REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 2963 / 2011

In the matter between:

MAFEMANI THOMAS CHABALALA **Applicant**

and

METAL AND ENGINEERING INDUSTRIES

BARGAINING COUNCIL **First Respondent**

BRAAM VAN WYK N.O. **Second Respondent**

REPUBLIC TRANSMISSIONS (PTY) LTD **Third Respondent**

Heard: 22 August 2013

Delivered: 20 September 2013

Summary: Bargaining Council 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

Bargaining Council 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

Bargaining Council arbitration proceedings – conduct by arbitrator – conduct entirely unacceptable – vitiates entire arbitration without the need to consider the merits of the matter – award reviewed and set aside

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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. After hearing the submissions by both parties on 22 August 2013 and, especially, considering the conduct of the second respondent as arbitrator as appearing on the record, I issued the following order:

> '1. The arbitration award of the second respondent, Arbitrator Braam Van Wyk, dated 24 October 2011 under case number MEGA 32905, is reviewed and set aside.
>
> 2. The matter is remitted back to the first respondent, MEIBC, for arbitration de novo before an arbitrator other than the second respondent.
>
> 3. Written reasons for this order will be handed down on 16 September 2013.
>
> 4. There is no order as to costs.'

[2] This judgment now constitutes the written reasons in terms of my order as set out above.

Relevant background

[3] The applicant was employed by the third respondent as a fitter. The applicant had some 24 years of service at the time of his dismissal by the third

respondent.

[4] The applicant was charged on 3 March 2011 with misconduct. This charge was in essence based on alleged gross insolence by the applicant towards the owner of the third respondent, being Mr F G Vas ("Vas"). This charge related to the applicant allegedly accusing Vas of employing foreign workers to replace the existing employees, the applicant accusing Vas of hiring unknown persons to kill the employees, the applicant saying to Vas that he did not trust him, and the applicant requesting Vas to retrench him (the applicant). The applicant throughout disputed the truth of these allegations.

[5] The applicant was dismissed on 1 April 2011 following disciplinary proceedings on the above charge. The applicant was also afforded the opportunity of an internal appeal in the third respondent but this was not successful.

[6] The applicant referred an unfair dismissal dispute to the first respondent on 11 May 2011 in which the applicant contended his dismissal was both substantively and procedurally unfair. The applicant in such referral (which was dated 6 May 2011) disputed that he committed any misconduct and was, in essence, falsely accused. The applicant also contended his dismissal was procedurally unfair because the chairpersons of the disciplinary and appeal enquiries did not call any witnesses. The first respondent resolved on 1 June 2011 that it was unable to settle the dispute and issued a certificate of failure to settle on such date. The applicant then referred the dispute to arbitration on 6 June 2011 and this dispute came before the second respondent as arbitrator on 18 October 2011.

[7] In an arbitration award dated 24 October 2011, the second respondent determined that the applicant dismissal was fair and dismissed his dispute referred to the first respondent. It is this arbitration award that has given rise to these proceedings now before me.

[8] I must immediately state, from the outset, that because of the basis on which I have found in favour of the applicant in this review application, it is simply not necessary to decide on the merits of the applicant's review application, so to

speak. As will be fully elaborated on hereunder, it is my firm view that the second respondent, as arbitrator, misconducted himself in the conduct of the arbitration proceedings and in respect of his duties as an arbitrator to such an extent that he actually deprived the applicant of a fair hearing and vitiated the entire arbitration proceedings.

The relevant test for review

[9] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[1] Navsa, AJ held that in the 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, '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?'[2] In *CUSA v Tao Ying Metal Industries and Others,*[3] O'Regan J held:

> 'It is clear…. that a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice.'

[10] In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[4] and in specifically interpreting the *Sidumo* test, the Court held as follows:

> '[T]o this end a CCMA arbitration award is required to be reasonable because, if it is not reasonable, it fails to meet the constitutional requirement that an administrative action must be reasonable and, once it is not reasonable, it can be reviewed and set aside.'

[1] (2007) 28 ILJ 2405 (CC).
[2] Ibid at para 110.
[3] (2008) 29 *ILJ* 2461 (CC) at para.134.
[4] (2008) 29 ILJ 964 (LAC) at para 92.

[11] After a number of developments in the approach to be followed in deciding review applications,[5] the SCA most recently in *Andre Heroldt v Nedbank Ltd*[6] found that the more recent approach being followed by the Labour Court set the *Sidumo* review test bar too low when deciding review applications. The Court concluded as follows:[7]

> '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. For a defect in the conduct of the proceedings to amount to a gross irregularity as contemplated by s 145(2)(a)(ii), the arbitrator must have misconceived the nature of the inquiry 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 the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.'

[12] In my view, the following dictum in *Pam Golding Properties (Pty) Ltd v Erasmus and Others,*[8] is properly in line with what the SCA in *Herholdt* concluded to be the position with regard to the review of arbitration awards under the LRA, where the Court in *Pam Golding Properties* said:

> 'In summary, s 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner's decision) must fall within a band of reasonableness. The court is also empowered to scrutinize the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review including, for example, a material mistake of law, and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless

[5] See for example *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2010) 31 ILJ 452 (LC) at para 17; *Lithotech Manufacturing Cape - A Division of Bidpaper Plus (Pty) Ltd v Statutory Council, Printing, Newspaper and Packaging Industries and Others* (2010) 31 ILJ 1425 (LC) at para 18.
[6] (701/2012) [2013] ZASCA 97 (5 September 2013) Cachalia and Wallis JJA.
[7] Id at para 25.
[8] (2010) 31 ILJ 1460 (LC) at para 8.

> of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.'

[13] Of particular importance to the current review application, both the judgment of the SCA in *Herholdt* and the above *dictum* in *Pam Golding Properties* contemplate misconduct by the arbitrator in the arbitration process and in the duties of an arbitrator as proper grounds for review in itself. In any event, section 145(2)(a)(i) of the LRA specifically prescribes that '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'. It is this very misconduct of the second respondent as arbitrator in relation to his duties as arbitrator that forms the basis of the determination of the review application in this matter, as will be set out below. As was said in *National Commissioner of the SA Police Service v Myers and Others*[9]:

> '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.'

In this case, the specific ground of review in Section 145(2)(a)(i) is indeed of direct relevance.

[14] I conclude on the issue of the review standard to be applied in this current matter by reference to the following dictum in *Naraindath v Commission for Conciliation, Mediation and Arbitration and Others,*[10] 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

[9] (2012) 33 ILJ 1417 (LAC) at para 41.
[10] (2000) 21 ILJ 1151 (LC) at para 27.

> 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.'

The issue of the misconduct of the second respondent

[15] The issue of the conduct of the second respondent was specifically raised by the applicant in his review application. The applicant, being unrepresented, articulated the issue as best he could, where he recorded in his founding affidavit under the heading of the arbitration proceedings that 'the commissioner was asking leading questions, ignored and/or failed to give me opportunity to justify (clarify) my objections to the allegations brought to my attention.' (sic) Under the grounds of review in the founding affidavit, the applicant specifically recorded that 'the commissioner committed misconduct in relation to the duties of the commissioner as arbitrator' and 'furthermore, properly hearing was not conducted as it was one sided'. (sic) In *Sonqoba Security Services MP (Pty) Ltd v Motor Transport Workers Union,*[11] the Court, in dealing with a review application, said that 'it is trite that an applicant must make out its case in its founding papers'. This is exactly what the applicant, even as a lay person, in my view, clearly did in respect of the issue of the misconduct by the second respondent as arbitrator in discharging his duties as arbitrator and conduct of the arbitration proceedings.

[16] The exercise of the review jurisdiction and functions by the Labour Court in respect of arbitration awards of bargaining councils (and the CCMA for that matter) entails the exercise of an overall supervisory duty over such functions of the bargaining councils. In the judgment of *Pep Stores (Pty) Ltd v Laka NO and Others,*[12] Mlambo J (as he then was) held as follows:[13]

> '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.

[11] (2011) 32 ILJ 730 (LC) at para 9.
[12] (1998) 19 ILJ 1534 (LC).
[13] Id at paras 23 – 25.

> 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.'

[17] In *Deutsch v Pinto and Another,*[14] 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.'

With specific reference to the *Deutsch v Pinto* judgment, the Court in *Van Rooy v Nedcor Bank Ltd,*[15] 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.'

These very same principles must surely, in my view, apply equally to arbitration proceedings conducted under the auspices of bargaining councils.

[14] (1997) 18 ILJ 1008 (LC) at 1011 and 1018.
[15] (1998) 19 ILJ 1258 (LC) at para 17.

[18] Guidance in this respect can also be found from the judgment in *Sidumo*[16] itself. In that judgment, Sachs J held[17] 'the 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:[18] '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:[19]

> '[t]he 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 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.*'*

In my view, what all of the above means is that the arbitration proceedings must be lawful, reasonable and procedurally fair, and that the Labour Court, in exercising its powers in terms of Section 145 of the LRA, is duty bound to supervise the bargaining councils and the exercise of its arbitration functions, so as to ensure that this primary objective as articulated in *Sidumo* itself is achieved.

[19] In the current matter, I have no doubt at all that the second respondent committed misconduct in the conduct of the arbitration proceedings and with regard to his duties as arbitrator. This is evidenced by the actual manner in which the second respondent conducted himself in the arbitration proceedings as it appears from the record itself before me, which in my view catapulted such proceedings into the realms of unfairness as contemplated by the above principles. The misconduct of the second respondent was such that it completely contaminated the entire arbitration to the extent that no matter what the outcome and what evidence was led in such arbitration, it was all

[16] *Sidumo (supra)*.
[17] Id at para 147.
[18] Id at para 89.
[19] Id at para 138 and 139.

worthless process. There was, at the heart of this matter, the complete absence of fair arbitration proceedings. In this respect, I intend to refer, hereunder, to a number of specific instances of what can only be called manifestly unacceptable conduct by the second respondent as arbitrator which is clearly evident from the record as it stands. The record in this matter is actually a prime illustration which can be used to demonstrate how not to conduct a fair and proper arbitration. I will venture so far as to call the conduct of the second respondent shocking.

[20] At the very start of the arbitration process the second respondent, unfortunately, by his conduct, set the tone of things to come. The second respondent, at such start, launches into what can only be described as a monologue of self glorification and highlighting his own perceived importance. It lasts for some four pages of the record and includes extensive references to his history as a practitioner. Having commented on and glorified his own history, the second respondent then proceeds to indicate why he is better than other commissioners with legal training because he, so to speak, came through the ranks and did not "inherit" his position from legal practice. He then proceeds to inform the parties that they must fight their respective cases with their "mouth". He tries to illustrate what this means by way of examples, but, with the utmost of respect to the second respondent, these examples are more confusing than clarifying. I wish to in particular refer to the following example which I am compelled to quote verbatim and which goes:

> 'And if you go out of the main gate, right in front of the CDR, you will see there is a very fast V6 blue Alfa Romeo parked there. It is mine. And then I drive in my car, as fast as I can home, and I open a cold beer, and decide who told be the best story. That is not the arbitrations we have. The fight with your mouth, when you cross examine, will tell me whose case is going to be the more probable or believable. It is the only technique you can use (indistinct). So the commissioner does not decide who is right or wrong.[20] It is not my job….' (sic)

[20] With respect to the second respondent, this statement is clearly fundamentally wrong and in fact nonsensical.

This entire statement is ludicrous and preposterous. Any lay litigant, after having heard this, would have no idea whatsoever of what was to come and what they are required to do in the arbitration proceedings. If it was an attempt at humour, it was entirely inappropriate and misplaced.

[21] The second respondent, in his opening monologue, unfortunately does not just stop there. He next compares the work of an arbitrator to that of a butcher. He illustrates it thus:

> 'If you go and buy meat, the butcher puts the meat in his scales, he weights it, he says R50. You want the T-bone steak, R50. My job is a bit more complicated. I weigh documents and I weigh words. Nothing more, nothing less' (sic)

Having said this, the second respondent then proceeds to summarise supposed cases and versions of the two parties as if that was their respective cases when no such cases even exist. Why this is even necessary is unclear. At the end of this all, the second respondent at least properly records that the employer (third respondent) must prove the dismissal of the applicant was fair and that he (the second respondent) would try and narrow issues before the arbitration starts. Considering the confusion liberally sowed by the second respondent as set out above, it is doubtful that any narrowing of the issues could save what was already a severally tainted arbitration process and, as will be set out hereunder, this unfair and tainted process was unfortunately further cemented by what came next.

[22] The second respondent, as part of his process of limiting the issues in dispute, then gets to the establishing what relief the applicant wants. The second respondent explains he can award reinstatement with back pay, re-employment or compensation. So far so good. The applicant then confirmed that he wanted retrospective reinstatement. The second respondent confirmed this and in fact put it to the third respondent that this was what the applicant would ask for in the arbitration, which Vas (who was representing the third respondent) confirmed that he understood. However, what happened next was something that can only be described as horrendous. Whilst the

applicant was still busy cross examining Vas who testified for the third respondent, the second respondent simply called a halt to it (this is gross misconduct in itself which will be addressed hereunder). The second respondent then caused the applicant to be sworn in to give evidence. Instead of the applicant even stating his case, what followed was what can best be described as hostile and aggressive lambasting and cross examination of the applicant by the second respondent himself to get the applicant to concede that in fact he does not want reinstatement. The second respondent, in exactly the same fashion as a cross examiner would, put it to the applicant (though the interpreter) firstly as follows: 'But the employer says the relationship of trust between themselves is gone.' This is put to the applicant by the second respondent before the applicant even gave a shred of evidence himself. The second respondent, however, did not leave this issue there. He proceeded to put a number of further statements to the applicant (again through the interpreter) which includes 'does he think the employer is going to organise a big party with lots of champagne and… if I send him back', and 'why is he asking me to send him back to the jaws of a lion'. This kind of behaviour leaves me lacking in finding a proper description of how unacceptable it is. I will suffice by saying it is hard to imagine anything more at odds with what would be considered to be a fair arbitration.

[23] The issue of the second respondent confronting the applicant because of the applicant's request for reinstatement then becomes even worse. The second respondent puts it to the applicant on the basis of it being an undisputed fact that there is "no love lost" between the applicant and Vas that reinstatement is inappropriate. He puts this proposition under circumstances where the applicant has not even stated his case nor completed his cross examination of Vas. The second respondent then asked the applicant why he wanted to go back to a place where there is only fighting, when there is no factual basis for this proposition being put to the applicant by the second respondent. In the end, and solely because of the clear pressure exerted by the second respondent, the applicant then conceded and stated that he would rather accept only compensation. I do not hesitate to say that the applicant was clearly bullied into making this concession and having change of heart

because of the conduct of the second respondent. This is the kind of conduct no independent adjudicator should ever make himself or herself guilty of. In this matter, and if the record did not tell me the second respondent was the arbitrator, I would readily have thought he was actually representing the third respondent.

[24] The next step in this sorry saga then follows after the second respondent had bullied the applicant into giving up his request for reinstatement. Having recorded that the applicant now wants compensation, the second respondent says that when he gave training to his managers at SAA, he would take his LRA and highlight chapter 8 with different colours. The second respondent stated that he would highlight "unfair" where it came to unfair dismissals in red, and if the applicant wanted the second respondent to give him money, then the applicant would have to convince him (the second respondent) that what to him happened was unfair. The second respondent thus put the onus squarely on the applicant to prove he was unfairly dismissed, which is manifestly irregular. Added to this is the fact that the second respondent basically immunised the third respondent as employer in this enquiry, having stopped and prevented the applicant's cross examination of Vas. The least said about this conduct of the second respondent the better. Suffice it to say, it surely has to be clear misconduct on part of the second respondent with regard to his duties as arbitrator and in the conduct of the arbitration proceedings.

[25] To add the icing to the cake, so to speak, and when the applicant at least tries to state his case as to why he considered that which happened to him was unfair (as wrong as this approach may be), he is consistently interrupted by the second respondent preventing him from properly doing so. Not only is he interrupted by the second respondent but he is vigorously and aggressively cross examined by the second respondent. I wish to specifically refer to a particular exchange between the second respondent and the applicant on the record.[21] It starts with the second respondent in effect putting to the applicant the third respondent's case that the applicant accused Vas of hiring people to

[21] See Record page 114

kill employees to the applicant in a fashion a cross examiner would. In response, the applicant disputed this ever happened. Not satisfied, the second respondent persists with the question and then rephrases the question (poorly so as appears from the record), and when the applicant is in the process of trying to answer, he is again interrupted by the second respondent, with the second respondent contending that is he (the second respondent) has asked the same question three times, the applicant is not answering his question, and the applicant is avoiding the question. This is not the behaviour of an independent adjudicator. This is the kind of behaviour of a cross examiner representing one of the parties. It is unacceptable conduct on the part of the second respondent as arbitrator.

[26] What the second respondent did next defied all comprehension. He proceeded to put to the applicant as a general proposition that why could it possibly be considered that the third respondent dismissed him unfairly, with this general proposition being based on individual contentions put to the applicant by the second respondent one after the other, without even waiting for an answer from the applicant. The individual contentions but by the second respondent to the applicant were: (1) why would the employer do this as it knows to 'fire" someone costs money; (2) why would the employer hire someone from an employers' organisation to chair the hearing; (3) why would the employer have an appeal hearing; (4) why would the employer spend money to come to the CDR; (5) "why did the employer not just swallow… if this guy has done nothing wrong, then why would he just decided to fire him?' (whatever this may mean) (sic). Despite not having waited for an answer to the above propositions the second respondent put to the applicant, the second respondent concluded with the following remark:

> 'Why would he do that? If the applicant says he has done nothing wrong. Why… this gentleman look fairly intelligent to me. He has got his own business, why would he be as stupid if… To fire somebody with 24 years, who has done nothing wrong? That is what he wants me to believe. And I do not understand it. He must give me something. He is not giving me anything. He is giving me a blank denial.'

The applicant finally gets an answer in and says, and in my view entirely justifiably so, the following: 'Am I being the chance to state my case?'[22] (sic) I find this conduct of the second respondent horrendous. In my view, the second respondent had already made up his mind. He made up his mind when he stopped the cross examination by the applicant of Vas in midstream. What happened after that was nothing more than a deliberate and systematic process conducted by the second respondent himself to destroy the case of the applicant and shift the onus onto him to convince the second respondent his dismissal was unfair. This is simply not fair play and clear misconduct by the second respondent in discharging his duties as arbitrator and in the conduct of the arbitration proceedings.

[27] After the long opening salvo by the second respondent in his cross examination of the applicant as set out above, the cross examination of the applicant by the second respondent continues for about a further five pages of the record. I do intend to refer to all the instances in this regard, as there are many. Again, I suffice by saying that a reading of the record paints the picture of the second respondent conducting himself not as an independent arbitrator but of the cross examiner representing the third respondent.

[28] I, however, would like to point out that the second respondent put it to the applicant that two unions were the true culprits (where he gets this evidence from is unknown) as they had no rights in the employer and they 'stirred' up anger with the employees and also the applicant. The second respondent also launches into a page long tirade in this regard. When the applicant answers that he is paying membership fees for WESUSA and Vas confirms that the third respondent had been deducting fees before, the second respondent turns around, despite what he has said before, and says that the issue is not before him and it is of no interest to him. This is not even handed behaviour. The second respondent appears to go out of his way to discredit the applicant and when this does not work, he then considers the issue irrelevant.

[29] Having completed his cross examination of the applicant, the second respondent asks Vas if he wants to ask the applicant questions. Not once is

[22] Clearly, the word 'given' is absent from the transcript.

the applicant even given a chance to state his own case in a manner that the applicant may have chose to do. Vas then also did not really cross examine the applicant. Vas put no version to the applicant. What I am saying is that nothing that Vas did could discredit the testimony of the applicant or assail his credibility. All of this was sought to be done by the second respondent himself.

[30] I conclude by specifically referring to the manner in which the second respondent brought the cross examination of Vas by the applicant to an end, which I have touched on above. On the record, and after the second respondent had invited the applicant to cross examine Vas, the applicant managed to ask Vas less than ten questions. He did not manage to put any case or version to Vas. Instead, the second respondent intervened and said 'Ja. I think, you know, let the applicant tell me his side of the story because we can carry on like this forever, okay. Please put the applicant under oath.' What then followed was what can only be described as the unmitigated disaster referred to above.

[31] 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.[23] I accept that these provisions equally apply to arbitrators conducting arbitrations under the auspices of bargaining councils. This, however, cannot give arbitrators license to actually become engaged in the proceedings to such an extent that it becomes questionable as to whether the arbitrator is a representative of one of the parties. Also this provision cannot be used to justify conduct that, in essence, deprives one of the parties of a fair hearing which is what, in my view, clearly happened to the applicant in this case. As the Court said in *CUSA v Tao Ying Metal Industries and Others*:[24]

> 'Consistent with the objectives of the LRA, commissioners are required to 'deal with the substantial merits of the dispute with the minimum of legal formalities'…. Thus the LRA permits commissioners to 'conduct the arbitration

[23] 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.'
[24] *CUSA v Tao Ying Metal Industries and Others* (supra) at para 65.

> in a manner that the commissioner considers appropriate'. But in doing so, commissioners must be guided by at least three considerations. The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do.' (emphasis added)

[32] In terms of the aforesaid three objectives as defined by the Constitutional Court in *Tao Ying Metal Industries*, an arbitrator would be permitted to conduct the proceedings in what may be described as an inquisitorial manner and not just leave it up to the parties to place the relevant material, evidence and issues before the bargaining council. This being said, there is a fine line between conducting arbitration proceedings in an inquisitorial fashion and becoming involved in the proceedings to such an extent so as to constitute a descent into the arena by the arbitrator. To descend into the area means that the arbitrator becomes an active participant in the conduct of the case by one of the parties and that is simply not fair play and completely negates the imperative of the conduct of fair arbitration proceedings as contemplated by law. Such kind of conduct creates a perception of bias on the part of the arbitrator and constitutes improper and actually wrongful conduct. In *County Fair Foods (Pty) Ltd v Theron NO and Others,*[25] 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 *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*

[25] (2000) 21 ILJ 2649 (LC) at para 7.

causa). (See Baxter at 536.)'

[33] Arbitrators, therefore, need to exercise their entitlement to conduct the proceedings in the manner he or she deems appropriate with the necessary circumspection and good sense. The reason for this is simple – the Labour Court is dependent on the typed transcript of the proceedings in order to determine whether the arbitrator was simply being inquisitorial to the extent permitted by law or had actually descended into the arena. This record constitutes the picture that the Labour Court looks at in evaluating the conduct and discharging of the duties of the arbitrator. The arbitrator must, therefore, be careful of how he or she paints this picture because a painted picture of unfair arbitration proceedings emanating from the record would render the conduct of the arbitrator reviewable *per se*. In *National Union of Security Officers and Guards and Another v Minister of Health and Social Services (Western Cape) and Others,*[26] the Court said:

> '…. the principle is apparent, ie when considering whether an award was fair, all the evidence (and that which is evident) before me should be considered in the light of all the evidence that was presented. The record is clear. The examination conducted by the commissioner is apparent from the transcript. No party is prejudiced if the transcript is examined to establish whether or not those proceedings were fair or the manner in which the arbitrator questioned.'

[34] In *Sondolo IT (Pty) Ltd v Howes and Others,*[27] 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

[26] (2005) 26 ILJ 519 (LC) at para 16.
[27] (2009) 30 ILJ 1954 (LC) at paras 10–11.

> 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 the light of this *ratio*, it is clear that the idea behind an arbitrator 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 agree with such an approach and such an objective. This being said, it surely can never be the idea that pursuant to these objectives, the arbitrator becomes actually engaged in the matter at the level of extracting and challenging evidence as if the arbitrator was a participant in the proceedings, as the second respondent did in the current matter.

[35] A specific example in the case law where the Court did find misconduct by an arbitrator to exist with regard to the issue of the carrying out of duties as an arbitrator, I refer to *Mollo v Metal and Engineering Industries Bargaining Council and Others*[28] which dealt with an arbitrator's decision to disallow a witness as being unnecessary without affording the applicant party in such proceedings an opportunity to explain the relevance of bringing the witness before making a ruling whether the witness was necessary. The Court concluded that this was a determination by the arbitrator 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.'[29]

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 arbitration proceedings or the discharge of the duties of the arbitrator, this would either be misconduct or constitute a gross irregularity.

[36] I now intend to deal with the second respondent conducting what is tantamount to the cross examination of the applicant, as referred to above. Of

[28] (2010) 31 ILJ 971 (LC).
[29] Id at para 32.

direct application is the judgment in *Solomon and Another NNO v De Waal*[30] where the Court dealt with a Judge that descended into the arena of conflict between the parties. Whilst it may be so that a High Court Judge certainly does not have the benefit of the provisions of section 138(1) of the LRA, the following ratio from this judgment in my view still finds application in the current matter and in arbitration proceedings before the bargaining councils, irrespective of the provisions of section 138(1):

> 'A perusal of the record reveals that the learned trial Judge often and, unfortunately, quite unwarrantedly, intervened in the proceedings while defendant's Counsel was cross examining plaintiff's witness and during the hearing of defendant's case. It is unnecessary to quote the numerous passages in question. Suffice it to say that during the hearing of the plaintiff's case the Learned Judge asked certain questions and made certain observations which reflected favourably upon the plaintiff's case and adversely upon the evidence that the defendant's Counsel asserted would be adduced for the defendants. Furthermore during the hearing of the defendant's case the learned Judge examined their witnesses in such a manner and made observations in the course thereof of such a nature as to evince his ostensible disbelief, or at any rate, his doubt about their credibility. Those and other interventions by the learned Judge must have been most harassing for the defendant's Counsel, but fortunately he did not allow the actual presentation of the defendant's case to suffer thereby. However, by descending into the arena of the conflict of the parties in that manner the learned Judge might well have disabled himself from assessing with due impartiality the credibility of the witnesses, the probabilities relating to the issues, and the amount of the general damages sustained by the plaintiff. Even if it were not so, such intervention might well have created the impression, at least in the mind of the defendant, that he had also disabled himself and that he was favouring or promoting the plaintiff's cause and prejudging the case against the defendants. In that regard it must be borne in mind that justice should not only be done but should manifestly and undoubtedly be seen to be done.'

[30] 1972 (1) SA 575 (A) at 580E-H.

[37] The above is an illustration of precisely the problem and issue in the current matter. The conduct of the second respondent is such that justice cannot be seen to have been done in this case. The conduct of the second respondent is such so as to leave me with little doubt that he favoured and promoted the cause of the third respondent. It is also clear from the conduct of the second respondent at the very start of the arbitration that he glamourised himself to the extent that he considered himself to able to basically do as he pleased. This is entirely unacceptable behaviour. The conduct of the second respondent actually deprived the applicant of a fair hearing and opportunity to properly state his case before an independent trier of fact and law. The conduct of the second respondent leaves me with no choice but to intervene, and is comparative with what happened in the judgment of *County Fair Foods.*[31] The following extracts from the judgment in *County Fair Foods* is instructive and comparative on the facts to the current matter:[32]

> '…. a commissioner must conduct the proceedings before him in a fair, consistent and even-handed manner. This means that he must not assist, or be seen to assist, one party to the detriment of the other. Therefore, even though a commissioner has the power to conduct arbitration proceedings in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly under the provisions of s 138(1) of the Act, this does not give him the power to depart from the principles of natural justice.'

> 'On the basis of the transcript of the proceedings before the first respondent in this case I am entirely satisfied that the first respondent questioned at least two of the applicant's witnesses, namely Erasmus and Hobden, in a manner which essentially amounted to cross-examination. For instance, the first respondent put to Erasmus propositions of his (the first respondent's) own making, interrupted Erasmus's answers, challenged Erasmus on the consistency of his answers with his previous evidence (when there was in fact no real inconsistency), reminded Erasmus that he was under oath (thereby impliedly indicating that he doubted his credibility), and made 'submissions' regarding the reasonable construction of his evidence. On one particular issue where it is certainly arguable that Erasmus's evidence was not inconsistent

[31] *County Fair Foods* (*supra*).
[32] Id at paras 8 and 14.

> the first respondent engaged vigorously with Erasmus and in a manner which would undoubtedly have created the impression that he was prejudging the case against the interests of the applicant. On reading certain passages of the record one would certainly form the view, without being informed otherwise, that the first respondent was not in fact the arbitrator but the representative of the third respondent.'

The Court in *County Fair Foods* concluded as follows:[33]

> 'In all the circumstances I am satisfied that the behaviour of the first respondent, certainly insofar as the evidence of Erasmus and Hobden is concerned, oversteps the boundaries of fair procedure in the conduct of arbitration proceedings. I am satisfied that his descent into the arena gives rise to a reasonable apprehension on the part of the applicant that he was not impartial. On the basis of the authority set out above it is clear that this is a reviewable defect. If it does not amount to misconduct then it certainly amounts to a gross irregularity in the conduct of the proceedings.'

The above is virtually identical to what the second respondent did in the current matter, save for the addition that in the current matter, the second respondent conducted himself even worse. In the current matter, the second respondent actually wrongfully intervened in the process, stopped the cross examination by the applicant of Vas testifying for the third respondent when he had no business doing so, then swore the applicant in as a witness and proceeded to challenge and cross examine the applicant without even allowing him to start by stating his own case. Worse, and by actually lambasting the applicant with regard to the relief he wanted, the second respondent solicited a concession from the applicant with regard to such relief and caused him to abandon a request for reinstatement. Having done this, the second respondent then demanded that the second respondent prove that he was unfairly dismissed despite the second respondent having already in effect concluded that this was not the case and to add insult to injury subjected the applicant in this blatantly unfair process to hostile and vigorous cross examination by the second respondent himself. The second respondent thus did a lot more than just overstepping the boundaries of fair procedure. He

[33] Id at para 18.

stepped onto the next continent of unfairness. The conduct of the second respondent is thus both misconduct and a gross irregularity.

[38] Similar kind of misconduct was also found to exist in the judgment of *National Union of Security Officers and Guards and Another v Minister of Health and Social Services (Western Cape) and Others*[34] where the Court concluded as follows:

> '…. I do not wish to refer to each and every sentence uttered by the arbitrator or each and every question she had asked the applicant. Suffice to say, that in my view, she exceeded the bounds of her enquiry and created an impression that she was biased in favour of the first respondent. This is supported by the fact that I found that the manner in which she dealt with certain witnesses to be deferential to them as a result of their political positions or for any other reasons she may have had. Her generosity in respect of those witnesses did not extend to the applicant and, in my view, he was entitled to hold the view that she was biased.
>
> Courts have warned on several occasions that trial judges or arbiters often, and unfortunately quite unwarrantedly, intervene in proceedings while for instance the defendant's counsel is cross-examining certain witnesses and during the hearing of argument (see *Solomon v De Waal* 1972 (1) SA 575 (A) at 580E). For this reason alone the award falls to be set aside.'

[39] More recently in *Raswiswi v Commission for Conciliation, Mediation and Arbitration and Others,*[35] the Court said:

> 'In this instance, having regard to the transcript, I am satisfied that there are enough examples to indicate that the manner in which the arbitrator approached the witnesses would create a justifiable impression that he had a predisposition to assist the employer in putting its case and to challenge the applicant's case. A reasonable person in the position of the applicant would have had a strong factual basis for drawing this inference, and therefore for having a reasonable apprehension of bias. The question that remains is whether the degree of licence which arbitrators are allowed in conducting proceedings in an inquisitorial manner might nevertheless mean that such an

[34] (2005) 26 ILJ 519 (LC) at paras 16 – 17.
[35] (2011) 32 ILJ 2186 (LC) at para 20.

apprehension of bias should not be recognized as legitimate.'

The Court then specifically referred, with approval, to the judgment in *County Fair Foods* and concluded:[36]

'The emphasized portion of the extract above is particularly pertinent in this matter. Both parties were represented in the hearing and the arbitration was conducted within the broad framework of adversarial proceedings. That is not to say that the arbitrator could not adopt an inquisitorial approach in the interest of expedition or fairness, but when intervening the arbitrator's approach must be consistent.

In this case the arbitrator's approach was far from even handed and there is more than an adequate basis for believing the arbitration was not conducted in an impartial manner, giving rise to a reasonable apprehension that he was more disposed to the employer than the employee. Consequently, the arbitrator committed misconduct in relation to his duties by depriving the applicant of a fair hearing.'

[40] The final reference to be made in this respect is to the judgment in *Vodacom Service Provider Co (Pty) Ltd v Phala NO and Others*[37] and I fully agree with the following extract from such judgment, which in my view can hardly be better put:

'A commissioner has a discretion about how the arbitration should be conducted. A commissioner may decide to adopt an adversarial approach or an inquisitorial approach. In an inquisitorial approach the commissioner is in control of the process. The commissioner plays a more active role in the hearing, calling witnesses and interrogating them to ascertain the truth. The commissioner cannot abandon the well-established rules of natural justice and must be careful to guard against creating a suspicion of bias….

Where the commissioner adopts the adversarial approach his role is much limited. The process is in the control of the parties. The evidence adduced is that which the parties choose to present and the commissioner operates more like an umpire. The commissioner must manage the process and ensure that

[36] Id at paras 22 – 23.
[37] (2007) 28 ILJ 1335 (LC) at paras 13 – 15.

> the laws of evidence are complied with. The commissioner can intervene where irrelevant questions are asked, hearsay evidence has been led or where the parties are not dealing with the issues that need to be decided. The commissioner must make rulings on objections raised etc. The commissioner must stamp his or her authority in the hearing and must be guided by s 138(2) of the Act.
>
> A commissioner is required to conduct the proceedings in a fair, consistent and even-handed manner. A commissioner cannot assist or be seen to assist, one party to the detriment of the other. A commissioner cannot put to witnesses his propositions, should not interrupt the witnesses' answers, challenge the consistency of a witness with his own evidence, indicate that he doubted the witness's credibility, or make submissions regarding the construction of evidence.'

[41] In this matter, the second respondent acted in virtually every manner the wealth of legal authority would consider to be unfair, wrongful and irregular. The second respondent embarked upon an opening address at the start of the arbitration that was entirely uncalled for, which was self glorifying, and served to only confuse the parties by entirely inappropriate examples. This was followed up by undue and unjustified interference in the arbitration proceedings to the extent of even preventing the applicant from conducting proper and fair cross examination. What then followed after that was, firstly, a lambasting of the applicant by the second respondent on the issue of relief he wanted which in turn was followed with vigorous and hostile cross examination of the applicant by the second respondent worthy of making a briefed representative representing the interests of the third respondent green with envy. The second respondent put propositions to the applicant as a cross examiner would and sought to impeach his credibility. The second respondent did not allow the applicant to even testify of his own accord in support of his case. It is my view that the second respondent was clearly assisting the third respondent in the arbitration process and this created a reasonable apprehension of bias against the applicant. In the end, as the Court said in *Strydom v Commission for Conciliation, Mediation and Arbitration and*

Others[38] what the second respondent had to do was "steer and control" the arbitration proceedings and not actually descend into the arbitration proceedings and conduct the same similar to the manner in which a party's representative would do.

[42] Had there been some professional body I could have reported the second respondent to, in this case, for his conduct I would have done so. Considering the second respondent's opening address in the arbitration in this matter, I shudder to think what may have happened in other arbitrations presided over by the second respondent in which parties were unrepresented and where these unrepresented parties were on the receiving end of the same kind of conduct but did not have the necessary will and drive to pursue the matter to finality in the Labour Court, as the applicant did in this case. The second respondent seems to be a law onto himself and this kind of conduct severely damages the credibility and integrity of the arbitration dispute resolution process under the LRA. It would seem that the second respondent regularly presides over arbitrations in bargaining councils and the CCMA and I can only hope that this judgment finds its way to being reported and coming to the attention of responsible functionaries at the CCMA and bargaining councils who have the power to not allocate further arbitrations to the second respondent. I shall in any event direct that this judgment be forwarded to the director of the CCMA as well as to the MEIBC and MIBCO where the second respondent presides over arbitrations.

[43] Therefore, and for the above reasons alone, the arbitration award of the second respondent falls to be reviewed and set aside, irrespective of the normal merits of the review application. Justice must be seen to be done and if this matter is left as is, this would not be the case in this instance. In my view, I am with regret compelled to state that the conduct of the second respondent in this matter is a prime illustration of how not to conduct fair arbitration proceedings. The conduct of the second respondent was more akin to that of a representative of a litigating party and not of an independent trier of the facts. The end result of all of the above is that the arbitration

[38] (2004) 25 ILJ 2239 (LC) at para 18.

proceedings in this matter are unfair to the extent of actually depriving the applicant of a fair hearing.

Conclusion

[44] Therefore, in conclusion, there is simply no basis on which the award of the second respondent can be sustained. The second respondent committed misconduct with regard to the conduct of the arbitration proceedings. The second respondent committed misconduct with regard to the discharge of his duties as an arbitrator. The conduct of the second respondent was also a gross irregularity as contemplated by law. I, accordingly, review and set aside the arbitration award of the second respondent in its entirety.

[45] With the award of the second respondent having been reviewed and set aside, the fact is that at the core of this matter are arbitration proceedings that were unfair per se. The conduct of the second respondent deprived the applicant of the opportunity to properly ventilate and state his case. 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 bargaining council, *de novo*, and before another arbitrator.

[46] 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 when it comes to the issue of costs. The applicant was unrepresented in Court. The applicant succeeded because it is 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.

[47] It is for the above reason that I made the order that I did on 22 August 2013, referred to above.

[48] I finally direct that the Registrar of the Labour Court forward a copy of this

judgment to the director of the CCMA as well as the persons responsible for case management at MEIBC and MIBCO.

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Snyman AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant: In person

For the Third Respondent: Mr D W Morgan of D W Morgan Attorneys