



ARBITRATION AWARD

Panelist/s: Thuthuzela Ndzombane
Case No.: PSHS213-10/11
Date of Award: 24-May-2012

In the ARBITRATION between:

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NEHAWU OBO L.L. MALI

(Applicant)

and

DEPARTMENT OF HEALTH-WESTERN CAPE

(Respondent)

Applicant's representative: Mr A. Meniers [Union Official]

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Respondent's representative: Advocate F. Rodriques [Deputy Director]

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DETAILS OF HEARING AND REPRESENTATION:

1. The arbitration hearing was scheduled for and heard on the following dates 21 February 2012 and 10 April 2012, under the auspices of the Public Health & Social Development Sectoral Bargaining Council at the Western Cape College of Nursing in Athlone. The applicant, Mr Mali, was represented by a Union Official, Mr Meniers from NEHAWU. The proceedings the respondent, the Department of Health, was represented by a Labour Relations Officer, Mr Nginase, at the initial stages of the case and Advocate Rodriques took over the matter.
2. Parties agreed to submit their written Heads of Arguments and including the transcribed disciplinary records by no later than 10 May 2012. The proceedings were digitally recorded and handwritten notes were taken. The applicant has submitted its Heads of Arguments on 10 May 2012, whilst I have not yet received that of the respondent at the time of writing this arbitration award. The transcribed disciplinary hearings records were not submitted.

BACKGROUND

3. The applicant was employed by the respondent in 1991, as a Senior Administration Clerk. At the time of his dismissal, he occupied the position of an Administrative Officer. He earned a monthly salary of R5500.00 [five thousand five hundred rand] prior to his alleged unfair dismissal.
4. The applicant stated that he had a love relationship with a Ms Makhlima and on a certain date they have arranged to meet and to engage into sexual intercourse. He denied that he had sexually harassed Ms Makhlima. He was dismissed on 07 June 2010.

5. The respondent stated that the applicant was charged with the following offence:

- Sexual harassment: *“On 25 September 2009, he undressed himself in front of Ms Nonyameko Makhalima and asked her if she wants to have sex with her. On 05 November 2009, he made a comment to a co-employee that Ms Makhalima does not want to have sex with him”.*

6. The applicant was found guilty at the disciplinary hearing and was dismissed accordingly.

7. There was a confusion as to when the incident occurred as the applicant insisted that the incident occurred in June 2009.

SUMMARY OF EVIDENCE AND ARGUMENT

8. I have considered all the evidence and argument, but because the Labour Relations Act, 66 of 1995, as amended (LRA), requires brief reasons (section 138(7)), I have only referred to the evidence and argument that I regard as necessary to substantiate my findings and the determination of the dispute.

ISSUE TO BE DECIDED

9. I am required to determine whether or not the applicant's dismissal was fair.

RESPONDENT'S CASE

10. **Nonyameko Makhalima** stated that she stays at Kuyasa in Khayelitsha and she presented the following evidence under oath. At the time of the incidence, she was working for a cleaning company that was contracted to the Department of Health at

Michael Mampogwana Clinic. She could not remember the date of the incident but it was her off-day and she was not at work.

11. As she had a planned journey to go to Site C, on that day, she proceeded to go to the bus stop to get a taxi. There were no taxis that run in front of her house which transport people to Site C and she decided to go over the bridge to find a taxi.
12. As she waited for the taxi, she however, saw a white car which was driven by a colleague, Mr Maphalala. The car passed her on the bus stop but reversed back to where she was standing. She also realized that there was a passenger in the car and it was the applicant.
13. She asked them as to where they were going and they indicated to Site C and then she went into the car. The car went to Site C at B-Section. At Site C, the applicant told her that he wanted to fetch books inside the house and he requested her to come and assist. Mr Maphalala waited outside the house. They went inside the house and applicant went into a room. As the applicant was inside the room, he asked her to come in as well to fetch the books.
14. She then went inside the room and applicant closed the door but not sure as to whether or not it was locked. Subsequent to that she saw the applicant taking -off his shoes, socks, trouser and the underwear. The underwear was beneath his knees. Applicant told her that he had been longing for a long time to make love with her.
15. She asked the applicant as to whether it was the way to show her that he loved her. The room door was not locked. The applicant was honing to sleep with her as the penis was fully erected. At no stage the applicant had touched her but he just requested to sleep with her. Surprisingly she managed to stand in front of him but eventually she left the room. As she left the house she realized that Mr Maphalala had left with the car. That is how the story of the day ended.

16. She went to Site B as it was near where she was. She was not sure about the time but it was early in the morning. The following week she reported for duty on Thursday and did not talk about the incident. But as she looked at him she wondered as to what the applicant was thinking about her.
17. Ms Luthuli called her and told her that she heard about the story between herself and the applicant at the meeting. She asked Ms Luthuli what story she was talking about and she decided to tell Ms Luthuli that she did not want the applicant to lose his job.
18. Ms Luthuli told her that the applicant had told them everything and Ms Jones wanted to hear everything. She thought, if, the applicant had already told them Ms Luthuli would tell her husband.
19. Prior to the above information a week after the occurrence of the incident applicant arrived at the club house when she was speaking to Mr Maphalala. The applicant uttered the following words "this woman does not want to have sex with him". She believed that the applicant was referring to her. This statement was the final straw as she felt uncomfortable and angry that the applicant could make a statement like that in the presence of another man.
20. Mr Maphalala was shocked to hear the utterances made by the applicant as he questioned the applicant that "this is not the wife of somebody". She then told Mr Maphalala about the incident. The worse part of these utterance were designed to embarrass her in front of another man, Mr Maphalala in that she does not want to have sex with him. She denied that she had a love relationship with the applicant.

21. If, the applicant had love relationship with her he would not go around and tell others that she does not want to have sex with him. She would not have reported the matter to the management but she felt embarrassed by the above utterances made by the applicant. The reason she never thought of reporting the matter she was of the view that she would not be believed as the applicant occupied a high position at the department.
22. **In cross –examination** she stated that at the time of the incident there were no taxis running in front of her house even though now there are taxis. At that stage, the only taxi which run in front of her house was the one which goes to Mitchell's Plain. She admitted that she was not at work on the day of the incident. She never spoke to the applicant before the incident. She knew the applicant's office but she was never assigned to clean it.
23. At the taxi stop, she was not waiting for the applicant instead for a taxi. She also conceded that at their arrival at the house there was another man there who organized and bought a cool drink for them. She also conceded that she would not have reported the matter but Ms Luthuli put pressure to her to report the matter and the fact that applicant made a nasty remark in the presence of the other man.
24. She cannot remember everything as the matter occurred long time ago and could not remember how many people were in the house. The applicant never touched her or forced himself to her. She never thought of laying a criminal case against the applicant as it was one on one. She was not embarrassed when they were at Site C. She was not promised any work at the Clinic. She denied that she had love relationship with the applicant.

25. **Mbuyiselo Maphalala** stated that he is employed by the respondent as General Assistant/ Driver and stationed at Michael Mampongwana Clinic and he presented the following evidence under oath. On the day in question applicant arrived in the morning at work. Applicant asked him to take him to Makhaza. He drove the vehicle as instructed. On their way, he passed a bus stop and applicant instructed him to reverse back. There was a lady [Makhalima] that was coming and they gave her a lift.
26. The applicant was sitting at the front seat and the lady seated at the back seat. The applicant then told him that they must go to Site C. He could not question the applicant as to why then they were going to Site C instead of Makhaza. He was afraid of the applicant as he was once told to pull up his socks if he did not want to lose his job. The applicant and Ms Makhalima did not talk whilst they were inside the vehicle. At no stage Ms Makhalima asked them as to where they were going to and she never informed them where she was going to as well. They arrived at this parking area in Site C and applicant and Ms Makhalima went out of the car. Applicant then told him that he could leave and applicant would find his way to go back.
27. After two weeks, he was cleaning between the club and the hall and Ms Makhalima was there as well. Applicant came there and said *“this woman does not want to have sex with me”*. He was shocked to hear those words because according to his culture one cannot utter such words to a married woman. Subsequent to that Ms Makhalima told him about the story that the applicant undressed himself at Site C but he kept quiet.
28. **Veronica Luthuli** stated that she is employed by the respondent as a House Keeper at Michael Mampongwana Clinic and she presented the following evidence under oath. On the day in question applicant left the premises with a general worker without permission. There was a crisis at the hospital where a patient had vomited and the general worker was needed to assist but was not available. She reported the matter to Sister Jones but they could not find the applicant and the general worker.

29. It was later discovered that the applicant and the general worker had left the premises without signing the trip sheet. Subsequent to that there was a meeting to discuss this issue and transport usage. She put the issue of a general worker on the agenda and that the applicant took general worker outside the premises without her authority.
30. At the meeting she informed the applicant that he ought to inform her when applicant wants to use the general worker in order for her to make further arrangement. Applicant respondent rudely that he went with the complainant, Ms Makhalima and that he was not going to sleep with Ms Luthuli but would sleep with younger woman. The meeting ended abruptly because of the rudeness of the applicant.
31. A week later Ms Makhalima was not happy as she was crying. Ms Makhalima alleged that the applicant came to the club and talked in the presence of a fellow employee that Ms Makhalima did not want to have sex with him. Ms Makhalima informed her that on a certain day, she was visiting her aunt to Site C. There was a vehicle driven by Mr Maphalala and applicant as a passenger. On their arrival at applicant's house, applicant asked her to assist to fetch the books inside the house. There were two children in the house and a cool drink was ordered.
32. According to Ms Makhalima they went to the other room where applicant had undressed himself and applicant asked Ms Makhalima whether she wanted to have sex with him.
33. She is 63 years old she finds it difficult to talk about this matter as it is a taboo. Ms Makhalima never worked at Administration block and she never promised her any job. She denied that she had encouraged Ms Makhalima to lay a complaint but it was Ms Makhalima who voluntarily made a complaint.

34. **Nosipho Jones** stated that she is employed by the respondent as a Sister in Charge at Michael Mampongwana and she presented the following evidence under oath. On the day in question Ms Luthuli reported to her that she could not find and locate Mr Maphalala. They enquired from other staff but could not find him.
35. Eventually, the security informed her that the applicant and Mr Maphalala went out of the premises. There was no report as to where they left to. The following day, she questioned the applicant about his whereabouts. Applicant's response was that he had an emergency to see his child at Makhaza. She then charged the applicant where he was found guilty of misuse of the respondent's vehicle.
36. She organized a meeting with the Heads of the Departments and one of the issues on the agenda was misuse of the transport. Ms Luthuli reported on this issue but the meeting became chaotic. Ms Luthuli and the applicant became argumentative. The applicant said that *"does Ms Luthuli think that he wants to have sex with her whilst there were younger women"*.
37. After the meeting she asked the applicant to retract these words. Ms Makhalima and Ms Luthuli arrived in her office where Ms Makhalima told her that she had visited Site C to visit her aunt. On her way she got a lift from the applicant and Mr Maphalala. Applicant had asked her to assist to fetch the books.
38. According to Ms Makhalima applicant undressed himself and asked her whether she wanted to have sex with her. Applicant did not touch her. Ms Makhalima was crying at that stage and said she could not write the statement and requested her to write it on her behalf. She confronted the applicant about the issue but applicant said she must leave it to him as he would speak to Ms Makhalima. She was advised to report the matter to labour relations as it was regarded as sexual harassment.

APPLICANT'S CASE

39. **Mr Lunga Mali** stated that he is the applicant in this matter and he presented the following evidence under oath. He stated that the incident occurred on 25 June 2009. He had a prior arrangement with the complainant, Ms Makhalima as they were involved in a love relationship. He arrived at work early in the morning and he instructed Mr Maphalala to drive for him. He left a message to the reception that he went to his child's school and would further go to Site C clinic.
40. He informed Mr Maphalala to drive to his school child. He took the route where he knew that he would find Ms Maphalala who was waiting for him. They had an arrangement that he would pick up her over the bridge away from her house at Kuyasa. On their way, he saw Ms Makhalima and instructed the driver to reverse and she boarded into the vehicle. He told the driver to drive to Site C. Upon their arrival at Site C, he instructed the driver to leave and not to wait for him as he would find his way afterwards. He had arranged a house with his brother. As they were inside the house they started to kiss and eventually they had sex on two occasions.
41. They took a taxi together as she went to Maccassar and he went to his house. Few days passed by and he heard that Mr Maphalala was spreading rumours about this issue. One day he saw the applicant and Ms Maphalala and suspected that they were talking about something and the driver was talking a lot. He went there to hear what they were speaking about. He thought he should protect Ms Makhalima. He spoke loudly that they did not do anything in Site C. His reason was to defuse the rumours that he had slept with her. Ms Makhalima stated that she did not lay a complaint herself but was forced by Ms Luthuli.

42. He confirmed that the meeting was convened where he was asked why he was using the driver. His response was that why now because he had been using the driver. It was clear to him that they heard about the rumours that he had taken the driver to Site C and he had sex with Ms Makhlima. The meeting became heated as he believed that everybody was attacking at him. He could not control himself as Ms Luthuli laid accusations that he takes government cars to go and sleep with wives of other people. His response was that *“did she want him to sleep with her”*.

43. **Peter Thethani** stated that he is the owner of a taxi and use the CODETA SITE C Taxi rank and he presented the following evidence under oath. The rank was opened between 1988 or 1989. He started operating in that rank in 2002. The taxis started operating in Ntlazana in mid 2009.

44. I will refer to the closings arguments and cross-examination in my analysis where necessary.

ANALYSIS

45. The respondent bears the onus to prove on balance of probabilities that the dismissal was effected with a fair procedure and a fair reason in terms of Section 192(2) of the Labour Relations Act 66 of 1995, as amended (“the Act”). The applicant does not challenge the fairness of the procedure which means that I need not to make a finding in this regard.

46. The Code of Good Practice on Sexual Harassment is summarised as follows:

- *“The unwelcome conduct must be of a sexual nature, and includes physical, verbal or non- verbal conduct;*

- *Physical conduct of a sexual nature includes all unwelcome physical contact, ranging from touching to sexual assault and rape, as well as strip search by or in the presence of the opposite sex;*
- *Verbal conduct includes unwelcome innuendos, suggestions, hints, sexual advances, comments with sexual overtones, sex-related jokes, or insults, graphic comments about a person's body made in their presence or to them, inappropriate enquiries about a person's sex life, whistling of a sexual nature and the sending by electronic means or otherwise of sexually explicit text.*
- *Non –verbal conduct includes unwelcome gestures, indecent exposure and the display or sending by electronic means or otherwise of sexually explicit pictures or objects.*
- *Sexual harassment may include, but is not limited to, victimization, quid pro quo harassment and sexual favouritism.*
- *Victimization occurs where an employee is victimized or intimidated for failing to submit to sexual advances.*
- *Quid pro quo harassment occurs where a person such as an owner, employer, supervisor, member of management or co-employee, influences or attempts to influence an employee's employment circumstances (for example engagement, promotion, training, discipline, dismissal, salary increments or other benefits) by coercing or attempting to coerce an employee to surrender to sexual advances. This could include favouritism, which occurs where a person in authority in the workplace rewards only those who respond to his or her sexual advances.*
- *A single incident of unwelcome sexual conduct may constitute sexual harassment.*
- *The conduct should constitute an impairment of the employee's dignity, taking into account:*
 - *the circumstances of the employee, and*
 - *the respective positions of the employee and the perpetrator in the workplace”.*

47. Obviously, in order for the respondent to succeed in these proceedings it needs to prove one or more of the above factors that the applicant had contravened.

48. The following are common cause:

- that Ms Makhalima was working for a cleaning company contracted to the department;
- that Ms Makhalima was not working on the day in question;
- that applicant instructed Mr Maphalala to take him to Mkhaza;
- that applicant and Ms Makhalima went to a specific house in Site C
- that applicant had disclosed at a meeting as to what transpired between him and Ms Makhalima,
- that Ms Makhalima explained the matter to Sister Jones.

49. The evidence of Mr Maphalala is very crucial in this dispute as I consider him as an impartial witness but I also noted that he does not like the applicant which makes his evidence more interesting. The evidence of the applicant that of Mr Maphalala is consistent in material respect to the extent that it confirms that the applicant and Ms Makhalima had an arrangement on that day in question.

50. Evidence shows that Ms Makhalima when she boarded the vehicle she did not ask as to where the vehicle was heading for. I find this evidence to be very strange because a person who gets a lift the first thing will do is to double check as to whether the vehicle is heading for his/her destination in order to decide whether she/he should take the offer.

51. The logic therefore dictates that Ms Makhalima was aware where the vehicle was heading for as she never asked where it was going to. I find the evidence of Mr Maphalala in this regard to be credible, reliable and confirms the arrangement. Clearly, Ms Makhalima is economical with the truth which does not assist these proceedings.
52. The second important evidence that appears to be very important is when the vehicle arrived at this specific house. Ms Makhalima led evidence to the effect that the applicant requested her to go and assist him to get the books inside the house. Clearly, this evidence is in contrast with that of Mr Maphalala who testified that upon arriving at that place both applicant and Ms Makhalima got off the vehicle and was instructed to leave. Clearly, if the applicant would have asked Ms Makhalima to assist him, Mr Maphalala was in a position to hear that as the applicant had seated on the front seat. It is also very strange as to why the applicant would have requested her to assist as opposed to Mr Maphalala.
53. I noted the testimony of Ms Makhalima omitted to mention her evidence that there was another man in the house and she was served with a cool drink. An inference can be drawn that Ms Makhalima and the applicant had something that was going on between them. Obviously, this could not have started on the day in question as Ms Makhalima led us to believe that it was first time to speak to the applicant on that day which is highly likely in my view.
54. Be as it may, the question which need to be determined is what transpired in the room between the applicant and Ms Makhalima on that day. Based on the evidence of the Ms Makhalima, I find it unbelievable that she could stood there watching the applicant taking off his socks, shoes, trouser and underwear without leaving such room if she was not in agreement with such actions. This evidence alone does not make sense as a reasonable person would have left when she realised that a person was undressing himself.

55. I am not convinced that a stranger could just strip in front of a woman and showed his genitals without having an affair. Moreover, this man does not touch and forced himself. Clearly, Ms Makhalima's evidence is putting this process into her confidence and is lacking in some respects.
56. Even if, I were wrong in the above conclusion I will come to the same decision on different grounds. If, for example, the applicant had misunderstood or misread the signal given by Ms Makhalima, could that be regarded as sexual harassment?. Ms Makhalima's evidence shows that she had no intentions of reporting the matter and she did not regard the actions of the applicant as offensive. The Code is very clear that the actions should be unwelcome in order one to pass the test of sexual harassment.
57. According to Ms Makhalima, she reported the matter because she did not like the statement made by the applicant in presence of a fellow colleague which insinuated that she does not want to sleep with the applicant. This statement does appear to have vicious connotations instead the statement was designed to portray her as a person who is not cheap. According to her she was encouraged by Ms Luthuli to report the matter even though Ms Luthuli's testimony shows a different view.
58. In my view the only reason the applicant reported the matter was because she was confronted by Ms Luthuli who told her that the applicant had disclosed the whole story. Clearly, Ms Makhalima did not like the fact that the applicant had spread news to his superiors that they were actively involved in a romantic relationship. It should be remembered that it is a taboo that married people are involved into sexual intercourse with other people besides their spouses. Obviously, she realised that the news will be transported and might reach her husband which will create conflict and problems in her marriage so to circumvent such was to lay blame at the door step of the applicant.

59. I am persuaded by the evidence of Ms Makhalima and that of the applicant that indeed sexual intercourse occurred between them. There is no law that prevents adults to engage in sexual intercourse as long as there is consent. By this conclusion there can not be any act of sexual harassment. Having considered the evidence before me I find on balance of probabilities that the respondent has failed to discharge the onus that applicant had misconducted. Consequently, the applicant's dismissal is substantively unfair.

60. The applicant requested to be re-instated which I am empowered by section 193 of the Labour relations Act, if, I find that the dismissal is substantively unfair, to re-instate retrospectively the applicant which I duly do so in these proceedings.

61. **In Republic Press v CEPPAWU [2207] SCA 121(RSA)**. Judge Nugent stated that *"I do not think that the back-pay to which a worker ordinarily becomes entitled when an order for re-instatement is made is to be equated with compensation. An order of re-instatement restores the former contract and any amount that was payable to the worker under that contract necessarily becomes due to the worker on that ground alone. ..."*

62. The applicant is entitled to receive the back pay for the duration of his unfair dismissal which is calculated as follows: R5500.00x 11months =R60500.00 [sixty thousand five hundred rand].

AWARD

1. I find that the applicant's dismissal was substantially unfair.

2.1 order the respondent, Department of Health –Western Cape, to re-instate retrospectively the applicant, Mr Lunga Mali, on the same or similar terms and conditions of employment prior to his dismissal. The applicant must report for duty at the Department of Health -Provincial Office [Human Resource] by no later than 04 June 2012.

3. The respondent is ordered to pay the applicant a back pay of R60500.00 [sixty thousand five hundred rand] by no later than 30 June 2012.

DONE AND SIGNED IN CAPE TOWN ON THIS 24 MAY 2012.

A handwritten signature in black ink, appearing to be 'Thuthuzela Ndzombane', enclosed within a hand-drawn rectangular border.

Arbitrator: Thuthuzela Ndzombane