



# ARBITRATION AWARD

Panellist/s: Ananthan Sanjivi Dorasamy  
Case No.: PSHS417-10/11  
Date of Award: 13-Jul-2011

**In the ARBITRATION between:**

DENOSA obo Mchunu S.E.  
(Union / Applicant)

and

Department of Health: KZN  
(Respondent)

Union/Applicant's representative : MR C LEKHOATHI

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**Details of hearing and representation:**

1. The arbitration proceedings commenced at 09H00 on the 24 May 2011 at the Ulundi District Office Boardroom and concluded at 18H00. The matter was set for two days but the parties decided to complete the evidence and submit written arguments on the 31 May 2011.

**Respondent's Opening Statement**

2. The Respondent will call witnesses to prove the allegation of Sexual Harassment by the applicant. The relief sought was the application be dismissed.

**Applicant's Opening Statement**

3. The Applicant's case relates to unfair dismissal for the allegation of Sexual Harassment. The applicant will present arguments that he is not guilty of Sexual Harassment and seeks re-instatement retrospectively.

**Issues to be decided:**

4. I am to decide whether the dismissal of the applicant was procedurally and substantively fair. Should I find in favour of the applicant then I am required to consider what remedy would be appropriate in terms of s 193 and 194 of the Labour Relations Act. Should I find against the applicant, then the matter would be dismissed save for the issue of costs.

**Background to the issue:**

5. The applicant was charged for sexually harassing two employees, attended a disciplinary hearing, appealed the decision but was dismissed. At the conciliation hearing the matter remained unresolved and hence the arbitration proceedings.

**Summary of evidence and arguments:**

6. **Respondent's case:**

**The respondent called four witnesses in support of its case.**

7. **FIRST WITNESS- NONKULULEKO DLONGOLO**

7.1 She is employed at Ceza Hospital and has worked there from 2007 to present as a nurse and was aware of the reason for the arbitration.

7.2 She was working night duty in the Male Ward with the applicant in March 2009 and after finishing the ward routine she was sitting at the duty room, doing the administrative work..

7.3 She is senior to the applicant.

7.4 He was sitting next to her reading a magazine. It was after 22H00 at night. Then he started to close the curtains in the office and took the chairs and the patient's linen.

7.5. She asked him what he was doing and he said that he was preparing a double bed for them.

- 7.6 She told him not to do that in the office, after that she continued with her work. He came behind her and covered her, kissing her, touching her all over her body.  
He touched her private parts and she asked him what he was doing. He did not answer but continued touching her and kissing her. She screamed loudly and he went outside. She was shocked.
- 7.7 He returned later and she didn't talk to him until the next morning. The following day she was scared of him and as usual they continued with ward routine. She was scared of him but did not want to show him that she was scared
- 7.8 She called her friend to visit her from EMRS but she did not tell her friend what had happened.
- 7.9 On that day the applicant was coming in and out of the duty room but she didn't question him.
- 7.10 Then she reported the incident to her superior Mrs.R.T. Shabangu, to take the applicant away from the duty roster. She asked her for the reason but she didn't tell her what had happened. She was not satisfied when she told her that he did not listen to her. She needed a strong reason and she told her the truth.
- 7.11 She told Mrs. Shabangu about the incident a day later when the applicant was on his day off. She believed that if she showed him that she was not scared he would stop doing what he did to her.
- 7.12 She said no to his touch because she was being abused by him and didn't want him to touch her private part.
- 7.13 If he denies any what you allege then he would be lying because he did what she alleged
- 7.14 After the report to Mrs. Shabangu, she reported it to the matron.
- 7.15 The applicant's version is that he did nothing to her and wants to return to his job.
- 7.16 She does not want to work with him. The applicant a few days ago before the incident told her about his past history. He said that he was in jail for 5 years because he murdered somebody and that he was a gangster and was involved in crime in Pietermaritzburg.
- 7.17 She is scared of him because of what he did to her.
- 7.18 The applicant will claim he was unfairly dismissed for something that he did not do. She addressed him and reiterated that he did abuse her and he deserves to be punished.
- Under cross examination she testified as follows:-**
- 7.19 The incident happened in March 2009 at night after 22H00. On the night of 21 March 2009 she collected the statistics and took it to the night matron before midnight.
- 7.20 He touched her body, private part – her vagina. He put his hand on her vagina. She was wearing a panty and trouser. He did not undress her.
- 7.21 He did not touch her vagina, but he touched the area around the vagina. She did not like what he was doing. There were only the two of them in the duty room.
- 7.22 She was screaming, nobody came, she was screaming loudly.

- 7.23 It was in the male ward and the next ward is far away (near the car park), nobody came to her rescue. She said that he must not do it in the office and not at all.
- 7.24 In her state of mind she did not go home. She went to the matron, and handed the report but did not report the incident to her as she was shocked. There was a phone in the ward but she did not call anyone.
- 7.25 In the morning she continued with her routine and returned the next day and called her friend's boyfriend and when he came the applicant was in the hospital.
- 7.26 The following day she reported for duty – 12hrs had lapsed. The next night she was still scared and called her friend's boyfriend. She called him because she was afraid of the applicant doing the same thing again. He was on duty. He arrived around 22H00 and he sat with her until midnight. She did not tell him about the incident. She reported it to him after 2-3 days. His reaction was that he was amazed.
- 7.27 The Applicant was not present from midnight until 05H00 when he returned as it was the patient's breakfast time.
- 7.28 She was in charge of the applicant and when he disappeared she asked him where he was and he replied that he was in his girlfriend's room. It was wrong because he was supposed to be on duty. She reported to her supervisor, but her supervisor did not record the incident because she forgot to write that incident.
- 7.29 At the period the applicant was on days off. After discussing with her he denies the allegation.
- 7.30 She does recall asking him to deposit some money (R100.00) for her brother, the deposit was made on 24 March 2009 and the incident occurred on the 21 March 2009. She gave him the account number. She paid him back the R100.00.
- 7.31 The applicant had mishandled her two days previously, and she called her male friend as she was scared of him, she didn't talk to him. He abdicated his duty post. She still asks for R100.00 and later refunded it.
- 7.32 Her version is a fabrication because she told her friend's boyfriend but never reported to the security or anybody else and she returned to work the next day. The applicant would say that the incident didn't happen.
- 7.33 She was in a position of power. She had an alternative motive and she is going with her friend Hlatswayo and she did not know when she was sexually harassed. It was before she was harassed.

#### **Under Re-Examination**

- 7.34 The R100.00 was deposited into her brother's account and she asked the applicant to do so after he sexually harassed her. He said he was going to Ulundi and there are no banks in Ulundi.

- 7.35 She alleges that he sexually harassed her because her brother needed the money urgently. He used his own money, as she did not have R100.00. It is strange for her to do as what she did in this regard.
- 7.36 The relationship by asking for a favour shows a good relationship with the applicant.
- 7.37 She does not know the reason for borrowing the money besides it was urgent and he was the only person going to Ulundi, 50 kms away.

*ZINHLE CHARMAINE HLATSWAYO*

- 7.38 Currently employed at Ceza Hospital as a staff nurse since April 2007.
- 7.39 She knows the applicant in this matter as she worked with him in the male ward.
- 7.40 The working relationship was all right until in February/March 2009, long time ago.
- 7.41 She was working with him on night duty. After finishing the rounds they went to the duty room, she was to write the statistics and take it to the duty person by midnight.
- 7.42 She was sitting in the duty room. There was a table and he started touching her on the shoulders. She told him to stop but he continued to touch her on her thighs and she told him to stop. Then he told her that he liked her from the first time he saw her.
- 7.43 She pulled him away. She saw he was sweating while touching her and she accidentally touched him on his penis and realised that he had an erection.
- 7.44 He continued touching her on her thighs and shoulders. Then she was crying and went outside and stood near the hedge for a long time. Then she went to the ward and after that he did not continue and she continued with the routine work.
- 7.45 On another day when she finished the routine the phone rang and it was a call for him. She allowed him to go away. When he returned he was smelling of alcohol and started touching her again. She was angry and told him to stop. He took out his shirt and he smelt of alcohol. He hung the shirt on the cupboard and continued to touch her, she pushed him and he told her that the patients will hear. She was loud and he stopped. Nobody came to her aid.
- 7.46 There was another day it was to be her last night. Sister Xulu was in charge of the day duty. He gave the reports and she followed him. After that day the relationship was not good.
- 7.47 She told Sister Xulu about the things as a man and to talk to him. She promised herself that she would fight him and she was serious.
- 7.48 She went to the ward and he didn't do anything. He complained about the day off.
- 7.49 She did the off duty and used the chance to put him on the other team. She didn't mind because she could not work with him.
- 7.50 She put him with the other team. Then she was in meeting and heard about Ms Dlongolo.
- 7.51 Another day she, Dlamini and the applicant were working in the duty room when the applicant touched her on her thighs and stopped. Dlamini did not realise anything.
- 7.52 Ms Dlongolo told Dlamini about it and said that she was not ready to work with the applicant and

would not work with him.

- 7.53 She told her that she would tell Sister Shabangu. She went to Sister Shabangu and told her to story with Dlongolo.
- 7.54 Dlamini was moved to the female ward and he used to protect them.
- 7.55 She told Sister Shabangu that she wanted the applicant moved to the female ward or move to day duty. She couldn't work with him.
- 7.56 She was asked the reason for not reporting and she said that the applicant told her scary stories.
- 7.57 She took the matter to the matron's office but the applicant said that he did not touch her but he touched Dlongolo. She said that he touched her because she pushed him away. He apologised to her and Dlongolo. The matron was present at the time.
- 7.58 Applicant says that he should not be dismissed and denies harassing her. He apologised to her in the matron's office.
- 7.59 She did not call the security or police, because she was busy in charge of the ward and the police walked around the hospital.
- 7.60 She was supposed to call her superior and the matron. Before the incident her relationship with the applicant was alright.
- 7.61 Only if they worked together they would be together. He was not her friend.
- 7.62 He alleges that he did not harass her or Dlongolo.
- 7.63 He did what he did and she said what he did in details as had happened.

**Under cross-examination she testified as follows: -**

- 7.64 After the incident the relationship was not good.
- 7.65 She worked with him for less than a year, and they worked as colleagues.
- 7.66 She wrote the statistics and the night supervisor would call and it would be taken to her.
- 7.67 Applicant used to take it but because he is older than her she would take it.
- 7.68 The applicant touched her on her thighs on the first time. He started on the shoulders and then at the thighs.
- 7.69 She shook herself and asked him to leave her alone.
- 7.70 He continued and then she turned and told him to leave her alone but it did not deter him and he again touched her thighs. His voice was soft. She pushed him away.
- 7.71 Thereafter she stood up and he continued and pleaded that he liked her the first time he saw her. She didn't want to have a relationship with him.
- 7.72 When he was touching her thighs she pushed him away and accidentally touched his penis. She was angry. She told sister Shabangu about it.
- 7.73 She recalls many things about the incident. She went out of the ward.

- 7.74 She allowed him to go out and was in charge of the ward during his break. When returned he smelt of alcohol but she didn't speak to him because the relationship was not good.
- 7.75 A person should not drink whilst on duty but she did nothing about it. The communication was not good.
- 7.76 She had a night supervisor but she did not talk about the incident of touching or alcohol. It bothered her but did not go to talk to him.
- 7.77 It was wrong the way her touched her. Initially he had somebody in the hospital.
- 7.78 When he touched her shoulders she thought that he was playing and when he continued touching her thighs she pushed him away.
- 7.79 The three incidents took place within the space of a month.
- 7.80 The first and third incident he did not smell of alcohol.
- 7.81 When he returned he took off his shirt, asked if they could put the chairs together like a bed. She did not put her chairs next to his. When he took off his shirt she was standing and talking to him loudly. He stopped what he was doing and said she would wake the patients. He went back to his chairs. Nothing happened on that day.
- 7.82 On the last night – Mr. Xulu was on day duty and he came to the ward. After she gave the reports she told him about it. It was a serious matter but he laughed.
- 7.83 She did not think it was proper to report the incident
- 7.84 She wanted to take him out of the roster but put him with somebody else. She used the off-duty. He grieved about the off-duty and that is the reason for the allegation.
- 7.85 When the change over came she put the applicant and Dlongolo together and the same day she reported to sister Shabangu. Only when approached for reason for the applicant to go duty and told not good enough and then the allegation came about.
- 7.86 The reason for changing the off-duty – he complained about working with Ma Khathi an older person. She changed the off-duties on his complaint. The change had the applicant work with Ma Kathi and Dlongolo.
- 7.87 Another reason was that she did not want to be with him.
- 7.88 The day Dlamini, she and the applicant were working together he touched her thighs in front of Dlamini but there was a table between them. The applicant was close to her, she spoke loudly "Stop it Mchunu".
- 7.89 She overheard Dlamini and Dlongolo about the incident,
- 7.90 After Dlongolo told her about her story the change over took place and she wanted to use Dlamini.
- 7.91 She is not sure about when her incident took place. They didn't have a chance to discuss the incident.

- 7.92 At the dismissal hearing the applicant was dismissed.
- 7.93 His girlfriend or wife works in another department and she did not want to report it because she may be working with her. The abuse in the ward is worse than the fear of the girlfriend.
- 7.94 She did not want sister Shabangu to report it to higher authorities. She told sister. Shabangu about her fears. She was scared as to what he could do.
- 7.95 She did not think it could get to go so far and he apologised and didn't want him to be punished.
- 7.96 What he did to her and after he apologised she felt it was fine.
- 7.97 She said she was not ready to work with him in the same ward.
- 7.98 When it went further he should have been punished.
- 7.99 When she saw Dlongolo crying she took the matter further.
- 7.100 She discussed this matter with Gasa after the first incident. She decided to fight him on the last occasion. She said she would fight back if he did it that day. She didn't report any incidents.

#### **Under Re-Examination**

- 7.101 She is not happy that she did not report it.

#### **REJOYCE THANDAZILE SHABANGU**

- 7.102 She is employed at the male ward at Ceza Hospital as chief professional nurse from 2007.
- 7.103 She knows the applicant as he was under her supervision.
- 7.104 He was initially on day duty.
- 7.105 While on night duty Zinhle Hlatswayo wanted to talk to her in private and wanted her to request the matron to get the applicant to work on day duty.
- 7.106 She asked her for a reason because the allocation was already out.
- 7.107 Firstly she refused to tell her and she told her that she would not go to the matron if she has no sound reason.
- 7.108 She told her about the incident with the applicant harassing her sexually. She went to the matron's office and reported it.
- 7.109 After the complaint the allocation was not changed. She went to the matron's office with the two of them. She was rushing for her transport and left them with the matron.

#### **Under cross-examination she testified as follows: -**

- 7.110 She knows the applicant when he worked in the male ward. While he worked there she did not get any adverse report about him.
- 7.111 On day duty he behaved.



7.112 The incident was reported in April and the incidents occurred in March.  
7.113 They did inform her when the incidents happened.  
7.114 She didn't speak to the applicant because he was on his day off and she reported it to the matron's office.

7.115 The witnesses did not want it reported because they were afraid and she felt it was above her powers to handle the issue and they said that they will stay away because they were sick.

7.116 They said that the applicant was harassing them sexually. They said that they were afraid because his girlfriend was working there and they may be working with her.

#### **Under Re-Examination**

7.117 NIL

#### **JOSTIMA THANDIWE MAVUNDLA**

7.118 She is employed at Ceza Hospital as an assistant Nursing Manager from 1974.

7.119 Her duties entail to relieving the nursing manager, allocating off-duty, checking the whole hospital, doing management duties. In disciplining she attends to the problem and tries to solve it if she's unsuccessful she takes the matter to the hospital manager.

7.120 The CEO is the ultimate custodian of discipline in the institution.

7.121 She knows the applicant because she was working at the hospital he was working as nursing assistant.

7.122 In the morning of 27 March 2009 sister Shabango came to the matron's office requesting that the applicant to be removed from the male ward and placed at another department because he was being a problem with Hlatswayo and Dlongolo.

7.123 She said that the applicant was sexually harassing the two ladies. Then she asked sister Shabangu to get the two ladies to the matron's office to question them. They came to the matron's office. First she questioned Hlatswayo who demonstrated what the applicant did to her while on night duty and she was crying. She also got Dlongolo to demonstrate what the applicant did, she began crying and she called other matrons Shoebede and Sibiya who came to the office. Then she asked the two ladies to demonstrate and they were crying and shivering.

7.124 They said that applicant would be called and she asked matron Sibiya to phone the applicant.

7.125 Mr. Mchunu came to the matron's office and the two ladies were asked to leave and the applicant was asked to come in.

- 7.126 They questioned him and he denied some of the things and then they called the two ladies to repeat what had happened. They asked Mr. Mchunu to go outside and then the two ladies requested that the matter not be taken further because the applicant's girlfriend may have a problem with them.
- 7.127 Mr. Mchunu was questioned again and he said that they were playing.
- 7.128 When the night staff left they should hug each other.
- 7.129 Mr. Mchunu asked to be pardoned for the incidents.
- 7.130 Eventually they decided to take the applicant out of the male ward and put him in the female ward.
- 7.131 He asked for forgiveness because he thought it was alright and because they were crying. This was not the practice and the two ladies confirmed it.
- 7.132 They told Mr. Mchunu to see the doctor and when Mrs. Phewe returned the matter was reported to her. She read circulars and policies on Sexual Harassment, but was not trained to handle Sexual Harassment cases.
- 7.133 The applicant would say that the ladies are lying and that he did not sexually harass them. The two ladies said that he sexually harassed them.

**Under cross-examination she testified as follows: -**

- 7.134 They told her that the applicant touched their private parts. She questioned them separately and then questioned the applicant separately. He denied the allegations, the ladies came in and repeated the incidents in his presence and they were crying.
- 7.135 She questioned him about his girlfriend and the reason for his behaviour. She told him to ask to be forgiven by the two ladies.
- 7.136 After taking all the information he was found to have done something not good to the two ladies.
- 7.137 She wanted to take the matter to the nursing manager who continued with the matter.
- 7.138 The matter was serious and she wanted to deal with him.
- 7.139 As assistant nursing manager she did not allow him to be represented by his union.
- 7.140 She separated the issues for the matron to deal with the matter.
- 7.141 The circulars guides/ tell the staff about Sexual Harassment cases and that it should be reported
- 7.142 In cases of Sexual Harassment are dealt with the nursing manager.
- 7.143 Ms. Hlatswayo was making the duty roster not to be on duty with the applicant. While he was in her department she can't recall any report that he was drunk.
- 7.144 She called the two ladies and they described how they were Sexually Harassed. Ms. Dlongolo said that he touched her private parts and pointed to the vagina

- 7.145 The applicant was denying sexually harassing the girls. He was denying that he touched their private parts.
- 7.146 The girls asked for the matter not to be reported but because it was serious she reported to the nursing manager.
- 7.147 The management is the whole management CEO etc but the nursing manager must be advised.
- 7.148 The applicant asked for forgiveness. The reason advanced to remove the applicant from night duty was that was suffering from epilepsy wanted to be moved when the matron returned.
- 7.149 The applicant will confirm that he did not want to go to a doctor to say that he was suffering from epilepsy. He does not suffer from epilepsy
- 7.150 She would want him to lie that he was suffering from epilepsy.

#### **Under Re-Examination**

- 7.151 She told him to go to the doctor to get a medical certificate to state that he suffers from epilepsy to substantiate his removal. This was a serious matter and by removing him from night duty, she was protecting him.

#### **Applicant's case:**

### **8. SIBISISO EMMANUEL MCHUNU**

- 8.1 He worked as security officer and joined Ceza Hospital in July 2008 as nursing assistant. He upgraded himself as an enrolled nurse.
- 8.2. He is alleged to have sexually harassed Ms Dlongolo and Hlatswayo, but he did not sexually harass them.
- 8.3. He didn't touch any of her private parts nor did he take alcohol whilst on duty.
- 8.4. Alleged incidents in February or March 2009 led to his dismissal. It was 26 March 2009 when he was called to the matron's office. The two ladies and matrons Mavundla, Sibiya and Shoebede were present and he was asked if there was a problem between him and the two ladies. He said that he had a problem with Hlatswayo and explained the problem that started in June 2009 – when he worked night duty in male ward, working six days and off one day
- 8.5. He worked 8 days, as he replaced somebody in January. In February he did not get his off-duty as asked. He explained the problem with Hlatswayo, as he worked abnormal duties.  
The Matrons asked him if he had any problem with Dlongolo. The last time he worked with her was 22 March 2009 and she borrowed R100.00 for her brother and showed the nursing manager the deposit slip. There was no problem with Dlongolo.
- 8.6. The Matron asked him to go out and the two girls said he touched their private parts. The only

problem was with Hlatswayo because of the off duties.

He does not know about the sexual harassment story. He complained about his off duties and didn't work with Ma Kathi. He did not have a problem with Dlongolo was never in prison.

8.7. Mrs. Mavundla indicated she resolved the problem by moving him to the female ward.

It was not the first time he was called to the matron's office.

8.8. He was asked to go to Ulundi to the doctor to give him a letter that he had epilepsy and give it to the nursing manager to say that was the reason he was removed from night to day shift.

He promised them that he would think about it and he decided not to go to the doctor. He did not get the doctor's letter. He was removed from the male ward and put in the female ward. He was unhappy when he received his dismissal letter. He was not advised of his rights to representation by Matron Mavundla.

**Under cross-examination he testified as follows: -**

8.9. He worked with Ms Dlongolo and does not know the reason for her allegations against him. In respect of Ms Hlatswayo he does not know the reason for her allegations because they were not in good relations because of the off duties. It was bad because they were not talking to each other. He did not lodge a grievance about his abnormal duties.

8.10. He did not get the chance to tell his representative that Ms Hlatswayo was lying. Also Ms Shabango could not be lying as she was the first person the ladies reported the incidents. It was not put to Ms Dlongolo or Hlatswayo that they were lying that he apologised to them.

**The applicant testified on his own and did not call any witness.**

**CLOSING ARGUMENTS**

The parties submitted written closing arguments on the 31 May 2011. The arguments are recorded verbatim below.

**RESPONDENT'S CLOSING ARGUMENTS**

1.

The issue to be decided is whether applicant's dismissal substantively fair or not.

2.

The evidence led by the respondent and the applicant will not be repeated in its totality as the record bears it.

3.

The respondent representative called three (04) witnesses to testify on behalf of the respondent. The first witness was Ms. N. Dlongolo who testified that she was sexually harassed by the applicant who during one night when they were on duty touched the witness's private part. She said in March 2009 she was on duty in the male ward. They had finished the routine and she was sitting in duty room. while she was busy doing reports and statistics, the applicant, Mr. Mchunu was sitting next to her reading a magazine. The applicant closed the curtains. He took chairs and patients' linen. She testified that's she asked him what was he doing, the applicant replied by saying he was preparing the double bed for himself and her. She was scared of the applicant who had told her of his past as a criminal.

4.

She said she continued to do her work. The applicant came behind her kissing her and touching her all over her body including her private part. She said she told him to stop and she screamed and the applicant went outside. She said she was shocked. . She said she did not talk to him until the following morning. She said she was scared to work with him on the following day. She called her friend who is working for Emergency Medical Rescue Services (EMRS). She did not tell her friend all the stories. She said on that night Mr. Mchunu was going in and out of the duty room. The rest of the story is borne by the record.

5.

The respondent called Ms. Z.C. Hlatshwayo who also testified that she was harassed by the applicant when she was working night duty wit him in the male ward. Mr Mchunu harassed her by caressing her thighs and her shoulders. She said Mr. Mchunu about being paired with Mrs. Khathi because she is old. He harassed her on three different occassions and at all times she told the applicant to stop and she screamed. Ms. Hlatshwayo she was very scared of Mr. Mchunu who at one stage told her of his ugly and scary past. He told her that he had been in prison for five years for heinous crime he had committed.

6.

The respondent called Mrs. Shabangu who testified that she was approached by Ms. Z.C. Hlatshwayo who told her about the harassment perpetuated against her by the applicant. She reported the matter to Matron Mavundla she was in a hurry and she wanted catch transport to take her to her home as she was going to be off duty.

7.

Matron was called to testify and she confirmed what other witnesses told the commissioner and further mentioned that the applicant apologised to Ms. Dlongolo and Ms. Hlatshwayo. He said he did not know that he was offending them as it was a norm that they would hug and touch each other during the duty changes. She testified that the applicant was changed to report in the female ward day shift. She advised the applicant to go to the Doctor to secure a medical certificate to justify his change of duty and shift. She was doing that to protect the applicant form people who would ask him why he was no longer reporting in the night duty in the

male ward. She said Ms. Dlongolo and Ms. Hlatshwayo demonstrated to her, Matron Shoebede and Matron Sibiya what the applicant did to them.

8.

The applicant was called to testify, he said before he joined Ceza Hospital he was a security guard. He said he joined Ceza Hospital in July 2008 as an Enrolled Nursing Assistant. He said he had since acquired an Enrolled Nurse qualification. He said he did not harass Ms Dlongolo and Ms. Hlatshwayo. He said he had no problem with Ms. Dlongolo but had a problem with Ms. Hlatshwayo about the off-duties.

9.

It is worth mentioning that all witnesses for the respondent were cross examined by the applicant's representative who put to Ms. Dlongolo that she was lying under oath. Ms. Dlongolo answered by saying she was not lying. He put it to the witness that if she was harassed by Mr. Mchunu why would she ask Mchunu to lend and deposit R100.00 for her brother. Ms. Dlongolo said her brother was desperate and she did not have the money while she learnt that Mr. Mchunu was going to Ulundi she asked him to assist her.

10.

It is submitted that other witnesses except Ms. Dlongolo were not confronted with the version of the applicant. The applicant could not explain why witnesses were not confronted with his version.

11.

### **Survey of evidence**

11.1. The applicant was asked if it was strange or not that Ms. Dlongolo said he touched her on her private part. He answered by saying it is strange. He was asked if he was aware of any reason why Ms. Dlongolo was making such allegations, he replied by saying he does not know.

11.2. He was asked if he agrees or not that it was for the first time for the commissioner to hear that he was not in speaking terms with Ms. Hlatshwayo. He replied by saying he agrees.

11.3. When asked why did he not mention it before the commissioner, he replied by saying he did not get an opportunity to say or mention it.

11.4. He was asked if he lodged a grievance about the off duties, he replied in negative.

11.5. It was put to him that Ms. Hlatshwayo was not confronted with the proposition that he denies the allegation and he conceded.

11.6. He was asked why it was not put Ms. Hlatshwayo that he denies the allegations of sexual harassment; he said he does not know.

11.7. The comment from the applicant was invited about his apology as per the Ms Hlatshwayo, Ms. Dlongolo and Mrs. Mavundla's evidence that he apologised to his victims. He said he did not apologise.

11.8. The applicant was asked of any specific reason why it was not put to the witnesses that he did not

apologise, he replied by saying he did not get an opportunity to put to witnesses.

11.9. It was put to him that had all the above been his version he would have instructed his representative accordingly, he conceded.

11.10. It was put to the applicant that he was lying under oath and designing his case as the case progresses, he denied it.

12.

It is submitted that the fact that Ms. Dlongolo asked for financial from the applicant does not suggest that harassment did not take place. In South Africa it is not unusual for the victim to continue live and ask for assistance from their abusers. In some cases the victims report the abuse after fifteen and twenty years. It is therefore submitted that it is not strange for the applicant to ask for assistance from the applicant.

13.

It is submitted that Ms. Dlongolo and Ms. Hlatshway testified that they were very scared of Mr. Mchunu, this is also the reason why they did not report the immediately after the incidents had occurred.

14.

It is submitted that the applicant's version is just a bare denial of allegations and it does not provide any plausible defence.

15.

it is submitted that the cautionary rule should be applied as the applicant was the only witness against four witnesses who testified on behalf of the respondent.

16.

In the circumstances it is submitted that the evidence of the respondent is the only true account and as such it should be admitted as true.

Wherefore it is respondent's prayer that the applicant's case be dismissed.

## APPLICANT'S CLOSING ARGUMENTS

### **INTRODUCTION:**

1.

From this arbitration, the applicant seek the following relief:

Reinstatement backdated to 13<sup>th</sup> April 2010.

2.

His cause of action is founded in the provisions of the Labour Relation Act, 66 of 1995 (the Act) dealing with unfair dismissals.

3.

The dispute arising out from an alleged sexual harassment on the 21<sup>st</sup> March 2009 at male ward duty room upon Ms N. Dlongolo and/or before February 2009 at Ceza Hospital Male Ward duty room, allegedly sexually harassed Ms C.Z. Hlatshwayo.

4.

It is submitted that the alleged misconduct came as a result of a complaint/verbal grievance by the applicant (Mr. Mchunu) about the irregular/abnormal off duties.

5.

The dispute of off duties happened in January where Mr. Mchunu was made to work 6 nights on duty and 1 night off duty and immediately commenced with the 7 nights on duty with 1 night off. On upon raising his dissatisfaction with Ms Hlatshwayo who was the person in charge of Mr. Mchunu on the night in question.

6.

Realizing that he (Mr. Mchunu) is not getting any joy from Ms Hlatshwayo, he then approached the night supervisor Matron Shoebede, who resolved the problem in Mchunu's favour by saying that in February, Mr. Mchunu off duties will be corrected.

7.

The ruling of the night supervisor was not well received by Ms Hlatshwayo, who on her admission stated that the relationship between her and Mr. Mchunu was bad. A month later in February 2009, she alleged that the applicant sexual harassed her by rubbing her shoulders and thighs. What is striking is that Ms Hlatshwayo did not report this incident to the night matron when she took the night report, did not report to the security of the hospital or the police. She only reported this incident to Ms Shabangu on the 23<sup>rd</sup> of April 2009.

8.

The reasons advanced by Ms Hlatshwayo for not reporting and the **only** reason is that she is afraid of Mchunu's girlfriend, who was not supposed to know about this incident and no where in her statement does she provided a reason for not reporting, except at the arbitration where she says she was afraid of Mr. Mchunu scary stories he told them about being in jail for 5years, the latter was denied by the applicant.

9.

The relative conclusion one can reach with Hlatshwayo's evidence is that as she puts it "this is the only way I can get rid of him" is because she failed in abusing her power to make the applicant work abnormal hours and thought best to frame him for sexual harassment as she knows that could be viewed as a serious action that can lead to a person being dismissed.

**NB:** Ms Hlatshwayo was in a position of power and Mchunu had no power to exercise to abuse his supervisor. A very rare occasion "Abuses are those in position of power, because they want favours". We therefore asked that her evidence be dismissed.

10.

Ms N. Dlongolo witness number one, presented similar type evidence that of being mishandled by Mr. Mchunu. Initially she said the applicant touched her vagina and later changed and said he touched her on an



around her vagina area, pointing in the area between her legs because on the day in question she was wearing a trouser.

11.

Evidence was lead supporting her relationship with Mr. Mchunu, that there was no bad blood between them. It was confirmed by her action the day after her alleged sexually harassment, that she borrowed money from the applicant to be deposited for her younger brother. It was clear that at that stage she made up the story of being harassed the previous night. Just like Hlatshwayo she did not report the serious misconduct to anybody, even her male friend from EMRS. It is clear that Ms Dlongolo was dragged into this conflict of the applicant and Ms Hlatshwayo, the conflict which started as the result of the off duty story. We humbly submit that the evidence of Ms N. Dlongolo be dismissed.

12.

Ms Shabangu only confirmed that a report was made to her, and **only** after she rejected the request that the applicant be removed from night duty with no sound reason, it was only at that stage that the revelation of the alleged sexual harassment was made. We want to submit that if indeed this deed did in fact took place, the primary complain would have been put forward and the second complaint that viz that the applicant does not take instruction would have been advanced.

13.

Ms Mavundla only confirmed that a meeting took place. The allegation that the applicant apologized was denied by the applicant. The attitude taken by Ms Mavundla of suggesting and wanting to mislead the management and the applicant by instructing the applicant to go and see a doctor that he is suffering from epilepsy, that leaves every little to be desired by the conduct and behavior of a person of a caliber in management. Mrs. Mavundla conceded that all staff in the hospital are aware of the circulars and what to do in the event of sexual harassment, therefore one was expecting that the alleged sexual harassed ladies would have followed the reporting channels and have laid complains with the relevant authorities, this further confirms that they had nothing to report because nothing had happened.

14.

The contention raised by the representative of the responded that the applicant did not rebut the evidence of the responded, is unfortunately far from the truth, that the said allegation was dealt with by the applicants representative e.g. the allegation that the applicant was in jail for 5 years.

15.

It is therefore clear from the above that the conflict between the applicant and Ms Hlatshwayo over the abnormal off duties lead to the framing and false accusation of sexual harassment.

The learned commissioner, John Grogan in his book " Second Edition" On the Dismissal, Discrimination & Unfair Labour Practices, with reference to page 316, stating that as a guide, caution to commissioners that: *"However, not every case of sexual harassment necessarily warrants dismissal. Arbitrators should exercise great care not to be influenced by the inherently sensitive and emotive nature of such matters. Serious as all cases may be, like all offences, sexual harassment is a matter of degree, ranging from behavior calculated*

*merely to irritate to cases of criminal assault. The code of good practice recognizes this by providing for informal as well as formal methods of resolution. Arbitrators should also be sensitive to the fact that some individuals are far more sensitive than others to unwanted attention, and that the perpetrator may not realize at first instance that he or she is dealing with a hypersensitive individual. Regrettably, claims of sexual harassment may also on occasion be made for ulterior reasons."*

It is therefore the applicant submissions that the dismissal be overturned / reversed.

**Analysis of evidence and arguments:**

9. This matter was cited as an unfair dismissal dispute in terms of Section 191 of the LRA and the issue to be decided was whether the dismissal of the applicant was procedurally and substantively fair.
10. The respondent charged the applicant with sexual harassment, a charge that relates to various incidents where he is alleged to have behaved inappropriately towards two employees namely Ms Dlongolo and Ms Hlatswayo. The applicant refutes the charges.
11. The respondent called four witnesses who testified candidly and especially Ms Hlatswayo who was so open and candid in her testimony that the applicant's representative had praised her and remarked that she was a good story teller. She was an impressive witness and although emotional at times related the incidents as it had happened. Ms Dlongolo also testified honestly and although some doubt may have arisen on her submission that she borrowed R 100.00 from the applicant after the incident the actual occurrence or alleged incident is what I have to apply mind to and ascertain whether the allegation against the applicant has a sound basis.

The applicant on the other hand was evasive and when he could not respond appropriately to questions posed by the respondent's representative passed the blame on his representative who I may add was impressive in his demeanour and presenting the applicant's case. Further there was no corroborating evidence by the applicant and I have considered the cautionary rule in respect of single witness testimony in this matter.

**The allegations that the applicant sexually harassed two colleagues at Ceza Hospital**

12. In the first instance Ms Dlongolo was clear that the applicant had placed his hand on her private parts. There was much emphasis made that she still had her trousers and panty on and that the applicant could not have touched her private parts. This aspect will be explored in greater detail later in the award.
13. In respect of Ms Hlatswayo the incidents of the alleged sexual harassment were repeated. The applicant's unwanted approaches were rebuffed by Ms Hlatswayo but he persisted in his advances. She was clear that she reached a point that she was prepared to defend herself by whatever means. This is an indication that she realized that the untoward behaviour of the applicant would not be tolerated and that his further advances would be met with force.
14. The incidents were reported to their superiors who decided to take action against the applicant. In the initial phase the witnesses were clear in their testimony that the applicant when confronted with the

allegations had apologized which he retracted in his evidence. The witnesses besides Ms Dlongolo and Hlatswayo were senior employees of the respondent and had no reason to lie at the arbitration that the applicant had apologized for his behaviour. In fact they tried to assist him by having him secure a medical certificate albeit unfairly to state that he suffered from epilepsy to have him moved to day duty. He selectively recall being asked to obtain a medical certificate to be moved but does not recall apologizing. The respondent's witnesses corroborated the version that he apologized for his errant behaviour.

15. The Labour Relations Act devotes a separate section dealing with the Code of Good Practice on the Handling of Sexual Harassment Cases. The reason can be found in the stated object of the code is to eliminate sexual harassment in the workplace. The code further encourages and promotes the development and implementation of policies and procedures that will lead to the creation of workplaces that are free of sexual harassment where employers and their employees respect one another's integrity, dignity, privacy and right to equity in the workplace.

Further it is important to consider the definition of sexual harassment and apply it to the facts in this case. Sexual harassment is unwanted conduct of a sexual nature. The unwanted nature of sexual harassment distinguishes it from behaviour that is welcome and mutual.

Sexual attention becomes sexual harassment if-

- (a) The behaviour is persisted in, although a single incident or harassment can constitute sexual harassment; and /or
- (b) The recipient has made it clear that the behaviour is considered offensive; and/or
- (c) The perpetrator should have known that the behaviour is regarded as unacceptable.

The Act details various forms of sexual harassment of which the following is relevant to the matter at hand:

4(1) Sexual harassment may include unwelcome physical, verbal or non-verbal conduct, but is not limited to the following examples:

- (a) Physical conduct of a sexual nature includes all unwanted physical contact, ranging from touching to sexual assault and rape, and includes.....
- (b) Verbal forms of sexual harassment includes .....hints, sexual advances, comments with sexual overtones.....

16. In applying the above provisions to the matter at hand I have considered the following in arriving at my decision:

- (i) The incidents occurred whilst the complainants Ms Dlongolo and Hlatswayo and the applicant were working night duty at Ceza Hospital;
- (ii) The complainants were the applicant's superior and they respected him to the extent that they

took the reports to their superior although he was expected to do so.

- (iii) The applicant's girlfriend also worked at the same hospital and reporting his actions may result in the working relationship between the girlfriend and the complainants being affected.
- (iv) The complainants had reported the sexual harassment to their superiors who say fit that the applicant be disciplined.
- (v) Ms Hlatswayo was so affected by the applicant's conduct that she believed that she could escape by placing him in a roster that did not include her but Ms Dlongolo but had a change of view when Ms Dlongolo reported her incident with the applicant.
- (vi) The applicant's representative proved to be fairly competent and his cross-examination of the complainants was robust but he could not get them to concede that the incidents did not take place. They were clear and boldly recounted the incidents as they occurred.
- (vii) There is no reason that I should that I should prefer the version of the respondent over that of the complainants. In their testimony it showed that they were affected by the incidents and had no reason to fabricate a story against the applicant.

In respect of the allegations of sexual harassment of Ms Dlongolo it is clear that the applicant had inappropriately placed his hands between her thighs in the direction of her vagina and in doing so perpetrated an unwanted physical contact against her and in so doing touched her inappropriately and thereby perpetrated an act that conforms with the form of sexual harassment prohibited by the code of good practice in respect of sexual harassment.

In respect of Ms Hlatswayo it is clear that his inappropriate actions were not once off but repeated to such an extent that she decided to take drastic action against him. His unfair conduct was such that she screamed loudly that she did not like what he was doing and also left the room that they were seated and found it necessary to have him moved from her duty schedule.

She also could not be building a case against him as there were no reasons for her to do so as he was her junior employee and had nothing to gain from removing him from her schedule except preventing further untoward incidents against her.

As a consequence of the above I find no reason to interfere with the finding of the chairperson of the disciplinary hearing against the applicant. The finding of the chairperson in respect of the reason for the dismissal of the applicant is hereby confirmed.

### **The allegation that the applicant's dismissal was procedurally unfair**

17. In terms of the Code of Good Practice in respect of Fair Procedure, normally the employer should conduct an investigation to determine whether there are grounds for dismissal. This does not need to be a formal enquiry. The employer should notify the employee of the allegations using a form and language

that the employee can reasonably understand. The employee should be allowed the opportunity to state a case in response to the allegations. The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee. After the enquiry, the employer should communicate the decision taken, and preferably furnish the employee with written notification of that decision.

If the employee is dismissed, the employee should be given the reason for the dismissal and reminded of any rights to refer the matter to a council with jurisdiction.

In this matter the applicant was informed via a Notice to Appear at a Disciplinary Hearing of the allegations against him and was represented by Mr F Ntuli of DENOSA at the hearing. He was found guilty and the decision was communicated to him. He appealed the decision of dismissal but it was upheld at the appeal hearing.

As a consequence of the above I find that the applicant's dismissal was procedurally fair.

**Appropriateness of sanction**

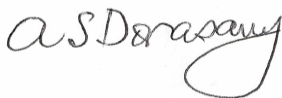
18. I determine that the sanction imposed by the respondent to be appropriate and find no reason to interfere with the sanction of dismissal.

**Award:**

19. The applicant's application is dismissed and he is not entitled to any relief.
20. No order for costs is made.
21. This file should be closed.

**DONE AND SIGNED IN DURBAN ON THIS                      DAY OF                      2011.**

***signature***



**Arbitrator: Anand Dorasamy**