

# ARBITRATION AWARD

Panelist: RG Pieterse \_\_\_\_\_  
Case No.: GPBC1362/2022 \_\_\_\_\_  
Date of Award: 28 February 2023 \_\_\_\_\_

**In the ARBITRATION between:**

PSA obo R Lobai \_\_\_\_\_  
(Applicant)

And

Office of the Chief Justice \_\_\_\_\_  
(Respondent)

## **DETAILS OF HEARING AND REPRESENTATION**

- [1] This is the award in the arbitration between PSA obo R Lobai (hereinafter referred to as the Applicant) and the Office of the Chief Justice (hereinafter referred to as the Respondent).
- [2] The arbitration was held under the auspices of the General Public Service Sectoral Bargaining Council (GPSSBC) in terms of section 191 of the Labour Relations Act 66 of 1995 as amended (LRA) and the award is issued in terms of section 138 (7) (a) of the LRA.
- [3] This award is not intended to be a verbatim transcript of the evidence led at the arbitration hearing but rather a determination with brief reasons for such determination.
- [4] Evidence relevant to the determination or to support any of the elements of fairness as required may be referred to. This however does not mean that I failed to consider other evidence or ignored such evidence in coming to my decision.
- [5] The Applicant was present and was represented by Mr Archie Sigudla from PSA and the Respondent was represented by Mr Terence Mashele.

## **ISSUE TO BE DECIDED**

- [6] The issue to be determined is whether the Respondent committed an unfair labour practice in relation to a final written warning and one month unpaid suspension without pay.

## **BACKGROUND TO THE ISSUE**

- [7] The applicant Mr Ronald Lobai is employed by the Respondent in a position of an Usher Messenger with effect from 01 May 2008 and stationed at North Gauteng Division of the High Court, in Pretoria.
- [8] The applicant was charged in terms of clause 6: Serious Misconduct of the Disciplinary Code and Procedures for the Public Service, wherein one count of misconduct together with its alternative was proffered against him and reads as follows:

### **Allegation 1: Sexual Harassment**

It is alleged that on or about 15 September 2021 whilst at Pick n Pay in Madiba Street, Pretoria you sexually harassed Ms M Phoko by touching her buttocks without her permission. Your action is viewed in a serious light and is in contravention of the Code of Conduct for Public Service as contained in Chapter 2 of Public Service Regulations, 2016.

#### Alternative to Allegation 1:

Conducting yourself in an improper, disgraceful and unacceptable manner. It is alleged that on or about 15 September 2021 whilst at Pick n Pay in Madiba Street, Pretoria you conducted yourself in an improper, disgraceful and unacceptable manner in that you without permission inappropriately touched Ms M Phoko's buttocks whereas you knew or ought to have known that it was wrong to do so. Your action is viewed in a serious light and is in contravention of the Code of Conduct for Public Service as contained in Chapter 2 of Public Service Regulations, 2016.

- [9] The Respondent appointed a presiding officer to wit Ms Letsoalo Modjadji who conducted the disciplinary enquiry in terms of clause 7.3. "Conducting the disciplinary hearing" and consequently found the applicant guilty on both counts and pronounced the sanction of One (1) month suspension without pay coupled with Final Written Warning (FWW).
- [10] The sanction was unsuccessfully appealed, and the Union referred the matter to the GPSSBC.
- [11] The matter was subsequently scheduled for arbitration on 01/02/2023 and 02/02/2023 at the offices of the Chief Justice in Midrand.
- [12] The applicant called two (2) witnesses in support of their case, to wit Mr Ronald Lobai and Mr Gabriel Maloka.
- [13] The Respondent also called two (2) witnesses to wit the complainant Ms Mmaselaelo Phoko and Ms Fikile Lukhele.

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

#### **APPLICANT'S CASE**

##### **Mr Ronald Lobai**

- [14] The applicant testified that on the 15<sup>th</sup> of September 2021 at around 07:45 he went to the Pick n Pay Store at Madiba Street, Pretoria with his colleague to wit Tryphina Legodi. After having bought some groceries, he had them in 2 plastic bags, one bag in each hand. After having left the store, he realized that he forgot to buy cigarettes and returned to the store. Whilst having the 2 plastic bags in his hands, he proceeded to the Kiosk whereby he had to wait for the cashier to come to serve him, and Mrs Legodi went to look for something to eat. She was not with him at the Kiosk, she was at a different place.

- [15] The Applicant further testified that whilst standing there waiting for the cashier to serve him, he noticed Ms Phoko passing, and he greeted her but it appears that Ms Phoko was in deep thought and did not hear the greeting. Mr Lobai testified that he then stretched his left leg out which resulted in kicking Ms Phoko on her left calf, as he wanted to draw her attention after he had greeted her.
- [16] The Applicant testified that Ms Phoko after being kicked turned around and looked at him, and asked him "what are you doing?" Mr Lobai testified that he did not respond to Ms Phoko after realizing that she seemed surprised.
- [17] The Applicant testified that after that incident, the cashier came, he was served and he left with Ms Legodi. Mr Lobai further testified that he did not touch or slapped Ms Phoko's buttocks, as he had 1 plastic bag in each hand so it would not have been practical or possible to touch or slapped her buttocks.
- [18] The Applicant further testified that he was later contacted by Ms Lukhele who told him that she was investigating allegations of sexual harassment raised by Ms Phoko, and he further testified that at that time when Ms Lukhele came to interview him it was around November 2021 on Black Friday and there were specials, and he had also demonstrated to her that on that particular day of the alleged incident, he had 2 plastic bags full of groceries (one bag in each hand).
- [19] The Applicant further testified that his relationship with Ms Phoko was a normal working relationship nothing more nothing less. He further testified about a previous incident in the lift at the workplace, where Ms. Phoko, himself (Mr Lobai) and Mr Maloka were in the lift and Ms. Phoko leaned on his shoulder and asked him, why he does not view her as wife material. Mr Lobai testified that in his response he said how can I view her as wife material when she is married, he further submitted that Ms Phoko had a wedding ring on her left finger at that time.
- [20] The Applicant testified that he understood sexual harassment to mean, it is when a male tells a lady that he wants to sleep or have sex with her, even when that lady does not accept such a request.
- [21] The Applicant testified that he can recall being invited to one session wherein he was given a big Arch Lever file was said to have "Do's and Don'ts" however he has never received training what constitutes sexual harassment within the workplace.

### **Mr Gabriel Maluka**

- [22] Mr Maluka, testified that he is working at Pretoria High Court since from 01/12/2008 as an Usher Messenger.
- [23] His duties entail *inter alia* escorting the Judge to the Court and handling of exhibits inside the Court and his Supervisor is Mr Robert Maasdorp.
- [24] He testified about an incident where he was in the lift with Mr Lobai. He testified that the lift stopped, and Ms. Phoko entered the lift and she greeted us. She stood next to Mr Lobai and rested her head on his shoulder and said: "You don't see us, we are the woman" and he cannot recall whether Mr Lobai replied.
- [25] He testified that he was never inducted on sexual harassment, and he is not aware if other colleagues were trained on sexual harassment.
- [26] He testified that he does not know anything about the incident on the 15<sup>th</sup> of September 2021 as he was at work on that day.

### **RESPONDENT'S CASE**

#### **Mrs Mmaselaelo Phoko**

- [27] The witness testified on the morning of the 15<sup>th</sup> of September 2021; she went to Pick n Pay as she wanted to buy an energy drink and whilst she was busy looking for a shorter queue in order to pay she eventually stopped at the last queue, she testified that whilst she was standing there, she felt someone slapped her bum, and that she angrily turned around to see who did that, she saw Mr Lobai, who was leaning at the Kiosk counter facing eastward and he smiled.
- [28] She testified the distance that was between her and Mr Lobai during the inspection-in-loco to be that which we agreed to be approximately 5 meters. Ms Phoko testified after having noticed the applicant Mr Lobai she asked Mr Lobai, what do you call that which you have just done now?
- [29] The witness further testified that the applicant noticed that she was angry, and he approached her and hugged or cover her from behind. She testified that she told the applicant that she was going to report him, and that the applicant told her that she was going to twist the events and state that she started everything. She pushed the applicant's hands away from her.

- [30] She testified that upon her arrival in the office, she placed the energy drink in her office and went to the bathroom, where she cried asking herself questions for which she did not have answers. She further testified that she did not tell anyone about this incident as she felt it was sensitive and she was ashamed as a woman, and that she only informed the court manager after 2 or 3 days later, who was sympathetic to her and advised her to report the matter to the SAPS because it did not happen at the workplace.
- [31] She further testified that she was a senior to Mr Lobai, and she did not tell him that she does not approve or appreciate being touched, she submitted that there was no time to tell him that, as that incident happened between 60 seconds to 2 minutes.
- [32] She testified that she was slapped on her bum and not touched, that there was no kicking and that what triggered her anger was being slapped on her buttocks.

**Mrs Fikile Lukhele**

- [33] She testified that she is employed at Gauteng Provincial Service Centre which is in Johannesburg High Court and that she started on 01 June 2020 her occupation is Assistant Director responsible for Labour Relations and HR.
- [34] She further testified that she investigated the grievance lodged by Ms Phoko against the 2 alleged perpetrators (Mr Ronald Lobai and Mr TJ Mbele) and generated the investigation report which is contained on pages 6 to 15 of Bundle R.
- [35] She conceded that she might have omitted other facts pertaining to the investigation and that was not intended to. Ms Lukhele further testified that there is a vast difference between touching and slapping. Ms Lukhele could not reconcile what made her record that the applicant touched the buttocks of the complainant whereas in terms of the version of the complainant, she said she was slapped whilst on the same point the alleged perpetrator when interviewed as captured on page 11, paragraph 3.35 of the investigation report, that "he kicked her buttocks just to get her attention.
- [36] She further testified that the charge and its alternative should have read as slapped, not touched.
- [37] She testified that she was the Initiator in the disciplinary hearing and that the Applicant was found guilty on both charges 1 and the alternative.

## **ANALYSIS OF EVIDENCE AND ARGUMENT**

- [38] In a case like this, we first need to consider the Code of Good Practice on the Prevention and Elimination of Harassment in the workplace and in particular the definition of sexual harassment.
- [39] Sexual harassment of an employee is a form of unfair discrimination and is prohibited on the grounds of sex, gender, or sexual orientation. Sexual harassment is unwelcome conduct of a sexual nature, whether, direct or indirect, that the perpetrator knows or ought to know is not welcome. Sexual Harassment may be offensive to the complainant, make the complainant feel uncomfortable or cause harm or inspire the reasonable belief that the complainant may be harmed.
- [40] The conduct must be unwanted and there are different ways in which an employee may indicate that the conduct is unwanted, which includes walking away or not responding to the perpetrator.
- [41] The unwanted conduct must be of a sexual nature and includes physical, verbal, or non-verbal conduct, whether expressed directly or indirectly and includes physical conduct, ranging from touching, and kissing, to sexual assault and rape.
- [42] The impact of the conduct should constitute an impairment of the employee's dignity considering, the circumstances of the employee, and the respective positions of the employee and the perpetrator.
- [43] From the onset, I must mention, that it was not easy for Mrs Phoko to testify in these arbitration proceedings. She was very emotional and on at least two occasions she burst out in tears, and I had to pause the proceedings. I could see that she was emotionally drained and to testify in these proceedings, was painful for her. Through this, she managed to present her evidence in chief and answered all the questions posed to her.
- [44] Mrs Phoko testified in no uncertain terms that the Applicant slapped her on the bum, and she turned around and saw Mr Lobai and she asked him "What have you just done? What do you call this that you have just done" She further testified that he saw she was angry, and he came from behind and put his arms around her from behind and she told him she is going to report him. She kept on pushing his hands away from her. Clearly, this conduct was unwanted for Mrs Phoko and Mr Lobai ought to have known that this conduct is unwelcome and that his conduct is of a sexual nature and constitutes sexual harassment. This was not disputed by the Applicant.

- [45] During cross-examination, she vehemently denied that Mr Lobai kicked her calf, and she maintained, throughout her evidence that he slapped her on her bum. She was asked to show where exactly she was slapped on her bum, and that was the second time she burst into tears.
- [46] She further testified that after getting back at the office, she cried at the office and was asking herself many questions for which she did not have answers. She testified that she did not tell anybody about the incident as it was a sensitive situation, and she was ashamed as a woman and could not speak to anyone. She only approached the Court Manager (Mrs Malatji) after about 2 or 3 days and informed her of the incident and she was informed to go to the SAPS.
- [47] During cross-examination, a version was put to her that the conduct of the Applicant is not sexual in nature and she replied by saying "I do not see myself going around talking about my buttocks and I have no reason of framing him out of everyone I work with, and we never had a fight before".
- [48] Mrs Phoko vehemently denied that Mr Lobai kicked her on the calf, and she maintained throughout the cross-examination that he slapped her on the bum.
- [49] The version of the Applicant is very unlikely, and the Applicant did not call any witnesses to corroborate his version. The version of Mrs Phoko is far more likely and I accept the version of Mrs Phoko that the Applicant slapped her on the bum and put his arms around her from behind. It is very unlikely that Mrs Phoko would have fabricated her version to get the Applicant into trouble. The Applicant failed to prove on a balance of the probabilities that he kicked her on the calf and I reject the version of the Applicant.
- [50] I am of the view that Mrs Phoko made it clear to the Applicant that his conduct is unwelcome, by informing him that she is going to report him and also by pushing his hands away from her.
- [51] I am further of the view that the conduct of Mr Lobai was indeed sexual in nature and furthermore that Mr Lobai, ought to have known that his conduct is unwelcome and constituted sexual harassment.
- [52] I am furthermore of the firm view that the dignity of Mrs Phoko was severely impaired, hence she was so ashamed of the incident, that she went to her office and cried, and she could not even discuss it with anyone as she felt so ashamed of herself as a woman. There is no doubt that her dignity as a woman, and as a person was severely impaired.



[53] For my reasons as set out above, it is my finding that the Respondent did not commit an unfair labour practice in relation to a final written warning and the one month unpaid suspension issued to the Applicant.

#### **AWARD**

[54] In the premises, I make and deliver the following award:

[55] The matter is dismissed.



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Panelist: RG Pieterse