



ARBITRATION AWARD

Case No: **PSHS665-23/24**

Commissioner: **Job Mzondi Molapo**

Date of award: **9 July 2024**

In the matter between:

PSA obo Mr. Machecha Zacharia Mathithibala

Applicant

and

Department of Health –North West

Respondent

Details of the hearing and Representation

1. The matter under case reference number PSHS665-23/24 was scheduled for arbitration for 25 April 2024 at the Respondent's Northwest Provincial Office, based in Mafikeng. The arbitration was postponed due to the unavailability of the respondent's witnesses including key witness. It was set down again for 24 June 2024 by agreement between the parties. The Applicant, Mr.Machecha Zacharia Mathithibala was present and represented by a PSA official, Mr.Kabelo Moalosi. The Respondent, Department of Health-Northwest was represented by the Acting Deputy Director, Labour Relations, Ms. Boitumelo Madede. The parties handed in a joint bundle of documents, marked "AR". The proceedings were conducted physically and digitally recorded.

Preliminary issues and rulings

2. The matter was postponed on 25 April 2024 to 24 June 2024 due to the unavailability of the respondent's key witness who was untraceable amongst others. At the commencement of the arbitration proceedings on 24 June 2024, the respondent applied for another postponement citing the reason that it still could not trace the key witness even after asking the police to assist them. They stated further that they were intending to procure the services of a private investigator to assist in tracing the witness who according to her mother was no longer staying with them at home and that she had no specific address of abode and could not assist the respondent. The respondent had other witnesses to call, except the alleged victim and two others who merely stated that they had personal challenges.
3. The applicant through his union representative objected to the application for a further postponement of the matter citing financial hardship, prejudice and uncertainty to a speedy finalisation of the dispute on the part of the applicant. The representative stated that the applicant was ready to proceed.
4. Having heard the submissions by both parties, I concluded that the respondent's reasons for seeking a further postponement were scanty. I ruled that the arbitration should proceed as .

Issue to be decided.

5. I am required to determine whether the applicant's dismissal was fair.

Background to the issue

6. The Applicant commenced employment with the respondent on 1 December 2011. He was dismissed on 24 May 2022. He unsuccessfully lodged an appeal which its outcome was issued on 30 August 2023. He referred the dispute for conciliation and the dispute remained unresolved. The matter was referred for arbitration and set down for 26 February 2024. The applicant was dismissed for misconduct relating sexual assault. At the date of dismissal, the applicant was a professional nurse, earning a monthly salary R39138.00 and with other allowances, the gross total is R44414.14. The applicant is challenging the substantive fairness of the dismissal, namely that there was no breach of the rule. The applicant seeks retrospective reinstatement with back pay.

7. On 24 June 2024 the respondent did not make any opening statement except to repeat the number of witnesses it intended to call in the matter and those present and those who were not available.
8. According to AR9 and AR14-15 and 16-24, the applicant was charged, found guilty and dismissed for two charges, namely that (1) he raped a female forensic observandi on 24 September 2021 and that (2) on 26 September 2021 he manipulated a female observandi to consent to have sex with him. The latter documents constitute the charge sheet, the verdict and the outcome report with a dismissal sanction on it.

Survey of evidence and argument

Respondent's version

9. **Mr. Benjamin Matsepane** testified under oath that he was the respondent's Operational Manager at Bophelong Hospital since January 2022. He knew the applicant since 2020 when they worked together at the same hospital in the forensic unit. He had no personal issues with the applicant. On 30 September 2021 whilst he was sitting at work, one Ms. Dikobe came to him and reported that the applicant slept with her more than once. Whilst she was still conferring to him, she was called into a consulting room by her Psychiatrist. Ms. Portia Dikobe was at the hospital as a patient under observation for thirty days. He stated that she was an observandi referred by the Department of Justice. She was not diagnosed at that stage of her reporting the alleged incident. After Ms. Dikobe made the allegations against the applicant, he called the applicant and told him what Ms. Dikobe said to him earlier. He told the applicant that he was just relating the story for his information and not for any other purpose. He was told by Ms. Dikobe that she and the applicant slept in the ward and then later in the linen room. He stated that observandis were not allowed to enter the linen room unless they go to change their clothes.
10. Ms. Dikobe told him that the two incidences happened on a Friday and a Sunday. He then informed the alleged victim's Psychiatrist about it and then he was advised to call the medical officer. Asked what he observed on Dikobe, he said that the lady appeared to be suffering bipolar and a manipulative behaviour. She would show signs of extreme happiness and extreme sadness because she had mood swings. She was however very functional in general. He stated that it was very rare to hear of rape cases at the facility. Referred to AR13, he stated that the document was a drug book completed when a drug is given or administered to a patient. The drug that was prescribed by the Psychiatrist to Ms. Dikobe was an Activan 2.5 milligrams. The effect of the drug may have cause a restless person to fall asleep. He stated that there are instances on the drug book where it shows that the applicant had administered up to 5 milligrams to the

observandi. Asked at what stage would 5 milligrams be administered to a patient, he stated that the professional nurse may have a physical or telephonic discussion with the doctor or psychiatrist to explain the behaviour of the patient. The doctor may then give a telephonic prescription advising the nurse to administer it. He indicated that AR12 was a progress report of a patient showing each behavioural pattern recorded per observation.

11. **Under cross-examination** he stated that he did not witness any sexual activity between the applicant and Ms. Dikobe. His testimony was limited to what Ms. Dikobe told him. He stated that the applicant had previously worked with female observandis and there were no reports of any sexual nature. Ms. Dikobe was referred to the facility for observation by the court. AR11 was a report showing that she suffered from hearing voices from friends telling her to kill her mother. He stated that there was a possibility that she may have been suffering real hallucinations or just seeking attention because she was very manipulative. It was put to him that the applicant's version was that there was no sexual intercourse between him and the alleged victim. He stated that he was not able to dispute the applicant's version as he never investigated the allegation. He stated that observandis are brought by the police to the facility and then the local police were the ones observing them whilst at hospital facility. He could not tell if Ms. Dikobe was guarded by the police at the time of the alleged incidences but under normal circumstances all observandis should be guarded by the police as they are in fact under custody for the alleged offences they are facing in courts.
12. He stated that all employees of the facility have free access to the linen room anytime. Ms. Dikobe told him that she slept with the applicant in the night. He could not deny the applicant's version that there were police guards at the facility throughout the nights alleged. Asked if a patient under activin can remember what happened to them, he stated that it drugs them until its effect is over in their system. They can only remember if they observe something or if something wakes them up.
13. **Mr. Katlego Tsholo** testified under oath that he was employed as the Labour Relations Officer at Bophelong Hospital. He stated that he knew the applicant as the former employee of the facility he works at. He investigated a complaint against the applicant before charging him. The applicant faced disciplinary processes after a complaint by an observandi, one Portia. The latter reported to her psychiatrist. The latter told him during the investigation that the observandi told her that she had a sexual encounter with the applicant after she was drugged and that when she woke up, she was undressed, and the applicant was on top of her. He was told that the observandi said that she asked the applicant what he was doing, and

applicant told her to keep quiet about it. After the Friday, the applicant again approached the observandi and offered her money in exchange for sex. She told the Psychiatrist that they both went to the linen room to have sex. She told her that it happened during the week of Heritage holiday. The matter was reported on 30 September 2021 to the Psychiatrist. During the investigation he found that she was given a higher dose than the 2.5 milligrams. He also asked the applicant for his response and applicant denied the allegations. He stated that she was only brought to the facility for observation by the court to evaluate if she was fit to stand trial.

14. The applicant was charged, and the matter proceeded to a disciplinary hearing. It was his further evidence that the observandis are kept in accordance with their gender and are guarded by police officers. Sometimes there would be challenges to have the police availability. He could remember that the applicant told him that the police were there on the days the alleged victim alleged the incidences happened. Other colleagues said that the police came late on the first night. He stated that the reports never showed that she was ever aggressive to warrant a higher dose.

15. **Under cross- examination** he agreed that he investigated and prosecuted the case against the applicant. He agreed that he was not a medically trained. He stated that observandi told the Psychiatrist that at the first encounter she was drugged and the first incident she only got the higher dose after the sexual encounter. He stated that he was told that the police officers came late on 24 September 2021 but was not told exactly what time they arrived. Asked if he asked the alleged victim where the police were when she woke up finding the applicant on top of her, he could not remember if he did. Referred to AR25 he stated that he did not see the medical report of the alleged victim at all. He stated that he was not aware if there were any medical check up on her. He did not know why the rape kit test did not reveal any sexual encounter except to speculate that it may have been influenced by lapse of time.

16. The respondent decried the fact that it was not afforded an opportunity to call its five intended witnesses. In the main the respondent's representative was unhappy about the refusal to have the matter postponed to call her absent witnesses. She argued that the applicant by administering a higher dose to the observandi had an intention to rape her. She argued that the version of Ms. Dikobe was more probable than that of the applicant.

Applicant's version

17. **Mr. Zacharia Machecha Mathithibala** testified under oath that he was employed at Bophelong Hospital as a professional nurse responsible to care for diagnosed patients or re-admitted ones. He was previously employed at Platinum Health, Impala, Moses Kotane Hospital before joining the respondent. Referred to AR11 he stated that it was a progress report showing the nurses' observations on the observandi. He stated that he was not certain when exactly the observandi was admitted. He can only make out from the AR11 that the document was completed by the day nurse. He reported for night duty on 24 September 2021. He stated that medication was administered by the nurse as prescribed by the doctor. He stated that at times a doctor may prescribe activin injection and when it is out of stock, they may still advise that the nurse give the patient a higher dose of tablets. Asked to explain his observations on the alleged victim on 24 September 2021, he stated that she was overreacting but not aggressive on the day. He gave her a higher dose for fear that her behaviour may be out of hand. He can remember that there were police around on the said area.

18. He admitted having provided the alleged victim a 5 milligrams dose but did not agree to the allegation that he had sexual intercourse with her. He stated that it was impossible for him to have any sexual encounter with the alleged victim because the patients lock their rooms at night. He stated that the medication was administered on the patients at the dining area. He stated that he only had a nurse-patient relationship with Ms. Dikobe. He was never charged with any misconduct since employed by the respondent. He stated that the dismissal broke him emotionally and psychologically.

19. **Under cross-examination** he stated that he had no other relationship with Ms. Dikobe except that of nurse-patient. He stated that it was not the first time she was admitted to the facility. She was a talkative patient always seeking attention, but she was not aggressive. He stated that he was denying the charge as he had done nothing. He stated that medication was given to the patients just after having breakfast or eaten bread and tea. He stated that during the day the nurses would provide warm water to the patients when the geysers were dysfunctional. He observed that Ms. Dikobe would have demands like asking for cigarette or snuff from staff in general including him. Asked why he administered 5 milligrams at times, he stated that the 2.5 milligrams lapsed quickly on a patient who was a drug user. He stated that a nurse had a discretion to administer a higher dose like 5 to 7.5 milligrams even when the doctor prescribed 2.5 milligrams depending on the agreement they have with the doctor on standby. He stated that the entries on AR12 were only related to observations on the patient in the morning when she wakes up. He denied that he raped the alleged victim. He did not have any intention of raping the alleged victim.

20. I perused the applicant's heads of argument and I do not intend to rehash them herein. The applicant correctly submits that the respondent bears the onus to prove the fairness of his dismissal. It was submitted that the respondent primarily relied on hearsay evidence and failed to call the person upon whose credibility the probative value of such evidence depended upon. It was argued that none of the requirements outlined in section 3(1) of the Law of Evidence Amendment Act, 45 of 1988 were met by the respondent's case. It was further argued that the evidence led by the respondent was gainsaid by the applicant. It was argued that the respondent's witnesses were not credible as they only presented evidence which they did not test themselves. There was no corroborating evidence supporting their hearsay.

Analysis of evidence and argument

21. The Constitutional Court in *Kapa v S* [2023] JOL 57250 on the admissibility of hearsay evidence in terms of section 3 of the Law of Evidence Amendment Act, 45 of 1988 stated the correct legal position. The majority judgment penned by Majiedt J restated the legal position relating to the admissibility of hearsay evidence. At paragraph 77 of the judgment, the Court stated that: "[77] *The provisions of section 3(1)(c) of the Hearsay Act have been set out in the first judgment. The factors listed in section 3(1) (c) must be viewed holistically and weighed collectively in determining whether it is in the interest of justice to admit the hearsay evidence. The factors that bear consideration when a court is determining whether it is in the interest of justice for the statement to be admitted are:*

- (a) The nature of the proceedings;*
- (b) The nature of the evidence;*
- (c) The purpose for which the evidence is tendered as evidence;*
- (d) The probative value of the evidence;*
- (e) The reason why evidence is not given by person on whose credibility its probative value depends upon;*
- (f) Any prejudice which admission of the evidence might entail for the applicant;*
- (g) Any other factor which should, in the opinion of the court, be taken into account."*

22. Dealing with the nature of the proceedings, Section 138(1) of the Labour Relations Act, 66 of 1995 ("LRA") provides that the commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute with the minimum of legal formalities. The commissioner is given a leeway to conduct arbitration proceedings in a less formalistic way in order to determine the dispute

fairly and quickly. Having said the latter, I have allowed the respondent even without any application in terms of the Rules of the Council to have the arbitration process postponed when its witnesses were not present and more importantly the alleged victim who was not traceable at the time.

23. I did that even when the applicant was ready to proceed and has been sitting without employment since his dismissal on 22 May 2022. On the second sitting before me, only two witnesses were brought, with the alleged victim still untraceable and the others having given the respondent's representative vague reasons for their absence. My ruling in refusing a further postponement to the respondent was informed by the requirement of the speedy and fair determination of the dispute. It would not have been fair of me to delay the finalisation of the matter further when there was a clear laxity on the part of the respondent's officials to ensure that their witness was adequately traced and brought to the process. I am only told on the date of the hearing that attempts were made to locate the witness but no prior application for a postponement is brought when such attempts yielded no result. I am only told that the respondent intends to procure the services of a private investigator after the matter had been postponed for a month later.
24. The parties did not even agree prior to the proceedings that the hearsay evidence should be admitted for consideration. The respondent did not make any application before the commencement of the proceedings or any time prior to the closure of its case to have the alleged victim or any other witness' testimony admitted due to any impractical reason obstructing them to do so in person. The joined bundle did not even contain the verbatim transcript of the internal disciplinary hearing for me to exercise the discretion in section 138 of the LRA. I was not compelled therefore by any law to admit such evidence in the proceedings.
25. Dealing with the nature of the evidence, the Constitutional Court at par 79 of the Kapa judgment stated that the enquiry is the extent to which the evidence can be considered reliable, and, secondly, the weighing of the probative value of the evidence against its prejudicial effect. As I said above, there was no transcript of the earlier hearing that led to the applicant's dismissal. I was not placed in a position to know what it is she herself had actually said in proving the allegations against the applicant. I perused the records of the proceedings in the bundle and only found a third party's account of what the alleged victim said during the hearing. During the arbitration proceedings the respondent's first witness, Mr. Matsepene indicated that the alleged victim was a manipulative person with bipolar and could not exclude a condition of hallucinations on her. The evidence of the respondent was not reliable because it was not corroborated at least by any medical report proving such an incident. The applicant denied the allegations as not being possible because the facility had police guards, including on the alleged nights of the incidents. It would be very prejudicial to admit such hearsay evidence when the respondent's account on the presence or not of the police was itself mere speculation than fact.

26. The purpose of the evidence was to prove if the applicant raped or manipulated the observandi to consent to sex. Both witnesses only testified on what was said to them by an unreliable and manipulative person as per the evidence of Mr. Matsipane. No rape kit or any such form of evidence was introduced. The applicant admitted having administered a higher dose to the alleged victim and provided reason thereto and the procedure followed when such dose is administered. He recorded the dose in the register without hiding it to anyone. It stands to reason that the person who could corroborate the act happening and the alleged manipulation was the wayward victim the respondent failed to trace and bring forward. The respondent could not deny that the alleged victim came to the facility more than ones for alleged criminal misdemeanours and with her manipulative behavioural patterns confirmed by the respondent's own witness, who knows if she used the report to get some undue favours from the hospital.
27. The probative value of the evidence would have been relevant had the respondent at least provided a valid reason why the alleged victim's evidence should be admitted in her absence. There was no such a request, and I could not find one in order to admit it on my own accord.
28. As to why the alleged victim could not give the evidence herself, the respondent had twice provided the same reason. I can safely make an adverse inference that the respondent failed to call the witness because she may not have cooperated to further testify as she had nothing further to benefit from her manipulative personality.
29. Clearly admitting the evidence would have prejudiced the applicant as he would not be able to test it through cross examination when her reasons for absence do not make any sense and give any hope that she will ever do.
30. I considered that that the applicant pleaded not guilty, the facility is guarded, the alleged victim is manipulative and suffered hallucinations. I considered that the applicant was a reliable witness whose evidence could not be faltered. It would not have been fair for me without any consent by both parties and any application by the respondent and any valid reason why the alleged victim could not come to testify, to admit the hearsay evidence. Such exercise of a discretion had the potential to prejudice the applicant's case.
31. The respondent had ample opportunity to prepare its witnesses and instead of doing so, they put the blame of their laxity at the door of the arbitrator who has a duty to protect both parties when discharging his duties in the interest of justice. It was not in the interest of justice to find that the absent and wayward alleged victim's hearsay evidence be admitted at the expense of the applicant livelihood.

32. The evidence provided by the two witnesses cannot be relied upon as it remains uncorroborated hearsay. The respondent failed on a balance of probabilities to prove the fairness of the applicant's dismissal.
33. Accordingly, I find that the applicant's dismissal was substantively unfair.
34. Procedure was not placed at issue.

Remedy

35. The applicant seeks the primary remedy of a reinstatement and I have not been given any reason why I should not grant it. At the date of dismissal, the applicant was a professional nurse, earning a monthly salary R39138.00 and with other allowances, the gross total is R44414.14. The applicant was dismissed on 22 May 2022, but the final decision was on 30 August 2022 when his appeal failed. I take notice of the fact that in the public service, employees get paid until the finalisation of their appeals on dismissal matters. The retrospective order of payment shall be effective 1 September 2022. At the date of the delivery of the award and the applicant resuming his duties around end of July 2024, the applicant would be twenty-two months without income as he remained unemployed since 2022. $R44414.14 \times 22 \text{ months} = R977\ 111.08$.

Award

36. The applicant's dismissal was substantively unfair.
37. The respondent must reinstate the applicant on the same terms and conditions as they applied prior to 30 August 2022 without loss of benefits.
38. The respondent must allow the applicant to resume with his normal duties on 25 July 2024.
39. The respondent must pay the applicant backpay of R977 111.08 (Nine Hundred and Seventy-Seven Thousand, One Hundred and Eleven Rands and Eight Cents) by not later than 31 July 2024, failing which the applicable interest rate shall accrue.

(1)

MZONDI JOB MOLAPO