



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR710/21

In the matter between:

FRASER ALEXANDER (PTY) LIMITED

Applicant

and

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION ("CCMA")**

First Respondent

COMMISSIONER NICHOLUS SONO N.O.

Second Respondent

JIMMY MOIMANA

Third Respondent

Heard: 29 August 2024

Delivered: 14 March 2025

JUDGMENT

ADAMS, AJ

Introduction

[1] This is an application for review in terms of section 145 of the Labour Relations Act¹ (LRA) to review and set aside an Arbitration Award (Award) issued by the Second Respondent, (Commissioner) in favour of the Third Respondent following con-arb proceedings under the auspices of the CCMA under case no: LP316/21.

[2] At the outset of this judgment, I believe that it is pertinent to point out that the Third Respondent's legal representative was not present at Court to argue the matter on the day that it was heard, being 29 August 2024. When the matter was called, I was advised by the Applicant's counsel and my registrar that there was a possibility that the Third Respondent's new legal representative had not received the notice of set down. I advised the Applicant's counsel that the matter was to stand down in order to get hold of the Third Respondent's legal representative to ascertain the position in the event that a postponement was required.

[3] I was informed thereafter that the Third Respondent's legal representative had sent an email confirming that the matter could proceed and requesting that I take the Third Respondent's opposing affidavit into consideration in determining the matter. This email was subsequently sent to my registrar and stated:

‘Dear Sirs,

Following the telephonic discussion in this matter, we wish to confirm that we did not receive notice of set down herein. It has been determined that the set down was actually sent to the previous attorneys.

We took liberty to obtain instructions in this matter and we are instructed to let the matter run (unopposed) to finality however request the Honourable Judge also consider our opposing papers so as to reach his decision. Ultimately, the Honourable Judge has a final say in the matter. Thanks.

Ms. Makosho Maria Ntsoane

Managing Attorney

MITTI ATTORNEYS’

¹ Act 66 of 1995, as amended.

[4] I, accordingly, proceeded with the matter. I did not, however, proceed on an unopposed basis taking cognisance of the fact that the Third Respondent has opposed the proceedings and delivered the requisite answering affidavit and heads of argument.

[5] In delivering this judgment, I have taken into consideration all of the papers filed in the matter, the Applicant's submissions at the hearing of the matter, and the Third Respondent's answering affidavit, as well as his heads of argument, filed by his former attorneys of record.

The award

[6] In terms of the Award, the Commissioner found that:

- 6.1. the dismissal of the Third Respondent was substantively unfair;
- 6.2. the Applicant was ordered to reinstate the Third Respondent on the same terms and conditions of employment which governed the employment relationship prior to the dismissal dated 29 November 2020;
- 6.3. the Third Respondent was to report for duty on 31 March 2021;
- 6.4. the Applicant was further ordered to pay outstanding remuneration to the Third Respondent in the amount of R124 446.52, which was equivalent to the Third Respondent's four months backpay, calculated at the Third Respondent's monthly salary of R31 111.63;
- 6.5. the amount due was to be paid to the Third Respondent by no later than 30 March 2021, failing which the sum would bear interest at the rate applicable from time to time to judgment debts.

Brief factual background

[7] The Third Respondent was employed by the Applicant on 26 January 1998 as a Superintendent. He was dismissed on 29 December 2020 following a disciplinary hearing into allegations of violating the Applicant's driving policy and damage to company property.

[8] The disciplinary enquiry had its origins in a motor vehicle collision on the R37 which occurred on or about 25 November 2020. The collision involved the vehicle of the Applicant, which was being driven by the Third Respondent at the time of the incident.

[9] The Third Respondent had, prior to his dismissal, been disciplined on two previous occasions by the Applicant for similar offences:

9.1. on 17 April 2018, the Third Respondent was issued with a final written warning for gross negligence, after he had driven the Applicant's vehicle into the back of a vehicle on the R555; and

9.2. on 11 April 2019, the Third Respondent was issued with a sanction of two weeks' unpaid suspension for damage caused to company property, after he had reversed the Applicant's vehicle into a pole at the Applicant's premises.

[10] The Third Respondent was informed that if a further incident of a similar nature occurred, he would be dismissed.

[11] Following the second disciplinary sanction of unpaid suspension, the Applicant placed the Third Respondent on a defensive driving course. He completed the course on or about 7 June 2019.

[12] After the last accident which occurred on 25 November 2020, the Applicant conducted an investigation. It found, *inter alia*, that the Third Respondent had failed to adhere to the speed limit of 60 kilometres an hour, that he had failed to take the necessary precautions to avoid the accident and that such failure had caused the damage to the Applicant's motor vehicle.

[13] The disciplinary enquiry was chaired by a Mr Nicolaas Muller, an independent third party.

[14] At the disciplinary enquiry, the Third Respondent pleaded guilty to the charge of damage to company property and was accordingly found guilty. The chairperson,

however, found the Third Respondent not guilty of violating the Applicant's driving policy, as it could not be established that he had exceeded the speed limit.

[15] The chairperson nevertheless found that a pattern of misconduct had been established relating to negligence and damage to the Applicant's vehicles. The chairperson also noted that the Third Respondent had been disciplined previously for such misconduct and that the appropriate sanction in the circumstances was dismissal. The Third Respondent was dismissed on 29 December 2020.

[16] The Third Respondent referred his dispute to the CCMA shortly after his dismissal and the matter was subsequently enrolled for con-arb at the CCMA's Polokwane offices. The dispute went before the CCMA Commissioner, being the Second Respondent herein, on 8 March 2021.

Test on review

[17] I am required to deal with the grounds for review within the context of the test this Court must apply in deciding whether the arbitrator's decision is reviewable. The test has been set out in *Sidumo and Another v Rustenburg Platinum Mines Limited and Others*² (*Sidumo*) as whether the decision reached by the Commissioner is one that a reasonable decision maker could not reach. The Constitutional Court held that the arbitrator's conclusion must fall within a range of decisions that a reasonable decision maker could make.

[18] The Labour Appeal Court (LAC) in *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others*³ affirmed the test to be applied in review proceedings and held that:

'In short, a reviewing Court must ascertain whether the arbitrator considered the [principle] issue before him/her; evaluated the facts presented at the hearing and came to a conclusion that is reasonable.'

² [2007] ZACC 22; (2007) 28 ILJ 2405 (CC) (*Sidumo*) at para 110.

³ [2013] ZALAC 28; (2014) 35 ILJ 943 (LAC) (*Gold Fields*) at para 16.

[19] The review court is not required to consider every factor individually and how the arbitrator treated and dealt with each of those factors and then determine whether a failure by the arbitrator to deal with it is sufficient to set the award aside. This piecemeal approach to dealing with the award is improper as the reviewing court must consider the totality of the evidence and then decide whether the decision made by the arbitrator is one that a reasonable decision maker could make.⁴

[20] In *Quest Flexible Staffing Solutions (Pty) Ltd (a division of Adcorp Fulfilment Services (Pty) Ltd) v Legobate*⁵ (*Quest Flexible Staffing*), the LAC confirmed the test to be applied on review:

‘The test that the Labour Court is required to apply in a review of an arbitrator’s award is this: “is the decision reached by the commissioner one that a reasonable decision maker could not reach?”’

[21] Our courts have repeatedly stated that in order to maintain the distinction between review and appeal, an award of an arbitrator will only be set aside if both the reasons and the result are unreasonable. In determining whether the result of an arbitrator’s award is unreasonable, the Labour Court must broadly evaluate the merits of the dispute and consider whether, if the arbitrator’s reasoning is found to be unreasonable, the result is nevertheless capable of justification for reasons other than those given by the arbitrator.

[22] An award will no doubt be considered to be reasonable when there is a material connection between the evidence and the result or, put differently, when the result is reasonably supported by some evidence. Unreasonableness, is, thus, the threshold for interference with an arbitrator’s award on review.

[23] In *Bestel v Astral Operations Limited and Others*⁶, the LAC considered the limited scope possessed by this Court to review an arbitration award and accepted that an arbitrator’s finding will be unreasonable if the finding is unsupported by any evidence, if it is based on speculation by the arbitrator, if it is disconnected from the

⁴ *Gold Fields supra* at paras 18 - 19.

⁵ [2014] ZALAC 136; (2015) 36 ILJ 968 (LAC) at para 12.

⁶ [2010] ZALAC 19; [2011] 2 BLLR 129 (LAC).

evidence, if it is supported by evidence that is insufficiently reasonable to justify the decision, or if it was made in ignorance of evidence that was not contradicted. The LAC held that:

‘... the ultimate principle upon which a review is based is justification for the decision as opposed to it being considered to be correct by the Reviewing Court; that is whatever this Court might consider to be a better decision is irrelevant to review proceedings as opposed to an appeal. Thus, great care must be taken to ensure that this distinction, however difficult it is to always maintain, is respected.’⁷

[24] It has been emphasised by the Courts that a review is not an appeal. This was confirmed in *Duncanmec (Pty) Limited v Gaylard N.O. and Others*⁸ (*Duncanmec*) where the Constitutional Court held that:

‘As is apparent from *Sidumo*, the genesis of the reasonableness standard of review is section 33(1) of the Constitution which confers on everyone the right to administrative action that is lawful, reasonable and procedurally fair. Since an award like the one we are concerned with here constitutes administrative action, the Constitution requires it to be procedurally fair, lawful and reasonable. This means that an award that fails to meet these requirements is liable to be set aside on review. These requirements are in addition to the grounds of review listed in section 145 of the LRA. However, to some extent the latter grounds may overlap with the Constitutional requirements. But the reasonableness standard is sourced from section 33 of the Constitution alone. It does not form part of the overlap.’

[25] *Sidumo* cautions against the blurring of the distinction between appeal and review and yet acknowledges that the enquiry into the reasonableness of a decision invariably involves consideration of the merits. So as to maintain the distinction between review and appeal, this Court formulated the test along the lines that unreasonableness would warrant interference if the impugned decision is of the kind that could not be made by a reasonable decision maker.

⁷ Ibid at para 18.

⁸ [2018] ZACC 29; [2018] 12 BLLR 1137 (CC) at para 40.

[26] This test means that the reviewing court should not evaluate the reasons provided by the arbitrator with a view to determine whether it agrees with them. That is not the role played by a Court in review proceedings. Whether the Court disagrees with the reasons is not material.

[27] The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by rational reasons.

[28] The review test to be applied *in casu* is a stringent and conservative test of reasonableness. The Applicant is required to show that the arbitrator arrived at an unreasonable result.

[29] In the matter of *Baur Research CC v Commission for Conciliation, Mediation and Arbitration and Others*⁹ (*Baur*), Snyman AJ held:

‘[16] What the above authorities in my view clearly show is that it must always be remembered that the Sidumo review test does not replace the statutory review grounds in Section 145.¹⁰ It “suffuses” the same, and in particular, this “suffusing” is applicable to the “gross irregularity” review ground in Section 145(2)(a)(ii). As the Court said in *Fidelity Cash Management*:¹¹

“Nothing said in *Sidumo* means that the grounds of review in s 145 of the Act are obliterated. The Constitutional Court said that they are suffused by reasonableness. Nothing said in *Sidumo* means that the CCMA's arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in s 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise. Also if the CCMA made a decision that exceeds its powers in the sense that it is *ultra vires* its powers, the reasonableness or otherwise of its decision cannot arise.”

⁹ [2013] ZALC JHB 338; (2014) 35 ILJ 1528 (LC) at paras 16 – 20.

¹⁰ 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”.

¹¹ *Fidelity Cash Management* (supra) at para 101.

[17] In this respect specifically, the LAC in *National Commissioner of the SA Police Service v Myers and Others* 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.”

[18] 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 not¹² 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.¹³ 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. Guidance in this respect can also be found from the judgment of *Sidumo*¹⁴ itself, where Sachs J held¹⁵ that “[t] the commissioner must be impartial and basically fair and reasonable in the conduct of his work”. *Navsa* AJ in turn held as follows, referring to Section 145 of the LRA:¹⁶

¹² See: *Colyer v Essack NO and Others* (1997) 18 ILJ 1381 (LC) at 1384; *Commuter Handling Services (Pty) Ltd v Mokoena and Others* (2002) 23 ILJ 1400 (LC) at paras 19 – 20; *Northern Province Development Corporation v Commission for Conciliation, Mediation and Arbitration and Others* (2001) 22 ILJ 2697 (LC) at paras 20 – 21; *Western Cape Southern Suburbs Real Estate (Pty) Ltd t/a Seeff Properties v Commission for Conciliation, Mediation and Arbitration and Others* (2009) 30 ILJ 2158 (LC) at paras 23 – 24.

¹³ See: *Naraindath v Commission for Conciliation, Mediation and Arbitration and Others* (2000) 21 ILJ 1151 (LC) (*Naraindath*) at para 27; *County Fair Foods (Pty) Ltd v Theron NO and Others* (2000) 21 ILJ 2649 (LC) at para 7; *Mollo v Metal and Engineering Industries Bargaining Council and Others* [2009] ZALC 157; (2010) 31 ILJ 971 (LC) at para 32; *National Union of Security Officers and Guards and Another v Minister of Health and Social Services (Western Cape) and Others* (2005) 26 ILJ 519 (LC) at paras 16 – 17; *Raswiswi v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 2186 (LC) at para 20; *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman NO and Others* (2013) 34 ILJ 2347 (LC) at paras 38 – 39.

¹⁴ *Sidumo supra* fn 3.

¹⁵ *Id* at para 147.

¹⁶ *Id* at para 89.

“Of course, section 145 has to meet the requirements of section 33(1) of the Constitution, i.e. it has to provide for administrative action that is lawful, reasonable and procedurally fair

O'Regan J said¹⁷:

“The question of purposive constitutional interpretation that thus arises is whether it is constitutionally appropriate to hold the CCMA to these standards. In my view it is. The CCMA is an organ of state exercising public power. Its statutory task is to resolve disputes that arise in the workplace by implementing the provisions of the Labour Relations Act read in the light of the provisions, in particular, of section 23 of the Constitution.”

[19] In this case, the specific ground of review in Section 145(2)(a)(i) is indeed of direct relevance in the current matter, as the case of the applicant principally is that of misconduct by the second respondent. As I have set out above, the issue of a reasonable outcome is not relevant in this regard, and the best manner in which to determine this ground of review was set out in *Naraindath v Commission for Conciliation, Mediation and Arbitration and Others*¹⁸, where the Court said:

“In my view it is perfectly clear in these circumstances that a complaint that a commissioner has conducted proceedings in a way which differs from the way in which the same dispute would be dealt with before a court of law cannot as such succeed. It is only where the person seeking to challenge the commissioner's award can point to specific unfairness arising from that action by the commissioner that a proper ground for review is established. 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.”

[20] Therefore, and in determining the principal review case raised by the applicant on the ground of misconduct by the second respondent, it must first be determined if the second respondent indeed conducted himself in a manner that could be considered to be unfair. If it is then determined that the

¹⁷ Id at para 138 and 139.

¹⁸ *Naraindath supra* fn 13 at para 27.

conduct is indeed unfair, the second part of the enquiry is whether such unfair conduct in actual fact had the effect of depriving the applicant of a fair hearing. If both these questions are answered in the positive, then the second respondent would have committed misconduct in the conduct of the arbitration proceedings which in turn vitiates the entire arbitration proceedings. This in turn must have the consequence that the arbitration award is reviewed set aside.'

[30] I intend to proceed to determine the Applicant's main ground of review on the same basis as the principles enunciated above.

Analysis of grounds of review

[31] The Applicant has raised three grounds of review premised on the following:

- 31.1. the Commissioner committed gross misconduct;
- 31.2. the Commissioner misconceived the true nature of the enquiry; and
- 31.3. the Commissioner ignored material and relevant evidence.

[32] Only the first ground of review will be specifically addressed hereunder, as I do not consider it necessary to determine the remainder of the grounds of review having regard to the conclusions I have come to.

[33] In the matter of *Coates Brothers Limited v Shanker and Others*¹⁹, the Court held as follows with specific reference to refusal by the *court a quo* to grant condonation:

'An Appellant must show, in an appeal from a decision in a lower court, that the court a quo "acted capriciously, or acted upon a wrong principle, or in a biased manner, or for insubstantial reasons, or committed a misdirection or irregularity, or exercised its discretion improperly or unfairly".'

[34] These considerations too apply to the discretion to allow legal representation as confirmed by Snyman AJ in *Baur*.

¹⁹ [2003] ZALAC 12; (2003) 24 ILJ 2284 (LAC).

[35] The Court has dealt with the issue of a decision by a Commissioner allowing legal representation in terms of Rule 25 of the CCMA Rules, in the judgment of *Samson v Commission for Conciliation, Mediation and Arbitration and Others*,²⁰ and said:

‘The Commissioner was required to exercise a discretion as to whether the Company should be afforded the right to legal representation, and to exercise that discretion judicially ...’

[36] In terms of the first ground of review, the Applicant has stated in its founding affidavit in summary, that same is premised on the following:

36.1. the Commissioner misconducted himself by allowing the Third Respondent’s attorney to be present during the conciliation phase of the con-arb hearing which took place on 8 March 2021; and

36.2. failed to deal with the issue of legal representation and permitted the Third Respondent to be legally represented during the arbitration phase of the con-arb hearing, without the Third Respondent having made any application for legal representation, as required by Rule 25 of the CCMA Rules.

[37] In terms of the first aspect above, in having the Third Respondent’s attorney present during the conciliation phase, the Applicant has contended as follows:

37.1. the CCMA Rules are explicit in regard to who may represent parties at conciliation proceedings. It is well established that Rule 25(1)(a) does not permit legal representatives to be present during such processes;

37.2. the Applicant had objected to the presence of Mr Banda (Banda) (the Third Respondent’s legal representative) during the conciliation process. The Commissioner nevertheless failed to exclude Banda from the proceedings, in breach of the Rules;

37.3. the Commissioner exhibited irritation with the Applicant when he communicated the Applicant’s position on settlement. Banda would have noticed the attitude and behaviour of the Commissioner and this may have

²⁰ [2009] ZALC 64; (2010) 31 ILJ 170 (LC) at para 8.

influenced the Third Respondent's position in relation to possible settlement and his willingness to proceed to arbitration;

37.4. the Commissioner delved into the facts of the matter, and in doing so, gave Banda insight into the evidence which the Applicant intended to lead. The Commissioner's conduct in this regard was aggravated by the fact that he made several inappropriate comments in regard to the merits of the Applicant's case, in the presence of Banda. The potential for prejudice in these circumstances, according to the Applicant, is obvious;

37.5. by immersing himself in the facts of the matter in the way that he did, and by expressing views on the merits and the ways in which he intended to disregard certain evidence (such as the previous disciplinary record of the employee), the Commissioner failed to ensure that he approached the subsequent arbitration in an unbiased and impartial manner; and

37.6. the conduct of the Commissioner would, at the very least, suggest an apprehension of bias. The Commissioner should properly have recused himself and, by failing to do so, also committed a further act of misconduct.

[38] In terms of the second aspect dealing with the issue of legal representation during the arbitration phase, the Applicant has contended as follows:

38.1. the CCMA Rules do not permit legal representation in disputes whether dismissal involves the conduct of the employee. Representation is only permitted in certain specific circumstances, as outlined in Rule 25(1)(c) of the CCMA Rules;

38.2. Rule 25(1)(c) permits the Commissioner to grant legal representation after considering specific criteria, including the nature and questions of the law, the complexity of the dispute, the public interest and the comparative ability of the parties to conduct the arbitration;

38.3. The Third Respondent did not seek to move an application for legal representation before the Commissioner. The Commissioner was prepared to commence the arbitration proceedings without dealing with this issue until it became necessary for the Applicant to raise it;

38.4. after raising the issue, the Commissioner required the Applicant to explain why it had objected to the Third Respondent being legally represented. The Commissioner's conduct effectively inverted the onus,

requiring the Applicant to explain why legal representation should not be granted. According to the Applicant, this was not the applicable test;

38.5. the Applicant was not legally represented at the arbitration. The deponent to the founding affidavit has stated that he is not a lawyer and does not have any legal qualifications. He had also objected to the legal representation of the Third Respondent. In these circumstances, it was difficult to understand how the Commissioner could have permitted legal representation, particularly in the absence of an application filed by the Third Respondent;

38.6. the Commissioner permitted legal representation without any application being made and indicated that he would deal with the issue in his award. Self-evidently he failed to do so.

Presence of the Third Respondent's legal representative during the conciliation process

[39] In conciliation proceedings, a party to a dispute may appear in person or be represented only by –

- (i) if the party is an employer, a director or employee of that party and, in addition, if it is a close corporation, a member of that close corporation;
- (ii) any office bearer, official or member of that party's registered trade union or registered employer's organisation;
- (iii) if the party has a registered trade union, any office bear, official or member of that trade union authorised to represent that party; or
- (iv) if the party has a registered employer's organisation, any office bearer or official of that party or a director or employer that is a member of that employer's organisation authorised to represent that party.²¹

[40] Accordingly, from the CCMA Rules, it is clear that only those persons expressly mentioned may represent parties during conciliation proceedings.

²¹ Rule 25 CCMA Rules.

[41] In an application for review to set aside a settlement agreement on the grounds that a person not permitted under section 135(4) of the LRA to attend conciliation proceedings between the Applicant and the First Respondent, the Court in *Mavundla and Others v Vulpine Investments Limited t/a Keg and Thistle and Others*²² held that:

‘[26] Whether the Commissioner made a mistake as to his designation, or whether she believed the Applicants had agreed to his presence by failing to object, she acted irregularly by allowing Berger to attend the conciliation because the limitation on persons allowed to attend proceedings under Section 135(4) of the Act is peremptory and cannot be departed from by agreement, or as a result of waiver. Likewise, if the Commissioner made a mistake of fact as to a person’s identity, this mistake is a reviewable irregularity.

[27] The limitation on representation rights at conciliation proceedings contained in Section 135(4) of the Act is based on public policy considerations, which Parliament deemed necessary to specifically include in the Act. Some detail around the rationale for this public policy can be found in the “Explanatory Memorandum on the 1995 Labour Relations Bill”, as well as in Section 1 of the Act, which sets out the purpose of the Act.

[28] The explanatory memorandum states that previous Conciliation procedures (those in place prior to the enactment of the 1995 Act) were “lengthy, complex and pitted with technicalities, requiring sophistication and expertise beyond the reach of most individuals and small businesses”.

[29] To achieve the object of a “simple non-technical and non-jurisdictional approach to dispute resolution” a policy was adopted of permitting only the parties or their collective representatives to attend conciliation proceedings, and excluding all others whether they be the parties’ lawyers or consultants or other interested parties. This policy it is believed, will ultimately promote the effective resolution of labour disputes, one of the primary objects of the Act.

[30] The commissioner, therefore cannot justify the presence of a consultant in Conciliation proceedings on the basis of agreement by any party, or a waiver of rights by any party.

²² [2000] 9 BLLR 1060 (LC) at paras 26 - 31.

[31] Authority for the rule that a private person cannot either expressly or tacitly waive their statutory right, nor can an administrative authority justify an illegal or unauthorised act on the grounds that a private person has consented, or waived the right is found in a number of cases going back to *Ritch and Bhyat v Union Government (Minister of Justice)* 1912 AD 123. These authorities are referred to in the Law of South Africa, Volume 1, Chapter on Administrative Law by M Wiechers at page 39 footnote 6.’

[42] In the matter of *Sapekoe Tea Estates (Pty) Limited v Make and Others*²³, the Court held that:

‘Unlike Section 38(4)(a), which permits legal representatives to appear in arbitrations, Section 135(4) excludes that category of representatives for the purpose of conciliations. Issues relating to jurisdiction may at times be complex, both in respect of fact and of law. Nevertheless, a Commissioner does not have the power to vary the provisions of Section 135(4) and to permit legal representatives to appear in a conciliation, albeit for the limited purpose of dealing with a jurisdiction dispute. It follows that a Commissioner may in that instance be obliged to perform a more inquisitorial function than is typically the case in our largely adversarial system.’

[43] In terms of this contention, the Third Respondent, in “his” answering affidavit (notably deposed to by his attorney and not by himself personally, with no confirmatory affidavit from the Third Respondent himself), in response to the contentions made by the Applicant in terms of this ground, has simply denied the allegations, put the Applicant to the proof thereof, and stated that if the Applicant was of the opinion that the Commissioner had made inappropriate comments and that he had delved into the merits of the matter during the conciliation process, the Applicant was entitled to bring a recusal application at that point, and did not do so.

[44] The problem that I have with the answering affidavit in this regard is that the attorney that has deposed to the affidavit, being Shahista Carrim, was not present at

²³ [2002] 10 BLLR 1004 (LC) at subpara 10.4.

the proceedings, as contended for by the Applicant, and therefore does not have personal knowledge of what transpired in the conciliation process at that stage.

[45] Accordingly, her evidence amounts to hearsay in this regard.

[46] Notwithstanding this, it is clear from the Third Respondent's answering affidavit that whilst there has been a bald denial to these contentions, the Third Respondent has not denied that his attorney was present during the conciliation phase of the con-arb hearing.

[47] Furthermore, there is nothing before me to demonstrate that this was not the case when one considers that the deponent to the Third Respondent's answering affidavit, was not present at the proceedings and her evidence is therefore inadmissible, constituting hearsay evidence.

[48] Accordingly, I accept the Applicant's version that the Third Respondent's attorney was present during the conciliation phase.

[49] The limitation on persons allowed to attend proceedings under section 135(4) of the Act is peremptory and cannot be departed from by agreement, or as a result of waiver.

[50] In terms of the Commissioner's decision to allow the Third Respondent's legal representative to be present during the Conciliation phase of the Con-Arb hearing, I find that this constituted a reviewable irregularity.

Commissioner's failure to deal with the issue of legal representation and permitting the Third Respondent to be legally represented during the Arbitration phase without the employee having made any application for legal representation.

[51] The transcript of the proceedings reflects the following exchange at the commencement of the arbitration proceedings pertaining to the aspect of legal representation:

"Commissioner: Good afternoon everyone and welcome. My name is Nicholus Sono. The case reference number is LP316/21. Today's date is the 8th March 2021. The matter is set down for a Con-\Arb process. Both parties are in attendance, the parties conciliate to the dispute. They are deadlocked and are now proceeding with Arbitration. Employer, are you familiar with the Arbitration process?

...

Commissioner: Okay, anything you want to raise before we proceed with Arbitration, any point in limine?

Respondent Representative: Yes, the legal representation.

Commissioner: Okay, any other point in limine?

Respondent Representative: No, that will be all Commissioner.

Commissioner: Applicant, besides the application for legal representation, any point in limine?

Applicant Representative: No, besides that.

Commissioner: Your full names for the record?

Applicant Representative: Kulani Nkuna ...

Commissioner: Nkuna?

Applicant Representative: Correct sir.

Commissioner: From which law firm?

Applicant Representative: Nakedi Banda Attorneys.

Commissioner: Nakedi?

Applicant Representative: Yes.

Commissioner: Banda?

Applicant Representative: Yes.

Commissioner: Can you address me on why the Applicant has to be legally represented?

Applicant Representative: (inaudible) something that will be far-fetched Commissioner, it's trite concepts that I am going to address the Commissioner in relation to my client's legal representation because in the nature of his dismissal there were issues that were of law in nature that he felt like by himself he cannot address (inaudible) and then he deemed it fit that perhaps he will call (inaudible) to come to the table of the Commissioner or rather at CCMA to converse these matters on his behalf. And we also felt like

his feeling was mutual in the office or that it's necessary that he be represented to address the very same issues that are already outlined that led to his dismissal.

Commissioner: Mhm.

Applicant Representative: That's my summary.

Commissioner: That's all?

Applicant Representative: Yes, in a summarised manner.

Commissioner: You don't have to summarise.

Applicant Representative: I heard the other time you were alerting us of a shorter time Commissioner.

Commissioner: (inaudible) that's something else. We have until, I don't know when so we can deal with this case until ... intervened.

Applicant Representative: Oh, if you withdraw the award that you have (inaudible) it's fine then. But in any case, let me just remain to that summary just to allow us (inaudible) issues that are needed to (inaudible).

Commissioner: Mhm, that's all?

Applicant Representative: That's all, yes.

Commissioner: That it only raised the issues of law?

Applicant Representative: Yes.

Commissioner: Okay, what was the charge that led to the employee's dismissal? The alleged charge?

Applicant Representative: It was destruction of the employer's property.

Commissioner: Okay.

Applicant Representative: Yes.

Commissioner: Okay. Employer are you opposing?

Respondent Representative: Yes Commissioner, I am opposing.

Commissioner: Mhm.

Respondent Representative: The Applicant rep here stated that there are questions of law that are raised in the dispute, but I don't know which questions referred to that are raised in the dispute. So I'm opposing because it's not reason enough to just say that there are questions of law that are raised in the dispute.

Commissioner: Is that all?

Respondent Representative: Yes, and if I continue, although only one item was addressed, yes, I am not judging but to me in my opinion, the matter is not complex and then the Applicant here is a manager. He has been applying discipline in terms of comparative ability and then I do not think that this matter as it is now, has the public interest in it or invested in it. So I do not see the necessity of legal representation on those basis.

Commissioner: Do you want to address us on the issues of law that can be raised by this matter?

Applicant Representative: Perhaps I should just reply to the latter (inaudible) that the employer mentioned Commissioner.

Commissioner: Mhm.

Applicant Representative: Issues of non-complexity of the matter and the status.

Commissioner: Address me on the issue of what issues of law that can be raised by this matter.

Applicant Representative: I will then abandon my address on, rather than just on replying in terms of the complexity of the issue. I will address you in regards to ... intervene.

Commissioner: Yes.

Applicant Representative: What you are enquiring Commissioner. My client was dismissed based on incidents that in itself have got a good amount of evidence or statements that may be referred or issues that were not necessarily assumed (inaudible). Now when we merely speak about evidence, said given a statement nature by any other person in a special practice of any field, it immediately speaks about issues related to that kind of evidence, how it will be led and how we can conclude that whoever, (inaudible) this question as such, they can be placed upon their shoulders a particular consequence in relation to that evidence that was led. That to me is a final definition of legal aspects being brought in the hearing or rather in the finality of my client's issue in this regard. We cannot say there was no aspect of law while there was evidence that was led or needed to be led.

Commissioner: Okay, do you want to respond to that employer?

Respondent Representative: I do not hear in particular what questions of the law are raised in this particular case ... intervened.

Commissioner: Okay, let him repeat.

Respondent Representative: Yes.

Commissioner: Maybe in a clear and simple language that what are the issues of law that could be raised by this matter. He is saying he did not hear you (inaudible) clearly?

Applicant Representative: The law in relation to the evidence that was led against him, that was led that eventually found a report, an award that prejudiced my client, so ... intervened.

Commissioner: But what evidence is what we are asking, what evidence that will raise issues of law?

Applicant Representative: The emanation of the condition.

Commissioner: Ja.

Applicant Representative: Yes.

Commissioner: Okay.

Applicant Representative: Yes, as well I address the Commissioner on issues of (inaudible) of who was directly (inaudible) to the cause of the accident. I limit my entitlement to evidence only and I will try to break it down to that level. We may raise it because they said he did something and that (inaudible). If you ask me a question to what brings us here, it was damage of property. The employer saw his property damaged. The employer's questions to how the damage was, the property was damaged. The employer led evidence, was giving evidence (inaudible) to the weight of how the property was damaged and how it was linked to my client and that was (inaudible) of our office to come (inaudible) in relation to that evidence that was led in connection to the, as I have already said, the placing of the prejudice upon my client's shoulders to say by this, by virtue of this evidence linked to this conduct by you, we are now placing upon your shoulders this charge or the sentence. So that in itself makes the whole concept of the legal nature, damage, even the (inaudible) itself.

Commissioner: Do you want to respond to that before I can issue a ruling?

Respondent Representative: Commissioner, you may proceed with the ruling.

Commissioner: Okay, legal representation will be granted and the reason will follow with the award.

Applicant Representative: As it pleases the Court Commissioner.

Commissioner: Okay employer, how many witnesses are you calling?’

[52] What is clear from the above is that a formal application for legal representation was not made from the outset. Furthermore, all of the aspects required to be addressed in terms of Rule 25, were not addressed by Banda in his address to the Commissioner.

[53] Whilst the Commissioner stated that he would deal with the aspect of granting legal representation in his award, when one considers the Commissioner’s award, same is not dealt with therein.

[54] In the Applicant’s supplementary affidavit, the Applicant has attached a document titled “Legal Representation and Postponement Ruling” (the Ruling), which was discovered in the record that was made available to the CCMA, however, the document is undated and does not appear to have been sent to either of the parties.

[55] We are therefore dealing with an issue where the Commissioner did not provide a ruling whatsoever, or the Ruling set out in this document, is one that should be taken into consideration by this Court.

[56] For reasons that will become apparent hereunder, the Ruling neither assists nor demonstrates a judicial decision was made on this aspect.

[57] In terms of the Ruling:

57.1. the Commissioner has stated that prior to the commencement of the hearing, the Third Respondent’s legal representative *filed* an application to represent the employee. There is no such application in the record, nor was

any application referred to in the transcript of proceedings. It is also clear from the affidavits filed in this matter that this was not done;

57.2. The Commissioner further found that:

“I am of the view that it would be unreasonable of the employee to deal with the dispute without legal representation only in respect of the comparative ability of the opposing party or their representatives to deal with the dispute. However, I am not persuaded that the dispute is complex, in the public interest or that the dispute raised some questions of law”.

57.3. This does not accord with the evidence that was led in support of the Third Respondent’s submissions for legal representation at the hearing which was based on the fact that the dispute was allegedly complex and that it raised certain questions of law (which were not explained either). The comparative abilities of the parties were not even canvassed by the Third Respondent’s legal representative;

57.4. This reasoning is unrelated to the evidence led on this aspect and it is unclear how the Commissioner made such a finding when this was not the evidence led.

[58] In the event that I was not to take the Ruling into account, it would also be difficult to ascertain how the Commissioner granted legal representation without this having been addressed in his Award whatsoever.

[59] It is clear from the authorities above that a Commissioner’s discretion to allow legal representation is a discretion that is to be exercised judicially.

[60] When one considers what has been set out above, I believe that the granting of legal representation *in casu*, is open to legitimate challenge in that it is clear that the discretion was exercised in a *mala fide* or capricious manner, or in a manner that cannot be considered not to be judicious.

[61] What is of further concern is that after the Commissioner allowed for the Third Respondent to be legally represented, and as is clear from the transcript of proceedings, the Commissioner did not give the Applicant an opportunity to obtain legal representation in order to level the playing field, so to speak.

[62] In the Ruling, the Commissioner has set out therein that he allowed legal representation in respect of the comparative ability of the opposing party. The Applicant is not a legal representative nor does he hold such qualifications. He is a lay person and has demonstrated as much when one considers the record.

[63] Because the Commissioner decided the issue of legal representation, he could have only done so by exercising the prescribed discretion and could have only allowed legal representation if he was satisfied that it was justified based on all of the requirements as set out in Rule 25 of the CCMA Rules, being:

- (1) the nature of the questions of law raised by the dispute;
- (2) the complexity of the dispute;
- (3) the public interest; and
- (4) the comparative ability of the opposing parties or their representatives to deal with the dispute.

[64] What this in effect means is that the Commissioner must have considered, at the very least, that the matter before him to be sufficiently complex and involving such questions of law so as to justify legal representation, and these considerations would then apply to both parties. This, especially because Banda indicated that the complexity of the matter and questions of law were the basis for the Third Respondent requiring legal representation. Once the Commissioner had so determined, it was an essential requirement of procedural fairness to both parties that the Applicant was also allowed legal representation, if it wanted it, as it equally had the right to legal representation.

[65] In *Colyer v Essack N.O. and Others*²⁴, the Court held that:

‘Further, it is clear that, once the commissioner thus allows legal representation, such party obtains a right to legal representation (the section is clear that the party “is entitled to be represented by a legal practitioner”).’

[66] In *Baur*, Snyman AJ held as follows in this regard:

²⁴ (1997) 18 ILJ 1381 (LC) at 1384F.

[27] With Mandlbaur being a layperson, and being unrepresented, it was in my view an imperative to ensuring procedural fairness that the second respondent had to inform Mandlbaur that he also had the right to procure legal representation and should have advised Mandlbaur that if he wanted legal representation, the arbitration would be postponed to afford him an opportunity to procure a legal representative. This is even more of an imperative considering that one of the requirements to be considered when allowing legal representation is the comparative abilities of the parties, which now, with the introduction of a legal representative for the third respondent, became entirely skewed. What was thus needed in the circumstances to ensure procedural fairness is that the applicant needed to be informed of the existence of its newly accrued right in this regard, what this right entailed and that the applicant could be afforded the opportunity to exercise such right if it wanted. If the applicant, having been so informed still decided to proceed with the arbitration, then so be it and the applicant could have no cause of complaint for not having a legal representative or subsequently raise any issue of procedural unfairness in this regard.

[28] Unfortunately, the record in this matter is clear to the effect that the second respondent did not inform the applicant nor adopt the course of action I have referred to above. The second respondent simply decided to allow legal representation and proceeded with the arbitration forthwith. It is also clear from a consideration of the record that Mandlbaur simply did not have the acumen or knowledge to have appreciated for himself that the applicant had the right to legal representation, what it meant and what he needed to do to exercise it. This inference is apparent from the fact that it appeared clearly from the record that Mandlbaur did not have an idea what cross-examination was, and he even tried to submit evidence in cross-examining the third respondent. Mandlbaur on several occasions during the arbitration indicated he did not know what to say or do. It is clear that Mandlbaur did not know what an arbitration was and what was required of him. All of this strongly supports the inference that Mandlbaur would never have known or appreciated what he could do about the right to legal representation which had accrued to the applicant.

[29] I am therefore of the view that the second respondent's failure, once he decided to permit legal representation, to inform the applicant that it also had the right to legal representation, and that it would be given the opportunity to procure it if it wanted, renders the arbitration proceedings procedurally unfair. The next question is – does this unfairness actually deprive the applicant of a fair hearing? In *Commuter Handling Services (Pty) Ltd v Mokoena and Others*²⁵ the Court said the following, in concluding that the applicant party indeed did not receive a fair hearing:

“In casu, the commissioner herself, even in the formulation of her award, conceded that the issues in the dispute were complex. She had, in fact, consented to legal representation to the employee on that basis. At the beginning of the enquiry she clearly formulated the impression that the employer was “bemused”. There is no evidence that she ever enquired into the employer's education or if he had any legal qualifications. The employer had clearly stated that he would be prejudiced pitted against an experienced labour law attorney. There does not seem to have been any yardstick by which she sought to compare the ability of the employer as against the employee's to deal with a dispute that she characterized as “complex”. Had she applied her mind, it seems to me – and I so hold – she would have come to the conclusion that it was unreasonable to expect the employer to deal with the dispute without legal representation.”

In casu, the current matter has many similarities. The second respondent made none of these kind of enquiries. The second respondent, having decided to allow legal representation, made no comparison of the abilities of Mandlbaur as against the third respondent's legal representative in circumstances where the second respondent must have accepted that the dispute is complex. It must have been clear to the second respondent that it was unreasonable to pit Mandlbaur against the legal representative for the third respondent. These failures would, as a matter of necessary consequence, deprive the applicant of a fair hearing.’

²⁵ (2002) 23 ILJ 1400 (LC) at para 19.

[67] In *casu*, the current matter has many similarities. The Applicant was not legally represented and its manager was a lay person. In my view, it was imperative to ensuring procedural fairness that the Commissioner had to inform the Applicant that it also had the right to procure legal representation and should have advised the Applicant that if it wanted legal representation, the arbitration would be postponed to afford it an opportunity to procure a legal representative.

[68] This, especially considering the comparative abilities of the parties, which were not the same.

[69] Whilst this would render the arbitration proceedings procedurally unfair, the next question is whether this unfairness deprived the Applicant of a fair hearing.

[70] When one considers the record, it is clear that the Applicant did not have the same or even remotely the same legal experience as the Third Respondent's legal representative. By way of one example, the following interaction took place between the Commissioner and the parties in the record:

'Commissioner: Any other common cause issues? Maybe let's deal with it like in this way.'

[71] The parties then addressed the Commissioner on some of the common cause issues whereafter the following transpired:

'Commissioner: Was the company property damaged by the Employee?
 Applicant Representative: No, it was damaged in the possession of the Employee.
 Commissioner: Yes.
 Applicant Representative: Yes.
 Commissioner: Okay, when?
 Applicant Representative: On the day that the Employer has shown in his bundle, that is common cause.
 Commissioner: (inaudible).
 Applicant Representative: There are two incidents.
 Commissioner: There?

Applicant Representative: There are two incidents, the first warning (inaudible) ... intervene.

Commissioner: That let to, we are not dealing with warnings, we are dealing with incidents.'

[72] It is clear from the exchange above, that the parties were, at that stage dealing with the common cause issues of the matter, prior to the arbitration proceeding. The Applicant, as a lay person, not understanding that it was only the common cause issues that were being addressed at that stage, believed that this was the Commissioner precluding him from leading any evidence on the previous disciplinary enquiries convened against the Third Respondent. This has been addressed by the Applicant in its supplementary affidavit under the third ground of review in contending that the Commissioner ignored material and relevant evidence. The Applicant, as a lay person with no legal background and/or qualifications and/or experience, would not have known that it was only at that point that the Commissioner did not want to deal with that aspect in addressing the common cause issues between the parties.

[73] It is also clear when one reads the record in totality that the Applicant was not in the same position as the Third Respondent in having legal representation in the manner in which the arbitration was run.

[74] When the Commissioner granted legal representation, it must have been clear to the Commissioner that it was unreasonable to pit the Applicant against the legal representative for the Third Respondent. These failures would, as a matter of necessary consequence, and premised on what is set out above deprive the Applicant of a fair hearing.

[75] In *Baur*, it was held that:

'[30] The next consideration is that of advising the applicant that it would be entitled to seek a postponement to procure its own legal representative if it wanted. The following extract from the judgment in *Northern Province Development Corporation v Commission for Conciliation, Mediation and Arbitration and Others*³⁴ is apposite, where the Court held as follows:

“[20] In the result, it is my conclusion that the second respondent erred in an unjustifiable manner in refusing a postponement on 7 February 2001, for the purpose of arranging properly prepared legal representation. In coming to that conclusion, I do not lose sight of the fact that the granting or withholding of a postponement involves a considerable degree of discretion and that this court should interfere with the exercise of such discretion only in very limited circumstances.

[21] It is therefore my conclusion that the award made by the second respondent in the absence of the applicant should be set aside also on the ground of his refusal of the application for postponement, to the extent that this was for the obtaining of properly prepared legal representation.”

[31] Added to the above, the applicant was not even forewarned that the third respondent would seek legal representation so that it could make contingency plans and possibly come armed to the arbitration with its own legal representative. In this respect, reference is made to *Western Cape Southern Suburbs Real Estate (Pty) Ltd t/a Seeff Properties v Commission for Conciliation, Mediation and Arbitration and Others*³⁵ where the Court said the following:

“On the facts placed before the commissioner, it is in my view reasonable to conclude that the employer approached his legal representative who indicated that he was not available on the date of the arbitration. Thereafter he was, however, advised by the employee that he was not going to be legally represented and, as Todd stated, he was quite content to proceed to the arbitration on the basis that the parties, both not being legally represented, would try to resolve all the outstanding issues. Had the employee advised him that he was going to be legally represented at the arbitration, the employer would have likewise obtained legal representation, so it said. On these facts presented to the commissioner, I am of the view there was no reasonable basis whatsoever for him to conclude that the application for postponement was not made bona fide.”

The Court concluded:³⁶

“Under all the circumstances I am satisfied that the award should be set aside by reason of the fact that I am of the view the commissioner ought to have granted Seeff the requested postponement to enable it to obtain legal

representation as this was the only reasonable decision the decision maker herein could arrive at.”

Again, and in *casu*, the second respondent’s failure to have actually proposed to the applicant that the arbitration could be postponed if it wanted legal representation is also procedurally unfair and this failure deprived the applicant of a fair hearing.’

[76] In *casu*, I find that this situation vitiated the entire arbitration process, irrespective of the merits of the Award and that this has cause in itself for the Applicant’s review application to be granted.

[77] Therefore, on the issue of the Applicant’s first ground of review, I conclude that this review ground has substance. The Commissioner committed misconduct with regard to the conduct of the arbitration proceedings and his conduct was also a gross irregularity as contemplated by law. The consequence of these failures is that the Applicant was deprived of a fair hearing.

[78] The Commissioner’s Award accordingly falls to be reviewed and set aside on this basis alone.

[79] The moment the Applicant was deprived of a fair hearing, as was the case in *casu*, this would be the end of the matter and the Award must be reviewed and set aside, irrespective of the merits normally dealt with in review applications.

[80] Due to the fact that the conduct of the Second Respondent deprived the Applicant of the opportunity to properly ventilate and state its case and deprived it of a fair hearing, the matter requires to be remitted back to the CCMA in order for the arbitration to be conducted again in the CCMA, *de novo* and before another commissioner.

Costs

[81] In terms of Section 162 of the LRA, I am of the view that no order as to costs would be fair and appropriate in this instance. It is clear that the Applicant succeeded

in this review application because of the misconduct of the Second Respondent and not because of what the Third Respondent did or as a result of the Third Respondent's conduct.

[82] In the premise, I make the following order:

Order

- 1 The arbitration award dated 17 March 2021 issued under the auspices of the First Respondent under case no. LP316/21, is reviewed and set aside;
- 2 The matter is remitted back to the First Respondent, the CCMA, for arbitration *de novo* before a commissioner other than the Second Respondent;
- 3 There is no order as to costs.

R Adams

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Advocate Victor Ndebele

Instructed by: Neil Coetzer of Cowan, Harper Madikizela Attorneys

For the Third Respondent: No appearance.