



Reportable

**THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN**

Case no: C184/2022

In the matter between:

KHANYISILE JIYANE

Applicant

And

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER BELLA GOLDMAN N.O.

Second Respondent

**AMAZON DEVELOPMENT CENTRE (SOUTH
AFRICA) (PTY) LTD**

Third Respondent

Heard: 3 July 2025

Delivered: 7 July 2025

Summary: application to review - review granted - commissioner failed to ensure a fair arbitration process and denied the applicant a fair opportunity to present

her case - matter remitted to the CCMA for a fresh arbitration before another commissioner.

JUDGMENT

DE KOCK, AJ

Introduction

- [1] This matter concerns an application by the applicant (Jiyane) to review and set aside an arbitration award given by the second respondent (Goldman) in her capacity as a commissioner of the first respondent (CCMA). The application has been brought in terms of section 145 of the Labour Relations Act¹ ('the LRA').
- [2] The matter arose from an alleged unfair labour practice wherein Jiyane alleged that the third respondent (Amazon) failed or refused to reinstate or re-employ her in terms of an agreement. The arbitration proceedings before Goldman took place on 6 April 2022. Goldman, following the conclusion of the arbitration proceedings, issued an award dated 25 April 2022 wherein she found that Jiyane was not subjected to any unfair labour practice and dismissed the referral. It is this determination that gave rise to the current review application.

The CCMA award

¹ Act 66 of 1995 (as amended).

- [3] Goldman, after summarising both parties' evidence, found that Jiyane bears the onus to prove that she was subjected to an unfair labour practice. Goldman finds that Jiyane's evidence was hard to follow at times and that she was unable to prove that she was subjected to an unfair labour practice. Goldman finds further that, even on Jiyane's own version '*Reeza told her to go and sort out her issues after which she could come back and return to work*' it does not amount to an agreement to reinstate or re-employ her. It must be noted that this finding is clearly incorrect, as if proven, it would be sufficient to amount to an agreement to reinstate or re-employ.
- [4] Goldman refers to various emails sent by Jiyane to Amazon after she resigned asking if there were any jobs available and how she could apply for a position with Amazon. It was found that not one of the emails refer to Jiyane having been forced to resign or to any agreement to re-employ or reinstate her.

The test for review

- [5] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,² the Court held that 'the reasonableness standard should now suffuse section 145 of the LRA', and that the threshold test for the reasonableness of an award was: '...Is the decision reached by the commissioner one that a reasonable decision-maker could not reach?...'³. In *Herholdt v Nedbank Ltd and Another*⁴ the Court applied this reasonableness consideration as follows:

² (2007) 28 ILJ 2405 (CC).

³ Id at para 110.

⁴ (2013) 34 ILJ 2795 (SCA) at para 25.

‘... A result will only be unreasonable if it is one that a reasonable arbitrator could not reach on all the material that was before the arbitrator. Material errors of fact, as well as the weight and relevance to be attached to the particular facts, are not in and of themselves sufficient for an award to be set aside, but are only of consequence if their effect is to render the outcome unreasonable.’

- [6] This test has thus been applied as a two-stage review enquiry. Firstly, the review applicant must establish that there exists a failure or error on the part of the arbitrator. If this cannot be shown to exist, that is the end of the matter. Secondly, if this failure or error is shown to exist, the review applicant must then further show that the outcome arrived at by the arbitrator was unreasonable. If the outcome arrived at is nonetheless reasonable, despite the error or failure, that is equally the end of the review application. In short, in order for the review to succeed, the error or failure must affect the reasonableness of the outcome to the extent of rendering it unreasonable.
- [7] Further, the reasonableness consideration envisages a determination, based on all the evidence and issues before the arbitrator, as to whether the outcome of the arbitrator arrived at can nonetheless be sustained as a reasonable outcome, even if it may be for different reasons or on different grounds.⁵ This necessitates a consideration by the review court of the entire record of the proceedings before the arbitrator, as well as the issues raised by the parties before the arbitrator, with the view to establish whether this material can, or cannot, sustain the outcome arrived at by the arbitrator. In the end, it would only be if the outcome arrived at by the arbitrator cannot be sustained on any grounds, based on the material, and the irregularity, failure or error concerned is the only

⁵ *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 964 (LAC) at para 102.

basis to sustain the outcome the arbitrator arrived at, then the review application would succeed.⁶

- [8] The test on reviews however goes further than what is referred to above. Where parties have been denied a fair trial, the reasonableness of the outcome does not come into the equation, as there would be no proper evidence placed before the arbitrator, and before the court to allow the court to examine the reasonableness of the decision arrived at by the arbitrator. The court will address this test hereunder and refer to the relevant case law in this regard.

Grounds of review

- [9] Jiyane's grounds of review, as contained in her founding affidavit, are that:
- (a) Goldman has changed everything Jiyane shared during the arbitration, which she believes was done to favour Amazon.
 - (b) Goldman failed to mention the managers and a site manager in her award and as a result the story changed, which weakened Jiyane's case.
 - (c) Goldman did not allow Jiyane to challenge or question the validity of Amazon's false evidence.

⁶ See *Campbell Scientific Africa (Pty) Ltd v Simmers and Others* (2016) 37 ILJ 116 (LAC) at para 32; *Anglo Platinum (Pty) Ltd (Bafokeng Rasemone Mine) v De Beer and Others* (2015) 36 ILJ 1453 (LAC) at para 12.

- (d) An email that Jiyane addressed to one of her former managers (Matombo) was edited by Amazon so that it is addressed to both Matombo and Reeza Omar (Omar), who was not even her manager at the time that the email was sent.
- (e) Goldman asked for Jiyane's evidence after she initially denied her from asking Amazon questions based on it, which Goldman now denies.
- (f) Amazon created a stressful work environment and when they learnt the truth they looked for ways to get her out of the company.

[10] Jiyane raised a few further grounds of review in the supplementary affidavit:

- (a) The recording of the proceedings was incomplete, and some parts of the recording were re-recorded in her absence.
- (b) The documents received from the CCMA contained new documents from Amazon which were not present during the arbitration, and some documents were not labelled. Also, that some of her documents were not included.

[11] Jiyane, in her replying affidavit, raised the following further grounds of review:

- (a) Favouritism / unprofessionalism in that Goldman kept telling her that, if she was forced to resign, she should have referred a constructive dismissal. It appears that Goldman was determined not to listen to her.

- (b) Goldman interrupted her when she wanted to read her evidence, as Amazon did, and that Goldman pushed her away from the point she wanted to get across. Jiyane states that there are more examples and that she did not have a fair hearing.
- (c) Jiyane states that the initial part of her evidence, which was that she was threatened to be fired if she did not resign and promised to be taken it back if she resigned, was removed.

Analysis of the grounds of review

- [12] An applicant is not entitled to raise new grounds of review in the replying affidavit. However, the grounds contained in Jiyane's replying affidavit are mostly sufficiently linked to the grounds contained in the founding and supplementary affidavit. Where there is no direct link, the further grounds of review contained in the replying affidavit will not be considered.
- [13] It is appropriate to start the analysis of the grounds of review in this application for review by referring to the mission of the CCMA. The purpose of the CCMA is to promote social justice and economic development in the world of work and to be the best dispute management and dispute resolution organisation trusted by the CCMA's social partners. The vision of the CCMA is to be the premier dispute prevention, management and dispute resolution organisation.
- [14] The Code of Conduct for Commissioners⁷, clause 2 – General Obligations of Commissioners – states as follows:

⁷ Government Gazette, No. 38230, No. 918 dated 21 November 2014

“To ensure that all processes which commissioners conduct are seen to be fair, impartial, independent and ensure that they promote the principles of equity and social justice in order to maintain the confidence of the public, and all CCMA users, commissioners must:

- 3.1 act with honesty, impartiality, due diligence and independently of any outside pressure in the discharge of their statutory functions;
- 3.2 conduct themselves in a manner that is fair to all CCMA users and the public at large;
- 3.3 ...
- 3.4 ...
- 3.5 ensure that their conduct reflects the values of the CCMA.’

[15] Clause 5 states as follows:

- ‘5.1 Commissioners should conduct proceedings fairly, diligently and in an even-handed manner.
- 5.2 ...
- 5.3 Commissioners should be patient and courteous to the parties and their representatives or witnesses and should encourage similar behaviour by all participants in the proceedings.’

- [16] Commissioners of the CCMA must therefore, in a nutshell, ensure that any party appearing before them are given the right to a fair process / trial. Commissioners should refrain from unduly interfering during the process and more specifically not descend into the arena by interrupting parties and witnesses; cross-examining witnesses; and treating any party or witness appearing before them in any manner whatsoever which would cause that party / witness to lose confidence in the impartiality and unbiasedness of the commissioner.
- [17] Commissioners are required to ensure that they explain the process of arbitration to the parties, identify and explain the nature of the dispute, and treat both parties in an even-handed manner. Where a party is not clear on how to present their case, the commissioners should guide and assist by properly and patiently explaining the issues in dispute, and what evidence is required. What is not acceptable is for a commissioner to continuously interrupt, take over the questioning of a party and witnesses, and continuously questioning the relevance of what a party is trying to bring to their attention. It is only by allowing a fair arbitration process and treating parties with respect that parties will have confidence in the process, and in the CCMA whose mission is to be the best dispute management and dispute resolution organisation trusted by the CCMA's social partners.
- [18] The court, in reading the transcribed record of the arbitration proceedings, was immediately concerned when the transcribed record shows Goldman's continuous interruptions, taking over of questioning, cross-examining witnesses and Jiyane, answering questions posed by Jiyane to witnesses, and time after time abruptly interferes with Jiyane's attempt to question witnesses by asking what the relevance is. It is most unfortunate that, for some reason, the initial part of the arbitration and more specifically the majority of Jiyane's evidence in chief were not provided by the CCMA / Goldman. It is not clear, given the absence of the first part of the arbitration, whether Goldman properly explained the

process, and properly guided the parties as to what is required, from both parties, regarding the issue in dispute.

- [19] The following are just some extracts from the transcribed record showing Goldman's actions during the arbitrations. The questions before and after each intervention have not been included to keep the judgment as brief as possible. The following interventions happened during Jiyane's evidence in chief:

COMMISSIONER: Okay. But he didn't tell you to resign. You told him.

APPLICANT: Let me finish.

COMMISSIONER: So, where does promotion come in? Did you ask a promotion?

APPLICANT: I am trying to get to that.

COMMISSIONER: So, he should be here so he can hear her evidence.

COMMISSIONER: I just want to repeat to you the thing. Hello. I wanted to tell you, take a seat, what the applicant says so that you can respond to her.

COMMISSIONER: What... How to word resignation... Where is the resignation letter? Which bundle? Is it on your bundle or?

COMMISSIONER: Sorry. I don't see anything about any of those. You haven't mentioned they were contacting your employer or whatever.

COMMISSIONER: Oh. No, that is fine. So, who told you they were contacting your employer?

COMMISSIONER: The church contacted employer and told him... And told them what?

COMMISSIONER: And told them what? You don't know?

COMMISSIONER: and told them to mistreat me?

COMMISSIONER: Mm-hmm? Yes? And what gave you that impression?

COMMISSIONER: What were they doing?

COMMISSIONER: Okay. So, where is the agreement? Who agreed to re-employ you or whatever? Where did the agreement come in?

COMMISSIONER: So, why is that an agreement to reinstate?

APPLICANT: Okay. Let me finish. He said ...

COMMISSIONER: You can apply through Amazon. But that is an application, isn't it?"

[20] The following are extracts taken during the cross examination of Jiyane by what was supposed to have been done by Amazon's representative:

"COMMISSIONER: Okay. Why do you disagree? Because before you said you believe they had.

COMMISSIONER: You weren't sure. You believe they had. So, do you still stand ... Do you still stand with your belief, or do you say you know they had?

COMMISSIONER: Well, what did he say?

COMMISSIONER: Okay. But what I am saying is how does that prove they were in contact with the church?

COMMISSIONER: Okay. So, you believe. It is not that you know.

COMMISSIONER: Okay. But you don't know for a fact. You believe. So, a belief is a feeling.

COMMISSIONER: Okay. So, how long did you report to him?

COMMISSIONER: Well, did the Manager say the same thing?

COMMISSIONER: Okay. So-

RESPONDENT REPRESENTATIVE: But I will get to that now, Madam Commissioner.

COMMISSIONER: But nobody said that to you anyway? Nobody gave you those choices?

COMMISSIONER: But you knew about the Performance Improvement Plan, because you said you were no longer on it?

COMMISSIONER: So, when did you finish? When did you finish your Performance Improvement Plan?

COMMISSIONER: Remember, all of you, the salient point is whether there was an agreement.

COMMISSIONER: And your job is open? Did he say your job is open?

COMMISSIONER: His exact words are quite important.

COMMISSIONER: His exact words are important.

COMMISSIONER: Okay. I am just coming back. Was it undated? Was it within a year? ... 10 years or whatever?

COMMISSIONER: So, did he agree that he said the words? Sort out your issue and you can come back to work?

RESPONDENT REPRESENTATIVE: Did you say that?

RESPONDENT: I didn't say come back.

COMMISSIONER: So, what is your Just tell your rep what your version is.

COMMISSIONER: Sorry. You said you have... Your hearing, when you said you have proof of your hearing and the outcome, do you have it in writing?

COMMISSIONER: He is saying yes, but what is the letter got to do with it?

COMMISSIONER: Yes. But where do you say that? What is the relevant paragraph?

COMMISSIONER: Okay. But... Just he says you weren't influenced to resign. You refused to take the options. But where is the line that says what you want to say about Performance Improvement?

COMMISSIONER: But the second one doesn't relate to that. The second page doesn't relate whether you were on a Performance Improvement Plan or not?

COMMISSIONER: Irrelative. That is written?

APPLICANT: But he told me to write that.

COMMISSIONER: Okay. But this is not a constructive dismissal. A constructive dismissal is when you say-

COMMISSIONER: That it is so intolerable that you have to leave?

COMMISSIONER: Cross-examination. Re-examination. Yes. Do you want to ask... Do you want to ask anything about... Do you want... I don't know what is going on with me. She is... She gave evidence, but she can't reply-..."

- [21] The following are extracts during Amazon's first witnesses' evidence in chief:

COMMISSIONER: When did she start reporting?

COMMISSIONER: Okay. But then didn't you say that you had said she could come back to work meaning-

COMMISSIONER: No. She always... She never wanted to go the EAP route.

RESPONDENT: Yes. She did.

COMMISSIONER: Well, you did say it. You told Tyler you did say that, but you didn't mean that. So, were you not telling the truth at that point?

COMMISSIONER: Okay. So, what you are saying now is different to what was put to the... I have to record it as that.

COMMISSIONER: No. But she said he never said it, so there is no interpretation. Let me see what my notes say.

RESPONDENT REPRESENTATIVE: Okay. So, why didn't it kick off?

COMMISSIONER: Because she resigned.

COMMISSIONER: There is nothing much to it anyway."

[22] The following are extracts during the first witnesses' cross-examination:

APPLICANT: But why would I want to continue with something that I am already... It is more of... Did you give me any options?

COMMISSIONER: Yes. He gave you options. He just said he did. He gave you EAP or PIP.

APPLICANT: Was there... Okay. Why would I come back for one day and then not continue with the other...

COMMISSIONER: How can he answer that question? I mean, how can he answer what you want to do? Why would you? How can he answer the question?

COMMISSIONER: But that doesn't, that doesn't answer the question you have to answer today.

APPLICANT: Can that person change teams? Can we switch teams?

COMMISSIONER: What has that got to do with this email?

APPLICANT: I'm sorry?

COMMISSIONER: Your own testimony was that you did change.

COMMISSIONER: So, you did sign that letter, but you don't know why you signed it. Is that what you are saying? Or you didn't sign it?

APPLICANT: Yes. I did sign the letter.

COMMISSIONER: But you signed something that wasn't true?

COMMISSIONER: Or not, doesn't change the story about the agreement, or does it?

APPLICANT: Which agreement?

COMMISSIONER: The agreement to be-

APPLICANT: No, no. I am coming to this-

COMMISSIONER: Okay. Go on. Okay.

COMMISSIONER: Let's make it simple. Did you get an increase?

COMMISSIONER: Did you get a cost of living increase?

APPLICANT: No

COMMISSIONER: But what is the relevance if you were on a Performance Improvement, or you weren't?

COMMISSIONER: So, why don't you bring it up with HR?

COMMISSIONER: Yes. But HR will be able to answer that. He won't be able to answer that.

COMMISSIONER: Sorry. This is not really, well, it is for credibility, but it is not relevant whether you had a PIP or not?

APPLICANT: Yes, I understand. I am coming to that. I am just trying to understand. If you are saying that we had a meeting, me and you, is there any document that you can present to us to confirm that we had this meeting on the 11th? Can you present it to us?

COMMISSIONER: But Reeza... But your evidence is also verbal. But what relevance is the meeting?

APPLICANT: But you don't have proof to say that we had a meeting.

COMMISSIONER: Do you have proof of the conversations you had, or is it just your evidence? You have got nothing in writing for the meeting of-

COMMISSIONER: So, it is your version against his version. He has got nothing in writing.

APPLICANT: No. I am not missing anything.

COMMISSIONER: Yes. You are. Yes. You are.

COMMISSIONER: So, why do you think... Why did you resign?

APPLICANT: I did not resign to go resolve the issue.

COMMISSIONER: So, why did you resign? Why did you resign?

APPLICANT: No. He is saying I resigned.

COMMISSIONER: Okay. But why did you resign?

APPLICANT: I did not resign.

COMMISSIONER: But why would you resign because he tells you?

COMMISSIONER: So, if your Manager tells you to resign, you say yes? Okay.

COMMISSIONER: You didn't say that in your evidence in chief?

COMMISSIONER: So, okay. So, now she is saying that you forced her to resign by saying what you said.

COMMISSIONER: Okay. Because you still have a job. But it is not what your correspondence says. Okay. But it is fine. Okay. Right. So, that is what she is putting to you. You forced her to resign by saying go and sort pout your issue. You will have a job.

COMMISSIONER: Mm-hmm? One minute. Well, there you didn't say you were forced to resign. You didn't say that you... You have accepted that your job would be there. But he didn't force you to resign. He didn't say you have to resign.

APPLICANT: That is what he said.

COMMISSIONER: But that is not what you said in your evidence in chief. When you were giving evidence, that is not what you said. How did he force you? Did he put a gun to your head? How did he do it?

COMMISSIONER: Well, that is not what you said before, anyway. You just said now you resigned because he said you could come back. Now you say the company can't cope with you.

COMMISSIONER: So, why a week or two later? Didn't you say I had the agreement to come back? There is a letter here from you-

COMMISSIONER: Yes. There is no... Why didn't you say there was an agreement here?

COMMISSIONER: No. But why... I am just going to... It is a very simple question.

COMMISSIONER: Why here did you not say there was an agreement?

COMMISSIONER: That would have been so simple.

COMMISSIONER: Well, okay. So, you said I have been trying to... Where did you say something about there was an agreement?

COMMISSIONER: Okay. But there is no mutual agreement, is there?

COMMISSIONER: Okay. But there is no agreement. That is a constructive dismissal. But that is no agreement, either. Mm-hmm?

COMMISSIONER: ... Because by this time you are fighting with the company.

COMMISSIONER: Well, you wrote about the resignation. You didn't write about an agreement. What I am saying is, please show me correspondence where you say but you promised me I could return. But anyway, carry on. Because I need to get to the crux of this matter.

COMMISSIONER: This is what the matter is about. It is about whether there was a promise to reinstate or not.

COMMISSIONER: Yes. But then they discuss your performance, and they say have you reached the standard, haven't you reached the standard. That is what the meeting about-

COMMISSIONER: The arbitration is not about whether you were forced to resign. That would have been a different case. Then you would have referred a constructive dismissal 30 days after the case. So, this... It is not even about it. Even if he forced you to resign.

COMMISSIONER: So, if he forced you to resign, why would he want you to come back? But, fine. But that is what it is about. Even if he forced... It is a... Let's accept he forced you to resign-

COMMISSIONER: ... Whether he forced you to resign or not is irrelevant.

COMMISSIONER: Also, the PIP is also irrelevant. It is about-

APPLICANT: How is it irrelevant?

COMMISSIONER: Well, it is about whether you were forced to, whether you were on PIP, not on PIP, whatever a PIP. It is about that. Okay?

COMMISSIONER: Just one... Just one question I forgot to ask right at the beginning. Okay. You are alleging there was an agreement on March, the 16th?

COMMISSIONER: No, no. Answer the question. When did you say to the company, listen, I am here, I am coming back? Reeza, I have decided to come back as you promised. You have to-

COMMISSIONER: Yes. But you have to have done that.

COMMISSIONER: Hang on. There has to be an agreement, as I have read to you, and there has to be a refusal. So, where is the refusal?

COMMISSIONER: No. You have to have said, hi, I am coming back to work, and they say no. That is a refusal."

[23] The following are extracts from the first witness' re-examination:

"COMMISSIONER: So, it is common cause that he did offer you absence without, ag, what do you call it?

COMMISSIONER: You didn't say that when you were cross-examining him?"

[24] The following are extracts from the record during cross-examination of Amazon's second witnesses:

"COMMISSIONER: They were colluding with the church?

COMMISSIONER: Okay. But that wasn't your evidence in chief. That is another version.

COMMISSIONER: Yes. You did. But you didn't say that was why you resigned, and that was why there was no agreement. But anyway.

COMMISSIONER: What is the relevance of it? Okay. If you have got it-

COMMISSIONER: Okay. But what is the sentence which you, which is relevant? Which is the paragraph that is relevant?

COMMISSIONER: What is that showing?

COMMISSIONER: Okay. But that will talk to-

APPLICANT: I am coming to that.

COMMISSIONER: Yes. But you have to... Your purpose now is not to give evidence. You have done that. It is to ask her questions.

COMMISSIONER: Anyway, even if this is or isn't the Certificate of Service, what does it indicate?

COMMISSIONER: Do you know what a delegated authority is?

APPLICANT: Okay, I think we can move on, please.

COMMISSIONER: Irrelevant.

COMMISSIONER: Irrelevant.

APPLICANT: Madam Commissioner, this is relevant.

COMMISSIONER: How is it relevant to the agreement to reinstate?

APPLICANT: Okay. I thought you said I can ask any question.

COMMISSIONER: And what proof do you have? Did the church tell you, or just your belief? Is there anything that you have got to substantiate that?

APPLICANT: Okay. This is what I am trying to prove here.

COMMISSIONER: Sorry. Can I just go back... Okay. Let's assume the church was colluding. Let's assume it. What has that got to do with the agreement to reinstate you or re-employ you?

COMMISSIONER: Okay. Fair enough. Again, what has that got to do with the agreement?

APPLICANT: Okay. Can I continue?

COMMISSIONER: Okay. But where is the agreement in all that?

COMMISSIONER: Again, I want to get to the relevance. You have to keep it relevant. Whether the psychologist is the right person or is not the right person, what is the relevance to the agreement?

COMMISSIONER: But you are not answering me.

COMMISSIONER: But there can't be a hearing if you are not there. No.

APPLICANT: I am not... Ma'am, can I finish?

COMMISSIONER: But that-

APPLICANT: Can I finish?

COMMISSIONER: Okay. So, what has that got to do... Well, so and so.

COMMISSIONER: And again, what has that got to do with the agreement? But still. Okay?

COMMISSIONER: Sorry. I just need to bring you back. I need to decide about the agreement. Not about any of this. Not about who gave consent, who didn't give consent, or whatever. You have got to tie it back to the agreement. That is all I have to decide on. Whether you had a disagreement about whether you would get a medical report, wouldn't get a medical, whatever they wanted, is neither here nor there.

COMMISSIONER: I don't have to take notice of what they have raised. I just have to consider whether there was an agreement or not.

COMMISSIONER: So, I am asking you, but if you were forced to resign, because you didn't want to then, why would he offer you a job back? If he forced you to resign.

COMMISSIONER: But then, how did he force you to resign? Forcing somebody to resign is not a nice thing.

COMMISSIONER: Yes. So, why would he then make it, then say I will have you back when you feel better?

COMMISSIONER: Okay. Do you want to... Do you want to carry... Have you got anything more to ask the... I have let you go on and on, and ask questions which aren't relevant, but do you want to ask something that is relevant?

COMMISSIONER: Okay. Do you want to, sorry, do you want to go to the next question? Are you nearly finished? I am not rushing you. I have been quite patient, though. Are there any more questions relating to the issue and?

APPLICANT: ... Okay. You will say it is irrelevant.

COMMISSIONER: Okay. The relevance is?

COMMISSIONER: You know. If it is relevant. If it is not... If you wanted to... When you resigned, you said you were forced to resign. You could have referred the constructive dismissal, which says I resigned, but I didn't want to. They made me. It is a terrible place to live in, and they made me. But you didn't refer that. You referred this."

[25] The court was provided with a copy of Goldman's hand-written notes made during the arbitration proceedings. On two occasions Goldman refers to Jiyane's evidence or to her version as "rubbish" and "what rubbish". The hand-written notes are part of the review record before the court. The court finds it disturbing that a commissioner, whilst arbitrating a dispute, refers to one party's evidence, questions, or version as rubbish. Such actions from a commissioner, whilst arbitrating a dispute, surely does not assist the CCMA to be the best dispute management and dispute resolution organisation, as per its mission statement. What is now on record and in fact public knowledge is that a commissioner of the CCMA conduct herself in this manner whilst she was required to arbitrate the dispute even-handedly, and with respect and fairness to both parties.

[26] The court requested Amazon's representative, before the review was argued, to have regard to what the Labour Court, and in a subsequent appeal to the Labour Appeal Court, the Labour Appeal Court found in respect of Goldman's actions during the arbitration proceedings.⁸

[27] Steenkamp J found as follows at paragraph [18]:

"The jurisprudence of the duties of a commissioner was also usefully analysed, ironically in a matter concerning the same commissioner, in ZA

⁸ *Satani v Educational Labour Relations Council and Others* (C272/2014) [2015] ZALCCT 13 (10 February 2015) and *Satani v Department of Education Western Cape and Others* (C10/15) [2016] ZALAC 131 (13 June 2016)

*One (Pty) t/a Naartjie Clothing v Goldman N.O. & others.*⁹ What is clear from the jurisprudence, is the extent to which a commissioner descends into the arena by adopting an inquisitorial approach will amount to misconduct if it creates a perception of bias in favour of one of the litigants.”

[28] And at paragraph [20]:

“Commissioner Goldman undoubtedly adopted an overly inquisitorial approach in the arbitration forming the subject of this review application. She constantly interjected and questioned the witnesses at length – sometimes in more detail than their representatives did. But did she oversteps the mark to the extent that it would lead to a reasonable apprehension of bias, i.e. to the extent that a reasonable, objective and informed person would have apprehended that she did not bring an impartial mind to bear on the arbitration?”

[29] And at paragraph [22]:

“... In those circumstances, it is perhaps understandable that the arbitrator went out of her way to question witnesses in her quest for the truth and fairness. The playing fields were not level. She took it upon herself to try and smooth the pitch. In doing so, she came close to overstepping the mark; but she did not, in my view, commit reviewable misconduct.”

⁹ (2013) 34 ILJ 2347 (LC) at para [18]

[30] Satani approached the Labour Appeal Court. The Labour Appeal Court found as follows, at paragraph [23] in respect of the manner in which Goldman conducted the arbitration proceedings:

“The conduct of the same commissioner who arbitrated this dispute was again a subject of consideration by the Labour Court in *Innovation Maven (Pty) Ltd v CCMA and Others*¹⁰ where the following observation was made by Van Niekerk J:

‘[17] In the present instance, in my view, and after a careful perusal of the record, the commissioner’s conduct was such that she overstepped the mark. It is difficult to convey the magnitude of the extent to which the commissioner actively engaged in the proceedings, but read as a whole, the transcribed record reflects that the commissioner failed to respect the roles of the parties’ respective representatives and assumed to herself the role of leading evidence and conducting cross-examination.’¹¹”

[31] At paragraph [24]:

“Unfortunately, the same observations are applicable in this case. The record is replete with instances where the commissioner took over the presentation of the case by leading evidence and not recognising the role of the parties’ representatives. She regularly interfered in the appellant’s examination of the respondent’s witnesses; allowed the respondent’s representatives to interject and interrupt the course of questioning by the

¹⁰ (2016) 37 ILJ 465 (LC)

¹¹ At para 17

appellant's representative; expressed scepticism regarding certain evidence adduced or to be adduced by the appellant; prematurely expressed views about appellant's conduct about the incident; solicited hearsay and similar fact evidence relating to other learners who had been allegedly approached by the appellant and appeared to be assisting the respondent's representative to the detriment of the appellant.

[32] At paragraph [25]:

"A few examples of instances referred to above will suffice; otherwise traversing each and every instance of inappropriate intervention will require me to rewrite the entire record or attach the entire transcript of the arbitration proceedings to this judgment."

[33] The LAC continues to address various parts of the transcribed record setting out Goldman's interventions and interruptions. The court will not set out the LAC's "few examples" in this judgment save to note the improper interventions and actions of Goldman in that matter.

[34] At paragraph [28] the LAC found as follows:

"... The manner in which she did it was clearly to descend into the arena reserved to the dispute and leaving the appellant with no doubt that she was partial..."

[35] At para [29] the LAC found as follows:

“This explanation is obviously incorrect with regard to the process and purpose of cross-examination. It has the potential of either scaring a witness or making her hostile towards the representative. A proper explanation as to the purpose and the process of cross-examination would have cleared any doubt of bias on the part of the arbitrator.”

[36] At para [30] the LAC found as follows:

“... The above cross-examination was a warning shot of what to expect during the appellant’s actual cross-examination. Same was also characterised by interjections and interruptions.”

[37] At paragraph [31]:

“It needs to be mentioned, for the fear of burdening this judgment with excerpts from the record, that the Learner’s cross-examination was marred by the arbitrator’s intervention as well. She dominated the process by taking over the questions asked and in the result diluted the essence of the questions. It is fair to say that the representative asked far fewer questions than the arbitrator. She, in one instance, insisted that appellant’s representative explains the appellant’s case and the relevance of a document. She allowed uncontrolled interjections by the respondent’s representative during the cross-examination of the Learner and repeated her evidence when cross-examined.”

[38] At paragraph [33]:

“Generally, the process adopted by the arbitrator in conducting the arbitration appears to have been an unbalanced one, leaning in favour of the respondent. The transcript reveals that the respondent benefited from advice by the arbitrator to its representative to call the principal to

testify; that he should check the transcripts of the disciplinary hearing to see whether the appellant's evidence was consistent; that he might need Subulelo's evidence to address some of the difficulties in his case which were pointed out by the arbitrator; that he should also call more witnesses to address other difficulties he was facing; indicating scepticism regarding certain of the evidence adduced or to be adduced by the appellant; and displaying sympathy with the Learner. Furthermore the arbitrator took over the questioning of one Khabisile who was the appellant's witness thereby depriving the appellant's representative of a proper opportunity to examine the witness and to tender the evidence they wished to place on record."

[39] At paragraph [36] the LAC found as follows:

"In my view, the award must be reviewed and set aside because the scope, nature and effect of the arbitrator's interventions and dominance were such that she failed to afford the parties a fair hearing. Her conduct gave rise to a reasonable apprehension of bias."

[40] Goldman's conduct in the arbitration proceedings that is the subject of the review application before this court is similar to her conduct as in the *Satani*-matter. What makes her conduct even more unacceptable is that, in this matter, the employee was not represented and required even-handed and fair guidance during the process. Jiyane should not have been subjected to the actions of Goldman, as set out above and as is born out of the transcribed record. Adding to the continuous interruptions of Jiyane, the continuous cross-examination of Jiyane and questioning relevance and the clearly impatient manner in which the arbitration was conducted is Goldman's hand-written notes referring to Jiyane's evidence as "rubbish". Added even further to this is Goldman's completely inadequate, and simply wrong conclusion under the analysis of the evidence. This all demonstrates that Jiyane's perception of the

biasedness and uneven-handed manner in which she was dealt created more than a reasonable apprehension of bias by Goldman.

[41] This court therefore finds that the arbitration award must be reviewed and set aside because the scope, nature and effect of Goldman's interventions and dominance were such that she failed to afford the parties a fair hearing, and that her conduct gave rise to a reasonable apprehension of bias. As the LAC held in *Satani*, the outcome of the award is therefore irrelevant because there is no material that can be said to be properly before the arbitrator to determine whether the outcome is reasonable. The entire proceedings have been tainted hence the conclusion that the parties have been denied a fair trial.¹² This court holds the same view in this matter.

[42] The court notes that there are many judgments of this court, and the Labour Appeal Court where the manner in which arbitrations is conducted by Goldman led to the review of her awards and where she failed to afford parties a fair trial. It does not appear, from Goldman's continuation of the said unacceptable actions, that this court's judgments have been noted, and corrective actions having been taken either by Goldman or by the CCMA to avoid a continuation of such actions.

[43] The CCMA's awards are supposed to be final. Labour disputes must be dealt with speedily and expeditiously. The launching of review applications are costly and time consuming to all parties concerned. It is not fair to parties, including Amazon who opposed the review application, to now be faced with a judgment where an award is reviewed and set aside because they were not afforded a fair trial. This award was issued by the CCMA on 25 April 2022, and the parties are now required, more than 3 years later, to return to the CCMA to ensure that the dispute is arbitrated afresh before a commissioner other than Goldman. The court

¹² At para [38]

notes the possible difficulties that this may impose on especially Amazon such as the availability of witnesses.

[44] However, such difficulties, if any, cannot trump a party's right to be afforded a fair trial. It may be so that it may eventually be found that Jiyane's dispute does not have merits. This however cannot be the reason for the court to refuse to review and set aside the award. A fair outcome can only be arrived at when the parties were afforded a fair trial, which most certainly was not the case in the matter before the court.

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

Order

1. The review application is granted.
2. The arbitration award is reviewed and set aside in its entirety.
3. The CCMA is directed to reschedule the matter on an expedited basis before a commissioner other than the second respondent and preferably before a senior commissioner.
4. The registrar is directed to bring this judgment to the attention of the director of the CCMA, and the director must take appropriate steps to ensure that parties before the CCMA are not subjected to similar actions by commissioners of the CCMA. Such steps must be taken to ensure that the mission and vision of the CCMA are upheld and achieved, and for parties to have confidence in the CCMA as the premier dispute prevention, management and dispute resolution organisation.

5. No order is made as to costs.



C de Kock
Acting Judge of the Labour Court of South Africa

Representatives:

For the Applicant:

In person (no representative)

For the Respondents:

Mr H Rossouw

From:

Edward Nathan Sonnenbergs Inc.