



**IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN**

Reportable

Case no: C150/17

In the matter between:

**MEC: DEPARTMENT OF HEALTH:**

**Applicant**

**WESTERN CAPE**

and

**SAMA obo SAADIQ KARIEM, NO**

**First Respondent**

**SAMA obo SRINVIVASAN GOVENDER**

**Second Respondent**

**Date heard: 6 June 2018**

**Delivered: 19 September 2018**

**Summary: Application to review decisions by an internal disciplinary chairperson in terms of section 158(1)(h) of the LRA; Charge of sexual assault in circumstances in which the Complainant unable to give informed consent.**

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**JUDGMENT**

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**RABKIN-NAICKER, J**

- [1] This is an opposed application to set aside certain decisions in terms of section 158(1)(h) of the LRA. These were made by by the first respondent (Dr Kariem) in his capacity as the duly appointed presiding officer in the disciplinary

proceedings, which were instituted in terms of the Disciplinary Code and Procedures for the Public Service (the Code), read with the Sexual Harassment Policy of the Western Cape Government (the Policy).

- [2] Both parties before me agreed that the decisions were an exercise of public power, in as much as they were made by Dr Kariem on behalf of his employer, an organ of state, in terms of a power arising from the provisions of a statutory collective agreement.<sup>1</sup> Further, that the impugned decisions are reviewable under the constitutional principle of legality, encompassing the requirements of lawfulness and rationality.<sup>2</sup> In addition, that the applicant had standing to bring the review of its own institution's action.<sup>3</sup>
- [3] It was submitted by Ms Norton on behalf of the applicant in comprehensive heads of argument, that the impugned decisions also constituted administrative action as defined in the Promotion of Administrative Justice Act<sup>4</sup> (PAJA), inasmuch as they were an exercise of a statutory public power which adversely affected the rights of, and had a direct legal effect on (a) the Complainant; and (b) members of the general public who receive medical treatment at the Department's facilities.<sup>5</sup> As such, the impugned decisions are reviewable by this Court on all the grounds set out in PAJA, which include unlawfulness, irrationality and unreasonableness.

#### The Charges against Dr. Govender

- [4] I deal first with Charge 2 of three charges of misconduct laid against the second respondent (Dr Govender). On this charge he pleaded not guilty. Charge 2 involved the following: *That on 20 September 2016, he engaged in a sexual act with the Complainant on the premises of the Department without her consent, and thus made himself guilty of an act of misconduct as contained in Annexure A to the Code, read with the Policy i.e. of sexual assault.* The said Policy itemizes various types of sexual harassment including:

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<sup>1</sup> *Hendricks v Overstand Municipality and Another* (2015) 36 ILJ 163 (LAC) at para 21.

<sup>2</sup> *Masetlha v President of the Republic of South Africa and Another* 2008 (1) SA 566 (CC) at para 81.

<sup>3</sup> *Khumalo and another v MEC for Education, KwaZulu-Natal* 2014 (5) SA 579 (CC).

<sup>4</sup> Act 3 of 2000.

<sup>5</sup> *Hendricks supra* at para 20.

“7.3.4 Physical conduct of a sexual nature includes all unwelcome physical conduct, ranging from touching to sexual assault and rape, and includes a strip search by or in the presence of the opposite sex.”

- [5] Dr Kariem found Dr Govender not guilty of this charge and the applicant asks the Court to review and set aside this decision which was handed down on 3 February 2017.
- [6] In respect of the further two charges, Dr Govender pleaded guilty, i.e. *that he engaged in a sexual act with the complainant on the Department's premises (Charge 1); and that he medically treated the complainant with hospital supplies when she was not admitted as a patient (Charge 3).*
- [7] In respect of Charge 1, Dr Kariem imposed the sanction of 'Demotion to the fourth notch medical specialist Grade One', and in respect of Charge 3, he imposed the sanction of 'Final written warning'. The applicant seeks the review and setting aside of both these sanctions.

#### Background to the Sexual Assault Charge

- [8] On 23 September 2016, the Department received a complaint from the Complainant that on 20 September 2016, at the Department's Site B Clinic, Dr Govender engaged in sexual intercourse with her without her consent, and while she was under the influence of a drug which he had administered to her.
- [9] Arising from the investigation into the complaint, it was recommended that Dr Govender be charged with the three counts of misconduct referred to above. The disciplinary hearing was held on 14 November 2016 and 19 December 2016. Two witnesses gave evidence for the Department: (a) the Complainant and (b) Professor Mark Blockman, a clinical pharmacologist; and four witnesses testified for Dr Govender: Dr Govender himself; Dr Gerrit Verster, a psychiatrist; Dr Conrad Derksen, a specialist anaesthetist; and (d) Dr Kate Joyner, an acquaintance of Dr Govender.
- [10] In a report titled 'Presiding Officer's Report into the Disciplinary Hearing of Dr Govender' (the Report), Dr Kariem provided a summary of the evidence and his reasons for the impugned decisions. Dr Govender did not appeal against any aspect of Dr Kariem's decisions.

- [11] It was established on the evidence before Dr Kariem that as of 20 November 2016 Dr Govender and the complainant had known one another for approximately five years, as colleagues and friends, and had a brief sexual relationship between March and June 2016.
- [12] Dr Govender knew that the Complainant had been suffering from post-traumatic stress disorder and clinical depression since an armed robbery in January 2016. He knew that she had undergone psychiatric treatment and was using anti-depressants and sleeping tablets which had been prescribed for her. He also knew that she suffered from hypertension.
- [13] On 20 September 2016, Dr Govender offered to give the Complainant a lift home. When she told him that she was having a 'down day', he told her about a drug called Ketamine, which he said could be used as a 'mood lifter'. He offered to administer Ketamine to her, and took her to the Site B clinic (which was where his office was) and arranged with the nursing manager to use a room in the clinic which had a bed in it. He administered a drip containing Ketamine to the Complainant while she was lying on the bed.
- [14] It was common cause that in the period which followed Dr Govender lay down next to the Complainant on the bed and had sexual intercourse with her. However, their respective versions on how this came to happen differed. The Complainant testified that the sexual intercourse occurred while the Ketamine drip was running and while she was experiencing disassociation and physical lameness. She could not recall consenting to sexual intercourse.
- [15] Dr Govender's version was that he had turned off the Ketamine drip shortly after it commenced, that he asked and obtained her permission for sexual intercourse while she was '*conscious and oriented*', and that he started the drip running again only after the sexual intercourse.
- [16] According to the Complainant, the nursing manager (Sister Mshumpela) assisted with inserting the drip. After doing so, and while the drip was running, Sister Mshumpela offered to switch on the heater, did so, and found a blanket for the Complainant before leaving the room. When she left the room, the Complainant testified that she started feeling '*very weird*.' She had a feeling of something like a buzz in her head, ears and eyes. She was experiencing 'a

*funny feeling*'. She told Dr Govender. He turned the drip (which was running fast) down 'a bit' and told her it must run for 30 minutes. He then said that he was going to fetch a blood pressure machine.

- [17] While he was away, she testified to the hearing, that it felt as if something was happening to her body. She felt like getting up but couldn't move. She said she didn't know how long Dr Govender was away, but he returned with a blood pressure machine and tested her blood pressure, finding that it was very high. He asked her if she had taken her blood pressure tablet that day, and she said that she had. He retested it a bit later and it had come down.
- [18] After the second time that he tested her blood pressure, he asked her if he could lie down next to her on the bed, as he had had a very long day. She said he could. He locked the door (which was already closed) and lay down next to her. He asked her to touch him on the chest and she put her hand on his chest, feeling as if she was in a trance. She heard people talking outside and said '*there's people*'. She was having difficulty speaking, her tongue felt very thick, and her lips felt like balloons. He offered to get her some water. He unlocked the door and fetched her some water. She took a sip, but her action in drinking the water was delayed. He took some vials out of his pockets and put them on the desk. When she asked him what they were, he said they were Phenergan and Hydrocortisone, for possible allergic reactions.
- [19] According to her testimony, Dr Govender took her blood pressure for a third time, and it had come down further. He locked the door again and got back onto the bed. Then he began kissing her in the neck and on the breasts. She heard a sound of packet and asked him what it was. He said it was 'lube'. She asked '*condom?*', and he said no, it wasn't necessary. When he tore the packet, he told her '*you don't have to do anything*'. He also said: '*You know, I didn't plan any of this*'. She answered: '*You did*'.
- [20] The Complainant testified that she did not know how long the intercourse continued, and did not recall whether she co-operated or was able to move. She had a feeling of being two people, one in the bed, the other looking down at her. She had the feeling that what was happening was 'not right'. Afterwards, she asked Dr Govender about the time, and he turned the drip

open to finish it. When he opened the drip for the last bit to run in, she felt as if she was going to die. She couldn't speak. She felt spaced out. When the drip was finished he told her she must get up. He handed her some paper towel and she wiped herself.

- [21] She stated that she struggled to get up, feeling drunk and dizzy and falling around. Dr Govender handed her pantyhose and panties to her and said she must get dressed. She struggled to put on her underwear and had to hold onto him as she walked from the room to his car. He took her home and she went straight to bed.
- [22] The Complainant stated that she decided the next morning to report the incident, despite being aware of the consequences for both of them and their reputations. She stated that she did so because of the way she felt as a woman being in such a vulnerable state: a person – a trusted friend – having sex with her while she was on a drip.
- [23] In his evidence to the disciplinary hearing, Dr Govender did not dispute the Complainant's account of the sequence of events in the room. In particular, he did not deny that she had complained of feeling strange while the drip was running, that he had left the room to fetch a blood pressure machine, and that he had tested her blood pressure and found that it was high. He also did not deny locking the door, bringing her water, opening a packet of lubricant, or telling her that a condom was not necessary, before having intercourse with her.
- [24] The essence of his testimony was that he had turned the drip off after he found that her blood pressure was high, and that it was while the drip was turned off that they had sexual intercourse. He also said that before having sexual intercourse, he asked and obtained her permission. He contended that when he turned the drip off, it had been running for a very short period, and that the complainant was 'conscious and oriented' when she gave permission for sexual intercourse. The record reflects that save for the issue of permission (which the Complainant could not recall giving), none of these contentions was put to the Complainant in cross-examination and she accordingly was not afforded the opportunity to deal with them.

[25] It was highlighted on behalf of the applicant that the record reveals that Dr Govender gave several different versions on the question of how long the drip had been running before he (allegedly) turned it off, as set out below:

25.1 He said in his evidence in chief that the drip had only been running for about 30 seconds when he turned it off.

25.2 Under cross-examination, he gave a different version, saying that he specifically turned the drip off when he realized that the Complainant's blood pressure was raised. He said that the drip had not been running *'for more than I would guess a minute or two'*. He testified that: *'We then checked her blood pressure and then stopped the drip because we needed to wait for the blood pressure to go down'*.

25.3 When his different versions were pointed out to him, he said the drip was running for 30 seconds, then there was *'a further thirty seconds to a minute'* until he got the blood pressure machine and checked the blood pressure.

[26] Thus on Dr Govender's version the period for which the drip was running began when the drip was inserted, and encompassed: the time during which the nursing manager left the room; the time during which the Complainant began to feel 'weird' and communicated this to Dr Govender; and the time which it took him to fetch the blood pressure machine and test her blood pressure.

[27] Professor Marc Blockman, (Prof Blockman), a professor of clinical pharmacology in the Department of Internal Medicine, and consultant specialist at Groote Schuur Hospital and the University of Cape Town, was called to the hearing as an expert witness by the applicant.

[28] Prof Blockman testified about the properties and uses of Ketamine. He said that he had administered it and taught about it. He described it as a drug used for analgesia and anesthesia which may be administered orally or intravenously. He stated that when it is administered intravenously, it is absorbed straight into the bloodstream. It causes sedation and disassociation from the event.

- [29] He testified that because it causes disassociation, it may be used as an anesthetic to remove a patient from what is happening in order to reduce anxiety during a painful procedure. It can also cause disorientation and hallucinations.
- [30] He conceded that there are some studies showing its use in treating depression which is severely resistant to treatment, to try to break a cycle of 'suicide ideation'. Further that there is a 'hint' that there may be some benefit in such cases.
- [31] Prof Blockman was asked to consider the scenario of someone engaging in a sexual act with a person who has undergone infusion with Ketamine. On the question whether such a person can give informed consent for a procedure or for '*any act on their body*', he replied as follows:
- 'There is only one question one has to ask. If you infuse Ketamine, I don't care what dose it is, would you take informed consent after infusing Ketamine?...The answer to that will be no'.
- [32] Prof Blockman's evidence on this issue was not challenged or undermined in any way at the hearing. In fact, two expert witnesses called by Dr Govender confirmed the pertinent aspects of Prof Blockman's evidence.
- [33] Dr Verster, a District Psychiatrist and senior specialist in psychiatry who had never administered Ketamine, agreed that Ketamine has side-effects which include hallucinations and hypertension.
- [34] Dr Conrad Derksen, a specialist anaesthetist, testified that based on his experience, a patient given 40mg of Ketamine over thirty minutes should not experience loss of consciousness or loss of memory, but Ketamine could cause disassociation, disorientation, dizziness, hallucinations, and heightened blood pressure. Its effects depend on many variables, including the dose, the speed of administration and the patient.
- [35] Several documents dealing with the use and administration of Ketamine were introduced by Dr Govender. One, a chapter which he had co-authored, entitled '*How to administer procedural sedation and analgesi,*' stated the following in respect of Ketamine:



'Ketamine is used for painful procedures, especially in children. It causes a state of disassociation with analgesic, sedative and amnestic properties. Psychiatric side effects such as hallucinations are more common in adults...The sympathetic nervous system stimulation can also cause tachycardia and hypertension'.

- [36] It must be noted that Dr Govender also testified that he personally used ketamine for "depression and anxiety" stating that it was taken orally and was a very low dose. He usually got access to it at the Khayelitsha clinic. The transcribed record reflects his evidence as follows:

'...so I would actually administer four mills to a patient. I would sometimes just – if it was just for one to two mills left at the end of the ....(indistinct) you know, I would, I know it was not legal, but I mean, it was just something that I found beneficial.'

- [37] In answer to a question from the Chairperson, Dr Govender stated that:

'Look, you know, we do know for a fact Ketamine can alter your perception, you know, it can cause, what is called an emergency...(indistinct). So it is possible that she – that while the drip was running, you know, she dissociated and she had outer body experience but the point I am making is that the act that really took place, before she reached that point...'

#### Dr Kariem's findings on the sexual assault charge

- [38] In his findings, Dr Kariem accepted that Dr Govender's intention was to assist the Complainant with her treatment resistant depression. He did not believe that at the outset Dr Govender had set out to sexually take advantage of the Complainant.

- [39] Dr Kariem accepted Dr Govender's evidence that Ketamine "*is appropriately used in the treatment of treatment resistant depression*" and expressed his own diagnosis of the complainant's condition as follows:

'I would regard the depression that the complainant suffered from as falling into this category as she had doubled the dose of her medication over the past year and was still suffering from depression'.

- [40] He concluded on this issue:

'Hence it is my view that ketamine was in the first instance being appropriately used for the correct clinical indication and that the defendant had the appropriate clinical experience to administer the drug - it was noted that he had previously authored an article on the use of ketamine in a medical journal'.

[41] Dr Kariem further accepted that the common effects of ketamine include:

'[d]issociative symptoms, confusion, neurocognitive effects (including poor co-ordination, concentration and restlessness), blurred vision, drowsiness, headaches, nausea, vomiting, transient mood elevation (talkativeness and decreased inhibition), elevations in blood pressure and increased libido.'

[42] He noted that '*[i]n one of the studies examined, the authors noted that 17% of patients had significant dissociative symptoms i.e. feeling outside of one's body or perceiving that time is moving more slowly or quickly than normal*'. He also accepted that the complainant '*could well have experienced some of the side effects of Ketamine as noted above. She could well have experienced a dissociative state. She stated that she felt 'weird' and 'similar to an anesthetic, of being spaced out' and also felt as though there were two people in the room, me and another me.*'

[43] He noted that the key issue to decide was whether the sexual intercourse was consensual. He found that '*on the balance of probability it [is] not clear in this case whether consent for sex was or was not granted.*' The basis for this conclusion in his finding was as follows:

43.1 Dr Govender testified that once the nurse had put up the drip it ran in for approximately sixty seconds before he stopped the drip and left the room to fetch the blood pressure machine. The Complainant had also confirmed this.

43.2 That: '*thus there could not have been a significant amount of ketamine that had been infused. It was while the drip was closed that sexual intercourse had taken place*'.

43.3 That the Complainant acknowledged that '*she cannot recall refusing kissing and touching*' under cross-examination.

43.4 That the Complainant stated that she '*cannot not recall having given consent (for sex)*' under cross-examination.

43.5 The complainant recalled granting consent to '*kissing and touching*'.

[44] In his Report, Dr Kariem stated that the aggravating factors which he considered in respect of the sexual assault charge included the following:

- '1. I take note of the employers' notes in aggravation with respect to sexual harassment. In my assessment this is not sexual harassment for the reasons outlined above.
2. I take note of the sanction of dismissal in the case of Mr Bardien who had sexual intercourse with a patient on state premises. In this specific case Mr Bardien clearly misused his power in return for sexual favours with a patient on the premises of the workplace. I find that in this specific case there was no abuse of a power relationship as the complainant was technically in a more senior management position than the respondent.
3. However, the seniority of position that the respondent holds and the weight of the moral and ethical obligations that come with being a senior family physician are important considerations to take into account in aggravation.
4. The respondent was well aware of the effects of using ketamine and the possible impact of the drug on the complainant.'

[45] Dr Kariem further stated that the mitigating factors which he considered in respect of the sexual assault charge included the following:

- '1. This is a first offence in the 28 years that the respondent has worked for the state.
2. The respondent has shown remorse and acknowledges that his actions were wrong. In mitigation he acknowledges that this was an error in judgment on his part.
3. He is the primary breadwinner in the household and has been using his credit and home loan to sustain his family since his lost income thus far from overtime has been in the region of R100 000.
4. The respondent is familiar with the use of ketamine and points out that he had authored an article on the procedural sedation in the SA Family

Practice Manual. It is my view that ketamine was clinically appropriate for use in the case of the respondent.

5. In mitigation the respondent also notes that there has been an amicable reconciliation between himself and the complainant that took place prior to the day of the last hearing which had been held on 19 December 2016. The chief director, Dr Perez, had been informed of this reconciliation.

6. The respondent requests that the sanction given is a final written warning.'

[46] Dr Kariem also found the following to be '*pertinent considerations*':

'The use of ketamine was clinically appropriate in this instance; and The complainant had agreed to the use of ketamine [she should also have known that this was wrong whilst she was not registered as a patient at Khayelitsha CHC]'

[47] Dr Kariem concluded:

'However, given the seniority of position that the respondent holds, the ethical and moral issues involved, a final written warning would not be an appropriate sanction. On the other hand, I feel that dismissal is too harsh a sanction in this case as pointed out above with reference to the LRA Code of Good Practice'.

[48] As noted above he imposed the sanction of '*demotion to the fourth notch medical specialist Grade One*.'

[49] It was argued on behalf of the applicant, and with respect, correctly so, that the sexual assault decision was irrational and unreasonable in that:

49.1 Prof Blockman's unchallenged evidence was that a person who has been infused with Ketamine, in whatever dose, does not have the capacity to give informed consent to any act in respect of her body.

49.2 It was common cause that the Complainant had undergone infusion with Ketamine before Dr Govender had sexual intercourse with her.

49.3 In finding that '*on the balance of probability it [is] not clear whether consent for sex was or was not granted*', Dr Kariem –

- 49.3.1 failed to take the aforementioned material evidence into consideration, or gave insufficient consideration to it;
- 49.3.2 made a finding that was not rationally connected to the aforementioned evidence; and
- 49.3.3 made a finding which was unreasonable, in that no reasonable decision-maker could have reached it based on the aforementioned evidence.

[50] The finding was also not rationally connected to, or reasonable in the light of Dr Kariem's own conclusion that the Complainant *'could well have experienced some of the side effects of ketamine'* and *'could have experienced a dissociative state'*.

[51] It was further submitted that in finding that *'there could not have been a significant amount of ketamine that had been infused'*, Dr Kariem disregarded the following relevant evidence:

- 51.1 Prof Blockman's evidence that when Ketamine is administered intravenously, it *'gets to the affected site straight away'*, and thus, unlike oral administration, there is no delay in its absorption;
- 51.2 The evidence of the complainant that Sister Mshumpela, after inserting the drip, and while it was running, offered to switch on the heater, did so, found and gave the complainant a blanket, and was thanked by Dr Govender, all before she left the room;
- 51.3 Dr Govender's version that it was only after (a) Sister Mshumpela had left the room, (b) the complainant began to feel 'weird' and communicated this to him; (c) he left the room to find a blood pressure machine; (d) he returned and tested the complainant's blood pressure, that he turned off the drip;
- 51.4 Dr Govender's evidence that the reason he turned off the drip was because the Complainant's blood pressure went up after the administration of the drip, indicating the effect of the Ketamine on her; and

51.5 The evidence of Ms Joyner, that Dr Govender had told her that *'they then had sexual intercourse during the admission of ketamine'*.

[52] I further note Dr Karriem's acceptance of the alleged severity of the Complainant's depression was based entirely on the evidence of Dr Govender with no recourse to requesting an opinion from the Complainant's own psychiatrist.

[53] Dr Kariem's finding that *'there was no abuse of a power relationship as the complainant was technically in a more senior management position than the respondent'* was irrational and unreasonable in light of the following factors:

53.1 The context in which the sexual intercourse took place, where Dr Govender, as a physician, was purporting to administer medical treatment to the Complainant, as a patient;

53.2 The unequal power relationship between a doctor and a patient;

53.3 Dr Govender's own evidence regarding the vulnerability of the complainant, including his evidence that *'it was actually because I knew her history that I was worried and concerned about her...I was aware of the fact that she was seeing a psychologist, the fact that she was seeing a psychiatrist and the fact that she actually recently doubled the doses of anti-depressants'*, and

53.4 Dr Govender's evidence that at the end of June 2016 there was a transition from the romantic relationship between him and the complainant to a relationship in which he played the role of Doctor.

[54] I am of the view that for at least the reasons set out above, the sanction in respect of sexual assault falls to be reviewed and set aside on the grounds of irrationality and unreasonableness.

[55] The parties agreed in the proceedings before me that if the Court should set aside the decision on the sexual assault charge this was a matter where the Court should substitute it, rather than remitting the matter for decision anew. I

agree, given that the Court has all the evidence before it and it is fair and practical for the Court to substitute its own decision.<sup>6</sup>

[56] In his finding Dr Karriem stated that the policies of the department made clear that in cases of clear sexual harassment a sanction of dismissal is appropriate. The evidence in this case, duly considered, was that the Complainant did not have the capacity to give informed consent to any act in respect of her body due to the infusion of the Ketamine. In the Court's view the misconduct by Dr Govender is aggravated by his professional position and the high ethical standards which he is expected to observe. His admission of guilt to the two other serious charges only serves to underscore that his conduct is of a nature that, objectively considered, breaches the trust in the employment relationship. It is not necessary for me to deal with the sanctions handed down for these latter charges. This is because in the Court's view Dr Govender stands to be dismissed in respect of the sexual assault charge. Dr Govendar was represented by Counsel and attorney instructed by the South African Medical Association. He defended the finding of his employer's tribunal. No cost order is apposite in this matter.

[57] In all the circumstances, I make the following order:

#### Order

1. The decision of the first respondent dated 3 February 2017, that the second respondent was not guilty of the second charge against him (that of sexual assault) is reviewed and set aside and substituted as follows:

- 1.1 The second respondent is found guilty in respect of the second charge against him (that of sexual assault).
- 1.2 The penalty for the finding of guilt shall be dismissal.
- 1.3 The date of dismissal shall be determined by the applicant.

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<sup>6</sup> Ntshangase v MEC for Finance: Kwa-Zulu-Natal and Another (2009) 30 ILJ 2653 (SCA) at para 9

H. Rabkin-Naicker

Judge of the Labour Court

Appearances

Applicant: Michelle Norton SC instructed by the State Attorney

Second Respondent: Thando Ntshonkota instructed by Madiba Mosai  
Masitanyane and Githiri Attorneys