



# ARBITRATION AWARD

COMMISSION  
FOR CONCILIATION, MEDIATION  
AND ARBITRATION



Case Number: GAJB9202-08  
Commissioner: Nicola Johnston  
Date of Award: 18-Nov-2008

In the ARBITRATION between

Thandiwe Radebe

(Union/Applicant)

and

South African Metro Police

(Respondent)

Union/Applicant's representative:

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## 1. DETAILS OF HEARING AND REPRESENTATION

1.1 The hearing was held at the CCMA Gauteng, on 26 August and 6 and 7 November 2008. The applicant was represented by Ms H. Rabkin-Naicker, an advocate. The respondent was represented by Mr J. Mobe, an employee of the attorney.

1.2 No pre-arbitration meeting was held. Both parties submitted a bundle of documents into evidence. The arbitration proceedings were mechanically recorded.

## 2. BACKGROUND TO THE DISPUTE

2.1 The dispute was referred to the CCMA as a constructive dismissal. It is common cause that the applicant was employed from 1 January 2002 to and that she resigned on 25 April 2008. She was earning R8700 per month as a Metro Police officer, at date of resignation.

2.2 The respondent's representative raised a point *in limine* regarding the jurisdiction of the CCMA to hear this matter. He argued that the matter should be heard by the bargaining council in terms of the applicant's contract of employment and the collective agreement with the relevant trade unions. He added that in terms of S147 of the Labour Relations Act, the CCMA may assume jurisdiction but should only do so in exceptional circumstances. The respondent's representative stated that the point *in limine* was not raised at the previous set-down for arbitration, as on that date the issue at hand was the application for postponement and the merits of the case were not dealt with.

2.3 The applicant's representative replied that the issue of jurisdiction had never been raised previously by the respondent; either in the correspondence between the parties, nor at the conciliation process or the previous date of the arbitration, at which a postponement was sought and granted. She argued that the applicant has the right to a speedy resolution in the matter, and that further delay would prejudice her client, in light of the sensitive nature of the matter, which revolves around an allegation of sexual harassment arising from an alleged rape. In addition the applicant's advocate and attorney are based in Cape Town, and the cost of flying back to Johannesburg for another date in another forum would be prohibitive. She argued that the respondent could have filed an application around the jurisdictional dispute in terms of Rule 31 of the CCMA rules.

2.4 After applying my mind to the arguments presented and after conferring with the Senior Commissioner, I issued an *extempore* ruling on the jurisdictional point. My ruling was that the CCMA would exercise its discretion to assume jurisdiction in this matter, as envisaged in S147 (2) (a) of the LRA.

2.5 In brief my decision was based, on the following factors:

a) Section 138(1) of the LRA requires the commissioner to resolve the dispute quickly and fairly. It is apparent that the applicant would suffer prejudice - both in financial and emotional terms - if this matter were not resolved expeditiously.

b) The respondent failed to raise the jurisdictional point either in previous CCMA processes or in terms of the Commission's rules. The matter was referred to the CCMA on 13 December 2007, affording the respondent ample opportunity to raise the issue. By failing to raise this point on the previous arbitration date - at which a postponement was sought and granted - the parties tacitly submitted to the jurisdiction of the CCMA.

## 3. ISSUES TO BE DECIDED

3.1 Whether the applicant resigned or was constructively dismissed

3.2 To what relief, if any, the applicant is entitled.

## 4. SURVEY OF EVIDENCE AND ARGUMENT

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#### 4.1 The applicant's evidence

4.2 Ms Thandiwe Radebe gave the following testimony under oath.

4.3 After the incident [the alleged rape] occurred on 27 May 2007 she returned to work on or around 10 June 2007, after having been hospitalised and suffering from stress and depression.

4.4 The alleged perpetrator "K" was a chief superintendent in the internal affairs (IA) department. She had worked with him previously and they had shared an office at IA. When she returned to work he was out on bail and performing his usual duties at the office. She was surprised by this, as per procedures, he should have been suspended.

4.5 She reported to her supervisor, Chief Superintendent Wayne Minaar, who said "OK, you are back". She asked why K was not suspended and he replied that K earned a lot of money and it would cost the JMPD too much to have him stay at home.

4.6 The applicant stated that K was very popular at work and her colleagues shunned her and accused her of lying. She had no one to talk to. On one occasion she went to the canteen where an Inspector Gumbi stopped her and said: "Sies, you think you are better – don't act like a virgin. Do you think you will be promoted if you open a rape case?" Inspector Gumbi is far more senior than her, but she replied that she laid a charge because she had a right to protect herself and her body. She phoned Mr Minaar to report the incident as she wanted him to reprimand Inspector Gumbi, but to her knowledge he took no action. Instead Mr Minaar told her to go home and avoid everybody. The applicant went to the SAPS and opened a case of harassment and victimisation against Inspector Gumbi. She could not report it to IA because K is in charge of that department. The director of HR, Ms Maribe, phoned her to say the SAPS had been around to investigate the Gumbi matter and asked her why. She explained, and in reply Ms Maribe just said "keep well" and hung up the phone. No steps were taken against Inspector Gumbi and when she asked Mr Minaar he said "stay at home. Leave these people".

4.7 On 5 October 2007 she was at work when K arrived in a convoy of 5 marked JMPD vehicles full of JMPD officials, hooting and with sirens blaring. Everyone in the vehicles was shouting and cheering. K told her that she thought she would finish him but that he had won the rape case. Senior officials had supported him by going to court with him, she had no idea what had happened so she went to court and was told that the case had been withdrawn as the state prosecutor had declined to prosecute the matter. She then referred the matter to the Portfolio Committee of Community Safety in the Gauteng Legislature and to the Independent Complaints Directorate, as she did not trust her employer to deal with it. She also approached the National Prosecuting Authority and People Opposing Woman Abuse. In December 2007 the NPA decided to proceed with the rape case against K.

4.8 The JMPD at no stage informed her of any hearing against K, nor did they keep her informed about the investigation. The first time she was offered counselling was after the conciliation at the CCMA on 16 January 2008. Mr Minaar told her to expect a call from a counsellor but this never happened.

4.9 On 18 December 2007 she wrote to her attorney at the time, informing him that she had not been invited to an employee recognition party and she had been informed the Chief of Police would not approve her presence, that her office equipment had been removed "for safekeeping", that the electricity at her home [staff accommodation] had been switched off for 10 days and that threatening messages and vulgar drawings were written on her office door on one occasion, and on her office wall on another. The drawing was of female genitalia and the message read: "hey jou poes ek sal jou weer naai."

4.10 She immediately informed Mr Minaar who told her to go home and avoid it. When she got to work the next day the message and drawing had been painted over. The same thing happened when she reported the second message.

4.11 On 13 November 2007 her attorney wrote to Mr Minaar raising issues including her ostracisation and harassment by colleagues, the lack of action against K and an incident in which a large number of uniformed JMPD officers arrived at her home at night with sirens and lights flashing, to take her vehicle away. The applicant stated this was the most excruciating pain she had ever felt, as she was treated like a criminal by her colleagues and humiliated in front of her neighbours. As stand-off ensued when she refused to hand over her keys – after phoning Mr Minaar – and she and her children were forced to stand on the street until midnight. She felt like she wanted to hibernate until it was all over.

4.12 She had been a public relations officer who organised all events for the department, and wrote articles for newsletters and pamphlets. When she returned to work in June 2007 she was no longer given any duties to do and was not informed or invited about events such as those for Women's Month. When she queried this Mr Minaar said it was the instruction of the JMPD Chief of Police that she stay at home. She felt redundant and told him she needed some work to do, as she was getting sick and depressed. She asked him many times if she could be transferred, starting in around July or August 2007. She had no response to this request until the CCMA conciliation on 16 January 2008. On 23 January 2008 he wrote a letter of recommendation for her to be transferred to the City of Joburg's department of Transportation, but when she phoned the department they said they knew nothing about it. She went back to Mr Minaar and the next day he wrote her a letter dated 22 January 2008, notifying her of her transfer to the transport department within the JMPD. She went with Mr Minaar to report to David Tembe, the director of Operations. It was obvious she was not welcome in his department as he told her he didn't want any trouble or problems and that she should not speak to the media. Chief Superintendent Mike Smith – who had done the investigation into her complaint against K – was also transferred to the department at the same time and she was to report to him. But he never once gave her any duties to do or a desk or space to sit or an access card. She was not given a job description. Mr Tembe was on leave so she went to the deputy director and told him she felt redundant without any duties for the past 9 months. He replied that she should not dictate to him.

4.13 Her car was taken away and she needed a form from the fleet office to be signed by Mike Smith to get a new one. She phoned him and he shouted at her and gave her a letter saying she could not drive or be allocated a car as she had been involved in an accident and that a case of "conduct unbecoming" was being investigated against her (!!!) She had no idea what this was about as the only damage to her vehicle was caused when members of IA came to remove it from her house at night and pushed it because they didn't have the keys. She was very hurt and couldn't take it any more, so she immediately drafted her resignation letter, dated 28 February 2008. In it she stated her reasons were the failure of the JMPD to take any action against K, as well as being ostracised and demoted and that her working conditions were intolerable. She handed the letter to Mr Tembe who said it wasn't a resignation and refused to accept it. She then gave it to Mr Smith who read it and said "oh, you're going." She replied it was because he said she was trouble, didn't give her duties and didn't follow up with her about the investigation. He told her that he reports to the Chief of Police, not to her.

4.14 In March 2008 she complied with the routine clearance document in terms of which uniforms, weapons etc are returned. There were no outstanding disciplinary cases pending against her according to the document. Mr Tembe and Mr Mncube signed it but she didn't have an exit interview. It was also signed by Mr Kubeka, the deputy director of HR. He told her he felt caught in the middle as he had a long history with K, who had approached him and said "when days are dark, friends are few". She replied that if that was the case she would rather go and sell tomatoes at the roadside than be near that person.

4.15 The HR officer Dan Matunzi sent her to see Director Mbuli. She thought Ms Mbuli would be sympathetic as she was an older woman but she was very impatient and it was clear she already

knew all the details. Ms Mbuli wouldn't let her speak about how she felt but cut her short and asked what she wanted. She replied that she wanted to be continue with her duties but be in a place where she would not have to see K. Ms Mbuli told her she should withdraw her resignation and she would do something and ensure she was placed within 7 days, so she agreed to bring in her retraction letter the next day. She did so the next day on 19 March 2008 and brought the letter in on a memory stick and two copies were printed for her. The applicant said it appears that the version in the respondent's bundle has several paragraphs missing from it, but that the copy in the applicant's bundle contains the full text. Thereafter she never heard another thing about her transfer. She would go to Ms Mbuli's office daily or phone her, but she kept saying she was too busy and the applicant shouldn't waste her money on phone calls or transport. Ms Mbuli said she would ensure that the applicant got her salary for April. At the end of April she got a cheque instead of the money being paid into her bank account as usual. This was her last payment from the respondent.

4.16 Then in May she received a notice to attend a disciplinary hearing regarding an altercation with her neighbour after their children had fought, which had happened outside the workplace more than two years previously. She then went to the police station and got a document proving that the matter had been withdrawn. The fact that old issues were being dug up to be used against her led to her being hospitalised again for depression.

4.17 On 25 April 2008 she wrote to Ms Mbuli saying she was reinstating her resignation as the promise to transfer her hadn't materialised, she was not even given a reply and it appeared old issues were being used to get at her.

4.18 The respondent did not attend the conciliation hearing on 17 April 2008.

4.19 Under cross-examination the applicant said she was appointed as a traffic officer and continued to be one until she resigned. She said the only reason she retracted her resignation was at the advice of Ms Mbuli who promised to transfer her if she did so.

4.20 She said she first reported the incident with K to her employer on 4 July 2007. She had been hospitalised from 28 May to 9 June after the incident. She told Mr Minaar about it when he came to visit her in hospital and also spoke to Mike Smith when he came to take a statement from her.

#### 4.21 **RULING**

*At this point the respondent's representative attempted to introduce into evidence a new bundle of documents which did not form part of the jointly agreed bundles and which the applicant's counsel had not had sight of and therefore had not referred to when leading the applicant in her evidence-in-chief. The applicant's counsel objected, and I upheld the objection on the grounds that I had afforded the parties an extended period at the outset of the arbitration to exchange bundles and peruse such documents, and that this would defeat the object of exchanging bundles as well as prejudicing the applicant.*

4.22 The applicant said Mr Smith told her he had been appointed to investigate the matter but apart from taking a statement it seemed no other investigation was done. She was never told David Tembe was investigating. She said she could not comment on whether the respondent first heard of the matter on the TV news.

4.23 She said she wanted to be transferred so she wouldn't have to see K at work, and spoke to Mr Minaar about this. Even though the incident happened in 2007 she was only transferred in January 2008, after the conciliation. She was transferred to the Operations/Transportation department. K works in IA which falls under Operations and he reports to Director Tembe. IA deals with everyone in every department.

4.24 The applicant said she believed she had been demoted because as a law enforcement officer if she was forced to stay at home, she could not perform her duties.

She was told she could not, for example, stop anyone and give them a fine. She said she was basically turned into a secretary.

4.25 In her final resignation letter on 25 April 2008 she pointed out that Ms Mbuli had not come back to her as undertaken and that the conditions attached to the withdrawal of her initial resignation had not been met. She said she had no knowledge of any discussion between Ms Mbuli and Ms Maribe. She denied jumping the gun by writing her resignation letter on 25 April, and said it was prompted by the charge sheet which was delivered to her house. She felt it was further harassment, while she was attempting to negotiate with Ms Mbuli. When she received it she went to the police station on 29 April to check on the status of the complaint and found it was withdrawn. The charge sheet was not dated or signed and was put under her door. She said she could not remember the exact date she received the charge sheet. She also wrote to Ms Mbuli about it but did not get a reply.

4.26 She said that while Mr Minaar's notification of transfer letter said he consulted with her, he did not do so in the previous 9 months, but only after the conciliation.

4.27 The applicant said the reason her car was taken away at night was to harass her. No reason was given, the officers simply asked for the keys. She denied ever having an accident in the car and said when she got the letter relieving her from driving, it was the final straw. She immediately sat down and drafted her resignation. It was dated 17 November 2007 but the first time she saw it was when she was transferred and applied for a vehicle. The letter was signed by the Chief of Police but she could not approach him as he said he was "the God of the department" and she could not approach him directly. She had written to him saying she had been raped by a senior officer and he did not respond, so she did not see that he would respond to a letter about a car.

4.28 She took her clearance form to Mr Kubeka in HR and when he asked she replied she was resigning because she would rather sell tomatoes on the side of the street than work in a department that does not take her complaints seriously. She denied telling him she had another job.

4.29 The applicant said that when she had queries and Maxi couldn't help her, she would go to Christo who was often rude or put her down in front of her staff. She told them in her February month-end report that she was struggling to cope and then straight after that they gave her more work. Mr Kubeka sent her to Mr Matunzi, who read her letter and said she should speak to someone more senior, so he sent her to Ms Mbuli who is deputy director of HR for the City, not the JMPD.

4.30 She said even after being transferred to Transport she was never given any work to do. She lodged a verbal complaint about this with Deputy Director Herzer. She said she was unaware of a collective agreement which says all grievances must be lodged in writing but said her attorneys had made a written complaint to Mr Minaar on 13 November 2007. Mr Minaar told her he had forwarded it to Mr Ngcobo, the chief of police. She also made numerous verbal complaints to Mr Minaar.

4.31 The applicant said the assault took place on 27 May 2007 and the next day Mr Minaar came to visit her in hospital and she reported it to him. He said when she was released the matter would be investigated formally and a report made. Mr Minaar sent Mr Smith to see her, as she was to prepare to go to IA, where K was working.

4.32 She said she wrote a letter to her attorneys detailing her problems at work but did not copy it to the JMPD as she had complained many times before and Mr Minaar was aware of all the issues listed in that letter. He signed for receipt of her lawyer's letter, so she saw no point in writing more grievances.

4.33. The applicant said she had tried to follow all the appropriate channels, which is why she wrote to Jacqueline Mofokeng, the chairperson of the Gauteng legislature portfolio committee on community safety. Ms Mofokeng's reply was copied to Mr Ngcobo directly.

4.34 She said when she resigned she approached Mr Smith and told him he had failed to give her the outcome of the investigation or his report. She does not believe he actually investigated. He replied that the report was for the chief and that he does not have to report to her. She said she did not ask the chief for a copy of the report. She is not aware of what action was taken against K or that he was transferred to another department. She did feel it necessary to escalate the complaint but did not know where to go or who to ask. Mr Smith told her she should go to IA and lay a complaint, as he is not a police station.

4.35 She agreed that there is an employee assistance programme and that employees can initiate counselling but she did not do so.

4.36 She said she wanted a transfer because she loved her job and it was not her intention to leave the JMPD. After 9 months of trying to be in the department she resigned as a last resort.

4.37 She said she confirmed her resignation on 25 April 2008 because she had not been transferred as promised and instead got a notification to attend a hearing. She said she was trying to deal with being raped and had no strength to deal with allegations and fabrications. It was the final straw. She believed the letter was from IA because she knew the people whose names were listed as prosecutor and presiding officer. She said she had never prepared or delivered such documents when she worked at IA. She was not sure of the procedure for signing such notices to confirm service. She believed it was valid which is why she resigned. She mentioned the charge sheet as a factor in her final resignation but no one came to her and said "those charges aren't valid."

After her resignation she got a phone call from IA to ask why she hadn't attended the hearing on 14 May 2008. She told them she was going through a hard time and they should leave her alone. She does not know if IA was aware of her resignation.

4.38 She resigned because of the incident on 27 May 2007 and then having to go to work and put up with all the things that happened at the employer's premises. No action was taken against K and she was given no work to do. All these things added up and were on her head and on her shoulders. She said the fact that Mr Smith took a statement didn't mean an investigation was done.

4.39 She said her vehicle was dented at the rear in 2006 when she was transporting big umbrellas for a function. She was charged for failing to report the incident timeously. It happened on a Friday and she reported it on the Monday. Her hearing was chaired by Mr Smith. Another dent was caused to the front of the vehicle when it was removed by JMPD officers from her home at night. She wrote a statement about the removal of that vehicle to Mr Minaar and the fleet department.

4.40 On the night they removed her car the children came to tell her that her car was being stolen. Officers were trying to push it out the garage even though it was locked. She went outside and they said they had come for the car. She refused to give them the keys and phoned Mr Minaar who spoke to the officers on her cell phone. He told her not to give them the keys and she asked him to come to her house. He arrived at around 23h00 or midnight and she gave him the keys. Paint had been scraped off the car and was left on the garage wall. A dented car should go to the fleet office. She does not know where they took that car as she did not see it after that night.

4.41 She said she told Mr Minaar and Mr Maribe that she had laid a charge with the SAPS against Inspector Gumbi. She couldn't remember the dates, but the SAPS did come to arrest Gumbi. She didn't put this in writing but told Mr Minaar about it face to face.

4.42 She agreed that she had served 30 days notice but said that was not difficult for her as she came to work each day, signed the register and went home just as she had done for the preceding

9 months. She didn't have a desk or an access card. She did raise this verbally with Mr Smith as a senior manager, who should have done something about it.

4.43 In the period after she withdrew her resignation she was just staying at home. By the time she reconfirmed her resignation she had still not been informed of any transfer.

4.44 She said she did not inform the media about the assault, but the police officers at the station knew she was a JMPD member. Perhaps they alerted the media that she had opened a case against a senior officer.

4.45 NOTE: At the close of the applicant's case at 14h45 the matter was adjourned to allow the respondent to telephone his witnesses to attend the arbitration. These witnesses had been present in the morning but had left the CCMA premises, on the understanding that they would be available within 10 minutes of being called. By 15h15 the witnesses could still not be contacted. At 15h30 the matter was stood down as the respondent could not present his case without them. It was agreed the matter would commence punctually the following morning.

## 5. The respondent's evidence

5.1 Mr Mike Smith gave the following testimony under oath.

5.2 In her final assignment as a JMPD officer, the applicant reported to him. He had also been appointed by the Chief of Police, Mr Ncgobo, to investigate after she alleged she had been raped by Chief Superintendent "K". There had been stories on eTV and in the newspapers about the matter which was generating negative publicity, so he was appointed by the chief to investigate, as the applicant had not lodged a formal complaint with the department. He was appointed as investigator on 2 July 2007 and the next day he phoned K and the applicant to ask for reports on the incident. He met separately with each party on 4 July 2007. The applicant had her union representative with her and she wrote a statement in his presence. K gave him a statement and told him that he had been arrested as there was a pending criminal matter. The witness said he then asked the investigating officer for copies of the docket, which he was given the next day (!) and he was also allowed to see the medical report. K then gave him names of several witnesses who had seen him at the applicant's house on the day in question. All of these witnesses provided him with statements which supported K's version of events. K had also provided witnesses who stated that he and the applicant had a previous sexual relationship dating back to 2003. K had said he had gone to the applicant's flat to collect a video camera and digital camera, but when he arrived she told him she didn't have the video camera. K's version was that he then said he would have to testify against her at a hearing, and in response she had made sexual advances to him and they had consensual sex. His vehicle's onboard computer showed K was at the applicant's house for 39 minutes. He then went to a choir competition in Pretoria.

5.3 In contrast the applicant's version was that K had tried to strangle her with her gown, that there was a scuffle and that a table had been sifted and a pot plant broken. The applicant said she had washed and then gone to report the matter at the Brixton police station. Her vehicle computer showed she did so 30 minutes after K left. In that time she sent K a text message sms asking "why did you rape me?"

5.4 K had told him that when he received the text message, his twin brother phoned the applicant to ask why she had sent it. She was at the police station at the time and Inspector Chidi answered and told him that K was to be charged with rape. K then phoned and Inspector de Beer from IA who went to fetch him. De Beer then phoned the SAPS to ask if K could hand himself over the next morning. Constable Langa told them the media were already aware of the case and they should come immediately. K was detained overnight and released on bail the next morning.

5.5 The applicant made a statement and then was taken to the district surgeon. According to the witness, the medical report showed possible penetration but no physical injuries. She was then taken to the sexual offences unit where she made another statement and then back to Brixton where she made yet another statement. He said the applicant's reports of what she was wearing at the time were contradicted by the statements from the SAPS. During his investigation, he also made an inspection *in loco* at the applicant's flat. She said K had raped her twice and demonstrated how it happened. He did not find her version credible as she said she was seated in a chair at the time. On the basis of his investigation he came to the conclusion that the sex was consensual. He thought she might have



possible motives against K, such as that he had formerly testified against her at a hearing and that she was worried about the missing camera.

5.6 When the matter went to court, the prosecutor declined to prosecute. The applicant pursued the matter with the NPA and the ICD and the case was put back on the roll.

5.7 On 18 July 2007 he met with the chief of police and handed him his report. The chief was to decide whether to take action against K. He believes there was a period during the investigation when K was transferred to Langlaagte testing station. He did not report back to the applicant about the investigation as he had been appointed by the chief of police

5.8 Thereafter the applicant SMSed him to say she was being intimidated and there was a conspiracy against her. He replied that she should report it to the SAPS and IA. The applicant said she couldn't do so, as K worked in IA.

5.9 In January or February 2008 he came back from leave and found the applicant had been transferred to the transport department where he was working. She did not have to have any dealings with K there, as it was 10kms away from the other office. It was a small department, with just one other member, an officer Mamabolo. Their duties were to engage with stakeholders in the taxi industry and road freight industry. Only Mamabolo had a patrol vehicle. In February he learned that the applicant had been forbidden from driving because of unreported damage to a vehicle. This was not the same incident which led to the hearing he had chaired. He went to his boss, David Tembe who told him that the applicant was suspended from driving, and that charges were pending against her.

5.10 He denied that the applicant was not given any work to do in his department. He said he was unaware that she would report to work, sign in and go home. If this was the case, Mamabolo would have told him and the applicant would be charged with being AWOL. He said it was not true that the applicant did not have an access card, and that she had never raised it.

5.11 When the applicant resigned at the end of February he asked her why and she said she had another job.

5.12 Under cross-examination the witness said his job as investigator was to determine whether there was a rape or not. He said K was a chief superintendent and therefore above the applicant in the rank structure.

5.13 He said he presides over disciplinary hearings and is aware of the Code of Good Practice on Sexual Harassment. He agreed that the code requires alleged victims to be treated with sensitivity. He said he is aware of the notion of *quid pro quo* harassment. He said it was not in his terms of reference to decide whether to discipline K. He said K was not suspended after the incident but was transferred. He was not sure when this happened.

5.14 He agreed that the applicant was obviously expecting that a hearing would take place. He said, it was appropriate for him not to give feedback to her but only to the chief. He said the applicant had not been traumatised on the occasions he had seen her during the investigation, but that the arbitration was the first time she appeared to be traumatised. He conceded that he was not qualified to diagnose post-traumatic stress. He said he was not aware that the applicant had been hospitalised after the alleged rape or that Mr Minaar had told her that the matter was being investigated.

5.15 He said he was not sure if it was normal practice for him to have been shown the docket and medical report. He said he "asked Constable Langa nicely" and he had cleared it with his superiors.

5.16 In his investigation he found that from the way the applicant was seated, it would have been impossible for K to rape her. He agreed that he had said that K would have had to be very well-endowed to do so, but denied that he found the matter to be a joke.

5.17 He said K remains an employee and has not been suspended, despite the ongoing criminal case because he remains innocent until proven guilty. He said that after the NPA decide to reopen the rape case the chief had not asked him to reopen the investigation. He is not aware of any other investigation. The reason he was appointed to investigate was probably because it wouldn't have much credibility if IA was asked to appoint one of their own.

5.18 He denied that the applicant did not have an access card and had to knock on his window to be let in.

5.19 He said the letter suspending the applicant from driving was dated November 2007 but he does not know why it had not been given to her prior to January or February 2007. He agreed that the letter spoke of an investigation but had no personal knowledge of such investigation. He said it was usual practice for the chief of police to sign such letters.

5.20 The witness denied K was popular in the JMPD, saying that "when you work in IA you have no friends". He said he was not aware that senior officers had gone to court in official vehicles and had celebrated the dropping of charges against the applicant.

5.21 He agreed that he had asked Mr Tembe why the applicant was transferred to his department and that he had reservations the reasons for this. He denied saying that Mr Minaar was shifting the trouble to him.

5.22 He said he had never seen the notice to attend a hearing which the applicant had received. The people named in the document are staff members: Mr van Heerden is a permanent presiding officer, and Mr Ncube is a prosecutor at IA. He assumes the reference number on the charge sheet was generated by IA.

5.23 The witness said that Mr Minaar had not discussed the letter sent by the applicant's lawyer with him. He said he was never informed of slogans or pictures being painted on her office wall. If such a matter was reported it should have been investigated. If this happened to one of his staff he would have taken steps and reported back to them.

5.25 Under cross-examination the witness said the applicant had agreed to come in and collect work each day while she was on leave. She couldn't take leave in December because she applied too late. She couldn't take leave in January because she had to train her staff. She couldn't take leave in February or April because of client issues. The applicant lost 8 days accrued leave because she couldn't take her leave in February but was to take it in April.

5.26 She said she was also penalised for not meeting the 48 hour turnaround time.

5.27 They asked HR to investigate the issue of payment of the incentive and then decided to remove it.

5.28 Mr Wayne Minaar was called as a witness and gave the following testimony under oath.

5.29 The applicant worked for him in the PR section. He became aware of the rape allegations when an SAPS officer phoned him about it – he was away at a conference at the time. Thereafter there were media reports about the case. A few months later he approached the applicant, who was studying transport, about a transfer. She was very happy about this.

5.30 He first saw the applicant about five days after the incident, at work. He offered her counselling but she didn't want to go the EAP. To help her recover he tried to give her time to study and prevent her being exposed to stress or trauma. She continued doing radio traffic reports. He also told her that she would no longer be required to do memorial services as the JMPD chaplain would do these.

5.31 He had nothing to do with the investigation, which was done by Mr Smith. The outcome was made known to the department, which was that K was not guilty of the alleged misconduct (but not to A).

5.32 He said the applicant never complained to him about being harassed or victimised by her colleagues. He denied ever having seen the letter written by the applicant to her attorney, complaining about being left out of functions and about the drawings on her office walls and doors. He denied saying that the chief would not want to see her at the employee recognition party.

5.33 He said the applicant had phoned him one night saying that JMPD officers were at her home trying to take her car away. He told her to cooperate as they were doing their duty. She refused and insisted he come to her house. She agreed to hand the keys over to him. The car was removed from her because it was damaged.

5.34 He denied that he stopped giving her work but said he understood the stress and trauma she was experiencing as everyone in the JMPD knew about the case. He told her to keep herself busy with the radio traffic reports, and she was happy with this. She continued with this until she was transferred because transport was her area of study.

5.35 He agreed that he had signed for receipt of the letter from the applicant's attorney on 13 November 2007. It was clear that the lawyer wanted to know what they had done to deal with K. He discussed it with the chief and they agreed they wouldn't engage with employees' attorneys, as employees are represented by unions. They wrote to the lawyer, saying they wouldn't be able to respond to them. The attorney's letter is not a proper grievance, which should be done through IA, and all employees know this. He said the applicant did not lodge any other formal grievance but she was unhappy about the memorial services.

5.36 Under cross-examination the witness said he couldn't remember telling the applicant at the hospital that K would probably be suspended, or that he would not be allowed to wear a uniform until the case was concluded. He said K was transferred to Langiaagte but could not recall how long he was there.

5.36 He said he saw that the applicant's car was damaged when he got to her house. There were 4 cars and 4 officers present and they were trying to remove the car. He phoned K to ask why the car was being removed and he replied that it was because the car had been damaged. He said it was not unusual to remove a car at night, as the JMPD works 24 hours a day. He agreed that K gave the order for the car to be removed but that he was simply following procedure. He denied telling the applicant it was revenge by K.

5.37 He said he was sympathetic to the applicant, and is always sympathetic to females such as when they have to be arrested, unless they are drunk.

5.38 The witness said that no hearing was held because the investigating officer found there were no grounds.

5.39 He conceded it was possible that there was an incident when vulgar drawings were painted on the applicant's door and wall. He said he didn't see these drawings but that it is possible he asked for them to be painted over or cleaned up. He said he did not launch an investigation. He said he could not remember the incident.

5.40 He agreed that the workplace could become difficult for a woman who made such allegations. He said he couldn't recall the applicant complaining to him about Inspector Gumbi's conduct. He said it was possible the applicant had complained to him about her electricity being switched off, and that he had said she should not worry but just spend time at home. She was not the only one affected by power outages in the complex. She needed time to heal and forget her bad experience. She had been exposed in the media and discussed at work; he could imagine how some people would have spoken about her. He agreed that the applicant asked him for more tasks but there was nothing else for her to do, as she had been appointed to do memorial services and traffic reports.

5.41 He couldn't recall if the applicant asked him why K wasn't suspended, when she returned to work. He agreed that K is a high ranking official. He denied promising to respond to the applicant's attorney within 2 or 3 days after receiving their letter.

5.42 He could not remember when the findings of the investigation were made known. He could not recall if this was communicated to the applicant.

5.43 He said he could not remember the day that criminal charges against K were dropped but said that it would not be appropriate for officers in uniform to behave in the way the applicant described.

5.44 The witness said he could not remember if the applicant referred an unfair discrimination dispute to the CCMA. She was no longer working in his department at the time the CCMA certificate was issued on 16 January 2008. He then conceded she was in his department until the letter of transfer was written on 23 January 2008 but said the letter was written only after she had been transferred. A letter confirming her transfer was written on 22 January. He said he wasn't aware of the referral of the dispute to conciliation, as he was busy during the festive season and couldn't focus on one officer.

He agreed that the transfer happened after the conciliation and said it was possible he had told her then that someone would phone her about counselling.

5.45 He agreed that he had removed the umbrellas from her office they had used for exhibitions that they had worked on together.

5.46 The witness said it was possible the applicant had asked for a transfer in about June 2007.

5.47 He said he may have seen the letter dated November 2007 in which she was suspended from driving, but couldn't recall. He couldn't recall Mr Tembe telling the applicant that he didn't want trouble.

5.48 He said IA has the power to suspend people from driving official vehicles, but that this decision is usually taken by the presiding officer at a hearing to decide if the employee should be allowed to drive a car. He said K gave the instruction for the applicant's car to be removed from her home.

5.49 He said grievances should be completed on a standardised document, filled in by the employee and endorsed by a senior officer in the IA department. Employees should be represented by the unions and investigations done by representatives of IA. He said Mr Smith was not in IA but was a senior officer. He said a lawyer's letter could not be a grievance.

#### 5.50 RULING

*The respondent's representative at this point applied for a postponement on the grounds that he had been unable to secure the attendance of Ms Mbuli, who was a witness for the JMPD. The applicant's counsel opposed the postponement due to the cost implications of travelling again from Cape Town to Johannesburg. After applying my mind to the matter I declined to grant the postponement.*

*My reasons included the fact that I had cautioned respondent's representative at the previous sitting of the arbitration in August, that if Ms Mbuli was reluctant to testify at the arbitration, he would need to subpoena her. It is clearly the responsibility of each party to secure the attendance of their witnesses, and I did not feel it would be equitable if the matter were delayed because they had failed to do so.*

*I had also agreed with the Convening Senior Commissioner that he would arrange for the security officer to stay late and lock up the hearing rooms if the matter were to continue past 17h00, as the respondent only had one remaining witness, Mr Kubeka.*

5.51 Mr Sipho Kubeka was called as a witness and gave the following testimony under oath.

5.52 He is a deputy director of Human Resources in the JMPD. He signed the clearance certificate which all employees who exit their employment must fill in. It is also signed by other departments.

5.53 He had a long discussion with the applicant about her resignation before he signed it. He was surprised at her resignation and asked for reasons. She replied that she had been unfairly treated by the management of the JMPD and he said she should look for alternatives to resigning. She said she had exhausted all the avenues to be followed. He told her it was not good to resign without having another job as she has children and a car to pay off. She said she was sure she would have another job 2 or 3 months down the line. Only then did he sign the document.

5.54 Both he and his colleague, Ms Maribe felt the applicant shouldn't resign, so Ms Maribe wrote an email on 24 April 2008 to see if the Chief of Police would agree to release the applicant to another job. The chief agreed and he was then informed by Ms Mbuli that she had met the applicant and agreed on another position.

5.55 Under cross-examination the witness said that Ms Maribe had a meeting with the chief on 23 April, where he agreed to release the applicant to another job. He is not sure if there were any conditions attached.

5.56 He said the applicant did not tell him that she already had a new job but that she was sure she would get one in 2 or 3 months. He couldn't recall her saying she'd rather sell tomatoes than work at the JMPD.

5.57 He said he was surprised to see her resigning. He was aware of the allegations against K. he agreed that K had told him "when days are dark, friends are few". This was because he had not been dealing with K on the issue, as it was being handled by Labour Relations.

5.58 The witness said that IA signed off on the clearance document which showed that there were no outstanding cases against the applicant.

## 6. ANALYSIS OF EVIDENCE AND ARGUMENT

6.1 In terms of s186 (1)(e) "dismissal" means that an employee terminated a contract of employment with or without notice because the employer made continued employment intolerable for the employee.

### 6.2 Substantive fairness

According to section 192 of the Labour Relations Act, in any proceedings concerning any dismissal, the onus is on the employee to prove that the dismissal occurred. Once the existence of the dismissal is established, the onus is on the employer to prove that it was fair.

6.3 The test of "intolerability" is an objective one, in that the applicant must prove that the act of resignation was a final resort when all other alternatives had been exhausted, and that it was the employer who made such continued employment intolerable.

6.4 I believe the applicant has succeeded in proving that her continued employment by the employer had become intolerable due to the accretion of a number of factors and incidents over an extended period of time.

6.5 While the alleged rape occurred on 27 May 2007, the first internal investigation into the matter began only when Mr Smith was appointed by the chief of police on 2 July 2007 - apparently in response to negative publicity, according to two of the respondent's witnesses. Mr Smith finalised his report, which found there was no rape, and handed it to Mr Ncgobo on 18 July 2007. In the almost two months between this event and the alleged rape, K was not suspended despite having been arrested on a serious criminal charge. Two of the respondent's witnesses averred that he had been transferred to the Langlaagte Testing station but were not sure of the dates of this transfer or how long he spent there. The purpose of suspension pending an enquiry is not to presuppose guilt but to allow for the investigation to proceed without interference from any party.

6.6 On the basis of Mr Smith's report it seems the Chief of Police decided not to charge K with misconduct. The applicant does not appear to have been notified of this decision at any stage, nor was she kept apprised of the progress or status of the investigation. Yet Mr Minaar testified that the department was notified of the findings of the report. It seems peculiar that the complainant should be the only party not notified of the decision not to charge K, particularly when it is clear from the witnesses' testimony that she fully expected a hearing to be convened. In this specific regard it is clear the applicant was not treated with dignity, as set out in section 6(1) (a) of the Code of Good Practice on Handling Sexual Harassment Cases, nor was the matter dealt with sensitively and expeditiously in terms of section 6(3) (a). I also found it worrying that Mr Smith - who did not present evidence that he has any specialised detection skills relating to sexual violence - took it upon himself to make a finding that no rape occurred, a conclusion which can only be properly reached in a criminal court.

6.7 An unfortunate series of events then followed, ranging from the applicant filing harassment charges against an Inspector Gumbi for verbally abusing her, to having obscene words and pictures painted on her office wall and door, to seeing uniformed officers in marked cars celebrate the rape charges against K being dropped. The incident in which 20 JMPD officers in uniform arrived at the applicant's home at night and insisted on removing her vehicle on allegations that it was dented, smacks rather of overkill and supports the applicant's view that it was an attempt to intimidate her. It is difficult to see why it should be necessary for a large contingent of officers to be deployed to remove a vehicle from a single mother, at home with her children, living in staff accommodation, who posed no physical threat and no flight risk. This view is strengthened by the chronology of events, which shows that this occurred after she had referred the decision not to prosecute in her rape case to the Gauteng Legislature. It was the testimony of witnesses on both sides that the instruction to remove the car was given by K, which raises immediate concerns about a conflict of interest and a possible abuse of position. If indeed the alleged damage to the vehicle was a legitimate concern for the JMPD, it would be proper for them to notify the applicant of these allegations and remove the vehicle from her control in a procedural fashion (and for K to recuse himself from any involvement in this regard). Mr Minaar testified that the usual procedure was for the presiding officer in a hearing to make a determination on whether an employee should be allowed to drive a JMPD vehicle.

6.8 The applicant is adamant that she kept Mr Minaar apprised of all such incidents, both verbally and by means of a lawyer's letter and that he took no action to protect her against victimisation and retaliation. I did not find Mr Minaar to be a credible witness, as he contradicted himself on basic points such as whether he first saw the applicant after the

incident when she returned to work or when she was in hospital. He also claimed not to remember the incidents when obscene messages were scrawled on her walls and doors but said that it was possible that he had given the order to have them painted over. It is clear that he took no further action to report or investigate what amounts to abuse of a junior member of his staff as well as being a blatant act of sexual harassment as set out in section 4 (1)(c) of the code of good practice.

6.9 It is clear that the applicant did not fill out the pro-forma grievance document and submit it for endorsement by the Internal Affairs department which, as Mr Minaar testified, was the correct procedure. It is also clear that such a course of action was not practicable as K was a Chief Superintendent in IA, and also because the applicant had already outlined her grievance in the statement taken by Mr Smith. The fact that she had her attorneys write to Mr Minaar is an indication of her frustration at the inaction over the alleged rape, and it is difficult to see how she could have had faith in their willingness to deal with more minor issues such as being ostracised by her colleagues.

6.10 The applicant testified that she became increasingly depressed as she was not given any work to do. Mr Minaar confirmed this had happened but said it was because a chaplain had been appointed, and that she should focus on radio traffic reports. It is clear that this is not full time job and this caused her to feel further marginalised. The same situation seems to have occurred when she was transferred to Mr Smith's department. While he testified that she went out each day with an officer Mamabolo, he appears to have no idea of what her deliverables were. The version that she worked to engage taxi and freight stakeholders was also not put to the applicant. The issue of the applicant being suspended from driving pending charge of "conduct unbecoming" also bears some examination: the letter from the Chief of Police is dated November 2007, but it was never served on the applicant and the first she (and Messrs Minaar and Smith) knew of it seems to be in February 2008. Despite the charges having been pending for a long period, such hearing was never convened and when the applicant completed her clearance document, IA confirmed there were no cases pending against her. This raises the question of what the motivation was for the applicant being suspended from driving. Her version is that it was another attempt to make her employment intolerable, and on balance of probably this seems the most likely explanation.

6.11 The applicant testified that she did not wish to leave the JMPD and this is borne out by the fact that she accepted Ms Mbuli's proposal that she withdraw her resignation on condition that she be transferred again. It is also clear that despite a concerted effort on the applicant's part, Ms Mbuli did not give her feedback or take the action as promised.

6.12 The final precipitating factor appears to be the charge sheet notifying her to attend a hearing where she would face a charge of misconduct. The respondent stated categorically that this was not an official notice as it was not signed or delivered in the proper way. Nonetheless, it is clear that the applicant perceived this as a further form of harassment. She clearly believed it was a legitimate hearing notification, particularly as it listed the names of a prosecutor and presiding officer and bore an IA reference number.

## 7. AWARD

7.1 I find that the applicant, Ms Thandiwe Radebe, was constructively dismissed.

7.2 I therefore order the respondent, Johannesburg Metropolitan Police Department, to pay the applicant, Ms Radebe, compensation equivalent to 12 months salary based on her remuneration at the time of dismissal, calculated as follows:

$$R8\ 700.00 \times 12 = R104\ 400.00$$

7.3 I believe this amount is just and equitable given the applicant's length of service and the circumstances of her constructive dismissal.

7.4 The above amount must be paid within 14 days of the date of this award.

Signed and dated at Johannesburg on 30 October 2008



Commissioner: Nicole Johnston  
Region: Gauteng



# Fax Send Report

Date/Time : 26-NOV-2008 17:15 WED  
 Fax Number :  
 Fax Name : RESCISSION 086139226  
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## ARBITRATION AWARD

Case Number: GA200702 04  
 Case Name: Nicole Johnson  
 Date of Award: 16 Nov 2008

In the ARBITRATION Between

*er*  
 Intervenor Rights

South African Metro Police

Union Applicant's representative:

Applicant's address: 24 - A Bartlett Street  
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Martinsburg  
2002

Telephone: 011 758 2153  
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# Fax Send Report

Date/Time : 26-NOV-2008 17:10 WED  
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 Fax Name : RESCISSION 086139226  
 Model Name : SCX-6x45 Series

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## ARBITRATION AWARD

Case Number: GA/862/08  
 Complainant: Isaac Johnston  
 Date of Award: 12 Nov 2008

In the ARBITRATION between:

Isaac Johnston

and

South African Metro Police

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