

SOUTH AFRICA / JUDGMENT

South African Revenue Service v Commission for Conciliation, Mediation and Arbitration and Others (C520/2020) [2023] ZALCCT 12; [2023] 7 BLLR 692 (LC); (2023) 44 ILJ 1603 (LC) (3 April 2023)
[2023] ZALCCT 12

COURT

Labour Court Cape Town

BEFORE

H Rabkin-Naicker

CASE / FILE NUMBER

C520/2020

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RUPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

REPORTABLE

C520/2020

In the matter between:

SOUTH AFRICAN REVENUE SERVICE Plaintiff and COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent COMMISSIONER PARATHI PATHER N.O. Second Respondent FRANCOIS ALLENS Third Respondent NEHAWU Fourth Respondent Date heard: 10 and 21 November 2022 Delivered: 3 April 2023 by means of email

[1] This is an opposed application to review an arbitration award under case number WECT9570-19. In terms of the Award, the second respondent (the Commissioner) found that the dismissal of the third respondent (Allens) was substantively unfair. She reinstated him with back-pay.

[2] The background to the dispute is set out by the Commissioner in her award as follows:

“5. The applicant, Francois Allens was employed by the respondent as an investigator from 1 March 2008 and was dismissed on 11 May

2019. At the time of his dismissal he was earning R26 826.06 per month.

6. The applicant was dismissed for misconduct on charges of bribery, corruption and dishonesty. The respondent alleged that the applicant had called a David Hans and had asked him to look the other way when inspecting a container and if he did so he would be well taken care of.
7. The applicant acknowledged that he called David Hans on 15 September 2017, but denied offering him a bribe in exchange for looking the other way.
8. When Hans inspected the container, he found undeclared goods which included counterfeit good to the value of about R10 to R12 million.
9. The applicant seeks retrospective re-instatement.”
- [3] SARS grounds for review are that the Commissioner committed gross misconduct in relation to her duties and/or alternatively committed gross irregularities in the conduct of the arbitration proceedings for the following reasons. In submission, SARS argues that the irregularities involved border on a perception of bias on the part of the Commissioner.
- [4] During the evidence in chief of Hans, the Commissioner asked him the following:

“COMMISSIONER: What did you think of the call? Did you understand what the applicant was saying then when he asked the question, when he told you those words?”

MR HANS: If I might say Ms Commissioner, at the time that the call was made the container was still being unpacked, so we did not get to this yet.

COMMISSIONER: So you did not understand what he was talking at the time when he called you, but after the container was unpacked, what did you think?

MR HANS: Ja, at the time, at the time the call was made and he asked what he asked and at the back of my mind immediately it went oh, this is TIU, this man is going to, I do not know what this man wants, because of the current stigma even today against TIU.

.....

COMMISSIONER: So what does that mean?

MR HANS: You see, at that we all feared that you know TIU, with the stigma that is surrounding them that they....[intervenes]

COMMISSIONER: With the stigma surrounding TIU?

MR HANS: TIU yes, because there have always been rumours and stories about them being corrupt and ...

COMMISSIONER: So you thought, you immediately thought there is some corruption going on here.

MR HANS: Yes.

COMMISSIONER: Hey?

MR HANS: Yes Ms Commissioner”

[5] Under cross-examination, Hans was asked by Allens’ union representative if it was possible that he could have misunderstood

Allens:

“MS MANONA: Yes, okay. Let us go back to, you say, you were saying that the call was one minute long according to the source document that is here.

MR HANS: Yes

MS MANONA: Yes. You said that there were greetings exchanged and everything, because you knew each other from, and then there was also a request, but how long, why would it be a minute long, the conversation between the two of you if it was only the greetings and the instruction? I think greetings could be 10 seconds and then the instruction could be 10 seconds.

MR HANS: The warehouse must look nicely at their things, if I remember correctly, the warehouse is quite noisy, there are hoisters moving up and down, so at time it takes a bit longer to, I mean you have noise interference, so you are not listening and it might have been that.

MS MANOMA: So there is a possibility that based on the noise that you could not hear one properly, hence the duration of the call, maybe he had to repeat himself to you.

MR HANS : Yes

.....

MS MANONA: Okay I said based on the noise and everything, is there a possibility that you could have misunderstood him of what he was saying?

MR HANS: It is possible”

[6] It was further put to Hans that Allens was enquiring about the goods and if there is ‘anything’, he, Hans, could hand it over to TIU. The transcript then reflects an interaction between the Commissioner and Hans which starts after the representative of Allens’ wished to repeat what she had put to Hans. It reads as follows:

“COMMISSIONER: I will repeat it to him now. What the applicant is saying is that the applicant, on that particular day he called you to make enquiries about the goods firstly, and then to ask you to hand over the goods to them once you have completed checking the container. Is that possible?

MR HANS : It was first like it is[intervenes]

COMMISSIONER : Because they will say he did not ask, he did not tell you they would look after you if you work with them, he is saying he phoned you to tell you how, what is the progress of the checking of the container and if you find something you must hand it over to them. That is what they are saying What is your comment on that? Do you understand or must we say it in Afrikaans?

MR HANS: No. no I am just...

COMMISSIONER: Firstly on the one hand you are saying that the applicant called you that day and he said to you if you look after them they will take care of you, that is the words you used, the translation that I am using from Afrikaans, correct?

COMMISSIONER : Now the applicant is saying he did not say that to you, he asked you what is the progress of the container, he was checking the container, and if you find something you must hand it over to them, TIU. Do you agree?

MR HANS: No, no, no I am getting there, Ms Commissioner. So as far as I put in my statement as well as in my interpretation of what he says, so due to the noise factor it could be possible.

COMMISSIONER : So you are not sure what he said to you, is that what you are saying? You are not really sure if he said, if he said to you what is the progress on the container, you must hand over the container to me or to us. It is very, very different to you, to what you said earlier on, because if you are saying on the one hand now you are not sure now what he said, but in your mind there is a stigma attached to what they are doing, there is a stigma that there is corruption in that department, you automatically assume he saying to you they will look after you, you take care of them. The words are very important sir.

COMMISSIONER : A person's life is at stake here, remember that. You are saying that your interpretation of what happened, because there is a stigma attached to the Department, as opposed to him actually telling you they will take care of you if you take care of them, if you work with them then they will take care of you, that is a totally different thing, sir.

You must be careful with what you are saying, so on the one hand if the applicant, if you are not sure what the applicant said to you, but you interpret as being, because this stigma, there must be some corruption going on and it must have been in connection with some corruption. It is very, very important what you are saying now. Do you remember what has been said? If you cannot remember, you must say that.

If you based your whole testimony on your belief that there is corruption in the department and therefore the applicant must be calling in connection with some sort of corruption, it is a different thing sir, whether it was in your mind or whether it was actually happening is very important. Do you understand that?

MR HANS : I understand.

COMMISSIONER : So do you want to think about your answer very carefully?

HEARING ADJOURNS

HEARING RESUMES

COMMISSIONER: Sir, you have now had some time to think about your answer. Did you hear the applicant saying to you those words that you said that if you work with them they will take care of you? [Indistinct] Did you just think that is what he said because he told you concerning the container and it just happens to be the container that was filled with counterfeit goods?

Are sure of your question sir, your answer? Your answer [indistinct] Did you actually hear the applicant saying those words you mentioned or did you think because there is so much corruption going on in that department, the applicant was involved in corruption in this part of this action now?

You had time to think about it and I do not have anybody to help you along here sir, you are on your own. A man's entire future is at stake here. I do not want you to look at your representative to ask him, he is not going to show you any answers.

MR HANS: Ms Commissioner, can I stick with what I said earlier.

COMMISSIONER: No I do not want to give you permission to do anything, I want you to give me a proper answer, sir. If you are sticking to your proper statement, then that is it, but you should you not say that, if you cannot remember you need to say that. If you assume that it has to do with corruption you need to say that as well.

I cannot give you permission to say certain things, because I need to know the truth and the truth can never change, the truth remains always the same and nobody is going to fault you, because it is a long time ago, but I am asking you to be very careful, because if you cannot remember it is better then to say you cannot remember. So what is your answer?

MR HANS: Ms Commissioner, apart from my statement I cannot [intervenes] COMMISSIONER: You cannot say any more?

MR HANS: Ja."

[7] At a later stage, after some further cross-examination and re-examination of Hans, regarding an email Hans had written just after the phone call from Allens, and his affidavit deposed to a year later[1], the Commissioner then intervened again as follows:

"COMMISSIONER : Now just one question I will want to ask you and if both parties want to ask from that, I will allow that. When you wrote these e-mails and this report and you told your manager about that, at that point in time, did you think because the applicant belonged to a department that is corrupt that this call was to do with corruption and therefore you acted in this way, is that right?"

MR HANS: Yes, yes

COMMISSIONER: So you did not have, so it is not a lie there in the e-mails and stuff, it is actually what you believed happened, correct?

MR HANS: Correct

COMMISSIONER: Because of your belief that the TIU Department was corrupt?

MR HANS: That is correct, yes

COMMISSIONER: Do you want to ask any other questions on that?

MR FELAAR[2]: Yes , Commissioner. So now when you said TIU was the only reason, do you then discard what your heard? Did you not take that into

consideration what you heard? Remember, you gave an affidavit that you heard what he was saying to you. The question is: are you

ignoring what you heard?

MR HANS: No, that is why, how can I say, in the statement that is what I heard and then as the Commissioner said, because of what I believed to be.

MR FELAAR: So it is what you heard that made you to call and report the incident.

MR HANS: Yes. “

[8] The above line of questions by the SARS representative was aimed at clarifying answers Hans had given to the Commissioner, in what can only be described as a cross-examination by the Commissioner, after Hans had already stated that he would stick with his sworn statement.

[9] The Commissioner’s eventual summary of Hans’ evidence in the Award bears recording:

“196. The respondent then called their only witness who had first-hand knowledge of what happened. However, this witness was very

unreliable. Without even being prompted to do so, he revealed a prejudice that he felt by his belief that everyone who came from

TIU[3], were corrupt. Prior to the hearing he had reported that the applicant had called him on 15 September 2017 and asked him to ignore most of the contents of the container and in exchange he will be taken care of. He then called his manager to report the phone call. His manager then told him to unpack the entire container whereby he found bales of counterfeit goods. Under cross-examination, he admitted that he did not really hear the applicant on that day because the call was only for one minute and it was very noisy where he was. He then drew his own conclusion that because the applicant worked at TIU, his call must mean he must overlook certain goods and he will be taken care of. In perusal of the appeal application, it appears as if Hans did not come across as being reliable witness at the disciplinary hearing himself.” (emphasis mine)

- [10] The 'prejudice' against TIU was proffered by Hans in answer to questions by the Commissioner. She appeared intent on obtaining an answer from Hans to the effect that it was because of this prejudice that he had thought the call from Allens involved corruption. The Commissioner's repeated warnings to Hans that a man's life was at stake and her insistence that he go and think carefully about his version, strike the Court as unusually intrusive in far as the proceedings were concerned. Her interventions were made both before he was cross examined and after he was re-examined.
- [11] Section 138(1) of the LRA provides: '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.' Section 138 does not ban all formality — it merely requires 'minimal formality'. In deciding on how much formality is permissible one must be careful not to sacrifice fairness on the altar of informality. An equitable balance must be struck so that none of these pre-eminent values are sacrificed.[4]
- [12] In *Satani v Department of Education, Western Cape & other*[5]s the LAC considered the role of the Commissioner in that and other matters:
- "[21] In ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman NO & others, the court took the view that it was duty bound to play a supervisory role over the conduct of commissioners in arbitration proceedings and may thus consider the conduct of a commissioner even if it was not a ground for review. The court, however, emphasised that it may only intervene in terms of its supervisory functions, if it is apparent from the record before the court that one of the specific grounds as listed in s 145(2)(a) of the LRA actually exists, as the existence of any one of these three specific considerations must surely be entirely incompatible with any arbitration proceedings that would be considered to be lawful, reasonable and procedurally fair.*
- [22] The court noted that, although a commissioner may, in terms of s 138(1), conduct arbitration proceedings in any manner he or she deems appropriate, this did not give the commissioner licence to become engaged in the proceedings to such an extent that it appeared that he or she was a representative of one of the parties. For a commissioner to descend into the arena and become an active participant in the conduct of the case for one of the parties, was simply not fair play and completely negated the imperative of conducting fair arbitration proceedings. In this respect, the court held that the manner in which the commissioner conducted herself in the proceedings created the perception that she was firmly in favour of finding for the employee and that it created a perception of bias.
- [23] In *Raswiswi v Commission for Conciliation, Mediation & Arbitration & others*, the Labour Court came to a similar conclusion about the conduct of the arbitrator during the proceedings when the following was said:

'This line of questioning directed by the commissioner continues in the same vein, with the applicant's union representative scarcely getting a word in. Apart from the fact that the applicant's representative had only asked one question before the arbitrator launched into his

own line of cross-examination, it is clear that the character of his questions to the applicant was very different to the character of the questions he asked the company witnesses. The entire thrust of his questioning was not aimed at elucidating or clarifying the applicant's defence, but at challenging it. Moreover, the arbitrator's questions to the applicant did not follow naturally from an incomplete line of cross-examination initiated by the employer: the arbitrator took the initiative by directly attacking the applicant's defence, while he was still giving evidence in chief.'

[24] The conduct of the same commissioner who arbitrated this dispute was again a subject of consideration by the Labour Court in *Innovation Maven (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & D others* where the following observation was made by Van Niekerk J:

'In the present instance, in my view, and after a careful perusal of the record, the commissioner's conduct was such that she overstepped the mark. It is difficult to convey the magnitude of the extent to which the commissioner actively engaged in the proceedings, but read as a whole, the transcribed record reflects that the commissioner failed to respect the roles of the parties' respective representatives and assumed to herself the role of leading evidence and conducting cross-examination.'

[25] Unfortunately, the same observations are applicable in this case. The record is replete with instances where the commissioner took over the presentation of the case by leading evidence and not recognising the role of the parties' representatives. She regularly interfered in the appellant's examination of the respondent's witnesses; allowed the respondent's representative to interject and interrupt the course of questioning by the appellant's representative; expressed scepticism regarding certain evidence adduced or to be adduced by the appellant; prematurely expressed views about the appellant's conduct about the incident; solicited hearsay and similar fact evidence relating to other learners who had been allegedly approached by the appellant; and appeared to be assisting the respondent's representative to the detriment of the appellant."

[13] In *Impala Platinum Ltd v Jansen & other*[6]s the LAC again dealt with how far the provisions of section 138 constrain Commissioners:

"[25] In the circumstances, commissioners are entitled in terms of s 138 to question witnesses. Whereas in formal civil proceedings an irregularity may arise from a presiding officer entering the fray, commissioners conducting arbitration proceedings are in fact, in my view, entitled to adopt an inquisitorial approach, which necessarily affords them greater latitude to question witnesses. Such questions need not be limited to obtaining clarity on any issues, but the commissioner is entitled to ask questions of an investigative nature. This is so even where the parties are legally represented and a largely adversarial process is adopted. The entitlement to so enter into the fray comes from the duty imposed on the commissioner to 'determine the dispute fairly and quickly ... with the minimum of legal formalities'.

[26] In this matter, the commissioner adopted a mixture of an adversarial and an inquisitorial approach. While he did ask a number of questions, a holistic assessment of the transcript evinces that he was even-handed and questioned most of the witnesses, regardless of the stage of the proceedings, whether they were presenting evidence in chief or under cross-examination, for the appellant or for Jansen. More importantly, most of the questions were meant to obtain clarity on the evidence already presented. It cannot therefore be said that his entering into the fray was in any way prejudicial to either of the parties insofar as getting a fair hearing is concerned.”

[14] In my view, the Commissioner in this case went further in her interventions than simply clarifying the evidence that was presented. She elicited evidence and sought that certain conclusions were drawn in the manner that she questioned Hans. She then relied on such conclusions in her final evaluation of the evidence in her Award:

“210. The respondent relied solely on the evidence of Hans to prove the charges against the applicant. The other witnesses could only testify on what Hans had told them. Hans himself was unable to say exactly what the applicant said to him. He admitted that his interpretation of what was said was clouded by his prejudice that all people from TIU were corrupt. (emphasis mine)

211. Roberts[7] raised an important fact that in order for the applicant to have called Hans to partake in corrupt activities, he needed to speak to him for longer than one minute or there had to be follow up calls. I note that that Hans admitted that he could not make out what the applicant was saying to him because of the noise level and that the conversation only took one minute. If the applicant was involved in corrupt activities, surely he had to discuss the unearned reward with Hans to entice him to ignore the contents of the container. It does seem improbable that the details of the reward were not discussed with a follow up call.
212. Roberts raised another important fact that if the applicant was involved in corrupt activities, he would have had extra money and no evidence was brought to show that the applicant had increased his financial situation in any way.
213. In the light of the above, I find that the evidence provided by the respondent is insufficient to prove that the applicant was involved in bribery, corruption or dishonesty.
214. Even if the evidence did prove that the applicant was involved in corrupt activities, it is difficult to believe that dismissal was the appropriate sanction. The reason for this is because the applicant was working for more than one year before it was decided to suspend him. If the trust relationship had broken down irretrievably, then the applicant would have been suspended immediately after Hans reported the incident. According to Roberts he received a complaint alleging that TIU investigators were interfering with the inspection at Cowrie House. Once he handed over the case to Mouers, he only heard about the case one year later. If the respondent found that the behavior of the applicant was so serious, why did they take over a year to suspend him.”

- [15] Paragraph 214 of the Award (above), does not assist in shielding the Award from review. Rather it damages any remaining perception that despite the Commissioner's robust style in conducting the proceedings, she ensured that principles of fairness in its conduct as to both parties, prevailed. Having found that Allen's was not guilty, she then doubles down, and in effect she states that even if he was guilty of the very serious charges he faced ('corrupt activities'), dismissal would not be an appropriate sanction.
- [16] In my view, the transcript of the proceedings reveals that the Commissioner undertook the enquiry before her in an incorrect way and her failure to keep the balance between informality and fairness amounted to a gross irregularity. In *Head of Department of Education v Mofokeng & others*[8] the Labour Appeal Court emphasized that Labour Court Judges in review applications should bear in mind: "that it is not only the reasonableness of the outcome which is subject to scrutiny. As the SCA held in *Herholdt*, the arbitrator must not misconceive the enquiry or undertake the enquiry in a misconceived manner. There must be a fair trial of the issues." [9]
- [17] In *Arends & others v SA Local Government Bargaining Council & others*[10] the LAC considered a case in which the Arbitrator had proceeded to hear the dispute in arbitration on insufficient facts. It had the following to say:
- 'The enquiry was undertaken in the wrong manner with the result that the appellants were denied their rights to have their case fully and fairly determined. The principal cause of their denial or failure was the inept manner in which the case was put before the arbitrator. Be that as it may, the undertaking of the enquiry in the wrong or in an unfair manner by an arbitrator is an irregularity in the conduct of the proceedings reviewable in terms of s 145 of the LRA as suffused by the constitutional right to administrative action that is lawful and procedurally fair.'[11]
- [18] The unfair manner in which the Commissioner undertook the enquiry in this case as highlighted above, makes the Award susceptible to review. There was no fair trial of the issues. I therefore make the following order:

Order

1. The Arbitration award under case number WECT9570-19 is reviewed and set aside.
2. The dispute is remitted back to the first respondent for hearing anew before a Commissioner other than second respondent.
3. There is no order as to costs.

H.Rabkin-Naicker

Judge of the Labour Court

Appearances

Applicant: Puke Maserumule Attorneys Inc Third and Fourth Respondents: Lynette Myburgh
Instructed by Adrian Moodley Attorneys c/o Bagraims Attorneys

[1] The 'proper' statement

[2] Rep for SARS

[3] Tactical Interventions Unit

[4] Exxaro Coal (Pty) Ltd & another v Chipana & others (2019) 40 ILJ 2485 (LAC) at para 35

[5]

(2016) 37 ILJ 2298 (LAC)

[6]

(2017) 38 ILJ 896 (LAC)

[7] Allens' manager called by him as a witness

[8]

(2015) 36 ILJ 2802 (LAC)

[9] At paragraph 31

[10]

(2015) 36 ILJ 1200 (LAC)

[11] At paragraph 19

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