



# ARBITRATION AWARD

Case Number: **PSHS482-22/23**

Commissioner: **Allan Kayne**

Date of award: **17 April 2023**

In the matter between:

**PSA OBO ALFRED MADODOKA**

Applicant

and

**DEPARTMENT OF HEALTH – GAUTENG**

Respondent

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## DETAILS OF THE HEARING AND REPRESENTATION

1. The Public Servants Association (“PSA”) referred an unfair dismissal dispute on behalf of Mr. Alfred Madodoka (“the applicant”) to the Public Health and Social Development Sectoral Bargaining Council (“the Council” or “the PHSDSBC”) in terms of section 191(5)(a) of the Labour Relations Act, 66 of 1995 (“the LRA”). The arbitration proceedings took place on 23 November 2022 at the Council’s offices in Centurion and, thereafter, on 06 and 07 February 2023, and 28 and 29 March 2023, at the Tshwane District Hospital (“TDH”).
2. Joel Ntwampe, a PSA official, represented the applicant, while Tebogo Makhubela appeared for Department of Health- Gauteng (“the respondent”). Daniel Jiyane, from the Council, provided translation services.
3. Each party submitted a bundle of documents to be used during the arbitration proceedings. The proceedings were digitally recorded, with the record being filed with the Council’s administration.

4. This award is issued in terms of section 138(7) of the LRA, which requires a commissioner to provide brief reasons for his outcome.

## **PRELIMINARY ISSUES**

5. As he was only recently able to consult with the member, Mr Ntwampe requested that the respondent provide him with a copy of the CCTV<sup>1</sup> footage of the hospital parking lot on the day of the incident, 12 June 2019. According to Ms Makhubela, it was irrelevant as it was unrelated to the charges preferred or the evidence tendered during the applicant's disciplinary hearing. However, Mr Ntwampe insisted that it was necessary, given that the presiding officer's report mentioned that there had been some interaction between the applicant and Ms Khoza in the parking lot. Noting that the presiding officer's report had not even been included in the parties' bundles, that the incident allegedly occurred 3½ years back, yet there had been no application for disclosure of that footage prior to the arbitration proceedings, the applicant could not expect the proceedings to be delayed as a result of his lack of preparation. Accordingly, I ruled that the matter should proceed. However, parties were free to bring applications for the disclosure of documents or to subpoena witnesses for future sittings of the arbitration hearing.
6. Given my ruling, Mr Ntwampe brought an application that I recuse myself on the basis that I was harsh and unfair toward the applicant, with a fair hearing being impossible in the circumstances. Ms Makhubela opposed the application, submitting that it was only brought following an adverse ruling against the applicant. Having considered the application, I found that the applicant had demonstrated no apprehension of bias on my part but rather disliked my earlier ruling. Accordingly, the application that I recuse myself was dismissed.

## **BACKGROUND**

7. The respondent employed the applicant from 01 January 2008. At the time that his dismissal was confirmed by the respondent, on 14 September 2022, he was a Finance Clerk at the TDH.

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<sup>1</sup> Closed-circuit television

8. The respondent found the applicant guilty of the following charge, which resulted in his dismissal:

*You are alleged that you have committed an act of misconduct as contemplated i.e. conducted yourself in an improper, disgraceful and unacceptable manner in that on the 12 June 2019 at Tshwane District Hospital while acting in your capacity as a Finance Clerk and as a Public Servant at the Gauteng Department of Health, you engaged in sexual intercourses with another person and or patient Ms L. Khoza in the premises of the employer, while you knew or ought to have known that it is unlawful of you to do so.*  
(sic)

### **ISSUE/S TO BE DECIDED**

9. I must determine whether the applicant's dismissal was procedurally and substantively fair and, if not, order the appropriate relief.
10. Substantively, the applicant denies committing the misconduct that resulted in his dismissal and submits that the presiding officer disregarded his version of events. If it is found that the misconduct did take place, his personal circumstances were not taken into account in determining the appropriate sanction to impose.
11. Procedurally, the applicant only claims that the respondent failed to comply with the provisions of its disciplinary code, which requires that disciplinary hearing outcomes be rendered within five working days of the conclusion of the proceedings, yet after his hearing ended on 31 August 2021, he was only furnished with its outcome on 26 October 2021. Given the non-compliance, the applicant contends that the outcome and sanction were nullified.
12. The applicant seeks retrospective reinstatement to his former position.

### **SURVEY OF EVIDENCE AND ARGUMENT**

13. The testimony led by the witnesses is fully captured on the record of proceedings. What appears in this award is a concise summary of the evidence relevant and material to the issues in dispute that require determination. The fact that I have not captured all of it herein should not be misconstrued that I have not taken all the evidence presented into account. My findings are, accordingly, within the context of all the evidence tendered during the proceedings.

## RESPONDENT'S EVIDENCE

### Lucia Khoza ("Ms Khoza")

14. Ms Khoza testified under oath, identifying the applicant as the man who raped her on Wednesday, 12 June 2019, when she underwent treatment at the TDH. She recounted how she met the applicant in May/June 2019, when she returned her file to his office and how he assisted her in obtaining treatment. He even called her the next day to find out how she was. She next attended the TDH again on 12 June 2019, where she underwent more tests, x-rays and physiotherapy, spanning the entire day. She bumped into him around 13h00/14h00, and she advised that she had no money for food, so he told her to go to his office, and he would give her R50 for lunch. After an hour, he called her to remind her to return the file, advising that he left around 16h00. Between 17h00 and 18h00, as it was getting dark, she took her RAF<sup>2</sup> file back to his office. She put the file on his table, along with the medication received and complained about how tired she was and how late it had become. The applicant stood up, closed the door behind her and started kissing her neck. When she asked what was happening, he told her she was clever enough to know he liked her. He removed her tights, put on a condom and raped her. When he was done, he realised that the condom had burst and there was semen on the table. He exited the office to the toilets, returned and wiped the semen from the table and floor. He did not talk after the incident and received a telephone call. They left together, and he gave her R50 at the security gate for a taxi, which made her feel like a slut, but she had no choice but to accept it. After alighting from the taxi at her destination, she passed out.
15. On Saturday, the applicant called and thanked her for how he had enjoyed her, saying it was what he expected of her. This angered her. About a week later, she reported the matter to the SAPS<sup>3</sup>, after being encouraged to do so by a friend. On 08 July 2019, she met with SAPS, and they took her to the applicant's office. They arrested him on Friday of that week, but by Monday, he was released. She learned from the investigating officer that he told them she wanted him to buy her a dress and that there was insufficient evidence to proceed with a case against him.
16. As a result, she was scared to continue her treatment at the TDH and had to be referred for psychological assistance after she started distrusting men. This led to poor work performance as a sales agent, and in December 2021, her employer retrenched her.

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<sup>2</sup> Road Accident Fund

<sup>3</sup> South African Police Services

After staying home for a few months, she got another temporary job. However, she recently had to advise her employer that she could no longer continue working due to her leg injuries sustained in April 2019.

17. She was furious with the applicant for thanking her for what he had done to her and acknowledged that she sent him three callbacks on 13 June 2019, to which he did not respond. On Friday, 14 June 2019, she sent him a text message reading, *“Hi y dnt u cl , pls borrow m 1000 ill pay u next week.stl surprise asking myself if wat u did in ur office maybe its wt u always do”* (sic). She expected him to compensate her for the trauma he caused her, but he did not even call her back. On Saturday, 15 June 2019, she sent another message, trying to elicit a response, which read, *“U ar trying m serious u wanted 2 test m if im angry or wt”* (sic). He ignored it. It angered her that he continued to deny what he had done to her and showed no remorse for his actions, which may have involved other women too. If he had only apologised, it might have changed how she felt, considering that she had initially trusted him when he helped her in May. The situation severely impacted her relationship with her fiancé.
18. Under cross-examination, Ms Khoza testified that when she sent callbacks to the applicant on 30 May 2019, he returned her call from a landline. She confirmed that, at his disciplinary hearing, she had testified to erroneously sending the message of 14 June 2019 to him. However, the real truth was that it was intended for him, as she felt entitled to ask for compensation for what he did to her. R1,000 was fair. She explained that she had not immediately sought medical treatment after the rape, as she was confused and bewildered, not believing what had happened. When she saw the doctor about a week later, he could not establish if she had been penetrated. After the incident, she only saw the applicant again on one occasion at the hospital gate.
19. Ms Khoza explained that owing to the trauma she experienced, she did not report the incident to anybody until she confided in a friend what happened on about 15 or 16 June 2019, and he encouraged her to report the matter.
20. According to Ms Khoza, Mr Madodoka’s office had curtains, which he closed before raping her. She disputed that he left work at 16h00, questioning how else she could have dropped off her file and received R50 from him when they left parted at the gate outside. She had no choice but to accept the money from her rapist, as it was already late, and she needed to get home. Had the incident not occurred, she would have long since left the hospital.

21. The witness submitted that the rape worsened her leg injury and that, during the rape, her right hand was pushed behind her back. Subsequently, she developed problems with it too. However, there were no medical reports available to substantiate same.
22. SAPS advised her that there was insufficient evidence to charge the applicant as he had told them they were in a relationship. Accordingly, they told her the two love birds should resolve their issues. However, she suspected something untoward about the whole thing because she had also heard rumours that she had withdrawn the matter, which was false.

**Dr Sasha Nkusi (“Dr Nkusi”)**

23. Dr Nkusi testified under oath that he was the TDH's Medical Manager. His office was situated next to that of the applicant. As the Acting Chief Executive Officer in September 2020, he signed the applicant's charge sheet, having realised the seriousness of Ms Khoza's allegations and the implications thereof. Asked if employees could have sexual intercourse on the employer's premises, he responded that rape, even outside the workplace, was a crime and was unacceptable. Sexual intercourse, assault or violence was not permitted in the hospital. Even if the incident did not constitute rape, it was still unacceptable conduct on the applicant's part. Whilst the presiding officer had found sufficient evidence of the misconduct to justify dismissal, and Mr Madodoka's appeal was unsuccessful, he would have no issue reinstating him if ordered to do so. However, given the findings of the disciplinary hearing, there had been a total breakdown of trust and reinstating him would send the wrong message to the female employees.
24. During a brief inspection *in loco*, the witness pointed out his office in relation to the applicant. He testified that the applicant's office was similar to his and included the same curtains. When he commenced working at TDH ten years prior, he was sure the curtains were already installed, as all the offices had the same standard set of curtains. After 16h00 each day, there was some movement of people in the parking area outside the applicant's office window, especially around 19h00. However, the passages in the administration section were very quiet, apart from employees using the men's restroom opposite the applicant's office door.
25. Under cross-examination, he confirmed that the telephone numbers of the MVA<sup>4</sup> officials, including the applicant, were displayed on the door. He submitted that SAPS

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<sup>4</sup> Motor vehicle accident

contacted him on 05 July 2019, but he could not explain why Ms Khoza waited so long to report the incident. However, it was not uncommon for rape victims to delay reporting such an assault. He had not had sight of any medical record confirming that she had been raped. According to his understanding, the respondent did not claim that Mr Madodoka raped Ms Khoza, but even having consensual sex in the workplace was unacceptable. He assumed that on 12 June 2019, there had been curtains in the applicant's office because all the offices had them.

26. Dr Nkusi conceded that, apart from Ms Khoza's claim, there was no other evidence that she and the applicant had sexual intercourse in his office, meaning that only the two of them knew what actually transpired. The breakdown of trust was a consequence of the presiding officer's findings. The only medical records to hand were those reflecting the treatment Ms Khoza received for her MVA injuries.

#### **Ida Phasha ("Ms Phasha")**

27. Ms Phasha testified that she was previously an Assistant Director of Labour Relations for the respondent and investigated the allegations of misconduct by the applicant. During her investigation, she interviewed, amongst others, the TDH Chief Executive Officer, Ms Khoza and Mr Madodoka. Ms Khoza advised her that after her visit to the hospital on 12 June 2019, she went to the applicant's office, where sexual intercourse took place between her and Mr Madodoka. Based on the interviews, she was tasked with testing these allegations during a disciplinary hearing and proving that the misconduct occurred on the balance of probability. She drafted a charge sheet but elected not to charge the applicant with rape because, as a criminal offence, it would need to be proved beyond a reasonable doubt rather than on a balance of probability. Accordingly, the most befitting charge was improper conduct, as the workplace should not be an employee's sex ground. She deemed his conduct to have been improper, disgraceful and unacceptable. There was no relationship between the two, and the act should not have occurred at the employer's premises. By taking part in sexual intercourse at work, the applicant contravened the code of conduct for the public service. She was convinced by Ms Khoza's statement and the record of text messages and callbacks sent. In her view, nobody would make such claims if the incident had not occurred as described because sexual assault was demeaning, and the complainant was a married woman who would not put her marriage at risk.

28. When interviewing Mr Madodoka, he did not deny that he knew Ms Khoza. He had previously assisted her when she was turned away from the Emergency Department because he saw how much pain she was in. When she asked Ms Khoza about the message regarding the R1,000, she advised that it had been sent in error. However, regardless of whether it had been sent intentionally or not, it did not detract from the fact that sexual intercourse had occurred between the two of them. In her mind, the message confirmed that they knew one another, as one would not request money from a stranger. In her understanding, different people responded differently to sexual assault. Accordingly, she deemed the complainant's explanation for not reporting the matter timeously to have been valid. This included her fear of it affecting her relationship with her husband, who lived in Bushbuck Ridge, a situation which already strained their long-distance relationship. It was only because a friend encouraged her to report the matter that she did so. That she only reported it much later should not detract from the fact that sexual intercourse definitely took place. Even if the two were romantically involved, having sex at the employer's premises was very serious and inappropriate and warranted the applicant's dismissal. Had Ms Khoza not found justice, it may have caused reputational damage to the respondent. Not dismissing the applicant or reinstating the applicant would send a clear message of indifference to the public and Ms Khoza.
29. Ms Phasha believed that she successfully proved the applicant's misconduct, on the balance of probability, during his hearing. For her, what was telling was the applicant not denying having seen Ms Khoza on 12 June 2019, that she came to his office and that there were text message interactions after that.
30. Under cross-examination, Ms Phasha confirmed that she understood that Ms Khoza went to the applicant's office as that was where RAF files were kept. She conceded that the applicant never replied to any of Ms Khoza's callbacks or text messages and that they appeared one-sided, but indicated that by interactions, she had also meant those of 12, 14 and 15 June 2019, which made her question why Ms Khoza had asked for money if something had not happened between them. She was concerned that Ms Khoza told her that the message had been sent in error, as she could not make sense of asking for money if there had been no relationship, which she strongly suspected. She saw it as confirmation that Ms Khoza did know the applicant but did not wish to admit to a relationship out of shame. Notwithstanding a relationship between the two, it was not a licence for Mr Madodoka to have sex in the workplace. If Ms Khoza's version was that the message was intended for him, she would have believed that too. She

repeated that the existence of the message did not mean that sexual intercourse had not taken place on 12 June 2019 but that she had left the decision to be taken to the presiding officer. Her reasoning behind accepting Ms Khoza's version that some form of sexual intercourse had taken place was the risk that she was willing to take by bringing it out into the open, risking her marriage, reporting it to SAPS, facing the applicant at a disciplinary hearing and having to answer to the messages she sent him. Based on her investigation, Ms Khoza advised her that she and the applicant had met in the parking area in the morning and that he had kissed her and told her to come and see him later. He confirmed to her that he met Ms Khoza in his office later on 12 June 2019 for about 30 minutes while he was studying and had promised her lunch, but she was too busy, and he wanted to give her taxi fare.

31. She understood that the SAPS arrested the applicant and released him on bail. However, they did not proceed with the case, but this did not detract from the internal case proceeding.

**Gloria Mkhathshwa (“Ms Mkhathshwa”)**

32. Ms Mkhathshwa testified under oath that she was an Assistant Director in the Office of the Gauteng Premier, whose primary function was to serve as a presiding officer at disciplinary proceedings. She confirmed that the outcome report, recently supplemented to the applicant's bundle, was indeed hers and was based on the evidence led during Mr Madodoka's disciplinary hearing.
33. Referring to the callbacks and text messages, she denied that the message requesting R1,000 could have been intended for another person, such as the one who actually assaulted Ms Khoza. Based on her report, she related that the applicant testified at his disciplinary hearing that Ms Khoza came to his office at 16h45, asking for transport money, and he gave her R50. They spent about 30 minutes in his office chatting before he walked her out, where she took a taxi home. He had testified that, a few days later, he received a request from Ms Khoza for R1,000 and had called her to find out why she sent it to him. It had been his evidence that she told him there would be a gathering for which she needed money. He thought that she was trying to trick him into giving her money.
34. In considering the evidence before her, she weighed the applicant's version against that of Ms Khoza, finding hers to be the more plausible, most probable and most believable. She believed that it was highly likely that Mr Madodoka acted in the manner described

in the charge for which she found him guilty on the balance of probability, with the only befitting sanction, taking into account the severity of the charge and the resultant breakdown of trust, being that of dismissal.

35. During cross-examination, Ms Mkhathshwa confirmed that Ms Khoza testified at the disciplinary hearing that the text message requesting R1,000 had been sent in error. However, her finding of the applicant's guilt was not restricted to that message. She took into account Ms Khoza's contradictory evidence but addressed same in her report saying that it did not taint Ms Khoza's entire testimony as it served as a part of the proof that Mr Madodoka committed the despicable act in his office. The evidence presented before her was considered based on its probabilities, culminating in her concluding that he was guilty of the misconduct. Put to her that possibly the message was intended for the actual person who may have assaulted her, she disagreed. It did not surprise her that Ms Khoza had only recently testified that the message had been intentionally sent to the applicant. She believed that Ms Khoza had been a credible witness before her, despite some of her evidence being wanting.
36. Ms Mkhathshwa further submitted that, based on Ms Khoza's evidence presented at the disciplinary hearing, it would not surprise her if the applicant had raped her because, on that evidence, it clearly was not consensual sex. There was no prescribed pattern of behaviour for a rape victim to follow after an assault, and thus, her not reporting the incident immediately was not seen to be out of the ordinary. She believed asking for money after a rape was not abnormal. However, she conceded that, apart from Ms Khoza's evidence, there was no other evidence that might suggest that sexual intercourse took place, as incidents of sexual assault usually would not occur in the open but in secluded areas. She was convinced that the incident occurred during the 30 minutes when Ms Khoza was in the applicant's office, as there was never any mention of her going to the applicant's office to return her file.

## **APPLICANT'S EVIDENCE**

### **Alfred Madodoka ("the applicant" or "Mr Madodoka")**

37. Mr Madodoka testified under oath that he was a Financial Clerk at the TDH since January 2008, primarily dealing with RAF matters. He retained the RAF patient files. He denied any misconduct relating to Ms Khoza, whom he knew as a hospital patient who had been involved in an MVA.

38. On 12 June 2019, he recalled greeting Ms Khoza in the parking area during the morning but denied hugging and/or kissing her, as she was a stranger to him. She told him she found nobody at his office and decided to report to the Out Patients Department (“OPD”), where she was assisted. She told him how she struggled with her consultations that day and asked him for R50 for taxi fare, which he gave her, although he had initially only wanted to give her R20. She undertook to return it to him on her next visit, as she would need to collect her file from his office. To date, she had not repaid it. He was going to get lunch while she was returning to OPD. He denied offering her food as he had none with him. Around 16h00, he received a call from an attorney's firm requesting a medical report for a patient. At the same time, he found Ms Khoza outside his office, telling him she had waited a long time for him. He directed her to sit down outside his office while he made copies of the report in the other office. When he completed that task, Ms Khoza dropped off her file and left. He denied that she spent 30 minutes in his office, as the person he assisted was with him. The only reason he was at his office that day after 16h00 was due to him assisting with a copy of the report. The file was incorrectly classified, thus delaying the process, and he was required to confirm that payment had been received before releasing the report. He went between the two offices to make copies and, during that time, engaged with Ms Khoza.
39. According to Mr Madodoka, he submitted the callbacks and text messages he received from Ms Khoza as evidence, wanting to be as transparent and truthful as possible. He recalled receiving several callbacks from her on 30 May 2019, as he was late for work that morning, and she was trying to obtain her file, but nobody was there. When he called her back that day, he arranged for his supervisor to assist her. He recalled that being the day he assisted her by taking her back to the Emergency Department. She obtained his mobile number as it was on a poster on his office door so that those who required assistance from the MVA officials could contact them if there was no one in the office.
40. On 13 June 2019, he received several callbacks from her but did not see her at his office and ignored them. However, on 14 June 2019, when he received the message requesting R1,000, he called her back. She told him that it was not intended for him but rather for a friend of hers and that she needed money for a gathering. However, it still concerned him, as she referred to something that took place in an office. He denied that anything untoward took place in his office between him and Ms Khoza. If indeed she had been sexually assaulted in an office, it was not by him and not in his office, as she never entered it that day but only returned her file to him.

41. He could see by the tone of the message of 15 June 2019 that she was angry but, given her explanation to him of the previous day that the message had been sent in error, he knew that it was not directed to him. He saw her again on 01 July 2019, when she collected her file again from his office.
42. The applicant denied throwing Ms Khoza on the table or raping her, adding that the table would not have held their weight and her existing leg injuries would have been exacerbated. He testified that when he started working in that office in 2017 and even two years later, on 12 June 2019, it did not have curtains. As a result, people parking outside could easily see into the office.
43. Under cross-examination, the applicant repeatedly denied that Ms Khoza was in his office on 12 June 2019, as he was busy attending to somebody else, making copies in the adjacent office for which he had a key, while she waited in the passage to return her file, although he did not know at the time that it was the sole reason for her being there. He denied that he had been on the phone with an attorney when she arrived but was busy arranging for copies of the reports for them.
44. Put to him that the curtains were installed in all the offices in 2017, he submitted that they could have been taken down for cleaning, renovating or painting if that was the case. He recalled the entire Finance Department being retiled at some stage. He disputed that Dr Nkusi would have been aware of curtains in the MVA office as his role was that of Clinical Manager and he worked in the office next door. He questioned how certain he could be of something like that. Mr Madodoka explained that, although he did not work directly with the attorneys handling RAF claims, he often received instructions from management and other officials to assist them.
45. He submitted that his call to Ms Khoza was made after receiving the message requesting R1,000 and that, during that call, they conversed about the gathering for which she needed the money, but she told him that the message was not intended for him. He believed her when she told him she sent it in error but, in hindsight, believed it might have been intended for the person with whom something had transpired in an office. He questioned how the presiding officer could have accepted the text message evidence despite the author of it testifying that it had not been intended for him. Regardless of the forum, a witness was always expected to tell the truth when testifying.
46. Mr Madodoka denied ever offering Ms Khoza lunch, knowing that he had none with him and only had R70 on his person, further questioning why she would have arrived for

lunch after 16h00. He denied that his leaving at the same time she had confirmed that he had raped or had sexual intercourse with her. He described her as someone who simply sought money with "crooks and hooks" and could not be trusted. Her actions, as a stranger to him, resulted in him being arrested and ultimately losing his job.

47. When Ms Khoza's version was put to Mr Madodoka regarding the rape, the burst condom and cleaning the semen from the table, he denied that any of it had ever occurred. In any event, the cleaning staff provided paper towels to the officials daily, meaning that had it happened as she said, there would have been no need to leave the office to get something to clean up the mess. When he left his office for the day, the person whom he was assisting departed with him and Ms Khoza.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

48. Section 185(a) of the LRA prescribes that every employee has the right not to be unfairly dismissed, and section 188(1) provides that a dismissal that is not automatically unfair is unfair if the employer fails to prove that the reason for the dismissal is, *inter alia*, a fair reason related to the employee's conduct or capacity or that it was effected in accordance with a fair procedure.
49. According to section 188(2), any person considering whether or not the reason for the dismissal is a fair reason or whether the dismissal was effected in accordance with a fair procedure must take into account any relevant code of good practice. In unfair dismissal disputes, the Code of Good Practice: Dismissal ("the Code") must be considered. Furthermore, section 138(6) of the LRA provides that, in addition to any code of good practice, a commissioner arbitrating a dispute must take into account any guidelines published by the Commission in accordance with the provisions of the LRA. In this regard, the CCMA Guidelines: Misconduct Arbitration ("the Misconduct Arbitration Guidelines"), published by the CCMA in terms of section 115(2)(g) of the LRA, which became effective on 01 April 2015, are relevant.
50. Although several witnesses testified during the arbitration proceedings, the only direct evidence tendered was that of the applicant and Ms Khoza, who could personally attest to what transpired on 12 June 2019. Whilst Ms Phasha and Ms Mkhantshwa made extensive submissions at arbitration, they were not a party to what occurred between the applicant and Ms Khoza. They could only talk with certainty about what information they garnered during the investigation and at the disciplinary hearing. However, despite

the hearsay nature of that evidence, it did assist in assessing the credibility and reliability of Ms Khoza and Mr Madodoka, which was essential in determining the dispute.

### **The versions**

51. Although both parties acknowledge being acquainted before the incident, due to Ms Khoza receiving medical treatment at the TDH, their versions differed considerably in respect of the period between 12 June 2019 and 15 June 2019.

### ***Ms Khoza's versions***

52. According to Ms Khoza, on 12 June 2019, she and the applicant met between 13h00 and 14h00, where he told her that she should go to his office and that he would give her R50. He subsequently called to remind her, so she went to his office sometime between 17h00 and 18h00, when it was starting to get dark, to return her file. Her description of what transpired after she sat down was exceptionally detailed and set out step-by-step what took place from her arrival to him approaching her from behind, kissing her neck, her questioning him, and he undressing her, all ending in him raping her on the table. Her detailed account did not end there, and she explained how the condom he used burst, resulting in semen on both the desk and floor, necessitating that he clean it up by collecting toilet paper from the toilets opposite his office. Only once they left together did he give her R50 for taxi fare. She did not report the rape until more than a week later. She testified that he specifically called her on Saturday, which could only have been 15 June 2019, to thank her. She acknowledged sending him callbacks on 13 June 2019 and text messages on 14 and 15 June 2019, seeking R1,000, which most definitely were intended for him, as she believed he needed to compensate her for what he did to her in his office. However, it would have gone a long way had he just apologised for his conduct. Unfortunately, SAPS advised her that there was insufficient evidence to proceed with the matter.
53. Her version at the disciplinary hearing similarly confirmed only meeting the applicant later in the day in the parking lot, where he hugged and kissed her, telling her that she should come and see him after her consultations. She testified that he called her while she was undergoing physiotherapy, telling her he would give her food, and she proceeded to his office just before 18h00. After she sat down, he closed the curtains and came up behind her, kissing her neck and professing his love for her. He pushed her onto the table, removed her tights and underwear, put on a condom and raped her. She realised that the condom had burst, spilling his semen, and he went to the bathroom

to get toilet paper to clean the mess. After redressing, they both left together, whereafter he gave her R50. After arriving at her destination, whilst walking home, she passed out. During the disciplinary hearing, it was her testimony that the messages she sent to the applicant had not been intended for him but rather for a friend. On 15 June 2019, the applicant called her to tell her how sexy she was. She believed that SAPS decided not to proceed with the matter because Mr Madodoka convinced them he and she were in a relationship.

54. Whilst a period of 18 months separated her testimony at the disciplinary hearing from that of the arbitration proceedings, her submissions were extremely consistent, apart from the one glaring difference being the changed version regarding the text messages of 14 and 15 June 2019. Whilst such an about-face would ordinarily be seen to taint the witness' reliability and credibility, Ms Khoza proffered a plausible explanation in this regard, citing "feeling small", intimidated and uncomfortable to have her action of seeking compensation put out in the open. Given the type of situation, which on her version, amounted to non-consensual sexual intercourse, I am of the view that seeking some form of recompense was not an abnormal reaction on her part, as there is no prescribed behaviour expected in such circumstances. Interestingly, it appears that Ms Mkhathshwa, despite not being privy to the consolidated evidence before me, similarly did not accept that by sending the messages, Ms Khoza's credibility was impacted.

#### ***Mr Madodoka's versions***

55. During the arbitration proceedings, the applicant testified to greeting Ms Khoza in the parking lot whilst *en route* to get lunch for himself but not to kissing or hugging her. She asked him for R50, which he loaned to her. He had no food and would, therefore, not have offered her any. Although he usually left by 16h00, he specifically testified to being on a call regarding the provision of a medical report. Ms Khoza arrived but waited outside his office the entire time, never entering it, while he proceeded to arrange copies of the medical report. However, he later testified that somebody was physically present in his office for the full period that Ms Khoza was outside, which was not as much as 30 minutes. After concluding business with the unknown person, Ms Khoza gave him her file, which was all she had waited to do, and all three of them left together. He was taken aback when he received the text message on 14 June 2019 and called Ms Khoza. She advised that it was not intended for him and that it related to a gathering for which she needed money. Although concerned when he received another message from her the next day, he accepted that it was not intended for him.

56. His version during his disciplinary hearing was that he saw Ms Khoza in the parking lot during the day, and she asked him for transport money. He offered her R20. At 16h45, she came to his office and requested R50. She sat down, and they chatted for approximately 30 minutes about the hospital before leaving the premises together. Ms Khoza then took a taxi home. A few days later, he received a text message from her asking for R1,000, also referring to happenings in his office, but he did not reply and instead called her. She told him that there was a gathering and she needed R1,000. He found it suspicious that she would ask a total stranger for money.
57. The most striking difference was that, despite earlier testifying that Ms Khoza spent about 30 minutes in his office chatting to him, at arbitration, he submitted that she had not even entered his office as he was busy with somebody else. That person was never identified and, surprisingly, never called upon to corroborate this version, which might have significantly assisted Mr Madodoka's defence. Even within the version at arbitration, he first testified to being on a call regarding the report. However, he later insisted that somebody was in his office while Ms Khoza waited outside. The unnamed person also allegedly left with him and Ms Khoza. Although the applicant had, at the commencement of the arbitration proceedings, sought to postpone them in order to acquire CCTV footage to confirm his evidence, I refused his request at the time of the first sitting. Subsequently, despite insisting that such footage was crucial to his case, there appears to have been no effort made to secure same.
58. Faced with mutually exclusive and destructive versions of what transpired, the Court in ***Stellenbosch Farmer's Winery Group Ltd and Another v Martell & Cie and Others (427/01) [2002] ZASCA 98 (06 September 2002)*** held that the credibility of the factual witnesses, their reliability and the probabilities, would need to be taken into account in determining the matter. In the present matter, Ms Khoza presented a version that remained largely consistent over time, recounting the essential elements of what transpired. On the other hand, Mr Madodoka's recollection changed from the applicant being present in his office for 30 minutes to an entirely new version that he was busy with an unnamed person in his office and that Ms Khoza never even entered it, with them all leaving the premises together. Although he consistently denied rape or sexual intercourse, this new version appears to be an attempt to strengthen his case, but, in the process, it destroys his credibility as a witness. Even within the arbitration proceedings, his version changed from one where he referred to a telephone call during his evidence-in-chief to another that talked to somebody else being present in the office

with him. When the contradiction was pointed out to him, he denied earlier testifying about a telephone call.

59. Given that the parties were allegedly only acquaintances, although several witnesses believed otherwise, one must interrogate what motive might exist on the part of Ms Khoza to fabricate allegations of this nature, with such a level of detail, which favours the probability of the situation having occurred as she described, rather than according to the applicant's version. If it were some form of attempt at revenge, it would need to be predicated on something and would undoubtedly rely on the simplest version of events in order to remember them rather than one that was explicitly detailed. Ms Khoza, in reporting the matter to the SAPS, and the respondent had absolutely nothing to gain other than justice. She put her relationship with her fiancé at risk, her career was impacted as a result of the lack of trust that manifested following the incident, and she has been required to face the applicant at both his disciplinary and arbitration hearings to recount what she described as a traumatic event, nothing short of demeaning.
60. Although no physical evidence could be adduced to substantiate her claim of rape or sexual intercourse, as a witness, Ms Khoza came across as a credible and reliable witness whose consistent version must be preferred over that of the ever-changing version of Mr Madodoka that they engaged in some form of sexual intercourse in his office on 12 June 2019, either consensually or not.
61. In accepting Ms Khoza's version, it becomes clear that Mr Madodoka commenced a process of preparing her for what he had in mind, akin to sexual grooming and a process of luring her into a secluded spot after hours where it would only be the two of them. Although the applicant made much ado regarding there being no curtains in his office, he was not entirely convincing. Unfortunately, neither was Dr Nkusi, who assumed they had been there in 2019. Notwithstanding the lack of certainty, the applicant once again attempted to reinforce his defence with a new proposition never previously suggested that any curtains may have been removed for cleaning or during a period when the offices were renovated. It appeared to be nothing more than an attempt to sow doubt but was never once put to any of the respondent's witnesses. Even after viewing the applicant's former office, I am unconvinced that any activity taking place inside the office with curtains open would not necessarily be easily visible from the outside unless a passer-by accessed the vehicle parked directly outside that window and made a conscious effort to look at what was taking place inside. His claim that the table on which he and Ms Khoza are alleged to have engaged sexually would not have withstood their

combined weight is equally improbable based on what I personally observed to be an old, sturdy desk.

62. I have taken into account that Mr Madodoka introduced the text message history during his disciplinary hearing, purportedly, in order to be transparent about the situation. However, it is my considered view that he did so to discredit Ms Khoza for seeking money from him, but that it inadvertently pointed straight back at him and the events in his office.
63. I am also unconvinced regarding the applicant's suggestion that perhaps the messages were intended for the actual perpetrator of the sexual assault against Ms Khoza. His redirection is an attempt to remove the spotlight from himself but fails to recognise that Ms Khoza sent two messages, one on 14 June 2019 and one the next day. Had she told him that she sent the first in error, it begs the question why she would repeat the error and send him another related message linked to the former.
64. Lastly, in another attempt to deflect attention away from him, Mr Madodoka suggested that even if the incident took place as described by Ms Khoza, there would have been no need for him to leave his office to collect toilet paper to clean up the mess, as cleaners always ensured that the offices contained sufficient paper towel. However, despite not supporting this claim with corroborating evidence from any other employee or even testing it with Dr Nkusi, it does not seem to consider that disposing of a used, burst condom covered in semen somewhere in an office is highly improbable.

## Substantive fairness

65. Item 7 of the Code provides the guidelines in cases of dismissal for misconduct and sets out the factors to be considered by any person considering the substantive fairness of a dismissal. At the heart of these factors is whether or not the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; in other words, is the employee guilty of the misconduct? If established that the employee contravened a rule or standard, a further enquiry in terms of Item 7(b) must be undertaken to determine whether or not:

*(i) the rule was a valid or reasonable rule or standard;*

*(ii) the employee was aware, or could reasonably be expected to have been aware, of the rule or standard;*

*(iii) the rule or standard has been consistently applied by the employer; and*

*(iv) dismissal was an appropriate sanction for the contravention of the rule or standard.*

66. Having rejected the applicant's version in favour of that of Ms Khoza, some form of sexual intercourse occurred in his office on 12 June 2019. Although Dr Nkusi testified that such conduct, whether consensual or not, should not occur in the workplace, it is essentially a standard of conduct that should not need to be spelt out to employees as constituting improper or inappropriate behaviour. It is entirely reasonable to expect employees to refrain from such conduct, which might influence the public's perception of the institution.

67. With the respondent having established on the balance of probability that Mr Madodoka misconducted himself, it was his contention that dismissal was inappropriate, as his personal circumstances were not considered. To this end, Item 3(5) of the Code provides that:

*When deciding whether or not to impose the penalty of dismissal, the employer should in addition to the gravity of the misconduct consider factors such as the employee's circumstances (including length of service, previous disciplinary record and personal circumstances, the nature of the job and the circumstances of the infringement itself.*

68. Very little, if any, evidence was presented in this regard, and the only information gathered was that he had amassed approximately 14 years of service with the respondent at the time of his dismissal and fulfilled an important administrative function

relating to the management of MVA and RAF claims. Neither party introduced any of the factors submitted to Ms Mkhantshwa prior to her determination of sanction in October 2021.

69. Within the context of the factors before me, the misconduct is of a severe nature in that the applicant slowly prepared Ms Khoza for what he sought from her, preying on her vulnerability as a patient who required some assistance from him. Given its severity, I am unconvinced that it warranted a lesser form of progressive discipline. Had he gotten away with it, there is no telling what other vulnerable women, who needed to rely on him, might have suffered at his hands. Accordingly, in the circumstances, dismissal was the only appropriate sanction to impose.

### **Procedural fairness**

70. Item 4 of the Code, which the Labour Court reinforced in *Avril Elizabeth Home for the Mentally Handicapped v CCMA and others* (2006) 27 ILJ 1644 (LC), recognises the minimum components of a fair procedure to include an investigation into the reasons, advising the employee of the allegations in a manner that he/she can understand, providing the employee with a reasonable time to prepare a defence and to state a case in response to the allegations, the assistance of a fellow employee or trade union representative and communication of the outcome of the enquiry.
71. Despite the applicant making it clear at the commencement of the proceedings that he challenged the procedural fairness of his dismissal, only to the extent that the respondent failed to comply with its own disciplinary code by furnishing him with the outcome of his hearing nearly two months post-conclusion, neither party presented any evidence to support or rebut this claim, and it appears to have been silently abandoned by them. The applicant initially averred that his disciplinary proceedings concluded on 31 August 2021, yet he only received the outcome on 26 October 2021. On the scant information before me in the form of the presiding officer's findings, dated 01 October 2021, the applicant's hearing concluded on 31 August 2021, with closing arguments being submitted on 15 September 2021, whereafter she compiled her findings, rendering her report on 01 October 2021. However, it is unclear as to when Mr Madodoka actually received it.
72. Even if I were to accept his unproven contention that it took an excessively long time for the findings to be made known, thus falling foul of clause 7.3(o) of Resolution 1 of 2003 of the Public Service Co-ordinating Bargaining Council, which requires that "*the chair*

*must communicate the final outcome of the hearing to the employee within five working days after the conclusion of the disciplinary enquiry,...”, I am unconvinced that this prejudiced the applicant in any manner. Item 67 of the CCMA Misconduct Arbitration Guidelines provides that:*

*“When deciding whether a disciplinary procedure conducted in terms of a collectively agreed procedure involves any procedural unfairness, the arbitrator should examine the actual procedure followed. Unless the actual procedure followed results in unfairness, the arbitrator should not make a finding of procedural unfairness in a dismissal case.”*

73. In the circumstances, the delay in furnishing the applicant with the findings was just that; a delay. There was no prejudice suffered by either of the parties and no apparent unfairness experienced by either the applicant or respondent, despite the respondent’s apparent non-compliance. Guided by Item 67 of the Guidelines, a finding of procedural unfairness is, therefore, unwarranted. Accordingly, the applicant’s dismissal was effected in accordance with a fair procedure.

#### **AWARD**

74. The respondent’s dismissal of the applicant, Alfred Madodoka, was substantively and procedurally fair.
75. The matter is dismissed.



**Allan Kayne**