



IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: DA 4/15

In the matter between:

DEPARTMENT OF HEALTH KZN

Appellant

and

PUBLIC SERVANTS ASSOCIATION

OF SOUTH AFRICA

First Respondent

K W PILLAY

Second Respondent

SC TEMBE

Third Respondent

Delivered: 20 March 2018

Summary: Review of arbitration award – commissioner faced with two conflicting versions as to whether the two employees had handed over the patient or abandoned her in the ambulance and gone home -- and whether one of the employees attended to the patient while en route to their destination or both employees sat in the front part of the ambulance leaving the patient unattended in the patient compartment – commissioner finding that employer's version more probable than that of employees.

Court finding that determination of such disputes needs an assessment of the credibility of the evidence and decision arrived at on a balance of probabilities. Held that the question that needs to be asked is whether the commissioner's preference of the appellant witnesses' version over that of the employees and their witnesses is a decision that a reasonable decision-maker could not reach

– Court finding that the common cause facts and improbabilities put the employees’ version to doubt. The events following the discovery of the patient in the patient compartment of the ambulance, such as the surprise by the shift supervisors when the report was made to them, the immediate telephone calls to the employees and report to manager are inconsistent with the conduct of persons who accepted a handover of the patient to them. Further that the version that Tembe was not in the patient compartment with the patient seems more probable than that of the employees because the security guard’s statement of what he observed shortly after the incident and not being aware of the significance of what he observed, is corroborated by the fact that there were no patient’s stats or data form. Further, he did not inspect the ambulance on arrival because of the fact that the two paramedics were sitting in front as was always the case when the ambulances came to the depot.

Court finding the commissioner was alive to the nature of the dispute and assessed the credibility of the witnesses and arrived at a reasonable decision – further that the Labour Court failed to analyse the approach of the commissioner in dealing with the mutually destructive versions of the witnesses. Appeal upheld – Labour Court’s judgment set aside and replaced with an order dismissing the review application.

Coram: Tlaletsi DJP; Ndlovu JA and Murphy AJA

JUDGMENT

TLALETSI DJP

Introduction

[1] This is an appeal to this Court brought with leave of the Labour Court against a judgment of that court (per Shai AJ) in which it reviewed and set aside the award of an arbitrator issued under the auspices of the Public Health and Social Development Sectoral Bargaining Council (the bargaining council).

[2] The case concerns the fairness or otherwise of the dismissal of the second and third respondents by the appellant from its employment. The second and

third respondents are members of the first respondent, a trade union duly registered in terms of the Labour Relations Act.¹

- [3] At the time of his dismissal, the second respondent (Pillay) was employed as an Intermediate Life Support Paramedic and had been in the employ of the appellant for approximately 15 years. The third respondent (Tembe) was employed as a Basic Ambulance Assistant and had been employed for approximately four years.
- [4] On 17 February 2009, in the late afternoon, Pillay and Tembe (collectively, the employees) were requested to take a female patient from Inkosi Albert Luthuli Central Hospital (IALC Hospital) and transport her to Murchison Hospital in Port Shepstone. The patient could not walk and was taken to the ambulance by a wheelchair and then placed on a stretcher in the patient compartment of the ambulance.
- [5] Pillay claimed that as they approached Port Shepstone, he received a telephone call from his mother who told him that his son was having an asthma attack. Instead of proceeding to Murchison Hospital where the patient was supposed to be taken to, Pillay drove the ambulance to their base/depot. As it was already time to knock off, the employees knocked off from the base without proceeding to Murchison Hospital to hand the patient over.
- [6] The employees were charged with the following three counts of misconduct:
- 6.1 On 17 February 2009, utilising an ambulance KZN 22958 (AIA) they uplifted a female patient [NZ], from Inkosi Albert Luthuli Central Hospital, who was diagnosed with suffering from multiple ring-enhancing untraceable sessions and neglected the patient alone in the patient compartment from Durban to Port Shepstone;
- 6.2 They abandoned the patient at Port Shepstone by parking the ambulance with her inside and knocked off;

¹ Labour Relations Act 66 of 1995.

6.3 They permitted one crew mate to sit in front whilst having a patient on board.

- [7] The Chairperson of the Disciplinary Inquiry found the employees guilty of the misconduct charges against them and were summarily dismissed. The employees together with their union referred a dispute of unfair dismissal to the bargaining council. The dispute was arbitrated by Commissioner G Gertenbach. The latter issued an award in which the dismissal of Pillay was held to be fair and that of Tembe was found to have been procedurally unfair but substantively fair. However, no relief was granted to Tembe for the procedural unfairness of his dismissal. It is this award which was reviewed and set aside by the Labour Court and ordered the appellant to reinstate the employees retrospectively and pay the costs of the review application.

Factual Matrix

- [8] At the heart of the dispute, is a factual controversy as to whether the two employees when transporting the patient from IALC Hospital in Durban to Murchison Hospital in Port Shepstone, left the patient alone in the patient compartment of the ambulance; whether they allowed one of the two who was not driving the ambulance to occupy the front seat of the ambulance leaving the patient unattended and finally, whether they abandoned the patient in the ambulance without making proper handover arrangements for the patient when they knocked off.
- [9] The employees disputed that the patient was left alone, unattended in the patient compartment of the ambulance. They contended that Tembe accompanied the patient in the patient compartment whilst Pillay was driving. They further disputed that the patient was abandoned in the ambulance without proper handover being made.
- [10] The appellant tendered the evidence of Mr CR Stoffels, Ms Khumalo, Mr Lushaba and Mr S Kunene. The employees testified and further tendered the evidence of Mr O Govender, Mr Rungasamy and MR R.B Mbonwa.² In light of

² The record of the arbitration consists of the bundle of documents that was used and referred to in the hearing, the transcribed evidence of most of the witnesses, the commissioner's notes of the first

the fact that the issues on appeal are centred around the factual findings made by the Commissioner, it shall be apposite that the relevant versions of the witnesses be stated with some detail.

- [11] Lushaba was employed as a security guard manning the gate at the Port Shepstone base. On 17 February 2009, he commenced his shift at 18h00. He noticed an ambulance entering the premises driven by Pillay. Tembe was sitting next to him on the passenger seat. He does not usually check vehicles which enter the premises, only those that exit the premises.
- [12] Stoffels is the IRS practitioner with 22 years' experience. He testified that on the day in question, he was in the supervisor's (Ms Khumalo) office at 18h00. Pillay walked in at 19h00. He mentioned that *"there was a transfer or a re-pat sent to another hospital from Inkosi Albert Luthuli Hospital"*, and thereafter left. Stoffels understood Pillay to be saying that there was a patient to be repatriated from IALC Hospital. He hoped that further information about where and when the patient was to be picked up would be provided in due course through the normal channels. Stoffels continued working until about 19h30 when one Hleza walked into the supervisor's office and mentioned that he found a patient lying on the stretcher in one of the ambulances. Stoffels called Ms Khumalo and they both went to the ambulance to investigate. They found an elderly female patient wearing a napkin. They tried to get to the *"case sheet"* of the patient and none could be found. They found a brown envelope from IALC Hospital indicating that the patient was to go to Murchison Hospital.
- [13] Stoffels testified that they requested the other teams to transport the patient to her destination. They refused stating that there was no case sheet, that there was no handover to them and that they also did not know what was wrong with the patient. Stoffels and Khumalo reported the incident to Mr Kunene, their supervisor. Stoffels phoned Pillay to enquire about the patient. Pillay mentioned to him that he told him about the patient and that he would come back and transport the patient to Murchison Hospital.

three witnesses and the award of the commissioner containing the summary of the evidence. Parties agreed that the record is sufficient for the determination of the appeal as was the case in the court *a quo*.

- [14] Stoffels explained that their policy is that “a patient comes first” and that employees were expected to exceed their working hours to assist a patient as they would be paid for overtime. He mentioned that it is a requirement that a patient be properly handed over to other officials; that failure to do so is regarded as abandonment of a patient and that before handover of a patient, the official concerned must always be with the patient. At handover, the new crew must be told what is wrong with the patient; the patient’s vital signs, what drugs and drips were given to the patient and what the final destination of the patient would be. There should also be a “case sheet” in which specific questions are answered and is to be signed by the person handing the patient over. He mentioned that this procedure was not followed on this occasion and as a result, there was no proper handover of the patient.
- [15] Ms Khumalo testified that she is the supervisor at EMRS, Port Shepstone base and had 16 people who reported to her. On the day of the incident, a certain Mr Hleza approached her in the office and enquired which ambulance he was supposed to use that day. Ms Khumalo referred him to a particular ambulance and gave him the required trip sheet and checklist. Hleza left and returned within a few minutes and reported that there was a patient in the ambulance. She told him that she was not aware of the patient and went to see for herself. She found the patient lying on the stretcher. She enquired from Stoffels about the patient. Stoffels replied that Pillay did mention that there was a transfer (of patient) to Murchison Hospital but was not told that the patient was in the ambulance. They reported the matter to Kunene.
- [16] Mr Kunene was the Operations Manager EMRS. He testified that on 17 February 2009, Stoffels came to his office and informed him about the patient discovered by Hleza in the ambulance. He asked Stoffels where the patient came from, and he replied that he had no idea, but that the ambulance was previously used by Pillay and Tembe. Stoffels took Kunene to the ambulance to show him the patient. Kunene took photographs of the patient in the ambulance. He instructed Ms Khumalo, the shift supervisor who was then assisted by Stoffels to arrange for the patient to be taken to Murchison Hospital as indicated on a note affixed to the stretcher.

- [17] Kunene testified that he phoned Pillay and requested him to urgently return to the base. He however failed to reach Tembe. Pillay arrived after 19h00. Kunene asked him about the patient. He replied that he received a telephone call from his home reporting that his child was sick. He then decided to come to the base to request other crews to take over the patient. Kunene instructed Pillay to provide written reasons why he came to the base with a patient instead of going straight to Murchison Hospital to handover the patient. He immediately told him that his conduct amounted to misconduct and that disciplinary action will be taken against them.
- [18] The following day Kunene met the two employees together with Mr Govender, their supervisor. Tembe was requested to make a written statement about the patient. Kunene asked them why they abandoned the patient *en route* because according to the report he received from the security officer (Lushaba) who was on duty, both employees occupied the front part of the ambulance, which suggests that the patient was left alone in the patient compartment. Their sitting arrangement led the security officer to conclude that the ambulance was not carrying a patient. Lushaba found it normal because ambulances do not come to the base with patients.
- [19] Kunene testified that according to EMRS operations, when a patient is transported from a referral institution to the receiving institution, the employees were not supposed to stop anywhere (except in an emergency) but to proceed straight to the institution where the patient should be handed over; that patients are not supposed to come or be taken to the base. Kunene mentioned that actually, Pillay required his permission if he could no longer continue with his duties and that he (Kunene) was the only one who could authorise other crews to take over the patient and proceed to the patient's destination. He explained that in this instance, the employees were supposed to have spoken to their supervisor Govender about their problems and the control centre was supposed to channel that call through to Kunene as the only person who could authorise that the patient be brought to the base and for the patient to be taken over by another crew. He mentioned that neither Govender as the supervisor nor the control centre knew about Pillay having a

problem of a sick child. In any case, he stated, as Murchison Hospital was only fifteen kilometres away, Kunene would have requested Pillay to send his wife who is also a paramedic employed at the base to attend to the child so that Pillay could proceed with his trip to Murchison Hospital. According to Kunene, Pillay's wife was not even on duty at the time and was expected to be at home.

[20] Kunene testified that there should have been "*a patient data book*" which must be signed by the person receiving the patient to take further responsibility of caring for the patient. In this instance, the patient was abandoned as she was not supposed to be left alone even for a minute. He mentioned that contrary to standard practice, there was no patient data book or form that was filled to indicate that the patient was under the employees' care. Furthermore, the trip sheet which should have indicated that they were conveying a patient from one point to another, only indicated that they were from Durban to Port Shepstone. Kunene mentioned further that if one of the employees was driving the ambulance, the other one was supposed to be sitting in the patient compartment with the patient at all times.

[21] In response to a question why there was no video footage to show who drove the ambulance when it entered the premises, Kunene explained that the video cameras installed do not show the premises but only the entrance to the control centre which is a restricted area. The entrance to the premises is not covered by the video cameras. He mentioned that the only way that Tembe could prove that he was seated at the patient compartment, is for him to produce "*a patient data form*" which he was expected to complete whilst sitting with the patient in the patient compartment of the ambulance. He disputed that there was a practice to bring patients to the base. According to him, the practice was that in cases where a crew needed assistance, they communicated with the control centre through the "radio" and assistance would be brought to the crew instead of the crew coming to the base.

[22] Mr Deeda Govender testified on behalf of the respondents. He was the shop steward that represented Pillay at the disciplinary enquiry. His evidence related to the procedural fairness part of the dispute. He testified that he

received some of the documents he had requested on the day of the hearing. His request that the inquiry be postponed to enable him to request further documents was refused. The matter proceeded with the appellant tendering evidence to support the charges against the employees. At the conclusion of the appellant's case, he requested absolution from the instance. When his application was refused he concluded that the chairperson of the inquiry was biased and he took Pillay and they walked out of the inquiry. The inquiry was continued in their absence but in the presence of Tembe.

[23] Pillay testified that they had taken a patient to IALC Hospital. Upon leaving the hospital they were informed by a doctor that there was a "re-pat" patient. He understood that to mean that there is a patient that was discharged from the central hospital to be taken to a secondary hospital. He mentioned that the doctor told him that the patient was in the "discharge room", that she had been discharged quite early and she missed the shuttle bus to Durban. The doctor advised him further that the patient was stable, did not require any oxygen, IV Line or drugs *en route* from IALC Hospital.

[24] Pillay mentioned that in compliance with their procedural requirements, he personally took the patient's vital signs, i.e. checked her blood pressure, oxygen saturation, sugar level and the patient proved to be in a totally stable condition. He recorded all the information in the specific form provided for that. Before they could start their trip Tembe told him that he was "fatigued" and tired and requested him to drive the ambulance and that he would do the patient care. Pillay agreed because he was satisfied that the patient did not require any equipment *en route* or IV Line drugs or oxygen and that Tembe was competent in handling a basic patient with his basic life skills. Tembe sat in the patient component of the ambulance with the patient lying on the stretcher. Pillay drove the ambulance.

[25] Pillay mentioned that as they reached the area of the toll gate *en route* to Port Shepstone, he received a telephone call from his mother reporting that his one year and two months old son was unwell. Pillay informed Tembe through the window about his situation and that he was changing course and going to the base to handover the patient. The son was suffering from asthma. On

arrival at the base, he found a lot of crews at the entrance as it was time for shifts to change. As he entered the base, he came across a certain Mr D B Pillay and informed him of the patient in the ambulance. He drove further on and parked the ambulance at the entrance of the crew room. He filled in the required information in their relevant trip sheet, namely their vehicle movements from the time they left the base until their return as well as the odometer readings on the vehicle and the reason for their trip. The trip sheet together with "*patient data*" and fuel slips were to be handed over to the station officer.

[26] As he walked to the crew room, he came across Stoffels. He spoke to him briefly and advised him about the patient in the vehicle. He proceeded to the shift Senior Officer's office and handed over all the relevant documentation to Ms Khumalo. He also advised her that there is a patient on board the vehicle to be taken to Murchison Hospital. He left the office with Stoffels who had been in Ms Khumalo's office with him. He again told Stoffels about the patient and the two walked to the ambulance. They reached the patient compartment. Tembe was still inside the ambulance with the patient. Pillay took his personal items from the ambulance and returned to the crew room to sign off the register. He left Stoffels standing at the sliding door of the patient component of the ambulance. He mentioned that as he walked with Stoffels to the vehicle he asked Stoffels which crew was to take over the ambulance so that he could personally inform them as well about the patient. Stoffels told him not to worry because he had switched the crews and he will make the necessary arrangements for a crew to take that patient over. As he signed off the register he once again informed Ms Khumalo about the patient at the back of the ambulance and thereafter left for home.

[27] Pillay confirmed that upon his arrival at home, he received a call from Stoffels. He wanted to know why he did not tell him about the patient. He replied that he told him and Ms Khumalo several times about the patient. He informed him that he was willing to return to the base to personally convey the patient to Murchison Hospital. Stoffels responded that it was not a problem, he would sort it out. About five minutes thereafter Kunene contacted him and instructed

him to return to the base to write a statement as to why he abandoned the patient. This was despite his explanation about his sick child. His child was distressed and he gave him oral medication and returned to the base where he prepared a report as instructed. He thereafter returned home to further attend to his son. He mentioned that although it was not a norm to bring patients to the base it had happened several times.

[28] Gordon Rungasamy testified on behalf of the respondents. He was the Emergency Care Practitioner Intermediate with 19 years' service at the appellant. He had on occasions acted in the supervisory position. He explained that a proper handover of a patient entailed the completion of a form pertaining to that patient and hand same over to the official receiving the patient. The recipient should sign the "stats" form in acknowledgement of receipt of the patient. If a handover was done at the base which was not a common practice, the driver handed over the stats form containing the patient's information to the shift supervisor. The shift supervisor did not normally sign the documents but verbally acknowledged receipt of the patient and thereafter instructed the new crew to convey the patient to the relevant hospital. According to Rungasamy, he had not personally brought any patient to the base but had on occasions accepted patients brought to the base by other officials. He mentioned that it was not necessary to advise the control centre about the patient to be brought to the base for as long as the shift supervisor was aware of the situation.

[29] It transpired during cross-examination that Rungasamy was also charged for abandoning a patient and was dismissed. He referred an alleged unfair dismissal dispute and was awaiting an arbitration. He also mentioned that he was present in the office when Pillay handed over the "stats" form to Ms Khumalo who also verbally acknowledged receipt of the patient. He mentioned that Pillay did inform Ms Khumalo that the patient was in the ambulance. He did not see Stoffels in the office. He could have been there as there were many people in the office who had their backs against him.

[30] Tembe's evidence was largely similar to that of Pillay about the events relating to the request at IALC Hospital up until they arrived at the base.

- [31] Tembe testified that upon arrival at the base, Pillay took a patient stats form and trip sheet and left for the supervisor's office. He met Stoffels coming out of the same office. They had a short conversation and both went into the office. After some time, the two came out of the office and walked towards the ambulance. Stoffels entered the patient compartment, greeted him and said: *"Mr Pillay says this is the patient you were telling about, then there is no problem"*. Stoffels thereafter told them that they could leave and they left. He mentioned that when Stoffels said that they could leave he was sitting on the "bunk" inside the ambulance. Tembe went to the supervisor's office and signed the register and left for home. It was already knock off time when they arrived at the base. It is then that he received a call from Mr Kunene at a later stage and called him to the base to prepare a written statement. He insisted that they did not abandon the patient because when they left, the patient was with Stoffels inside the ambulance. He said that Stoffels was telling a lie when he said that he did not see the patient.
- [32] Mr R.B Mbonwa testified that on the day of the incident he was at the base. He saw the ambulance arriving driven by Pillay. After a few moments, Tembe got out of the patient compartment, stretched his legs and greeted him. He was at the time standing with Mr Lushaba. The following day he was asked by Tembe to write a statement about the incident.

The Arbitration Award

- [33] The commissioner in analysing the evidence recognised that he was faced with two mutually destructive versions of what transpired on 17 February 2009. Relevant to the determination of the dispute, the commissioner held that:

'Having due regard to the credibility of the witness and all the principles set out above, I find more probable than not that the Respondent's version is the correct version, for the following reasons. The Respondent's case is dependent on the evidence of the following witnesses, all of whom I found to be credible and reliable witnesses who dealt with their evidence clinically and objectively. There is also no evidence before me to suggest that they held any grudges against the employees. I accept Khumalo's evidence that she

referred Hleza to a particular vehicle (which was the ambulance that had been used by the employees), that he returned within a few minutes and told her that when he checked the vehicle he had found a patient inside the ambulance, that she told him that she was not aware of the patient and she accompanied him to the ambulance, that she saw a patient lying on a stretcher inside the vehicle. Although she is hard of hearing, I am satisfied that this had no influence on what she said she had heard and what she was told on the night in question, by particularly, Pillay. At the time when she inspected the ambulance, both employees had already left the workplace and her testimony is paramount to charge (C) which relates to the abandonment of the patient. She also testified that she was not advised that the patient was in the back of the ambulance. The Respondent's second witness Lushaba's evidence related to the question of whether or not Tembe was sitting in front of the ambulance with Pillay. He similarly was a good witness and in the absence of any ulterior motive which he might have had to frame the employees or any other gainsaying evidence, I have no reason not to accept his evidence. The Respondent's third witness, Stoffels was an excellent witness and I accept his evidence that he found an elderly lady who was wearing a napkin in the back of the ambulance and that he did not find any case sheet, but found a brown envelope with a note from Albert Luthuli Hospital which confirmed that the patient was to be transferred to Murchison Hospital. He was adamant that he was not told about the patient in the back of the ambulance. The Respondent's fourth witness, Kunene was a good witness, but his assertiveness unfortunately bordered on arrogance. Be that as it may, his testimony that he and Stoffels had found a patient lying on a stretcher in the patient compartment of the ambulance is also accepted. However, his evidence was not that he had not been advised by either Pillay or Tembe about the patient, but that Stoffels had told him that he (Stoffels) had not been advised of the patient. Although this was hearsay evidence I am prepared to accept it, as it is supported by the evidence of the other witness'.

[34] The commissioner rejected the version of the employees as false. He held that:

'On a balance of probabilities I find that the employees and their witness were not telling the truth and in order to put a credible version of what transpired on the day in question before me they wore the metaphorical masks. I find that

the Respondent discharged the onus by credible evidence that its version is the more probable and acceptable version [...] and that the employees were correctly found guilty of the offences recorded in paragraph 3 above'.

- [35] Regarding sanction, the commissioner noted that the appellant imposed the sanction of dismissal because of the severity of the offences and the potential, harm which could have been caused by the employees' conduct; that long service is a compelling mitigating factor but long service does not necessarily come to the assistance of an employee when serious offences as in this case are committed and that because of the seriousness of the offences, the trust relationship had been breached.
- [36] The commissioner held further that it was neither unfair nor unreasonable for the appellant to expect its employees to act with the utmost care and diligence when exercising their duties; that additional training and instruction would not have resulted in improving the employees' performance and that although dismissal has a severe and negative impact on the employees, it must be weighed up against the reasons for their dismissal having regard to the employment environment, the seriousness of the offences and in particular the employer's prerogative to set rules and standards. He reasoned further that although Rungasamy testified that he was found guilty of a similar offence, which in itself does not establish a defence of inconsistency to sway his decision in favour of the employees.
- [37] The commissioner rejected Pillay's claim that the chairperson of the disciplinary enquiry was biased as baseless. Regarding Tembe, the commissioner found that he was procedurally unfairly dismissed because it was common cause that he was not served with any documentation before being subjected to a disciplinary enquiry. However, the seriousness of the offences negated any right to compensation he might have had. In conclusion, the commissioner was satisfied that dismissal was an appropriate sanction under the circumstances.

The Review

- [38] The Respondents sought to review the award of the commissioner on the grounds that the award was not reasonable; that he failed to apply his mind; he misconducted himself; he committed a gross irregularity and exceeded his powers by acting unreasonably or unjustifiably. The respondents further sought that the award be substituted with an order that the dismissals were unfair and that the employees be retrospectively reinstated.
- [39] The Labour Court remarked *inter alia*, that the dispute is about whether Pillay told Stoffels that the patient he was talking about was in the ambulance. The court *a quo* found that Stoffels confirmed that Pillay spoke to him while they were in the presence of Ms Khumalo, whereas Ms Khumalo denied that she was ever in the presence of both Pillay and Stoffels on that day. This aspect was found by the court *a quo* to be a material contradiction at the heart of charge two and concluded that Pillay did inform Stoffels and Ms Khumalo about the patient in the ambulance and further that they were given the relevant documents pertaining to the patient. The employees should therefore not have been found guilty of the second charge. The court *a quo* held further, in the alternative, that there may have been a miscommunication between Stoffels and Pillay, that is, Stoffels misunderstood what Pillay told him.
- [40] Regarding the charge of abandoning a patient in the ambulance, the court *a quo* held that the act of abandoning denotes an intentional act and since there was a miscommunication between the two as to what was communicated and as to what was understood by the recipient of the report, it cannot be said that the employees abandoned the patient. The commissioner's finding was therefore found to be unreasonable.
- [41] As regards charges 1 and 3, the court *a quo* held that the commissioner failed to give reasons for rejecting the evidence of the employees other than to say that they had reason to wear a mask, and as such, he failed to apply his mind to the evidence before him. The conviction on the two charges was found to be a conclusion that a reasonable commissioner could not reach. The court *a quo* concluded that even if it was to agree with the convictions on all charges as the commissioner did, the sanction was too harsh, taking into account Pillay's thirty (30) years' service and that he had only one previous warning

unrelated to this matter; Tembe's four years' service with a clean record and the fact that the other employee was given a final written warning for the same or similar offences; and finally that there is evidence of miscommunication between Stoffels and Pillay.

The appeal

- [42] In this Court, the appellant, in essence, defended the findings of the commissioner. Counsel for the appellant made the following submissions: that the commissioner was faced with two conflicting versions on the two major factual issues giving rise to the misconduct, the first being whether the two employees had handed the patient over or had left her in the ambulance and gone home; the second being whether on the trip while they were conveying the patient one attended to her or whether they both sat in the front part of the ambulance leaving the patient unattended in the patient compartment; that the decision of the commissioner rejecting the employees' version and accepting that of the appellant after consideration of the evidence tendered, was a reasonable decision.
- [43] It was contended that the court *a quo* failed to apply the proper test on review, misconstrued and ignored vital aspects of the evidence and erroneously came to the conclusion that the award was one that no reasonable arbitrator could make and incorrectly reviewed and set aside the award.
- [44] On behalf of the respondents, counsel submitted that the commissioner failed to apply his mind to the evidence before him, misapplied the applicable legal principles and tests in adjudicating the issues, including disputes of fact resulting in an unreasonable and unsustainable award.
- [45] Counsel for the respondents further contended *inter alia*, that despite the fact that Stoffels testified that abandoning a patient was a "*defined offence*" there was no evidence led by the appellant to demonstrate what the charge of abandonment comprised namely, whether an intentional leaving of the patient alternatively a negligent leaving of the patient; that there was no evidence presented that the employees intentionally left the patient without effecting any handover.

- [46] It was further contended that the commissioner failed to adjudicate the probabilities of the matter, failed to properly consider the evidence before him and resolve the material disputes of fact and the substantive dispute before him.
- [47] It is settled law that the test on review which is based on reasonableness is whether the decision made by the commissioner is one that a reasonable decision-maker could not have made. In *Head of Department of Education v Mofokeng and Others*³ this Court held that:

'[30] The failure by an arbitrator to apply his or her mind to issues which are material to the determination of a case will usually be an irregularity. However, the Supreme Court of Appeal ("the SCA") in Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae) [(2013) 34 ILJ 2795 (SCA)] and this court in Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation & Arbitration & others [(2014) 35 ILJ 943 (LAC)]; have held that before such an irregularity will result in the setting aside of the award, it must in addition reveal a misconception of the true enquiry or result in an unreasonable outcome.

"[31] The determination of whether a decision is unreasonable in its result is an exercise inherently dependent on variable considerations and circumstantial factors. A finding of unreasonableness usually implies that some other ground is present, either latently or comprising manifest unlawfulness. Accordingly, the process of judicial review on grounds of unreasonableness often entails examination of inter-related questions of rationality, lawfulness and proportionality, pertaining to the purpose, basis, reasoning or effect of the decision, corresponding to the scrutiny envisioned in the distinctive review grounds developed casuistically at common law, now codified and mostly specified in s 6 of the Promotion of Administrative Justice Act (PAJA); such as failing to apply the mind, taking into account irrelevant considerations, ignoring relevant considerations, acting for an ulterior purpose, in bad faith, arbitrarily or capriciously, etc. The court must nonetheless still consider whether, apart from the flawed reasons of or any irregularity by the arbitrator, the result could be reasonably reached in the

³ *Head of the Department of Education v Mofokeng and Others* [2015] 1 BLLR 50 (LAC) at paras 30-33.

light of the issues and the evidence. Moreover, judges of the Labour Court should keep in mind that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in Herholdt, the arbitrator must not misconceive the enquiry or undertake the enquiry in a misconceived manner. There must be a fair trial of the issues.

[32] However, sight may not be lost of the intention of the legislature to restrict the scope of review when it enacted s 145 of the LRA, confining review to 'defects' as defined in s 145(2) being misconduct, gross irregularity, exceeding powers and improperly obtaining the award. Review is not permissible on the same grounds that apply under PAJA. Mere errors of fact or law may not be enough to vitiate the award. Something more is required. To repeat: flaws in the reasoning of the arbitrator, evidenced in the failure to apply the mind, reliance on irrelevant considerations or the ignoring of material factors etc. must be assessed with the purpose of establishing whether the arbitrator has undertaken the wrong enquiry, undertaken the enquiry in the wrong manner or arrived at an unreasonable result. Lapses in lawfulness, latent or patent irregularities and instances of dialectical unreasonableness should be of such an order (singularly or cumulatively) as to result in a misconceived enquiry or a decision which no reasonable decision maker could reach on all the material that was before him or her.

[33] Irregularities or errors in relation to the facts or issues, therefore, may or may not produce an unreasonable outcome or provide a compelling indication that the arbitrator misconceived the enquiry. In the final analysis, it will depend on the materiality of the error or irregularity and its relation to the result. Whether the irregularity or error is material must be assessed and determined with reference to the distorting effect it may or may not have had upon the arbitrator's conception of the enquiry, the delimitation of the issues to be determined and the ultimate outcome. If but for an error or irregularity a different outcome would have resulted, it will ex hypothesi be material to the determination of the dispute. A material error of this order would point to at least a prima facie unreasonable result. The reviewing judge must then have regard to the general nature of the decision in issue; the range of relevant factors informing the decision; the nature of the

competing interests impacted upon by the decision; and then ask whether a reasonable equilibrium has been struck in accordance with the objects of the LRA. Provided the right question was asked and answered by the arbitrator, a wrong answer will not necessarily be unreasonable. By the same token, an irregularity or error material to the determination of the dispute may constitute a misconception of the nature of the enquiry so as to lead to no fair trial of the issues, with the result that the award may be set aside on that ground alone. The arbitrator however must be shown to have diverted from the correct path in the conduct of the arbitration and as a result failed to address the question raised for determination.' (My emphasis)

- [48] It is apparent from the record that the employees understood what the charges of misconduct against them were. They at no stage challenged the nature and the basis upon which they were charged. Their defence was at all times that they were not guilty of the misconduct charges because they complied with what was required of them. It is therefore important that the matter be assessed on that basis and as was presented before the commissioner.
- [49] The commissioner correctly identified that he was confronted with diametrically opposed versions of the parties and had to establish which version was more probable, bearing in mind the *onus* resting on the appellant to establish the commission of the misconduct on a balance of probabilities. In *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others*,⁴ it was held:

'[5] On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. 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. As to (a), the court's finding on the credibility of a particular witness will depend on its

⁴ *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at para 5.

impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness's candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness's reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail."

[50] In my view, the commissioner was alive to what was expected of him. He considered the versions of the respective witnesses and gave detailed reasons why he preferred the version of the appellant's witnesses over that of the respondents. Therefore, the question that needs to be asked and answered is whether his preference of the appellant witnesses' version over that of the employees and their witnesses is a decision that a reasonable decision-maker could not reach. It needs to be mentioned that the court *a quo* did not undertake any analysis of the approach of the commissioner in dealing with much mutually destructive versions of the witnesses. Neither did it fault or approve of the findings made by the commissioner other than on two aspects that will be discussed below and which I find immaterial.

[51] The first factual dispute relates to whether the patient was properly handed over to Stoffels and Khumalo. It is common cause that taking a patient to the

base was an unusual practice. It is also a coincidence that the patient was taken to the base at the time that the employees were to knock off. Be that as it may, the employees' version is that Pillay told Stoffels about the patient on arrival and the two walked to the office where he informed Ms Khumalo about the patient who is in the ambulance and handed over the patient's stats form and other documents to her. He again told Ms Khumalo about the patient when he went to sign off the register in order for him to go home. This aspect is corroborated by Rungamsamy who testified that he was present in the office when Pillay informed her about the patient in the ambulance and handed over the "stats form" to Ms Khumalo who verbally acknowledged receipt of the patient. It is however surprising that Rungamsamy is unable to confirm if Stoffels was also in the office at the time. It is further surprising that Pillay did not mention that Ms Khumalo acknowledged receipt of the patient Rungasamy claimed. On the respondents' version Ms Khumalo was told and was fully aware of the patient in the ambulance and was in possession of the papers pertaining to the patient. Similarly, that Stoffels was told of the patient and even entered the patient compartment of the ambulance, saw and identified the patient he was told about by Pillay, promised to arrange her conveyance to Murchison Hospital and gave them permission to knock off. The fact that Ms Khumalo had a hearing problem is therefore irrelevant as the version of the employees is that she was aware and acknowledged the patient and the stats form. Her acknowledgement of the patient means she heard what she was told about the patient.

- [52] The common cause facts and improbabilities put the employees' version to doubt. The events following the discovery of the patient in the patient compartment of the ambulance, such as the surprise by Ms khumalo and Stoffels when Hleza made a report to them, the immediate telephone calls to the employees and report to Kunene are inconsistent with the conduct of persons who accepted a handover of the patient to them. If the version of the employees is to be accepted, it means that Ms Khumalo and Stoffels are the ones who abandoned the patient in the ambulance, something which I find improbable. All these aspects were not considered by the court *a quo*.

- [53] This evidence that Ms Khumalo was told about the patient and that she acknowledged the handover of the patient, as well as the fact that Stoffels went into the ambulance, saw the patient and was left inside the ambulance with the patient is a fabrication which was rightly rejected as false by the commissioner. It is surprising that it is only Tembe who testified that Stoffels entered the patient compartment, identified the patient as the one that Pillay told him about and told them to knock off and he will make arrangements for the patient to be transported. These important elements of a proper handover were not mentioned by Pillay. Logic dictates that he would have found them important to mention because they supported his version that he did a proper handover of the patient. There is also no explanation why these details of the handover were not disclosed to Kunene and Stoffels when they were confronted with the allegation of abandoning patients in the ambulance. The rejection of the employees' version on this aspect is not a decision that a reasonable decision-maker could not reach.
- [54] The second controversy is whether Tembe sat with the patient in the patient compartment of the ambulance. The version that Tembe was not in the patient compartment with the patient seems more probable than that of the employees. Lushaba who made a statement of what he observed shortly after the incident and not being aware of the significance of what he observed, is corroborated by the fact that there were no patient stats or data form. Further, he did not inspect the ambulance on arrival because of the fact that the two paramedics were sitting in front as was always the case when the ambulances came to the depot. They would normally not carry patients and there would be no need for the other paramedic to sit at the back.
- [55] It is reasonable to conclude that if the two employees had accepted that the patient was simply someone who had missed a shuttle bus, leaving her alone in the back would have been probable. It would not make sense for Pillay to take the patient's vital signs and assess her if the doctor told him that the patient was stable, required no further medical attention and was merely to be transported as she missed her bus. If this evidence is accepted, then it is probable that the patient was left alone in the patient compartment *en route* to

the depot as she needed no assistance. The employees' version is clearly a fabrication intended to cover all the basics of criticism. This aspect also makes Lushaba's version more probable. On the other hand, Mbonwa's evidence is suspect. He is an ambulance attendant who happened to have been standing at the gate and observed detailed things that should have been observed by Lushaba who was employed as a security guard posted at the gate. Mbonwa was even off duty at the time. His version was not even put to Lushaba.

[56] It is noteworthy that the written statement of Tembe, dated 17 February 2009, on the day of the incident is very brief and runs into only two paragraphs. What he stated in the statement is simply that they were advised by the doctor at IALC Hospital that there is a patient that needed to go to Murchison Hospital, that they took the patient over from the nursing staff and when they were on their way to Port Shepstone his crew mate said to him that *"we gonna handover patient to the night crew and & I listened to him because he is high qualified than me"* (sic). There is no mention of the vital signs of the patient being checked by Pillay and that he offered the patient his sandwich. He did not mention that Pillay told him that his child was sick and that is the reason for going to the base. These are the fundamental details one would have expected him to include since he was responding to being accused of abandoning the patient. It was only in the subsequent statement written on the 18 February 2009 that he disputed that the patient was left alone in the back of the ambulance. His initial statement has a ring of truth and is supported by the probabilities of the events.

[57] The respondent contended that the appellant should have produced the video or camera footage from the IALC Hospital, the tollgate and the Port Shepstone base to verify the sitting arrangement in the ambulance and that since the appellant bore the *onus* to prove that the employees were indeed travelling together in the front of the vehicle, it failed to secure this evidence or to marshal it. Indeed, the video footage if it existed would have assisted. However, regarding the base, Kunene testified that the cameras only covered the entrance to the Control Centre as it is a restricted area and not

necessarily the entrance to the premises. Kunene relied on the evidence of Lushaba and the objective fact that had someone sat with the patient as the employees claimed, there would have been a patient stats or data form which would have been completed during the course of the trip. It is such a coincidence that this document does not exist although the employees claim that the document was completed and was handed over to Ms Khumalo, which is disputed. I have already found that the appellant's version is probable and preferable on this aspect as opposed to that of the employees.

[58] To the extent that the court *a quo* held that the dispute is about whether Pillay told Stoffels that the patient he was talking about was in the ambulance it erred. The real question is rather whether there was a proper handover of the patient to either Stoffels or Ms Khumalo. Because of the error of the question posed by the court *a quo*, its inquiry was restricted to whether Pillay made mention of a patient to be repatriated and that there was a miscommunication. With respect, the court *a quo* overlooked the fact that the employees' version excluded any possible miscommunication because their case was simply that there was a proper handover, that Stoffels even came to the ambulance and on Tembe's version, accepted handover and the responsibility over the patient going forward and released the employees to go. The alleged contradiction on the testimony of Ms Khumalo and Stoffels that the two were in the office with Pillay is, in my view, immaterial if one has regard to the defence of the employees.

[59] The court *a quo*'s conclusion that the employees were wrongly found guilty of abandoning the patient is based on the reasoning that since there was a miscommunication between Stoffels and Pillay, there was no intention to abandon the patient. The findings that there was no miscommunication, that the employees' version is not truthful on this aspect, the fact that the patient was found alone in the ambulance, and the conclusion that the patient was abandoned by the employees are not conclusions that a reasonable decision-maker could not reach.

[60] Counsel for the respondents contended that there was no evidence led that the relationship of trust had broken down or that the employees could no

longer be trusted to do their jobs of caring for patients. She submitted that given the evidence before the commissioner and the fact that in all probability there was simply, at worst, a misunderstanding between Stoffels and Pillay, there was no justification for the dismissal of the employees.

[61] The commissioner took into account all the relevant factors in concluding that the sanction imposed by the appellant was fair. He considered the importance of the rule breached, potential harm caused by the employees' conduct, whether additional training and instruction was necessary, the effect of the dismissal on the employees and the reason why the appellant imposed a sanction of dismissal. He considered the fact that Rungamsamy testified that he was found guilty of a similar offence and concluded that this in itself does not establish a defence of inconsistency to sway his decision in favour of the employees. In my view, the conclusion reached by the commissioner with regard to sanction is not a decision that a reasonable decision-maker could not reach. One may add that the conduct of the employees is unacceptable and unprofessional. They abandoned a vulnerable sick elderly woman in an ambulance so that they could knock off. The treatment the patient received is inhuman and degrading. The issue is not necessarily limited to whether trust relationship has been broken but regard must be had of the fact that their conduct compromised a patient's rights to dignity and proper health care.

[62] In the result, the appeal should succeed and the order of the Labour Court must be set aside.

[63] In my view, it would be in accordance with the requirements of the law and fairness that each party pay its costs.

[64] **Ndlovu JA** was part of the court that heard the appeal and was the nominated Judge to write the judgment on behalf of the Court. He unfortunately passed away before he could produce the judgment. The lengthy delay in having the judgment released is regretted and we tender our apology to the parties.

[65] In the result, the following order is made:

- a) The appeal succeeds and the order of the Labour Court is set aside and replaced with the following:

“The application for Review is dismissed with no order as to costs”.

- b) There is no order as to costs.

L.P Tlaletsi

Deputy Judge President

Labour Appeal Court of South Africa

Murphy AJA concurs in the judgment of Tlaletsi DJP.

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LABOUR APPEAL COURT