IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 16/16

In the matter between:

SOUTH AFRICAN MEDICAL ASSOCIATION obo

GRZEGORC LUDWICK PIETZ **Appellant**

and

DEPARTMENT OF HEALTH - GAUTENG **First Respondent**

ADVOCATE RONNIE BRACKS N.O **Second Respondent**

PUBLIC HEALTH AND SOCIAL DEVELOPMENT

BARGAINING COUNCIL **Third Respondent**

Heard: **16 November 2016**

Delivered: **04 May 2017**

Summary: The Bargaining Council – Finding that the dismissal of the appellant employee was substantively fair but procedurally unfair – refusing to exercise its discretion to award compensation for procedural unfairness. The Labour Court – dismissing the application to review and setting aside the Bargaining Council arbitration award. The Labour Appeal Court - confirming that the dismissal was substantively fair but procedurally unfair- Finding that the egregious disregard of the appellant employee's right to a fair pre-dismissal hearing justified redress on just and equitable basis- The order of the Court *a*

***quo* set aside - the award of the Bargaining Council amended by an addition of an award of compensation.**

Appeal upheld in part and the order of the Court *a quo* substituted.

Coram: Landman JA, Molemela JA and Phatshoane AJA

JUDGMENT

Phatshoane AJA

[1] This is an appeal by the South African Medical Association (SAMA) on behalf of Dr Grzegorz Ludwick Pietz (Dr Pietz), the appellant, against the whole of the judgment and order of the Labour Court (per Rhoodie AJ) dated 29 July 2015, dismissing with costs Dr Pietz's application in terms of s145 of the Labour Relations Act, 66 of 1995 (the LRA), to review and set aside the arbitration award dated 15 August 2012 issued under Case No: PSHS642-09/10 by commissioner Ronnie Bracks (the commissioner),[1] the second respondent, under the auspices of the Public Health and Social Development Sectoral Bargaining Council (PHSDSBC), the third respondent. The appeal is with the leave of the Court *a quo*.

Background:

[2] Dr Pietz, a medical doctor from Poland and admitted to practice in South Africa as a gynaecologist and obstetrician, was employed by South Rand Hospital, a level 1 hospital[2] which falls under the administration of the Department of Health, Gauteng (the department), the first respondent, for the period 1991 until 1998. He was re-employed by the same hospital from 2007 until his dismissal on 01 December 2009. He had been in the medical practice for a period of 39 years.

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[1] The award is date-stamped 21 August 2012

[2] In terms of the Guidelines for Maternity Care in South Africa 2007, third edition (record page 295-320) - A level 1 hospital "may be called a district hospital, as it would normally be the base hospital for a heal district. The definition applies best to rural areas, while in urban areas level 1 hospital functions are often integrated into larger hospitals." The evidence suggests that this would be a type of hospital which does not have facilities such as an ICU, Paediatric Unit and the like specialised units. It provides basic procedures not major operations.

[3] It is common cause that on 01 December 2009, Dr Pietz was summarily dismissed without a disciplinary hearing by the department on the strength of the allegation that he was guilty of insolence, insubordination and gross negligence. The letter of termination of his services reads:

> 'It has come to the attention of the department that you were involved in an act of misconduct (Gross negligence, insolent behaviour and insubordination) leading to the death of an unborn child.
>
> The department has therefore decided to terminate your services with immediate effect.'

[4] The factual milieu precipitating Dr Pietz's dismissal is as follows. On 25 November 2009 at 23h05 the late Ms Philile Hlatshwayo, 41 years of age and approximately 27 weeks pregnant, was admitted to the admissions ward by Sister Merriam Nape, a midwife with 19.5 years of experience, complaining of lower abdominal pains. Sister Nape placed her on the non-stress test (NST)[3] machine which indicated that the foetal heart rate was 128 beats per minute. The patient's cervix was about 5cm dilated. The evidence suggested that a foetus is premature at 28 weeks gestation period.[4]

[5] Sister Nape examined the patient's birth canal. She felt a soft mass which in her view was an indication that the unborn child was descending with its buttocks (in breech presentation). To the right of the soft mound ahead of the presenting parts was a prolapsed (protruding) umbilical cord. Sister Nape summoned her colleague, sister Thembekile Jennifer Ncube, a professional nurse and a clinical specialist, who confirmed her clinical findings. The umbilical cord was pulsating.

[6] Sister Ncube instructed sister Nape to call Dr Pietz, the doctor on call during that night, to inform him of the prolapsed cord. Only a doctor is permitted to deliver a baby in instances where the patient presented with a prolapsed cord or the foetus was in a breech position because this was life-threatening and an obstetrical emergency. In order to prevent the presenting parts from resting

[3] At times referred to as the CGT (Cardiotocograph) Machine on the record.
[4] The lungs have developed but not to a desirable extend.

on the umbilical cord thereby cutting off the blood supply/oxygen to the unborn child, which could result in death by asphyxiation, sister Ncube pressed her fingers inside the patient's birth canal. She was assisted by two other nurses, sisters Mbonani and Mbombi. They placed the patient on a drip and a catheter to drain the urine in anticipation of the caesarean procedure they believed would follow.

[7] Sister Nape says she called Dr Pietz at approximately 23h10 and explained to him "*that the patient is presenting with a breech and a cord prolapse*" and that she was about 27 weeks pregnant. He replied that he would attend to the patient when she "*is fully dilated to deliver*". Sister Nape informed sister Ncube of the astounding impertinent response she received from Dr Pietz. Sister Ncube intimated that she enquired from sister Nape "*did you tell him that it is a cord prolapse*". Sister Nape replied affirmatively. Sister Ncube requested one of the sisters present to continue pushing up the presenting parts whilst she called Dr Ilunga Kabale, the medical superintendent, requesting his intervention given the critical situation. She also called Matron Elizabeth Kentse Kgomongwe, a nursing manager, to inform her of the state of affairs. Matron Kgomongwe instructed her to call Dr Kabale for an update on Dr Pietz's reaction to the obstetrical emergency.

[8] Dr Kabale called Dr Pietz and informed him of the telephonic conversation he had with Sister Ncube. Dr Pietz denied having been informed of the prolapsed cord. Dr Kabale instructed him to attend to the patient immediately. Dr Pietz, who was furious, proceeded to the ward. Upon his arrival, around 23h35, visibly enraged, he enquired from the nursing staff regarding who had contacted Dr Kabale. Ncube acknowledged that she had done so. Sister Nape says Dr Pietz hurled unprintable opprobrious epithets at sister Ncube "*f… you, who do you think you are".* Sister Ncube added that Dr Pietz proceeded to say *"f.. you, f…the hospital, f…..this management."* He then approached sister Ncube in a threatening manner as if he would assault her. He kicked the drip stand which fell. Sister Ncube who was terrified by Dr Pietz's conduct moved out of the ward and stood outside. Sister Nape intimated that Dr Pietz carried

on in that vein for approximately five to eight minutes before attending to the patient.

[9] According to sister Nape when Dr Pietz eventually examined the patient the foetal heart rate was 117-118 beats per minute (showing a deceleration). Having conducted his examination Dr Pietz left the hand of the unborn child and the cord "*just [hanging] outside the vagina*"; took off his gloves; and instructed the nursing staff to prepare the patient for a caesarean section in the theatre. Dr Pietz did not inform the patient of the need to perform the C-section to enable the patient to give her informed consent to the operation. According to him "*the sisters could inform the patient why she is going for caesarean section*." Prof Eckhart Johannes Buchmann, a Professor of gynaecology and obstetrics at the Wits Medical School, called as an expert by Dr Pietz, explained that in terms of the standard procedure "*the doctor in charge should speak to the patient and explain what is wrong and why the operation is necessary and how the operation is going to be done*."

[10] Sister Nape further testified that Dr Pietz was supposed to push the prolapsed parts back into the birth canal because if the cord is exposed to the cold environment the unborn child could die. Sister Ncube used a warm wet gauze to push the prolapsed cord and the hand back into the birth canal to keep the cord pulsating. Having prepared the patient and put her in a genupectoral (knee-chest) position she was wheeled into the theatre. There was tension in the theatre. Part of the reason for the tension, according to Dr Nosipho Taye, the anesthetist in this case, who testified for Dr Pietz, was all about the life of the unborn child. She also enquired from one of the sisters whether the cord was pulsating but the response was negative. She then looked at Dr Pietz who confirmed that the cord was not pulsating. This version was not put to any of the department's witnesses. As a general rule it is essential, when it is intended to suggest that a witness is not speaking the truth on a particular point, to direct the witness's attention to the fact by questions put in cross-examination showing that the imputation is intended to be made and to afford the witness an opportunity, while still in the witness-box, of giving any explanation open to the witness and of defending his or her character. If a

point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony is accepted as correct.[5]

[11] Sister Nape says that at the theater Dr Pietz continued disparaging the hospital and management "*saying that we are stupid South Africans, even management is stupid and he knows very well*". He completed the C-section but the child was stillborn. Attempts to resuscitate it were in vain.

[12] The next day, on Thursday 26 November 2009, Dr Pietz informed the patient that the baby died before her admission to the ward because she had not attended the ante-natal clinic examinations. Earlier on that same day around 09h00 Dr Kabale testified that he had called Dr Pietz to explain what had transpired. Dr Pietz told him that he was tired and sleeping. The following day he telephonically requested him to report to his office. Dr Pietz replied that he was busy and would come later but did not do so. Dr Pietz denied that Dr Kabale made contact with him on Thursday and Friday following the operation.

[13] On Monday 30 November 2009, at the behest of the executive committee of the hospital, Dr Kabale wrote a letter to Dr Pietz requesting him, within a period of 24hrs, to give "*a full report of all the processes you instituted in the management of the above patient (Ms P Hlatshwayo)*". In a separate letter of the same date his overtime duties in gyne-obstetrics were suspended with immediate effect pending the outcome of the investigation into this and other incidents which I will revert to. Dr Pietz did not respond to the letter. He intimated that the next day, 01 December 2009 around 9h00, he spoke to one Dr Mitchell of the department and explained to him what had transpired. Dr Mitchell accepted his explanation and requested him to put it in writing. Before he could forward the explanation to Dr Mitchell, he was dismissed.

[14] In his defence to the allegations involving the treatment he accorded Ms Hlatshwayo, Dr Pietz says he would have immediately attended to the patient

[5] See *President of the Republic of South Africa and Others v South African Rugby Football Union and Others* 2000 (1) SA 1 (CC) at 36-37 para 61

had the sisters informed him of the prolapsed cord. He intimated that on his arrival at the ward he observed that four to five sisters were disinterested in the patient. This version was not put to any of the department's witnesses. Be that as it may, he conceded that he did not report the sisters for their failure to assist the patient. He went on to say that the patient was lying in a normal and not genupectoral position which would have been the case if the cord had prolapsed as alleged by the sisters. No catheter was inserted into the patient's bladder. The floor was dirty and slippery. He enquired from the sisters why they called Dr Kabale and had not informed him of the prolapsed cord. He says that sister Ncube started shouting at him saying that she told him of the prolapsed cord and did not want to discuss this further with him. He does not recall using any foul language when addressing the sisters. Because the floor was wet he slipped and grabbed the drip stand but did not kick it. He admitted that he was aggressive to sister Ncube who fled from the ward.

[15] On his examination of the patient Dr Pietz says he found, contrary to the sisters' clinical findings, a presenting cord which was not prolapsed. It was also not pulsating. The foetus was not in breech presentation but shoulder presentation (transverse lie). It is important to state that Prof Buchmann testified that, strictly speaking, the cord had already prolapsed at the time Dr Pietz examined the patient because the membranes had ruptured.

[16] Dr Pietz admitted that he did not check the NST machine to determine the heart rate of the unborn child. However, he disputed that it was above 118 beats per minute as testified to by the sisters. He was of the view that the only option open to deliver the unborn child was through the C-section because the full hand prolapsed from the birth canal, the uterus was strongly contracted, and could rupture. Therefore, he instructed the sisters to prepare the patient for that procedure. Prof Buchman confirmed that the correct management of a transverse lie with a shoulder and hand presentation, irrespective of whether the unborn child was already dead or alive, was through a C-section.

[17] Extensive evidence was led at arbitration, without any demur from Dr Pietz, regarding two previous incidents in which concerns were raised regarding the

manner in which Dr Pietz dealt with requests to attend to three pregnant mothers.

[18] The first previous incident related to Ms Lizzie Okocho who was admitted in the maternity ward on 02 July 2008. Her gestation period was 35 weeks with intra uterine death.[6] Early in her pregnancy her cervix was sutured. Dr Pietz had informed the nurses that the shirodkar sutures would be removed in the morning prior to the induction of labour. In the next morning, when attempts at contacting Dr Pietz had failed, Dr Kabale removed the sutures and induced the patient. Her cervix started dilating at 14h00.

[19] Half an hour later, sister Bulelwa Nomtshongwana says, that while she was in the office, she overheard Ms Okocho's husband screaming. She found the patient and her husband on the floor. The patient was vigorously fitting; bleeding from her forehead; and had passed urine on the floor. There was also blood on the floor and the wall from her forehead.

[20] The nurses were busy attending to the patient when Dr Pietz entered the ward. He did not examine the patient's forehead or assist the nurses with how to deal with the laceration on the forehead which was visible and bleeding profusely. He ordered the nurses to prepare the patient for the C-section and left the ward. The nurses put a pressure bandage around the patient's head to stop the bleeding. Later on that day Dr Kabale found Dr Pietz and Dr Jetham in the ward. Dr Pietz was signing the consent form for the C-section. Dr Kabale says he stopped him in his tracks and said because the patient had already been induced and had fits she be transferred to Baragwanath. Dr Pietz transferred the patient.

[21] Dr Pietz says that he was not informed about the laceration on the patient's forehead for the half hour he attended to her. What is remarkable is that Dr Kabale saw the blood-stained dressing on the patient's forehead. Dr Pietz further says that his first impression was that the C-section be performed but backtracked because it would be risky to do so in South Rand Hospital as the latter had no ICU facility. He admitted that he did not examine the patient

[6] The unborn child had already died.

because he saw her the previous day at the antenatal clinic and he "*knew this patient, I knew the problem and I knew that this problem should be resolved as soon as possible*." He could not say on what basis he informed Dr Kabale that the patient was stable when he had not examined her. When confronted on this statement he said Dr Jetham was looking after the patient while he was making arrangements for her transfer to Baragwanath. He also could not give a plausible response why he arranged that the patient be transferred to Baragwanath when he had not examined her. Insofar as the stillborn baby was delivered naturally at Baragwanath and not through a C-section he intimated that he could not have been negligent as it often happened that patients would deliver normally albeit a C-section had been envisaged. Prof Buchmann says that the fact that the foetus was potentially macerated[7] was no reason for the C-section to have been ordered. He intimated that the C-section or the transfer of the patient should not have been ordered unless a doctor had examined the patient.

[22] With regard to the second previous incident the evidence can be summed up as follows. On 28 October 2009 Ms Serero Makali was admitted to the hospital. Her cervix was 3cm dilated and her water had broken. The foetal heart rate was 118 beats per minute, which is below normal, and there were signs of foetal distress. There was also another patient in the ward, Ms Bridgette Ragopane. Her cervix was 1-2cm dilated with a "brownish discharge". Sister Ncube says that Dr Pietz saw the patients and ordered her to continue observing them. She was uncomfortable due to their condition. She called Baragwanath Hospital for a second opinion. She also spoke to the CEO who advised her to use her discretion and not put the patients' life at risk. She transferred the patients to Baragwanath. Dr Pietz never enquired about the patients thereafter.

[23] Dr Pietz intimates that the sisters did not make any contact with him or report any changes in the patients' condition. They were transferred to Baragwanath Hospital without his knowledge.

<u>The arbitration award:</u>

[7] Had been dead for quite some time.

[24] The commissioner noted that the dismissal of Dr Pietz resulted from an incident which occurred on 25 November 2009 "*where the applicant* (Dr Pietz) *was allegedly called for a patient* (Hlatshwayo) *who had a prolapsed cord*". He identified that the only question that fell to be determined was whether the nurses had conveyed to Dr Pietz that the patient's cord had prolapsed and, if so, whether his failure to immediately attend to the patient constituted gross negligence.

[25] The commissioner found that the nurses were unwavering in their evidence that when they discovered that the patient's cord had prolapsed they consulted each other and called Dr Pietz whose response to them was that he be called when the patient was fully dilated. The commissioner held that Dr Pietz's denial that he was told by sister Nape about the prolapsed cord begged the question why the sisters would resort to calling the matron and the medical superintendent regarding same but neglect to relay the same message to Dr Pietz. He was of the view that, even if sister Nape had omitted to inform Dr Pietz of the prolapsed cord, the fact that the nurses took the trouble to call him meant that he ought to have immediately attended to the patient to establish how urgent the circumstances were, regard being had to the fact that the patient was in pre-term labour. He found that Dr Pietz had been irate when he examined the patient which in turn affected his interaction with the nurses.

[26] The commissioner noted the dichotomy in the evidence of Dr Pietz and that of the nurses regarding whether the prolapsed cord had been pulsating. He was of the view that this begged the question why the nurses went to the trouble of following the guidelines for maternity care if the cord was not pulsating. Dr Pietz, he stated, merely did the physical observation of the patient and determined that the cord was not pulsating which is contrary to Prof Buchmann's expert opinion. The commissioner accepted the evidence by the nurses that they recorded two heart rates of 117 and 128 beats per minute for the mother and her unborn child, respectively, through the NST machine at 23h15, soon after the admission of the patient at the hospital. He rejected the evidence of Prof Buchmann and Dr Pietz to the extent that they testified that

there might have been some confusion between the heartbeats of the unborn child and its mother.

[27] The commissioner was of the view that it made no sense that Dr Pietz performed the emergency C-section whereas he conceded that the unborn child was no longer alive. He reasoned that it was also illogical that Dr Pietz did not inform the nurses that the child was no longer alive. They proceeded to look after the patient as contemplated in the guidelines for the pulsating prolapsed cord. In addition, he stated, Dr Pietz did not inform Dr Taye, the anesthetist on duty, prior to the operation that the unborn child was no longer alive. The commissioner concluded that Dr Pietz's management of the patient "*was extremely careless and reckless*".

[28] The commissioner had regard to the previous incidents in respect of which the department contended that Dr Pietz had been negligent in the management of the three patients' cases. In respect of the incident concerning Ms Okocho, he found it inexcusable that having been informed that the patient had seizures and was bleeding, he completely failed to examine her. He found Dr Pietz's explanation that he had examined the patient a day prior to the incident unacceptable. He held that it was inappropriate that Dr Pietz ordered that the C-section be performed on Ms Okocho when he had not examined her and had to be frowned upon because this was a case of intra-uterine death. With regard to the other previous incident involving the two patients the commissioner held that Dr Pietz's denial that he had refused to attend to the patients was not convincing because it made no sense that the nurses would jeopardise their careers by transferring these patients to Chris Hani Baragwanath Hospital without the doctor's authorisation.

[29] The commissioner held that Dr Pietz blamed the nurses and made unwarranted accusations that they were negligent in the manner they managed the patients but never laid any formal complaint against them with the hospital or the Nursing Council. Dr Pietz was duty bound to lay a formal complaint against sister Nape for omitting to inform him of the prolapsed cord. He found it remarkable that Dr Pietz would let the complaint against the nurses "slide" despite his allegation that he had no good relationship with

them. He noted that Dr Pietz did not provide feedback to Dr Kabale concerning the death of Ms Hlatshwayo's child. He remarked that there were various means by which he could have communicated with Dr Kabale. For instance, through the short message service (sms), e-mails, or telefax. He was of the view that Dr Pietz was uncaring and lax in the performance of his duties.

[30] The commissioner accepted that Dr Pietz's general behaviour and working relationship with the auxiliary employees was unprofessional, particularly considering the evidence that he attempted to assault sister Ncube who avoided him by stepping outside.

[31] The commissioner concluded that the department had discharged the *onus* of proving that Dr Pietz was grossly negligent and had acted in a reckless and uncaring manner with regard to the patients that were entrusted to his medical care. In respect of the allegation that Dr Pietz was insolent the commissioner was of the view that the department did not adduce sufficient evidence to sustain the charge and exonerated him.

[32] The commissioner then turned his attention to the sanction imposed by the department. He held that Dr Pietz "*was a senior employee who dealt with a situation involving the life and death of the patients*". He violated the patients' constitutional rights by failing to provide them with proper health care, contrary to the "Batho Pele" principle. He was of the view that progressive discipline would be inappropriate as the negligent act was of a serious nature. In addition, he stated, Dr Pietz did not show any contrition and tried to justify his inexcusable conduct. He found no cogent evidence that Dr Kabale and the nurses were negligent. It could therefore not be said that the department had been inconsistent in the application of discipline.

[33] In respect of procedural fairness: The commissioner found that Dr Pietz was not afforded the opportunity to state his case and that the department dismissed him unfairly. Notwithstanding this, he made the following determination:

'40. When the gross negligence of the applicant (Dr Pietz) is considered, it is clear that it would be difficult for me to justify granting compensation. Especially when it is considered (that) he had the responsibility of caring for patients in a life and death situation. Also, by his actions he violated the patients' constitutional rights and when he was approached by the hospital to provide reports on his actions he refused to cooperate placing the hospital in a precarious position which could have resulted in claims being brought against the hospital. During the arbitration the applicant also failed to show any remorse.

41. I have also considered that while the respondent (the department) did not follow the proper procedure the applicant was given an opportunity to explain his actions to the respondent in a letter dated the 30th of November 2009 which he failed to do.'

[34] The commissioner refused to exercise his discretion in favour of awarding Dr Pietz compensation for the procedurally unfair dismissal. Resultantly, he dismissed Dr Pietz unfair dismissal claim.

The review proceedings before the Labour Court:

[35] The Labour Court ("the Court *a quo"*) commenced its enquiry by setting out the test for the review of the arbitration awards under the LRA as formulated in various decisions of the Courts.[8] It identified the following grounds of review raised by Dr Pietz in his founding papers. That the commissioner failed to apply his mind or committed a gross irregularity in that:

35.1 He failed to award compensation for the procedurally unfair dismissal;

35.2 He considered irrelevant evidence which impacted adversely on the outcome of the arbitration. The contention had been that the resultant decision was one that no reasonable commissioner could have reached; and lastly

[8] The Court *a quo* had regard to, *inter alia*, *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* 2008 (2) SA 24 (CC); (2007) 28 *ILJ* 2405 (CC); *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* (2013) 34 *ILJ* 2795 (SCA) at 2806 para 25; *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 943 (LAC)

35.3 He failed to properly consider the evidence before him.

[36] On the question of failure by the commissioner to award compensation for the alleged procedurally unfair dismissal the Court *a quo* held that in terms of s193 of the LRA the commissioner had a discretion to award compensation.[9] The Court *a quo* was of the view that the exercise of the discretion involved a two-stage enquiry: firstly, whether the compensation should be awarded, and secondly, the appropriate amount to be awarded as compensation subject to the limitation imposed by s194 of the LRA.[10] It was satisfied with the commissioner's finding that "*an employee party that was unfairly dismissed does not have an automatic right to relief*." It recognised the danger of allowing an employer to escape the consequences of not following a fair process but was persuaded that the commissioner's decision in refusing to allow compensation, in the circumstances of this case, was appropriate. To hold otherwise, it remarked, "*would not pass the moral and value judgment test*."

[37] On the aspect that the commissioner considered irrelevant evidence (previous alleged acts of negligence by Dr Pietz which impacted adversely on the outcome of the arbitration) the Court *a quo* was not swayed that the commissioner erred in his evaluation of Dr Pietz's general conduct. He remarked that a reading of the award reflected that the commissioner was alive to the key issue he was enjoined to determine. This being, the negligence said to have been perpetrated by Dr Pietz with regard to the management of Ms Hlatshwayo's case. This, he stated, formed the basis of the commissioner's decision.

[38] The Court *a quo* had regard to the question whether the commissioner failed to consider the evidence before him; failed to recognise that there was no

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[9] Section 193(1)(c) of the LRA provides that: 'If the Labour Court or an arbitrator appointed in terms of *this Act* finds that a *dismissal* is unfair, the Court or the arbitrator **may**-
(c) order the employer to pay compensation to the *employee*.'

[10] Section 194 of the LRA sets out the limits on compensation. Section 194(1) provides: The compensation awarded to an *employee* whose *dismissal* is found to be unfair either because the employer did not prove that the reason for *dismissal* was a fair reason relating to the employee's conduct or capacity or the employer's *operational requirements* or the employer did not follow a fair procedure, or both, must be just and equitable in all the circumstances, but may not be more than the equivalent of 12 months' remuneration calculated at the *employee's* rate of *remuneration* on the date of *dismissal*. (My emphasis).

causal link between the death of the unborn child and the alleged negligent conduct; and had improperly considered the evidence of Prof Buchmann which resulted in an unreasonable outcome.

[39] The Court *a quo* held that the commissioner had in fact dealt with the probabilities in respect of the parties' conflicting versions. He also appropriately assessed the credibility and reliability of the witnesses' evidence. He found that Dr Pietz did not adduce coherent evidence demonstrating that the nurses conspired against him. Dr Pietz conceded that he had no reason to believe that sister Nape would lie. The Judge was of the view that the conclusion reached by the commissioner that Dr Pietz was notified by sister Nape on 25 November 2009 that the patient's cord had prolapsed was inescapable. He remarked that Dr Pietz never accepted blame for any of his negligent conduct. Dr Pietz, he said, provided no acceptable reason why he did not react to the nurses' call informing him of the prolapsed cord or the pre-term delivery by the patient.

[40] The Court *a quo* was of the view that Prof Buchmann's testimony was academic and neutral. It did not corroborate Dr Pietz's version on any of the material aspects. On the contrary, the professor often criticised the manner in which Dr Pietz handled the critical situation. Dr Pietz was unable to justify his actions or omissions and did not provide any cogent reason why he failed to inform his fellow team workers, including the anaesthetist, that the unborn child had already died prior to the C-section.

[41] The Court *a quo* further remarked:

> '(T)he applicant's conduct and actions surrounding the operation speaks to the probable conclusion that the child was not dead at the time of going to the theatre and that renders the applicant's version of events improbable.'

[42] The Court *a quo* held that even though "*the death of the baby looms large over this case, it had not been the fundamental allegation against the applicant (Dr Pietz)*." It found no support for the argument that Dr Pietz was dismissed because he caused the death of the unborn child. *Per contra*, it stated that the commissioner determined that Dr Pietz had been grossly

negligent in his response to the critical situation. The Judge was of the view that part of the reason that the cause or time of death could not be determined was due to the failure by Dr Pietz to communicate with his team and complete the medical records. It went on:

> 'To now hide behind the "incomplete picture" which he is largely to be blamed for, and to then proceed to point at the first respondent (the department) for failure to provide clear evidence on these aspects, is nothing but disingenuous'.

[43] The Court *a quo* concluded that the commissioner's decision fell within the purview of reasonable decisions that a reasonable decision-maker could make. No irregularity existed which warranted his interference. As already alluded to the Court *a quo* dismissed the review application with costs.

The grounds of appeal before us:

[44] Dr Pietz's principal argument on appeal is fourfold. In summary, it was contended:

44.1 The commissioner's decision not to award Dr Pietz any compensation for procedural unfairness was wrong both in law and in fact and therefore reviewable. In the alternative, it was contended, that the decision is one that no reasonable decision-maker could have reached.

44.2 The commissioner determined the issue of substantive fairness by attaching significant weight to irrelevant evidence regarding two previous incidents ("the Okocho case" and the case of two patients who were transferred to the Baragwanath Hospital) which, according to him, formed no part of the reasons for his dismissal and for which he was not disciplined. It was contended that in acting as he did the commissioner misconceived the nature of the enquiry he was enjoined to undertake; exceeded his powers; committed a gross irregularity and/or misconduct in relation to his duties; and came to a decision that no reasonable commissioner would have reached.

44.3 The commissioner's finding that sister Nape informed Dr Pietz of the prolapsed cord, during their hotly contested telephonic conversation of 25 November 2009, was arbitrary and not justifiable on the facts.

44.4 There was no causal link between the alleged misconduct and the death of the unborn child and therefore the decision to dismiss Dr Pietz was harsh and no reasonable commissioner could have upheld the dismissal.

Evaluation of substantive fairness of the dismissal:

[45] Under the substantive head, there are three crisp issues arising for consideration in this appeal.

45.1 First, whether sister Nape told Dr Pietz of the prolapsed cord.

45.2 Second, whether a causal connection between the conduct of Dr Pietz and the death of the unborn child had been established.

45.3 Third, whether the evidence in respect of the previous incidents, pertaining to the conduct of Dr Pietz when attending to the patients involved in those cases, was irrelevant. In addition, whether in considering that evidence, the commissioner exceeded his powers, committed a gross irregularity, and/or misconduct in relation to his duties.

[46] As support for the conclusion that errors of fact by a commissioner would not ordinarily give rise to a valid review ground the Court *a quo* referred to *Dumani v Nair and Another* [11] where the Supreme Court of Appeal (SCA) quoted the following instructive dictum in *Pepcor Retirement Fund and Another v Financial Services Board and Another*:[12]

> '[47] In my view, a material mistake of fact should be a basis upon which a Court can review an administrative decision. If legislation has empowered a functionary to make a decision, in the public interest, the decision should be

[11] 2013 (2) SA 274 (SCA) at 283.
[12] 2003 (6) SA 38 (SCA) at 58-59 paras 47-48.

made on the material facts which should have been available for the decision properly to be made. And if a decision has been made in ignorance of facts material to the decision and which therefore should have been before the functionary, the decision should (subject to what is said in para [10] above) be reviewable at the suit of, *inter alios*, the functionary who made it - even although the functionary may have been guilty of negligence and even where a person who is not guilty of fraudulent conduct has benefited by the decision. The doctrine of legality which was the basis of the decisions in *Fedsure* [1999 (1) SA 374 (CC)], *Sarfu* [2000 (1) SA 1 (CC)] and *Pharmaceutical Manufacturers* [2000 (2) SA 674 (CC)] requires that the power conferred on a functionary to make decisions in the public interest, should be exercised properly, ie on the basis of the true facts; it should not be confined to cases where the common law would categorise the decision as *ultra vires*.

[48] Recognition of material mistake of fact as a potential ground of review obviously has its dangers. It should not be permitted to be misused in such a way as to blur, far less eliminate, the fundamental distinction in our law between two distinct forms of relief: appeal and review. For example, where both the power to determine what facts are relevant to the making of a decision, and the power to determine whether or not they exist, has been entrusted to a particular functionary (be it a person or a body of persons), it would not be possible to review and set aside its decision merely because the reviewing Court considers that the functionary was mistaken either in its assessment of what facts were relevant, or in concluding that the facts exist. If it were, there would be no point in preserving the time-honoured and socially necessary separate and distinct forms of relief which the remedies of appeal and review provide. Of course, these limitations upon a reviewing Court's power do not extend to what have come to be known as jurisdictional facts and, in my view, it will continue to be both necessary and desirable to maintain that particular category of fact. I am therefore, with respect, unable to share the opinion of Professors *Wade and Forsyth* (quoted in para [39] above) that one can safely 'consign much of the old law about jurisdictional fact, etc, to well-deserved oblivion' if by that statement is meant that the distinction between appeal and review will be eliminated…'

[47] In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae),*[13] the SCA pronounced that:

> 'For a defect in the conduct of the proceedings to have amounted to a gross irregularity as contemplated by s 145(2)*(a)*(ii), the arbitrator must have misconceived the nature of the enquiry or arrived at an unreasonable result. A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was 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 any consequence if their effect is to render the outcome unreasonable.'

[48] In *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration and Others (Gold Fields*),[14] this Court made it plain that where a gross irregularity in the proceedings is alleged, the enquiry is not confined to whether the arbitrator misconceived the nature of the proceedings, but extends to whether the decision that the arbitrator arrived at is one that falls within a band of decisions to which a reasonable decision-maker could come on the available material.

<u>The first aspect: Whether Dr Pietz was informed of the prolapsed cord.</u>

[49] Adv Boda SC, for Dr Pietz, contended that the department had fallen far short of discharging the *onus* resting upon it to prove that sister Nape told Dr Pietz about the prolapsed cord. He argued that this was so because:

49.1 Dr Pietz would not have responded to sister Nape that he would attend to the patient when her cervix was fully dilated had he been informed of the prolapsed cord;

49.2 Sister Ncube was surprised at the response by Dr Pietz that he would attend to the patient when she was fully dilated. Sister Ncube's question to sister Nape "*did you tell him that the cord prolapsed*?", it was contended, was significant in this regard.

[13] 2013 (6) SA 224 (SCA) at 234 para 25
[14] (2014) 35 ILJ 943 (LAC) at 948 para 14.

49.3 Neither sisters Ncube nor Nape called Dr Pietz again to enquire whether he indeed understood what Nape had claimed she said. The innuendo is that Dr Pietz may not have gathered fully the import of the message that the patient's cord had prolapsed.

49.4 Dr Pietz's aggression was purely motivated by the nurses' failure to notify him of the prolapsed cord. It was further contended that sister Ncube was unable to recall whether Dr Pietz had expressed to the nurses that he was not informed of the cord prolapse.

49.5 Matron Kgomongwe was informed by the nurses that Dr Pietz had been called "*to come and examine the patient and Dr Pietz told them they should leave the patient to be fully dilated*". It was submitted that this evidence left out the most crucial aspect about the prolapsed cord.

49.6 Dr Taye, the anaesthetist on duty, testified that Dr Pietz was upset because the nurses had not told him of the prolapsed cord and learned of this when Dr Kabale called him.

49.7 Prof Buchmann's evidence was that the nurses did not do their job properly because they did not mitigate against the compression and the umbilical cord before Dr Pietz's arrival.

[50] There are disputes of fact on the question whether sister Nape when she called Dr Pietz, informed him of the prolapsed cord. Sister Nape says that she "*clearly*" conveyed the message to Dr Pietz that the patient's cord had prolapsed. Dr Pietz's argument that he was not informed of the prolapsed cord is fraught with difficulties because, on his own version, at the very least, he had been made aware that the patient had been admitted with a breech presentation; she was approximately 28 weeks pregnant; her membranes had ruptured; and her cervix was about 6cm dilated. Sister Ncube's evidence, which was corroborated by that of Dr Kabale and Prof Buchmann, was that at 28 weeks' period of gestation a doctor's presence was required to manage the pre-term labour regardless of whether the cord had prolapsed. She added that "*When we phone it means we are having problems, so we need him.*" This, I believe, puts paid to any argument that Dr Pietz was not aware that his

immediate attendance was required. There was no need for him to be reminded that the patient's condition required a prompt response.

[51] It is impermissible for a party to blow hot and cold.[15] On the one hand, Dr Pietz's argument is that the nurses did not do their job properly because they did not mitigate against the compression and the umbilical cord before his arrival. On the other hand, the contention is that the commissioner ignored the evidence by sister Ncube to the effect that she took appropriate action by inserting her fingers into the birth canal to prevent the obstruction of blood supply to the foetus and that the nurses had been preparing the patient for the anticipated C-section before Dr Pietz's arrival.

[52] Dr Pietz simply did not heed the urgent call. When asked why he did not immediately attend to the patient because she was in pre-term labour his startling response was that it was not an emergency. He further intimated:

> '(W)hen the sister told me that it is only 28 weeks and 28 weeks is the border line between abortion and normal delivery. For me it was not really urgent just to go and see this patient immediately, I could go and see this patient later.'

[53] Dr Pietz was unable to offer any reasonable explanation to the commissioner why he had not reported the nurses to the matron or the nursing council, for their failure to inform him of the prolapsed cord, if he was so deeply troubled by their conduct.

[54] Dr Pietz's aggression towards the nurses was unwarranted. What is further disconcerting is that it was put to the department's witnesses that when called to testify the doctor would say "*he might have used strong language but he did not use any (abusive) language towards management*." The expletives, it was said, were directed at the situation where the doctor had not been informed of the prolapsed cord. There was clearly some altercation which went about in front of the patient. Sister Nape and Dr Pietz said sister Ncube fled from the ward. It makes no sense that sister Ncube would decamp if the doctor was not ranting and raving in total disregard of the Batho Pele principle

[15] *Brümmer v Minister for Social Development and Others* 2009 (6) SA 323 (CC) at 336 para 32; *Pitelli v Everton Gardens Projects CC* 2010 (5) SA 171 (SCA) at 178 para 34.

as found by the commissioner. The probabilities are that Dr Pietz approached sister Ncube in a threatening manner and kicked the drip stand in the process. Clearly, Dr Pietz did not immediately attend to the medical emergency he was called for. The deprecated conduct by Dr Pietz was woefully inappropriate.

[55] To come to a conclusion on the disputed issues, a Court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. [16] The Court *a quo* correctly concluded that the commissioner had dealt with the probabilities in respect of the parties' conflicting versions. He also appropriately assessed the credibility and reliability of the witnesses. The commissioner was right that it was improbable that the nurses would inform both Dr Kabale and Matron Kgomongwe of the prolapsed cord but neglect to inform Dr Pietz, who was the doctor in charge at the relevant time.

[56] The commissioner cannot be faulted in rejecting Dr Pietz's defence that he was a victim of a conspiracy and malicious plot. More so because Dr Pietz conceded that sister Nape had nothing against him and he had no quibbles with her. The judge *a quo* correctly found:

> 'In view of the fact that the applicant had no reason to believe that Miss Nape failed to tell the truth during her testimony, it can only be considered correct that the commissioner reached a reasonable decision when he found that the applicant had indeed been told about the prolapsed cord.'

<u>The second aspect: The question of causation</u>

[57] Mr Boda's argument is mainly predicated on the letter of termination of Dr Pietz's services insofar as it records: *"It has come to the attention of the department that you were involved in an act of misconduct (Gross negligence, insolent behaviour and insubordination)* ***leading to the death of an unborn child.****"* He contended that there was no evidence demonstrating that Dr Pietz caused the death of the unborn child. Adv Hulley SC, for the department, contended that the death of the unborn child cannot be discounted. He argued

[16] *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at 14-15 para 5.

that Dr Pietz's conduct (leaving the unborn child's hand and the cord "*just hanging outside the vagina*"), after removing his fingers from Ms Hlatshwayo's birth canal, was negligent and could have caused the unborn child's death.

[58] From the factual matrix sketched the cause and the time of death of the unborn child is in dispute. It is important to remember that Sister Nape's evidence was to the effect that she placed Ms Hlatshwayo on the NST machine immediately following her admission at the hospital. This machine indicated that, at that time, the foetal heart rate was 128 beats per minute. Sister Nape further intimated when Dr Pietz examined the patient the foetal heart rate was 117-118 beats per minute and slowing down. On this score, Prof Buchmann said he could not reject the nurses' version out of hand and said it was very difficult to say if Dr Pietz or the nurses were right.

[59] Sister Nape disputed that her recorded heart rate of 117-118 beats per minute was that of the patient, Ms Hlatshwayo. She also disputed that the unborn child had no heart rate and that the cord was not pulsating. She persisted that when she initially examined the patient "*the baby was still moving, that is why even the foetal heart (rate) was 128, which means it was still normal at that time*." Sister Ncube remained steadfast on this aspect.

[60] The nurses were accused of being negligent because the NST machine was not set to record both the mother and unborn child's heart rates in a print format. In my view, the lack of recorded information on the NST machine does not advance Dr Pietz's case because the direct evidence by sister Nape was that she recorded on the Admission in Labour Forms[17] the information as was reflected on the NST machine at the time. In the end, it was Dr Pietz's responsibility to verify the information relayed to him by the sisters. He admitted that he did not check the NST machine. Nothing lends any credence to his version that the machine was not connected to the patient. He merely conducted the physical examination and concluded that the unborn child had died. Prof Buchmann criticised this incorrect form of assessment as follows:

[17] Obstetrical clinical records for Ms Philile Hlatshwayo.

> **'**The interesting thing is that they [the nurses] reported…that the cord was pulsating even after he [Dr Pietz] had examined the cord himself. So it cannot be temporal thing that they found it pulsating first and then he, then the baby died and he did not find it pulsating, they actually said it was after. How do I explain that? I cannot explain it very well, except that **we are told and we teach, doctors and our students, that you do not diagnose foetal life or death by feeling the cord, because the cord can pick up pulsations from fingers and can feel as if it is pulsating when it is not. Alternatively it may be in spasm with a live baby and you do not feel it pulsating when the baby is actually still alive. So we always want to confirm if the baby is alive by listening to the baby's heart or doing an ultrasound or using a Doppler instrument.'** (My emphasis.)

[61] Prof Buchmann did not criticise the nurses for having used the NST machine to measure the patient's and the unborn child's heart rates. On the contrary, he said this machine is frequently used in his department. In the absence of any countervailing evidence, the nurses' clinical finding that they picked up both the mother and the unborn child's heart rate on the NST machine at the time of admission and during the doctor's examination of the patient must be accepted.

[62] What I find astonishing, if Dr Pietz's version is to be accepted, is that he did not inform Dr Taye and the nurses that the unborn child had already died when the patient was wheeled to the theatre. The nurses' reaction of placing some warm wet gauze on the birth canal to push the pulsating prolapsed cord and the hand of the unborn child back into the birth canal in order to keep the cord pulsating is significant. As correctly found by the commissioner, it defies logic that the doctor did not announce to the team that the child was already dead when the mother was prepared for the immediate C-section. Even more remarkable is that the doctor did not bother to notify Ms Hlatshwayo that her unborn child was already dead. He also did not mention this critical issue in the obstetrical clinical records of the patient. According to Prof Buchmann Dr Pietz should have recorded this information in the records.

[63] The Court *a quo* cannot be faulted in concluding that "*the applicant's conduct and actions surrounding the operation speaks to the probable conclusion that*

the child was not dead at the time of going to theatre and that renders the applicant's version of events improbable."

[64] One important observation made by the Court *a quo* was that the death of the unborn child was not the fundamental allegation brought against Dr Pietz. What the department, on more than one occasion, took issue with was that "*the applicant had been grossly negligent in his response to the situation and not for the death of the baby*." The Judge *a quo* was correct in concluding that "*Part of the reason that the cause or time of death cannot be determined is the fact that the applicant failed to communicate properly with his team and failed to complete documentation/records. To hide behind the incomplete picture which he is clearly to be blamed for, and to then proceed to point at the first respondent for their failure to provide clear evidence on these aspects, is nothing but disingenuous.*"

[65] In the final analysis what is important is how Dr Pietz attended to the patient. Apparent from the factual background is that he was grossly negligent. In his lengthy statement[18] Dr Pietz says that "*This was the fourth probably unwanted pregnancy*." There is no basis established on the papers for this conclusion. What can be inferred from this is that he attended to this patient in an indifferent and uncaring manner because what prevailed in his mind was that the pregnancy was "*probably unwanted*".

<u>The third aspect: The evidence in respect of the previous incidents.</u>

[66] As already alluded to, the issues pertaining to the previous incidents involving Ms Okocho, who had a laceration on her forehead as a result of fitting and falling from bed and the case of two other patients, one of whom was suffering with foetal distress and the other with a prolonged latent phase of labour, was canvassed at great length during the arbitration without any objection from Dr Pietz to the admission of this additional evidence. It is also important to point out that Dr Pietz's grounds of review metamorphosed somewhat with the passage of time. In its founding papers, concerning the evidence with regard

[18] In the statement Dr Pietz provides his version in respect of his management of the case of Ms Hlatshwayo. The statement appears at page 359-361 Volume 4 of the record.

to the previous incidents, he attacked the award on the basis that the commissioner ignored his explanation of the incidents; on the grounds of inconsistency in the application of discipline by the department; and on the basis of probabilities. On appeal, his argument is that the commissioner ought to have ruled this evidence irrelevant.

[67] Mr Boda contended that the commissioner had no jurisdiction to deal with the evidence adduced in respect of the previous incidents because these were not disputes referred by Dr Pietz to arbitration. In entertaining that evidence, so it was contended, the commissioner exceeded his powers and jurisdiction and beclouded his judgment with irrelevant evidence. Mr Boda further contended that reliance on the previous incidents by the commissioner tainted his consideration of the question of the substantive fairness of the dismissal; he misconceived the nature of the enquiry to determine both the guilt and sanction.

[68] Mr Boda argued that it was not open to the department to rely upon any other extraneous incidents for which Dr Pietz was not disciplined or dismissed to demonstrate the substantive fairness of the dismissal. Where an employer relies on one reason to dismiss an employee it cannot extend the ambit of the dispute by relying on other unrelated disputes as a matter of law, the argument went. Mr Boda submitted that the commissioner's consideration of the previous incidents resulted in a decision that no reasonable commissioner would arrive at on the substantive fairness of the dismissal.

[69] At the commencement of the analysis of the evidence the commissioner summarised the issue in dispute as: "*Whether or not in the case of patient Hlatshwayo the applicant was aware of the prolapsed cord*." He comprehensively dealt with the evidence pertaining to this aspect and made this determination: "*When **all** this is considered the only inference that can be made is that the applicant's management of patient Hlatshwayo was **extremely** careless and reckless*." Regard being had to this conclusion, it can hardly be argued that the commissioner misconceived the true nature of the enquiry he was enjoined to undertake or arrived at an unreasonable result.

The Court *a quo* was correct in finding that the commissioner understood what the main issues in dispute were.

[70] In my view, the misconduct for which Dr Pietz was dismissed, the mismanagement of Ms Hlatshwayo's case, suffices on its own to justify a conclusion that the department discharged the *onus*, on the balance of probabilities, that the dismissal was substantively fair.

The discrepancies in the evidence adduced at arbitration.

[71] It was contended, on behalf of Dr Pietz, *inter alia*, that: the nurses were inconsistent in their evidence with regard to the alleged offensive remarks which Dr Pietz had directed towards the hospital management; there were discrepancies in the nurses' account of the time it took to perform the operation; there were also contradictions on the times sister Nape made her notes on the clinical records and that she backdated same to reflect the time she made the telephone call to Dr Pietz. I am of the view that these were immaterial contradictions which would not render the outcome of the arbitration unreasonable. When regard is had to the review test as laid down in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[19] little purpose, if any, is served by referring to copious passages from the transcript to highlight why the version presented on behalf of one party was improbable and should have been rejected.

Evaluation of the procedural fairness of the dismissal.

[72] The *audi alteram partem* principle was not given effect to in this case because the pre-dismissal processes were not followed prior to Dr Pietz's dismissal. Dr Rachman, the Head of Services for the department, gave evidence on the reasons why the disciplinary enquiry was dispensed with. Regrettably, the transcribed record of the portion of his evidence has several indistinct parts. He intimated that part of the reason for not following due process was the treatment which Dr Pietz accorded to Ms Hlatshwayo: "*it warrants not only summary dismissal, much more than that*". He further testified that a long

[19] (2007) 28 ILJ 2405 (CC).

drawn disciplinary process would have amounted to a waste of the taxpayers' money. As already alluded to, on the eve of Dr Pietz's dismissal, he was given a letter in which he was requested, within 24 hours, to give a report in respect of how he managed Ms Hlatshwayo's case. On the next day, before he could provide the response, he was dismissed.

[73] Mr Boda contended that the commissioner, in declining to offer Dr Pietz compensation under these circumstances, misconstrued the applicable legal principles in relation to the relief of compensation and considered himself to be bound by the "all or nothing" obsolete legal principles.[20] He contended that the decision not to award compensation for procedural unfairness sets a dangerous precedent in the workplace and renders an employee's due process rights utterly hollow and nugatory. Mr Hulley contended that the language of s194(1) of the LRA[21] makes it plain that a Court or an arbitrator, as the case may be, is enjoined to award just and equitable compensation having regard to "*all the circumstances".* These are the circumstances, so he argued, that may legitimately impact upon what is just and equitable*.*

[74] In *Kemp t/a Centralmed v Rawlins,*[22] this Court made the following seminal pronouncement:

> '[22] I do not think that the provisions of s 193(1)*(c)* of the Act give the Labour Court or an arbitrator the kind of power which would enable it or him to grant or refuse an order of compensation on identical facts as it or he sees fit. In my view the ultimate question that the Labour Court or an arbitrator has to answer in order to determine whether compensation should or should not be granted is: which one of the two options would better meet the requirements of fairness having regard to all the circumstances of this case? If the court or arbitrator answers that the requirements of fairness, when regard is had to all of the circumstances, will be better met by denying the employee compensation, no order of payment of compensation should be made. If the court or arbitrator answers that the requirements of fairness will be better met

[20] 'The all or nothing approach' which was adopted *Johnson & Johnson (Pty) Ltd v CWIU* (1999) 20 ILJ 89 (LAC) [1998] 12 BLLR 1209 (LAC) is that either compensation for a procedural irregularity is granted in terms of a prescribed formula or no such compensation would be awarded.
[21] See footnote 10.
[22] (2009) 30 *ILJ* 2677 (LAC) at 2689 para 22.

by awarding the employee compensation, then compensation should be awarded. When that question is answered, the interests of both the employer and the employee must be taken into account together with all the relevant factors. In my view, where the court or an arbitrator decides the issue of whether or not to award the employee compensation, it does not exercise a true discretion or a narrow discretion. The determination of that question or issue requires the passing of a moral or value judgment. It is decided or determined on the basis of the conceptions of fairness because the court or arbitrator has to look at all the circumstances and say to itself or himself or herself as the case may be: What would be more in accordance with justice and fairness in this case? Would it be to award compensation or would it be to refuse to award compensation? It or he or she would then have to make the decision in accordance with its, his or her sense of which of the two options would better serve the requirements of justice and fairness."

The Court proceeded as follows at 2696-2697 para 55:

'The importance of the distinction between a discretion that is exercised in terms of s 193(1)*(c)* and a discretion that is exercised in terms of s 194(1) is how the reviewing court will consider the matter. **When the discretion that is challenged is a discretion such as the one exercised in terms of s 194(1) the test that the court, called upon to interfere with the discretion, will apply is to evaluate whether the decision maker acted capriciously, or upon the wrong principle, or with bias, or whether or not the discretion exercised was based on substantial reasons or whether the decision maker adopted an incorrect approach.** When dealing with a discretion however such as provided in s 193(1)*(c)*, the court must consider if the arbitrator or the Labour Court properly took into account all the factors and circumstances in coming to its decision and that the decision arrived at is justified. In essence therefore, a review of a discretion exercised in terms of s 193(1)*(c)* is essentially no different to an appeal because the reviewing court will be required to consider all the facts and circumstances which the arbitrator or the Labour Court had before it and then decide based on a proper evaluation of those facts and circumstances whether or not the decision was judicially a correct one.' (My emphasis)

[75] An employee's entitlement to a pre–dismissal hearing is well recognised in our law. Such a right may have, as its source, the common law or a statute which applies to the employment relationship between the parties.[23] This entitlement is reflected in Schedule 8 Item 4 of the Code of Good Practice (Dismissal) of the LRA which provides that the employee ought to be afforded an opportunity to state his/her case prior to dismissal for misconduct. It was held in *Slagment (Pty) Ltd v Building Construction & Allied Workers Union and Others*[24] that:

> 'It is within the province of the employer who holds a disciplinary enquiry to determine its form and the procedure to be adopted, provided always that they must be fair. Fairness requires, *inter alia*, that the employee should be given an opportunity of meeting the case against him: the employer must obey the injunction audi alteram partem.'

[76] In *Kemp t/a Centralmed v Rawlins* (supra) Zondo JP listed a number of factors, the list of which is not exhaustive, which are relevant to the question whether a Court or a commissioner should or should not order the employer to pay compensation. Included in these are the following factors:

76.1 Insofar as the dismissal is procedurally unfair, the nature and extent of the deviation from the procedural requirements; the less the employer's deviation from what was procedurally required, the greater the chances are that the court or arbitrator may justifiably refuse to award compensation; obviously, the more serious the employer's deviation from what was procedurally required, the stronger the case is for the awarding of compensation.

76.2 Insofar as the reason for dismissal is misconduct, whether the employee was guilty or innocent of the misconduct; if he was guilty, whether such misconduct was in the circumstances of the case not sufficient to constitute a fair reason for the dismissal.

76.3 The consequences to the parties if compensation is awarded and the consequences to the parties if compensation is not awarded.

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[23] *Old Mutual Life Assurance Co SA Ltd v Gumbi* 2007 (5) SA 552 (SCA); (2007) 28 ILJ 1499 (SCA) at para 4.
[24] (1994) 15 ILJ 976 at 990J-991A.

76.4 The need for the courts, generally speaking, to provide a remedy where a wrong has been committed against a party to litigation but also the need to acknowledge that there are cases where no remedy should be provided despite a wrong having been committed even though these should not be frequent.

[77] In concluding that *"(W)hen the gross negligence of the applicant (Dr Pietz) is considered, it is clear that it would be difficult for me to justify granting compensation*" the commissioner's discretion was based solely on issues that fell within the ambit of substantive fairness of the dismissal without any consideration of the due process that was not followed in this case. In my view, the commissioner's undue accentuation of the aspects of substantive fairness, in the exercise of his discretion whether to award compensation for procedural unfairness, was patently unjust and inequitable. I am of the view that, in so doing, the commissioner followed an incorrect approach.

[78] The right to due process finds expression in the right to fair labour practices and in the right to be afforded a fair hearing prior to dismissal as entrenched in the LRA. When this right is breached the employee loses the constitutional protection emanating from the right to fair labour practices.

[79] The CCMA Guidelines in respect of misconduct arbitrations effective as at 01 January 2012 [25] require the commissioners to assess the degree of departure from the requirement of procedural unfairness. They provide in part:

'Compensation for procedurally unfair dismissals

135. An Arbitrator who finds that a dismissal is procedurally unfair must determine:

135.1 Whether an award of compensation is appropriate in the light of severity of the procedural unfairness; and

135.2 If it is, determine an amount of compensation that is just and equitable in all the circumstances.

[25] See CCMA Guidelines: Misconduct Arbitrations [2012] 2 BALR 109 (CCMA) at page 135 -136, as amended in the Government Gazette No: 38573 of 17 March 2015.

136 The Courts have held that compensation in these circumstances is a solatium for loss of the right to a fair pre-dismissal procedure. It is punitive of the employer to the extent that the employer who has breached the right must pay a penalty for doing so.

137 In order to determine the appropriate amount of compensation for the procedurally unfair dismissal, the arbitrator must take into account the extent or severity of the procedural irregularity together with the anxiety or hurt experienced by the employee as a result of the unfairness.

138 An arbitrator may find that a dismissal is procedurally unfair but award no compensation because the procedural irregularity was minor and did not prejudice or inconvenience the employee. When assessing the extent of the procedural irregularity, arbitrators may consider the employer's conduct prior to, and in the course of, dismissing the employee.'

[80] In my view, the egregious disregard of Dr Pietz's right to a fair pre-dismissal hearing justified redress on a just and equitable basis by the commissioner as a *solatium* for the loss of the right to a fair pre-dismissal procedure. To this extent the commissioner's award merits this Court's interference.

[81] Insofar as there had been a partial success both at the proceedings before the labour Court and in this Court I am of the view that it will be in accordance with the requirements of law and fairness that each party pay its own costs. In the result, I make the following order.

Order

1. The appeal is upheld in part.

2. No order is made as to costs in respect of the appeal.

3. The order of the Court *a quo* is set aside and substituted with the following:

"(a) The review application succeeds in part;

(b) The commissioner's decision not to award compensation is reviewed and set aside;

(c) The arbitration award dated 15 August 2012 issued under case No PSHS642-09/10 is amended by the addition of the following order:

(i) The dismissal of the applicant, Dr Grzegorc Ludwick Pietz, is found to be substantively fair but procedurally unfair;

(ii) The respondent, the Department of Health, Gauteng Province, is to pay the applicant compensation equivalent to (3) three months' remuneration;

(d) No order is made as to costs."

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MV Phatshoane

Acting Judge of the Labour Appeal Court

Landman JA and Molemela JA concur in the judgment of Phatshoane AJA

APPEARANCES:

FOR THE APPELLANT:	Adv F A Boda SC
	Instructed by Hogan Lovells (South Africa) Inc
FOR THE FIRST RESPONDENT:	Adv I Hulley SC assisted by Adv S B Nhlapo
	Instructed by The State Attorneys