REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 28 / 2011

In the matter between:

BAUR RESEARCH CC **Applicant**

and

COMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **First Respondent**

COMMISSIONER JACOB DANIEL SELLO **Second Respondent**

SALOMONE SAMUEL MBIZA **Third Respondent**

Heard: **22 August 2013**

Delivered: **10 December 2013**

Summary: **CCMA arbitration proceedings – Review of proceedings, decisions and awards of arbitrators – Test for review – Section 145 of LRA 1995 – Includes misconduct by arbitrator depriving party of a fair hearing**

CCMA arbitration proceedings – Review of proceedings, decisions and awards of arbitrators – supervisory role of the Labour Court in exercising powers of review – misconduct by arbitrator in the conduct of the proceedings – award reviewed and set aside

CCMA arbitration proceedings – conduct by arbitrator regarding legal representation and calling of witnesses by applicant – conduct entirely unacceptable – vitiates entire arbitration without the need to consider the

merits of the matter – award reviewed and set aside

CCMA arbitration proceedings – duties of arbitrator where one party is legal represented and the other party is a lay person – principles stated

---

JUDGMENT

SNYMAN AJ:

Introduction

[1] The matter came before me on 22 August 2013 as an opposed review application. The applicant applied that the arbitration of the second respondent be reviewed and set aside, based on a number of reasons, but of importance to this judgment are those reasons relating to the conduct of the second respondent as arbitrator. This application has been brought in terms of Section 145 of the Labour Relations Act[1] ("the LRA").

[2] The principal issue before the second respondent as arbitrator was whether the third respondent had been dismissed by the applicant. The third respondent contended that he had been arbitrarily dismissed and pursued an unfair dismissal dispute to the CCMA. The matter came before the second respondent for arbitration on 12 November 2010. Pursuant to these arbitration proceedings, the second respondent then determined that the third respondent was indeed dismissed by the applicant and such dismissal was unfair. The second respondent finally determined that the third respondent be paid compensation by the applicant pursuant to such unfair dismissal. It is this determination by the second respondent that forms the subject matter of the review application brought by the applicant, which application was filed five days out of time.

[3] The applicant properly applied for condonation for the late filing of the review application. The delay of five days is a minimal delay which in itself justifies the granting of condonation in the absence of compelling reasons to the contrary. The explanation submitted by the applicant that its legal

[1] No 66 of 1995.

representative's offices being closed for the festive reason, and the applicant's proprietor being away during this time is reasonable. As the Court said in *Transport and General Workers Union and Others v Hiemstra NO and Another:*[2]

> 'In my view I would be unduly shortsighted to fail to acknowledge that it is a norm of South African society that during the period mid-December to early January the nation slouches to a near halt. This customary annual shutdown may not have excused the appropriate degree of expedition in a matter which was truly urgent but it can hardly be said that the nature of this matter was one in which it was inexcusable not to disturb our collective slumber.'

Once the offices of the applicant's legal representative opened on 2 January 2011, the application was prepared and then filed in 10 days which, in my view, is prompt conduct. In the circumstances, I am of the view that the determination as to whether condonation should be granted was entirely dependent on the issue of prospects of success which entails a full consideration of the merits of the applicant's review application.

[4] In presenting argument before me, the thrust of the case of Adv Nel, who represented the applicant, related to the contentions of misconduct by the second respondent as arbitrator in the conduct of the arbitration proceedings. Adv Nel contended that these issues were such so as to vitiate the entire arbitration proceedings without even having to consider the merits of the award of the second respondent. These complaints of the applicant will be specifically addressed hereunder.

Relevant background

[5] The third respondent was employed by the applicant in the position of a handyman.

[6] What was common cause is that the third respondent was instructed by the applicant's proprietor, John Mandlbaur ("Mandlbaur'), to go and cut the grass at the new home of Mandlbaur. This instruction was given on 8 April 2010.

[2] (1998) 19 ILJ 1598 (LC) at para 7; See also *Lentsane and Others v Human Sciences Research Council* (2002) 23 ILJ at para 24.

This instruction was also given to a fellow employee, one Aubrey, who would work with the third respondent in fulfilling this task. It was also common cause that two employees went to the house on 8 April 2010 to fulfil this task.

[7] According to the third respondent, the grass was very long and as he was using a manual lawnmower, the task was not completed on 8 April 2010. According to the third respondent, and on the following day, Mandlbaur was so aggrieved about him and Aubrey not having completed this task, that he summarily dismissed them on the spot. The third respondent contended that he thus had been dismissed on 9 April 2010.

[8] Mandlbaur had a different version of events. According to him, and when he inspected the house on 8 April 2010 at the end of the day, he noticed very little had been done. He then confronted the third respondent about this on 9 April 2010. According to Mandlbaur, the third respondent contended that the work could not be done without a petrol lawnmower, and a discourse arose between him and the third respondent. Mandlbaur stated that the third respondent became aggrieved, and simply left the work premises never to return and simply referred a dismissal dispute to the CCMA. Mandlbaur stated that he never dismissed the third respondent, but that the third respondent absconded of his own accord.

[9] What was common cause is that neither party tried to ever approach or contact one another after the events on 9 April 2010.

[10] The second respondent, in his arbitration award, accepted the version of the third respondent and concluded that he had been dismissed and such dismissal was unfair

[11] In considering this review application, I must first decide the issues pertaining to the alleged misconduct of the second respondent as arbitrator in the conduct of the arbitration proceedings. The reason for this is that if there is merit in these contentions, then it is simply would not be necessary to decide on the merits of the applicant's review application, so to speak. The fact is that misconduct by an arbitrator that deprives one of the parties of a fair hearing would vitiate the entire arbitration proceedings.

The relevant test for review

[12] The test for review, in general terms, is enunciated in the judgment of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[3] where Navsa, AJ held that in light of the constitutional requirement (in s 33 (1) of the Constitution) that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, and that 'the reasonableness standard should now suffuse s 145 of the LRA'. The majority of the Constitutional Court set the threshold test for the reasonableness of an award or ruling as the following: 'Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?'[4] This review test is known as 'the *Sidumo* test'. The relevant question in the current matter is to what extent the *Sidumo* test may limit other tests that may be applied in deciding review applications. Differently put, can arbitration awards only be reviewed based on the application of the *Sidumo* test?

[13] A point of departure in deciding this question can be found in *CUSA v Tao Ying Metal Industries and Others,*[5] where the Court said in specifically referring to functions of commissioners, that '…in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do.'

[14] The Labour Appeal Court in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others,*[6] also considered the *Sidumo* test and said the following:

> 'The Constitutional Court has decided in *Sidumo* that the grounds of review set out in s 145 of the Act are suffused by reasonableness because a CCMA arbitration award, as an administrative action, is required by the Constitution to be lawful, reasonable and procedurally fair. The court further held that such an award must be reasonable and if it is not reasonable, it can be reviewed and set aside.'

[3] (2007) 28 ILJ 2405 (CC).
[4] Ibid at para 110.
[5] (2008) 29 *ILJ* 2461 (CC) at para.65.
[6] (2008) 29 ILJ 964 (LAC) at para 96.

[15] The SCA in the judgment of *Herholdt v Nedbank Ltd and Another*[7] then said:[8] 'In summary the position regarding the review of CCMA award is this: A review of a CCMA award is permissible if the defect in the proceedings fall within one of the grounds in s 145(2)(a) of the LRA…'.

[16] What the above authorities in my view clearly show is that it must always be remembered that the *Sidumo* review test does not replace the statutory review grounds in Section 145.[9] It 'suffuses' the same, and in particular, this 'suffusing' is applicable to the 'gross irregularity' review ground in Section 145(2)(a)(ii). As the Court said in *Fidelity Cash Management:*[10]

> 'Nothing said in *Sidumo* means that the grounds of review in s 145 of the Act are obliterated. The Constitutional Court said that they are suffused by reasonableness. Nothing said in *Sidumo* means that the CCMA's arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in s 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise. Also if the CCMA made a decision that exceeds its powers in the sense that it is ultra vires its powers, the reasonableness or otherwise of its decision cannot arise.'

[17] In this respect specifically, the LAC in *National Commissioner of the SA Police Service v Myers and Others*[11] said the following:

> 'It should be noted, however, that the standard of review as formulated by the Constitutional Court in *Sidumo* does not replace the grounds of review contained in s 145(2) of the LRA. The grounds of review referred to in s 145(2) still remain relevant.'

[18] What this means is that where it comes to an arbitrator acting *ultra vires* his or her powers or committing misconduct that would deprive a party of a fair hearing, the issue of a reasonable outcome is simply not relevant. In such

---

[7] [2013] 11 BLLR 1074 (SCA) at para 25
[8] Id at para 25.
[9] Section 145(2) reads: 'A defect referred to in subsection (1), means-(a) that the commissioner- (i) committed misconduct in relation to the duties of the commissioner as an arbitrator; (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or (iii) exceeded the commissioner's powers.'
[10] *Fidelity Cash Management* (supra) at para 101.
[11] (2012) 33 ILJ 1417 (LAC) at para 41.

instances, the reviewable defect is found in the actual existence of the statutory prescribed review ground itself and if it exists, the award cannot be sustained, no matter what the outcome may or may not have been. Examples of this are where the arbitrator should have afforded legal representation but did not[12] or where the arbitrator conducted himself or herself during the course of the arbitration in such a manner so as to constitute bias or prevent a party from properly stating its case or depriving a party of a fair hearing.[13] The reason for reasonable outcome not being an issue is that these kinds of defects deprive a party of procedural fairness, which is something different from the concept of process related irregularity. Guidance in this respect can also be found from the judgment of *Sidumo*[14] itself, where Sachs J held[15] that '[t]he commissioner must be impartial and basically fair and reasonable in the conduct of his work'. Navsa AJ in turn held as follows, referring to Section 145 of the LRA:[16]

> 'Of course, section 145 has to meet the requirements of section 33(1) of the Constitution, ie it has to provide for administrative action that is lawful, reasonable and procedurally fair.'

O'Regan J said:[17]

> 'The content of section 33 is straightforward. It requires administrative action to be 'lawful, reasonable and procedurally fair…. The question of purposive constitutional interpretation that thus arises is whether it is constitutionally appropriate to hold the CCMA to these standards. In my view, it is. The

[12] See *Colyer v Essack NO and Others* (1997) 18 ILJ 1381 (LC) at 1384; *Commuter Handling Services (Pty) Ltd v Mokoena and Others* (2002) 23 ILJ 1400 (LC) at paras 19 – 20; *Northern Province Development Corporation v Commission for Conciliation, Mediation and Arbitration and Others* (2001) 22 ILJ 2697 (LC) at paras 20 – 21; *Western Cape Southern Suburbs Real Estate (Pty) Ltd t/a Seeff Properties v Commission for Conciliation, Mediation and Arbitration and Others* (2009) 30 ILJ 2158 (LC) at paras 23 – 24.

[13] See *Naraindath v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 ILJ 1151 (LC) at para 27; *County Fair Foods (Pty) Ltd v Theron NO and Others* (2000) 21 ILJ 2649 (LC) at para 7; *Mollo v Metal and Engineering Industries Bargaining Council and Others* (2010) 31 ILJ 971 (LC) at para 32; *National Union of Security Officers and Guards and Another v Minister of Health and Social Services (Western Cape) and Others* (2005) 26 ILJ 519 (LC) at paras 16 – 17; *Raswiswi v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 2186 (LC) at para 20; *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman No and Others* (2013) 34 ILJ 2347 (LC) at paras 38 – 39.

[14] *Sidumo (supra)* footnote 3.

[15] Id at para 147.

[16] Id at para 89.

[17] Id at para 138 and 139.

> CCMA is an organ of state exercising public power. Its statutory task is to resolve disputes that arise in the workplace by implementing the provisions of the Labour Relations Act read in the light of the provisions, in particular, of section 23 of the Constitution.'

[19] In this case, the specific ground of review in Section 145(2)(a)(i) is indeed of direct relevance in the current matter, as the case of the applicant principally is that of misconduct by the second respondent. As I have set out above, the issue of a reasonable outcome is not relevant in this regard, and the best manner in which to determine this ground of review was set out in *Naraindath v Commission for Conciliation, Mediation and Arbitration and Others,*[18] where the Court said:

> ''In my view it is perfectly clear in these circumstances that a complaint that a commissioner has conducted proceedings in a way which differs from the way in which the same dispute would be dealt with before a court of law cannot as such succeed. It is only where the person seeking to challenge the commissioner's award can point to specific unfairness arising from that action by the commissioner that a proper ground for review is established. A failure to conduct arbitration proceedings in a fair manner, where that has the effect that one of the parties does not receive a fair hearing of their case, will almost inevitably mean either that the commissioner has committed misconduct in relation to his or her duties as an arbitrator or that the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.'

{20] Therefore, and in determining the principal review case raised by the applicant on the ground of misconduct by the second respondent, it must first be determined if the second respondent indeed conducted himself in a manner that could be considered to be unfair. If it is then determined that the conduct is indeed unfair, the second part of the enquiry is whether such unfair conduct in actual fact had the effect of depriving the applicant of a fair hearing. If both these questions are answered in the positive, then the second respondent would have committed misconduct in the conduct of the arbitration proceedings which in turn vitiates the entire arbitration proceedings. This in turn must have the consequence that the arbitration award is reviewed and

[18] (2000) 21 ILJ 1151 (LC) at para 27.

set aside. I will now proceed to determine the applicant's principal review case on this basis.

The issue of the misconduct of the second respondent

[21] The issue of the alleged misconduct of the second respondent was specifically raised by the applicant in his review application. In the founding affidavit, the applicant recorded the following grounds of review in this regard:

21.1 The second respondent erred in allowing legal representation;

21.2 The second respondent, having allowed legal representation, and in proceeding with the arbitration in the manner that he did with the applicant not being represented and being a lay person, and being opposed by the legal representative of the third respondent, was irregular and unfair;

21.3 The applicant was at a loss of what to do in the arbitration and should have been assisted by the second respondent especially considering the third respondent was legally represented;

21.4 The applicant asked the second respondent for the opportunity to bring two witnesses who would confirm that the third respondent had indeed absconded on 9 April 2010, but this was refused by the second respondent;

21.5 The second respondent prejudged the matter and was biased in that he recorded in his award that Mandlbaur was "still upset' in the arbitration.

Only some of these grounds of review will now be specifically addressed hereunder, as I do not consider it necessary to determine all of these grounds having regard to the conclusions I have come to.

[22] I will start the determination with some general observations. In deciding whether the conduct of an arbitrator in the course of arbitration proceedings as being part of the functions fulfilled by the CCMA in terms of the LRA falls within the realms of what is acceptable, the Labour Court exercises an overall

supervisory duty. In the judgment of *Pep Stores (Pty) Ltd v Laka NO and Others,*[19] Mlambo J (as he then was) held as follows:[20]

> 'As found in a number of decisions of this court, this court has a supervisory function over the commission. As part of this function, this court should point out flaws in the commission for rectification. A part of this supervisory function is to protect the commission from abuse and practices that could earn it disrespect and ridicule.
>
> It is in the interest of this court to see the role played by the commission in dispute resolution achieves the legislative objectives. It is only if the dispute resolution system provided within the Act succeeds that it will engender respect and confidence. An important policy consideration therefore is the maintenance of an effective dispute resolution system underpinned by speed and finality.
>
> As a matter of policy this court, as supervisor of the commission, must have some discretion to ensure that commissioners apply consistent and reasonable standards of justice. As a matter of policy this court should be mindful not to over-supervise the commission to such an extent that it no longer has any discretion of its own. Commissioners should be allowed latitude and flexibility to apply the provisions of the Act.'

[23] In *Deutsch v Pinto and Another,*[21] the Court said that:

> 'The CCMA is not established as a court of law. When arbitrating it follows the rules of natural justice as embodied in the LRA. It arrives at its decisions and makes its awards in a judicial manner…. The Labour Court is however empowered to supervise the arbitration process and outcomes as will be presently explained',

The Court then concluded that:

> '…. the general rule is clear - a court of review will be inclined to exercise a supervisory function unless it is by law excluded from doing so.'

[19] (1998) 19 ILJ 1534 (LC).
[20] Id at paras 23 – 25.
[21] (1997) 18 ILJ 1008 (LC) at 1011 and 1018.

With specific reference to the *Deutsch v Pinto* judgment, the Court in *Van Rooy v Nedcor Bank Ltd,*[22] said that:

> '…. This court has a supervisory role to the activities of the commission. In a sense this court polices conduct by the commission and its commissioners…. this court acts in a supervisory role to the commission and it should make sure that what the commission does complies with the Act.'

[24] I have had the opportunity to deal with similar issues as those forming the subject matter of these proceedings in the judgment of *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman No and Others*[23], where I said the following:[24] '…. The exercise of the review jurisdiction and functions by the Labour Court in respect of arbitration awards of the CCMA entails the exercise of an overall supervisory duty over such functions of the CCMA'. Having said this, I concluded as follows:[25]

> '…. However, and to ensure that the policy consideration that the Labour Court should be mindful not to over-supervise the CCMA, as said in the judgment in *Pep Stores*, is not negated, the Labour Court should only intervene in terms of its general supervisory functions if it is apparent from the record before the court that one of the specific grounds as listed in s 145(2)*(a)* of the LRA actually exists, as the existence of any one of these three specific considerations must surely be entirely incompatible with any arbitration proceedings that would be considered to be lawful ….'

[25] Having made these general observations as to the nature of the duty of the Labour Court, I will first deal with the ground of review that the second respondent erred in allowing legal representation. I can immediately dispose of this ground of review with a conclusion that it has no substance at all. The fact is that the second respondent has a discretion when deciding whether to allow legal representation. Having exercised such a discretion, and with the second respondent then concluding that legal representation is permitted, the only basis on which such discretion would be open to legitimate challenge is if

[22] (1998) 19 ILJ 1258 (LC) at para 17.
[23] (2013) 34 ILJ 2347 (LC).
[24] Id at para 34.
[25] Id at para 38.

the discretion was exercised in a *mala fide* or capricious or unlawful manner, or in a manner that can be considered not to be judicious.[26] The Court has dealt with the issue of the decision by a commissioner allowing legal representation in terms of Rule 25 of the CCMA Rules, in the judgment of *Samson v Commission for Conciliation, Mediation and Arbitration and Others*[27], and said: '… The commissioner was required to exercise a discretion as to whether the company should be afforded the right to legal representation, and to exercise that discretion judicially …'. I point out that no case has been made out by the applicant that the second respondent did not exercise his discretion in a proper, lawful and judicious manner. The high water mark of its review case in this regard being that the second respondent 'erred'. I may also point out that since the very issue of the existence of a dismissal was in dispute in the arbitration, legal representation was in any event a right and allowed.[28] This ground of review of the applicant therefore falls to be rejected.

[26] The next ground of review relates to the issue as the further conduct of the arbitration proceedings once legal representation had been granted to the applicant. This is an entirely different issue. The simple point is this – the second respondent, because he did decide the issue of legal representation by exercising the prescribed discretion, could only have allowed legal representation if he was satisfied that it was justified based on all the requirements as set out in Rule 25[29] of the CCMA Rules, being: (1) the nature of the questions of law raised by the dispute; (2) the complexity of the dispute; (3) the public interest; and (4) the comparative ability of the opposing parties or their representatives to deal with the dispute. This means that the second

---

[26] See *Coates Brothers Ltd v Shanker and Others* (2003) 24 ILJ 2284 (LAC) at para 5 where the Court held as follows with specific reference to a refusal by the Court a quo to grant condonation*:* 'An appellant must show, in an appeal from a decision in a lower court, that the court a quo 'acted capriciously, or acted upon a wrong principle, or in a biased manner, or for insubstantial reasons, or committed a misdirection or an irregularity, or exercised its discretion improperly or unfairly.' The same consideration in my view apply to the discretion to allow legal representation. See also *Sukazi v Commission for Conciliation, Mediation and Arbitration and Others* (2012) 33 ILJ 2188 (LC) at para 14.

[27] (2010) 31 ILJ 170 (LC) at para 8

[28] Rule 25 of the CCMA Rules only apply to instances where there actually exists a dismissal for misconduct or incapacity.

[29] Rule 25(2) of the CCMA Rules published under GN R1448 in *GG* 25515 of 10 October 2003

respondent must have considered, at the very least, that the matter before him to be sufficiently complex and involving such questions of law so as to justify legal representation, and these considerations would apply to both parties. Once the second respondent had so determined, it was an essential requirement of procedural fairness to both parties that the applicant also be allowed to legal representation, if it wanted it, as it equally had the right to legal representation. In *Colyer v Essack NO and Others,*[30] the Court said that: 'Further, it is clear that, once the commissioner thus allows legal representation, such party obtains a right to legal representation (the section is clear that the party 'is entitled to be represented by a legal practitioner').'

[27] With Mandlbaur being a lay person, and being unrepresented, it was in my view an imperative to ensuring procedural fairness that the second respondent had to inform Mandlbaur that he also had the right to procure legal representation and should have advised Mandlbaur that if he wanted legal representation, the arbitration would be postponed to afford him an opportunity to procure a legal representative.[31] This is even more of an imperative considering that one of the requirements to be considered when allowing legal representation is the comparative abilities of the parties, which now, with the introduction of a legal representative for the third respondent, became entirely skewed. What was thus needed in the circumstances to ensure procedural fairness is that the applicant needed to be informed if the existence of its newly accrued right in this regard, what this right entailed and that the applicant could be afforded the opportunity to exercise such right if it wanted. If the applicant, having been so informed still decides to proceed with the arbitration, then so be it and the applicant can have no cause of complaint for not having a legal representative or subsequently raise any issue of procedural unfairness in this regard.

[30] (1997) 18 ILJ 1381 (LC) at 1384

[31] As comparison see *C/K Alliance (Pty) Ltd t/a Greenland v Mosala NO and Others* (2009) 30 ILJ 571 (LC) which concerned the failure by the commissioner to warn a party of the consequences of a witness sitting in the arbitration during the testimony of other witnesses and the Court said at para 12: 'In my view the commissioner failed in her duty by firstly not warning the applicant of the consequences of Vance sitting in the hearing during the testimony of the first witness. The consequence which the commissioner should have warned both Robinson and Vance of is not that Vance would be disqualified from testifying but that the applicant ran the risk that her evidence may carry little or no weight for the simple reason that she was present during the testimony of the first witness'.

[28] Unfortunately, the record in this matter is clear to the effect that the second respondent did not inform the applicant nor adopted the course of action I have referred to above. The second respondent simply decided to allow legal representation and proceeded with the arbitration forthwith. It is also clear from a consideration of the record that Mandlbaur simply did not have the acumen or knowledge to have appreciated for himself that the applicant had the right to legal representation, what it meant and what he needed to do to exercise it. This inference is apparent from the fact that it appeared clearly from the record that Mandlbaur did not have an idea what cross-examination was, and he even tried to submit evidence in cross-examining the third respondent. Mandlbaur on several occasions during the arbitration indicated he did not know what to say or do.[32] It is clear that Mandlbaur did not know what an arbitration was and what was required of him. All of this strongly supports the inference that Mandlbaur would never have known or appreciated what he could do about the right to legal representation which had accrued to the applicant.

[29] I am therefore of the view that the second respondent's failure, once he decided to permit legal representation to inform the applicant that it also had the right to legal representation, and that it would be given the opportunity to procure it if it wanted, renders the arbitration proceedings procedurally unfair. The next question is – does this unfairness actually deprive the applicant of a fair hearing? In *Commuter Handling Services (Pty) Ltd v Mokoena and Others*[33] the Court said the following, in concluding that the applicant party indeed did not receive a fair hearing:

> 'In casu, the commissioner herself, even in the formulation of her award, conceded that the issues in the dispute were complex. She had, in fact, consented to legal representation to the employee on that basis. At the beginning of the enquiry she clearly formulated the impression that the employer was 'bemused'. There is no evidence that she ever enquired into the employer's education or if he had any legal qualifications. The employer had clearly stated that he would be prejudiced pitted against an experienced

[32] See for example record page 43 ; 44 ;
[33] (2002) 23 ILJ 1400 (LC) at para 19.

> labour law attorney. There does not seem to have been any yardstick by which she sought to compare the ability of the employer as against the employee's to deal with a dispute that she characterized as 'complex'. Had she applied her mind, it seems to me - and I so hold - she would have come to the conclusion that it was unreasonable to expect the employer to deal with the dispute without legal representation. ….'

In *casu,* the current matter has many similarities. The second respondent made none of these kind of enquiries. The second respondent, having decided to allow legal representation, made no comparison of the abilities of Mandlbaur as against the third respondent's legal representative in circumstances where the second respondent must have accepted the dispute is complex. It must have been clear to the second respondent that it was unreasonable to pit Mandlbaur against the legal representative for the third respondent. These failures would, as a matter of necessary consequence, deprive the applicant of a fair hearing.

[30] The next consideration is that of advising the applicant that it would be entitled to seek a postponement to procure its own legal representative if it wanted. The following extract from the judgment in *Northern Province Development Corporation v Commission for Conciliation, Mediation and Arbitration and Others*[34] is apposite, where the Court held as follows:

> 'In the result, it is my conclusion that the second respondent erred in an unjustifiable manner in refusing a postponement on 7 February 2001, for the purpose of arranging properly prepared legal representation. In coming to that conclusion, I do not lose sight of the fact that the granting or withholding of a postponement involves a considerable degree of discretion and that this court should interfere with the exercise of such discretion only in very limited circumstances.
>
> It is therefore my conclusion that the award made by the second respondent in the absence of the applicant should be set aside also on the ground of his refusal of the application for postponement, to the extent that this was for the obtaining of properly prepared legal representation.'

[34] (2001) 22 ILJ 2697 (LC) para 20 – 21.

[31] Added to the above, the applicant was not even forewarned that the third respondent would seek legal representation so that it could make contingency plans and possibly come armed to the arbitration with its own legal representative. In respect, reference is made to *Western Cape Southern Suburbs Real Estate (Pty) Ltd t/a Seeff Properties v Commission for Conciliation, Mediation and Arbitration and Others*[35] where the Court said the following:

> 'On the facts placed before the commissioner, it is in my view reasonable to conclude that the employer approached his legal representative who indicated that he was not available on the date of the arbitration. Thereafter he was, however, advised by the employee that he was not going to be legally represented and, as Todd stated, he was quite content to proceed to the arbitration on the basis that the parties, both not being legally represented, would try to resolve all the outstanding issues. Had the employee advised him that he was going to be legally represented at the arbitration, the employer would have likewise obtained legal representation, so it said. On these facts presented to the commissioner, I am of the view there was no reasonable basis whatsoever for him to conclude that the application for postponement was not made bona fide.'

The Court concluded:[36]

> 'Under all the circumstances I am satisfied that the award should be set aside by reason of the fact that I am of the view the commissioner ought to have granted Seeff the requested postponement to enable it to obtain legal representation as this was the only reasonable decision the decision maker herein could arrive at. ….'

Again, and in *casu*, the second respondent's failure to have actually proposed to the applicant that the arbitration could be postponed if it wanted legal representation is also procedurally unfair and this failure deprived the applicant of a fair hearing.

[35] (2009) 30 ILJ 2158 (LC) para 24.
[36] Id at para 32 ; See also *Colyer* (*supra*) at 1385.

[32] The above situation vitiates the entire arbitration process, irrespective of the merits of the arbitration award. This is cause in itself for the applicant's review application to be granted.[37] In *SA Post Office v Govender and Others,*[38] the Court specifically dealt with irregularities in the context of legal representation in an arbitration, and then said the following:

> '…. This irregularity, which pervaded the entire process, was compounded by the commissioner calling on the first respondent to submit closing arguments which were to be prepared by his attorney. At the very least, this disturbed the balance between the comparative abilities of the parties. It would have affected the quality and content of the evidence that was advanced. It also caused confusion. Mr Mnyandu informed the commissioner as much.
>
> Finding, as I do, that the entire process was vitiated, it is not necessary for me to consider the further grounds of review.'

[33] Therefore, and on the issue of the applicant's review ground with regard to the issue of conduct of the arbitration proceedings after the second respondent having decided to grant the third respondent legal representation, I conclude that this review ground has substance. This issue clearly rendered the arbitration proceedings procedurally unfair and the existence of this unfairness deprived the applicant of a fair hearing. The arbitration award of the second respondent accordingly falls to be reviewed and set aside on this basis alone.

[34] I however also intend to deal with the review ground of the second respondent having refused to allow the applicant the opportunity to call witnesses, as it was Adv Nel's main argument. From the record, the following events are apparent: (1) the question of witnesses first came up when Mandlbaur was cross-examining the third respondent and the second respondent asked if Mandlbaur was referring to witnesses he wanted to call and Mandlbaur answered that he was not aware that he would need to call these witnesses;

---

[37] See *Sukazi v Commission for Conciliation, Mediation and Arbitration and Others* (2012) 33 ILJ 2188 (LC); *Fundi Projects and Distributors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2006) 27 ILJ 1136 (LC); *Ndlovu v Mullins NO and Another* (1999) 20 ILJ 177 (LC).

[38] (2003) 24 ILJ 1733 (LC) para 13 – 14.

(2) when Mandlbaur finished cross-examination, he stated that there were "people" in his office and right outside his office who will be able to dispute what the third respondent was saying, and the second respondent answered 'Okay, we'll deal with that later, let's just put that aside'; (3) The second respondent concluded the arbitration after Mandlbaur testified and said that he would give an award in 14 days and the proceedings adjourned, without the issue of these witnesses having been dealt with; (4) immediately after the proceedings adjourned, they were reconvened, for the reason that Mandlbaur had said he wanted to call witnesses. By this time, it is clear that the second respondent's mind was closed to any notion of further witnesses being called, as he simply confronted Mandlbaur with the arbitration set down notice, and informed Mandlbaur that in that notice he was warned to bring his witnesses. Mandlbaur answered that he did not know that he needed a witness to dispute events, and the second respondent answered that 'but anyway' the request to call further witnesses was refused.

[35] I am fully aware that in terms of Section 138(1) of the LRA, a commissioner may conduct arbitration proceedings in any manner that a commissioner deems fit.[39] However, Section 138 cannot serve to shield the commissioner against misconduct. In *County Fair Foods (Pty) Ltd v Theron NO and Others,*[40] the Court said:

> 'For there to be misconduct, it has been held that there must be some 'wrongful or improper conduct' on the part of the decision maker, in this instance the commissioner. (See *Dickinson and Brown v Fisher's Executors* 1915 AD 166 at 176.) Misconduct has also been described as requiring some 'personal turpitude' on the part of the decision maker. (See *Reunert Industries (Pty) Ltd t/a Reutech Defence Industries v Naicker and Others* (1997) 18 ILJ 1393 (LC) at 1395H-I.) The basic standards of proper conduct for an arbitrator are to be found in the principles of natural justice, and in particular the obligation to afford the parties a fair and unbiased hearing. (See Baxter *Administrative Law* at 536.) These principles have been reinforced by the constitutional imperatives regarding fair administrative action. (See

[39] Section 138(1) reads 'The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.'
[40] (2000) 21 ILJ 2649 (LC) at para 7.

Carephone (Pty) Ltd v Marcus NO (1998) 19 ILJ 1425 (LAC) at 1431I-1432A.) The core requirements of natural justice are the need to hear both sides (*audi alteram partem*) and the impartiality of the decision maker (*nemo iudex in sua causa*). (See Baxter at 536.)'

[36] The Court in *Sondolo IT (Pty) Ltd v Howes and Others,*[41] also specifically dealt with the very issue of Section 138, and it was held as follows:

> 'Section 138 (1) of the LRA thus places two distinct but related obligations on the commissioner. The first is to determine the manner in which the arbitration will be conducted. This discretion will be exercised bearing in mind the legislative instruction to determine the dispute fairly and quickly. Secondly, the commissioner must deal with the substantial merits of the dispute. In dealing with the matter the commissioner may rule on the evidence which may be presented to the arbitration and may also make rulings which may restrict the range of issues on which the parties are required to give evidence. The commissioner may therefore narrow down the issues and in doing so the commissioner may decide what evidence it wants to hear. In exercising this discretion, the commissioner will consider the facts and circumstances of the particular case and also the nature of the dispute that was referred to arbitration.'

In light of this *ratio*, it is clear that the very idea behind a commissioner exercising his or her powers in terms of Section 138 would be to achieve the objectives of expedition and elimination of unnecessary legal formalities and to get to the substance of this matter. I would agree with such an approach and such an objective. The point however remains that if the pursuit of these objectives means that the conduct of the commissioner falls in the realms of misconduct, the fact that all a commissioner wanted to do was to achieve what Section 138 required him or her to achieve cannot save the day.

[37] In the current matter, and as set out above, it is clear that the applicant asked that it be given the opportunity to call witnesses. It is equally clear that this request was refused out of hand by the second respondent. The consequence of this decision is that simply that the second respondent did not allow the applicant the opportunity to call the witnesses it wanted. Such a determination

[41] (2009) 30 ILJ 1954 (LC) at paras 10–11.

by the second respondent would resort under the spectrum of the exercise of his powers in terms of Section 138. The question now is whether this was a legitimate exercise of such powers or whether it was misconduct.

[38] In *Pick 'n Pay Supermarkets, Northern Transvaal (A Division of Pick 'n Pay Retailers (Pty) Ltd) v Commission for Conciliation, Mediation and Arbitration and Others,*[42] the Court dealt with the very issue of a commissioner refusing to allow witnesses to be called and said:

> 'Mr *Bruinders*, for third and fourth respondents, submitted that if second respondent did indeed refuse applicant's request to call a further witness, then applicant has a case on this score. I agree. The right to call a witness is firmly entrenched in our jurisprudence. Vide *Mahlangu v CIM Deltak; Gallant v CIM Deltak* (1986) 7 ILJ 346 (IC) and *Korsten v Macsteel (Pty) Ltd & another* [1996] 8 BLLR 1015 (IC) at 1027E-F. ….'

{39] There is in fact a specific example in the case law where the Court dealt with a contention of misconduct by an arbitrator in the context of refusing to allow witnesses to be called, with due consideration of the provisions of Section 138. This is the judgment of *Mollo v Metal and Engineering Industries Bargaining Council and Others*[43]. The Court said that such a determination by the arbitrator was a determination as contemplated by Section 138(1) of the LRA but concluded that:

> 'I am satisfied that second respondent has committed a gross irregularity by making a decision on the objection raised without first affording the applicant an opportunity to show the relevance of the evidence he intended leading.'[44]

The point that needs to be made is that this judgment confirmed that where an arbitrator acts in terms of Section 138(1) but this leads to unfairness in the conduct of the arbitration proceedings, and in this judgment specifically in the context of a refusal to allow witnesses to be called, this would either be misconduct or constitute a gross irregularity, and the award would be susceptible to be reviewed and set aside on this basis alone.

[42] (2000) 21 ILJ 234 (LC) at para 27.
[43] (2010) 31 ILJ 971 (LC).
[44] Id at para 32.

[40] The refusal to allow a witness to be called is equally a gross irregularity as contemplated by Section 145. In *Director-General, Department of Public Works and Another v Public Service Sectoral Bargaining Council and Others*[45] the Court said:

> 'The applicant challenges the arbitrator's award on the basis of gross irregularity as envisaged in s 145(2) of the LRA. Gross irregularity as a ground for review may, as was indicated in Goldfields Investment Ltd & another v City Council of Johannesburg & another, take place in two ways. It may manifest itself in the form of a latent or patent defect. Patent irregularities can be identified from the manner in which the arbitration proceedings were conducted, for instance where the arbitrator refuses to allow the right to call witnesses or to cross-examine witnesses. And patent irregularity can be determined from analysing the reasoning of the commissioner. This is a defect that occurs in the mind of the arbitrator and can be observed from an analysis of his or her reasoning.'' (emphasis added)

[41] I therefore conclude, based on the principles as set out above, that the second respondent's decision not to allow the applicant to call witnesses it wanted was procedurally unfair and actually deprived the applicant of a fair hearing. The fact that this decision was made in the context of Section 138 simply does not matter. The moment the applicant was deprived of a fair hearing, as was the case in *casu*, this would be the end of the matter and the arbitration award must be reviewed and set aside. The situation is certainly exacerbated by the fact that the second respondent actually refused this request out of hand with no proper reasoning for this determination, which fact appears clearly from the record.

[42] In conclusion, therefore, and for the above reasons alone, the arbitration award of the second respondent falls to be reviewed and set aside, irrespective of the merits normally dealt with in review applications. Justice must be seen to be done and if this matter is left as is, this would not be the case in this instance. The end result of all of the above is that the arbitration proceedings in this matter are unfair to the extent of actually depriving the

[45] (2012) 33 ILJ 1649 (LC) at para 22.

applicant of a fair hearing.

Conclusion

[43] I conclude that the award of the second respondent cannot be sustained. The second respondent committed misconduct with regard to the conduct of the arbitration proceedings. The conduct of the second respondent was also a gross irregularity as contemplated by law. The consequence of these failures is that the applicant was deprived of a fair hearing. I, accordingly, review and set aside the arbitration award of the second respondent in its entirety.

[44] With the award of the second respondent having been reviewed and set aside, the fact is that the basis for this decision is that the arbitration proceedings were unfair *per se*. The conduct of the second respondent deprived the applicant of the opportunity to properly ventilate and state its case and deprived it of a fair hearing. Because of this, I am of the view that it would be inappropriate and unwarranted to substitute the award of the second respondent with an award that I would consider to be appropriate, as there is really no proper and sustainable factual basis for me to do so. This is a matter that needs to be conducted again in the CCMA, *de novo*, and before another commissioner.

[45] Finally, in dealing with the issue of costs and in terms of the provisions of Section 162(1) and (2) of the LRA, I have a wide discretion. The applicant succeeded because of the misconduct of the second respondent as arbitrator and not because of what the third respondent did. I also consider that proper arbitration proceedings between the same parties are still to come. I am of the view that no order as to costs would be fair and appropriate in this instance.

[46] I accordingly make the following order:

1. The late filing of the applicant's review application is condoned.

2. The arbitration award of the second respondent, commissioner Jacob Daniel Sello, under case number GAJB 12933 – 10, is reviewed and set aside.

3. The matter is remitted back to the first respondent, CCMA, for arbitration *de novo* before a commissioner other than the second respondent.

4. There is no order as to costs.

_____

Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant: Adv A J Nel

Instructed by: Lee & McAdam Attorneys person

For the Third Respondent: In person