IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT CAPE TOWN

CASE NO: C972/2009

In the matter between:

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| PAWUSA OBO PAUL SKOSANA and 3 Others | APPLICANT |
| and | |
| THE PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORIAL BARGAINING COUNCIL | FIRST RESPONDENT |
| PANELIST LUNGILE MATSHAKA N.O. | SECOND RESPONDENT |
| DEPARTMENT OF HEALT FOR THE PROVINCE OF WESTERN CAPE | THIRD RESPONDENT |
| THE MEMBER OF EXECUTIVE COUNCIL RESPONSIBLE FOR THE DEPARTMENT OF HEALTH FOR THE PROVINCE OF WESTERN CAPE | FOURTH RESPONDENT |

DATE OF HEARING : 03/03/20011

DATE OF JUDGMENT: : 17/06/2011

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JUDGMENT

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SHAI AJ

*Introduction*

[1] This is an application by which the applicant seeks to review and set aside the arbitration award, the "award" issued by the second respondent, the "arbitrator", dated 14 October 2009, under case number PSHS447-08/09 issued under the auspices of the first respondent. The applicant further seeks to have the decision of the arbitrator that the third respondent had correctly interpreted and applied the provisions of a collective agreement being the Occupational Specific Dispensation, which consisted of Resolution 3 read with Nursing Act No 33 of 2005, Circular H123 of November 2007, in respect of Mr. P Skosana, Mrs. G Jeftha, Mrs. Louw and Mrs V Makie 'the member' be substituted with the one that says the second respondent has failed to correctly interpret and applied the aforesaid collective agreement in respect of the members.

*The facts*

[2] On or about 21 August 2009, the applicant referred a dispute to the first respondent on behalf of members. The nature of this dispute was categorised as an interpretation and /or application of a collective agreement dispute.

[3] This dispute relates to the application and interpretation of the Occupation Specific Dispensation of Nurses, which consisted of Resolution No 3 of 2007 of the Public Health and Social Development Bargaining Council as read with the Nursing Act No 33 of 2005, Circular H123 of November 2007, Circular H129 of November 2007, Circular H63 of June 2008 and Circular H97 of August 2008.

[4] The primary objectives of Resolution 3 included inter alia:

[4.1] To introduce an occupational specific remuneration and career progression system for professional nurses, staff nurses and nursing assists, who fall within the registered scope of the First Respondent and

[4.2] To introduce differentiated salary scales for identified categories of nursing professionals based on a new remuneration structure.

[5] Resolution 3.1.3.1 makes provisions for a differentiation in salary scales in professional nurse categories of general nursing, speciality nursing / primary health care, specialist nurse practitioner and nursing educator.

[6] Resolution 3.2.5.2 sets out the two phases in which the transition would be done:

[6.1] Phase 1 being the minimum translation to the appropriate salary scale attached to the post as contained in annexure "B" to the agreement, and;

[6.2] Phase 2 in respect of production levels / grade which involves:

"The re-calculation of relevant experience obtained by a person who occupies a post on a production level after registration in the relevant nursing category, based on four

years service as of 31 March 2007, in order to a higher salary at a production level subject to and within the limits of the measure for such recognition contained in Annexure C."

[7] Circular H123/2007 provides amongst others that:

[7.1] The OSD is not a tool to rectify malpractices and current and past misulitisation of nursing staff, nor is it a general salary increase for nurses. It is a specific occupational dispensation which provides for higher salaries and more diverse career opportunities for nursing staff, subject to specific provisions and criteria.

[7.2] Certain posts have been identified as non-nursing posts, annexure "A" containing a list of "nursing" and "non-nursing" posts, 2.6.1.

[7.3] In terms of annexure "A" the post of nursing, Administration: Personnel Matrons at 'hospitals' in general is categorised as non-nursing posts.

[7.4] The affected professional nurses who occupy non-nursing in terms of annexure "A", were given the option to either remain in their current posts in which case they will forfeit the option to participate in the OSD for nurses, or decide on an option for participation in the OSD for nurses.

[8] The option for participation in the OSD for nurses will be for relocation to a production or management level post on a similar salary scale in one of the nursing

career streams, provided that the employee complies with the applicable educational qualifications and appropriate experience as required for such jobs / posts on a similar salary scale in one of the nursing career streams could be determined and calculated based on the appropriateness of experience in the previous non-nursing posts.
That should the affected nurses have occupied a non-nursing management post, and not a production level post the principles and measures for restructuring as indicated in the HR Restructuring Framework for the CSP will be applied for the matching and placement of said incumbent. A list of vacant and funded post will be submitted to the affected nurse to indicate her/his preference for placement in accordance with the appropriate experience, skills and competencies of such affected nurse as well as the requirements for the vacant management post.

[9] The applicant's referral document indicated that the dispute arose on 24 September 2008, as this was the date on which the members were advised that their grievance had not been resolved by the third respondent to their satisfaction.

[10] The dispute was set down on the 8 April 2009. The dispute was dismissed for non-attendance by the members' representative. The said dismissal was rescinded and the dispute was re-scheduled on the 21 September 2009 before the second respondent.

[11] The applicant contends that at the commencement of the arbitration proceedings Mr. F Rodriquez, the third respondent's representative requested a postponement on the third respondent's behalf because they were not prepared for the

arbitration which applicant's representative objected as the third respondent had enough time to prepare.

[12] In response to the objection, Mr. Rodriquez indicated that:

[12.1] The facts in respect of the matter were not in dispute.

[12.2] The third respondent would be withdrawing their witnesses.

[12.3] The Third respondent would only argue legal principles applicable to the collective agreement.

[12.4] There should not be any oral argument as this would be a waste of time as "we would just be going backwards and forwards". The parties should argue the matter on paper and submit heads of arguments.

[13] The applicant contends further that members caucused during adjournment that although they would agree to postponement there were a number of issues in dispute and it was not correct that there were no issues in dispute.

[14] The applicant further contends that when the proceedings re-commenced, the applicant's representative, Faraah September, indicated to the arbitrator, that applicant would consent to postponement but that Rodriguez and the third respondent were incorrect when they indicated that there were no facts in disputes.

[15] The said facts in dispute were the following according to the applicant:

[15.1] Whether there were managerial level vacant funded posts at the Groote Schuur Hospital, or elsewhere, which the members were qualified to fill and which the members should have been aligned to at the time when the Occupational Specific Dispensation was applied in request of them.

[15.2] Whether managerial level funded posts became vacant at the Groote Schuur Hospital, or elsewhere, which members were qualified to fill, after the date on which the members were aligned to production level posts, and which the members should have been aligned subsequently.

[15.3] Whether or not the third respondent had submitted, alternatively, was required to submit, a list of vacant funded posts to the members so that they would indicate their preference for placement in those vacant funded posts.

[15.4] Whether or not Thorpe, as a Head at District / Institutional offices had submitted to the Directorate Nursing services, for attention of Tendani Mabuda, a complete lists of all the Professional Nurses who opted to Participate in the Occupational Specific Dispensation for Nurses, indicating their current rank, category and workstation / area, vacant posts at the Groote Shcuur Hospital where members could absorbed were possible and Professional Nurses who opted to remain in their current Occupational Specific Dispensation posts.

[15.5] Whether or not the posts of personnel Matron existed at Groote Schuur Hospital and whether or not the members were employed as personnel Matrons.

[16] The applicant further contends that the arbitrator did not give applicant the opportunity to inform him that the above facts were in dispute and why they were material to the resolution of the dispute.

[17] In response to the applicant's attempt to do as in paragraph 11 above the arbitrator allegedly respondent as follows:

"Faraah September, the employer says that there are no facts in dispute. If the employer says there are no facts in dispute then there are no facts in dispute."

[18] The applicant further contends that at that stage Rodriquez interjected and stated that the parties should agree on a time table for the exchange of documents and heads of argument.

[19] The applicant contends that such a time table was agreed upon and was as follows"

"40.1 28 September 2009 – submission of the applicant's documents and heads of argument to the respondents;

40.2 1 October 2009 – submission of the third respondent's

documents and heads of argument to the applicant as well as the first and second respondent; and

40.3 5 October 2009 – final submission by the applicant to the first and second respondent"

[20] The applicant contends further that at the time the agreement was reached the applicant's representative had an express understanding that after the exchange of documents there will be a set down for hearing for oral evidence.

[21] It is further contention by the applicant that when its representative asked the arbitrator whether there was going to be a next hearing the arbitrator did not respond but indicated that he had fourteen days to issue the award. Had the applicant's representative knew that there was not going to be a next hearing he would not have agreed to the timetable and would have insisted that oral evidence be heard first to be followed by the said exchange of the documents.

[22] On the other hand the respondent contents that the parties agreed that there were no facts in dispute and as a result the matter could be disposed off by way of arguments. Following the agreement parties agreed to the timetable of exchange of documents as outline in paragraph 19 above.

[23] In relation to time table referred to above, the applicant delivered its bundle of documents and heads of argument to the respondent on or about 28 September 2009 to

which the Respondent did not respond to. The applicant, after a number of communications with the respondent regarding failure to comply with the agreement in paragraph 1(a) above, the applicant filed its final submission on the 5th October 2009 and served only the first and second respondents as per the said agreement.

[24] The respondent contends that the agreement was reached at the arbitration that there were no facts in dispute and that the arbitration should be conducted based on the submission of head of arguments by the parties to the second respondent. Further that the agreement was to the effect that the applicant would submit its heads of argument to the second respondent and third respondent, since the onus was on the applicant to prove it's case while the third respondent would submit its heads of argument to the second respondent. The respondent contends further that there was no discussion or agreement that the applicant would have the right to reply to the third respondent's heads or argument, given that this does not constitute part of the stipulated legal rules, procedure and practice. It is contested further on behalf of the respondent that there was also no agreement to exchange bundles but that such bundle would be annexed to the heads of arguments in the form of the third respondent's heads of argument.

*Grounds of review*

[25] The applicant raises the following complaints against the award of the arbitrator:

[25.1] The arbitrator committed a misconduct in relation to his duties as

an arbitrator by failing to conduct proceedings in a fair manner, in that he did not allow a full and proper ventilation of all the facts and issues in dispute as raised by both parties.

[25.2] The arbitrator committed a material error of law by not allowing proper evidence to be placed before him for consideration. The heads of argument and bundles of documents, in the absence of oral evidence, does not constitute proper evidence when there is no agreement between the parties that the facts are common cause.

[25.3] The arbitrator committed a misconduct by disregarding relevant evidence, alternatively misconstruing submissions, documents and evidence before him to such an extent that he misconstrued the dispute.

[25.4] The arbitrator committed a misconduct be reaching a conclusion which was not supported by any submissions or "evidence". The conclusion that he reached that there were no factual issues in dispute and that he could make an award in respect of this dispute without hearing evidence basis solely on documents and closing arguments, alternatively, heads of arguments being submitted, was not supported by any submission and / or evidence before him.

[25.5] The arbitrator committed a gross irregularity in the conduct of the arbitration proceedings by not allowing the Applicant's case to be

fully and fairly determined and thereby failing to comply with the principles of natural justice, particularly, no principle of *audi ulteram patem.*

[24.6] That the arbitrator committed gross irregularity in the conduct of the arbitration proceedings in that his reasoning was so flawed that one must conclude that there had not been a fair trial of the issue.

[24.7] That the arbitrator committed a gross irregularity in the conduct of the arbitration proceedings in that the proceedings were so irregular that there was no proper hearing then undermining the integrity of the proceedings in that arbitration is required to hear and consider oral evidence save for when the parties agree that the facts are common dispute.

[25.8] The arbitrator committed a gross irregularity in the conduct of the arbitration proceedings in that he displayed deference in the third respondent's submissions and / or evidence and improperly rejected the applicant's submissions and / or evidence.

[25.9] The arbitrator exceeded his powers and / or made a decision that nor reasonable decision maker could have made, when he decided that the third Respondent had correctly interpreted and applied the said collective agreement, as this decision was not rational or justifiable in terms of the reasons given for it and the evidence properly before him.

[25.10] The arbitrator exceeded his powers and / or made a decision that a reasonable decision maker could not have made, was not rational, justifiable in terms of reasons given for it and the evidence properly before him, when he decided not to allow, alternatively, call for, the hearing of oral evidence, either at the arbitration proceedings on 21 September 2009 or subsequent to receiving the applicant's heads of arguments and final submissions on or about the 28 September 2009 and 5 October 2009 respectively, to determine various material disputes of facts including but not limited to facts in dispute as outlined in paragraph 1(b) above.

[25.11] The arbitrator exceeded his powers and / or made a decision that a reasonable decision maker could not have made when he decided that the third respondent had correctly interpreted and applied the collective agreement when none of the required lists were submitted to either the members or to Mabuda. This decision was not rational and / or justifiable in terms of the submissions, documents and evidence before him.

[25.12] The applicant added three more grounds of review through the supplementary affidavit of Faraah September and they are as follows:

[25.12.1] Failure to keep a record of all the evidence given in an arbitration hearing, including all documents handed in to the panellist during

the hearing;

[25.12.2] The failure by the first and / or second respondent to keep a record of the oral proceedings of the arbitration in that he failed to keep a record of the oral proceedings of the arbitration on 21 September 2009 by either legible hand written notes, electronic notes or by means of a mechanical, magnetic or electronic recording of sound, and

[25.12.3] It was apparent from the heads of argument / closing submissions delivered by the parties that there were material disputes of facts between the parties. That the facts material to the dispute were not common cause and that the second respondent was required to hear oral evidence in order to resolve these disputes of fact.

*Application for condonation*

[26] The third respondent's answering affidavit was late by 17 days. The reason for lateness was because the instructing attorney, Pamela Melapi went on maternity leave on 7 April 2010. Thereafter, one Shireen Karjiker a fellow state attorney, assumed responsibility for Melapi's files. Again at a meeting held on the 23rd April 2010, a decision was taken that one Colleen Bailey, would assume responsibility for Melapi's files. It was only when she saw the letter from the applicant's attorney on 19 May 2010 requesting for an agreement that the matter be referred back for arbitration that she attended to the file.

[27] She then briefed counsel to draft answering affidavit. It appears that both Bailey and counsel did not have all papers, in particular annexures FS2 to FS9 as they were not annexed to the review application. The heads of arguments were also not in the state attorney's file and not in counsel's brief.

[28] The third respondent requested the applicant to furnish the said document to no avail and as a last resort, Bailey attended to the Labour Court and uplifted the court file and made the relevant copies and made them available to the counsel. The respondents contends that due to the complexity and the voluminous nature of the affidavits and documents in the proceedings, it took time to comply with relevant time frames.

[29] The third respondent contents further that the applicant do not enjoy good prospects of success in having the arbitration award reviewed as is evident from the answer to the grounds of review.

[30] The third respondent content further that the case is important to the third and fourth respondent because it is a precedent setting case which, if the application for condonation is rejected by this Honourable Court, will have major financial and budgetary implications. Further that, it will also undermine the restructuring process the nursing sector that is undergoing on a national level.

[31] This application is vigorously opposed by the applicant. The basis of the

opposition appears to be that the respondent having failed to deliver on time was requested on a number of occasions to comply but in vain. The complication appears to have occasioned by the fact some annexures were not attached to the answering affidavit and that some documents were not properly copied and caused further delay in the delivery of the replying affidavit.

[32] The law relating to condonation of non compliance with the rules has been laid down in a number of court decisions. In *Melane v Santam Insurance Co Ltd,*[1] laid down the law as follows:

> "In deciding whether sufficient cause has been shown, the basic principle is that the Court have a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefore, the prospects of success, and the importance of the case. Ordinarily these facts are interrelated: they are not individually decirise, for that would be piecemeal approach incompatible with a true discretion, save of course that if there are no prospects of success there would be no pint in granting condonation."[2]

[33] In the case of *Kritzinger v CCMA and Others,*[3]. Molahlehi J said the following in relation to test as initiated in *Melane v Sanlam Co Ltd:*

> "These factors are not individually decisive but are interrelated and must be weighed against each other. In weighing the factors for instance a good explanation for the lateness may assist the applicant in compensation for week

1 1962 (4) SA 531 (A)

2 Id at p 532 C - D
3 JR2254/05 / [2007] ZALC 85 (9 November 2007)

> prospects of success. Similarly strong prospects of success may compensate for the inadequate explanation and the long delay."[4]

[34] In the case of *Siegelaar v Minister of Safety and Security*,[5] Murphy AJ in dealing with the test for condonation said the following:

> *"*In other words, in determining whether the delay in bringing the proceedings is unreasonable the Court is obliged to exercise a judicial discretion taking into account all the relevant circumstances. Guidance can also be sought from cases dealing with applications for condonation for special leave to appeal. In *Brummer v Gorfil Brothers Investments Pty Ltd and Others* 2000 (2) SA 837(CC) the Constitutional Court Stated:
>
> > 'This court has held that an application for leave to appeal will be granted if it is in the interest of justice to do so and that the existence of prospects of success, though an important consideration in deciding whether to grant leave to appeal, is not the only factor in the determination of the interest of justice. It is appropriate that an application for condonation be considered on the same basis and that such an application should be granted if that is in the interest of justice and refused if it is not. The interest of justice must be determined by reference to all relevant factors, including the nature of the relief sought, the extent and cause of the delay, the nature and cause of any other defect in respect of which condonation is brought, the effect on the administration of justice, prejudice and reasonableness of the applicant's explanation of the delay or effect."'[6]

The court went further and said:

4 Id at para 11
5 [2005] 26 ILJ 133 (LC)
6 Id at para 35

> "In other words, the interests of justice are central consideration in deciding whether to grant condonation for unexplained delay. So too is the observance of the appropriate standards in the administration of justice. Applications for condonation must be properly made in the appropriate manner in order to ensure they can be effectively adjudicated."[7]

[35] In this instance of this case the delay is not very long and the reasons for the delay are reasonable taking into account change in personnel dealing with the matter and the fact that some documents were attached to the notice of motion. I have taken into account also that delivery by both parties of their papers was less than perfect and parties took time communicating with each other with the purpose of obtaining unattached annexures. Further that I have taken into account that the documentation herein is voluminous and the nature of the dispute quite complex. The case is very important in that it may create a precedent and would be in the interest of Justice that the merits be heard. In the premises, I conclude that the respondent has made a good case for condonation and hence the late filing of the answering affidavit is condoned.

*Application for review*

*The legal position*.

[36] The law is now settled with regards to the test for review as enunciated in the well known case of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[8] being: "whether the decision reached by the commissioner is one that a reasonable decision maker could not reach".

7 Id at para 36
8 2008 (2) SA 24 CC

[37] In *Sidumo* Ncgobo J was of the opinion that although the provisions of Section 145 of the LRA have been suffused by the Constitutional standard, that of a reasonable decision maker, when a litigant who wishes to challenge the arbitration award under Section 145(2) must found his or her cause of action on one or more of these grounds of review and said the following:

> "The general powers of review of the Labour Court under Section 158(1)(g) are therefore subject to the provisions of Section 145(2) which prescribe grounds upon which arbitral awards of CCMA Commissioners may be reviewed. These grounds are misconduct by the Commissioner in relation to his or her duties; gross irregularity in the conduct of the proceedings; where Commissioner exceeds his or her powers; or where the award was improperly obtained. These are the only grounds upon which arbitral awards of CCMA Commissioners may be reviewed by the Labour Court under Section 145(2) of the LRA. It follows therefore that a litigant who wishes to challenge an arbitral award under Section 145(2) must found his or her cause of action on one or more of these grounds of review"[9]

[38] In *Southern Sun Hotel Intererests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others,*[10] the Court acknowledged the test for review of Commissioner's award as enunciated in the *Sidumo* decision (reasonable decision maker test) but said:

> "…. Section 145 of the Act clearly invites a scrutiny of the process by which the result of an arbitration proceedings was achieved, and a right to intervene if the Commissioner's process related to conduct is found wanting. Of course, reasonableness is not irrelevant to this inquiry – the

9 Id at para 189
10 (2010) 31 ILJ 452(LC)

reasonableness requirement is relevant to both process and outcome."[11]

[39] The applicant raised 14 grounds of review in its papers and for convenience will be categorised as follows:

39.1 Grounds 25.5, 25.6, 25.10.

These grounds are closely related and will be dealt together. The crux of these grounds of review is that the arbitrator committed an irregularity in the conduct of the proceedings in that he displayed deference to the third respondent when he rejected the applicant's submission that there were factual issues in dispute, to the extent that she was not allowed to explain what the factual issues were in dispute.

39.2 The applicant in its papers allege that the respondent's representative, Rodriquez requested a postponement of the arbitration because he was unprepared. Further that, he had indicated that there were no facts in dispute, that the matter could be argued on the legal principles applicable to the collective agreement and that the matter would be argued on papers only.

39.3 Applicant further argues that its representative, September had indicated that although she agrees to the postponement of the proceedings she denied that there were no facts in dispute.

39.4 The arbitrator allegedly refused to allow September to inform

11 Id at para 14

him of which facts were in dispute and uttered the following words:

"If the employer says that there are no facts in dispute then there are no facts in dispute."

39.5 It is the Applicant's argument that even though September agreed on a timetable for the exchange of heads of argument, it was her understanding all along that the heads of argument were merely a summary of the case and that oral evidence would be led at a later stage.

39.6 The respondent responded as follows:

39.6.1 That the third and fourth respondent deny that Rodriquez requested a postponement because he was unprepared. Such a reason for a postponement is extremely improbable because Rodriquez who is a full time employee and would not give such a reason.

39.6.2 That the third and fourth respondent deny that the second respondent refused to allow September to inform him of which facts were in dispute and that there were facts in dispute in that:

- It is improbable that a commissioner would have denied a party the right to state her or his case or to take submissions in such a flagrant manner.
- September, as a reasoned trade unionist consist who has extensive experience of representing

employees in conflictual situations, would not have allowed such blatant suppression by the second respondent. It is improbable given her allegation, that there were dispute of facts; she would have reached an agreement on a time table for heads of argument in circumstances where she alleges what she was silenced.

39.6.3 The third and fourth respondents deny that September understood all along that the heads of argument were merely a summary of the case and that oral evidence would be led at a later stage because September is a seasoned unionist and familiar with arbitration proceedings; and that if she was clueless on the rules he would not have been sent to represent members, for to do so would amount to negligence in the extreme.

39.6.4 September, in contradiction of the above allegation in her heads of argument pray for relief of a written apology from GSH Nursing and HR Management depending on the outcome of the award.

39.6.5 Further that the third and fourth respondent contention finds support in the arbitrator's award where she says "it is a deliberate untruth and

> misleading for the applicant's representation to say that the respondent requested postponement due to the fact that they were unprepared" and further that he said "I accepted the proposal as understood and agreed upon by both parties."

[40] The determination of this point would be made difficult by the fact that the said agreement was not reduced to writing nor recorded in any manner. However, the final submissions dated the 5 October 2009 and contained at page 58 to 59 ("F54") gives a clear state of mind of Faraah September, the applicant's representative, at the time of the said proceedings and probably until the time the award was issued, contrary to her vehement denial that there was agreement that the dispute could be disposed of on papers only. I say so because at the end of the said submissions Faraah September says the following words "we await your award". Faraah September would not have said the said words if all along she was of the view that after submission there would still be a hearing. Instead she would have ended by saying "we are awaiting a date of hearing" or something to that effect. Taking this and the other factors state above that she is a seasoned unionist, and the fact that she agreed to the time table for submissions etc. I have safely come to the conclusion that the parties concluded an agreement that there were no facts in dispute and that the matter could be disposed of by way of written arguments and therefore find no irregularities on the part of the arbitrator in this regard.

*Grounds 25.1, 25.2, 25.4, 25.10.*

[41] The above grounds are related to each other and will be dealt with together and can be summarised as follows:

- that arbitrator committed a misconduct in relations to his duties as an arbitrator in conducting the proceedings based on heads of arguments and bundles of document on the basis that:
    - There were too many material dispute of facts and therefore;
    - He should have requested that oral evidence should be heard.

[42] The third and fourth respondent's response to the applicant's submissions in this regard is that there was an agreement that the dispute should be resolved on paper and that in any event those factual dispute were capable of being resolved on papers or were not material to the dispute.

[43] I have concluded above that on the balance of probabilities the parties agreed that there dispute would be resolved on papers for reasons state there. The remaining issue in this regard is whether the said facts are material and whether they were capable of being resolved on papers only.

[44] The said facts in dispute are stated by the Applicant's as follows:

- Whether there were managerial level vacant funded posts at

Groote Schuur Hospital. The third respondent had denied that there were such vacancies and therefore the applicants were aligned to production level posts. Thus if there had been such posts, the applicants would have been aligned to these posts.

- Whether such managerial level funded posts had become vacant after the date the applicants had been aligned to production level posts and which they should have been subsequently aligned.
- Whether or not the third respondent had submitted, alternatively, was required to submit, a list of vacant funded post to the applicant's so that they could indicate a preference for placement in there vacant funded posts.
- Whether or not Thorpe had submitted a complete list of all the professional nurses who opted to participate in the OSD with other particulars' to Mabuda, and whether she was required to do so, since the applicants had not received a copy of such a list.
- Whether or not the post of personnel Matron existed at Groote Schuur Hospital and whether or not the applicants were employed as matrons.

[45] It is trite in our law that the disputes of fact are resolved through evidence. The trier of facts has to rely on assessment of the evidence and make credibility findings in respect of witnesses. In our law that is how the truth is established. On this point the court in the case of *Stellenbosch Farmers Winery Group Ltd and Another v Martel ET*

*CIE and Others*[12] held that:

> "to come to a conclusion of disputed issues a court must make findings on: (a) the credibility of various factual witnesses; (b) their reliability, and (c) the probabilities. As to (a) the court's findings to the reliability of a particular witness will depend on its impressions on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness contour and demeanour in the witness-box; (ii) his bias, latent and gallant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, (v) the probability or improbability of particular aspects of its version, (vi) the calibre and cogency of his performance compared to that of other witnesses reliability will depend from the other facts mentioned under (a) (ii), (vi) and (v) above."[13]

[46] The third and fourth respondents submitted that it was irrelevant to the findings and decisions made by the arbitrator whether or not there were vacant funded managerial posts before or after the member's alignment on 1 July 2007 because the arbitrator upheld the third respondent version that because the post of Personnel Matron was not a managerial post, they could only be aligned to production posts. third and fourth respondent submitted further that even though the arbitrator noted that there was a dispute concerning the existence of such vacant managerial funded posts, such dispute was not relevant to the decision that the members were correctly aligned at a production and not management level in terms of Resolution 3 of 2007. The logical conclusion of this is that even if it was to be found that there were management funded posts, the members could not have been aligned into such posts.

12 3003 (1) SA 11 (SCA).
13 Id at para 5.

[47] It is suggested that the above facts in dispute were apparent in papers and whether such facts were material or could be disposed of on papers is another matter. The crux of this question is whether the position of personnel matron was a management position or not. Once this is determined all the other facts would easily be determined. It is common between parties, and as is clear from the documents that the occupation of these positions by members did not result in monetary benefit or promotion from one level to another. The members were Chief Professionals Nurses when they occupied the position of Personnel Matrons and remained so even after occupation of such positions. It is also common between parties that although the members remained Chief Professional nurses, which move resulted in the enhancement of their status in that they now assisted the nursing manager in execution of his / her duties albeit after hours. It is clear from the papers that this did not translate into officially occupying a managerial position as such. It appears that this were an internal arrangement to easy the load of the nursing manager.

[48] However, I must comment on the anomaly that I think the department occasioned by allowing Groote Schuur to create an anomaly of this nature. I say so because the third respondent in its papers contends that the position of personnel Matron was declared a non-nursing post while on the other hand it contents that they did not occupy a nursing management position. This I think created expectation on the side of the members. However the fact that the Respondent created this anomaly does not mean that the members are entitled to a management position. The fact that

the deployment did not result in monetary improvement and their designation did not change thereafter; clearly indicate that it was a deployment meant to assist the Nursing Manager after hours and therefore not a promotion into a substantive management position.

[49] The arbitrator in his award accepted that the members were not occupying non-nursing management post but a production level post and rightly so because this was based on their actual official position of Chief Professional Nurse, which they were at all times. In this regard I find no fault with the arbitrator's conclusion.

[50] Once I accept that the commissioner's conclusion is correct as mentioned above it follows that all the facts in dispute are irrelevant for the purpose of deciding whether the third respondent currently interpreted and applied resolution 3 of 2007. Had he found contrary to this then it will follow that other disputes would become relevant and evidence would be necessary to determine whether such positions were available or not. Since this is not the case I found that they would not be relevant to a finding whether the third respondent had correctly interpreted and applied to Resolution 3 to the members.

[51] In a supplementary affidavit applicant raised the following three more grounds of review. The first two will be dealt together and they amount to a complaint that the arbitrator failed to keep the record of the proceedings including all documents handed in at the hearing:

[51.1] The general approach in our law has been to require a record to enable the Court to exercise its review function without any hindrance.[14]

[51.2] However, there are exception to the above rule in that the Court may consider the review even in the absence of the record when it has been shown that the parties are unable to reconstruct the record. In such instance the Court may determine the review application on the evidence that was before the arbitrator including also on basis of the arbitration award. See in this regard *Nathaniel v Northen Cleaners Kya Sands (Pty) Ltd & Others (2004) 25 ILJ 1250 LAC ; JDG Trading Pty Ltd t/a Russels v Whitcher N.O. and Others* [2001] 3 BLLR LAC. In this instant parties agreed that the dispute should be determined on papers and agreed on the time table of delivery of documents. The arbitrator should have recorded this but did not do so. Even if he recorded he would have recorded that the parties agreed as aforesaid and no more than that. It is not difficult to arrive at what the parties agreed upon from the papers. Even if it can be said that an irregularity has occurred such irregularity is not material to the extent of vitiating the proceedings. It is therefore my determination that commissioner committed no reviewable irregularity.

14 See *UEE Dantex Explosives (Pty) Ltd v Maseko and Others* (2001) 22 ILJ 1905 (LC) at 21

[51.4] The final attack on the arbitrator's award namely that it was apparent from the submissions that there are facts in dispute and therefore the arbitrator should have called for oral evidence has been dealt with together with above. In brief, even though such facts in dispute existed they were not material to a finding of whether the Third Respondent correctly interpreted and applied Resolution 3 of 2007 to the members.

[52] Can it be said that the arbitrator reached a conclusion a reasonable decision maker could not reach? I do not think so.

[53] In the circumstances my order is as follows:

[1] The application for the review and setting aside of the award issued by the arbitrator under case no PSHS447 is dismissed.

[2] Applicant to pay the costs.

SHAI, AJ

FOR THE APPLICANT: ADV. Graham Leslie

Instructed by Bowman Gilfillan

FOR THE RESPONDENT: ADV. R Nyman, State Attorney