating to her colleagues.

He did not ask her to explain how sexual assault took place as it is unethical to be intrusive for the first time you meet a patient.

Her mood was very low and she was depressed, and the symptoms one normally associated with trauma, including sexual trauma. However, he is not an expert in sexual trauma.

## **Cross-Examination**

40. He stated that:

- Just because a person is mentally ill does not mean s/he cannot give account of what happened.
- He does not remember if the Applicant mentioned something like a transfer.
- He did not do a psychological assessment.

## **Sarah Molepo**

She testified that she was employed as a cleaner but she is now on retirement – having retired in January 2011.

She has known the victim (Maria Chabalala) since 2006 when she arrived at the Hospital.

The victim informed her of the incident after three months and she (Molepo) decided to report the matter to the supervisor (Malebogo).

The victim told her the following:

- She was raped during lunch-time.
- The incident happened when she was busy cleaning with a mop and was moving backward when the Applicant pulled (dragged) her into the toilet.

- She did not scream because the Applicant told her to keep quite.
- The Applicant told her that the Applicant told her if she tell other people about the incident she would be killed.
- She did not want to work at that hospital any longer.
- She was raped only on one occasion, although she told others that she had been raped on two occassions.
- After the alleged rape, she accommodated her at her place. She started to be absent from work.

### **Cross-Examination**

41. When it was put to her that the alleged victim testified that she was asked to follow the Applicant and that she was one was not grabbed and forced into the toilet, she stated she was disputing that.

42. When it was put to her that the alleged victim testified that she was in the company of the other two co-workers when the Applicant called her she stated that she was surprised.

### **Clarification**

43. In seeking clarity, she re-confirmed that the Applicant told her she was raped only once and not on two occasions.

## **APPLICANT'S CASE**

### **The Applicant**

The Applicant testified that on the 19<sup>th</sup> of November 2007 he was approached by the investigating officer one Maphutha who asked him where he was during October 2006 to which he told him it was difficult to give him a straight answer because it was 13 months ago and he did not specify a date.

The investigating Officer told him about the allegation that he sexually assaulted a cleaner in Ward D in the toilet. The investigating Officer told him Chabalala alleged that he grabbed her and forced her into the toilet and raped her for the first time and at a later stage for the second time when he used vaseline or vicks from his trouser's pocket.

Also, the investigating Officer told him he proposed love to her and she refused.

The Investigating Officer asked him if he would consent to clinical tests and he agreed, yet the tests were not done.

The Investigating Officer said to him he could see by reading his face that he did it and he replied to say it is not practical to rape in the ward because there is always a movement of patients and nurses and it is not possible to have a ward without a nurse.

The police told him the case had been dismissed because of lack of evidence.

He denies allegations levelled against him.

### **Cross-Examination**

44. When asked how was the relationship with the alleged victim, he stated it was collegial.

45. When asked to describe the alleged victim for the period he worked with her he stated it was like she was always scared.

46. When asked if he was the one who wrote his statement, he stated yes, with the assistance of his daughter.

47. When asked why he did not submit the statement in the disciplinary hearing he stated at that time he had not yet written the statement.

48. When asked how did he know that the alleged victim was transferred from Department of Agriculture in Giyani he stated the Unit Manager made an announcement.

49. When asked if he knew where the victim resided he stated he did not know.

50. When asked if he raped the victim, he stated he did not.

51. When asked why a woman of 57 years old would fabricate the story that he raped her in the toilet he stated the woman can lie.

52. When asked why if there were other male nurses (5 or 6 in the section) would the victim makes accusation only against her, she stated it might be because she wanted him to propose her. Also, there are many beautiful and attractive women in the Hospital and that he has a wife and how can she rape an unattractive woman who he does not even know where he stays.
53. When asked if he thinks rapists go for attractive women he stated some rapists are not mentally stable and others rape when they are drunk.
54. When asked why would three witnesses lie, he stated the witnesses did not see the alleged incident, they were informed by her.
55. When asked if a lying victim would go through all the processes of a hearing and arbitration he stated if the incident was true, she would have reported the matter immediately. Also, the toilets are always not locked.
56. When asked if he had ever proposed love to the woman, he stated she did not and the lady is not attractive.

### **Clarification**

57. When I asked him if she can't sleep with old women, he stated she can only sleep with an old woman if she is attractive and she consents to having sex.

## **Thupetsi Manamela**

He testified that he was the Applicant's representative at the disciplinary hearing.

He further stated that:

- No dates of rape were given.
- When he cross-examined Ms Thindiza (D-Section Manager) she could not produce the Incident and Doctor's reports.

## **Cross-Examination**

58. When asked if he understand the difference between the disciplinary hearing and the arbitration hearing he said yes.

59. When asked if he witnessed the incident he stated no.

60. When it was put to him that his evidence is hearsay, he agreed.

## **ANALYSIS OF EVIDENCE AND REPRESENTATION**

61. For the first time during the closing arguments the Applicant was challenging the delay in charging the Applicant. As I have stated at the beginning, the Applicant's representative stated that the Applicant was not challenging the delay in prosecuting the matter. I shall therefore proceed to deal with the matter on the merits of the case.

62. The victim did not specify when did the incidents of rape occur (i.e. specific dates). She simply testified that it was during the month of October 2006.
63. The difficulty in the Respondent's case is that the alleged victim did not report the matter immediately. The matter was reported only after three months. Which means the Respondent does not have the doctor's report.
64. While the investigation was done by one Maphutha and while his report formed part of the bundle of documents of the Respondent, Maphutha was not called to testify. Therefore, I cannot attach much weight to the report.
65. While the Applicant testified what transpired between him and Maphutha during the investigation, there is only one version that I can accept, that of the Applicant, as Maphutha did not testify.
66. It follows that the following version of the Applicant is accepted:
- That Maphutha told him that the victim claimed that for the first time the Applicant grabbed her and forced her into the toilet.
67. While the alleged victim testified that the Applicant called her during lunch while she was in the company of her colleagues and requested her to follow him, the alleged victim's friend (Sarah Molepo) testified that the alleged victim told her the Applicant grabbed her and forced her in the toilet while she was busy cleaning with a mop. At no stage did the alleged victim testify about her being grabbed and pulled by force to the toilet.
68. Whereas the alleged victim testified she was raped by the Applicant on two different occasions, Molepo testified that the alleged victim told her she was raped only on one occasion.

69. The Applicant testified that had she screamed, people would definitely have heard her yet she did not scream. She explained this by stating that she thought that the Applicant was carrying a gun and she would be shot in the toilet. The victim did not however give a proper explanation why she thought the Applicant might have brought a gun to the workplace. It was not put to the Applicant that he was carrying a gun. I am not satisfied with the explanation of the alleged victim (Ms. Maria Chabalala) as to why out of possible weapons she thought of a gun. She did not testify that she once saw the Applicant carrying a gun.

70. It defeats logic and common sense that while the alleged victim claims the Applicant had previously proposed love to her and she wasted no time in telling him where to get off, she nonetheless was unable to tell him where to get off when the Applicant was committing a serious case of sexual assault. Also, the alleged victim conceded that neither of her colleagues who were in her company saw the Applicant calling her during lunch. This is despite the version of the alleged victim that when the Applicant asked them where were Level 4's, **they** (her and her colleagues) replied that they were writing exams.

71. The alleged victim, while testifying that she could not see if the Applicant used protection as she was facing backward strangely testified that she saw the Applicant using vicks which he took out from his trouser's pocket as it was difficult for him to penetrate her. In my view, if she could not see if the Applicant was using a condom as she was facing the opposite side, I find her difficult to believe her that she saw the Applicant using vicks.

72. It is common cause that the alleged incident took place during daylight and in the toilet that is situated in the ward. According to the Applicant there was at least one other nurse and the patients in the vicinity. In my view it is highly improbable that the Applicant could have taken chances under those circumstances. Worse still, the toilets are always unlocked.
73. The alleged victim testified that when she was taken to hospital, she did not tell the doctor of rape but told the doctor of high blood pressure. The alleged victim way of doing things make her not to be trusted as a reliable witness.
74. The credibility of the alleged victim is further questionable in that she initially said she did not develop a discharge but later on during re-examination, she stated she developed a rash and a discharge.
75. I also fail to understand why the alleged victim did not simply walk away from the toilet when she was told to bend. The alleged victim's case was never that the Applicant had locked the door of the toilet to prevent her from walking away.
76. It is common cause that the alleged victim was not happy with her being transferred from Giyani to Polokwane. After the alleged incident she asked the Social Worker to recommend that she be transferred back to Giyani which the Social Worker recommended.
77. The Clinical Psychologist who testified for the Respondent (Robert Teunissen) conceded that he did not do a psychological assessment and instead he took the alleged victim's word that she had been sexually assaulted. Also, he conceded that he is not an expert in sexual trauma. Therefore, I do not attach much weight to his testimony.

78. I also do not attach much weight to the testimony of the Applicant's witness Mr. Manamela who accepted that his evidence was hearsay.
79. The fact that the alleged victim is an old woman does not mean she cannot not lie. She was not in my view a reliable witness. I found not only one or two inconsistencies in her testimonies, but a lot of inconsistencies.
80. According to the alleged victim, she reported the matter only after she was persuaded to do so, yet her friend Molepo testified that she took it upon herself to report the matter to Malebogo after her friend had confided in her.
81. I do not understand why the alleged victim did not report the matter to the police as the alleged perpetrator had left and the alleged victim had conceded that she knew that the police protects the citizens.
82. While rape is a serious offence, it does not mean that the alleged victim will always tell the truth. While rape is a horrible conduct that must be condemned by all right thinking citizens, the victim must make sure she assists the employer in coming forward with credible evidence. In all the likelihood, the Applicant and Chabalala were not in the toilet together.
83. The arbitrator and adjudicator decides the matter on the evidence and facts presented before him or her and cannot be seen to decide on emotions and soft feelings for the alleged victim.
84. In casu, no reasonable arbitrator can (on balance of probabilities) confirm the guilt findings given evidence before me. Any reasonable decision maker cannot ignore the huge discrepancies in the Respondent's case. The alleged victim's case had a lot of loopholes and was terribly weak.

85. When the accuser makes certain allegations against the accused it is not only the accuser's version that must be looked into, the accused dignity and the damage the false accusations caused to the accused. In my view, these false accusations have destroyed the reputation of the Applicant especially in the eyes of the hospital Community and his family.

### Conclusion

86. I find the Applicant not guilty of the charges that were preferred against him.

87. The suspension of the Applicant was lifted and the Applicant worked normally for many months before he was dismissed.

88. I see no reason why the Applicant should not be reinstated back to his previous position.

### AWARD

89. In the premises, I make the following award, (incorporating the order)

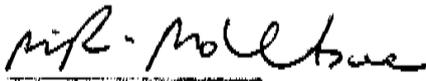
89.1. The dismissal of the Applicant was substantively unfair.

89.2. I order the Respondent (**Department of Health and Social Development-Limpopo**) to reinstate the Applicant (**N.R. Mapholo**) retrospectively to his previous job at Thabamoope Hospital on the same terms and conditions that governed his employment and without forfeiture of his benefits that were applicable to him prior to his dismissal.

89.3. I order the Respondent (**Department of Health and Social Development-Limpopo**) to pay the Applicant (**N.R. Mapholo**) his backpay amounting to **R69 536-00** which back-pay shall be paid on or before **30 November 2011**.

89.4. The reinstatement above shall be conditional upon the Applicant reporting for duty within ten (10) days of him receiving this award.

89.5. I make no order as to costs.



**Adv. Russell Moletsane**

**Arbitrator**

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**16 November 2011**