



Prof. Thidziambi Phendla Tshivhase

Complainant

and

**Prof. Peter Mbatl (Vice Chancellor University of
Venda for Science and Technology)**

First Respondent

**Council of the University of Venda for Science
and Technology**

Second Respondent

University of Venda for Science and Technology

Third Respondent

Witness statement /Re: Prof Phendla and related matters

1. Introduction

I, the undersigned:

Marissa Van Niekerk

do hereby state that:

- 1 I am an adult female with identity number 8108220008083. I am the Acting Chief Executive Officer of the Commission for Gender Equality, a constitutional body established in terms of section 187 of the Constitution of the Republic of South Africa, 1996.

The facts contained herein fall within my personal knowledge and are true and correct, unless where otherwise stated or where the contrary appears from the context.

This statement is in relation to the complaint lodged with the Commission for Gender Equality (Commission) by Professor Phendla against Professor Mbatl. The statement will comprehensively detail all investigative processes embarked by the Commission from date of receipt of the complaint until finalisation of the complaint.

2. Professor Phendla lodges a complaint with the Commission

- 2.1 On the 11th of May 2012, the Commission received a complaint from the Complainant alleging that she was sexually harassed on several occasions and subsequently dismissed by the first respondent.

- 2.2 The Complainant alleged that the sexual harassment took place between 2008 and 2010, in the official residence of the First Respondent and in different venues where the University Management held its meetings.
- 2.3 The Complainant further alleged the following:
- (i) She met the first respondent for the first time at the University of Venda in 2008 when he was introduced as the new Vice Chancellor of the University of Venda to all University staff members by the Registrar of the University Mr. KC Nemadzivhanani.
 - (ii) They continued meeting each other at the University Management meetings on several occasions. In one of the meetings that took place at Khoroni in 2008, he asked her cell phone numbers and she gave it to him.
 - (iii) Few days later he called her and requested her to visit him in his official residence; she refused to visit him saying that she feared visiting him alone. He continued calling her, offering to have coffee or tea with her at his official residence.
 - (iv) The Complainant alleged that she ended up running out of the excuses and on the other hand feared denting her official working relationship with him.
 - (v) The first respondent called Complainant again on the 4th May 2008, inviting her to his official residence and she agreed to visit him on the 5th May 2008 at 18h00. The agreement was that they will just sit in his house, drink coffee and talk about University of Venda.
 - (vi) On her arrival, the first respondent offered her dinner which she accepted, and they talked about general issues.

- (vii) The first respondent then informed the Complainant that he is interested on her, she then said to him that she is married and scared of him because he is a very big man.
- (viii) He then told her not to be worried about other issues; she insisted that she was not willing to be involved in a romantic relationship with him.
- (ix) She alleged that while they were still talking, he then grabbed her, push her down and had sexual intercourse with her.
- (x) After the sexual intercourse he apologized to her and said he could not contain himself because she (the Complainant) is too sexy. He then took her home.
- (xi) He started calling and inviting her almost every time, but when she arrived in his place, he would demand sex.
- (xii) she further alleged that when she refused to have sex with him, he would give her cold shoulder, refusing to approve or sign her requisitions or other official documents, something that she found to be unfair. For example: there was a time when she was supposed to attend a "Conference on Women in Politics" he refused to approve her attendance.
- (xiii) In December 2010 she started to be uncooperative and refused to have sexual intercourse with him, the Complainant alleged that, from that time their working relationship started deteriorating completely.
- (xiv) On the 7th February 2011 the first respondent called the complainant to his office and informed her that he intends to institute a disciplinary action against her based of the recommendation of the forensic audit report compiled by **Deloitte & Touche**. She said she was shocked and confused with these developments.

- (xv) On the 15th of February 2011, she was officially given a copy of charges levelled against her for misconduct and subsequently suspended on the 12 April 2011.
- (xvi) On the 14th September 2011 she lodged a sexual harassment complaint against him to the Council.
- (xvii) The case was referred to the Mediator. After the mediation process collapse the Mediator recommended *inter alia* that “clause 5.2 of the University Policy on Sexual Harassment should kick- in”. [sic]
- (xviii) The disciplinary hearing against her was conducted in August 2011. She attended the Disciplinary Hearing without being given a copy of the report that forms the basis of her charges of misconduct.
- (xix) She was found guilty and subsequently dismissed from her position as a Professor and a Dean of School of Education at the University on the 1st November 2011.

3. Steps taken by the Commission

- 3.1 After receiving the complaint, the Commission initiated its investigations into the allegations. The Commission had a consultation with the Complainant to get more details on the complaint.
- 3.2 After having received all the necessary details from the complaint, the Commission wrote allegations letters to the First and Second Respondents and dated the 14th and 18th of June 2012, respectively.
- 3.3 The Commission's officials also visited the University and interviewed some of the employees of the University who were allegedly in possession of the information that could

assist in the investigation; the first Respondent was also interviewed.

- 3.4 On the 18th of June 2012, the first respondent submitted written response to the Commission; however, the Council failed to respond to the Commission's letters and did not submit its response to the allegations levelled against it by the Complainant.
- 3.5 Both parties were given reasonable time/ opportunity to submit their responses to the Complainant allegations as determined by the CGE's Complaints Handling Manual. The first and the Second Respondents duly submitted their responses, with the First Respondent denying having a sexual relationship with the complainant.
- 3.6 In her complaint, the complainant made serious allegations against the Council regarding the way her sexual harassment complaint was handled by it.
- 3.7 The CGE proceeded with its investigations of the allegations, relying on the information provided by the complainant and first respondent as required by Law.
- 3.8 The CGE concluded its investigations and after that an investigative report with findings and recommendations was issued on the 4th of December 2014. The report found that:
 - 3.8.1 the failure of Univen's Council and Management to take further steps as per Univen's Policy on Sexual Harassment after the collapse of the mediation process was a direct contravention of Univen's Policy on Sexual Harassment.
 - 3.8.2 the decision by Univen to institute disciplinary proceedings against Professor Phendla based on

Deloitte's report, which she was denied access to, amounted to quid pro quo harassment; and

3.8.3 clauses 3.7 and 3.8 of Univen's Staff Disciplinary Procedure Manual was not fully nor correctly implemented by Univen.

- 3.9 The report was furnished to the first respondent and the University of Venda as the interested parties. The CGE found that the allegations advanced by Professor Phendla were convincing on the grounds of the denial made by Professor Mbatlana and his failure to explain certain incidents.
- 3.10 In October 2012, Professor Phendla referred a dispute of unfair dismissal to the CCMA. The dispute was later withdrawn at the instance of Professor Phendla on or about the 31st of October 2012.
- 3.11 On or about the 6th of June 2013, Professor Phendla referred the dispute to the Labour Court as automatic unfair dismissal. At this stage she was represented by Len Dekker Attorneys on a *pro bono* basis.

Review of the Commission's investigative report

- 3.12 On the 21st of January 2015, Bowman Gilfillan Attorneys addressed a letter to the CGE under the instruction of the first respondent raising various issues on the report. The CGE responded on the 29th of January 2015.
- 3.13 Subsequent to that the first and third respondents lodged an application in the High Court of South Africa, Gauteng Local Division under case number 2015/07394 to review and set-aside the report issued by the CGE.

3.14 The application for the review was heard on the 30th of May 2016. A settlement agreement was reached between the parties and parts of the reports were excised. It was agreed that the Commission would excise certain portions of its Investigative Report. Univen was directed to call for a report as contemplated in paragraph 5.2.1 of its Policy on Sexual Harassment² within 30 days of the court order. Univen duly referred the matter in terms of paragraph 5.2.1 of its Policy on Sexual Harassment as directed by the Court. Mr Modise issued a report ("Modise's Second Report"). Univen refused to provide the Commission and Professor Phendla with a copy of Modise's Second Report.

Proceedings for an order to compel by the Commission

- 3.15 Due to the persistent refusal by Univen to provide the Commission and Professor Phendla with a copy of Modise's Second Report, on 19 October 2016 the Commission instituted legal proceedings against Univen and Mr Modise requesting the court to direct Univen and Mr Modise to furnish the Commission and Professor Phendla with a copy of Modise's Second Report.
- 3.16 After initially opposing the application, on 23 November 2016, Univen ultimately furnished the Commission and Professor Phendla with a copy of Modise's Second Report.
- 3.17 The Commission withdrew its application and Univen tendered the Commission's costs in the amount of R34 045.31. (Thirty Four thousand forty five rand and thirty one cents).

3.18 In Modise's Second Report, he found- amongst other things, that Professor Phendla and Professor Mbatl had a consensual sexual relationship.

Application by professor Mbatl for the reviewing and setting aside of modise's reports

3.19 On 11 January 2017, Professor Mbatl instituted legal proceedings in the High Court of South Africa, Thohoyandou for the review and setting aside of:-

- Modise's Second Report in its entirety; and
- paragraph 5 of Modise's First Report dated 03 November 2011, wherein he stated,; "... Be that as it may, having had the opportunity to consult broadly with Mbatl and Phendla I do have a view on the legitimacy or otherwise of Phendla's complaint. ..."

3.20 The Commission took a decision not to oppose the application. On 09 February 2017, the court granted the order sought by Professor Mbatl. Consequently, Modise's Second Report was set aside in its entirety and paragraph 5 of Modise's First Report was excised.

3.21 The High Court granted the order in favour of Professor Mbatl and states , *inter alia*: -

1. *That the whole mediators report of Lavery Modise, the first respondent, dated 24 June 2016 is reviewed and set aside as having no legal force and/ or null and void ab initio.*

2. That the following words: “be that as it may, having had the opportunity to consult broadly with Mbatia and Phendla I do have a view on the legitimacy or otherwise of Phendla’ s complaint.” as appearing in paragraph 5 of page 3 of the mediation report of Lavery Modise, first respondent dated 3 November 2011 are hereby removed and excised as being of no legal force and/ or null and void ab initio.

The Court Order therefore had the practical effect that the report by Mr Modise dated 24 June 2016 is set aside in its entirety and paragraph 5 of the report dated 3 November 2011 is excised and the remainder of the report remains valid.

- 3.22 Univen has not followed its sexual harassment procedure beyond Clause 5.2.1 which requires that they call for a report from the mediator, where mediation has been attempted and failed. Clause 5.2.2 and 5.2.3 of the procedure require that subsequent to the failure of the mediation and the receipt of a report from the mediator, Univen must request the first respondent to respond in writing to the allegations made against him and if there is a prima facie case of misconduct, the Director of Human Resources should assist the relevant Head of Department to draft a charge sheet in terms of the Disciplinary Procedure Manual. This process has not been followed. Consequently, no independent determination has been made on the legitimacy or otherwise of Professor Phendla’ s complaint.
- 3.23 Effectively, sub-clause 5.2.3. leaves it to the Human Resources Director to decide if there is a prima facie case before the matter can proceed further to a full enquiry. Cases of sexual harassment usually involve a complex factual matrix (such as was in Professor

Phendla' s case) and leaving it to the Human Resources Director to establish whether there is a prima facie case without a proper ventilation of issues could result in unfair treatment of victims of sexual harassment.

3.24 The CGE, through the advice of its legal advisors, Advocate Mokoena SC and the team from Madikizela Nyati Attorneys, acknowledged the fact that the report that was prepared by Mr Lavery Modise ("Mr Modise") dated 24 June 2016 was set aside in its entirety and paragraph 5 of Mr Modise's report dated 03 November 2011 was excised by as indicated in in 8.17 *supra*. As a result of Mr Modise's report being set aside the matter remains with no finding regarding the allegations proffered by Professor Thidziambi Tshivhase-Phendla ("Professor Phendla"). The CGE through its legal representatives wrote to the first respondent's attorneys on what the University of Venda has done in terms of its Policy on Sexual Harassment with regards to Professor Phendla' s allegations.

3.25 On the 6th of June 2013, Professor Phendla refers the dispute to the Labour Court as an automatic unfair dismissal. A letter was sent to Professor Phendla by Bowmans Attorneys representing Univen dated the 8th of December 2016. The University proposed the following terms: -

- The University to pay Professor Phendla an amount of R 1 300 000.00;
- The University will change the reasons for dismissal from misconduct to mutual separation and will give Professor Phendla a positive reference;
- Professor Phendla to withdraw the Labour Court matter and any other applications instituted against the University;

- Professor Phendla to refrain from making comments to the media and third parties about the matter; and
- Professor Phendla keeps the settlement proposal confidential.

3.26 On the 15th of December 2016, the CGE was advised by Len Dekker Attorneys that Professor Phendla rejected the offer and counter-proposes that in addition to the proposal by the University, it should also tender a public apology to her.

3.27 A meeting was held on the 3rd of February 2017, with Professor Phendla, CGE legal team, Madikizela Nyati attorneys and Len Dekker Attorneys to discuss the settlement offer with Professor Phendla.. The settlement in the view of the parties involved was reasonable; Prof Phendla agreed to accept the offer.

3.28 On the 7th of February 2017, Len Dekker Attorneys wrote a letter to Bowmans Attorneys accepting the original settlement proposal. After that Len Dekker Attorneys received a correspondence from Bowmans advising that the settlement proposal is not acceptable [Probably because the offer was no longer open for acceptance].

Labour Court judgement

3.29 The Commission received a copy of the Labour Court judgment on 16 October 2017. The judgment delivered by Moshwana J makes findings based on facts and evidence as it had an opportunity to hear both Professor Phendla and Professor Mbatii's testimony and that of their respective witnesses. The Court found that there had been no sexual harassment.

Judge Moshwana had the following to say regarding Professor Phendla's allegations:- "... *It may well be so that the applicant and*

Professor Mbatia had a consensual relationship, which like many other relationships hit the rough patch...."

Whilst it remains a fact that Professor Phendla's complaint of sexual harassment has not been investigated to finality at the instance of the Commission due to all the intervening circumstances highlighted above, the Labour Court's judgment effectively made a pronouncement (albeit in obiter) on the very issue of the existence or otherwise of the alleged sexual harassment.

3.30 The Labour Court matter was set down from the 31st of July to the 4th of August 2017 and oral arguments on the 18th of September 2017.

3.31 The judgment in this matter was delivered on the 12th of October 2017. Order was as follows: -

- The dismissal of the applicant was not automatically unfair.
- The dismissal of the applicant was both substantively and procedurally fair.
- The applicant was to pay the costs.

Subsequent to the judgment of the Labour Court, Professor Phendla applied for leave to appeal the judgment delivered on the 12th of October 2017. That petition was also not successful. The effect of all this is that the Labour Court judgment stands.

Meeting between the Commission and Professor Phendla

3.31. On the 17th of July 2019, the Commission had a consultation with the complainant, HOD Legal and the Chief Executive Officer at

the Braamfontein office. The CGE highlighted the fact that the Labour court order still stands.

- 3.32. The CGE liaised with Prof Phendla to check whether she is proceeding with the Constitutional Court challenge or not. She did however, indicated that she would want to proceed and as a result the CGE contacted the Legal Practice Council to assist in terms of providing Pro bono attorneys and motivated to move with the application in the Constitutional court.

Compliance with the recommendations made by the Commission and implementation thereof

- (i) The Minister of High Education should be notified of the investigation through a high-level delegation meeting by the Commission and the findings should be shared. The Minister should be made aware of the Corruption charges against the Complainant, the disciplinary hearing process and the outcome, the sexual harassment complaint, and the conduct of the Council.

The Commission notified the Minister of Higher Education about the report, findings and its recommendations by delivering the first report to the Minister.

- (ii) The Minister may take any decision deemed appropriate to resolve this matter, considering the interest of both the complainant and the University.

Compliance: The Minister of Higher Education did not adequately address this recommendation. This is however being addressed through request for further engagements with

the Minister in relation to work undertaken by the CGE in relation to institutions of higher education.

- (iii) The University of Venda to comply with Clause 5.2 of the Sexual Harassment policy.

Compliance: The Labour Court Judgment and appeal Court made it difficult for the Commission to follow through this recommendation, as it basically nullified the issue of sexual harassment, but cited that a relationship went sour.

The Commission did however follow through on the process and requested the University to comply with Clause 5.2, which was done.

The Commission further assisted Univen to amend their sexual harassment policy to bring it in line with the Code of Good Practice of 2005.

- (iv) The Commission to monitor the case referred to the Labour Court.

Compliance: The Commission followed up on this recommendation and continued to monitor and even got Advocate Mokoena SC and Madikizela Nyati Attorneys inclusive of the CGE legal team to assist Professor Phendla. This is reflective of how the CGE worked to assist Professor Phendla. It is prudent to mention that the CGE in all labour matters was monitoring as per its constitutional mandate.

- (v) University of Venda to form part of the investigative hearings on Gender Transformation in tertiary institutions as per the Annual Performance Plan of the Commission.

Compliance: The university did participate in the gender transformation hearings and issues relating to sexual harassment were raised vigorously by the CGE.

The CGE further undertook to conduct a sexual harassment workshop and such took place. The attendees being management and students. The objective of the workshop was to sensitize management and students about the prevalence of sexual harassment and the need to report cases of sexual harassment. The CGE has also made inputs into the Gender Studies Curriculum for the University of Venda.

Further to the above the university's 2015 sexual harassment policy is due for a review on September 2020, the CGE will make inputs to the reviewed policy. This is to ensure that there is compliance with all the applicable legal prescripts.

4 Conclusion

I conclude that for the reasons outlined in this statement, the Commission has discharged its mandate, to the extent that the complaint of sexual harassment lodged by Professor Thidziambi Tshivhase-Phendla ("Professor Phendla") against Professor Peter Amunga Mbatlana ("Professor Mbatlana") had been pronounced upon by the Labour Court.



Marissa Van Niekerk
Acting Chief Executive Officer
Commission for Gender Equality

25/08/2020