THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Of interest to other Judges

Case No: JR 390/15

In the matter between:

MEC FOR HEALTH (GAUTENG PROVINCE) **First Applicant**

DIRECTOR GENERAL OF HEALTH GAUTENG PROVINCE **Second Applicant**

and

D R SG SPIROV **First Respondent**

COMMISSIONER CS MBILENI *N.O.* **Second Respondent**

PUBLIC HEALTH AND SOCIAL DEVELOPMENT SECTORAL BARGAINING COUNCIL ('PHSDSBC') **Third Respondent**

Heard: **6 June 2018**

Delivered: **12 June 2018**

Date of Reasons: **13 June 2018**

Summary: **(Review- dismissal– pre-requisites of review based on reasonableness not met)**

JUDGMENT-REASONS FOR ORDER

LAGRANGE, J

Introduction

[1] This is an opposed review application. There is also a condonation application for the late filing of the review and an application to make the arbitration award an order of court in the event the review application fails.

[2] The judgement without the reasons was handed down yesterday. Owing to time pressures which made it impossible to finalise the editing of the reasons for the judgment, the reasons for the judgment were delayed. They are set out below.

[3] The order handed down on 12 June 2016 read:

> '[1] The late filing of the review application is condoned.
>
> [2] The review application is dismissed.
>
> [3] The arbitration award of the second respondent dated 11 January 2016 under case number PSHS 995-14/15 is made an order of court.
>
> [4] The applicants must pay the first respondent's costs.'

The condonation application

[4] The award was handed down on 11 January 2016 and the review application was filed on 2 March 2016 just over seven weeks later. The review was consequently filed about a week late. Having considered the reasons given for the slight delay and the absence of any demonstrable prejudice to the first respondent, implicitly confirmed by his failure to oppose the application, I am satisfied condonation should be granted.

Background

[5] The first respondent Dr SG Spirov ('Dr Spirov') was summarily dismissed on 28 January 2015. At the time he was employed as a senior registrar (deployed as a surgeon) and performed his duties at the Pholosong Hospital and had worked for the department since 1991.

[6] The reasons advanced for his dismissal arose out of his conduct during the course of a laparotomy in which he was the lead surgeon. The operation was nearly complete except for closing the patient's abdomen, when a significant blood spill was noticed by Dr Spirov on his lower body. It appears to be common cause that he left the theatre to clean himself and change before returning to the theatre. He claimed that the reason for leaving the theatre before the operation was concluded was that he had an open wound from a spider bite on his thigh and there was a risk of infection from the blood spill which soaked his trousers.

[7] The reasons given for his summary dismissal were that:

7.1 As the lead surgeon he left the operating theatre with a patient on the operating table with the patient's abdomen still open and bowels exposed, and

7.2 He wore a gown without scrubbing and proceeded with the operation on the patient in an unsterile environment. Essentially this reason concerned his alleged conduct when Dr Spirov returned to the theatre to complete the operation rather than his observance of sterile procedures prior to that.

The award

[8] After recounting the evidence of all the witnesses in great detail, the arbitrator noted, *inter-alia*, that "…misconduct is said to take place when an employee culpably disregards the rules of the workplace". He concluded that that "the preponderance of incontrovertible facts, analysis and case law points to the fact that the summary dismissal of Dr Spirov was not founded on a fair reason related to his conduct and was effected in accordance with a fair procedure and therefore unfair…"

[9] On the question of whether the misconduct was proved, the arbitrator concluded that the evidence of the employer's witnesses did not support the reasons given for his dismissal.

[10] The arbitrator ordered the retrospective reinstatement of Dr Spirov.

[11] The concluding portion of the award is regrettably cryptic and is in stark contrast with the extensive preceding account of the testimony of the various witnesses. Nevertheless, paragraphs 91 to 93 of the award indicate the penultimate findings which informed the arbitrator's decision that the dismissal was substantively unfair. In short these were that:

11.1 The cause of Dr Spirov leaving the theatre, namely because of the blood spill and potentially being exposed to blood-borne diseases as a result of the spill could not constitute misconduct.

11.2 The evidence did not support the conclusion that Dr Spirov had acted negligently in the sense that he allegedly failed to scrub before returning to complete the operation and conducted the operation in an unsterile environment.

11.3 No evidence was led to support the employer's claim that the dismissal was effected in accordance with a fair procedure or to prove that the reason for the dismissal was a fair one related to Dr Spirov's conduct.

11.4 The dismissal was procedurally unfair on account of being a summary dismissal without giving Dr Spirov an opportunity to state his case in a disciplinary enquiry.

[12] Further, the arbitrator's analysis of Dr Spirov's closing argument provide further insights into his reasoning.

[13] A feature which stands out in this case is the failure of the employer to call Dr E Michalski, a Principal Specialist and acting head of surgery at the time to give evidence. Dr Michalski had direct knowledge of the incident unlike Dr Lingham, and the employer called as a witness. It is telling that, Dr Michalski's unchallenged evidence at the arbitration was that he gave the same account of events to the hospital management as he testified to in the arbitration.

The Grounds of review and response

[14] The applicants contend that the arbitrator misconstrued or failed to take cognizance of certain evidence in deciding that "none of the applicants' witnesses testified to support a charge of dereliction of duty when Dr Spirov left the operating theatre without completing the operation". The applicants highlight the following evidence in this regard:

14.1 Dr Bokaka testified that Dr Spirov's actions as a senior surgeon were contrary to policy and endangered the patient. The respondent points out that Dr Bokaka, unlike Dr Nokwindla and Dr Michalski, had no direct knowledge of the incident and his evidence relating to the incident itself was hearsay.

14.2 Dr Lingham, the hospital CEO, who also had no direct knowledge of the event, testified that:

14.2.1 He spoke to several individuals who viewed Dr Spirov's conduct in a serious light.

14.2.2 He viewed Dr Spirov's conduct as serious and as unethical professional misconduct.

14.2.3 Leaving the patient with bowels exposed constituted gross procedural misconduct

14.2.4 Prolonged duration of anaesthetic could affect the patient's brain, liver and kidney.

14.3 Dr Spirov points out that at the time he left the theatre, blood was still oozing from the patient's liver and the abdomen could not be closed up until it stopped. Moreover, the evidence showed that the patient's abdomen was covered with swabs and sterile surgical sheets while he was out of the theatre for about 15 minutes. Moreover, no infection occurred and the patient was discharged earlier than he would have recommended.

14.4 The applicants also claim that the arbitrator failed to consider the evidence of Sister Maphothoma who testified that Dr Spirov told her that he was not going back to the theatre and she could tell her CEO that. The arbitrator also failed to take account of her evidence that when a patient's bowels are exposed for long periods there is a risk of infection.

[15] Further, the hospital argues that the arbitrator misconstrued or failed to take account of the evidence of several witnesses that his hands were dry when he came back to the theatre in concluding that no evidence was led to establish a charge of negligence on account of allegedly not scrubbing before returning to proceed with the operation.

[16] Dr Spirov retorts that the evidence showed that he used appropriate soap (alcohol rub) and double gloved before coming back to theatre. Dr Nokwindla corroborated that he had gloved and put on a new gown. Dr Spirov pointed out that full scrubbing would have taken longer.

[17] Lastly, the applicants contend that the arbitrator ignored the evidence that Dr Spirov did not cooperate with the employer's investigations even

though he was provided with several opportunities to present reports and statements, in finding that the dismissal was conducted without following a fair procedure.

[18] In this regard, Dr Spirov claims there was evidence that he was willing to co-operate in an investigation, but the hospital management did not want to classify the event as an accident, which would have focussed on the event of the blood spill and how he reacted to that, rather than an incident describing his conduct of leaving the theatre and not scrubbing up properly before returning. Whatever the merits of this debate, it was common cause that Dr Spirov was summarily dismissed without a disciplinary enquiry being conducted.

[19] In any event, in argument, the applicants wisely did not persist in arguing that Dr Spirov's dismissal was procedurally fair.

[20] The applicants also claim that the arbitrator admitted the evidence concerning protective gowns and medical reports which were not in the parties' bundles thereby allowing the applicants to be 'ambushed'.

Evaluation

[21] It is now trite law that it is insufficient for a party on review to simply say that certain evidence was not considered or was misconstrued. The omission or misdirection must fundamentally have affected the arbitrator's reasoning to such an extent that the arbitrator necessarily could not have reached the findings he or she did, if that evidence had been taken into account or if the misdirection had not occurred. Conversely, it means that the effect of rectifying that omission or misdirection inevitably would lead to a different outcome. In other words, the consequences of rectifying the failure must dramatically alter any conclusion that the outcome was one

that a reasonable arbitrator could reach. In *Head of Department of Education v Mofokeng and Others*[1] the Labour Appeal Court has expressed the principle thus:

> [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.

[22] The first difficulty with the current review application is that no explanation was advanced as to why any of the supposed omissions which the arbitrator is alleged to have committed in relation to his evaluation of evidence, would necessarily fundamentally shake his findings or render

[1] (2015) 36 *ILJ* 2802 (LAC) at 2813

them unsustainable if he had been compelled to factor that evidence into his reasoning. The grounds of review are set out more like grounds of appeal. As such there is no a proper case for review based on grounds of reasonableness made out in the founding affidavit.

[23] In any event, if I am wrong, I will consider the grounds raised as if the alleged omissions or misdirections had been properly framed as ones that would have fatal consequences for the reasonableness of the arbitrator's findings. I have not repeated the responses of Dr S to the grounds of review, which are summarised above, but most of them are trenchant retorts to the applicants, which I accept as part of the reasons why this review should not succeed.

The arbitrator's finding that the evidence of applicants' witness to support a finding of dereliction of duty when Dr Spirov left the operating theatre without completing the operation

[24] Before considering this ground of review, it is important to mention that this finding was clearly one of the findings made by the arbitrator in determining that Dr Spirov was not guilty of misconduct on the first charge. It amounts to an expression of the arbitrator's view that the applicants had failed to prove their case against Dr Spirov through their own evidence.

[25] It was common cause that Dr Spirov abruptly left the operating theatre after the main surgical operation was completed but before the closing up of the patient's abdomen had finished. It was also essentially common cause on the evidence that he left abruptly when he noticed that his pants were soaked in blood. There was no dispute that this must have resulted from a blood spill from the operation. The applicants' witnesses in the operation were also evidently aware that it was Dr Spirov's discovery that his trousers were soaked in blood which prompted him to leave the

theatre, though they might not have been aware at the time of the reason for his abrupt departure, namely the presence of an open wound from a spider bite on his thigh which he feared might be contaminated by the blood spill and created the risk of him being infected by a blood-borne disease.

[26] It was suggested that Dr Spirov could have asked another surgeon to perform the operation in view of his risk of exposure to infection because of his open sore, but it is also not disputed that a readily available substitute surgeon was not a reality at the hospital, nor was Dr Spirov's contention that the operation was an emergency operation seriously disputed. It was also agreed that there was no existing protocol at the hospital requiring the disclosure of any pre-existing injury which might raise the risk of a practitioner being infected, or which forbade a person in Dr Spirov's position from conducting surgery, under circumstances where he had an open wound.

[27] There was also undisputed evidence that at the time he left the theatre, there was still blood seeping from the patient's liver and that the abdomen could not be closed until that bleeding had stopped. When Dr Spirov left the theatre two other junior doctors, Dr Nokwindla and Dr Odimbuleko, a floor nurse and the scrub nurse, Sister Maphothoma, remained in attendance. On the evidence it was more than reasonable to conclude that his absence from the operating theatre had not been longer than approximately 15 minutes, during which time his uncontested evidence was that he had waited for a bathroom to become unoccupied so that he could wash the blood off his legs, change his clothes, and clean up before re-entering the operating theatre. It was also accepted that in an operation of that nature it could not normally have been completed in that time because it would usually take that long to determine if bleeding had stopped.

[28] There was conflicting evidence about whether the patient's bowels were exposed, but the scrub nurse herself testified that there were still swabs in place to staunch bleeding and the abdomen was covered with a sterile green gown. It was accordingly not unreasonable for the arbitrator to conclude that the patient's bowels were not simply left exposed during Dr Spirov's absence of approximately 15 minutes. Moreover, it was not even obvious from the evidence that the bowels would normally have been covered while the residual bleeding was still being monitored.

[29] There was ample evidence that Dr Spirov was in an agitated state when he left the theatre, which he did not dispute. It appears common cause amongst the eyewitnesses that the source of his agitation was the extent to which his upper legs and area below his waist had become soaked in blood. He was also clearly partly angry because his exposure would have been prevented if the surgeons were issued with proper full length rubberised gowns instead of the short white gowns which did not cover them properly.

[30] The evidence also showed that what was not known by the other professionals in the theatre was why he became so agitated or left so abruptly, namely his risk of infection from a blood borne disease owing to an exposed spider bite on his thigh. However, it was never contested that his concern about possible infection from the blood spill was irrational or trivial given that his unhealed spider bite was still an open wound. Both Dr Nokwindla and Dr Michalski testified that given the risk of infection, it was acceptable that Dr Spirov would have sought to minimise the risk of infection by cleaning himself up.

[31] Essentially, if one looks at the applicants' case it adopted a somewhat simplistic view that there was no balancing of risk to be undertaken by Dr Spirov in deciding whether he could not leave the theatre without finalising the operation and expose himself to the risk of infection for the duration of the operation. The context of making this decision was that he left at a

point when there was more than sufficient evidence supporting the conclusion that there was little to be done until the patient's residual bleeding had been stopped which would have taken about the same time as he was absent from the operating theatre.

[32] Although it was not disputed that a patient's bowels should not be unnecessarily exposed, the evidence did not support the conclusion that they were exposed for a period longer than they would have been, even if Dr Spirov had not left the theatre, owing to the inability to close up the abdomen until the bleeding had stopped and the time that normally took.

[33] On the claim that he allegedly told Sister Maphothoma that he was not going back to the theatre and she could tell her CEO that, that might have been true given his anger about the inadequacy of the surgical gowns. But that evidence does not advance the applicants' case on the charge. The evidence showed that whatever anger he had expressed, he returned to complete the operation within a time period that would have been a normal pause in the operating procedure, because of the residual bleeding. It was also not disputed that he actually declined Dr Michalski's offer to finish the operation in his stead.

The evidence of not scrubbing in before re-entering the theatre.

[34] The claim that he conducted the operation in an unsterile environment was essentially confined to the scrubbing issue. Was there no justifiable basis for the arbitrator to infer that Dr Spirov had scrubbed before re-entering the operating theatre? There was no dispute that Dr Spirov had put on a clean gown, and had 'double gloved' before finishing the operation. There was also undisputed evidence that this was the primary protection against contamination. The only issue was whether or not he had scrubbed before resuming the operation.

[35] The key evidence in this regard was the evidence of the scrub nurse, who could not say whether or not Dr Spirov had scrubbed before entering the theatre, but that when he entered the theatre to put on the gloves, his hands did not appear to be wet and did not require to be dried in the theatre before his gloves were put on, which was normally the case if someone had just scrubbed. The other witness who testified that Dr Spirov's hands were dry was Sister Mabaso, the operational manager at the hospital. It is unclear from her evidence at what point she claimed she saw that Dr Spirov's hands were dry but it seems unlikely it could have been when he re-entered the theatre because her own evidence was that he was already back in the theatre before she returned to it after the incident.

[36] Although it seems clear that the normal procedure would have been to have scrubbed up just before entering the theatre in a basin adjacent to the theatre, neither witness could dispute that Dr Spirov could have scrubbed his hands and arms in the bathroom where he changed his soiled clothes, which had an elbow tap fitting that allowed the user to open and close the tap without using their hands. His version that he had cleaned his hands with alcohol in addition to washing with soap was also not challenged when he presented it, though the use of alcohol was not put to the applicants' witnesses.

[37] On a balance of probabilities, I accept that another arbitrator could conclude that there was sufficient circumstantial evidence to draw an inference that Dr Spirov did not scrub up before entering the theatre. But that does not mean that the arbitrator's alternative conclusion that Dr Spirov did scrub up is one that no reasonable arbitrator could have reached on the evidence, bearing in mind Dr Spirov's very extensive experience of nearly 35 odd years as a surgeon and his obvious awareness of surgery hygiene and the need to avoid contamination. If the reason relied on by the applicants had been that Dr Spirov had not done his scrubbing in accordance with the standard practice which appeared to

be that scrubbing up was done in the basin adjacent to the theatre, which Dr Spirov readily concedes he did not do, a finding on that issue in favour of the applicants would have been justified. However, the complaint against Dr Spirov was not articulated in such a narrow form and the arbitrator only had to decide if Dr Spirov had scrubbed up before re-entering the theatre.

Introduction of medical reports and gown samples

[38] Regarding the introduction of medical reports, the applicants also claims that the arbitrator admitted the evidence concerning protective gowns and medical reports which were not in the parties' bundles thereby allowing the applicants to be 'ambushed'. The applicants do not explain how their ability to present their case was prejudiced. Moreover, insofar as the samples of the protective gowns are concerned, the type of gowns used was something within the applicants' knowledge as was demonstrated by the evidence given by its witnesses on the different type of surgical gowns provided. I find nothing in this ground that would warrant setting aside the award.

<u>Concluding remarks and costs</u>

[39] In conclusion, I am not satisfied that the applicants have established grounds of review that would warrant setting aside the arbitrator's finding on the reasons given for Dr Spirov's dismissal. That is not to say his conduct was free from criticism. He ought to have communicated more clearly with his team why he felt it necessary to leave the theatre as they would not have been aware of his potential exposure to blood borne diseases, even if they realised it was the blood spill which prompted him to leave the theatre because he had drawn their attention to it. But his conduct was not arbitrary nor undertaken without balancing the risks to

himself and the patient. He also might be criticised for not scrubbing up in the standard way, which might have demonstrated a degree of remissness on his part, but even if he had been charged with that, such conduct would not have been the kind that would have warranted his dismissal, particularly given his very lengthy and untarnished record prior to the incident.

[40] What is particularly regrettable about this case is that the matter could have been addressed and resolved without the parties incurring all the expenses of litigation and the indirect costs thereof if the applicants had simply held a disciplinary enquiry before dismissing Dr Spirov. The applicants have only themselves to blame for the eventual expense they will incur in back-pay and costs. It is also because the applicants failed to hold a disciplinary enquiry before dismissing Dr Spirov that I decided to award costs against them.

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R Lagrange

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