REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 235/14

In the matter between:

DEPARTMENT OF HEALTH (WESTERN CAPE) **Applicant**

and

DENOSA obo E J CLOETE **First Respondent**

PHSDSBC **Second Respondent**

L MARTIN N.O. **Third Respondent**

Heard: 17 February 2016

Delivered: 25 February 2016

Summary: Review – sexual harassment – award not so unreasonable as to fail *Sidumo* test – application dismissed.

JUDGMENT

STEENKAMP J

Introduction

[1] This is an application to have an arbitration award by the third respondent, Leslie Martin (a panellist of the Public Health and Social Development Sectoral Bargaining Council[1]), reviewed and set aside. It arises from the dismissal of an employee, Mr Elton John Cloete[2], after it was found that he had committed four acts of misconduct. Cloete is a nurse. The most serious allegation – and the one on which much of the argument at arbitration and in this hearing focused – is that he had sexually molested a patient, Ms Celeste Nerina Dimphana. The arbitrator found her evidence improbable and not credible. As a result, he found on a balance of probabilities that Cloete had not committed the misconduct and reinstated him. The employer, the Department of Health (Western Cape) seeks to have the award reviewed and set aside. It initially asked for the dispute to be remitted to the Bargaining Council. In a belated amendment to the notice of motion it asked, in the alternative, that this Court substitutes the award with one that the dismissal was fair.

[2] The state attorney delivered the review application late, as well as the supplementary affidavit in terms of rule 7A(6) and the replying affidavit. It sought condonation. DENOSA and Cloete withdrew their initial opposition to condonation. At the outset of the hearing, I granted condonation. It appeared to me to be in the interests of justice that the review application be heard on its merits.

Background facts

[3] Cloete was employed by the Department as an enrolled nurse from January 2009 until his dismissal on 24 September 2013 on charges of, inter alia, sexual harassment and administering unauthorised injections to a patient, Ms C.N. Dimphana, ('the complainant') under his care and whilst on duty at Karl Bremer Hospital.

[1] The second respondent (PHSSBC).

[2] The first respondent, represented by his trade union, DENOSA. He is a nurse. There was no evidence whether he is also a singer or a pianist.

[4] The complainant had been admitted to Karl Bremer Hospital on 30 May 2013 and diagnosed with a spontaneous pneumothorax - in lay person's terms, a collapsed lung. At the time of the alleged incidents on 4 and 5 June 2013, she was 49 years old.

[5] At a disciplinary hearing on 24 July 2013, the employee was charged with four counts of misconduct. They are summarised as follows:

5.1 It is alleged that the employee during the period of 4 June 2013 to 5 June 2013 administered two unauthorized injections to the complainant, contrary to her prescription chart.

5.2 It is alleged that the employee on 5 June 2013 made a false entry into the complainant's prescription chart to the effect that he had administered one injection of Clexane 40mg to her at 10:00 whereas his shift ended at 07:00.

5.3 It is alleged that on 4 June 2013 to 5 June 2013, the employee made unwelcome physical contact of a sexual nature with the complainant in that he pulled down her panties and placed his hand on her pubic area.

5.4 It is alleged that during the course of his shift on 5 June 2013, the employee, without any prescription and explanations to the complainant, gave her un-prescribed cream which he required her to rub on her vaginal area whilst being present and which he also applied to her vaginal area.

[6] The employee noted an internal appeal against his dismissal. It was unsuccessful. His dismissal was confirmed on 30 August 2013.

[7] Following arbitration proceedings which commenced on 29 October 2013, the arbitrator found the employee's dismissal to have been substantively unfair and ordered his retrospective reinstatement by 3 February 2014. This determination is the subject of the review application.

<u>The arbitration</u>

[8] At the arbitration, the Department led the evidence of the complainant, Ms Dimphana; and that of a registered nurse, Ms Norma Vivienne Kalamdien.

Cloete testified on his own behalf. He was represented by a trade union official, Ms F Behardien. The Department was represented by Adv F Rodriguez.

[9] It is common cause that Ms Dimphana had to be given an injection of Clexane, an anti-coagulant, at 10:00 every day. It is also common cause that Cloete was on duty from 19:00 on 4 June until 07:00 on 5 June 2013.

[10] Dimphana testified that Cloete gave her an injection at about 20:00 on 4 June. She assumed it was Clexane. He lowered her panties slightly, put the heel of his hand on the pubic area, and administered the injection on her stomach, between the navel and the pelvic area. (There was nothing untoward about the place where he injected her; that is where it was usually done. However, she felt "slightly uncomfortable" about where he placed his hand). Later that night, she said, he visited her again and administered another injection in the same manner.

[11] Early in the morning of 5 June Ms Dimphana went to wash. She did not have any clean panties and did not put any on. She only wore her hospital gown. She covered herself with her bedclothes. After 06:00 Cloete came around to give her medication and indicated that he needed to give her another injection. She pulled the bedcover down and pulled her gown up, thus exposing her genitals. She testified that, after he had administered the injection, Cloete took out a sachet of gel – it appeared to her to be K-Y jelly – and told her to apply it between her legs. She was unsure what to do and rubbed it on her thighs. He told it to apply it to her vagina. She did so on the outside of her vagina. Cloete then squirted some of the gel on his fingers and applied it to her labia. She felt uncomfortable but did not say so.

[12] After Cloete had left, the complainant saw Nurse Kalamdien. She told her what had happened. Kalamdien wrote down the complainant's version of events but did not check if any syringes or gel were missing or whether any gloves were either missing or had been disposed of. (The complainant said that Cloete was wearing gloves when he applied the gel).

[13] Kalamdien testified that she called Cloete to her office. After initially denying all knowledge of the alleged incidents, he confirmed that he had

mistakenly administered the Clexane injection at 06:25 instead of 10:00. He noted the time and the injection on the prescription chart. He denied giving Dimphana any other injections. He said that she had complained of a dry skin and he had given her some aqueous cream to rub on her stomach.

[14] Cloete testified that he had administered the Clexane injection at 06:25 as that was the time indicated on the prescription chart when it was first administered when the patient was admitted, and all the medicines were on the trolley at the time. When he realised his mistake, he told Kalamdien. He confirmed his version relating to the aqueous cream as relayed by Kalamdien. He denied that he had used gloves or that he had given the complainant any other injections. When he gave her the Clexane injection, only the part of her skin where he had to administer it – i.e. below the navel and above the pubic area – was exposed. At a pre-arbitration meeting he rejected an offer by the Department to change his dismissal to a resignation as he wished to clear his name.

The award

[15] The arbitrator accepted at the outset that, if the complainant's version was to be accepted, it had "sexual connotations". But he was faced with two contradictory versions relating to the allegations of two injections during the night of 4 June; whether the complainant had exposed herself on the morning of 5 June; and the gel incident.

[16] The arbitrator accepted that Cloete had administered the Clexane injection at the wrong time in the morning of 5 June. On the other allegations, he preferred Cloete's version over that of the complainant. He took the following into account:

16.1 When he did administer the injection at the wrong time, Cloete recorded and admitted it. It is unlikely that he would have administered two other injections without noting it.

16.2 The complainant alleged that she was already uncomfortable with Cloete's conduct; why would she willingly expose herself to him when he came to give her the injection on the morning of 5 June?

16.3 Cloete's version that only the area needed to be exposed for the injection was so exposed, is more plausible than that of the complainant that she exposed the full genital area.

16.4 If Cloete had administered three Clexane injections – an anti-coagulant – it is likely that serious consequences to the patient would have manifested.

16.5 Ms Dimphana's evidence was uncorroborated.

16.6 Kalamdien did not check anything to corroborate the complainant's version.

[17] The arbitrator thus preferred Cloete's version of events over those of the complainant and Kalamdien. He thus found, on a balance of probabilities, that Cloete had not committed the misconduct and that his dismissal was unfair. He ordered the Department to reinstate him.

Review grounds

[18] Ms *Seria* raised the following review grounds on behalf of the Department:

18.1 The arbitrator failed to arrive at a decision properly based on the evidence before him and, as such, he committed misconduct in relation to his duties.

18.2 The award has no logical relation to the evidence presented to the arbitrator. He therefore failed to apply his mind properly to the matter and to the material facts and therefore committed misconduct in relation to his duties.

18.3 The arbitrator incorrectly applied the cautionary rule with regard to the single witness testimony of the complainant, whose evidence according to him was uncorroborated.

18.4 The arbitrator upheld the version of the employee even though his legal representative failed to put his version to the complainant.

18.5 The arbitrator failed to consider the provisions of the Provincial Government Western Cape's ('PGWC') Sexual Harassment Policy ('the Sexual Harassment Policy' or 'the Policy' depending on the context). The Policy is a transversal policy which finds application in

the various departments of the PGWC including the applicant. The omission to consider the provisions of the Policy was a gross irregularity. The arbitrator, accordingly, failed to properly assess the facts in relation to the charge of sexual harassment.

18.6 The arbitrator failed to properly apply his mind to material aspects of the evidence and drew incorrect conclusions thereby affecting the outcome of the award

Evaluation / Analysis

[19] In considering these review grounds, I will once again traverse the current state of the law regarding reviews[3]; and then apply it to the facts.

THE APPLICABLE LEGAL PRINCIPLES

[20] As Mr *Leslie* pointed out in his argument, the Department now (ostensibly) asks the Court to review the factual findings of the arbitrator, which were based on the inherent probabilities of the competing versions and the credibility of the witnesses. As he persuasively argued, reviews of this nature will succeed only in the narrowest of circumstances. The Court must guard against an impermissible attempt to "appeal" against the arbitrator's findings of fact. It is perhaps necessary to again set out the distinction between appeals and reviews in some detail.

The Sidumo test: reasonableness

[21] One of the primary purposes of the Labour Relations Act [4] is to promote "the effective resolution of labour disputes".[5] To this end, the scheme of LRA contemplates a relatively informal dispute resolution process through conciliation or arbitration under the auspices of the Commission for Conciliation, Mediation and Arbitration ("the CCMA") or, where applicable, a bargaining council with jurisdiction.

[3] For this somewhat tedious exercise, I am indebted to both counsel for their comprehensive heads of argument. I have borrowed from their summary of the case law as it has evolved.

[4] Act 66 of 1995 ("the LRA").

[5] LRA s 1(d)(iv).

[22] A CCMA commissioner tasked with arbitrating a labour dispute is empowered to "conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities". [6]

[23] There is no appeal against a CCMA or bargaining council arbitration award. The LRA accords the Labour Court limited oversight over arbitration awards, in the form of a review. The review grounds set out in section 145 are limited in scope, and mirror the grounds contained in section 33(1) of the Arbitration Act[7].

[24] In *Sidumo*[8] the majority held that:

24.1 Arbitrations conducted under the auspices of the CCMA constituted administrative action.[9]

24.2 The LRA was specialised labour legislation that effectively trumped the general legislation governing administrative action[10]. The grounds of review applicable to CCMA arbitrations were therefore limited to those set out in section 145(2) of the LRA. The review grounds set out in PAJA were not applicable. [11]

24.3 However, the grounds in section 145 had to be read in conformity with the Constitution[12] and, in particular, the right to administrative action that is lawful, reasonable and procedurally fair. The effect of this was that the review grounds in section 145 had to be suffused with the standard of reasonableness. [13]

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[6] LRA s 138(1).

[7] Act 42 of 1965.

[8] *Sidumo v Rustenburg Platinum Mines Ltd* 2008 (2) SA 24 (CC).

[9] Para [88].

[10] i.e. the Promotion of Administrative Justice Act 3 of 2000 ("PAJA").

[11] Para [104].

[12] Constitution of the Republic of South Africa Act 108 of 1996.

[13] *Sidumo* para [106]; Constitution s 33(1).

24.4 The reasonableness standard was that set out in *Bato Star*[14] . The court's task was limited to ensuring that awards "fall within the bounds of reasonableness". To this end, an award would be subject to review only where the decision was not one that a reasonable decision maker could reach.

[25] The court was alive to the fact that review for reasonableness did pose a threat to the distinction between review and appeal, since it necessarily entailed some consideration of the "merits" of the award. However, the court endorsed Professor Hoexter's analysis that the danger lies, not in careful scrutiny, but in "judicial overzealousness in setting aside administrative decisions that do not coincide with the judge's own opinions." [15]

[26] In this regard, the caution sounded by the Labour Appeal Court in *Carephone* [16] remains apposite:

> "As long as the Judge determining this issue is aware that he or she enters the merits not in order to substitute his or her opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order."

[27] As Professor Hoexter[17] has stated:

> "Judges will be less likely to usurp administrative powers if they remember that review for reasonableness does not demand perfection (or what the court regards as perfection), but ought indeed to give scope for legitimate diversity. The important thing, then, is that judges should not use the opportunity of scrutiny to prefer their own views as to the correctness of the decision."

[28] In *Bestel* [18]the LAC emphasised that:

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[14] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (4) SA 490 (CC) paras 42-48; *Sidumo* paras 107 and 110.

[15] *Sidumo* para [109], citing Hoexter *Administrative Law in South Africa* (Juta, Cape Town 2007) pp 106 and 316-318. See Hoexter (2ed, Juta 2012) at 352.

[16] *Carephone (Pty) Ltd v Marcus NO* 1999 (3) SA 304 (LAC).

[17] Hoexter 2ed at 352.

[18] *Bestel v Astral Operations Ltd* [2011] 2 BLLR 129 (LAC) 133 A-B.

> "The ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected."

[29] The stringency of the *Sidumo* test was highlighted in *Thebe Healthcare v NBC, Road Freight Industry*[19]:

> "As the famous saying goes, 'Quot homines, tot sententiae'. Opinions, even among reasonable men and women, may differ and, at times, quite markedly. If the test in a challenge to an administrative decision is whether the decision was one that no reasonable decision maker could reach, it will, in practice, be very difficult to succeed."

[30] An applicant for review faces an even more onerous task where, as in the present case, it seeks to impugn credibility findings of the original decision-maker. The reluctance of appellate courts to upset the findings of a trial judge is based on the fact that the latter has advantages in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial. This reluctance applies both to credibility findings and findings based on probabilities.[20] These principles apply with equal force where a litigant challenges an arbitration award on review.

[31] The approach of arbitrators when dealing with contradictory versions – and that of a reviewing court in assessing the resultant award – was recently succinctly and eloquently discussed in *Solidarity obo Van Zyl v KPMG Services (Pty) Ltd.*[21] The traditional approach is that applicable to courts of law and set out in the well-known case of *Stellenbosch Farmers'*

[19] 2009 (3) SA 187 (W) 201D-E.

[20] *Malan v Law Society, Northern Provinces* 2009 (1) SA 216 (SCA) 221 I-J; *R v Dhlumayo* 1948 (2) SA 677 (A) 705-6: "The trial judge has advantages – which the appellate court cannot have – in seeing and hearing the witnesses and in being steeped in the atmosphere of the trial."

[21] (2014) 35 *ILJ* 1656 (LC).

Winery Group Ltd v Martell et cie.[22] But the court in *KPMG* called for a more nuanced approach in arbitrations, citing *Transnet Ltd v Gouws*:[23]

> "11. The proper approach of a court (or arbitrator) which is called upon to determine which of two mutually destructive versions should be accepted was related in the judgment of *Stellenbosch Farmers Winery Group Limited and other v Martell et Cie* …
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> 12. That judgment emphasises the interrelationship of credibility of the witnesses, their reliability and the probabilities. However, it is be borne in mind that the ultimate decision which a court, or an arbitrator (as the case may be) must determine is whether on the issue in question the party which bears the onus has discharged it. In cases concerning the fairness of dismissals under the LRA, the party which bears the onus of justifying the dismissal is the employer. The question which the arbitrator must ask in discharging its duties as such is where the probabilities lie. If the probabilities favour the employer, it may well discharge the onus of proving the dismissal was fair. If they do not, the employer may fail.
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> 13. The importance of credibility has sometimes been over-estimated. An assessment of evidence on the basis of credibility only, without regard for the underlying probabilities, is inappropriate – indeed, it constitutes a misdirection. (See *Medscheme Holdings (Pty) Limited v Bhamjee* 2005 (5) SA 339 (SCA) at 345 A)
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> 14. The proper approach was expressed by Eksteen J in *National Employers General Insurance Co. Limited v Jagers* 1984 (4) SA 437 (E) at 440 D-H, which is to the following effect:
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> 'It seems to me, with respect, that in any civil case, as in any criminal case, the onus ordinarily only be discharged with adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case and where there are two mutually destructive stories, he can only succeed if he satisfies the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and fails to be rejected. In

[22] 2003 (1) SA 11 (SCA) para 5. See also *Sasol Mining (Pty) Ltd v Ngqeleni NO* (2011) 32 *ILJ* 723 (LC).

[23] Unreported, Labour Court (JR 206/09), 25 April 2012 [per Redding AJ].

deciding whether the evidence is true or not, the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the court will accept his version as being probably true. If, however, the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false.'

…

18. The second respondent did not pertinently address the question of the credibility of the three witnesses he mentions – Mr Van Rensburg, the first respondent, and the first respondent's wife, Mrs Gouws. It is this failure which draws the criticism of the applicant in these proceedings. It has been submitted that there ought to have been a discrete enquiry by the second respondent into the question of each witness's credibility.

19. As I have indicated above, the important question which had to be tackled by the arbitrator was whether the employer, on a preponderance of probability, had established that the first respondent had received cash bribes from Nu-Liner. The key question for him was which version was more probable. He was able to reach a decision on the probabilities without having to have regard to the credibility of each witness. It is quite possible for evidence to be assessed purely on its probability, assuming for the purposes of that assessment that the witnesses who testified were credible. It is not necessary for a judicial officer or arbitrator to find a witness not to be credible in order to find that his evidence is not probable. In this regard, there is an informative and authoritative article by the former judge of the Appellate Division, H.C. Nicholas "'Credibility of Witnesses'" (1985) 102 SALJ 32.

20. In my view, the failure by the arbitrator to make a pertinent finding on credibility does not demonstrate that he failed to understand the proper approach to the assessment of conflicting evidence. The arbitrator appears clearly to me to have understood that his primary task was to resolve the conflicting versions by having regard to the balance of probability. He applied the correct judicial technique in this regard. Accordingly, his failure

> to address the credibility of each witness and comment thereon is not a fatal flaw which would entitle the applicant to review of his award." (Emphasis as in *KPMG*).

[32] This approach to credibility findings by an arbitrator seems to me to be consistent with that adopted in the case cited by Ms *Seria*, i.e. *National Union of Mineworkers v CCMA*[24]:

> "This court should not readily interfere with credibility findings made by CCMA commissioners, and should do so only if the evidence on the record before the court shows that the credibility findings of the commissioner are entirely at odds with or completely out of kilter with the probabilities and all the evidence actually on the record and considered as a whole."

[33] It bears emphasis that "errors of fact by an arbitrator, particularly in respect of facts that he or she is empowered to determine (such as findings on the probabilities), will not usually give rise to a valid ground of review"[25]; and "the fact that an arbitrator commits a process related irregularity is not in itself a sufficient ground for interference by the reviewing court."[26]

[34] The test in *Sidumo* is result-based. The enquiry is whether the conclusion reached by the arbitrator is reasonable in relation to all the material that served before him. The reviewing court is not constrained by the reasons relied upon by the arbitrator for his conclusions.[27]

[35] A useful summary of the *Sidumo* test for reasonableness was set out by Anton Myburgh in a 2011 *Industrial Law Journal* article:[28]

• "the Sidumo test is a result based test, which tests the reasonableness of the result/outcome of the award;

[24] (2013) 34 *ILJ* 945 (LC) para 37.

[25] *Solidarity obo Van Zyl v KPMG Services (Pty) Ltd* (2014) 35 *ILJ* 1656 (LC) para [15]; *Dumani v Nair* 2013 (2) SA 274 (SCA) paras [29] – [33].

[26] *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA* (2014) 35 *ILJ* 943 (LAC) para [17].

[27] *Fidelity Cash Management Service v CCMA* [2008] 3 BLLR 197 (LAC) paras 102-3; *Edcon Ltd v Pillemer NO* [2010] 1 BLLR 1 (SCA) para 23.

[28] A Myburgh SC "Reviewing the review test: Recent judgments and developments" (2011) 32 *ILJ* 1497.

• in order to assail an award on the basis of the Sidumo test, the applicant must thus assail not only the commissioner's reasons, but also the result of the award;

• the reasonableness of the result of the award stands to be determined on all the material that was before the commissioner (with the result that the award can be sustained for reasons not considered by the commissioner);

• the focus is on whether the result of the award falls within a range of reasonable outcomes, as opposed to whether it was correct (this so as to maintain the distinction between a review and an appeal); and

• seen in the context of the above, the fact that a commissioner … commits an error in the process of his reasoning will not result in the Sidumo test being met, unless the result of the award is incapable of justification on all the material before the commissioner."

[36] In the years following *Sidumo*, in a series of judgments the Labour Court and the LAC applied a more generous standard of review, under the nomenclature of "latent irregularity" or "dialectical unreasonableness". This resulted in some commentators questioning whether the Sidumo test was in decline. The development of this more relaxed standard of review was, however, extinguished by the SCA in *Herholdt*.[29] The SCA confirmed the reasonableness test posited by the majority in *Sidumo*, emphasising that the distinction between review and appeal should be preserved. The SCA highlighted the stringency of the Sidumo test, which was a deliberate choice of the lawmaker:[30]

> "Those responsible for drafting the LRA deliberately chose arbitration on a relatively informal basis as the preferred option for dealing with most issues arising in the context of labour relations and under the LRA. In particular this was to be the means for resolving disputes over dismissals, which constitute the bulk of the work of the CCMA. They were also deliberate in rejecting the possibility of appeals and selecting the narrowest possible grounds of review as the basis for challenging arbitration awards. They did so, not because review is an inexpensive or speedy way of reconsidering

[29] *Herholdt v Nedbank Ltd* (2013) 34 *ILJ 2795 (SCA).*

[30] *Herholdt* paras 9 and 13.

> the award of an arbitrator, but because it sets an extremely high standard for setting aside an award and, together with the cost and delays inherent in reviews, it was thought that this would act as a deterrent to parties challenging arbitration awards and thereby support the overall aim of a speedy and inexpensive resolution o*f such disputes."*

[37] A proper consideration of the *Sidumo* test, the court held, revealed that arbitration awards would only be set aside in the narrowest of circumstances:

> "The *Sidumo* test will, however, justify setting aside an award on review if the decision is 'entirely disconnected with the evidence' or is 'unsupported by any evidence' and involves speculation by the commissioner."

[38] The SCA concluded that:[31]

> "A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable."

[39] This point of a strict review test in arbitrations was also stressed by the Constitutional Court in *CUSA v Tao Ying Metal Industries*[32] :

> "The LRA introduces a simple, quick, cheap and informal approach to the adjudication of labour disputes. … The absence of appeal from arbitral awards was intended to speed up the process of resolving labour disputes and free it from the legalism that accompanies other formal judicial proceedings. By adopting this simple, quick, cheap and informal approach to the adjudication of labour disputes, Parliament intended that, as far as possible, arbitral awards should be final and should only be interfered with in very limited circumstances.

[40] Subsequent to *Herholdt*, the LAC in *Gold Fields*[33] aligned itself with these principles, confirming that interference with an award was warranted only

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[31] Para 25.

[32] 2009 (10 BCLR 1 (CC); (2008) 29 *ILJ* 2461 (CC) paras 61-66 (per Ngcobo J).

[33] *Gold Fields Mining SA Ltd (Kloof Gold Mine v CCMA* (2014) 35 *ILJ* 943 (LAC) para 16.

where the decision was not one that another decision-maker could not reasonably have arrived at based on the evidence before him or her.

APPLICATION TO THE FACTS

[41] The question before this court is whether the arbitrator's conclusion that Cloete's dismissal was substantively unfair is one at which no reasonable decision maker could arrive. More specifically, in order to succeed the Department must persuade the court that no reasonable decision maker could have accepted Cloete's evidence over that of Dimphana.

No corroboration of Dimphana's version

[42] Ms *Seria* argued that Kalamdien's evidence served as corroboration of Dimphana's version. This is not entirely correct. Kalamdien's evidence was limited to reporting what she alleged Dimphana had told her on the morning of 5 June 2013. At best, Kalamdien's evidence amounts to hearsay. Properly construed, Kalamdien's report of what Dimphana allegedly relayed to her amounts to an impermissible attempt at so-called "self-corroboration" of Dimphana's evidence. The only relevant "corroboration" is that Kalamdien confirmed that Dimphana appeared "rattled" and emotional when she saw her after 06:00 on 5 June.

[43] As Mr *Leslie* pointed out in his argument, corroboration is confirmatory evidential material independent of the evidence to be corroborated. Inadmissible hearsay evidence cannot be used to corroborate a version. Where it is required, corroboration must be external. Self-corroboration (such as reliance on a statement previously made by the primary witness) is inadmissible.[34] In any event, Kalamdien's version of what Dimphana reported to her contradicted Dimphana's evidence in a number of material respects.

[44] If Dimphana's version was to be accepted, it is inexplicable why the Department did not adduce any objective, external corroboratory evidence. This could easily have been done, but was not. For example, in her evidence Kalamdien confirmed the following:

[34] C Schmidt *Law of Evidence* (LexisNexis 2003) 4-3 to 4-6 and authorities cited there.

44.1 Regarding Dimphana's allegation that Cloete had injected her with an "insulin-type" injection, Kalamdien confirmed that she had not checked whether any insulin syringes were missing.

44.2 Regarding Dimphana's allegation that Cloete had administered a sachet of Johnson & Johnson KY-jelly to her, Kalamdien confirmed that she did not check stock of this item.

44.3 Regarding Dimphana's allegation that Cloete had administered the injection(s) in an inappropriate manner or position, Kalamdien confirmed that she did not check where the injection had been administered on the patient's abdomen.

44.4 As regards Dimphana's allegation that Cloete had used gloves when administering the KY-jelly in between her legs and then discarded these gloves before leaving her bedside, Kalamdien confirmed that she had not checked whether there was a pair of gloves in the bin.

44.5 Kalamdien initially (and dishonestly) refused to concede that, in fact, she had not checked anything complained about by Dimphana. Ultimately however, she was constrained to admit that she had not checked anything complained about by Dimphana "because it was handover that time". This reflected poorly on her credibility.

[45] Ms *Seria* countered that nurse Kalamdien was not instructed to investigate the event. But the fact is that she was the one person who could easily have checked the veracity of the complainant's version at the time. Dimphana was obviously in a fragile state. She had recently undergone a major medical procedure, for which she was receiving ongoing treatment and medication, including one or more scheduled drugs. It fell well within the Department's powers to present physical corroborative evidence of Dimphana's version, and nurse Kalamdien could easily and immediately have done so. She did not.

The probabilities of Dimphana's version

[46] The arbitrator found Dimphana's version to be improbable. He found:

> "All in all the evidence on the version of Dimphana does not persuade me that Cloete had conducted himself in the manner testified by her."

[47] That does not appear to me to be a conclusion that no reasonable arbitrator could reach.

[48] Mr *Leslie* pointed to the following examples:

48.1 Dimphana had been hospitalised since 30 May 2013. By 4 June, she was aware of the hospital routine and, in particular, the fact that she only received one injection each morning. Her version was that, on the evening of 4 June, Cloete administered two injections to her – one at about 20:00 and one at some unclear time "in the middle of the night". Neither of these alleged injections was recorded on the prescription chart. Although receiving two additional injections was in stark contrast to her established routine, on her version, Dimphana did not regard this as strange, and did not query the injections with Cloete (or any other member of staff at the time). This is inexplicable and improbable, as the arbitrator reasonably concluded. As he asked, if Cloete had indeed administered two superfluous injecitons, "what were they and for what reason were they administered?"

48.2 The allegation that Cloete administered three injections to Dimphana between 20:00 on 4 June and 06:30 on 5 June 2013 was problematic for the Department. The only prescribed injection for Dimphana was a daily 40mg dose of Clexane. Dimphana could not have received three doses of Clexane during this period. Had she done so, there would have been serious side-effects, including internal bleeding. There is no plausible explanation as to why Cloete would want to administer un-prescribed (and undocumented) medication to Dimphana, which could have had serious ramifications for Dimphana's health. (Cloete had no prior disciplinary record or any problems with hospital management. His uncontested evidence was that he was passionate about his occupation).

48.3 This alleged conduct is also inconsistent with Cloete's conduct on the morning of 5 June. It is common cause that, when Cloete administered the Clexane injection on 5 June 2013, he recorded that he had done so on Dimphana's prescription sheet. As the arbitrator

reasonably asked, why would he have done so on that occasion only?

48.4 Dimphana testified that she felt "a bit uncomfortable" with the manner in which Cloete allegedly administered the injections. She found it "a bit strange" that Cloete shifted her underwear when he injected her. Yet the following morning, on Dimphana's version, when Cloete injected her (for the third time) she had no compunction in (unnecessarily) exposing herself naked from the waist down to Cloete. Dimphana's version was that, although she was not wearing underwear at the time, and although she knew that the injection would be inserted around her navel, she failed to simply cover her pubic area with her hospital blanket. It is highly improbable that a female patient would, under ordinary circumstances, simply not cover herself with the hospital bedding, exposing only the injection area to the male nurse. However, if Dimphana's version is to be believed, that she already felt discomfort around Cloete, then her alleged conduct in exposing herself to him is, as the arbitrator found, "farfetched". Ms *Seria* argued that Dimphana had "unwittingly" exposed herself; but on Dimphana's own version she did so voluntarily, without Cloete even asking her to expose her genital area. The arbitrator found Cloete's version – that Dimphana had not exposed herself to this extent – more plausible. That is not so unreasonable that no other arbitrator could have come to the same conclusion.

Contradictions, inconsistencies and omissions

[49] Kalamdien testified as to what Dimphana had allegedly reported to her on the morning of 5 June 2013. Kalamdien subsequently drafted a written statement of what had been reported to her, which, it appears, formed the basis of the charges against Cloete. As Mr *Leslie* pointed out, there are a number of material inconsistencies and contradictions between the respective versions of Dimphana and Kalamdien. For example:

49.1 In her written statement, Kalamdien recorded that Dimphana had "stated that during the night and that same morning she was given

two injections by Mr E Cloete" (emphasis added). The charge sheet itself (charge 1) refers to "two unauthorised injections" during the period of 4 to 5 June 2013.

49.2 In the arbitration, for the first time, Dimphana alleged that Cloete had administered three injections to her: the first at 20:00 on 4 June, the second in the middle of the night, and the third at around 06:30 on 5 June. The contradiction is significant. It is improbable that Dimphana would simply have forgotten to mention the injection in the middle of the night to Kalamdien, had it in fact happened. Her failure to mention it is inexplicable if she is to be believed. This contradiction or omission undermined Dimphana's credibility as a witness. And in her evidence Kalamdien was emphatic that Dimphana had only complained about one injection by Cloete, even though this contradicted her written statement.

49.3 Kalamdien's written statement records that Dimphana had felt "very uncomfortable" with the manner in which Cloete administered "the injection" (which one is not clear), as he allegedly placed his hand "on her private area". In her evidence, however, Dimphana stated that "I wasn't that uncomfortable with it" – she simply found his style of injecting her "a bit strange". Her overall impression was that "he is just doing his job". These versions cannot be reconciled.

49.4 According to Kalamdien's statement, Dimphana reported that once Cloete had given her cream to apply between her legs, "Mr E Cloete then left the room returning with gloves and then applied the cream himself using his gloved hands". At arbitration, Kalamdien testified that Dimphana had reported this to her. In contrast, in her evidence at arbitration, Dimphana was emphatic that Cloete had been present throughout, and that he had not left the room. She testified that:

> "Because you must remember when he did that I was busy trying to follow his instructions about applying the cream, so this area was open. And it's not like he paused and did something else and then came back, this happened instantly and in a matter of seconds or minutes."

49.5 The most serious aspect of Dimphana's complaint (at arbitration) was her allegation that Cloete had applied the gel or cream with his gloved hand on her vagina. However, according to Kalamdien, Dimphana failed to mention to her that she did not have underwear on at the time and, astoundingly, failed to mention "anything about Mr Cloete coming and inserting his finger in her private parts". If her version is to be believed, Dimphana's failure to mention these crucial facts is inexplicable.

[50] In light of the above, it was not unreasonable for the arbitrator to find, on a balance of probabilities, that the evidence presented by the Department and the complainant was so flawed that it was not capable of sustaining a conclusion that Cloete's dismissal had been fair (bearing in mind that the Department bore the onus in this regard). More pertinently, the arbitrator's conclusion to this effect is not one which no reasonable decision maker could have reached.

Cloete's evidence

[51] The arbitrator preferred Cloete's evidence over that of Dimphana. Having had regard to the record at arbitration, that does not appear to me to be unreasonable.

[52] Cloete testified as follows:

52.1 He consistently denied that he had administered any injections to Dimphana during the night of 4 June. His first interaction with Dimphana was at 20:00 on 4 June 2013, when he issued her with ("handed out") her medication. He attended to her again at about 06:20 on 5 June 2013. He read her prescription chart and saw that a daily 40 mg dose of Clexane had been prescribed. Cloete misread the prescription chart. He erroneously thought that the injection should be administered at 06:25, and not 10:00. This mistake is understandable, having regard to the prescription chart itself. The initial dose of Clexane was administered by the attending doctor at 06:25 on 31 May 2015. Both times (06:25 and 10:00) appear on the prescription chart. Cloete administered the Clexane injection at

around 06:20. It is common cause that Cloete recorded (by his signature) that he had administered Dimphana's daily dose of Clexane.

52.2 Cloete informed Dimphana that he was going to administer an injection, and that she should prepare herself for this. Dimphana prepared herself by exposing part of her stomach to him. The rest of her body was not exposed, according to Cloete, but was covered with the blanket. Cloete did not know that Dimphana was allegedly not wearing underwear.

52.3 Cloete administered the injection on the left side of Dimphana's navel, two fingers away from the umbilicus or navel. His hand supported the left-hand side of Dimphana's skin – he did not touch her pubic area.

52.4 After administering the injection, Dimphana asked Cloete if he could give her something for dry skin. Cloete fetched a small bottle of aqueous cream from the cupboard, opened it and offered it to Dimphana. Dimphana took some of the cream in her hand. Cloete left the room to return the bottle to the cupboard.

52.5 Cloete did not wear gloves at any relevant time. There was no need to wear gloves. Cloete testified that he found it difficult to administer injections wearing gloves.

52.6 Cloete subsequently realised that he had made a mistake regarding the time of the Clexane injection. He reported this to Kalamdien. At the same time, she asked him about the aqueous cream. Cloete informed Kalamdien that he had given Dimphana the cream as she complained of dry skin.

[53] The arbitrator's preferring Cloete's version is not unreasonable. His version is not improbable or not credible.

Not putting Cloete's version to Dimphana

[54] It is common cause that various aspects of his evidence had not been put to Dimphana. Ms *Seria* argued that this in itself constituted a reviewable irregularity.

[55] I disagree. It appears to me that, in an arbitration – as opposed to court proceedings – the failure to put a version to the other side, especially by a lay person, is but one factor to be taken into account when considering whether the arbitrator's finding is sustainable on the evidence.

[56] In this case, Cloete was represented by a lay person. In terms of s 138 (1) of the LRA, the arbitrator must deal with the substantial merits of the dispute with a minimum of legal formalities. He did so. And, as Mr *Leslie* pointed out, some of the Department's criticism strikes one as somewhat opportunistic after the fact. For example, the Department's representative queried why it had not been put to Dimphana that Cloete had denied administering the alleged injections on the evening of 4 June 2013. But Cloete had denied this allegation throughout. The Department's representative had in fact put Cloete's version (which appeared in his written statement) on this point to Dimphana himself.

[57] I also do not agree that, post *Herholdt* and *Goldfields*, it can be said that the failure to put a version to a witness is invariably a reviewable irregularity in itself. The question remains whether the outcome is sustainable on all the evidence before the arbitrator. And in this case, having regard to all the evidence, the credibility of the witnesses, their reliability, and the probabilities, it seems to me that the conclusion reached by the arbitrator is not one that no reasonable arbitrator could have reached.

The Department's sexual harassment policy

[58] Ms *Seria* also argued that the award is reviewable because the arbitrator did not take the sexual harassment policy of the provincial government – applicable to the Department – into account.[35] That policy requires a

[35] With reference to *SA Metal Group (Pty) Ltd v CCMA* (2014) 35 *ILJ* 2848 (LC).

decision-maker to consider the following factors when determining whether sexual conduct constitutes sexual harassment:

58.1 whether the sexual conduct was unwelcome;

58.2 the nature and extent of the sexual conduct; and

58.3 the impact of the sexual conduct on the complainant.

[59] This argument begs the question. The arbitrator found, on a balance of probabilities, that no sexual conduct took place. The basic premise for any further application of the policy fell away. He could not consider whether the conduct was unwelcome; its nature and extent; and its impact on the complainant, having already found that no such conduct took place.

Conclusion

[60] Although the facts of this case raise the inevitable question why the alleged victim would have invented the bizarre facts upon which she relied in evidence, the arbitrator considered the evidence of all the witness before him; he made findings on their credibility and on the probabilities; and he arrived at a finding that is not so unreasonable that no other arbitrator could have come to the same conclusion on the evidence before him. On review – as opposed to appeal – the Court will not lightly interfere with an arbitrator's findings on fact, on credibility, and on the probabilities. The award is not open to review.

[61] Both parties asked that costs should follow the result. In oral argument I questioned this, as there is an ongoing relationship between the trade union, DENOSA, and the Department. The upshot of the arbitration award and of this judgment is also that there is an ongoing employment relationship between the Department and the employee, Cloete. Yet both parties' legal representatives insisted that those were their instructions. I accept, therefore, that costs should follow the result.

Order

The application for review is dismissed with costs.

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Anton Steenkamp

Judge of the Labour Court of South Africa

APPEARANCES

APPLICANT:	Ms S Seria Instructed by the State Attorney.
RESPONDENTS:	Mr G A Leslie Instructed by Chennels Albertyn.