IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C154/16

In the matter between

THE DEPARTMENT OF CORRECTIONAL SERVICES **Applicant**

and

DOMINGO DANIEL WANDILE **First Respondent**

JUSTICE NEDZAMBA N.O. **Second Respondent**

GENERAL PUBLIC SERVICE SECTORAL BARGAINING COUNCIL **Third Respondent**

Heard: 25 October 2017
Delivered: 2 February 2018

JUDGMENT

RABKIN-NAICKER J

[1] This is an opposed review of an arbitration award under case number GBPC 892/15. The first respondent (Wandile) was dismissed after being charged with the following offences:

"You are alleged to have contravened RES 1/2006 Annexure A Clause (MM) "Commitment of common law or statutory offence whilst on duty and in premises in that in and around November 2010 you sexually penetrated an 11 year old minor whilst on duty in uniform and in your departmental residential house.

You are alleged to have contravened Res 1/2006 Annexure A Clause "Bringing the Department's name into disrepute in that in and around November 2010 you sexually penetrated an 11 year minor whilst on duty in uniform and in your departmental residential house and these allegations are reported in the media and social networks mentioning the Department of Correctional Services."

[2] The second respondent (the Arbitrator) found that the dismissal of Wandile was substantively unfair and reinstated him with retrospective effect from the date of his dismissal. This application was launched two months and one week late and condonation is sought by the applicant. Wandile opposes the condonation application. I grant condonation for reasons that shall become apparent below.

[3] The review application is comprehensive. I do not find it necessary to deal with all the grounds of review set out therein. The applicant submits that the award is not one that a reasonable decision maker could have reached on the evidence before him, in particular the conclusion that: "there was not sufficient evidence to show that the applicant had penetrated the Complainant."

[4] The Arbitrator summarised the evidence of the Complainant inter alia as follows:

"The Complainant testified that she is 16 years old and born on 25 February 1999. One morning the applicant woke her up asked her to go and brush her teeth. He then led her to his bedroom. He aggressively picked her up, laid her on

his bed, took off her pyjamas, opened her legs and penetrated her with his penis. At that time she was 11 years old. Her young sister and two of the applicant's younger daughters were also in the house.

The applicant was in his uniform when he penetrated her. After he penetrated her, he gave her some substance mixed with water to drink. He told her not to tell anyone. He went back to work. When the applicant returned from work at 16h the atmosphere was normal and nothing was different.

During 2011 she told her best friend that she had told her mother that the applicant had touched her. She did not tell her that she was raped. She was scared to tell her mom because her mother and the applicant's wife are sisters and she did not want to break her close relationship.

After a year, her other took her to a doctor for a medical examination. The doctor examined her vagina. She was not told the results. She sat in the front seat with the applicant and the applicant/s wife sat in the back seat….

During cross examination she testified that she could not remember the day that the incident occurred. All that she remembers was that it happened in the morning. Her private parts were sore but she did not see any blood. She did not complain to anybody…"

[5] Dealing with the evidence of one Jenkins a registered nurse of 17 years' experience, working at Kimberley Thutbuzela Rape Crisis Centre who performed a gynaecological examination on the Complainant on the 6th of January 2014, the Arbitrator stated as follows in his award:

"87. The J88 revealed that there were no injuries and regarding the hymen, there was nothing written in her report to indicate whether it was intact or not. The whole gynaecological examination as it appears from the report shows that no injuries were observed in all sections. Her ultimate conclusion however was that the physical injuries observed corresponds with vaginal penetration. This finding is inconsistent with the complainant's testimony that she had no injuries. Furthermore the J88 report itself shows

that there were no injuries. Jenkins failed to explain these internal contradictions.

88. The J88 revealed there was a cleft. According to Jenkins a cleft is an old scar which heals within 15 days. Her evidence further suggests that clefts disappear with time. Comparing the time that she examined the complainant at the time that Dr Irwin examined the complainant, it is more probable that Dr Irwin stood a better chance of observing any visible injuries or scars. While Jenkins evidence was gynaecological, there is no evidence that Dr Irwin's medical exam was not gynaecological. What is certain is the Dr Irwin's examination was vaginal.

89. Furthermore, the J88 report does not show any signs of a hymen being partially broken. Jenkin's evidence is that the complainant's hymen was partially broken. Her evidence did not go unchallenged. She conceded that penetration of a 38 male to an 11 year old would cause more substantial harm to the hymen. Considering this, actual penetration would have been difficult if not improbable to achieve. Her evidence that the hymen was partially broken is inconsistent with the complainant's version that the applicant made movements while penetrating her In balancing the probabilities, and in not excluding the possibilities, and in considering the applicant's physical body and the age of the complainant at the time of the alleged incidence, I find it more probable that the hymen would have completely broken." (my emphasis)

[6] The record shows the following exchange of Nurse Jenkins testimony under cross-examination:

"MR OLIVIER: Alright. Now you see the problem that we have here is that these injuries took place in November 2010 and it was by a 30 something old man. Would the hymen and everything still be partially intact if that was the situation?

CORDELIA JENKINS: It is possible that the hymen can be partially intact, yes even if there was a cleft.

MR OLIVERIA: Would not the injuries be much worse?

CORDELIA JENKINS: Yes it is possible and it is also not possible. It all depends on the penetration, how it was."

[7] It is clear from the above, that the Arbitrator's finding that Nurse Jenkins conceded "that penetration of a 38 male to an 11 year old would cause more substantial harm to the hymen" materially deviates from what is on record. Furthermore, Dr Irwin, a general practitioner did not give evidence at the arbitration. There was no direct evidence as to the exact nature of the examination by Dr Irwin in 2011, who according to hearsay evidence told the Complainant's mother she 'was fine'. On the other hand the J88 Report prepared by Jenkins concluded that: "on gynaecological examination physical injuries observed corresponds with vaginal penetration."

[8] As submitted by Ms Nyman on behalf of the applicant, the Arbitrator was enjoined in dealing with two conflicting versions, that of the Complainant and that of the alleged perpetrator, to assess the credibility and reliability of their evidence and that of their witnesses and to assess the probabilities. In evaluating the evidence regarding the incident in question, the Arbitrator records in the Award:

> "90. Whilst it would be unfair to expect such a young complainant to recall dates and occurrences with precision, it is equally difficult to expect the applicant to defend himself in such circumstances. I am not surprised that the applicant found it difficult to provide more details in support of his denial of the incident."

[9] The Arbitrator also recorded that since he did not have the evidence of a social worker or psychologist:

"I have considered the Diagnostic Symptoms Manual 5 (DSM5) and the emotional effects of sexual assault victims. No evidence was placed before me to suggest that the complainant has suffered any of the listed symptoms. I have

also considered the complainant's conduct after the alleged incident, the fact that she was willing to drive with the applicant in the absence of her mother and her mother's willingness to create opportunities for the applicant and his family to spend time with them. This behaviour is not consistent with the earlier suggestion that the complainant did not want to be around applicant."

[10] Two issues regarding the above need noting. First the record shows that the incident where the Complainant drove with Wandile, her aunt, Wandile's wife, was in the back of the car. Secondly, the Arbitrator was not qualified to foray into the diagnostics of emotional impact on sexual assault victims to support his ultimate decision.

[11] The Arbitrator was enjoined to decide whether on a balance of probabilities the first respondent was guilty of the misconduct for which he was charged, and if so whether his dismissal was substantively fair. I agree with submissions on behalf of the Applicant that his treatment of the evidence was materially defective; that he failed to properly evaluate the conflicting versions before him; and that he rejected relevant evidence such as that by Nurse Jenkins while accepting as relevant the content of an academic handbook which he was not qualified to understand or apply. In the Court's view these defects constitute gross irregularities.

[12] The above gross irregularities were committed in a context in which the Arbitrator misconstrued the nature of the enquiry before him.[1] In this regard, the Court raises as a matter of law, that at the time of the arbitration the definition of the common law offence of sexual penetration included "any act which causes penetration to any extent whatsoever by the genital organs of one person into or beyond the genital organs, anus, or mouth of another person'[2]. (emphasis mine) . The Arbitrator did not interrogate what the meaning of the common law offence comprising the alleged misconduct was in his enquiry into whether there had

[1] Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae) (2013) 34 ILJ 2795 (SCA) at para 25
[2] s 1 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007

been sexual penetration, and focussed on what he believed was the lack of physical injury to the Complainant.

[13] In all the above circumstances, I am of the view that the Award stands to be reviewed and set aside. Given that issues of credibility are key to a matter such as this, I will not substitute the Award but instead remit it. The application for condonation is granted in view of the merits of the review and given that the delay was not inordinate. I do not consider it appropriate to order costs against an individual respondent defending the Award made in his favour. I make the following order:

Order

1. The application for condonation is granted.

2. The Award under case number GPBC 892/2015 is reviewed and set aside.

3. The dispute is remitted to Third Respondent for arbitration anew before an arbitrator other that Second Respondent.

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H RABKIN-NAICKER

Judge of the Labour Court of South Africa

Appearances

For the Applicant: R. Nyman instructed by the State Attorney

For the Second Respondent: BDB Attorneys