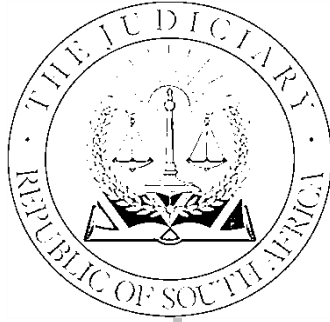




**THE LABOUR COURT OF SOUTH AFRICA
JOHANNESBURG**

Not Reportable

Case No: JR1312/11

LABOURNET CENTRAL (PTY) LTD

Applicant

And

COMMISSIONER G S JANSEN VAN VUUREN, N.O.

First Respondent

**THE COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

Second Respondent

NIEL MAYS

Third Respondent

Heard: 03 July 2014

Delivered: 15 September 2015

Summary: Application for review in terms of s. 145 of the LRA; Applicant *inter alia* contending that the Commissioner was biased; Commissioner evidently impartial; Excerpts from the record revealing unwarranted interference, questioning and remarks sustaining the apprehension of bias; Applicant not afforded a fair hearing; Award set aside on this basis alone; Application granted with no order as to costs.

JUDGMENT

VOYI AJ

Introduction

- [1] The Applicant seeks to review and set aside an arbitration award issued by the First Respondent (hereinafter “*the Commissioner*”) on 24 May 2011 under case number GATW13012-10. The application for review is launched in terms of the provisions of s 145 of the Labour Relations Act.¹
- [2] The application was launched on 05 July 2011² and it is opposed only by the Third Respondent.

Background

- [3] The Applicant is Labournet Central (Pty) Ltd, a company providing *inter alia* industrial relations products and services to its client on a retainer basis. It employed the Third Respondent (hereinafter “*Mr Mays*”) as its sales consultant for the Pretoria branch of the business.
- [4] Mr Mays was employed with effect from 1 November 2009. His basic salary was a fixed amount of R10 000.00. As a sales consultant, he had an agreed monthly sales target of R10 000.00. He was also entitled to earn commission over and above the basic salary, provided that he exceeded 50% of his target.
- [5] For the first month of his employment, it being November 2009, Mr Mays was not expected to achieve any target. During this time, he was expected to take some time in learning about the Applicant’s products and services. It was in December 2009 that he was expected to commence attaining some target, albeit at a reduced amount.
- [6] For the month of December 2009, the target he had to meet was an amount of R3 000.00. This gradually increased and in January 2010, he was expected to reach R5 000.00 on sales. The agreed monthly sales target of R10 000.00 only took effect on the month of February 2010. From then onwards, he was expected to meet his fixed monthly sales target of R10 000.00.

¹ Act No. 66 of 1995 as amended (“the LRA”).

² The award was, according to the Applicant, served on it on 03 June 2011.

- [7] As for his actual performance as against the set target, Mr Mays managed to attain his fixed monthly sales target *only* for the months of April 2010 and May 2010. On February 2010, he only attained R3 950.00 on sales. For March 2010, he reached R8 440.00 on his actual sales.
- [8] In April 2010, Mr Mays exceeded his target by 19%, attaining actual sales to the amount of R11 900.00. The month of May 2010 was even better, he having attained R13 000.00 on his sales.
- [9] It was from June 2010 onwards that Mr Mays began to perform poorly. It is common cause that Mr Mays' performance from June 2010 until the date he was dismissed was below the expected standard. For June 2010, he only attained R1 275.00 on his sales target. The sales target was also not met for July 2010, with Mr Mays only reaching R3 725.00 on his set monthly sales target of R10 000.00.
- [10] On 3 August 2010, one Ms Gillian Barnes ("*Ms Barnes*"), who was the Applicant's Branch Manager for the Pretoria Branch of the business, addressed an electronic mail to Mr Mays wherein she requested that he sends his commitments (on sales) by close of business the following day. On 4 August 2010, Mr Mays responded by attaching a list of possible sales for August 2010. In his response, Mr Mays stated that he can unfortunately not commit to any of the figures as they are all just possible sales.
- [11] For the month of August 2010, Mr Mays did not achieve any sales up and until after the 20th of that month. On the latter date, an informal discussion regarding his performance was held. Present were Mr Mays and Ms Barnes.
- [12] What was discussed at the aforesaid informal session was recorded by Ms Barnes in an electronic mail dated 23 August 2013, addressed to Mr Mays. Therein, Ms Barnes detailed what was discussed and what she and Mr Mays each submitted on the issue of the latter's poor performance. In her electronic mail, Ms Barnes closed off by recording that if there was anything Mr Mays needed, he must feel free to come and discuss same with her at any point in time.

- [13] For the month of August 2010, Mr Mays only attained sales to the amount of R1500.00. This resulted in the Applicant issuing Mr Mays with a notice to attend a poor work performance counselling session to be held on 9 September 2010. The notice was issued on 07 September 2010. The subject matter for discussion was Mr Mays' failure to meet the required sales target of R10 000.00 per month, for the past 3 months, namely June, July and August 2010.
- [14] On 9 September 2010, the poor work performance counselling session was convened. Present were again Mr Mays and Ms Barnes. The actually achieved sales for the previous months were canvassed and Mr Mays made submissions on his poor work performance and his ability to perform his duties. Ms Barnes also made her own submissions.
- [15] Towards the end of the aforesaid formal poor work performance session, Mr Mays was given the month of September 2010 as a 'review period' respecting his performance. Of importance, Mr Mays was placed on final terms in that it was conveyed to him by Ms Barnes that should he fail to meet the required target of R10 000.00 for the month of September 2010, his services may be terminated due to poor work performance.
- [16] The issues discussed at the poor work performance counselling session of 9 September 2010 were recorded in a document dated 13 September 2010, which Ms Barnes labelled as a 'judgment'. Ms Barnes also took contemporaneous handwritten notes of what was discussed.
- [17] For the month of September 2010, which was the 'review period', Mr Mays only attained sales in the amounts of R1600.00 (on the Skills and Equity product) and R2420.00 (on the IR product). All in all, Mr Mays archived R4 020.00 as against the set monthly sales target of R10 000.00. This resulted in a poor work performance hearing being convened by the Applicant.
- [18] The formal poor work performance hearing was held on 7 October 2010 and it was concluded on 11 October 2010.

[19] The hearing was chaired by one Mr Frederick Joubert (“*Mr Joubert*”), who was the then Divisional Executive of the Applicant and in charge of *inter alia* the Pretoria branch of the business.

[20] At the aforesaid hearing, all issues pertaining to Mr Mays’ poor work performance were deliberated upon. In the end, Mr Joubert came to the conclusion that Mr Mays should be relieved from his duties. Based on this recommendation, the Applicant terminated Mr Mays’ services.

[21] Following his dismissal, Mr Mays lodged an unfair dismissal dispute with the Second Respondent (hereinafter “*the CCMA*”), which dispute culminated in the issuing of the arbitration award under review. I now turn to the arbitration proceedings presided over by the Commissioner as well as the primary basis for the application for review.

The arbitration proceedings and the review application

[22] The arbitration hearing over the fairness of Mr Mays’ dismissal was initially enrolled for 14 March 2011 before the Commissioner. After the latter refused the Applicant’s request for legal representation, the arbitration proceedings were adjourned. The matter was then re-enrolled for 4 May 2011.

[23] At arbitration, the Applicant was represented by Mr Sean Snyman, in his capacity as one of the directors and shareholder of the Applicant. Mr Mays represented himself. The Applicant called only two witnesses to testify on its behalf, they being Ms Barnes and Mr Joubert. Mr Mays, on the other hand, testified in support of his case and did not call any witnesses.

[24] Before the Commissioner, documentary evidence was presented by the parties and this related, in the main, to the sequence of events and the performance of Mr Mays as alluded to in the background facts stated above.

[25] At the end of arbitration hearing, the parties were afforded an opportunity to submit written closing submissions in support of their respective cases. The arbitration award under review was, thereafter, issued.

- [26] Being dissatisfied with the award, the Applicant launched the present motion proceedings wherein it seeks to set aside the Commissioner's arbitration award.
- [27] In the founding affidavit in support of application for review, the Applicant assails the Commissioner's award on various grounds. One of these grounds advances a case of a reasonable apprehension of bias on the part of the Commissioner. It is also contended that the Commissioner exceeded his powers in certain respects. It is, furthermore, submitted that the Commissioner's decision, on the merits, is one that no reasonable decision maker could have reached.
- [28] In view of the fact that the presence of partiality in arbitration proceedings is capable of vitiating the entire proceedings and their outcome, it seems to me that the correct approach is to deal, at the outset, with the review ground that the Commissioner conducted himself in a manner that gave rise to an apprehension of bias. On this score, the Applicant contends as follows at paragraph 7.1 of its founding affidavit:

"From the outset, it is submitted that the manner in which [the Commissioner] conducted the arbitration was completely unacceptable, amounted to misconduct in the conduct of the proceedings, and in fact indicated bias against the [A]pplicant. This will be apparent from the record of the proceedings, once discovered. However, and at this stage, an example of such misconduct included [the Commissioner] in fact cross-examining the [A]pplicant's witnesses and in particular confronting Joubert in an aggressive and confrontational manner. In particular, and what was nothing else other than confrontational cross-examination of Joubert, [the Commissioner] kept suggesting to Joubert, who was the author of the minute of 7 October 2010, what he (Joubert) in the view of [the Commissioner] meant when he wrote the minute, despite Joubert being adamant that he was the author of the minute and what he meant in writing it. The fact is that [the Commissioner] did not afford the [A]pplicant a fair and impartial hearing. This is clearly a gross and reviewable irregularity and specific legal argument in this regard will be submitted to the above Honourable Court at the hearing of this matter."

[29] Further in the founding affidavit and at paragraph 7.14 thereof, the Applicant avers the following:

“From the above, it is clear that [the Commissioner] in fact went out of his way to make a finding in favour of [Mr Mays] and justify the same, by relying on evidence not in evidence, by relying on evidence he should not rely on, and excluding crucial evidence. This is unacceptable and deprived the [A]pplicant of a fair hearing. In fact, the conduct of [the Commissioner], and the manner in which he behaved towards the [A]pplicant, created a reasonable expectation of bias.”

[30] Elsewhere in its founding affidavit,³ the Applicant contends that the Commissioner failed to comply with the provisions of the LRA, “...*pertaining to the conducting of fair and proper arbitration proceedings...*”

[31] The Applicant concludes on this particular accusation by contending that the Commissioner “...*failed to afford [it] a fair and proper hearing in the circumstances and failed to properly conduct the arbitration proceedings in the circumstances.*”⁴

What the transcript reveals

[32] The Applicant’s indictment on the conduct of the Commissioner can properly be assessed with reference to the record of the arbitration proceedings, especially the transcript of the said proceedings. In the Applicant’s heads of argument in support of the review application, specific references are made to certain passages from the transcript.

[33] In assessing the Applicant’s complaint of partiality, I deemed it appropriate to consider the entire transcript in context as opposed to merely referring to certain passages thereof. What follows below is selected instances of what I, particularly, noted from the transcript in relation to the Commissioner’s conduct. It is worth mentioning that there are other instances which would have simply inundated this judgment if I were to restate them.

³ At para 7.28.1

⁴ At para 7.28.6

[34] First, the Commissioner, in my view, took a rather odd interest in the Applicant's business. The Commissioner himself confessed to the irrelevancy of his enquiries in this regard. When Ms Barnes, the Applicant's first witness, was asked to explain and also illustrate something on the Applicant's IR Product, the Commissioner abruptly interrupted the examination-in-chief. This is what the transcript reveals at page 17 thereof:

“COMMISSIONER It's, it's, it is, it is a month, it is actually a, wow, let me just, a monthly sales, is it, is it, is there, what did they, what was the value of the retainer paid by the client?

GILLIAN BARNES: Um, well it varies, but his target was R10 000.00 a month

COMMISSIONER Oh was the, the total value of retainers

GILLIAN BARNES: Yes, yes

COMMISSIONER Oh, okay let me just make a note of that.

RESPONDENT REPRESENTATIVE: All right (Interrupted by the Commissioner)

COMMISSIONER Let me just, I am just, I am just interested, interesting to me now, maybe not even relevant here but what kind of retainers are you talking about? I mean payment wise?"

[35] Of importance at this juncture is the Commissioner's own remark that the issue he was enquiring about was not even relevant. The exclamation in the first sentence of the above quoted passage is, to me, also telling. The peculiarity about the Commissioner's curiosity will become evident later on in this judgment.

[36] Second, the Commissioner lashed at the Applicant's second witness (being Mr Joubert) in the following unacceptable manner:

“COMMISSIONER No wait a minute you know what you must don't be so tensed up and in a hurry.”⁵

⁵ At page 92 of the Transcript; lines 1 and 2.

[37] Third, as Mr Joubert, the Applicant's second witness, was presenting his evidence-in-chief, the Commissioner jumped into the arena and commenced with what, to me, amounted to unwarranted and aggressive cross-examination of the witness. At some points during this cross-examination by the Commissioner, Mr Joubert would not even be given an opportunity to expand on his answers. This particular cross-examination commences at page 95 of the transcript and proceeds up to page 101 thereof. During this cross-examination, the following selected remarks are made by the Commissioner:

- **"COMMISSIONER** Ten days is that reasonable?"⁶
- **"COMMISSIONER** No let's just look at the context within which I'm asking these questions."⁷
- **"COMMISSIONER** Or hasn't been put before me as yet but from thereon ten days to get to 10000 is that reasonable in your opinion?"⁸
- **"COMMISSIONER** But that exactly the point I'm making if he was given if he was confronted on the 1st day of the month."⁹
- **"COMMISSIONER** But you wait until the 20th.

FREDERICK JOUBERT: Commissioner you know I've.

COMMISSIONER That's the point I'm trying to make."¹⁰

- **"COMMISSIONER** Ja I cautioned you that's not dispute that's not dispute but, but, but now you are (inaudible) is you starting to, to, to, to, to, to, to, to um, um, um get into a position to take formal action to get rid of this employee right.

FREDERICK JOUBERT: Well.

⁶ Transcript, page 96, line 2.

⁷ *Ibid*, line 6.

⁸ *Ibid*, lines 19 and 20.

⁹ *Ibid*, lines 23 and 24.

¹⁰ Transcript, page 96, lines 11 to 13.

COMMISSIONER No that's what it leads up ultimately now, now, why not at least give him a full month to say to him look you know what you run away with it in the past but in the next month if you don't get to R100000 which is your agreed target."¹¹

- **"COMMISSIONER** Now I'm asking my questioning

FREDERICK JOUBERT: Yes

COMMISSIONER And I'm giving you an opportunity to explain your reasoning.

FREDERICK JOUBERT: Fine

COMMISSIONER Because you fired the man."¹²

- **"COMMISSIONER** Mr. don't, don't dodge me you've been a good witness up to now but you starting to evade now I must warn you.

FREDERICK JOUBERT: I.

COMMISSIONER I'm not talking about your general management capabilities I'm talking about this particular individual and your decision to terminate his career with your company and you chaired the hearing."¹³

- **"COMMISSIONER** Okay good well thank you very much for that, that perfect illustrates the point that I'm trying to make."¹⁴
- **"COMMISSIONER** Okay but now why did you not take that into consideration when you, when you fired this man."¹⁵

[38] Forth, the Commissioner bluntly rejected Mr Joubert's earnest explanation of what he wrote in his minutes of the poor work performance hearing of 7 October 2010. In this regard, the transcript reveals the following:

- **"FREDERICK JOUBERT**: Commissioner I'm referring to the month of September in that paragraph

¹¹ Transcript, page 97, lines 17 to 23.

¹² Transcript, page 99, lines 10 to 14.

¹³ Transcript, page 100, lines 6 to 11.

¹⁴ Transcript, page 102, line 13 and 14.

¹⁵ *Ibid*, lines 22 and 23.

COMMISSIONER How can that be.

FREDERICK JOUBERT That's why I'm saying it's a month.

COMMISSIONER Read that sentence please."¹⁶

- **"COMMISSIONER** No there is no type error you know that...."¹⁷
- **"COMMISSIONER** Ja that will take some doing I'll leave it to your representative to argue that."¹⁸
- **"COMMISSIONER** That will take some doing."¹⁹
- **"COMMISSIONER** A type O a type O doesn't go that far I'm sorry but let me just make a note I'll be with you just now."²⁰

[39] Over and above the above passages, there are other instances of unwarranted remarks and cross-questioning by the Commissioner. To me the acme of them all is when the Commissioner passes the following remarks during the cross-examination of Mr Joubert:

"COMMISSIONER I enjoy playing with you guys because you suppose to be the labour law experts.

RESPONDENT REPRESENTATIVE: Laughing I'm saying nothing.

COMMISSIONER Ja you better look over the other way also."²¹

[40] Whilst Mr Mays was cross-examining the Applicant's Mr Joubert, the Commissioner took over this task and proceeded with a line of questioning that amounted to no less than a more robust cross-examination. The Commissioner went on with this to a point of patronising the Applicant's witness. The transcript, on this score, reveals the following:

"COMMISSIONER But you an extra ordinary person.

¹⁶ Transcript; page 105, lines 14 to 18.

¹⁷ Transcript; page 106, line 1.

¹⁸ Transcript; page 107, lines 10 and 11.

¹⁹ *Ibid*, line 13.

²⁰ *Ibid*, lines 18 and 19.

²¹ Transcript; page 110, lines 11 and 14.

FREDRICK JOUBERT: Commissioner I need there some of the whole some of the.

COMMISSIONER You are an extremely brilliant person.

FREDRICK JOUBERT: There is some of that part.

COMMISSIONER Am I right?

FREDRICK JOUBERT: Commissioner there is some.

COMMISSIONER You top of the notch do you agree or not?"²²

[41] At some point, the Commissioner indicated that he was going to switch off the tape recording for a moment, although it is not clear from the transcript if this indeed occurred.²³ Over and above, I reiterate that there are other instances of the Commissioner conducting himself in a manner that was unwarranted. He even allowed an issue of consistency, which was not part of the agreed issues in dispute, to be canvassed. In this connection, he lashed at the Applicant's witness with a question on why Mr Mays was singled out. The transcript reveals the following:

"COMMISSIONER Listen can just answer me was he singled out or."²⁴

[42] When Mr Mays was presenting his evidence, the Commissioner came across as being rather helpful to the detriment of the Applicant. At some point, he brought an issue to Mr Mays' attention as follows:

"COMMISSIONER Did you not earlier also said say that you were unemployed and that you would have accepted any target."²⁵

[43] This considerate approach was glaringly absent in respect to the Applicant's witnesses, who were met with a rather hostile and confrontational attitude by the Commissioner. The manner in which the Commissioner conducted himself and, more importantly, the ultimate outcome he reached in his award resulted in the Applicant being convinced that he was, somewhat, bias.

²² Transcript; page 114, lines 3 to 9.

²³ See: Transcript; page 119, lines 19 and 20.

²⁴ Transcript; page 117, line 5.

²⁵ Transcript; page 134, lines 12 and 13.

Evaluation

- [44] Under s 145(1) of the LRA, any party to a dispute who alleges a *defect* in any arbitration proceedings under the auspices of the CCMA is entitled to apply to this Court for an order setting aside the arbitration award.
- [45] A *defect* in the arbitration proceedings is defined, under s 145(2)(a) of the LRA, to mean *inter alia* that the commissioner “...committed misconduct in relation to the duties of the commissioner as an arbitrator.”
- [46] Where a commissioner fails to conduct the arbitration proceedings in an impartial manner or where he deprives a party of a fair hearing, that amounts to misconduct in relation to the duties of the commissioner as contemplated by s 145(2)(a)(i) of the LRA.²⁶
- [47] It has been held before that an aggressive cross-examination of a witness by a commissioner can constitute a reviewable irregularity.²⁷ The some of the occurrences in the present matter are analogous to those in *County Fair Foods (Pty) Ltd v Theron NO & Others*,²⁸ where the following was observed:

“[14] On the basis of the transcript of the proceedings before the first respondent in this case I am entirely satisfied that the first respondent questioned at least two of the applicant's witnesses, namely Erasmus and Hobden, in a manner which essentially amounted to cross-examination. For instance, the first respondent put to Erasmus propositions of his (the first respondent's) own making, interrupted Erasmus's answers, challenged Erasmus on the consistency of his answers with his previous evidence (when there was in fact no real inconsistency), reminded Erasmus that he was under oath (thereby impliedly indicating that he doubted his credibility), and made 'submissions' regarding the reasonable construction of his evidence. On one particular issue where it is certainly arguable that Erasmus's evidence was not inconsistent the first respondent engaged vigorously with Erasmus and in a manner which would undoubtedly have created the impression that he was prejudging the case against the interests of the applicant. On reading certain passages of the record one would certainly form the view, without being informed otherwise, that the first

²⁶ *Raswiswi v Commission for Conciliation, Mediation & Arbitration & Others* (2011) 32 ILJ 2186 (LC).

²⁷ *Chabalala v Metal & Engineering Industries Bargaining Council & Others* (2014) 35 ILJ 1546 (LC).

²⁸ (2000) 21 ILJ 2649 (LC).

respondent was not in fact the arbitrator but the representative of the third respondent.

[15] In regard to the evidence of Hobden the first respondent similarly engages in an interchange with him apparently to clarify an issue but in such a manner so as to challenge his credibility. The manner of the questioning is such that it appears to cross the line between seeking clarification and challenging the witness's version which is an unacceptable position for an impartial arbiter to adopt."

[48] In *County Fair Foods (Pty) Ltd v Theron NO & Others (supra)*, this Court went on to conclude as follows:

"In all the circumstances I am satisfied that the behaviour of the first respondent, certainly insofar as the evidence of Erasmus and Hobden is concerned, oversteps the boundaries of fair procedure in the conduct of arbitration proceedings. I am satisfied that his descent into the arena gives rise to a reasonable apprehension on the part of the applicant that he was not impartial. On the basis of the authority set out above it is clear that this is a reviewable defect. If it does not amount to misconduct then it certainly amounts to a gross irregularity in the conduct of the proceedings."²⁹

[49] The provisions of s 138(1) of the LRA, which grant a CCMA commissioner to adopt an inquisitorial approach to the conduct of arbitration proceedings, are in no way a *carte blanche* entitling a commissioner to do as he may please in the conduct of such proceedings.³⁰

[50] In this matter, I have no hesitation in coming to the conclusion that the Commissioner committed obvious misconduct in relation to his duties as an arbitrator. The passages quoted herein above directly from the transcript speak for themselves.

[51] The Commissioner, without any compunction, descended into the arena to transparently advocate Mr Mays' case. This inevitably sustains the Applicant's quarrel that it was denied a fair hearing. All things considered, the Commissioner's conduct does justify the Applicant's apprehension of bias. On

²⁹ At para 18.

³⁰ See: *County Fair Foods (Pty) Ltd v Theron NO & Others (supra)* at para's 7 to 10.

the facts of this case, I find that such an apprehension is reasonable under the circumstances.

[52] As stated herein before, failure to afford a party a fair and an impartial hearing would amount to misconduct in relation to the duties of a commissioner as an arbitrator within the meaning of s 145(2)(a)(i) of LRA. Such defect is enough to set aside an arbitration award.

[53] A commissioner's failure to afford a party a fair and an impartial hearing has the effect of contaminating the entire proceedings and the quality of the evidence presented. Under such circumstances, the appropriate remedy is the remittal of the matter back to the body under whose auspices the proceedings were held for arbitration *de novo* before a different commissioner.

[54] In view of the fact that I am upholding the Applicant's challenge to the arbitration award on the ground for review pertaining to bias, it becomes unnecessary to entertain the other grounds for review. Perhaps in passing one may mention an instance where the Commissioner remarked as follows:

“COMMISSIONER Okay can we just stop that now that's all hearsay evidence I will disregard all that.”³¹

[55] In this passage, the Commissioner categorically stated that evidence from Ms Barnes about the content of her discussions with one employee of the Applicant was hearsay evidence and he will disregard same. I must point out that there is no absolute bar to the admission of hearsay evidence at arbitration as the Commissioner seeks to suggest in the passage quoted above.³² The Commissioner's ruling in this regard may very well amount to some gross irregularity in the conduct of the arbitration proceedings but I make no finding on this score.

³¹ Transcript; page 43, lines 20 and 21.

³² See: *The Foschini Group v Madi & Others* (2010) 31 ILJ 1787 (LAC) at para 35; *Public Servants Association of South Africa v Minister of Department of Home Affairs & Others* [2013] 3 BLLR 237 (LAC) at para 19.

[56] In this matter, I am satisfied that the Commissioner's arbitration award cannot stand. It falls to be set aside. The arbitration award itself demonstrates that the Commissioner's complete lack of impartiality did not desert him as its traces can also be gleaned from his findings and reasoning in the award he issued. Reference in the award is made to (i) findings that are described as 'astounding and incomprehensible', (ii) a witness 'going through the motions', (iii) '(idle) promises', (iv) 'smokescreen', (v) 'futile exercise', etc; all of which expressions and terms are used in rejecting the Applicant's version of events and the evidence tendered.

[57] In the circumstances, the Applicant's application for the review and setting aside of the Commissioner's arbitration award succeeds. As for costs, I am of the considered view that no adverse costs order is warranted against the opposing party. The fault here lies with the Commissioner. Mr Mays was understandably defending an award that was in his favour. There is, accordingly, no justification for condemning him in costs. There shall, therefore, be no order as to costs in this matter.

Order

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

- i. The arbitration award issued by Commissioner GS Jansen Van Vuuren on 24 May 2011 under case number GATW13012-10 is reviewed and set aside.
- ii. The matter is remitted back to the CCMA for arbitration *de novo* before a different commissioner.
- iii. There is no order as to costs.

VOYI AJ

Acting Judge of the Labour Court of South Africa

APPEARANCES:

On behalf of the Applicant: Mr S Snyman of Snyman Attorneys

On behalf of the Third Respondent: Advocate F le Roux, instructed by Francois
Le Roux Attorneys

LABOUR COURT