THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 2103 / 12

In the matter between:

PREMIER FOODS (PTY) LTD (NELSPRUIT)	**Applicant**
and	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
GLEN CORMACK N.O.	**Second Respondent**
MAROPENG STEWARD LEKOKOTLA	**Third Respondent**

Heard: **8 November 2016**

Delivered: **8 November 2016**

Summary: CCMA arbitration proceedings – misconduct by arbitrator – test for review – s 145 of LRA 1995 considered

Recusal – principles considered – refusal of recusal by arbitrator unreasonable and irregular – arbitrator should have recused himself

CCMA arbitration proceedings – conduct by commissioner in the course of con/arb proceedings – duties of commissioner stated

CCMA arbitration proceedings – con/arb – conduct of commissioner in the course of conciliation – cannot advise party on merits of matter and prospects of success – constitutes misconduct

CCMA arbitration proceedings – guidelines on how commissioner must conduct conciliation component of proceedings discussed – commissioner did not act fairly and reasonably in proceeding with arbitration

Review of arbitration award – conduct of commissioner vitiating the arbitration – award reviewed and set aside – matter remitted back to CCMA for arbitration de novo

---

JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter concerns an application by the applicant to review and set aside an arbitration award by the second respondent, Commissioner G Cormack, in terms of which the third respondent's dismissal by the applicant was held to be substantively unfair, and the third respondent was afforded the relief of reinstatement retrospective to date of dismissal. This application has been brought in terms of Section 145 of the Labour Relations Act[1] ('the LRA').

[2] This application is however not based on the merits, so to speak, of the third respondent's dismissal for misconduct. Rather, it is principally based on allegations by the applicant of misconduct by the second respondent in the conducting of the proceedings before the CCMA, which was con/arb proceedings. The applicant's case is that the misconduct by the second respondent deprived it of a fair hearing.

[1] Act 66 of 1995.

LABOUR COURT

[3] In deciding this matter, I will now proceed to only summarize the facts relevant to deciding the applicant's principal review ground relating to the misconduct of the second respondent.

The relevant evidence

[4] The third respondent had been dismissed by the applicant on 2 May 2012 for misconduct pursuant to disciplinary proceedings at the applicant, on charges of gross negligence, and failure to adhere to company policy. On another charge against the third respondent, being that of gross insubordination, he had been acquitted of. The third respondent then referred an unfair dismissal dispute to the CCMA.

[5] The matter was set down for con/arb on 12 June 2012 and came before the second respondent. The second respondent, after hearing each of the parties' respective opening submissions, then first proceeded with conciliation to try and settle the matter. Unfortunately the matter could not be settled.

[6] When the proceedings resumed, on record, the applicant moved an application for the recusal of the second respondent. This recusal application was founded on statements the second respondent had made to the applicant's representative in the course of the settlement discussions in conciliation about the evidence in the case and the applicant's prospects of success. The applicant contended that these statements made by the second respondent indicated that the second respondent had already made up his mind in the matter, against the applicant.

[7] In the founding affidavit, the applicant has contended that the second respondent had been inextricably involved in a discussion of the evidence in the conciliation, and following that he told the applicant that continuing with the arbitration would result in them losing.

[8] The transcript does not reflect this statement, and for good reason. It is clear for the transcript that the applicant had barely started motivating its recusal application when the second respondent intervened, saying:

LABOUR COURT

'I'm going to interrupt you, I'm not going to recuse myself, I don't believe you have any grounds to ask me to recuse myself …'.

The second respondent then in essence compelled the applicant to commence leading evidence by calling its first witness. The applicant was thus not allowed by the second respondent to bring a recusal application, and the third respondent was never required to answer such.

[9] There is no answer from the second respondent to these allegations of the applicant as contained in the founding affidavit. I must say that I am concerned that the second respondent did not address all these issues, which was called for, and especially those concerns relating to the second respondent saying to the applicant that it would lose if the matter continues to arbitration.

[10] In his arbitration award, the second respondent does deal with the recusal application. He says that he did deal with certain aspects of the case in the conciliation, but had not formed an 'opinion' as to whether this was the crux of the charges. The second respondent held that a recusal would lead to a postponement and delay in resolving the dispute, which would be prejudicial to the third respondent. But, and critically, the second respondent records that 'the arbitration then continued by agreement', as part of the reasoning why he did not recuse himself.

[11] The transcript shows that the applicant never agreed to continue with the arbitration after asking for the second respondent's recusal. As stated, the applicant had just started bringing the recusal request when it was simply shut down by the second respondent. The third respondent was not even called on to answer the submissions and claim any prejudice that may result to him if the recusal was upheld. The applicant was in fact given no choice by the third respondent other than commencing the arbitration by calling its first witness.

[12] The applicant's review application does go on to deal with and then challenge the findings of the second respondent on the merits of the matter, contending the same was reviewable in several respects. But because of the basis on which I will deal with this matter, below, it is not necessary to consider the review application insofar as it concerns the merits of the findings and

LABOUR COURT

determinations of the second respondent relating to the fairness of the dismissal of the third respondent.

Test for review

[13] I will commence with the determination of this matter by setting out the review test relevant to deciding a matter such as this, where it concerns an allegation of misconduct on the part of the commissioner. In the judgment of *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[2] Navsa AJ held that in light of the constitutional requirement (in s 33 (1) of the Constitution) everyone has the right to administrative action that is lawful, reasonable and procedurally fair, and said that

> 'the reasonableness standard should now suffuse s 145 of the LRA'.

[14] Specifically therefore, the judgment in *Sidumo* does not contemplate that the review grounds as listed in Section 145(2)(a) are obliterated. A review application can still succeed without a review applicant having to show that the outcome arrived at by the arbitrator is unreasonable, where the review grounds are founded on the text of Section 145(2)(a) itself.[3] For example, if an arbitrator commits misconduct in the course of conducting the arbitration, it does not matter whether the outcome arrived at is reasonable, as the misconduct itself vitiates the proceedings, resulting in the award being set aside. Another example is where the arbitrator had no power or jurisdiction to conduct the arbitration, because, once again, this in itself vitiates the proceedings and causes any award made pursuant thereto to be set aside on this basis alone. In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[4] the Court considered the review test postulated by *Sidumo* and said:

> '…. 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

[2] (2007) 28 ILJ 2405 (CC). See also *Herholdt v Nedbank Ltd and Another* [2013] 11 BLLR 1074 (SCA) at para 25; *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* [2014] 1 BLLR 20 (LAC) at para 14.

[3] 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'

[4] (2008) 29 ILJ 964 (LAC) at para 101.

LABOUR COURT

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.'

Similarly, and in *National Commissioner of the SA Police Service v Myers and Others*[5], the Court 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.'

[15] The determination where it comes to review grounds as articulated in the text of Section 145(2) was summarized in *Baur Research CC v Commission for Conciliation, Mediation and Arbitration and Others*[6] as follows:

> '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 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 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. 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. …'

LABOUR COURT

---

[5] (2012) 33 ILJ 1417 (LAC) at para 41.
[6] (2014) 35 ILJ 1528 (LC) at para 18. See also *Chabalala v Metal and Engineering Industries Bargaining Council and Others* (2014) 35 ILJ 1546 (LC) at para 13.

[16] The following *dictum* in *Naraindath v Commission for Conciliation, Mediation and Arbitration and Others*[7] is also relevant, where the Court said:

> '… 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.'

[17] Against the above principles and test, the conduct of the second respondent, as complained of by the applicant, must be considered.

<u>Analysis</u>

[18] I confess from the outset that I have difficulties with the conduct of the second respondent in this case, and in particular the manner in which he dealt with the recusal application.

[19] It was entirely inappropriate for the second respondent to in essence derail the recusal application in the manner that he did. He simply did not allow the applicant to properly argue and motivate the application. He said, without hearing argument that he was going to interrupt the applicant and that there were no grounds for his recusal.

[20] Then, and in his award, the second respondent deals with the recusal issue and simply says that he refused recusal because he did not yet decide whether the evidence he discussed with the applicant would be the 'crux' of the charges, and that recusal would result in a postponement that will prejudice the third respondent. The problem however is that because the second respondent simply cut the recusal application short before it even started, the third respondent never argued against the application and thus never claimed such prejudice.

---

[7] (2000) 21 ILJ 1151 (LC) at para 27.

LABOUR COURT

[21] The point remains that the second respondent was confronted with a recusal application. He had to decide it in line with the relevant principles applicable to deciding such applications. In *President of the Republic of SA and Others v SA Rugby Football Union and Others*[8] the Court said:

> '… The question is whether a reasonable, objective and informed person would on the correct facts reasonably apprehend that the judge has not or will not bring an impartial mind to bear on the adjudication of the case, that is a mind open to persuasion by the evidence and the submissions of counsel. The reasonableness of the apprehension must be assessed in the light of the oath of office taken by the judges to administer justice without fear or favour; and their ability to carry out that oath by reason of their training and experience. It must be assumed that they can disabuse their minds of any irrelevant personal beliefs or predispositions. They must take into account the fact that they have a duty to sit in any case in which they are not obliged to recuse themselves. At the same time, it must never be forgotten that an impartial judge is a fundamental prerequisite for a fair trial and a judicial officer should not hesitate to recuse herself or himself if there are reasonable grounds on the part of a litigant for apprehending that the judicial officer, for whatever reasons, was not or will not be impartial.'

[22] In *SA Commercial Catering and Allied Workers Union v Irvin & Johnson Ltd (Seafoods Division Fish Processing)*[9] the Court added the following:

> 'The court in *Sarfu* further alluded to the apparently double requirement of reasonableness that the application of the test imports. Not only must the person apprehending bias be a reasonable person, but the apprehension itself must in the circumstances be reasonable. This two-fold aspect finds reflection also in *S v Roberts* decided shortly after *Sarfu*, where the Supreme Court of Appeal required both that the apprehension be that of the reasonable person in the position of the litigant and that it be based on reasonable grounds.'

The Court in *Irvin & Johnson* then said the following, as to how this test must be applied:[10]

[8] 1999 (4) SA 147 (CC) at para 48.
[9] (2000) 21 ILJ 1583 (CC) at para 14.
[10] Id at para 16.

LABOUR COURT

'…The court must carefully scrutinize the apprehension to determine whether it is to be regarded as reasonable. In adjudging this, the court superimposes a normative assessment on the litigant's anxieties. It attributes to the litigant's apprehension a legal value, and thereby decides whether it is such that should be countenanced in law.'

[23] Commenting on the judgment in *SA Rugby*, this Court in *Raswiswi v Commission for Conciliation, Mediation and Arbitration and Others*[11] held:

'Without, I hope, detracting from the nuanced reasoning expressed in those judgments, a major theme in the Constitutional Court's refinement of the test was to emphasize that not only must the apprehension of bias be that of a reasonable person in the position of the person being judged who has an objective factual basis for their suspicion, but the apprehension of bias they have must be one that in law would be recognized as raising a legitimate concern about the adjudicator's impartiality …'

[24] Considering the above test for recusal, it is clear that the second respondent never came close to deciding the issue of his recusal based on these principles. In fact, the second respondent did not even allow the issue to be properly ventilated, which in itself can be seen to add to the existence of the requisite apprehension to justify recusal. For a judicial officer deciding a matter in the course of CCMA dispute resolution proceedings, to say from the very outset of the matter to a litigating party that they would lose, and then in effect prevent the issue from being ventilated when the arbitration starts, would surely satisfy the double requirement of reasonableness to justify recusal.

[25] The second respondent then, in his award, articulated as one of the reasons for refusing the recusal application, that of being prejudice that would be caused to the third respondent by the delay that would follow if the application is successfully entertained. This kind of consideration does not form part of the test when deciding a recusal application. Prejudice caused to the other litigant as a result of the delay in finalization of the proceedings should recusal be granted, is simply irrelevant. If it is justified for a presiding officer to recuse

[11] (2011) 32 ILJ 2186 (LC) at para 19.

LABOUR COURT

himself or herself, that should be the end of it, as the presiding officer is simply not competent in proceeding to decide the matter. In short, the second respondent had regard to entirely irrelevant considerations, which, worse still, was not even raised by the third respondent.

[26] Therefore, and if it is true that the second respondent told the applicant prior to the recommencement of the arbitration that it would lose if arbitration proceeded, that is without doubt proper and justified grounds for the applicant seeking recusal. The problem I have in this case, and in many related cases that I have come to consider over the years, is that commissioners simply do not engage the applicant in a review application, where such serious allegations are made about the conduct of the commissioner. The applicant has clearly contended, under oath, that the second respondent told its representative that the applicant will lose if the matter proceeds to arbitration. It was in my view incumbent on the second respondent as commissioner to answer this. He was the only one with the applicant in the conciliation proceedings, and the only one that could refute the allegation. The second respondent needed to engage in the proceedings to deal with this.

[27] Further factors I have considered which I believe support the applicant's contention as to this statement made by the second respondent, is the fact that the second respondent simply eliminated the recusal application before it really happened and in his award in effect conceded that he did indeed express views as to aspects of the evidence. Of critical importance, however, is the fact that the second respondent recorded in his award that the applicant agreed to continue with the arbitration despite the recusal application, when the record shows this is simply not true. The record shows that the second respondent in effect bullied the applicant into proceeding with the matter by calling its first witness without further ado. These factors, considered with the undisputed statements made by the applicant in the founding affidavit, convinces me that it is likely that the second respondent did say to the applicant that it would lose if it proceeded with the arbitration, which the second respondent then decided was the case at the end of proceedings.

[28] I appreciate that in con/arb proceedings there is a conciliation component and that in conciliation proceedings parties may very well discuss, in the presence

LABOUR COURT

of or together with the commissioner, the merits of the matter. This is done in the context of what has been called 'reality testing' which has been held to be a proper component of conciliation. Reality testing entails the commissioner testing through questioning, what informs the underlying positions adopted by the respective parties, so that the parties understand what their respective disputes in fact are, and then, what the legal consequences would be if these disputes are not amicably resolved. The objective of this approach is thus to educate and inform the parties. As said in *Anglo Platinum Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[12]:

> '… The process also assists the parties to conceptually understand and appreciate the assumptions that informed their respective positions and which may have also informed their stances as they go into the negotiations process. Those assumptions may be misplaced and undermine the underlying interest insofar as the resolution of the dispute is concerned. The underlying interests which parties may fail to address may well be critical to both the resolution of the dispute …'

[29] But even this process of reality testing cannot include the commissioner becoming involved in discussing the evidence with the parties to the extent of the commissioner giving his or her views as to what the outcome would be if that evidence is presented in the arbitration proceedings. Further, the commissioner should especially refrain from giving his or her views on the possible evaluation or determination of that evidence. To illustrate the point in its simplest form – the commissioner should refrain from telling a party that it would win or lose, but the commissioner can explain to a party what consequences the party would face if it loses without saying whether this would happen.

[30] In *Kasipersad v Commission for Conciliation, Mediation and Arbitration and Others*[13] the Court dealt with a situation where an employee party was convinced to withdraw a dispute, because of advice dispensed by the commissioner as to the prospects of success of the employee's case. The Court said the following:[14]

---

[12] (2009) 30 ILJ 2396 (LC) at para 32.
[13] (2003) 24 ILJ 178 (LC).
[14] Id at paras 27 – 28.

LABOUR COURT

> '… Even if a commissioner is invited by a party to give advice, such an invitation should be resisted. A commissioner has to be even-handed in dealing with the parties. If she gives advice to one party, she would have to do likewise for the other party. That would create conflicts of interest for the commissioner. A commissioner who puts herself in such a situation would have great difficulty in acting with honesty, integrity and impartiality. Ethically, it is therefore untenable.
>
> Giving advice is also counterproductive to the objectives of conciliation. A party who is advised that she has a good case is unlikely to settle. One who is advised that he has a bad case is likely to capitulate, as happened in this case.'

In my view, this reasoning equally applies to the current matter. It is not appropriate for the second respondent to have expressed any sentiments to the applicant as to the prospects of success of its case, before arbitration even starts, and then continue with the arbitration and deciding the matter. By so conducting himself, the second respondent put himself in a position where his impartiality and integrity could clearly properly be called into question. Worse still, and when the applicant did call it into question, by asking for recusal of the second respondent, the applicant was in effect admonished by the second respondent who prevented the applicant from even properly raising its concerns.

[31] Similarly, and in *Anglo Platinum*[15] the Court held:

> 'There seem to be general consensus that a conciliating commissioner acts improperly when he or she gives direct advice on the merits of the subject-matter to the parties …'

[32] In the end, and as said in *NUMSA and Others v Cementation Africa Contracts (Pty) Ltd*[16]:

---

[15] (*supra*) at para 34.
[16] (1998) 19 ILJ 1208 (LC) at para 23.

LABOUR COURT

> 'While a commissioner may not advise the parties on the merits or compel parties to adopt any particular view, he or she may indicate to the parties making the claims or demands the possible weaknesses in their claims or demands.'

[33] All the above authorities relate to conciliation proceedings as a standalone process. However, and in the case of con/arb proceedings, there is an added dimension. This dimension is that the very same commissioner conducting the conciliation then immediately proceeds to conduct the arbitration if conciliation fails. This added dimension calls for even more caution to be exercised by the commissioner when engaging the parties with the view to procure a settlement. In the case of conciliation only, and when settlement fails, the matter will proceed to arbitration only on a later date, and inevitably before another commissioner. This would in effect, in general terms, mostly negate and neutralize undue involvement by commissioner in conciliation proceedings and possible negative consequences of the same. But in the case of con/arb, there is no such process based intervention. Matters all happen on the case day before the same commissioner.

[34] I venture to say that in the case of con/arb proceedings, the commissioner's involvement in discussing the merits of the matter in conciliation should be as minimal as possible. Especially, the commissioner cannot be seen to express any view as to whether any one of the respective parties' case has merit or not. The commissioner should not dispense any advice to the parties as to their respective cases. The conciliation proceedings are fresh in the mind of the parties when arbitration proceeds immediately following conciliation, and the perception of impartiality would be strong in the mind of a party where a commissioner became unduly involved in the merits in conciliation and expressed views on that party's prospects of success immediately before that same commissioner presiding over the arbitration. The current matter is a clear case in point where it comes to this problem.

[35] If a commissioner in the case of con/arb, based on that commissioner's skill and expertise, believes that a settlement may be readily achievable if that commissioner becomes more actively involved, so to speak, in the conciliation, then so be it, and the commissioner should not shy away from this. The

LABOUR COURT

commissioner should be free to do what any other conciliating commissioner may lawfully and reasonably do, to try and facilitate a settlement. But if this belief of a settlement being achievable is not realised, and the matter is not resolved, that commissioner should then rather recuse himself or herself from later arbitration and simply postpone the matter to be set down before another arbitrator. Expedition is not the be all and end all of all CCMA dispute resolution process, especially if settlement is viable and given a proper chance to succeed with the appropriate intervention. I am concerned that expedition is often over emphasized in CCMA dispute resolution processes to the expense of all else.

[36] In simple terms, a commissioner in the case of con/arb proceedings is faced with one of two possible choices where it comes to the conciliation component of con/arb. The first choice is that of minimal involvement in the conciliation process, and if the parties more or less conciliating on their own do not want to settle, then the commissioner conducts the arbitration. The second choice is for the commissioner to actively engage with the parties in the settlement discussions, to the extent permitted by law, and which process would include applying reality testing as set out above. However, and if settlement discussions do not succeed, then the commissioner should rather postpone the matter to be heard by another arbitrator. In my view, any skilled and experienced commissioner, after simply asking each party for a short summary of its case first, should be in a position to decide which of the two choices would be the most appropriate one.

[37] In the current matter, the second respondent became involved in the conciliation part of the process in excess of what would be considered to be proper to still allow him to conduct the arbitration, without a perception of impartiality. But, and even more importantly, as has been discussed above, the second respondent dispensed advice to the applicant and told the applicant what he considered the applicant's prospects to be (being that the applicant would lose). This is simply not appropriate, entirely irregular behaviour, and constitutes misconduct on the part of the second respondent.

[38] The second respondent had the opportunity to remedy the situation, when confronted with the recusal application. This should have made it clear to him

LABOUR COURT

that the applicant was concerned with the manner in which the second respondent involved himself in the conciliation proceedings. Purely from a perspective of conducting himself ethically and responsibly, the second respondent should have recused himself, once this concern was raised. But instead, he placed the requirement of expeditious dispute resolution above all else, to the extent of even not allowing the applicant to properly raise the concern. I am satisfied that this constitutes misconduct by the second respondent in conducting the arbitration proceedings, and this vitiates the entire proceedings rendering it a nullity. In *Sasol Infrachem v Sefafe and Others*[17] the Court said:

> 'To summarise, in cases where it was held that the presiding officer ought to have recused himself or herself at the outset, but failed to do so, the entire proceedings before the arbitrator or presiding officer are a nullity. …'

[39] The Labour Court has a duty to supervise this kind of conduct by CCMA commissioner. In *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman No and Others*[18] the Court said:

> '… In my view, … the arbitration proceedings must be lawful, reasonable and procedurally fair, and that the Labour Court, in exercising its powers in terms of s 145 of the LRA, is duty bound to supervise the CCMA and the exercise of its arbitration functions, so as to ensure that this happens and this is indeed the case.'

[40] In *Pep Stores (Pty) Ltd v Laka NO and Others*[19] it held as follows:

> '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.

LABOUR COURT

[17] (2015) 36 ILJ 655 (LAC) at para 54.
[18] (2013) 34 ILJ 2347 (LC) at para 37. The judgment was referred to with approval in *Satani v Department of Education, Western Cape and Others* (2016) 37 ILJ 2298 (LAC) at paras 21 – 22. See also *Deutsch v Pinto and Another* (1997) 18 ILJ 1008 (LC) at 1011 and 1018; *Van Rooy v Nedcor Bank Ltd* (1998) 19 ILJ 1258 (LC) at para 17.
[19] (1998) 19 ILJ 1534 (LC) at para 23.

[41] In terms of this supervisory duty of the Labour Court over the arbitration functions of the CCMA, it is important that irregular practices of CCMA commissioner be highlighted, with the view that the CCMA can adopt policy measures to remedy or discourage the same. In my view, and as the facts of this case illustrates, what could happen in con/arb proceedings would be one these kind of unacceptable practices. It must be ensured that arbitration proceedings conducted under the auspices of the CCMA are not only actually lawful, reasonable and procedurally fair, but must be seen to be so. As said in *Sasol Infrachem*[20]:

> '… The hearing must not only be fair, but must also be seen to be fair. Anything less than that would not suffice. The remedy employed must cure the irregularity; it must restore the right. Generally, nothing less than a complete rehearing would be required. The hearing must not only be fair, but must also be seen to be fair. Anything less than that would not suffice. The remedy employed must cure the irregularity; it must restore the right. Generally, nothing less than a complete rehearing would be required.'

[42] Overall, it is my conclusion that the events that occurred during the conciliation part of the con/arb proceedings in this matter, and in particular the manner in which the second respondent became involved in the conciliation and the views he expressed, deprived the applicant of a lawful, reasonable and procedurally fair hearing in the arbitration that followed. The situation was exacerbated by the manner in which the second respondent virtually arbitrarily disposed of the concerns raised by the applicant in the form of a recusal application, and then recording in his award that the arbitration proceeded by agreement, which was never the case. This all constitutes misconduct by the second respondent as arbitrator as contemplated by Section 145(2)(a)(i) of the LRA. The effect of this is that the arbitration award itself is vitiated and falls to be set aside.

[43] Based on my findings as set out above, I do not consider it necessary to consider any of the other review grounds as raised by the applicant, as the consequence of these findings, as stated, is to vitiate the entire arbitration proceedings and with it the arbitration award.

[20] (*supra*) at para 54. See also para 62 of the judgment.

LABOUR COURT

[44] The final question to determine is what to do next, with the arbitration award of the second respondent having been reviewed and set aside. The simple reality is that the applicant did not receive a fair hearing. It was the conduct of the second respondent that gave rise to such situation. As a result, it would be inappropriate and unwarranted to substitute the award of the second respondent with an award that I would consider to be appropriate, and the matter needs to be conducted again in the CCMA, *de novo*, before another commissioner.[21] I shall therefore remit this matter to the CCMA for arbitration *de novo* before another commissioner.

[45] This matter was unopposed, and accordingly no issue of costs arises.

Order

[46] In the circumstances, I accordingly grant the following order.

1. The applicant's review application is granted.

2. The arbitration award of the second respondent dated 16 August 2012 and issued under case number MP 3389 – 12 is reviewed and set aside.

3. The dispute is remitted back to the first respondent for arbitration de novo, on the merits thereof, before an arbitrator other than the second respondent.

4. There is no order as to costs.

____

S Snyman

Acting Judge of the Labour Court

[21] See *ZA One* (*supra*) at para 81.

LABOUR COURT

Appearances:

For the Applicant:	Mr D Berry of Guardian Employers' Organization
For the Third Respondent:	No appearance

LABOUR COURT