REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no JR 2343/12

In the matter between:

SOUTH AFRICAN MEDICAL ASSOCIATION OBO

DR GRZEGORC LUDWICK PIETZ **Applicant**

And

DEPARTMENT OF HEALTH - GAUTENG

PROVINCE **First Respondent**

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

PUBLIC HEALTH AND SOCIAL DEVELOPMENT

BARGAINING COUNCIL **Third Respondent**

Date heard: **9 January 2015**

Date delivered: **29 July 2015**

JUDGMENT

RHOODIE AJ,

Introduction

[1] This matter concerns an opposed application to review and set aside an arbitration award of the Second Respondent made under case number PSHS642-09/10.

[2] This application has been brought in terms of Section 145 of the Labour Relations Act ('the LRA').

[3] The Applicant was dismissed by the First Respondent for alleged misconduct committed on 25 November 2009. The Applicant then referred his dismissal as an unfair dismissal dispute to the Third Respondent.

[4] The Second Respondent determined that the dismissal of the Applicant was substantively fair, but procedurally unfair. He further determined that the Applicant was not entitled to any compensation.

Background

[5] The Applicant was employed as a medical doctor and obstetrician at South Rand Hospital.

[6] The charges relate to an incident that occurred while he was on duty during the night of 25 November 2009.

[7] The 1st Respondent alleged that the Applicant did not respond with the required urgency to a call made to the Applicant that a pregnant mother needed urgent attention, as she, amongst others, presented a prolapsed cord.

[8] The child was pronounced dead at birth and the matter revolves around the actions / omissions of the Applicant during the night of 25 November 2009 and whether he was grossly negligent in his conduct.

[9] As a result of the alleged misconduct, the Applicant was dismissed by the 1st Respondent on 1 December 2009, without following a proper disciplinary process.

Arbitration Award

[10] The Commissioner in his "analysis of evidence and argument", dealt with the legal principles applicable to this matter, amongst others, the burden of proof, the role of the Commissioner and substantive and procedural fairness.

[11] The Commissioner specifically dealt with and considered the;

i. Legal interpretations applicable in determining gross negligence and poor work performance respectively.
ii. Evidence presented and specifically the issue of whether the midwives conveyed the news of the prolapsed cord to the Applicant and if so, whether the Applicant failed to respond with the necessary urgency.

[12] The Commissioner weighed up the conflicting versions of the evidence as presented and led by the parties. The Commissioner clearly considered the evidence of the only expert, namely Dr. Buchmann, called to give evidence by the Applicant.

[13] Against this background, the Commissioner set out and evaluated the actions of the Applicant during this incident and also considered evidence presented on the Applicant's behavior in general.

[14] The Commissioner then reached the conclusion, having made reference to legal authorities and case law that the First Respondent "has discharged the onus of showing that the Applicant had acted in a reckless and uncaring manner with

regard to the patients entrusted to him and that he was grossly negligent in his actions".

[15] The Commissioner, however, found the Applicant not guilty on the alleged charge of insolence. He then addressed the issue of sanction and considered whether dismissal was the appropriate sanction, both from the perspective of the Applicant's own circumstances (professional and personal), as well as from a labour law / progressive discipline perspective.

[16] Amongst others, the Commissioner then considered case law pertaining the principles of trust and the appropriate test for an Arbitrator when considering whether to interfere with a sanction imposed by the employer, or not.

[17] The Commissioner further dealt with the Applicant's allegation that the First Respondent had acted inconsistently in dealing with similar offences. The Commissioner found that the Applicant failed to provide convincing evidence to substantiate the claim of inconsistency.

[18] The Commissioner then addressed the Applicant's claim of procedural unfairness. The Commissioner comes to the conclusion that, although the 1st Respondent had provided the Applicant with an opportunity to address it on the events in question and the Applicant had failed to make use of that opportunity, the First Respondent failed to apply the required fair procedure in dismissing the Applicant. Flowing from that conclusion, the Commissioner then grappled with the discretion that he has in terms of section 193, as to whether he should grant the Applicant compensation for this procedural unfairness.

[19] The Commissioner stated as follows in paragraph 40 of the award:

'When the gross negligence of the applicant is considered it is clear that it would be difficult for me to justify granting compensation…… during the Arbitration the Applicant also failed to show any remorse'.

[20] In light of the above, the Commissioner concluded that the Applicant should not be compensated for the procedural unfairness.

[21] The Commissioner's approach and mindset in his assessment and evaluation of the evidence pertaining to procedural and substantive fairness are clearly reflected in the award. In summary the Commissioner dismissed the Applicant's unfair dismissal case.

Grounds for Review

[22] In essence, the Applicant raised the following grounds of review as set out in the papers:

[23] The commissioner failed to apply his mind or committed a gross irregularity in that he:

[24] Failed to grant the Applicant compensation for the procedural unfairness – referred to as the "First Aspect"

[25] Considered irrelevant evidence before him and may have reached an overall decision that a reasonable decision maker could not have reached – referred to as the "Second Aspect".

[26] Failed to properly consider the evidence before him and reached an overall decision that a reasonable decision maker could not have reached - referred to as the "Third Aspect".

Test for Review

[26] The test that this Court must apply in deciding whether the Commissioner's decision is reviewable, has been set out in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[1] as:

[1] (2007) 28 ILJ 2405 (CC).

> 'Whether the conclusion reached by the arbitrator was so unreasonable that no other arbitrator could have come to the same conclusion'.

[27] The Constitutional Court clearly held that the Commissioner's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[28] In the decision of *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)*[2], the Supreme Court of Appeal held that:

> 'In summary, the position regarding the review of CCMA awards is this: A review of a CCMA award is permissible if the defect in the proceedings falls within one of the grounds in s 145(2)(a) of the LRA. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a), 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'.

[29] In the subsequent judgment of *Goldfields Mining South Africa (Kloof Mine) v CCMA and others*[3], the Labour Appeal Court held that:

> 'In short: A reviewing court must ascertain whether the arbitrator considered the principal issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable'.

[30] It is in view of this test that the Applicant's grounds for review must be assessed.

[31] The position of the Labour Appeal Court clearly reflects that in the event that the arbitrator ignored material evidence, and in considering this material evidence together with the case as a whole, the Review Court believes that the arbitration

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[2] (701/2012) [2013] ZASCA 97; 2013 (6) SA 224 (SCA); [2013] 11 BLLR 1074 (SCA); (2013) 34 ILJ 2795 (SCA)
[3] (JA 2/2012) [2013] ZALAC 28; [2014] 1 BLLR 20 (LAC); (2014) 35 ILJ 943 (LAC)

award cannot now be reasonably sustained on any basis, then the award would be reviewable.

[32] In considering this approach, the first step in a review enquiry is to consider and determine if a material irregularity indeed exists. A Review Court determines whether such an irregularity exists by considering the evidence before the Commissioner as a whole, as gathered from the record and comparing this to the content of the award and reasoning of the arbitrator as reflected in such award.

[33] The Review Court must then proceed to apply all the relevant legal principles in order to determine the content that the Commissioner considered to constituted proper evidence.

[34] Should the Review Court, in conducting this enquiry find that no irregularity exists in the first instance, the matter is at an end and no further determinations need to be made and the review must fail.

[35] This position is clearly reflected in *Surgical Innovations (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others (D290/2012) [2014] ZALCD 3 (13 February 2014)*, where the Labour Court summarised the review process and held the following:

> [20] .... Once an irregularity is identified, the materiality of the irregularity then becomes relevant and must be considered. This means that the irregularity committed by the arbitrator must be a material departure from the acceptable norm or a material deviation from the actual evidence before him or a material departure from the proper principles of law or a material failure to consider and determine the evidence or case, in order to constitute an irregularity of sufficient magnitude to satisfy this first step in the enquiry. If the review court in conducting this first step enquiry should find that no irregularity exists in the first instance, the matter is at an end, no further determinations need to be made, and the review must fail.
>
> [21] Should the review court however conclude that a material irregularity indeed exists, then the second step in the review test follows, which is a determination as to whether if this irregularity did not exist, this could reasonably

> lead to a different outcome in the arbitration proceedings. Put differently, could another reasonable decision-maker, in conducting the arbitration and arriving at a determination, in the absence of the irregularity and considering the evidence and issues as a whole, still reasonably arrive at the same outcome? In conducting this second step of the review enquiry, the review court needs not concern itself with the reasons the arbitrator has given for the outcome he or she has arrived at, because the issue of the arbitrator's own reasoning was already considered in deciding whether an irregularity existed in the first part of the test.

[36] The pertinent question is therefore, whether another reasonable decision-maker, in conducting the arbitration and arriving at a determination, in the absence of the irregularity and considering the evidence and issues as a whole, could still arrive at the same outcome?

[37] The test is thus whether the award falls within the boundaries of reasonableness. For this Review Court to interfere with the Commissioner's award would therefore mean that the Review Court would need to find that the Commissioner had been unreasonable in his finding.

[38] The LAC in *Bestel v Astral Operations Ltd and Others*[4] summarised the test for review as follows:

> 'It is important to emphasise…that the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the reviewing court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.'

[39] It is prudent to mention that errors of fact by a Commissioner, specifically in respect of facts that he is empowered to determine (such as findings of fact on the probabilities), will not usually give rise to a valid ground of review. This point

[4] (JA 37/08) [2010] ZALAC 19; [2011] 2 BLLR 129 (LAC) (16 September 2010)

of law is mentioned by the Supreme Court of Appeal in *Dumani v Nair and Another*[5] below:

> [29] … '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.'
>
> [33] For these reasons, even if there were a misdirection by the presiding officer in regard to the evidence of Claassen, the convictions would not be reviewable on the ground of material error of fact, nor under the guise of the provisions of s 6(2)(e)(iii) of PAJA, viz 'because irrelevant considerations were taken into account or relevant considerations were not considered'. That leaves the following grounds of review relied upon by the appellant, namely that the presiding officer acted arbitrarily (based on s 6(2)(e)(vi) of PAJA) and that the presiding officer's decision was so unreasonable that no reasonable person could have reached it (based on ss 6(2)(f)(ii)(cc) and (h) of PAJA). (The alleged misdirection to which I have referred would be relevant, if established, to the latter ground in considering whether, on the facts before the presiding officer as disclosed in the record, no reasonable person could have found the appellant guilty.) These grounds are dealt with in the judgment of my colleague Theron JA in whose judgment I concur.'
>
> [40] The general approach applied by this Court is that grounds for review based on the treatment and assessment of evidence by a Commissioner, will not in themselves constitute separate grounds of review to be determined independently from the result.

[5] 2013 (2) SA 274 (SCA)

Analysis

[41] An analysis of the Applicant's grounds for review reflects that the Applicant seeks to rely on a number of alleged errors made and gross irregularities committed by the Commissioner. I will now deal with the Applicant's grounds of review relating to the findings of the Commissioner as set out in the papers. For ease of reference, I will use and follow the same structure as the Applicant in its application.

THE FIRST ASPECT

[42] The Applicant raised the fact that the Commissioner erred in finding that relief was not due to the Applicant despite the finding of procedural unfairness and in exercising said discretion, committed a reviewable irregularity.

[43] The Applicant based its argument on the premises that the Commissioner bound himself to obsolete legal principles in that he followed the dictum of the Labour Appeal Court in the 1997 matter of *CWIU v Johnson & Johnson Pty Ltd*. The 1st Respondent countered in stating that this argument was not raised in the Applicant's founding and replying affidavits. Although the Court accepts that this issue was not specifically raised, it is sufficiently clear from the Applicant's papers that he had an issue with the outcome related to the procedural fairness. In light thereof, it will be allowed and also due to the principle that this Court is obliged to consider points of law that are apparent from the papers.[6]

[44] At the heart of this aspect is the Commissioner's discretion to award compensation for procedural unfairness. The discretion is evident from the use of the word "may" in section 193 of the LRA and the omission of the word "must". "Must" is, however, utilized further on in that section and it can be safely deduced that the legislator elected to provide a discretion to the Commissioner.

[6] Paragraph [68] of CUSA V Tao Ying Metal Industries and Others 2009 (2) SA 204 (CC)

[45] This specific discretion is a two stage enquiry. Firstly, one must consider whether compensation should be awarded, and only if the response be positive, the Commissioner has the discretion to decide the appropriate monetary amount of compensation limited, as per section 194, to twelve months remuneration.

[46] It is my opinion that despite the finding that dismissal was procedurally unfair, the Commissioner properly considered his discretion whether to grant compensation or not. I agree with the Commissioner's finding that "an employee party that was unfairly dismissed does not have an automatic right to relief". It is correctly argued by the Applicant that this Court must deal with the discretion, in a manner similar to an appeal and not in terms of the normal review test. In the case of *Kukard v GKD Delkor (Pty) Ltd*[7], the following is relevant:

> '[28] ….Concurring, Zondo JP (as he then was) held specifically in relation to the exercise of the discretion under s193(1)(c) of the LRA, that the "ultimate question" that the Labour Court or arbitrator has to answer in determining 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 the case? He said that when a court or arbitrator decides this issue, it does not exercise a true or narrow discretion but rather passes a moral or value judgment on the basis of the requirements of fairness and justice. It is important to recognise that the Sidumo (reasonableness) test does not apply to a review of a compensation award made by a commissioner in terms of s193(1)(c) of the LRA. This is a mistake commonly made by counsel and judges alike. What the reviewing court is required to do is to evaluate all the facts and circumstances that the arbitrator had before him or her, and then decide based on the underlying fairness to the both the employer and employee whether the decision was judicially a correct one'.

[47] Having evaluated all the facts and circumstances as set out in Kukard *supra*, I concur with the Commissioner's decision not to award compensation. I do, however recognize the danger of allowing an employer to escape the consequences of not following a fair process and don't come to my decision

[7] (JA52/2013) [2014] ZALAC 52; [2015] 1 BLLR 63 (LAC); (2015) 36 *ILJ* 640 (LAC) (7 October 2014)

lightly. The circumstances of this matter do, however, allow for such a drastic departure from the norm, as the alternative of awarding compensation would not pass the "moral and value judgment test" as also stated by Zondo JP. The Commissioner's decision to acknowledge the procedural unfairness of the dismissal does provide a balance in that the fundamental principle of procedural fairness remains intact and recognized.

[48] Furthermore, it was argued by the 1st Respondent that the Applicant raised a new argument in its Heads of Argument at paragraphs 4.4 – 4.19 and 4.26 – 4.27.

[49] After careful consideration of the aforementioned paragraphs, I concur that an additional argument was indeed raised.

[50] However, from the award it is my opinion that the Commissioner did not base his discretion on the grounds as alleged by the Applicant. Accordingly, the Commissioner correctly utilized the factors listed in the case of Kemp *supra,* as reflected in his award in paragraph 39.[8]

[51] The 1st Respondent's approach to the interpretation of section 193 and 194 of the LRA as set out in its Supplementary Heads of Argument is deemed by this court to be the correct approach. As stated *supra*, the use of the word "may", clearly reflect the intention to provide the commissioner with discretion and surely the exercise of that discretion *per se* can then not be faulted.

[52] From a reading of the award and in particular considering the structure of the Second Respondent's "deliberations" on this aspect, it is apparent that the referral to the Johnson matter is made in context of the first stage of the discretion enquiry (as explained *supra*). The Commissioner is clearly awake to the then current LAC position vis-a-vis section 193 (Dr D.C. Kemp t/a Centralmed v M.B. Rawlins) and then in particular with the principle that "an employee party who was unfairly dismissed does not have an automatic right to relief and that in

[8] Paragraph 39 of the Arbitration Award.

deciding whether or not to grant compensation in such circumstances the following factors needed to be considered."

[53] The First Respondent argued that the Applicant's gross negligence must be considered by the Commissioner in determining whether to grant compensation or not. I agree with this argument as gross negligence falls within the facts and circumstances before the Commissioner.

[54] I am not convinced by the Applicant's argument that the Commissioner erred in his approach to the legal issue at hand (flowing from the exercise of his discretion) As stated *supra,* I do not find reason to review the Commissioner's decision on this aspect.

SECOND ASPECT

[55] The Applicant contends that the Commissioner committed a gross irregularity by considering irrelevant evidence before him and the Commissioner reached an overall decision that a reasonable decision maker could not have reached.

[56] The Applicant states that the Commissioner considered previous incidents for which the Applicant was not disciplined and should therefore have ignored these previous incidents for purposes of this award.

[57] The 1st Respondent, in response, points out that the Commissioner correctly in the award identifies the issue in dispute as being "whether or not in the case of the patient Hlatshwayo the Applicant was aware of the prolapsed cord". [9]

[58] The Commissioner further qualified this by stating "when all of this is considered the only reference that can be made is that the Applicant's management of patient Hlatshwayo was extremely careless and reckless".[10]

[59] I am not convinced that the Commissioner erred in his finding by considering these mentioned previous incidents in evaluating the Applicant's general

[9] Paragraph 10 of the Arbitration Award.
[10] Paragraph 17 of the Arbitration Award.

conduct. From the award it is clear that the Commissioner had a clear understanding of what the main issues in dispute were.

[60] The Respondent convincingly argues that the only conclusion that may be drawn from the Commissioner's mention of "other incidents" is that he considered same in relation to the Applicant's conduct *vis-a-vis* the other staff and his attitude in general.

[61] In my opinion the Commissioner's primary focus was on the issue of the Hlatshwayo incident and that formed the basis of his decision.

[62] It must be noted that from the record it does not appear that the Applicant raised any objection to these incidents being dealt with during the arbitration.

[63] In light of the above, and in considering the above extracts in context of the award, I am firstly not convinced that an irregularity exists and secondly, to the extent that the consideration by the Commissioner of the other incidents might be considered to be to some degree irregular, I'm not of the opinion that it impacted on the reasonableness of the final decision.

THIRD ASPECT

[64] The Applicant contends that the Commissioner committed a gross irregularity by not properly considering the evidence before him, failed to consider causation and wrongly considered the expert evidence of Buchmann and as a result the Commissioner reached an overall decision that a reasonable decision maker could not have reached.

[65] Various elements were dealt with under this contention and I have no intention of repeating the arguments presented, but merely wish to point out a number of salient points on the various arguments raised. It is also with caution that the various topics under this aspect are dealt with as the proverbial individual pieces of the puzzle, for the test remains based on the complete puzzle as presented to the Second Respondent for adjudication.

Prolapsed cord:

[66] The Applicant raised a number of issues regarding the prolapsed cord. One such issue is that the Applicant was not negligent in his response to the pregnant mother as he was initially not aware of the urgency due to the prolapsed cord.

[67] The Applicant argued that the nurses were not fond of him and were looking for reasons to get rid of him and would even lie in order to do so. This is in reference to the Applicant's "conspiracy theory" mentioned in his defense. The Applicant failed to provide a coherent version on this defense and could not make up his mind what exactly constituted this alleged conspiracy.

[68] However, it is clear from the transcribed record that the Applicant unequivocally states that he had no reason to believe that Sister Nape would lie and not tell the truth and that she must therefore be exempt from being part of the conspiracy theory.

[69] In view of the fact that the Applicant had no reason to believe that 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.

[70] In reaching his decision, the Commissioner dealt with conflicting versions and in the end concluded that there were only two witnesses, namely Nape and the Applicant, who could shed light on what had actually been said during the telephone conversation (pertaining to the prolapsed cord).

[71] It is clear that the other witnesses could only provide some circumstantial evidence as they reflected back on the actions and discussions of these two individuals.

[72] The Applicant also alleged in argument, that Nape only stated in cross examination that she informed the Applicant of the breach / prolapsed cord and not during her testimony in chief. The Respondent, however, correctly pointed

out that Sister Nape did in fact state during her testimony in chief that she had informed the Applicant about the prolapsed cord.

[73] Various other aspects were also not addressed by the Applicant to any degree of satisfaction, amongst them the use of the term “presentation cord” (that even confused the expert), the aggressive behavior on entering the ward and his subsequent actions and attitude towards the staff, his conflicting evidence on the heart rate monitor and very importantly, his failure to properly examine the patient and to record his findings.

[74] The Commissioner summarized the evidence and clearly considered and weighed the evidence presented on this issue.

14 Minute delay:

[75] The Applicant attempted to argue the delay from a “distance”. The context of this is important as the Applicant himself had not been present - that being the delay at the centre of this matter.

[76] The urgency and what was required in preparation of the patient going into theatre was clearly indicated and explained by the 1st Respondent’s witnesses.

[77] The 14 minute delay was dealt with and explained in sufficient detail and the 1st Respondent’s challenge is that it was rather the Applicant’s failure to respond with the required urgency that essentially caused the delay.

[78] From a reading of the transcribed record, it is evident that throughout the Applicant’s testimony he never accepts blame for any negligence. There was also no reason provided by the Applicant as to why he did not respond to the prolapsed cord and the preterm patient immediately. Even the expert witness called by the Applicant conceded that the Applicant should have attended to the patient with more haste merely based on the medical situation at hand, irrespective whether he was told about the prolapsed cord or not. The

Applicant's silence on this point and stubborn refusal to accept any wrong doing is deafening.

[79] It is not the Review Court's place to second guess the witnesses and their motives and will not interfere with an arbitrator's finding in the absence of any clear irregularity. I am convinced that the Commissioner properly dealt with the evidence regarding the delay and I find no grounds to interfere with the Commissioner's position on this issue.

Cause and time of death:

[80] Buchmann is an expert in the medical field, but found it difficult to explain to the Commissioner a number of issues, amongst other the exact time and cause of the baby's death.

[81] The First Respondent argued that Buchmann's testimony is based on speculation and found flaws in his testimony, amongst others, regarding the determination of the fetal heart beat.

[82] Buchmann later conceded a number of important issues during cross examination, inclusive of the test needed to determine whether the child was alive.

[83] It is clear that Buchmann's theory is as best academic and neutral. Buchmann only gave evidence from an outside point of view and in hindsight. He could not corroborate the Applicant's version on any important aspect and in actual fact often criticized the Applicant's handling of the situation.

[84] I am of the opinion 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 render's the Applicant's version of events improbable. The Applicant struggled to justify his actions and omissions and could not provide a reason as to why he failed to inform his fellow team

members in theatre, including the anesthetist, that the child was dead prior to doing the cesarean.

[85] As for the Applicant's contention that the Applicant was dismissed for the death of the baby and consequently that the Second Respondent failed to consider the issue of "causation", I wish to point out that I do not find support for that contention in the record. On the contrary the Second Respondent more than once stated that the Applicant had been grossly negligent in his response to the situation and not for the death of the baby. This is not a criminal matter and although the death of the baby looms large over this case, it had not been the fundamental allegation against the Applicant. In my opinion, the Second Respondent had a clear understanding of the events of that night and had dealt with the evidence before him as it related to the allegation of gross negligence.

[86] What is, however, evident from the evidence, is that the Applicant had not acted with proper care and in accordance with normal protocol. This is apparent even from his own expert witness and the Applicant had very little explanation to offer in dealing with these important issues - as a whole they create a very disturbing picture. 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 now hide behind the "incomplete picture" which he is largely 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.

[87] I am convinced that the Commissioner reached the correct decision and should one consider the evidence as a whole, then the Commissioner's interpretation of the evidence on this aspect cannot be considered an irregularity. I cannot find reasons in the record to interfere with the 2nd Respondent's position.

Operation of the patient:

[88] Buchman explained that the operation may have taken more time as a result of the child's position in the womb, but was critical of the Applicant's decisions and actions.

[89] The First Respondent argued that said delays and the uncertainty of whether the child was still alive played a significant role in determining whether the Applicant was negligent.

[90] The Commissioner considered all the probabilities that were properly put before him, including the version and evidence of the Applicant. It is my opinion that the Commissioner reached the correct conclusion in his award pertaining to this aspect.

Conclusion

[91] I wish to mention that the award comprises of 30 pages and is well written and to the point. The merits are comprehensively set out and the Commissioner's reasoning is well supported by evidence and applicable case law.

[92] A Review Court has to apply caution in interfering with any credibility finding of a Commissioner. It is the duty of the Commissioner to balance the conflicting versions and to decide which version to accept. *Sasol Mining (Pty) Ltd v Ngqeleni NO and Others* state the following:

'One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him...'

[93] It is clear that the Second Respondent went about discharging this function by way of a determination of the probabilities, as well as the credibility and reliability of the witnesses that testified before him.

[94] I am not convinced by the Applicant's argument that the Commissioner had failed to properly evaluate the evidence before him and that his failure to assess the

probabilities of the conflicting versions before him led to an unreasonable outcome. I find no reason to interfere with his findings on credibility and probability.

[95] As to the Applicant's argument that the matter was "dismissed", I conclude that the matter had not been "dismissed", but had rather been "dismissed with no compensation awarded".

[96] The Applicant also raised the issue that "trust" had not been dealt with, but I found evidence in the record that Dr Kabale in fact testified to that issue and clearly stated that he does not trust the applicant and does not see his way open to work with the Applicant again. Even the Applicant's expert witness had doubts about whether he would have the Applicant working in his own hospital should the allegations be true.

[97] Although the Applicant's argument appears to be compelling, I found its arguments to be often based on "dissected" parts of the record, which parts were then presented to favour the Applicant's own version. A proper reading of the record, as pointed out by the Respondent, reflects a different story and seldom favoured the Applicant.

[98] It is of extreme importance to note that an arbitration award that does not live up to a Review Court's high standard will not automatically be subject to review. Commissioners are empowered to deal with the dispute with a minimum of legal formalities, their decisions are immune from appeal, and the legislature has deliberately set a high bar for reviewing arbitration awards.

[99] In reviewing the arbitration award, the grounds for review as raised by the Applicant must be assessed and test to be applied is a strict one.

[100] Having considered the evidence adduced at the arbitration proceedings, the findings made by the Commissioner and the grounds for review raised by the Applicant, I cannot find that an irregularity existed. The Commissioner's decision

fell within the band of decisions to which a reasonable decision maker could come to. I find no reason to interfere with the arbitration award.

[101] I see no reason why costs should not follow the results.

[102] In the premises I make the following order;

1. The Applicant's application to review and set aside the award is dismissed with costs.

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Rhoodie AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the Applicant:	Advocate, F A Boda
Instructed by:	Hogan Lovells Inc
For the Respondent:	Advocate S B Nhlapo
Instructed by:	State Attorneys