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Conciliations and the importance of maintaining impartiality

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Issue

Whether comments made by a commissioner in conciliation proceedings could give rise to a basis to request his recusal from arbitrating the matter and whether the subsequent refusal to recuse himself may result in the setting aside of an arbitration award.

Facts

The above issues were considered in the Labour Court (**LC**) case of *R G Brose Automotive Components (Pty) Ltd // Numsa obo N. Biyana and Others* (JR2411/19). The facts of the matter are briefly as follows.

The First Respondent referred a dispute to the Second Respondent, the Motor Industry Bargaining Council (**MIBCO**), alleging that he had been unfairly dismissed by his employer, R G Brose Automotive Components Proprietary Limited (**Applicant**).

The matter was initially conciliated by the Third Respondent (**the arbitrator**). The matter could not be resolved during conciliation and it immediately proceeded, thereafter, to arbitration.

At such time, the Applicant's representative requested the arbitrator to recuse himself based on comments made, by the arbitrator, during the conciliation process. After the commencement of the arbitration proceedings, the arbitrator issued a ruling refusing the Applicant's application for recusal. He subsequently issued an award in which he found the First Respondent's dismissal to be both procedurally and substantively unfair. The Applicant was ordered to reinstate the First Respondent.

LC Findings

The Applicant, thereafter, approach the LC and sought to review and set aside both the ruling on recusal and the arbitration award. The Applicant sought to review the recusal finding on the basis that the Arbitrator committed misconduct in relation to his duties as an arbitrator and breached his duty to conduct the arbitration fairly in terms of the Labour Relations Act 66 of 1995 (**LRA**). The Applicant sought to review the arbitration award issued on the basis that the Arbitrator's decision regarding the fairness of the dismissal and the relief to be awarded to the First Respondent was unreasonable.

The Applicant submitted, furthermore, that the recusal award should be set aside because the Arbitrator, in conducting the conciliation, "(a) delved into the merits of the dispute, (b) expressed the view that the First Respondent's dismissal was procedurally unfair, (c) intimated that the Applicant had already lost the case, (d) asked the Applicant's representative to give the First Respondent what she wanted; and (e) disclosed that he was going to rule in the First Respondent's favour".

The LC held that the Arbitrator did not deny making the utterances referred to by the Applicant. The Arbitrator's reasons for refusing the recusal application were that "(a) the Applicant's representative had failed to prove that he was unable to disabuse his mind of irrelevant personal beliefs or predispositions (b) it was **after** the leading of evidence had commenced that his conduct during the arbitration could be assessed (c) he displayed similar conduct in the past with no complaints from the parties; and (d) he took into account his obligations to bring the matter to finality expeditiously".

The LC reiterated that the test for recusal is trite. It is ***whether the Applicant for recusal has a reasonable apprehension that the decision maker will be biased***. In this regard, the LC also made reference to the case of *President of the Republic of South Africa and others v South African Rugby Football Union and others* 1999 (4) SA 147 (CC).

The LC, therefore, accepted the Applicant's submission that the Arbitrator erred in applying the incorrect legal principles in determining the recusal application.

The LC stated further that the arbitrator "erred in finding that his conduct during the arbitration process could be assessed only **after** the leading of evidence has started. The arbitration process starts **before evidence is led** and importantly, the arbitrator's conduct **after the arbitration has started** and **before evidence is led** falls within the conduct of the arbitration". The fact that the irregular and improper conduct was made before evidence was led is irrelevant.

In addition, the Arbitrator's previous similar conduct did not change the irregularity of making a pronouncement on the dispute before listening to the evidence. While section 138 of the LRA requires arbitrators to determine the dispute **fairly and quickly**, he erred in sacrificing fairness in the process.

The LC, therefore, held that the test the arbitrator utilised in reaching his ruling did not assist him in considering the relevant factors he was required to base it on, and he did not deal with the apprehension of bias relied upon by the Applicant's representative. In addition, the Arbitrator conducted the enquiry incorrectly and the errors made in reaching the ruling refusing the recusal application had a distorting effect on his decision and rendered it unreasonable.

The court held that in light of the above factors, the arbitration award could also not stand. This is because he exceeded his powers in continuing with the arbitration, after having unreasonably refused the recusal application. The arbitration award was, therefore, reviewed and set aside and remitted to be arbitrated *de novo* (afresh) by an arbitrator other than the Arbitrator.

Importance of this case

This case is important in reiterating the need for commissioners/arbitrators to act in an unbiased manner. Parties to the proceedings should note that where commissioners made comments that indicate bias they are entitled to request the recusal of such commissioners from subsequent proceedings. Should the commissioner unreasonably refuse such an application it may give rise to a basis to have the recusal ruling and/or any subsequent arbitration award set aside.



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