



REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 1060/10

In the matter between:

**NATIONAL UNION OF METAL WORKERS OF
SOUTH AFRICA**

First Applicant

LUCKY MHLUNGU

Second Applicant

and

ALEC WAINWRIGHT N.O.

First Respondent

**METAL AND ENGINEERING INDUSTRIES
BARGAINING COUNCIL**

Second Respondent

AUTOMATIC MASS PRODUCTION (PTY) LTD

Third Respondent

Heard: 19 December 2014

Delivered: 24 February 2015

Summary: (Review Application - whether commissioner committed misconduct or gross irregularities in arbitration proceedings - denial of right to representation and right to interpreter - denial of the right to an unbiased and

fair hearing)

JUDGMENT

VENTER, AJ

Introduction

- [1] The application is to review and set aside an arbitration award made by the first respondent in his capacity as a commissioner of the second respondent, a bargaining council accredited by the Commission for Conciliation, Mediation and Arbitration ("the CCMA") in terms of section 127 of the Labour Relations Act, 66 of 1995¹ ("the LRA"). In terms of the award the first respondent held that the dismissal of the second applicant ("Mhlungu") was fair. The application has been brought in terms of section 145 of the LRA.
- [2] There is also an application to dismiss the review application on the ground of the lengthy delay in the filing of the record. The third respondent did not pursue the application to dismiss and I will accordingly consider the review application only.

Background facts

- [3] Two disputes were referred to the second respondent, one being an unfair labour practice dispute and the other an unfair dismissal dispute. The two disputes were consolidated in terms of a ruling of commissioner, Mr B J Van Niekerk dated 3 June 2009 ("the Consolidated Dispute").
- [4] The Consolidated Dispute was set down for hearing before a commissioner other than the second respondent on 25 August 2009. The arbitration proceedings were, on the request of the third respondent and thereafter by agreement suspended and an attempt was made to resolve the Consolidated

¹ Act 66 of 1995, as amended.

Dispute through conciliation. These attempts failed and the arbitration of the Consolidated Dispute was postponed.

- [5] The Consolidated Dispute was thereafter set down before the first respondent on 1 December 2009. The arbitration proceedings were again suspended initially on the request of the third respondent and thereafter by agreement (reluctantly from the applicants' side) to attempt settlement which was unsuccessful. The first respondent decided on his own in absence of an application for a postponement by either the applicants or the third respondent not to continue with the arbitration proceedings on the same day and postponed the arbitration to 19 January 2010. The first respondent directed the applicants and the third respondent to attempt to settle the Consolidated Dispute outside of the arbitration process.
- [6] Due to a miscommunication between the first and second respondents, the arbitration did not proceed on 19 January 2010 and was set down on 6 April 2010 at 8h30.
- [7] On 6 April 2010, Mhlungu's representative from the first applicant, Tshabalala's car broke down on the N3 motorway on his way to the arbitration and at 7h50 that morning, he attempted to call the second respondent but no one answered. He thereafter informed Mhlungu of his predicament.
- [8] At 8h10 Tshabalala phoned the second respondent and informed the receptionist, Monica Taylor ("Taylor") that his car had broken down and that he was arranging alternative transport to attend at the arbitration proceedings. He requested Taylor to inform the first respondent of his problem.
- [9] At 8h30 he informed Mhlungu that he was still arranging alternative transport.
- [10] At 8h50 he again contacted Taylor and asked to speak directly to the first respondent as he wanted to personally convey the reason for the delay to the first respondent.

- [11] Taylor placed Tshabalala on hold and after a while returned and informed Tshabalala that the first respondent refused to take the call as he was 'not there for phone calls but only for arbitrations'.
- [12] Tshabalala contacted Mhlungu directly thereafter who informed him that the first respondent ignored his appeals not to continue the proceedings in the absence of his representative and insisted that the arbitration would continue.
- [13] Tshabalala arrived at the second respondent's offices at approximately 9h45 and entered the hearing room. The first respondent ignored him and concluded the process.
- [14] Jacob Xilongo ("Xilongo") of the first applicant personally advised the first respondent on two occasions of Tshabalala's predicament. On the second occasion which was at approximately 8h43 the first respondent told Xilongo that if Tshabalala did not arrive in seven minutes time he would continue the arbitration.
- [15] Xilongo also approached Taylor who told Xilongo that the first respondent was aware of Tshabalala's predicament and had refused to speak to Tshabalala.
- [16] The facts set out in paragraphs 4 to 8 above are common cause on the affidavits filed.
- [17] The facts in paragraphs 9 to 15 above were denied by the third respondent. One reason for the denial was that the allegations were hearsay in absence of confirmatory affidavits by Xilongo, Mhlungu and Taylor.
- [18] I do not understand why the third respondent raised this issue as confirmatory affidavits of both Xilongo and Mhlungu were filed together with the founding affidavit of Tshabalala.²
- [19] Another reason for the denial is that the facts were not supported by the transcribed record. In my view most of the facts save for Tshabalala entering the arbitration proceedings are supported by the transcribed record.

² Pages 29 to 32 of pleadings.

Grounds for review

- [20] The applicant's grounds of review set out in the founding affidavit are that the first respondent committed gross irregularities in the conduct of the arbitration proceedings and committed gross misconduct in *inter alia* proceeding with the arbitration proceedings in the absence of Mhlungu's representative and in coming to a finding in absence of Mhlungu's version. The applicants list their complaints against the first respondent's conduct in the founding affidavit which I will not repeat here.
- [21] In the supplementary affidavit the applicants submit, in addition to the grounds of review in the founding affidavit, that the motive for the first respondent's conduct was that he had another matter scheduled that same day and had to conclude the arbitration proceedings before this other matter was to be heard.
- [22] In opposing the application the third respondent denies that the first respondent committed a reviewable irregularity and submits that it is clear from the transcript that Mhlungu was given an opportunity to state his case and to have an interpreter assist him. The third respondent further submits that the *audi alteram partem* rule was complied with, however, Mhlungu refused to participate and in doing so waived his right to be heard and must live with this stubborn decision in refusing to participate.
- [23] Mr Lengane who appeared on behalf of the applicants argued that the first respondent in conducting himself as he did denied Mhlungu his fundamental right to representation and by doing so denied Mhlungu a fair hearing. Mr Lengane further argued that the first respondent also did not deal with the issues before him and that his award is bereft of reasons.
- [24] Ms Mthembu who appeared on behalf of the third respondent submitted that there were two main grounds of review, namely that the first respondent refused a postponement and came to a finding without listening to Mhlungu's version.
- [25] In respect of the first ground of review Ms Mthembu argued that the record clearly shows that the first respondent waited 35 minutes, he considered

whether to postpone the arbitration and decided against a postponement. In exercising his discretion he took all facts into account including the fact that the arbitration had already been postponed 3 times and refused the postponement. The Third Respondent submits that the refusal of the postponement was reasonable. Ms Mthembu further argued that Mhlungu was given an opportunity to state his case, however, he refused to participate in the hearing and thus waived his right to be heard.

The relevant test for review

[26] The applicants' grounds of review are that the first respondent committed misconduct in relation to his duties as an arbitrator and committed gross irregularities in the conduct of the arbitration proceedings. These two grounds are contained in sections 145(2)(a)(i) and 145(2)(a)(ii) of the LRA.

[27] In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*³, the Labour Appeal Court considered the review test as enunciated by the Constitutional Court in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*⁴ and held that:

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

[28] The grounds of review in section 145(2) have not been replaced by the Constitutional Court's review test and are still relevant.⁵ The reasonableness or not of the outcome is not relevant in circumstances where the grounds of

³ (2008) 29 ILJ 964 (LAC) at para 101..

⁴ (2007) 28 ILJ 2405 (CC).

⁵ See *National Commissioner of the SA Police Service v Myers and Others* (2012) 33 ILJ 1417 (LAC).

review relate to the conduct of the commissioner during the arbitration proceedings. If it is established that the commissioner misconducted himself or committed a gross irregularity in the conduct of the arbitration proceedings, the award cannot stand regardless of the outcome.

[29] The test to be applied in cases where the grounds of review are misconduct or gross irregularities by the commissioner in the conduct of the proceedings is to determine whether the misconduct or gross irregularity had the effect of depriving the applicant of a fair hearing.

[30] This Court held in *Naraindath v Commission for Conciliation, Mediation and Arbitration and Others*⁶ that:

'In my view it is perfectly clear in these circumstances that a complaint that a commissioner has conducted proceedings in a way which differs from the way in which the same dispute would be dealt with before a court of law cannot as such succeed. It is only where the person seeking to challenge the commissioner's award can point to specific unfairness arising from that action by the commissioner that a proper ground for review is established. A failure to conduct arbitration proceedings in a fair manner, where that has the effect that one of the parties does not receive a fair hearing of their case, will almost inevitably mean either that the commissioner has committed misconduct in relation to his or her duties as an arbitrator or that the commissioner has committed a gross irregularity in the conduct of the arbitration proceedings. (See sections 145(2)(a)(i) and (ii) of the LRA; McKenzie, *The Law of building and Engineering Contracts and Arbitration*, 5th ed. at 188-9).'

[31] The test of review I will accordingly apply will be to first determine whether or not the first respondent committed misconduct in relation to his duties as a commissioner and/or committed a gross irregularity in the conduct of the arbitration proceedings. If I find that the first respondent did misconduct himself or committed a gross irregularity, I will then determine whether such

⁶ (2000) 21 ILJ 1151 (LC) at para 27.

misconduct or gross irregularity had the result of denying Mhlungu a fair hearing.⁷

Conduct expected of commissioners

- [32] Before considering the question of whether or not the first respondent committed gross irregularities in the conduct of the proceedings and/or committed misconduct, I will consider the standards of behaviour, values and ethics which are expected of commissioners of the CCMA and bargaining councils. As it is a requirement for bargaining councils and the commissioners who conduct dispute resolution processes at the bargaining councils to be accredited by the CCMA, I am of the view that the CCMA's Mission and Vision Statement and Code of Conduct for Commissioners ("the Code") are applicable not only to the commissioners of the CCMA but all commissioners exercising their functions as such in the CCMA and bargaining councils.
- [33] In terms of section 138(1) of the LRA, a commissioner may conduct the arbitration in a manner the commissioner considers appropriate in order to determine the dispute fairly and quickly. The requirements of fairness and expedition must be balanced so as not to infringe or deprive any party of their rights, the right to a fair hearing being paramount.
- [34] In *Country Fair Foods (Pty) Ltd v Theron NO and Others*⁸, this Court held that section 138(1) does not give commissioners the power to depart from the principles of natural justice.
- [35] One of the fundamental rules of natural justice is that parties are to be given a fair hearing during which the parties are given an opportunity to present their cases to the arbitrator. The parties are entitled to a fair and unbiased hearing.
- [36] Commissioners are expected in exercising their functions in terms of section 138(1) of the LRA to uphold and promote the CCMA's Vision and Mission Statement.

⁷ See *Bauer Research CC v Commission for Conciliation, Mediation and Arbitration and Others* (2014) 35 *ILJ* 1528 (LC).

⁸ (2000) 21 *ILJ* 2649 (LC) at para 8.

[37] The CCMA's Mission states that:

'The purpose of the CCMA is to promote social justice and economic development in the world of work and to be the best dispute management and dispute resolution organisation trusted by our social partners.'

[38] The principle of social justice is a constitutional imperative⁹ and features prominently in International Employment Law.

[39] The Preamble to the Constitution of the International Labour Organisation ("the ILO") provides that:

'Whereas universal and lasting peace can be established only if it is based upon social justice.'

[40] On 10 June 2008, the ILO unanimously adopted the ILO Declaration on Social Justice for a Fair Globalisation. This declaration is a powerful affirmation of the ILO's values and seeks to promote and achieve social justice through the Decent Work Agenda.

[41] The LRA and Basic Conditions of Employment Act ("the BCEA")¹⁰ both have as their purpose the advancement of economic development and social justice.¹¹

[42] Social justice is based on treating all people equally with dignity and respect, the advancement of human rights and access to opportunities and justice for all regardless of social or economic status.

⁹ The Preamble to Constitution of the Republic of South Africa provides that: "We, the people of South Africa, Recognise the injustices of our past; Honour those who suffered for justice and freedom in our land; Respect those who have worked to build and develop our country; and Believe that South Africa belongs to all who live in it, united in our diversity. We therefore, through our freely elected representatives, adopt this Constitution as the supreme law of the Republic so as to Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights; Lay the foundations for a democratic and open society in which government is based on the will of the people and every citizen is equally protected by law; Improve the quality of life of all citizens and free the potential of each person; and Build a united and democratic South Africa able to take its rightful place as a sovereign state in the family of nations. May God protect our people. Nkosi Sikelel' iAfrika. Morena boloka setjhaba sa heso. God seën Suid-Afrika. God bless South Africa. Mudzimu fhatutshedza Afurika. Hosi katekisa Afrika."

¹⁰ Act 75 of 1997, as amended.

¹¹ See Section 1 of the LRA and Section 2 of the BCEA.

[43] In the South African context, the concept of social justice is best described by the term "*ubuntu*".

[44] In *S v Makwanyane*¹² the Honourable Court Justice Mokgoro described "*ubuntu*" as follows:

'Generally, *ubuntu* translates as *humaneness*. In its most fundamental sense, it translates as *personhood* and *morality*. Metaphorically, it expresses itself in *umuntu ngumuntu ngabantu*, describing the significance of group solidarity on survival issues so central to the survival of communities. While it envelops the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality. Its spirit emphasises respect for human dignity, marking a shift from confrontation to conciliation. In South Africa *ubuntu* has become a notion with particular resonance in the building of a democracy. It is part of our rainbow heritage, though it might have operated and still operates differently in diverse community settings. In the Western cultural heritage, respect and the value for life, manifested in the all-embracing concepts of *humanity* and *menswaardigheid* are also highly prized. It is values like these that Section 35 requires to be promoted. They give meaning and texture to the principles of a society based on freedom and equality.'

[45] Social justice is central to the CCMA's strategic goals. The CCMA's Siyaphambili "*Moving Forward*" Strategy 2010 - 2015, which sets out the road map within which the CCMA will execute its mandate over the period 2010 to 2015, has as one of its strategic objectives the delivery of excellent service rooted in social justice. One of the key performance areas of this objective is the removal of social justice blockages in the CCMA and dispute resolution processes.

[46] In the context of the CCMA and bargaining councils social justice is achieved by treating all the users equally with dignity and respect and being accessible to the public in a language of choice and in a non-intimidating environment.

¹² 1995 (3) SA 391 (CC) at para 308, 1995 (6) BCLR 665 (CC), 1995 (2) SACR 1 (CC).

- [47] In promoting social justice, commissioners should respect diversity, treat the employee and employer parties appearing before them equally and with respect and dignity, should make them feel welcome, comfortable and not intimidated, conduct themselves with integrity and impartiality, never appear irritated or impatient with a party and to assist the parties in the process where necessary, particularly where a party is unrepresented. A commissioner should conduct him/herself in an even handed, objective, courteous and fair manner and should avoid the display of favouritism or bias by either his words or his conduct.
- [48] In addition to promoting social justice, when exercising their powers and functions in terms of section 138(1) of the LRA, commissioners of the CCMA and bargaining councils are expected to exhibit certain values and ethics and are expected to conduct not only the arbitration proceedings but also themselves with a high level of integrity.
- [49] In *Kasipersad v CCMA and Others*¹³, the Honourable Justice Pillay set out some of the attributes of a commissioner to be honesty, integrity, trust, fairness, impartiality, general reliability, patience, persistence, self-controlled, dignified, respectful, intelligent and sympathetic.
- [50] A commissioner is also expected to uphold and promote the CCMA's values as set out in its Vision and Mission Statement being integrity, diversity, transparency, excellence, accountability and respect.
- [51] The CCMA's Vision and Mission statement describes these values as follows:
- 'Integrity: We are honest and ethical in everything that we do. We deliver on our commitments. We are accountable and responsible for our performance.
- Diversity:** We are a team of highly qualified individuals that is representative, at all levels, of our country's diversity. Transparency: We work in a manner that is open and transparent, guided by our statutory obligations and commitment. Excellence: We are committed to excellence. We continuously strive to deliver quality work. We always seek to improve our processes,

¹³ (2003) 2 BLLR 187 (LC) at para 27.

products and services to better serve the citizens of South Africa. Accountability: We constantly measure ourselves against our commitments and we hold ourselves responsible for our actions and the outcomes of our work. We are committed to each other and all we do. Respect: We value differences in people and ideas and we treat others with fairness, dignity and respect. We foster a culture of trust, respect, teamwork, communication, creativity, equal opportunity, and empowerment.'

- [52] The purpose of the Code is to assist commissioners in maintaining the good repute of the CCMA and to provide guidance on matters of professional conduct and practice generally.
- [53] The Code sets out general attributes expected of commissioners such as honesty, impartiality and due diligence. In terms of the Code commissioners must conduct themselves in a manner that is fair to all parties and to conduct proceedings in a fair, diligent and even handed manner and to be patient and courteous to the parties and their witnesses.
- [54] By conducting themselves and the arbitration proceedings in the manner set out above in accordance with the Code and the CCMA's Vision and Mission Statement, commissioners will promote social justice and as ambassadors of the CCMA assist the CCMA in achieving its Vision and Mission Statement and strategic goals.
- [55] Commissioners should conduct the proceedings and themselves bearing in mind at all times that their conduct is on record and could be scrutinized by this Court in exercising its supervisory role over the functions of the CCMA and bargaining councils should one of the parties allege in a review application that he/she has committed misconduct or a gross irregularity.
- [56] As regards this Court's supervisory function over the CCMA and bargaining councils, this Court in *Pep Stores (Pty) Ltd v Laka NO and Others*¹⁴ held as follows:

¹⁴ (1998) 19 *ILJ* 1534 (LC) at paras 23 to 25.

'As found in a number of decisions of this court, this court has a supervisory function over the commission. As part of this function, this court should point out flaws in the commission for rectification. A part of this supervisory function is to protect the commission from abuse and practices that could earn it disrespect and ridicule.

It is in the interest if this court to see the role played by the commission in dispute resolution achieves the legislatives. 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.'

[57] In *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman NO and Others*¹⁵ the Honourable Court Justice Snyman AJ held as follows:

'The Labour Court fulfils this supervisory function irrespective of what the applicant party in the review application may raise as grounds of review. However, and to ensure that the policy consideration that the Labour Court should be mindful not to over-supervise the CCMA, as said in the judgment in *Pep Stores*, is not negated, the labour Court should only intervene in terms of its general supervisory functions if it is apparent from the record before the court that one of the specific grounds as listed in a 145(2)(a) of the LRA actually exists, as the existence of any one of these three specific considerations must surely be entirely incompatible with any arbitration proceedings that would be considered to be lawful, reasonable and procedurally fair. As was said in *National Commissioners of the SA Police Service v Myers & others*: 'It should be noted, however, that the standard or review as formulated by the Constitutional Court in *Sidumo* does not replace

¹⁵ (2013) 34 *ILJ* 2347 (LC) at para 38.

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.' The very reason for intervention by the Labour Court therefore would be to achieve the objectives of the judgment in *Pep Stores*, as quoted above, with which I respectfully agree, where one or all of the grounds of review in s 145(2) are found to exist.'

Did the first respondent misconduct himself?

[58] Having set out the conduct which is expected of commissioners above, I will now determine whether the first respondent misconducted himself or committed gross irregularities in the arbitration proceedings.

[59] In *Country Fair Foods (Pty) Ltd v Theron and Others*¹⁶, the Honourable Justice Stelzner AJ held that:

'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 & 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 & 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 causa*). (See *Baxter* (supra) at 536.)'

[60] It is common cause that Tshabalala's car broke down on the N3 motorway on the way to the arbitration proceedings on 6 April 2010.¹⁷

¹⁶ Supra at para 7.

- [61] As the events which transpired thereafter are disputed, I will consider the question of whether the first respondent committed misconduct or gross irregularities in the conduct of the arbitration proceedings by reference to the transcript.
- [62] The transcript speaks for itself and I will quote from the transcript extensively.
- [63] The arbitration award paints a very different picture to the transcript. In the award Mhlungu is made out to be someone who was obstructive, who refused to answer questions, was proficient in English, ill-considered and "obdurate" and whose request for an interpreter was insincere. The first respondent records in the award that he warned Mhlungu about the serious consequences of refusing to participate in his own defence. The first respondent further states that Mhlungu should not have waited for a "very advanced stage of the proceedings" to request an interpreter and whilst 'English may not be his first language the applicant was certainly proficient in English'. The First respondent further concludes that the third respondent would suffer financial and other prejudice if the matter were to have been postponed yet again.
- [64] It appears from the record that the arbitration was scheduled for 08h30 and the first respondent waited 35 minutes and then decided to commence the arbitration proceedings in the absence of Mhlungu's representative.
- [65] It further appears that the first respondent did not welcome the parties, did not give the parties the opportunity to introduce themselves, did not explain the process that would be followed, did not ascertain whether Mhlungu, who as a result of his refusal to adjourn was unrepresented, would require an interpreter, did not give the parties an opportunity to submit opening statements, did not attempt to narrow the issues in dispute and did not explain the different phases of evidence, the importance of cross examination and testing of versions.

¹⁷ Para 9.9 of founding affidavit and para 11 of answering affidavit.

[66] The first respondent was in such a rush to commence the proceedings he almost administered the oath to the wrong person, the third respondent's representative.

'Commissioner: Okay do you have any objection to taking the oath?

Respondent's representative: It's not myself who's going to testify but the company witness sitting next to me.¹⁸

[67] The third respondent's witness, Peter Hayer ("Hayer") was sworn in and only asked two questions when the arbitration proceedings were interrupted.

'Lady:....(Inaudible).

Commissioner: Yes.

Lady: I've got representative.

Commissioner: The arbitration was due to start at 8.30 it's now 9:08 the arbitration has started. I'm proceeding.

Lady: ...(Inaudible)

Commissioner: He can come in but he is coming in late.

Lady: No he's on the phone.

Commissioner: Oh he's on the phone well what am I supposed to do I'm holding the arbitration must I go to the phone? I'm taking a sworn statement on the tape recorder I'm not going to the phone and that I've placed on record.¹⁹

[68] Without any further hesitation, the first respondent continued with the arbitration proceedings and the examination in chief of Hayer.

[69] A few questions later the first respondent interrupts Hayer's examination in chief to make a suggestion:

¹⁸ Page 51 of the transcript.

¹⁹ Page 52 of the transcript.

'Commissioner: Can I make a suggestion?

Respondent's representative: Okay.

Commissioner: This is a dismissal related to misconduct I have another arbitration afterwards. I don't want to cut your case short but the point that you need make here is that his job was to check and record faults and if you allege that he didn't record the faults then say so.

Mr Peter Hayer: Okay.

Respondent's representative: Ja.... (rest inaudible)

Commissioner: Because I had unfortunately this matter has started late it is now 9:11 I've got another arbitration I don't want to prejudice your case but I suggest we could hasten the process without justice being compromised.

Respondent's representative: Hundred percent.

Commissioner: Only because I have another arbitration immediately hereafter I didn't schedule the next arbitration so close to the first one.²⁰

[70] A little while after this initial interruption and as the third respondent's representative was not moving at the pace he wanted the first respondent again interrupts the examination in chief of Hayer to make another suggestion.

'Commissioner: Can I make a suggestion?

Respondent's representative: Ja.

Commissioner: You know a lot of unions try and present a case by leading a witness to give evidence and it's a very laborious process for someone like myself as the arbitrator to try and work out where you're going I think what you need to do is to make an opening statement where you set out this matter relates to obviously in this instance a refusal to carry out instructions there were disciplinary enquiries or whatever it is in other words give me a paragraph that I can, a summation of this matter so that I can understand where we're going because it's becoming a very laborious process and trying

²⁰ Pages 53 and 54 of the transcript.

to follow it and it's very difficult, can you not make an opening statement where you...(inaudible) and concisely?²¹

[71] The third respondent's representative then during the evidence in chief of Hayer which had been interrupted now for the second time makes an opening statement on the suggestion of the first respondent.²² Hayer thereafter finishes his examination in chief.

[72] Instead of assisting and explaining the next step of cross examination to Mhlungu, the first respondent attempts to narrow the issues and directs a question to Mhlungu who then pleads with the first respondent not to continue until his representative has arrived.²³

[73] The transcript clearly shows the first respondent's agitation and irritation with Mhlungu and I will accordingly quote the exchange that followed between Mhlungu and the first respondent.

'Commissioner: So let me just get some factors that are common cause here, Mr. Mhlungu when did you start work there?

Applicant: Mr. Commissioner before I answer your question ... (interrupted).

Commissioner: Mr. Mhlungu when did you start work at the company please answer my question?

Applicant: Mr. Commissioner before I answer your question I'm asking you ... (interrupted).

Commissioner: Mr. Mhlungu please answer my question when did you start working at the company please answer my question?

Applicant: I'm requesting Mr. Commissioner ... (interrupted).

Commissioner: Right ... (rest inaudible).

Applicant: ... (inaudible).

²¹ Page 58 of the transcript.

²² Pages 59 - 62 of the transcript.

²³ Page 67 of the transcript

Commissioner: Company when did he start working at the ... (inaudible).

Applicant: This case is ... (rest inaudible)... (interrupted).

Respondent representative: ...(inaudible).

Mr Peter Hayer: ... (inaudible) because without my representative(rest inaudible).

Commissioner: So Mr. Mhlungu?

Applicant: My representative phone to the reception before and then you never and then also request you and appeal to you to not continue with this case because my representative has phoned to the reception to say that there is a problem in the traffic and then you said you'll continue with the case and then you didn't even give me the chance to explain, if then my representative phoned you and you never went to the phone to understand or to hear what my representative ...(rest inaudible) so my appeal is to say I'm sorry I can't even answer your question because I don't even understand English properly and you never gave me the chance and then you never gave me the chance to explain and then instead you continued and to the register I never signed because before we start I tried to explain to you and you never gave me a chance and it seems as if you are harsh to me and then that's why I'm here but even the case is proceeding I don't even understand what they're saying but you continue with the case.

Commissioner: Right I ... (interrupted).

Applicant: So ... (rest inaudible).

Commissioner: Can I answer you?

Applicant: That's why I say that so that we can put this in the record and then ... (rest inaudible) ... (interrupted).

Commissioner: ... (inaudible) it is in.

Applicant: ... (inaudible) and it would be in the union to challenge.

Commissioner: Fair enough.

Applicant: That's why ... (rest inaudible).

Commissioner: Let me place this to you Mr. Mhlungu the record here says the language here today in this arbitration is English you do understand a reasonable amount of English I asked you a simple question when did you start working at the company you refused to answer me. You have made the point that your union representative has a problem I quote you directly, "a problem with the traffic", this arbitration was due to start at 8:30 it is now 9:40 you union representative with his problem with the traffic which is a problem that all of us face every single one of us faces this problem but I got up at 4:30 to take an arbitration award to the CCMA this morning so that I would be here by 8 o'clock to read the file and prepare for this matter. It is now 9:40 your union still has not been here your file is redolent with postponements and postponement and postponements the Bargaining Council simply cannot keep postponing because your union official is late in the traffic the matter must proceed and it must reach finality. Now I'm going to repeat thus yet again because I've said it to you before the tape recorder was on the company has to show that there was a fair dismissal they have to show that the dismissal was in terms of a fair procedure and it was for a fair reason. You have a chance to respond you have already indicated to me that you refuse to participate in your defence and if you refuse to participate in your defence then I only have one version to listen and that is the version of the union ... (presumably Commissioner meant the company) would you now like to give me your statement Mr. Mhlungu?

Applicant: Mr. Commissioner I'm repeating again I can't even respond as I'm saying you didn't give me even to say to you that I am requesting not to continue or not to proceed with this matter.

Commissioner: This matter is proceeding Mr. Mhlungu.²⁴

[74] At this point Mhlungu raises his right to an interpreter and again pleads with the first respondent not to continue in absence of his representative.

'Applicant: Because it's my right to get a representative and it's my right to get an interpreter.

²⁴ Pages 69 - 71 of the transcript.

Commissioner: Do you want an interpreter ... (rest inaudible) I hear you want an interpreter?

Applicant: You didn't give me the chance to explain that ... (rest inaudible) ... (interrupted).

Commissioner: ... (Inaudible) ... (Speaking simultaneously) ... (Rest inaudible) says that the language is in English do you want an interpreter?

Applicant: I want to put this on record.

Commissioner: What language do you want Mr Mhlungu what language do you want?

Applicant: My representative is not here.

Commissioner: I've already noted that.

Applicant: My representative ... (rest inaudible).

Commissioner: He's got a problem with the traffic I am not waiting for his problem with the traffic it is now 9:45 (Interrupted).

Applicant: You said (Rest inaudible) ... (Interrupted).

Commissioner: Do you want an interpreter what language do you want Mr Mhlungu what language do you want an interpreter for? Mr Mhlungu if you're not going to answer me I must proceed on the basis that you are not participating in your own defence.

Applicant: And then I explained why I don't ... (rest inaudible) ... (interrupted).

Commissioner: Don't you want an interpreter?

Applicant: It's my right to get the representative.

Commissioner: ... (Inaudible) ... (Interrupted).

Applicant: I am appealing to you ... (rest inaudible) before you start this.

Commissioner: But he has already not before I start it is already well into the proceeding the company has almost finished the presentation of its case I certainly hope so.

Applicant: So it's up to you?

Commissioner: It is up to me I'm telling you the matter was meant to start at 8:30 it is now 9:45 if your union has a problem with the traffic he can still walk in, he hasn't walked in now asking you to present your case, you tell me that I must not proceed because there was a problem with the traffic. Well I'm afraid that is not good enough the matter will proceed traffic or no traffic we all had to fight the traffic to get here, now I want to ask you for the final time do you or don't you want an interpreter? I record there is no response, secondly do you want to answer the question when did you start working at the company?

Applicant: Mr Commissioner I repeat again and to say that my appeal is to not continue with is to not proceed because there is no representative that's what I'm asking you.

Commissioner: Right ... (interrupted).

Applicant: (Inaudible).

Commissioner: Now my finding on that matter is that your representative was aware of this matter today you were aware that he was aware of it you were here, he was aware of it because he even says that he had a problem with the traffic the matter is proceeding, the matter is proceeding justice is not going to be denied because somebody has a problem with the traffic. You have a right to state your case this matter has been postponed the file is thick with postponements and more postponements, the matter proceeds. Would you like to state your case?

Applicant: Well Commissioner I'm saying I'm not willing to continue with this case without my (Rest inaudible).

Commissioner: Right you may please continue with (Rest inaudible). (Interrupted).

Applicant: Without my representative.

Commissioner: Okay well then your case I must advise you will stand or fall on the stance that you have I'm now giving you a final chance to state your version and to answer questions are you going to state your version or are you not? Right I get no response, could you summarise your closing statements if you're finished with your witness?²⁵

- [75] The third respondent's representative presented closing arguments and the arbitration proceedings were thereafter concluded.
- [76] It is clear from the transcript that the first respondent was aggravated by the fact that Tshabalala had a problem with his car and had not arrived on time. The first respondent was irritated and extremely impatient not only with Mhlungu but also the representative of the third respondent and Hayer. The first respondent was rude and abrasive. In my view the first respondent's conduct was unprofessional, unacceptable and disrespectful to both Mhlungu and the third respondent.
- [77] The first respondent not only failed in most if not all his duties as a commissioner arbitrating a dispute, but also simply ignored the overriding principles of social justice and fairness, the very principles which should drive the process and which should be the benchmark for the conduct expected of commissioners in their capacities as arbitrators.
- [78] The first respondent first and foremost failed to create a non-hostile, welcoming environment where Mhlungu, who was placed in a difficult position due to his representative being late, was made to feel comfortable. To the contrary the first respondent's agitation, irritation, abrasive manner and rudeness created a hostile and intimidating environment for Mhlungu.
- [79] The first respondent failed in establishing up front before proceeding with the process whether Mhlungu required an interpreter. The fact that Mhlungu required an interpreter only came to his knowledge when Mhlungu told him so late in the process and after Hayer had led his evidence. The request for an interpreter appeared to irritate the first respondent further. This failure by the

²⁵ Pages 71 to 74 of the transcript

first respondent was an infringement of Mhlungu's fundamental right to be assisted in a language of his choice and is in my view so serious that it alone renders the award reviewable. The fact that Mhlungu was "proficient in English" is in my view irrelevant as Mhlungu had the right to have the arbitration proceedings interpreted into a language of his choice. The first respondent in his award appears to have the view that the duty to request an interpreter was on Mhlungu. This can never be a duty on an unrepresented party. The first respondent who was in control of the proceedings had the duty to inform Mhlungu, an unrepresented party, of his right to an interpreter and should have done so before the arbitration proceedings commenced.

- [80] The first respondent failed to explain the process of arbitration to Mhlungu. I accept that the first respondent had no duty to explain the process to the third respondent's representative as she was familiar with the process being from an employers' organisation. He, however, had a duty to Mhlungu who was unrepresented, not by choice but by the first respondent's refusal to adjourn the proceedings beyond the 30 minutes grace period generally practiced by commissioners, to explain the process and provide guidance to Mhlungu. The first respondent failed dismally in this duty.
- [81] The first respondent thereafter failed in his duty to allow the parties to give opening statements and to narrow the issues in dispute before proceeding to listen to evidence. Had he done so, he would have realised that the dispute before him was not only an unfair dismissal dispute but in fact the Consolidated Dispute. This omission by the first respondent resulted in the first respondent not dealing with the real issues before him. The first respondent in his haste to conclude the arbitration failed to deal at all with the unfair labour practice dispute. This in my view is a gross irregularity which in itself renders the award reviewable. The first respondent failed to give Mhlungu any hearing on his unfair labour practice dispute.
- [82] Opening statements by parties and the narrowing of issues by commissioners prior to the commencement of the arbitration proceedings are not necessarily requirements of a fair hearing and a failure to do so will not necessarily render the award open to review. The purpose of opening statements and narrowing

of the issues is for the commissioner to grasp the nature of the dispute and the real issues before him which in turn places the commissioner in a position to shorten the proceedings by limiting the evidence to relevant issues.

[83] The first respondent attempted, at an inappropriate time in the arbitration proceedings during Hayer's evidence in chief and in an attempt to speed the process up, to elicit an opening statement out of the third respondent's representative. The first respondent ignores Mhlungu and does not afford him the same opportunity. The first respondent only after the third respondent had concluded its case, attempted to narrow issues all in his haste to conclude the arbitration in the quickest time possible. This is in my view gross irregularities in the conduct of the arbitration proceedings.

[84] The Honourable Justice Pillay in *Char Technology (Pty) Ltd v Peter Mnisi and Others*²⁶ had the following to say on the issue of a commissioner's duties in arbitration proceedings:

'Commissioners of the CCMA are instructed during their training to conduct arbitration proceedings. They are aware, therefore, that after they introduce themselves to the parties at an arbitration they should outline the process to them. The detail of the outline will depend on the level of experience of the parties. The commissioner should, therefore, ascertain the experience of the parties at the outset. In their training arbitrators are briefed to ensure that the parties are aware *inter alia* of the format of the proceedings and of their rights to call and cross-examine witnesses. The commissioners should also be make the parties aware of the consequences of their failure to do and ensure that they are aware of how documentary evidence should be dealt with. Lay people often assume that documents are automatically admissible as evidence of the truth of their contents. By making these introductory remarks, the commissioner absolves himself or herself from intervening or failing to intervene in the course of the arbitration to remind the parties of their obligations. If such intervention is made when the proceedings are under way it could lead to the commissioner being perceived as favouring one or other party.

²⁶ Case J1038/99 at paras 1-2.

If commissioners approach arbitrations by complying with these instructions of their training they cannot be faulted if, thereafter, a party fails to present its case properly. It is a matter of great concern to this court that some commissioners continue to disregard the instructions they receive during their training. Whilst it is acknowledged that many commissioners carry a heavy workload, the cost of not abiding by basic rules of arbitration are far greater to all concerned, including the CCMA, than the cost of taking sufficient care to do the job properly the first time round.'

[85] In *Solomon v CCMA and Others*²⁷ Stelzner AJ held that:

'Many if not most parties appeared before the CCMA on an unrepresented basis. In my view it is both necessary and desirable that CCMA commissioners make an effort with the parties to identify and narrow the issues in dispute...'

[86] This brings me to the first respondent's stubborn refusal to adjourn the arbitration beyond 35 minutes to give Mhlungu's representative whose car had broken down an opportunity to make alternative arrangements for transport to the offices of the second respondent.

[87] I disagree with Ms Mthembu that the first respondent considered the facts when exercising his discretion in refusing the postponement. There was no application for a postponement before him only a request by Mhlungu for a further indulgence beyond the 30 minutes and an adjournment in order for his representative whose car had broken down to get to the arbitration proceedings. It does not appear at all from the record that the first respondent actually considered and applied his mind to Mhlungu's request for an adjournment. In fact the contrary is apparent. The first respondent in a rush to conclude the arbitration was not willing and prepared to grant Mhlungu an audience.

[88] Commissioners are required to assist unrepresented and laypersons where it is apparent that such person needs assistance with one proviso that the

²⁷ (1999) JOL 5297 (LC) at para 18.

assistance or intervention by the commissioner should not lead to perception of bias or amount to advancing of the case of one of the parties.

[89] The first respondent in refusing the adjournment and by proceeding in the absence of Mhlungu's representative was obliged to assist Mhlungu with the procedural aspects of the arbitration proceedings.

[90] He failed in this duty and in fact intervened at inappropriate times during Hayer's examination in chief to make suggestions to the third respondent's representative on how to present her case, all in his attempt to shorten the proceedings. This intervention of the first respondent in my view created a perception of bias and favouritism towards the third respondent. The statement in the award that a further postponement would result in the third respondent suffering financial and other prejudice is in my view an indication of bias on his part. What about the prejudice Mhlungu would suffer should the arbitration proceed without his representative and in a language he does not fully understand. The first respondent did not consider these aspects at all, his only focus being the matter scheduled after the arbitration and the shortening of the proceedings.

[91] I agree with the applicants that the first respondent's motive for rushing was the fact that he had another matter scheduled and wanted to conclude the arbitration before this other matter. The first respondent appears to blame the second respondent for this scheduling and the reason why he has to shorten the proceedings, "cut" Hayer's evidence "short" and "hasten the process".

[92] A commissioner should never use the fact that another matter has been scheduled on the same day as an excuse to shorten proceedings. All the first respondent had to do was to inform case management that the arbitration was running and that he would not be able to deal with the other matter scheduled later that day. The second respondent would in these circumstances be required to allocate the other matter to another commissioner in order for the first respondent to conclude the arbitration in a fair manner to both parties.

[93] I do not agree with Ms Mthembu that Mhlungu in refusing to participate waived his right to be heard. Mhlungu's refusal to participate must be seen in the

context of the denial by the first respondent of Mhlungu's right to have his representative present and to have the proceedings interpreted into a language of his choice. These are two rights so fundamental to a fair hearing. The first respondent denied Mhlungu his right to be heard, before Mhlungu refused to participate.

[94] In order to be valid a waiver of a right must *inter alia* be clear and unequivocal and must be made freely and voluntarily. There is nothing in the record from which it can be concluded that Mhlungu had any intention to waive his rights to representation and an interpreter and did so freely and voluntarily.²⁸ The record in fact establishes the contrary and that is that the first respondent did not give Mhlungu the opportunity to exercise these rights. The mere fact that Mhlungu after being denied his right to his representative and an interpreter refuses to participate further in the proceedings cannot in my view constitute an unequivocal waiver of his right to be heard. To argue that Mhlungu waived his right to a fair hearing in these circumstances is unconvincing.

[95] The first respondent's conduct during the course of the arbitration proceedings denied Mhlungu a fair and unbiased hearing, which rendered the award reviewable. In the circumstances, I do not believe it necessary to consider the issue of whether the first respondent's finding that Mhlungu's dismissal was fair was a finding a reasonable decision maker would have arrived at on the evidence before him.

Conclusion

[96] For the reasons mentioned above, I am of the view that the first respondent committed gross irregularities in the conduct of the arbitration proceedings and committed misconduct which denied Mhlungu his right to a fair hearing.

[97] I see no reason why costs should not follow the successful party

[98] Accordingly I make the following order:

²⁸ See *Moyo v Execujet* (2012) 33 ILJ 429 (LC).

- 98.1 The arbitration award of the first respondent under case number MEGA 24159 dated 6 April 2010 is reviewed and set aside.
- 98.2 The Consolidated Dispute is remitted back to the second respondent for a hearing *de novo* before commissioner other than the first respondent.
- 98.3 The third respondent is ordered to pay the costs of this application.

Venter AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES

For Applicant: Advocate L Lengane

Instructed by: Phungo Incorporated

For Respondent: Advocate N Mthembu

Instructed by: Du Plessis de Villiers

LABOUR COURT