

SOUTH AFRICA / JUDGMENT

Minister of Correctional Services v Mashiya and Others (JR2740/13) [2023] ZALCJHB 86; (2023) 44 ILJ 1536 (LC) (22 March 2023)

[2023] ZALCJHB 86

COURT

Labour Court Johannesburg

BEFORE

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CASE / FILE NUMBER

JR2740/13

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THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Reportable

Case No: JR2740/13

In the matter between:

MINISTER
OF CORRECTIONAL SERVICES
Applicant
and
NKOSINJANI
WALTER MASHIYA
First
Respondent
MASHORO
JAMES MATLALA N.O.
Second
Respondent
GENERAL
PUBLIC SERVICE SECTORAL BARGAINING COUNCIL (“GPSSBC”)
Third
Respondent

Heard:

30 November 2022

Delivered:

22 March 2023

Summary:

Review application –
application based on misconduct by arbitrator – s 145(2)(a)
of LRA – principles considered – misconduct vitiates
proceedings – whether outcome reasonable not relevant
Recusal –
previous arbitrator mero motu recusing herself in course of
arbitration – arbitration proceedings incomplete – new
arbitrator continuing with proceedings
– consequences and
principles considered – de novo arbitration required and
essential for fair hearing – new arbitrator simply continuing
with arbitration proceedings constitutes
misconduct contemplated by s
145(2)(a)
Recusal – new
arbitrator recording agreement to proceed with arbitration – no
such agreement exists – agreement
to continue with arbitration
where proceedings incomplete and where complaints made against
previous arbitrator not competent in
any event – arbitrator
committed misconduct by proceeding with arbitration on this basis
Review application –
failure of new arbitrator to recommence arbitration proceedings de
novo constitutes misconduct – nature of misconduct vitiates
proceedings no matter what the outcome may be – award reviewed
and set aside and matter remitted back to GPSSBC for arbitration de
novo
Judgment –
interpretation of judgment – principles considered – no
indication in earlier judgment by another Judge
that review
application will be decided only by that Judge on the merits without
further hearing – prior judgments also all
dispose of
preliminary issues raised by first respondent – competent to
finally decide review on the merits thereof pursuant
to new set down
notice
Review application –
review application upheld – matter remitted back to GPSSBC for
arbitration de novo
Costs –
principles considered – conduct by first respondent justifies
costs order against him – costs order made

JUDGMENT

SNYMAN, AJ

Introduction

[1] This is a very old case which makes for some sorry reading. It is a prime example of how not to conduct litigation in this Court. The matter started as far back as 2011 when the first respondent was dismissed, and then, throughout the many following years, there were a variety of applications and counter applications, stay proceedings, leave to appeals and other preliminary issues, which all served to materially delay conclusion of the case. It is absolutely astounding to me that over the years, this entire matter (including this case and other applications) has attracted no less than seven judgments by various Judges of this Court. In the course of all of this, the merits of the review application itself, which application was brought as far back as 2013, has still not been decided. I am compelled to reiterate the following principle in *Food and Allied Workers Union* on behalf of *Gaoshubelwe v Pieman's Pantry (Pty) Ltd*[1], which in my view has undoubtedly been severely compromised:

‘Our courts have, on occasion, pronounced on the importance of labour disputes to be conducted with expedition. For example, in *National Research Foundation* the Labour Court held:

‘[15] It is now trite that there exists a particular requirement of expedition where it comes to the prosecution of employment law

disputes. ... ‘

[2] What makes all of this worse is that if mere common sense was applied by the parties, and in particular the first respondent, right from the outset of the review application, it would have been realised that the most efficient, competent and in fact expeditious resolution of the matter would have been to agree to simply refer the matter back to the GPSSBC, so that a proper arbitration could be held from scratch. I am quite sure that if this was done, this case would have been completed long ago. I will now do my bit to hopefully finally bring this matter to an end, on the merits. However, considering the history in this case, it is probably likely that good sense will not prevail, and the matter will be sought to be pursued to the Labour Appeal Court. So, I will be as

thorough as reasonably possible in deciding this matter on the merits.

[3] Before getting to grips with the merits of the case, certain preliminary issues must be addressed. There were all kind of difficulties with the administration of the Court file in this case, with a variety of spurious allegations being made by the first respondent's attorneys, which I will not delve into in any detail. Suffice it to say, and to ensure that the sanctity of the Court file was retained, it was kept in the chambers of the Judge President. Instead of accepting this intervention as a gesture of good faith and assistance to the parties, which is

exactly what it was, the first respondent's attorneys embarked upon a course of action which in essence boiled down to accusing the Judge President of interference with the case. I find this suggestion unfounded and

unacceptable. The Judge President placed nothing in the file nor did he in any manner interfere with its compilation. The Judge President also made no decisions or determinations on the file, and in fact went out of his way to ensure that all decisions made in this case were made by presiding Judges in open Court. In short, the Judge President simply retained the file for safe keeping and to ensure that the matter be heard, due to a variety of reasons that need not burden this judgment. In the end, and whatever may happen in this matter would in each instance be entirely in the hands of the presiding Judge it is allocated to.

[4] When the matter was set down for 30 November 2022, the file was allocated specifically to me to deal with. I was presented with a letter dated 24 November 2022 written to the Registrar by the first respondent's attorneys, in which a number of contentions were made. This included that when the matter came before Nieuwoudt AJ on 15 September 2021, that learned Judge had determined that the merits of the review application had to be argued (which was done), and consequently, only that Judge could and had to

decide such merits, and it was therefore not competent for the review application to be set down for argument on the merits on 30 November

2022. The first respondent's attorneys also took issue with a variation judgment handed down by Nieuwoudt AJ on 5 November 2021, which directly contradicted the version offered by the first respondent that the review could only be determined on the merits by Nieuwoudt AJ. This entire issue will however be dealt with later in this judgment. Suffice it to say at this stage, I was unconvinced that there was any impediment to the merits of the review application being argued before me, and I insisted that the matter proceed.

[5] There is another issue of concern. In the letter dated 24 November 2022 by the first respondent's attorneys, it was indicated that the first respondent's counsel, advocate Ndziba, would recuse himself from the matter because of the alleged interference by the Judge President with the case as well as an alleged abuse by the Judge President of his judicial position. This contention was also relied upon by the first respondent's attorney in stating that he would similarly recuse himself. I have little doubt that this was all part of a stratagem to scupper the hearing of the review application on the merits on 30 November 2022.

To put it as simply as possible, the Judge President was not deciding the matter, and these allegations could simply not serve as any kind of justification for the first respondent's counsel and attorney not to appear before me on 30 November 2022 to argue the merits of the review application.

[6] When the matter then came before me on 30 November 2022, the applicant, as represented by counsel, and the first respondent personally, was present. I indicated to the first respondent that I had seen the letter of 24 November 2022 by his attorneys, however I did

not accept that what was contained therein in any manner stood in the way of the matter being heard on the merits on that day. The first respondent indicated that he would like an opportunity to have his attorney attend at Court, and I afforded him that opportunity. The first respondent's attorney, Mr Malahlela, arrived sometime later. He indicated he was not ready to proceed with the matter, based on what was contained in the letter of 24 November 2022. I explained to Mr Malahlela why I considered the

position that had been adopted in that letter to be fundamentally wrong. Mr Malahlela insisted that it was required that Nieuwoudt AJ had to hand down judgment on the merits of the review. I however indicated to Mr Malahlela that there was no obstacle to my

determination of the review application on the merits thereof, with the record being in all respects complete, and if he and / or the first respondent's counsel decided not to participate, they had to stand or fall by that decision, as I would proceed to decide the matter.

[7] In a last attempt to accommodate the first respondent, I informed Mr Malahlela that I would hear argument from the applicant's counsel that was present in Court, that he had to make careful notes of what was being submitted by such counsel, and that I would then afford the first respondent's attorneys (and counsel) an opportunity to file written submissions in answer to any argument the applicant's counsel had presented. I did this because Mr Malahlela was not inclined to present argument himself. The applicant's counsel then proceeded to present argument. At the conclusion of the argument of the applicant's counsel, I made the following order:

1. Judgment in deciding the merits of the review application is reserved.
2. The first respondent, Mr M W Mashiya, is given until 20 January 2023 to file further written submissions on the merits of the review application.
3. The applicant, the Minister of Correctional Services, is given until 27 January 2023 to file replying submissions to the first respondent's submissions in terms of paragraph 2 of this order.
4. The issue of costs shall be determined along with the judgment on the merits of the review application.

[8] The first respondent's counsel then did file written submissions as contemplated by my order quoted above, albeit only on 27 January 2023, having requested an extension. The applicant elected not to make further submissions. The submissions made by the

first respondent have been properly considered by me in deciding this case.

[9] All the above being said, the current application before me concerns an application by the applicant to review and set aside an arbitration award by the second respondent in his capacity as an arbitrator of the General Public Services Sector Bargaining Council (GPSSBC), being the third respondent. This arbitration award is dated 15 November 2013 and was issued under case number GPBC 4864 / 2011. In terms of this arbitration award, the second

respondent found that the dismissal of the first respondent by the applicant was substantively and procedurally unfair, and he then afforded the first respondent consequential relief in the form of reinstatement retrospectively to the date of his dismissal on 24 October 2011, with full back to pay to such date of dismissal. The second respondent directed that the first respondent report for duty on 6 January 2014. Dissatisfied with this arbitration award, the applicant then launched the current review application in terms of section 145 as read with 158(1)(g) of the Labour Relations Act (LRA)[2].

- [10] As will be discussed below, this matter falls to be decided, not on the merits of the issue whether the dismissal of the third respondent by the applicant was substantively and procedurally fair, but rather on the basis that the second respondent had committed misconduct in the course of the arbitration proceedings of the kind that would vitiate such arbitration proceedings, no matter what the outcome on the merits of the dismissal itself may have been. Therefore, and 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, which is what it presented when the matter was argued before me.

Background facts

- [11] As stated above, this matter has a long and rather unfortunate history. It all started on 24 October 2011, when the first respondent was dismissed by the applicant for misconduct. The first respondent pursued his dismissal as an unfair dismissal dispute to the GPSSBC, where the matter was then ultimately set down for arbitration over a number of days in the course of 2012.
- [12] But the tone of what was to follow was set before the first respondent was even dismissed. When the first respondent was still subject to an internal disciplinary hearing, he brought an urgent application on 26 August 2011 under case number J 1744 / 11 to interdict the disciplinary hearing. The basis for the application was the alleged bias of the chairperson, which was an independent advocate (advocate Sirkhot). This bias, according to the first respondent, was evident from the refusal by the chairperson of the first respondent's application for legal representation in the internal disciplinary hearing, and the chairperson's refusal to then recuse himself when his alleged bias was raised by the first respondent. This application was brought despite the disciplinary

hearing already having started and witnesses having testified. In a judgment handed down on 30 August 2011, Steenkamp J dismissed the application with costs. This was followed by an application for leave to appeal, which was also dismissed with costs on 3 November 2011. Needless to say, the hearing continued, and the first respondent was dismissed.

- [13] Returning then to the arbitration proceedings at the GPSSBC, the unfair dismissal arbitration was set down before arbitrator M M Malebye, which arbitration commenced on 13 March 2012, and continued over a number of days throughout 2012. Arbitrator Malebye heard lengthy evidence by a total of seven witnesses for the applicant, this being the

complete witness complement of the applicant. Both parties were legally represented in the arbitration. The first respondent's current counsel, advocate Ndziba, also represented the first respondent in the arbitration.

[14] It appears that both the applicant and the first respondent were not satisfied with the manner in which arbitrator Malebye handled the arbitration proceedings. At an early stage, there was an application that arbitrator Malebye recuse herself, but this application was refused. The arbitration proceeded, but it seems that both parties were not happy with the manner in which arbitrator Malebye was allowing the evidence to be led, and the manner in which she dealt with the questioning of witnesses.

[15] Then, and at the end of 2012, arbitrator Malebye simply mero motu recused herself. She gave no reasons for so deciding. The events giving rise to her doing so will be touched on later in this judgment. That brought the current second respondent into the picture as the arbitrator that replaced arbitrator Malebye, and the arbitration

proceedings then convened before him on 14 January 2013. The second respondent requested the parties to give him a brief background

concerning the status of the matter, and also required the parties to address him on the way forward. In this regard, the second respondent indicated that it was open to the parties to agree that he continue with the matter and then use the tape recordings of the testimony in the prior arbitration proceedings before arbitrator Malebye. The second respondent specifically said that he would '... prefer an approach that suits you both ...'.

[16] The applicant's counsel, advocate Halam (Halam) first addressed the second respondent. He indicated that the applicant had already led the testimony of seven witnesses, with the last witness still being subject to cross examination. Halam argued that a newly appointed arbitrator simply stepping in and continuing with the matter would not have had the opportunity to observe the

witnesses that testified and assess their credibility. He also pointed out that the witnesses were subjected to intensive cross

examination before arbitrator Malebye. Halam specifically said that '... my view is that we should start afresh ...'. He concluded his submissions by saying: '... that is why I was saying, on the employer's side we should or we are to start afresh ...' (sic). Halam also indicated that it was essential for the second respondent to observe the witnesses when they testified and assess their credibility in the course of such testimony.

[17] The second respondent was then addressed by the first respondent's counsel, advocate Ndziba (Ndziba). According to Ndziba, the matter had been dragging on for a long time. He blamed the inexperience of arbitrator Malebye for this. He also blamed the applicant for allegedly reneging on an agreement to exchange pre-arbitration questions, and stated that arbitrator Malebye should

have made a ruling in this regard. Ndziba was also critical of arbitrator Malebye disallowing certain questions under cross examination, and when she was asked to make a ruling, she instead recused herself. According to Ndziba, the first respondent was also dissatisfied with the manner in which arbitrator Malebye chose to recuse herself. In the light of all this criticism, Ndziba then stated that:

‘... We made representations to the council that whatever happens, it is okay, we can start from scratch. It is not a problem, but we need some assurances you know ...’ (sic).

[18] In further developing his argument to the second respondent, Ndziba indicated that there was still a ruling outstanding as to whether evidence of a witness for the employer (the applicant) not led during the earlier disciplinary proceedings would be admitted. It was suggested that ‘unprofessional discussions’ took place between the applicant’s counsel and arbitrator Malebye. It was pointed out that arbitrator Malebye was a former employee of the ‘department’, clearly referring to the applicant. After a long and largely incoherent argument concerning arbitrator Malebye and her conduct in this matter, Ndziba concluded by saying: ‘... So with that background, I hear what my colleague is saying about the matter starting from scratch. I am not convinced that there would be prejudice to either party and that the Commissioner is unable to make a ruling in terms of section 138 ...’. Ndziba then adds: ‘... the horse in this case has bolted. Whatever we are doing now, really, we are just trying to salvage, you know, that of a very badly handled arbitration ...’ (sic).

[19] But then, inexplicably, Ndziba does a volte face. He claims prejudice to be suffered by the first respondent if the matter starts afresh. He stated that the evidence before arbitrator Malebye was ‘very simple’ and can easily be gathered from the audio recordings of the previous arbitration proceedings. He said: ‘... I think the record should really suffice, you know ...’. He further complains that if the matter starts from scratch, witnesses may change their stories, and this would delay matters

further, as this would have to be tested. Ndziba then asks for the following ruling: ‘... a ruling must be made that, really, the employer must continue. That the cross-examination of that witness must continue and then be finalised and then the employee opens its case ...’. He concludes, again after a drawn-out argument that had nothing to do with the issue at hand, that he cannot see any justification for the arbitration having to commence de novo.

[20] The transcript continues with further drawn-out submissions by Ndziba about the merits of the case, undue delays, rulings about evidence being allowed, pre-arbitration proceedings and the leading of evidence. None of it was helpful where it came to the issue of what to do next following the recusal. But after this long winded verbal exposition, another volte face follows. Ndziba says: ‘... So it must be then clear, Commissioner, that these are the issues, this is what the Commissioner has to decide and that this is the evidence that I am going to lead, because then we can start even de novo. I am prepared to do that. We can start from scratch, we can start from scratch. We are prepared to say, if it is going to save the parties, okay, let us start from scratch. Okay, but we start from scratch on a clear understanding that

there will be no calling of useless who come here to say things that we agreed ...'(sic).

- [21] In reply, Halam pointed out that Ndziba had actually argued that the arbitration had been badly handled, and that this failure would then be imputed on the second respondent if he proceeds on the basis of the arbitration already conducted. Halam refers to the conflicting positions adopted by Ndziba where it came to how the proceedings should take place going forward, and he then concludes by saying: '... Well, my own feeling, Commissioner ... is that it should start de novo, it should start de novo taking into account the complaints

already made on how that evidence was led before the previous Commissioner ...'. However, Halam stated that despite this being his view, the applicant was in the hands of the second respondent to decide what to do going forward and that this was the second respondent's decision.

- [22] The second respondent then proceeded to issue a ruling. He accepted that the record that he already had was sufficient to proceed with the matter, provided he just properly listened to it and considered it with the necessary circumspection. According to the second respondent, starting the case de novo, even though it would be 'great' for him to do so, would infringe on the constitutional obligation of expeditious resolution of employment disputes and there would be undue prejudice to the first respondent. The second respondent also expressed his concerns that witnesses may 'tailor' their evidence if they are allowed to testify de novo. The second respondent then ruled he was going to proceed with the matter on the basis of the previous record, and not de novo.

- [23] Ironically, and when the matter then resumed with the testimony of the witness for the applicant still under cross examination (Mr Mabashi), the second respondent records, at the start of the testimony, that '... both parties agreed that we are going to proceed where we ended ...'. That is clearly not an accurate and true statement of what actually happened. The arbitration then indeed continued on the basis of the previous recordings, this time over a number of days in the course of

2013. The testimony of Mabashi was completed, and the testimony for the first respondent was then led, which included testimony by the first respondent himself. The arbitration concluded with closing arguments.

- [24] As stated above, and in an arbitration award dated 15 November 2013, the second respondent found in favour of the first respondent, found that his dismissal was substantively and procedurally unfair, and awarded him consequential relief in the form of reinstatement with effect from 6 January 2014, with back pay retrospective to the date of his dismissal.

- [25] On 20 December 2013, the applicant filed its review application seeking to challenge the aforesaid arbitration award of the second respondent. In this review application, the applicant raised a particular ground of review relating to the conduct of the second respondent. This ground of review was it was impermissible for the second respondent to

simply replace arbitrator Malebye in the arbitration proceedings, as the LRA did not provide for it. According to the applicant, and considering that arbitrator Malebye had recused herself, it was incumbent upon the second respondent, as newly appointed arbitrator, to recommence the arbitration de novo. It was also pointed out that it was not possible for the second respondent to properly consider and assess the testimony of all the witnesses that had already testified before arbitrator Malebye, just from audio recordings.

- [26] The review application unfortunately did not proceed in the ordinary course. What followed was protracted alternative litigation. Firstly, the first respondent, despite the review application having been served and filed, sought to enforce the arbitration award in his favour. This resulted in an urgent application by the applicant to the Labour Court under case number J 16 / 14, brought on 9 January 2014, to stay execution of the award pending the finalisation of the review application. The application came before Steenkamp J on 9 January 2014, and the learned Judge granted an order that same day that the execution of the arbitration award was stayed pending the finalisation of the review application. The learned Judge confirmed this order, with reasons, in a written

judgment handed down on 11 February 2014.

- [27] The record of proceedings was provided by the GPSSBC in February 2014, when it was filed in the Labour Court. The Registrar informed the applicant on 26 February 2014 that the record was available for upliftment. The applicant immediately uplifted the record and on 28 February 2014 sent it to transcribers for transcription. There was however a delay in the completion of the transcription of the record, resulting in the record only being served and filed on 9 July 2014. The service and filing of the record was accompanied by a supplementary affidavit in terms of Rule 7A(8).

- [28] It appears that the first respondent, dissatisfied with the delay in the filing of the record, contended that the review application was deemed to be withdrawn by virtue of the provisions of clauses 11.2.2 and 11.2.3 of the Practice Manual, and he proceeded to

have a writ of execution issued for an amount of just short of R2 million, as part of the execution of the arbitration award against

the applicant. Pursuant to this writ of execution, the Sheriff of the High Court effected an attachment at the applicant for a total amount of R2 258 717.06, on 29 October 2014.

- [29] This execution and attachment prompted the applicant to bring an application on 31 October 2014 in which it sought declaratory relief to the effect that the review application should not be deemed to be withdrawn, alternatively that condonation be granted to the applicant for the late filing of the record and for the reinstatement of its review application. This application was also brought under case number J 16 / 14, and came before Molahlehi J on 31 October 2014. In a written judgment handed down on 5 March 2015, the learned Judge considered the condonation application, and held that despite the explanation for the delay in filing the record

not being satisfactory, condonation should be granted because the applicant had a strong prospect of success. The relevance of this particular finding will be addressed below. The learned Judge made an order that the review application be reinstated.

[30] Because Molahlehi J had not specifically granted an order in terms of which the writ of execution issued by the first respondent in October 2014 had been stayed and the learned Judge only granted an order reinstating the review, the first respondent opportunistically sought to execute the exact same writ of execution referred to above, against the applicant, in January 2017. The first respondent did this despite Steenkamp J having granted an order as early as 9 January 2014 that any execution of the arbitration award was stayed pending the finalisation of the review application. The applicant's attorneys attempted to impress on the first respondent's attorneys that the execution of the award had been stayed by Steenkamp J, but the first respondent's attorneys were not open to reason. The upshot of the approach adopted by the first respondent is that the total sum of R2 258 717.06 was attached out of the applicant's Standard Bank operating account on 20 February 2017 by the Sheriff.

[31] The applicant then launched another urgent application under case number J 16 / 14 on 8 March 2017 to set aside the writ of execution, to uplift any attachment made, and for declaratory relief that any execution of the arbitration award be stayed pending the finalisation of the review application. The application came before Steenkamp J, who granted a rule nisi on 9 March 2017 affording the applicant the relief sought, with the return date of such rule ultimately being 13 April 2017. The matter came before Tlhotlhamajale J on 13 April 2017 pursuant to this return date, with the application being opposed by the first respondent. The first respondent once again contended, in opposition, that the review application was deemed withdrawn pursuant to clauses 11.2.6 and 16.2 of the Practice Manual, and thus the execution of the writ was competent.

[32] In a written judgment handed down on 5 May 2017, Tlhotlhamajale J rejected the first respondent's contention that the review application had become withdrawn in terms of the Practice Manual. The learned Judge held that this issue had already been determined by Molahlehi J in terms of the judgment of 5 March 2015, and could simply not be revisited. The learned Judge pointed out that if the first respondent believed the applicant was being dilatory in prosecuting its review application to finality, it was open to the first respondent to bring an application in terms of Rule 11 to have the review application dismissed on that basis. The

learned Judge also pointed out that in any event, all the pleadings in the review application had been filed, pleadings had closed, and all that was awaited was a hearing date.

[33] In his judgment of 5 May 2017, Tlhotlhamajale J also dealt with the issue of the writ of execution. The learned Judge accepted that this issue had been disposed of by the order granted by Steenkamp J on 9 January 2014, and held that the execution of the arbitration award would remain stayed in terms of that order until the review application was concluded. The learned Judge also expressed his concerns as to how the first respondent

arrived at the amount reflected in the writ of execution, which the learned Judge considered to be irregular.

[34] Tlhotlhemaje J then granted an order that inter alia set aside the writ of execution, and ordered that any attachment pursuant to that writ be uplifted. The learned Judge further directed the applicant to approach the office of the Registrar to seek an expedited hearing date of the review application. As to costs, the learned Judge held that the attorneys of the first respondent 'should have known better' and that there was never a basis for deciding to proceed to execute the writ of execution. The learned Judge accordingly also made a costs order against the first respondent for these reasons.

[35] For reasons not apparent from the Court file, the review application was not afforded an expedited hearing date. The first respondent then proceeded to file a Rule 11 application on 18 October 2018 to dismiss the review application.

[36] On 15 March 2019, the Registrar gave notice to the parties in terms of which the review application was set down for 12 July 2019. The first respondent then brought another preliminary application on 14 June 2019 seeking to have the dismissal application first determined, separately, from the review application on the merits. The review application was not heard on the merits on 12 July

2019, because the applicant failed to file heads of argument. The applicant was also directed to file an answering affidavit to the first respondent's Rule 11 application to dismiss the review application, failing which the first respondent could approach the Court again asking for relief on the same papers in his dismissal application.

[37] The review application itself, as well as the two applications by the first respondent referred to above, all came before Lagrange J on 8 October 2019, on direction from the Judge President, who declined to decide any of the issues raised by the first respondent in chambers, and instead decided that all issues raised best be determined in open Court by a presiding Judge.

[38] When the matter came before Lagrange J on 8 October 2019, the first respondent's counsel insisted that firstly, three points in limine had be argued. Because of the time taken to argue these three points, only these issues were dealt with by the parties in Court on 8 October 2019. In a written judgment handed down on 25 October 2019, Lagrange J disposed of these three points in limine. The points were firstly that the review application was not properly before Court because it was archived, secondly that the review application could not be heard until such time as the dismissal application had first been decided, and thirdly, that the dismissal application must be dealt with as an unopposed application.

[39] Lagrange J, in his judgment of 25 October 2019, held that a dismissal application was in essence a counter application to the review application itself, and thus there existed no basis as to why the review application and the dismissal application should not be dealt with together. The learned Judge reasoned that that by insisting that the dismissal application be

dealt with separately, it was tantamount to saying all counter applications must be considered separately, which would result in an unnecessary proliferation of proceedings and undue extension of the litigation process, which runs counter to the fundamental requirement of the expeditious resolution of employment disputes. The learned Judge also pointed that it is often the case that in a dismissal application, the merits of the review application may to some extent be considered. The learned Judge held that the dismissal application and the review application on the merits must be heard together.

[40] Lagrange J then dealt with the point that the review application had been archived in terms of the Practice Manual. The learned Judge referred to the judgment by Tlhotlhamaje J in which it had already been held that the review application had not been archived. As to further circumstances that may have occurred after the judgment of Tlhotlhamaje J which, as contended by the first respondent, could serve to cause the review application to once again become archived, Lagrange J considered this to be an issue that could only be determined based on a number of disputed facts, and it could thus not be dealt with as an issue in limine. The learned Judge adopted similar reasoning where it came to the issue whether the dismissal application should be determined as opposed or unopposed. The learned Judge held that it was not competent to raise these issues as in limine points.

[41] In his judgment of 25 October 2019, Lagrange J then dismissed all three points in limine raised by the first respondent. The learned Judge ordered that the dismissal application and the review application on the merits be set down jointly for determination. The learned Judge also afforded the first respondent leave to file an answering affidavit to the applicant's application for condonation for the late filing of its answering affidavit to the dismissal application, and for the applicant to file a reply if required. The learned Judge also considered the issue of costs, and reasoned that the in limine points raised by the first respondent only served to further delay the final resolution of the review application and the dismissal application, and none of the points had any merit. The learned Judge made an attorney and own client costs order against the first respondent so as to discourage this kind of litigation.

[42] The matter next came before Moshoana J on 17 June

2021. Once again, the merits of the review application was not dealt with. Instead, and in a judgment handed down on 28 June 2021, Moshoana J dismissed the first respondent's application to dismiss the review application. The learned Judge directed that the review application on the merits be enrolled as soon as possible. This order granted by Moshoana J thus finally disposed of the first respondent's dismissal application, leaving only the review application on the merits thereof for determination. As a result, the Registrar, by way of notice given on 2 July 2021 to the parties, set the review application down for hearing on 15 September 2021.

[43] The first respondent sought leave to appeal against the judgment of Moshoana J refusing his dismissal application. This application for leave to appeal served before the Constitutional Court, by way of an application brought by the first respondent directly to that Court in terms of Rule 19 of the Constitutional Court Rules. Because of this application for leave to appeal, the first respondent's attorneys, in a letter dated 9 September 2021 to the Registrar, instructed the Registrar to remove the matter from the roll for 15 September 2021 because of this pending application for leave to appeal. The Registrar did not adhere to this purported instruction.

[44] As a result, the review application came before Nieuwoudt AJ on 15 September 2021. At the commencement of the hearing, the first respondent's counsel proceeded to raise a point in limine to the effect that application for leave to appeal to the Constitutional Court suspended the order of Moshoana J and that the review

application should not proceed until that application had been decided. That point appears to be the gravamen of what Nieuwoudt AJ was ultimately called on to decide.

[45] Nieuwoudt AJ handed down written judgment on 26 October 2021. Because of particular contentions made by the first respondent in his written submissions filed pursuant to my order of 30 November 2021, it is necessary to deal with this judgment in more detail. In his judgment, Nieuwoudt AJ recorded that he directed the parties to deal with the merits of the review application, so that he would be in a position to decide those merits, should the point in limine raised by the first respondent's counsel fail. The learned Judge however ultimately upheld the point in limine, finding as follows:[3]

'In their respective heads of argument ... counsel were *ad idem* that section 18(1) of the Superior Courts Act, No. 10 of 2013 has the effect that the application for leave to appeal by the first respondent suspended the dismissal order.

They were further *ad idem* that this court should not pronounce on the merits of the review application pending the decision of the Constitutional Court. The dismissal order is undoubtedly final in effect. Should this court have pronounced on the merits of the review application before the Constitutional Court dealt with the appeal, that appeal would have become academic.

Further, should the Constitutional Court have granted leave to appeal and upheld the appeal before the court had dealt with the review, the review application would have been dismissed ...'

[46] Nieuwoudt AJ concluded that the leave to appeal application pending in the Constitutional Court suspended the order refusing the first respondent's dismissal application, and until this was finally decided, it would not be proper to hear the review application on the merits. The learned Judge thus upheld the first respondent's point in limine. However, and clearly in error, the learned Judge made an order in the judgment that the review application itself be dismissed.

[47] The error in the order made by Nieuwoudt AJ on 26 October 2021 was brought to the learned Judge's attention by the applicant's

attorneys. As a result, Nieuwoudt AJ issued a variation judgment on 5 November 2021. In this judgment, the learned Judge records that the applicant was ‘absolutely correct’ in pointing out that the order granted on 26 October 2021 which reflected that the review application be dismissed was in error. The learned Judge explained that the order did not reflect his true intention, and he clarified the position as follows:[4]

‘The 26 October 2021 judgment is concerned with the fact that the first respondent had made an application for leave to appeal against the dismissal order to the Constitutional Court. The parties were ad idem that the application for leave to appeal suspended the dismissal order and that this court should not deal with the merits of the review application pending finalisation of the appeal. I had intended to make an order to this effect ...’

[48] Nieuwoudt AJ on 5 November 2021 then varied the order granted in his judgment of 26 October 2021 as follows:

‘Pending the finalisation of the application for leave to appeal to the Constitutional Court under case number CCT229/21 or any appeal that may flow from that application:

1.3 The operation of the order handed down on 28 June 2021 is suspended.

1.4 The review application should not be set down on the merits.’

[49] It was common cause that the Constitutional Court subsequently refused the first respondent’s application for leave to appeal, and that there was no further appeal pursued by the first respondent in this regard. Consequently, the order of 28 June 2021 by Moshoana J stood, the first respondent’s application to dismiss the review application had been finally refused, and thus

there was no longer any impediment to setting the review application down for hearing on the merits thereof. In short, all the conditions imposed by the order by Nieuwoudt AJ on 5 November 2021 for setting the review application down for hearing on the merits had been fulfilled.

[50] The review application was then set down for hearing on the merits thereof on 30 November 2022. In a pattern that seems to be consistently repeating itself, the first respondent’s attorneys took issue with that set down. In a letter dated 24 November 2022 addressed to the Registrar, the first respondent’s attorneys indicated that the matter had been set down by special allocation on 15 September 2021 for hearing on the merits thereof. According to the first respondent’s attorneys, and despite the point in limine that had been raised, Nieuwoudt AJ ruled that the parties had to argue the merits of the review application, which the parties then did. It was contended that the learned Judge propagated a ‘two-stage’ decision process, in that should the matter need to be set down again in the future, he could simply hand down judgment on the merits. The first respondent’s attorneys indicated that the actual order then issued by Nieuwoudt AJ on 5 November 2021 did not ‘capture’ the decision made by him on 15 September 2021. The first respondent’s attorneys insisted that the matter should not be set down on the merits of the review application, as this would be ‘arbitrary and unreasonable’, and Nieuwoudt AJ should simply be called upon to hand down judgment

on the merits.

- [51] It is then under all of the above circumstances that the review application, on the merits thereof, finally ended up before me on 30 November 2022 for determination.

The proceedings before Nieuwoudt AJ

- [52] Before delating with the merits of the review application, it is necessary to first deal with the first respondent's contentions that it is not competent to set the review application down for hearing on the merits thereof, because of what happened on 15 September 2021 before Nieuwoudt AJ. In his written submissions dated 26 January 2023, the first respondent once again repeats all the contentions made in the letter of 24 November 2022 referred to above. The first respondent however added that the review application was set down for a 'rehearing before a new judge' on 30 November 2022, by way of order from the Judge President. This latter statement is simply not true, as there was no such order by the Judge President. The matter was set down because the conditions for set down as contained in the order of Nieuwoudt AJ of 5 November 2021 had been fulfilled.
- [53] The first respondent argued that its counsel was entitled not to appear in Court on 30 November 2022 by virtue of what was contained in the letter from the first respondent's attorneys dated 24 November 2022. However, and in compliance with my order on 30 November 2022, and as stated, the first respondent did file the written submissions he was given the opportunity to make. I have also established that the applicant's heads of argument on the merits of the review application, had been served on the first

respondent as far back as October 2019, and filed in Court then. The submissions made by the applicant's counsel in Court before me was principally based on the written heads of argument already filed by it.

- [54] I am convinced, based on a consideration of all that had transpired in this matter as summarized above, that the first respondent had a clear stratagem. This stratagem was to avoid, at all costs, the review application being heard on the merits thereof. The clearly incorrect interpretation sought to be attached by the first respondent to the judgment of Nieuwoudt AJ, as specifically later amended by the learned Judge, is in line with this stratagem. This kind of situation cannot be allowed to perpetuate. With the application to dismiss the review application now having been finally disposed of, it is critical that the review application

must now be finally decided, once and for all. I will next set out why the contentions of the first respondent to the contrary are simply unsustainable.

- [55] Where it comes to the interpretation of Court orders, the applicable principles have been summarized by the Constitutional Court in *Eke v Parsons*[5] as follows:

‘The starting point is to determine the manifest purpose of the order. In interpreting a judgment or order, the court’s intention is to be ascertained primarily from the language of the judgment or order in accordance with the usual well-known rules relating to the interpretation of documents. As in the case of a document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention.’

The Constitutional Court in *Department of Transport and Others v Tasima (Pty) Limited; Tasima (Pty) Limited and Others v Road Traffic Management Corporation and Others*[6] added the following considerations:

‘... As in the case of any document, the judgment or order and the court’s reasons for giving it must be read as a whole in order to ascertain its intention. If on such a reading, the meaning of the judgment or order is clear and unambiguous, no extrinsic fact or evidence is admissible to contradict, vary or qualify, or supplement it.’

[56] In *Mashaba v Citibank Na SA Branch and Others*[7], the Court, having considered the above principles, held that:

‘... in addition to the aforesaid, there is in my view a further consideration. This consideration is that it must always be borne in mind that Court orders must grant effective relief, and the order as it stands must be capable of being construed so as to give effect to the purpose for which it was intended. This is evident from the following dictum in *SOS Support Public Broadcasting Coalition and Others v South African Broadcasting Corporation (SOC) Limited and Others*:

‘Court orders are intended to provide effective relief and must be capable of achieving their intended purpose. That must be the starting point in interpreting a court order ...’

The Court added that:

‘... A determination of the legal context within which the words in an order are used is also required. ...’

[57] In my view, the judgment of Nieuwoudt AJ of 26 October 2021, as varied on 5 November 2021, is sufficiently clear. Both these judgments must be read as a whole, and the language contained therein is clear. Even though it is true that Nieuwoudt AJ required the parties to argue the merits of the review application, the learned Judge actually made it clear that he did this only to cater for the scenario that if he decided that the first respondent’s point in limine not be upheld, he could then decide the merits of the review. Therefore, and in simple terms, if the learned Judge refused the point, he would then issue judgment on the merits of the review. The learned Judge never ruled, and no such intention is apparent from his judgment, that if he upheld the point in limine, he would still at some unknown point in the future (which considering the history in this case may be years) simply hand down judgment on the merits. As matters turned out, the learned Judge upheld the point in limine. It follows that he was never seized with deciding the merits of the review application, and he never did.

- [58] I have quoted the relevant extracts from the judgment of Nieuwoudt AJ earlier in this judgment. It is clear from these extracts that the learned Judge undoubtedly had in mind that the review application on the merits cannot be considered until such time as the application for leave to appeal the refusal of the dismissal application had been decided. In fact, the order granted on 5 November 2021 records that until the aforesaid has happened, 'The review application should not be set down on the merits'. Such order surely makes it clear that the set down of the review application for hearing, on the merits thereof, is contemplated only once the leave to appeal application is disposed of.
- [59] The first respondent, confronted with the clear language of the judgments of Nieuwoudt AJ, then seeks to indicate that the order as granted on 5 November 2021 did not 'capture' the actual decision made by Nieuwoudt AJ on 15 September 2021. In order to succeed with such a submission, extrinsic evidence about what was discussed or submitted in Court, and what the learned Judge said in Court, on 15 September 2021, would need to be considered. However, and considering that the language used in the written order, which was contained in a specifically amended judgment, is clear and unambiguous, such an extrinsic consideration is not permitted. The first respondent is specifically limited only to the judgments as they stand, where it comes to the interpretation thereof. And in this context, the import of the judgments is clear, being that Nieuwoudt AJ was not seized with the merits of the review application, because of the pending application for leave to appeal. Therefore, Nieuwoudt AJ never decided the merits of the review application, but instead ordered that it be set down for argument on the merits once the impediment of the application for leave to appeal is removed.
- [60] If Nieuwoudt AJ had it in mind that he would simply issue a judgment on the merits of the matter, should the application for leave to appeal ultimately be unsuccessful, the learned Judge would have said so in clear terms. There is nothing in the order that he gave that can substantiate any such interpretation. The purpose of the order granted always was to defer the hearing of the review application on the merits until the application for leave to appeal had been concluded. In fact, and as illustrated by Nieuwoudt AJ himself in his judgment, if the first respondent ultimately won in the Constitutional Court which would lead to his dismissal application being upheld, that would be the end of the review application, without even having to hear the merits thereof. But if the application for leave to appeal failed, then the review application had to be considered on the merits thereof.
- [61] I in any event find it questionable that the first respondent can adopt the position that the review application should not be argued on the merits because of what happened on 15 September 2021, when the very approach of his counsel on 15 September 2021 was to avoid the consideration of the merits of the review application by way of the point in limine. To then seize upon the approach adopted by Nieuwoudt AJ to nonetheless require that the merits of the review be argued just

in case the point in limine was found to have no substance, in order to scupper the matter being set down for argument on the merits at a later stage because the point in limine succeeded, is simply opportunistic in the extreme.

[62] In all the above circumstances, the import of the judgments of Nieuwoudt AJ is in my view undeniable. The learned Judge was not seized with deciding the merits of the review application. The learned Judge only had to decide whether the hearing and

determination

of the review application should be stayed and should be deferred until such time as the Constitutional Court had decided the first respondent's application for leave to appeal against the order refusing his application to dismiss the review. The learned

Judge decided this issue in favour of the first respondent, and made an order accordingly. In fact, as contemplated by the order of Nieuwoudt AJ itself, once the impediment of the pending application for leave to appeal was removed, the review application was ripe to be set down for hearing on the merits thereof. I would accordingly reject any contention by the first respondent that only Nieuwoudt AJ could decide the review application on the merits. The review application was properly and competently set down before me for determination on 30 November 2022, on the merits thereof, and I am entitled to now and finally determine the same.

Test for review

[63] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,^[8] the Constitutional Court dealt with the test for review. Whilst accepting that the permissible grounds for review are articulated in section 145(2) of the LRA, the Court nonetheless said that: '... the reasonableness standard should now suffuse s 145 of the LRA ...', and concluded that the threshold test for the reasonableness of an award was: '... Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'

[64] However, the judgment in *Sidumo* supra does not contemplate that the review grounds as specifically listed in Section 145(2)(a) of the LRA are somehow obliterated or negated.^[9] 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.^[10] In particular, if an arbitrator commits misconduct in the course of conducting the arbitration, it does not matter whether the outcome arrived at is reasonable or unreasonable, as the misconduct itself vitiates the proceedings, resulting in the award being set aside.^[11] In *National Commissioner of the SA Police Service v Myers and Others*^[12], 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 ...'

[65] The nature of the determination where it comes to the 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*[13] 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 ...’

[66] The following dictum in *Naraindath v Commission for Conciliation, Mediation and Arbitration and Others*[14] 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.’

Analysis: the review

[67] In this case, and in my view, the undeniable facts speak for themselves. The arbitration proceedings between the applicant and the first respondent were convened before arbitrator Malebye as the duly appointed arbitrator of the GPSSBC. The arbitration actually commenced before her, and seven witnesses testified for the applicant in support of its case of misconduct against the first respondent. The testimony of its last (seventh) witness had not been completed, with such witness still being subject to cross-examination. No case had as yet been presented by the first respondent in his defence.

[68] From the record, it is apparent that the legal representatives of both the applicant and the first respondent were not satisfied with the manner in which arbitrator Malebye was conducting and presiding over the arbitration. In fact, and from the extracts of the record quoted earlier in this judgment, the first respondent’s counsel even described her as being inexperienced to the extent that she was unable to effectively manage the presenting of evidence in the arbitration. There had also been an earlier recusal application, which was refused by arbitrator Malebye. The upshot however came when an issue arose about the questioning of the applicant’s last witness, and the arbitrator was called upon to make a ruling. It is at this point that arbitrator Malebye *mero motu* recused herself from the arbitration, giving no motivated reasoning for this decision.

- [69] This recusal then brought the second respondent into the picture, in a case where there was a pending hearing that was far from having been completed. Legally, the proceedings into which the second respondent stepped into were in the form of a trial (which is what arbitration really is) where witnesses had testified. It is an important part of the duties of an arbitrator, as presiding officer, to assess the credibility of the witnesses that may testify before him or her in that trial.[15] This assessment is done on the basis of the following dictum in *SFW Group Ltd and Another v Martell et Cie and Others*[16], where the Court said: ‘...the court's finding on the credibility of a particular witness will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candour and demeanour in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf...,
- (v) the probability or improbability of particular aspects of his version, (vi) the calibre and cogency of his performance compared to that of other witnesses testifying about the same incident or events. ... a witness' reliability will depend, apart from the other factors mentioned under (a) (ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. ...’ (emphasis added). In my view is not possible for the second respondent to effectively discharge this duty on the basis of reading a transcript of what happened in the earlier trial proceedings before another arbitrator. But another concern must be that the quality of the evidence presented before arbitrator Malebye was in any event in doubt, especially considering the concerns raised by both parties.
- [70] The second respondent, when he stepped into the arbitration, specifically asked the parties what their intentions were as to the further conduct of the matter. I have already set out in some detail the exchanges between the parties and the second respondent in this regard, as they appear from the transcript. From these exchanges, it is in my view clear that the applicant was of the view that the arbitration should start *de novo*. Where it came to the first respondent, his position was less clear. The first respondent's counsel gyrated between accepting that the arbitration should start *de novo* on the one hand, and then that the arbitration should simply proceed on the basis of considering the recording of the earlier arbitration, on the other. It also appeared from the addresses by both parties that there were difficulties with the evidence presented in the earlier arbitration, and the first respondent's counsel was particularly critical in this regard. Pursuant to this toing and froing, the parties then stated that they would leave the decision on how to proceed with the matter in the hands of the second respondent. There was however no agreement between the parties to proceed with the matter on the basis of the recording of the earlier arbitration before arbitrator Malebye.

[71] The above being the undeniable reality, what was the second respondent as newly appointed arbitrator in this matter lawfully expected to do, in discharging his duties as arbitrator? In my view, he could do only one thing, namely to recommence the arbitration proceedings de novo. I reach this conclusion not only based on the facts in this case, but also based on what I believe to be sufficient legal precedent in this regard.

[72] It is my view that as a general rule, where an arbitrator recuses himself or herself from an arbitration that has not been completed and is still continuing, whether the arbitrator does so mero motu or on application by one of the parties, then that arbitrator and the arbitration proceedings are rendered functus officio, as that arbitration has ceased to exist.[17] As held in *Zackey and Another v Magistrate of Benoni and Another*[18]:

‘... But it seems to me that it must amount to a decision that the court has no jurisdiction to hear the matter. Once that is decided the court could not be properly seized of the matter at all, and all the proceedings before that court prior to the recusation being accepted must logically become a nullity. In my view an accused successfully asking for recusation cannot demand any more than that the court records its recusation - it cannot claim any verdict at all. ...’

[73] The only consequence that can follow from the above state of affairs that is that the proceedings must recommence before another arbitrator, de novo. If the newly appointed arbitrator simply continues with the arbitration in place of the recused arbitrator, it is in reality nothing else but such newly appointed arbitrator stepping into the shoes of the recused arbitrator and continuing the proceedings as if the new arbitrator was always the arbitrator. That, I believe, is not permissible in law, and would constitute a nullity. In *Punshon v Wise, NO and Others*[19] the Court held:

‘... The magistrate recused himself at the instance of the accused. As soon as he did so he became functus officio. If follows, therefore, that if there had been a demand for it, he could not, after he had recused himself, enter a verdict, yet the accused asks the Court to send the case back to the same magistrate for that purpose. It was because of the action of the accused that the present position has been created. The proceedings have become, in my opinion, a nullity in the circumstances. I notice that in *Gardiner and Lansdown* (4th ed., p. 301) there is a statement that in the event of the death or the incapacity of the magistrate proving other than purely temporary

- and here it is permanent - the matter must be heard de novo before another magistrate. ...’

And in *S v Suliman*[20] it was held that the above applies equally where the presiding officer has recused himself mero motu.

[74] An apposite example can be found in *Director of Public Prosecutions, Northern Cape v Brooks*[21]. In that case, the presiding Judge had recused herself, in circumstances where the admissibility of video and audio material gained in an entrapment still had to be decided, the evidence of one witness was incomplete, and another witness still had to testify. The Court accepted that the consequence of the recusal by the trial judge in these circumstances was that ‘... all the proceedings before her were nullified’, and a de novo

hearing was the only option.[22]

[75] An important reason why an arbitration de novo must be the only appropriate course of action in the case of the recusal of an arbitrator in incomplete arbitration proceedings, is aptly described by the following dictum in *Mhlanga v Mtenengari and Another*[23]:

‘... The desirability of adopting such a course is self-evident. The second judicial officer would otherwise be deprived of the

substantial advantage of seeing and hearing the witnesses for himself and of being able to compare their demeanour with that of the witnesses who testified in person before him. He would be steeped only partially in the atmosphere of the trial. ...’

[76] In *Mhlanga supra*,[24] the Court did say that in the event of it being agreed by the parties that the newly appointed presiding officer continue with the trial, in the sense that the transcript of the earlier proceedings be produced as evidence before him, then the presiding officer may be at liberty to do so. The Court however emphasized that in the absence of consent, the trial must commence afresh.[25] In *Mondi Shanduka Newsprint (Pty) Ltd v Murphy*[26] the Court reasoned as follows as to why the Court considered it necessary for a hearing de novo in that particular case, which is also of relevance in *casu*:[27]

‘... Given the number of conflicts of fact and expert opinion in this case, I am of the view that a judge would not be able properly to determine the matter upon a mere reading of the record.

It is also no answer to the above to suggest that one can simply apply the tests set out in *Stellenbosch Farmers' Winery* for the resolution of disputes. That is because the first two aspects referred to by the learned judge of appeal are the credibility of the factual witnesses and their reliability. The very fact that they cannot be decided merely on paper is recognised in *Plascon-Evans* and provides a limitation on the ability of judges to make such decisions, except in special circumstances. ...’

[77] In arbitrations before the CCMA or bargaining councils, the hearing itself is a dynamic process. There are no pleadings to speak of and there is rarely a limitation of issues and articulation of cases by way of pre-arbitration proceedings and minutes. A case may develop in the course of evidence being led.[28] Parties are often not legally represented, and it is always the duty of any arbitrator appointed under the LRA to supervise the process and ensure that the necessary evidence is properly placed before him or her in substantiation of the cases as sought to be presented by the parties. Observations of the testimony of an earlier witness may well inform the arbitrator as to how a later witness should be treated when giving evidence. In my view, a proper trial (hearing) is undermined where there is nothing else but effectively a substitution of an arbitrator in the course of an incomplete arbitration proceedings. As said in *South African Commercial Catering and Allied Workers Union and Others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)*[29]:

‘... A trial is a dynamic process where the issues develop under the supervision of the presiding judicial officer. Oral testimony is led. Pleadings may be amended as the issues take shape. The nature of the process imposes duties of evaluation on the Judge or magistrate, who is required to gauge the personal attributes of the witnesses who are called and to hold an even hand between the contenders. ...’

[78] It appears from the authorities that an agreement by the parties to continue with the matter based on the recording of the earlier

proceedings, instead of conducting a hearing de novo, may be considered competent principally in the case where the actual proceedings (hearing) had concluded and all that remained is a verdict (decision).[30] As held in *Standard Bank of South Africa Ltd v Sibanda*[31]:

‘In *St Paul Insurance Co SA Ltd v Eagle Insurance Ink System (Cape) (Pty) Ltd* 2010

(3) SA 647 (SCA) the Supreme Court of Appeal held that where, in a civil matter in which the hearing of evidence has been completed, the presiding judge dies before the delivery of judgment, the parties are entitled to agree that a transcript of the evidence, together with the documentary exhibits, be placed before another judge for the hearing of argument and the delivery of judgment ...’

[79] In my view, it is unlikely that a recusal (withdrawal) of the presiding officer would arise at the stage where the proceedings (hearing) had already been fully completed and only a decision is outstanding.[32] More than likely, the withdrawal of the presiding officer from the matter at this stage would happen where the presiding officer becomes deceased, or otherwise incapacitated to make a decision, after the proceedings had concluded. It would then be quite understandable and actually practicable that the parties agree that another presiding officer simply decide the matter based on the record of the completed proceedings, even if it is not an ideal situation. This is because, simply put, the parties would have had no concerns with the conduct of the presiding officer in the course of the process and the manner in which evidence was presented or dealt under the auspices of that presiding officer, and the withdrawal of the presiding officer took place as a result of external factors other than those factors normally associated with an act of recusal.

[80] Where a recusal happens in the course of the proceedings based on a decision by the presiding officer, that is a totally different kettle of fish. As a general principle, a recusal in this context happens because the presiding officer is concerned that he or she would not be able to bring an unbiased and entirely independent view to bear in the proceedings. Even though there exist no proper reasons given by arbitrator Malebye why she recused herself, it cannot be accepted that she did this based on some personal / subjective whim or consideration. It must be accepted that she did so for substantive and objective reasons, which, in the case of recusal, would be a lack of impartiality and / or independence.[33] As explained in *S v Zuma and Another*[34]:

‘... It would appear to me that the same applies in cases where judicial officers decide suo motu to recuse themselves. There must be an objectively reasonable basis in law for doing so, quite apart from the judicial officer's subjective and sometimes parochial views and feelings.

If it were otherwise, judicial officers would recuse themselves from hearing matters in respect of which they have some personal aversion, fear or foreboding, under the ruse of subjective reasons which may not be subjected to objective standards of scrutiny and this may yield the administration of justice and the esteem and dignity of the courts a shattering blow in the minds of the public. In that way, judicial officers may circumvent their duty to sit even in appropriate cases by employing the simple stratagem of recusing themselves suo motu for personal reasons when no objective or reasonable basis for so doing exists in law, logic or even common sense. ...’

[81] There can be many reasons giving rise to a justified view of a lack of impartiality and / or independence on the part of a presiding

officer, one of which could be the conduct of the presiding officer and / or his or her interaction with the parties and / or witnesses

in the course of the hearing. It must therefore be accepted that where a presiding officer takes the material decision of recusing

himself or herself, it must be because of a lack of the requisite impartiality and / or independence that has become apparent, or has arisen, in the course of the proceedings. In this context, the following dictum in *Bokoni Platinum Mines (Pty) Ltd v Moropane*[35] is apposite:

‘It has long been accepted by our courts that a decision maker should be unbiased and impartial. This common-law right is now buttressed by the fair trial rights in the Constitution. Impartiality is the cornerstone of any fair and just legal system and an impartial

presiding officer in every judicial proceeding or tribunal is an absolute requisite of fairness. The rule against bias requires

the recusal of a presiding officer where there is bias or a reasonable perception thereof. Once the conduct of a judicial officer

is tainted with bias, this vitiates the proceedings. The law reports are replete with criminal matters where the entire proceedings were rendered a nullity upon a presiding officer having recused him or herself. The reason for this is straightforward. Unbiased

adjudication is fundamental to a fair hearing; it is an irreducible prerequisite. Once an adjudicator recognises his or her own bias, recusal must follow. But so too does the consequence that the proceedings cannot stand. They are set aside because we do not ask whether a biased adjudicator came to a correct decision. Rather, the law adopts the position that a biased adjudication will not be countenanced because it is so inimical to what fairness requires that the decisions rendered by it may not stand.

There is a dearth of authorities in respect of civil matters but there are no coherent reasons why civil litigants have a lesser claim to an unbiased hearing. Nor why the principle of nullity should not apply to them. ...'

[82] Applying all the above principles to the undeniable facts as summarized above, I have little hesitation in accepting that the arbitration

proceedings in this case were a nullity, because the second respondent did not commence the arbitration de novo, which he was compelled to do. The moment arbitrator Malebye recused herself from what was still substantially incomplete proceedings,

those proceedings became functus officio. As said, recusal contemplates a lack of impartiality and / or independence, which has the consequence of vitiating the entire

proceedings.[36] The second respondent as arbitrator should not even have asked the parties for their views on how to proceed with the matter going forward. He should have simply directed that the proceedings start de novo. His failure to have done so compromised the right of the parties to a fair hearing, and constituted misconduct in the arbitration

proceedings as contemplated by section 145(2)(a) of the LRA.

[83] But even if the views of the parties as to how the matter was to proceed are considered, it is my view that the problem remains that the parties cannot agree to continue with the arbitration before the second respondent, as newly appointed arbitrator, based on the recording of what had happened in the earlier proceedings. The reason for this is that the option to agree to continuation of the matter using the recording of earlier proceedings, is only available where the proceedings in which the evidence was led had been concluded, and all that remained was a decision (award). The matter in casu was however far from complete, with issues regarding the admissibility of evidence and the appropriateness of questioning still being outstanding, a witness still being under cross examination, and a number of further witnesses still having to testify. This took the option to agree to simply continue, off the table. In failing to appreciate this, the second respondent committed misconduct, and deprived the parties of fair hearing, especially considering his duties as an arbitrator in assessing and determining the evidence.

[84] In any event, a consideration of the record shows that there was no agreement that the matter continue on the basis of the previous recording, instead of starting the proceedings de novo. I am satisfied that the applicant's counsel adequately expressed his concerns to the second respondent, to the effect that the matter had to start de novo. The position adopted by the first respondent's counsel is contradictory to say the least. At the very best, it can be said that the parties acquiesced in leaving the issue up to the second respondent to decide, each of them having expressed their respective views, which certainly cannot constitute an agreement to proceed concluded between them. I also have some concerns about the second respondent in fact expressing, when the process then continued, that the parties had agreed to that course of action when that was certainly not the case. One must also consider

all of the concerns expressed by both parties where it came to how arbitrator Malebye conducted the earlier proceedings. In the absence of clear agreement on this issue, even assuming it was possible by the parties to so agree, there was no other option but to start the arbitration de novo.

[85] Ironically, there were indications much earlier in this matter itself that what happened with the second respondent simply proceeding with the arbitration, was irregular. When Steenkamp J dealt with the stay application in his judgment of 5 February 2014 under case number J 16 / 14, he specifically mentioned that ‘... However, I do take into account that the process adopted by the Commissioner, namely to carry on with an arbitration before a new commissioner in circumstances where that Commissioner had not had the opportunity to consider the evidence of the previous witnesses in person but only on paper, may be open to attack on review ...’.[37] Next, and when Molahlehi J dealt with the application to reinstate the review application in his judgment of 5 March 2015, the learned Judge said: ‘...I agree that the explanation proffered by the applicant is not satisfactory. However, I find that it is compensated for by the prospects of success. In this regard, it has not been disputed that the second respondent, in his consideration of the dispute, relied on the evidence which was presented before the first arbitrator and not him. It seems to me that there are excellent prospects that on review. In this regard it would appear that the Court is likely to find that the approach adopted by the second arbitrator amounted to gross irregularity ...’ (sic).[38] For the reasons summarized above, these views are obviously correct.

[86] To try avoid the consequences of the above to the sustainability of the arbitration award, the first respondent takes aim at the grounds of review as they have been articulated in the applicant’s founding affidavit, which grounds, according to the first respondent, do not contemplate placing the case I have dealt with above, before this Court on review. According to the first respondent, the applicant now relies on a new case of a lack of consent to simply proceed with the proceedings, which was never raised as a review ground. It is of course trite that a review applicant must make out its case on review in the founding affidavit and in the supplementary affidavit in terms of Rule 7A(8), and the review applicant would then be bound to that case.[39] When properly considering what the applicant has actually raised as a basis for review in its founding and supplementary affidavits, it in my view undoubtedly contemplates a pleaded case that the second respondent committed misconduct by continuing with the arbitration

instead of requiring that the arbitration recommence de novo. This is exactly what this matter is all about, and the issue of consent to proceed with the arbitration is but one of the facets of such case. In short, the case of the applicant, described as succinctly as possible, is that when arbitrator Malebye recused

herself, it was not legally competent for the second respondent as the newly appointed arbitrator to simply continue with the arbitration, and not start it de novo. This case is properly before Court, and the first respondent’s contentions to the contrary have no substance.

[87] But even if it can be said that the applicant did not specifically raise a case of a lack of consent to continue with the arbitration, and this was a material issue that needed to be raised, it has to be stated that this Court has a supervisory duty over the CCMA and bargaining councils, their functions, and of the arbitration proceedings conducted under their auspices.[40] If the applicant is prohibited from raising an irregularity of the kind that occurred in *casu*, then this supervisory duty would be compromised. In *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman No and Others*[41] the Court said:

‘... What the court is seised with in this matter is a review application, and the power exercised by the court in such an application is to conduct a review of not only the arbitration award issued by the arbitrator, but also of the arbitration proceedings giving rise to such an award. This is evident from the wording of s 145(2)(a) of the LRA, as read with the prescription relating to the powers of the court in terms of s 158(1)(g) of the LRA. The exercise of the review jurisdiction and functions by the Labour Court in respect of arbitration awards of the CCMA entails the exercise of an overall supervisory duty over such functions of the CCMA.’

The Court concluded:[42]

‘... 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.’

[88] The first respondent also sought to rely on the provisions of section 138 of the LRA,[43] as basis to justify the approach the second respondent had adopted. There is no merit in the reliance on this section. Section 138 was never intended to be used as a basis to justify a case where the right to a fair hearing has been compromised. Simply put, section 138 cannot be used to cover up that which is inherently unfair where it comes to the conduct of the arbitration proceedings. This was aptly described in *Ekurhuleni Metropolitan Municipality v SA Local Government Bargaining Council and Others*[44] as follows:

‘The injunction to conduct the proceedings with the minimum of legal formality may justify a decision by a commissioner to conduct proceedings with less regard for the formality that ordinarily characterises a trial in this court or any other civil court, but it is not an invitation or a licence to disregard the parties’ right to a fair hearing ...’

[89] All being said, I am satisfied that when the second respondent decided to simply continue with the arbitration based on the recording of the proceedings before the previous arbitrator, he committed misconduct which deprived the applicant of a lawful and procedurally fair hearing. He should have directed, when taking over the matter, that it starts *de novo*. The situation was exacerbated by the fact that when the arbitration then continued, the second respondent recorded that the parties

agreed to that process, when this was clearly not the case. This all constitutes misconduct by the second respondent as arbitrator as envisaged by Section 145(2)(a)(i) of the LRA. The effect of this misconduct is that the arbitration award itself is vitiated and falls to be set aside.[45]

Conclusion

- [90] Having regard to the conclusion I have come to above, there is no need to consider any of the other grounds of review raised in this matter. Nor is it necessary to consider any of the other issues raised by the first respondent. The simple reality is that the entire arbitration proceedings are a nullity, and the misconduct of the second respondent is such that it vitiates the entire arbitration proceedings and with it the arbitration award that he had made. The arbitration award of the second respondent is therefore reviewed and set aside.
- [91] Having reviewed and set aside the arbitration award of the second respondent, where to now? The answer is somewhat unfortunate, considering this matter first arose in 2011, the review application having been brought in 2013, and the matter now being more than a decade old and with the end not yet in sight. I accept that this Court has wide powers under section 145(4) of the LRA to make any determination it deems appropriate, where it has decided to review and set aside an arbitration award. I also accept that this matter is severally testing the fundamental requirement of the expeditious resolution of employment disputes. That being said, the undeniable reality is that the applicant did not receive a fair hearing, which must always be paramount, and it was the misconduct of the second respondent that gave rise to such situation. No reliance can be placed on any of the evidence as it emerged from the vitiated arbitration proceedings, meaning that any substitution of the arbitration award with another determination is impossible. 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 GPSSBC, de novo, before another arbitrator.[46] As succinctly said in *Sasol Infrachem v Sefafe and Others*:^[47] ‘... The remedy employed must cure the irregularity; it must restore the right. Generally, nothing less than a complete rehearing would be required...’

Costs

- [92] In terms of section 162(1) of the LRA, I have a wide discretion where it comes to costs. I am mindful of the dictum in *Union for Police Security and Corrections Organisation v SA Custodial Management (Pty) Ltd and Others*^[48] where the Court said:

‘In the labour context, the judicial exercise of a court’s discretion to award costs requires, at the very least, that the court must do two things. First, it must give reasons for doing so and must account for its departure from the ordinary rule that costs should not be ordered. Second, it must apply its mind to the dictates of the fairness standard in s 162, and the constitutional and statutory imperatives that underpin it ...’

- [93] Considering all that happened in this case, I am of the view that the first respondent is deserving of a costs order against him. The manner in which he conducted himself, whether it is on advice of his legal representatives or of his own accord, is deplorable. Had the first respondent simply applied a little focus and common sense, especially considering the earlier remarks made by Steenkamp J and Molahlehi J in their judgments in 2014 and 2015, it would have been obvious to him that further litigation should be avoided by simply agreeing to a consent order under in terms of Rule 17 that the arbitration award be reviewed and set aside and the matter be remitted to the GPSSBC for arbitration de novo. If that was done, this matter would have been long since concluded. I also take a dim view of the manner in which the first respondent sought to interpret and apply the two judgments of Nieuwoudt AJ to suit his purposes, which interpretation was entirely unjustifiable and opportunistic.
- [94] I am convinced that the first respondent must have been aware that applicant had good prospects of success on review where it came to the second respondent's decision to simply continue with the arbitration instead of starting it de novo. It is for this reason, in my view, that the first respondent did all he could to scupper the review application, without the merits thereof having to be considered. He did this by way of questionable attempts to execute the award, thereby harassing the applicant, the constant taking of points in limine, multiple dismissal applications, leave to appeals and objecting to set down dates. This stratagem is unacceptable, and primarily the cause of the entire delay in this case, especially considering that the review application was ripe for hearing as far back as July 2014. Added to this, the applicant then had to spend time, effort and costs to defend against these attempts, which defence is conducted out of the already depleted public purse. These kind of attempts by a litigant to avoid dealing with the merits of a case is worthy of censure in the form of a costs order.
- [95] This Court has consistently said that frivolous and unfounded litigation is deserving of costs orders.[49] In fact, and in his judgment of 25 October 2019, Lagrange J made a punitive costs award against the first respondent. Further, and in the proceedings under case number J 16 / 14, Tlhotlhamale J also made a costs award against the first respondent. All these costs orders were motivated by the same kind of conduct on the part of the first respondent summarized above. The first respondent seems impervious to these clear warnings. He should pay the price for this misconception.
- [96] In the end, the first respondent's opposition to what was clearly a material irregularity, never had substance. The conduct of the first respondent throughout is nothing else but an abuse of process. The first respondent must now be told, in no uncertain terms, that exercising his right of access to the Courts must be done in a responsible manner and always in compliance with the rules and processes of this Court.[50] The only way that the first respondent can learn this lesson is by way of an appropriate costs order.
- [97] But what puts the icing on the cake, so to speak, is the manner in which the first respondent (though his attorneys and counsel) chose to deal with the Judge President of this Court. It is entirely unacceptable for the first respondent to write to the Registrar on 24 November 2022

and make accusations such as the Judge President interfering with the matter so that the archiving thereof could be avoided, that he abused his judicial position, and that he acted unreasonably, without any evidence to substantiate such conclusions.[51] This is especially so, considering that the first respondent was well aware that such complaints should be referred to the Judicial Service Commission (JSC) to be dealt with in that appropriate forum, which the first respondent did, and which complaints were rejected by the JSC. In *De Lacy and Another v SA Post Office*[52] the Court had the following to say:

‘An officer of the court may not without more convey to a court allegations or claims by a client when there is reason to believe

that the allegations are untruthful or without a factual basis. This duty is heightened in circumstances where imputations of dishonesty and bias are directed at a judicial officer who ordinarily enjoys a presumption of impartiality. It behoves the legal

representative concerned to examine carefully the complaints of judicial bias and dishonesty and the facts, if any, upon which

the accusations rest.’

And as held in *Sepheka v Du Pont Pioneer (Pty) Ltd*[53]:

‘Any allegation of bias, especially on the part of a judge of this court, must be substantiated by a proper factual basis, must not be based on mere speculation and conjecture, and must be proved by the party alleging bias. ...’

[98] In its heads of argument, the applicant has asked for a punitive attorney and client costs order against the first respondent. I must confess that I was sorely tempted to accede to this request, considering how the first respondent behaved. However, and as a gesture of mere goodwill, I have decided not to, even though it is deserving. Therefore, and at the very least, the first respondent is deserving of a costs order, and I will thus order him to pay the third respondent’s costs of the entire review application. This shall include the costs of two counsel.

[99] In the premises, I make the following order:

Order

1. The applicant’s review application is granted.
2. The arbitration award of the second respondent, arbitrator M J Matlala dated 15 November 2013 and issued under case number GPBC 4864 / 2011, is reviewed and set aside.
3. The dispute is remitted back to the third respondent, the GPSSBC, for arbitration de novo, on the merits thereof, before an arbitrator other than the second respondent.
4. The first respondent is ordered to pay the applicant’s costs, which shall include the costs of two counsel, where used.

S Snyman

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate L Pillay Together with Advocate M C Mavundla Instructed by: The State Attorney For the First Respondent: Mr T Malahlela of Malahlela Attorneys (Written submissions by Advocate M Ndziba)

[1] (2018) 39 ILJ 1213 (CC) at para 187.

[2] Act 66 of 1995 (as amended).

[3] See paras 14 – 15 of the judgment.

[4] Para 7 of the judgment.

[5] 2016

[3] SA 37 (CC) at para 29. See also *Finishing Touch 163 (Pty) Ltd v BHP Billiton Energy Coal South Africa Limited and Others* 2013 (2) SA 204 (SCA) at para 13.

[6] 2018

[9] BCLR 1067 (CC) at para 43.

[7] (2019) 40 ILJ 2762 (LC) at para 17.

[8] (2007) 28 ILJ 2405 (CC) at para 110. See also *Herholdt v Nedbank Ltd and Another* (2013) 34 ILJ 2795 (SCA) at para 25; *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* 2014) 35 ILJ 943 (LAC) at para 14; *Monare v SA Tourism and Others* (2016) 37 ILJ 394 (LAC) at para 59; *Quest Flexible Staffing Solutions (Pty) Ltd (A Division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate* (2015) 36 ILJ 968 (LAC) at paras 15 – 17.

[9] Section 145(2) reads: ‘A defect referred to in subsection (1), means- (a) that the commissioner- (i) committed misconduct in relation to the duties of the commissioner as an arbitrator; (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or (iii) exceeded the commissioner's powers’ (emphasis added).

[10] See *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 964 (LAC) at para 101; *Premier Foods (Pty) Ltd (Nelspruit) v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 ILJ 658 (LC) at para 14.

[11] *Mystra (Pty) Ltd t/a Silverton Spar and Tops v Thoka NO and Others and Six Similar Cases* (2023) 44 ILJ 204 (LC) at para 20.

[12] (2012) 33 ILJ 1417 (LAC) at para 41.

- [13] (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; *Mystra* (supra) at para 20.
- [14] (2000) 21 ILJ 1151 (LC) at para 27.
- [15] As was said in *Sasol Mining (Pty) Ltd v Ngqeleni NO and others* (2011) 32 ILJ 723 (LC) at para 7: ‘... One of the commissioner's prime functions was to ascertain the truth as to the conflicting versions before him. The commissioner was obliged at least to make some attempt to assess the credibility of each of the witnesses and to make some observation on their demeanour. He ought also to have considered the prospects of any partiality, prejudice or self-interest on their part, and determined the credit to be given to the testimony of each witness by reason of its inherent probability or improbability. He ought then to have considered the probability or improbability of each party's version. ...’. See also *Solidarity on behalf of Van Zyl v KPMG Services (Pty) Ltd and Others* (2014) 35 ILJ 1656 (LC) at paras 7 – 8; *National Union of Mineworkers and Another v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 945 (LC) at para 30; *Coega Development Corporation (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2016) 37 ILJ 923 (LC) at para 63.
- [16] 2003
- (1) SA 11 (SCA) at para 5
- [17] In *S v Makgetle; S v Matlowe and Another* 1980
- (4) SA 256 (B) at 257, the Court held that the trial must start de novo in the case of recusal by the presiding officer, because: ‘... the proceedings so far are a nullity in that the court has ceased to exist ...’.
- [18] 1957
- (3) SA 12 (T) at 14A-B.
- [19] 1948
- (1) SA 81 (N) at 84.
- [20] 1969
- (2) SA 385 (A) at 390F-G.
- [21] 2020 JDR 1282 (SCA).
- [22] Id at para 35.
- [23] 1993
- (4) SA 119 (ZS) 121H-J. This judgment was applied in *Mondi Shanduka Newsprint (Pty) Ltd v Murphy* 2018

(6) SA 230 (KZD) at para 8.

[24] Id at 122A-C.

[25] See also *Combrinck v Nhlapo* 2002

(5) SA 611 (LCC) at para 17.

[26] 2018

(6) SA 230 (KZD).

[27] Id at paras 23 – 24.

[28] In *Commercial Workers Union of SA v Tao Ying Metal Industries and Others* (2008) 29 ILJ 2461 (CC) at para 65, the Court said: ‘... The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in ...’.

[29]

[2000] ZACC 10; 2000

(3) SA 705 (CC) at para 40.

[30] See *St Paul Insurance Co SA Ltd v Eagle Ink System (Cape) (Pty) Ltd* 2010

(3) SA 647 (SCA) at para 1; *Bank of South Africa Ltd v Sibanda* 2021

(5) SA 276 (GJ) at para 3.

[31] 2021

(5) SA 276 (GJ) at para 13.

[32] See *Le Car Auto Traders v Degswa* 1038 CC and Others 2013 JDR 1651 (GSJ) at para 36, where it was said that: ‘... The effect of a recusal can only be in respect of a prospective or current proceeding. ...’.

[33] In *President of the Republic of South Africa and Others v South African Rugby Football Union and Others*

[1999] ZACC 9; 1999

(4) SA 147 (CC) at para 48, it was held as follows: ‘... 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 ...’. See also *South African Human Rights Commission obo South African Jewish Board of Deputies v Masuku and Another* 2022

- [4] SA 1 (CC) at para 63.
- [34] 2023 JDR 0248 (KZP) at paras 29 – 30.
- [35] 2020 JDR 2717 (SCA) at paras 20 – 21.
- [36] See *Sasol Infrachem v Sefafe and Others* (2015) 36 ILJ 655 (LAC) at para 54; *Premier Foods* (supra) at para 39.
- [37] Para 11 of the judgment.
- [38] Para 21 of the judgment.
- [39] See *Northam Platinum Ltd v Fganyago NO and Others* (2010) 31 ILJ 713 (LC) at para 27; *Brodie v Commission for Conciliation, Mediation and Arbitration and Others* (2013) 34 ILJ 608 (LC) at para 33; *Kock v Commission for Conciliation, Mediation and Arbitration and Others* (2019) 40 ILJ 1625 (LC) at para 37.
- [40] See *Satani v Department of Education, Western Cape and Others* (2016) 37 ILJ 2298 (LAC) at para 21; *Premier Foods* (supra) at paras 39 – 41; *National Union of Metalworkers of SA and Another v Wainwright NO and Others* (2015) 36 ILJ 2097 (LC) at para 55; *Baur Research* (supra) at para 22; *Pep Stores (Pty) Ltd v Laka NO and Others* (1998) 19 ILJ 1534 (LC) at paras 23-25; *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.
- [41] (2013) 34 ILJ 2347 (LC) at para 34.
- [42] *Id* at para 37.
- [43] The section 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.’
- [44] (2017) 38 ILJ 1820 (LC) at para 10. See also *ZA One* (supra) at para 40.
- [45] See *Premier Foods* (supra) at para 44.
- [46] See *ZA One* (supra) at para 81; *Premier Foods* (supra) at para 45.
- [47] (2015) 36 ILJ 655 (LAC) at para 54.
- [48] (2021) 42 ILJ 2371 (CC) at para 35.
- [49] See for example *Democratic Nursing Organisation of SA on behalf of Ramaroane v Member of the Executive Council for Health, Gauteng Province and Others* (2019) 40 ILJ 2533 (LC) at para 20; *Sihlali and Others v City of Tshwane Metropolitan Municipality and Another* (2017) 38 ILJ 1692 (LC) at para 29.

- [50] See *Mashishi v Mdladla NO and Others* (2018) 39 ILJ 1607 (LC) at para 14; *Ngobeni v Passenger Rail Agency of SA Corporate Real Estate Solutions and Others* (2016) 37 ILJ 1704 (LC) at para 14.
- [51] Compare *Moila v University of the North and Others* (2005) 26 ILJ 452 (LAC) at paras 51 and 60; *Sepheka v Du Pont Pioneer (Pty) Ltd* (2019) 40 ILJ 613 (LC) at paras 11 and 13.
- [52] 2011
- (9) BCLR 905 (CC) at para 120
- [53] (2019) 40 ILJ 613 (LC) at para 16.

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