



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case Number: JR1599/21

In the matter between:

COCA COLA BEVERAGES SOUTH AFRICA (PTY) LTD Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION (CCMA)** First Respondent

JOHN M. SIAVHE N.O. Second Respondent

KAOHELO MOROE N.O. Third Respondent

**NATIONAL UNION OF FOOD, BEVERAGE, WINE,
SPIRIT AND ALLIED WORKERS (NUFBWSAW)** Fourth Respondent

LETSIE FANI ALBERT MOEKOENA Fifth Respondent

Heard: In chambers

Delivered: 12 March 2025

(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and

released to SAFLII. The date on which the judgment is delivered is deemed to be 12 March 2025.)

JUDGMENT

FORD, AJ

Introduction

[1] This matter arises in the following circumstances. The first commissioner refused an application for his recusal. Pursuant thereto, he withdrew from the matter (on grounds that he felt it was too complex for him). The two rulings are different. In the first instance, the commissioner refused to recuse himself pursuant to an application. The second, where he, out of his own volition, withdrew from the matter. The applicant contends that after he made his first ruling (refusing to recuse himself), he was rendered *functus officio*, in relation to his second ruling, in which he withdrew from the matter (styled – recusal ruling).

[2] Following the first commissioner's withdrawal (recusal) from the matter, the CCMA appointed a second commissioner to proceed with the arbitration de novo. The arbitration continued afresh before the second commissioner, who found against the applicant and ordered the employee's reinstatement. Unhappy with that decision, the applicant (employer in the CCMA proceedings) sought to review the decision of the second commissioner, as well as the first commissioner's decision to withdraw (recuse himself) from the proceedings. At the hearing before me, the applicant sought to review and set aside both the initial withdrawal and the award of the second commissioner. I found against the applicant, dismissing the application for review. The applicant contends that in doing so, I erred on both the law and the facts, and this gives rise to the application for leave to appeal against the whole of my judgment and order dated 21 August 2024. For reasons that will become apparent below, I disagree with that contention.

Discussion on the grounds of appeal

Grounds 1 and 2: The recusal and functus officio issue

[3] The first and second ground of appeal pertains to the issue of the recusal of the first commissioner and the appointment of the second commissioner. In this regard the applicant contends that the recusal of the first commissioner amounted to misconduct, and that I should have accepted that the only plausible inference that can be drawn from the extraordinary sequence of events (the recusal of the first commissioner and the appointment of the second commissioner), is that something improper occurred. The applicant contends further that there is no other plausible explanation for the first commissioner rejecting the recusal application in November 2019, signing the attendance register on 27 January 2020 in preparation for continuing with a part-heard hearing, and then, absent any further input from the parties, suddenly deciding that the matter was too complex.

[4] In the judgment I stated that: *A commissioner may recuse himself in circumstances where the issues raised in a matter are complex, even if the assessment of complexity comes pursuant to an initial refusal.* The applicant seeks authority for this conclusion.

[5] A commissioner's recusal is generally considered in the following circumstances – a reasonable apprehension of bias: (*President of the Republic of SA and others v SARFU and others* 1999 (4) SA 147 (CC); *SACCAWU v I&J Ltd (Seafoods Division Fish Processing)* 2000 (8) BCLR 886; *Raswiswi v CCMA and others* (2011) 32 ILJ 2186 (LC); *Chabalala v MEIBC and others* (2014) 35 ILJ 1546 (LC).

[6] In the present instance, the first commissioner "recused" himself from the proceedings on grounds that, as he concluded, the matter was too complex for him. What the commissioner referred to as his "recusal" was effectively a withdrawal from the proceedings, because he regarded the matter to be complex. It is in that context that my commentary was made, and is to be understood.

[7] In light of the fact that the parties, pursuant to the first commissioner's withdrawal¹ (*"recusal"*) agreed to abide by the direction issued by the second commissioner, who became seized with the matter, and then proceeded with the matter, it can hardly be suggested that either party was prejudiced by that turn of events.

[8] The relief sought by the applicant in respect of the first commissioner's decision to "recuse" himself, is indeed remarkable. The applicant seeks for the matter (that has since been finalised before the second commissioner) to continue before the first commissioner, claiming that such proceedings, were effectively part-heard. The proceedings before the first commissioner came to an end, when he recused himself (the withdrawal). The matter commenced *de novo* before the second commissioner.

[9] I agree with what Snyman AJ noted in *Minister of Correctional Services v Mashiya and Others* (2023) 44 ILJ 1536 (LC), where he says:

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.²

[10] At paragraph 73 – 74, the learned judge says:

The only consequence that can follow from the above state of affairs that is that the proceedings must recommence before another arbitrator, *de novo*.

An apposite example can be found in *Director of Public Prosecutions, Northern Cape v Brooks*³. 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

¹ In *Minister of Correctional Services v Mashiya and Others* (2023) 44 ILJ 1536 (LC) (22 March 2023) where court notes withdrawal as a type of recusal (cf. para 79)

² 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 ...'.

³ 2020 JDR 1282 (SCA).

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.⁴

[11] And at paragraph 75, he said:

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*⁵:

‘... *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. ...*’

[12] The applicant participated in proceedings before the second commissioner, until the proceedings were finalised. The arbitration was a hearing *de novo* before the second commissioner. And those proceedings were finalised, and an arbitration award was issued.

[13] The contention that the first commissioner’s first ruling rendered him *functus officio* in regards the second ruling is not legally sound. The first ruling was occasioned by an application for his recusal. The second ruling is in effect a withdrawal from the proceedings on account of the first commissioner concluding that the matter is too complex for him. The doctrine of *functus officio*, did not bar the first commissioner, from making the second ruling. I say this for the following reasons. Firstly, the ruling was not a final order, and secondly no party have been granted rights flowing from that decision. This is exactly what the Supreme Court of Appeal said in *Retail Motor Industry Organisation and Another v Minister of Water & Environmental Affairs and Another* [2013] 3 All SA 435 (SCA), at paragraph 25:

⁴ Id at para 35.

⁵ 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.

It is not necessary in this judgment to define the exact boundaries of the *functus officio* principle, save to say the following: first, the principle applies only to final decisions;¹⁸ secondly, it usually applies where rights or benefits have been granted – and thus when it would be unfair to deprive a person of an entitlement that has already vested;¹⁹ thirdly, an administrative decision-maker may vary or revoke even such a decision if the empowering legislation authorises him or her to do so (although such a decision would be subject to procedural fairness having been observed and any other conditions);²⁰ fourthly, the *functus officio* principle does not apply to the amendment or repeal of subordinate legislation.²¹ (Footnotes omitted)

[14] Neither the first nor the second ruling of the commissioner is subject to the doctrine of *functus officio*.

Ground 3: The commissioner's assessment of the evidence

[15] In the arguments before me in the review application, duplicated in the application for leave to appeal, Coca-Cola alleges that the second-commissioner did not undertake a proper enquiry, before he reached a conclusion that Mokoena was not guilty of misconduct. And that I similarly failed in that regard, by *not engaging with the issue at all*.

[16] The second-commissioner, as previously stated, allowed the parties ample space and opportunity to ventilate the issues properly. I found that his recordal of the evidence and the assessment thereof, accords with the record. The second-commissioner concluded that Mokoena did not lie, and that he was not dishonest. That conclusion accords with the record.

Ground 4: The second-commissioner was biased

[17] I have considered the applicant's submissions on this issue, which is a duplicate of what was presented at the hearing of the application. In the submissions, Coca-Cola alleges that the second-commissioner was biased, having regard to the cumulative effect of the various factors set out in the papers. These allegations are not borne out by the record.

The legal test

[18] In terms of s 17(1)(a) of the Superior Courts Act 10 of 2013, leave to appeal *"may only be given" when:- the appeal would have a reasonable prospect of success; or there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration."*

[19] Touching on the question whether leave to appeal ought to be granted, the court in *MEC Health, Eastern Cape v Mkhitha*⁶, held that:

"[16] Once again it is necessary to say that leave to appeal, especially to this court, must not be granted unless there is truly a reasonable prospect of success. Section 17(1)(a) of the Superior Courts Act 10 of 2013 makes it clear that leave to appeal may only be given where the judge concerned is of the opinion that the appeal would have a reasonable prospect of success, or there is some other compelling reason why it should be heard.

[17] An applicant for leave to appeal must convince the court on proper grounds that there is a reasonable or realistic chance on appeal. A mere possibility of success, an arguable case or one that is not hopeless is not enough. There must be a sound, rational basis to conclude that there is a reasonable prospect of success on appeal." (Emphasis added).

[20] In *Smith v S*⁷ the Supreme Court of Appeal, also had occasion to consider what "reasonable prospects of success" in section 17(1)(a)(i) meant:

"What the test of reasonable prospects of success postulates is a dispassionate decision, based on the facts and the law that a court of appeal could reasonably arrive at a conclusion different to that of the trial court. In order to succeed therefore the appellant must convince this court on proper grounds that he has prospects of success on appeal and that those prospects are not remote but have a realistic chance of succeeding. More is required to be established than that there is a mere possibility of success, that the case is

⁶ 2016 JDR 2214 (SCA)

⁷ 2012 (1) SACR 567 (SCA) at para 7

arguable on appeal or that the case cannot be categorised as hopeless. There must, in other words, be a sound, rational basis for the conclusion that there are prospects of success on appeal."

[21] The full court in *Fair Trade Tobacco Association v President of the Republic of South Africa and Others*⁸ held that:

"As such, in considering the application for leave to appeal, it is crucial for this Court to remain cognizant of the higher threshold that needs to be met before leave to appeal may be granted. There must exist more than just a mere possibility that another court, the SCA in this instance, will, not might find differently on both the facts and the law. It is against this background that we consider the most pivotal grounds of appeal."

[22] I have considered, the application for leave to appeal, the submissions and the authorities quoted therein. I am of the view that the applicant does not have any prospects of success on appeal. I find no reason why the Labour Appeal Court ought to be burdened with a matter of this nature.

Order

1. The application for leave to appeal is refused.
2. I make no order as to costs.

Bart Ford

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant:	Adv. C. Orr SC
Instructed by:	Bowman Gilfillan Inc
For the fifth respondent:	No appearance

⁸ 2020 JDR 1435 (GP) at [6]