(1) Reportable: NO
(2) Of interest to other Judges: Yes/No
(3) Revised

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Signature Date

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case No: C268/2022

In the matter between:

UFF AGRI ASSET MANAGEMENT (PTY) LTD	**Applicant**
and	
THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION (CCMA)	**First Respondent**
COMMISSIONER H ADAMS N.O.	**Second Respondent**
HANG-WAH MAN	**Third Respondent**

Heard: **1 September 2025**

This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 29 January 2026.

JUDGMENT

MYBURGH, AJ

Introduction

[1] This is an application brought in terms of s 145 of the Labour Relations Act[1] (LRA) to review and set aside the arbitration award of the second respondent acting under the auspices of the first respondent under case number WECT12675/20 dated 11 May 2022, finding that the dismissal of the third respondent was substantively and procedurally unfair.

[2] The third respondent opposed the application.

Background facts

[3] The third respondent was employed on a fixed term contract in the position of Corporate Development and Investment Manager, ending on 31 July 2016 by the applicant.

[4] When the term of his contract expired, the third respondent entered into an agreement with a third party, Crystal Tree (Pty) Ltd, which was at that time a shelf company, along with van Wyk, Bouland and Vink, all shareholders in the applicant, to launch a new financial advisory business which he would become the Managing Director of in due course.

[5] There was a further agreement that the third respondent would acquire a 25 percent shareholding in Crystal Tree, with the remaining 75 percent equally split between Bouland, Vink and van Wyk. The terms of this agreement were recorded in an unsigned Draft Term Sheet and provided for *inter alia* (i) the transfer of 25 percent of Crystal Tree shares by van Wyk to the other 3 parties; (ii) Bouland, Vink and van Wyk to arrange capital for the day-to-day operation of Crystal Tree, (iii) the third respondent's continued employment by the applicant, forgoing his salary every fourth month in exchange for the shares in Crystal Tree and (iv) the secondment of this employment to Crystal Tree.

[1] Act 66 of 1995, as amended.

[6] The third respondent commenced working in Crystal Tree, with 10 percent of his time reserved for the applicant. Despite many drafts, no shareholders' agreement was ever signed for the proposed shareholding in Crystal Tree.

[7] The applicant and Crystal Tree entered into a 'Consulting Agreement' providing for the secondment of resources by the applicant to Crystal Tree to perform certain services with effect from 1 September 2016. The 'resource' to be so seconded was the third respondent. The applicant continued paying the salary of the third respondent for 3 months out of every 4, however it recovered 90 percent thereof from Crystal Tree.

[8] On 24 March 2020, the third respondent put van Wyk, Bouland and Vink to terms, giving them notice until 30 March 2020 to transfer the shares in Crystal Tree to him.

[9] When this did not happen, the third respondent cancelled his agreement with Crystal Tree and/or Bouland, Vink and van Wyk, demanding the repayment of his salary sacrifices dating back to 2016.

[10] On 5 May 2020, the applicant addressed a notice proposing his dismissal for operational reasons to the third respondent, and ultimately, he was dismissed on 18 August 2020.

[11] The second respondent's award ordered the applicant to pay compensation in the amount of R660 000 to the third respondent as compensation for the procedural and substantive unfairness of his dismissal. This is the award that the applicant seeks to review.

Grounds for review

[12] The applicant raised 2 grounds for review: (i) lack of jurisdiction as the third respondent was not an employee of the applicant; and (ii) the second respondent's failure to understand the issues and the true nature of the claim before him, ignoring material evidence or not understanding the evidence resulted in an award that was not one a reasonable arbitrator could have arrived at.

Test on review

[13] In *Sidumo & another v Rustenburg Platinum Mines Ltd & 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].'

[14] In *Herholdt v Nedbank Ltd (Congress of SA Trade Unions as Amicus Curiae)* [4] the Court applied this reasonableness consideration as follows:

> '… 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.'

[15] *In Securitas Specialised Services (Pty) Ltd v Commission for Conciliation Mediation and Arbitration and Others*5, the Labour Appeal Court restated the review test as follows:

> 'The test for review is this: "Is the decision reached by the arbitrator one that a reasonable decision maker could not reach?" 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 justifications for reasons other than those given by the arbitrator. The result

[2] (2007) 28 ILJ 2405 (CC).
[3] Id at para 110.
[4] (2013) 34 ILJ 2795 (SCA) at para 25.
[5] [2021] 5 BLLR 475 (LAC) at para 19.

> will be unreasonable if it is entirely disconnected with the evidence, unsupported by any evidence and involves speculation by the arbitrator.'

[16] Before this two-stage test can be applied on the facts *in casu*, the jurisdiction of the CCMA must first be established.

[17] Where the jurisdiction of the CCMA is challenged, it is for this court to determine whether or not the CCMA had the requisite jurisdiction to arbitrate the dispute. The Labour Appeal Court in *SA Rugby Players Association & others v SA Rugby (Pty) Ltd & others (SAPRA)*[6] set out the position as follows:

> 'The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court.'

[18] The decision whether or not the CCMA had jurisdiction to arbitrate the dispute is a factual inquiry. Before the merits of the review application can be considered, this court has to determine the issue of jurisdiction.

<u>Jurisdiction</u>

[19] The applicant contends that the second respondent did not have the requisite jurisdiction to arbitrate the dispute, as the third respondent was not employed by the applicant, nor was he dismissed by it.

[20] The CCMA is a creature of statute with jurisdiction conferred on it to arbitrate only disputes as listed in the LRA. If the third respondent was not employed by the applicant, the CCMA had no jurisdiction to arbitrate the dispute.

[21] CCMA commissioners are required to determine if they have the necessary jurisdiction to arbitrate a dispute if this issue is raised by one of the parties, and even when it is not raised.

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[6] (2008) 29 ILJ 2218 (LAC).

[22] The Award under review did not address the jurisdiction of the CCMA at all, despite the requirement that the arbitrator had to determine who the true employer of the applicant was.

[23] This is a factual determination, based on the *de facto* position between the parties at the time of termination of employment.

[24] It is common cause that the applicant invited the third respondent to consult on his redundancy and, in fact, dismissed him for operational reasons.

[25] The applicant argued that the consultation and dismissal were not necessary, as it was not the employer of the third respondent, but embarked on the consultation process out of an abundance of caution.

[26] There was a consulting agreement between the applicant and Crystal Tree, which provided for the applicant to provide services to Crystal Tree for a fee.

[27] In accordance with this agreement, the third respondent remained an employee of the applicant, was paid by the applicant, and received pay slips showing that he was an employee of the applicant. It was, however, common cause between the parties that the third respondent rendered services to Crystal Tree, with 10 percent of his time being reserved for the applicant.

[28] Mr Stelzner conceded that the applicant remained the employer of the third respondent in respect of 10 percent of his time.

[29] There is no indication that the employment of the third respondent ever transferred from the applicant to Crystal Tree. The opposite is true. The third respondent remained an employee of the applicant at all times, with his services seconded to Crystal Tree.

[30] Consequently, the CCMA did have jurisdiction to arbitrate the dispute.

<u>Fairness of the dismissal</u>

[31] The third respondent cancelled his agreement with Vink, Bouland and van Wyk on 3 April 2020.

[32] This resulted in Crystal Tree indicating to the applicant that it no longer required the service provided for in the consulting agreement between the two entities.

[33] The effect of this cancellation was that the third respondent's services reverted to the applicant.

[34] Pursuant to this, the applicant initiated consultations with the third respondent in terms of s189 of the LRA on 5 May 2020, correctly so, as it remained the employer of the third respondent.

[35] The reason for the proposed retrenchment of the third respondent was the cancellation of the agreement between the applicant and Crystal Tree, resulting in the position of the third respondent becoming redundant.

[36] The Commissioner, in his award, conflated the applicant and Crystal Tree, in his erroneous belief that the two companies shared the same shareholders, resulting in a blurring of the business of the 2 companies. While there were some shared shareholders, the applicant had shareholders who were not also shareholders of Crystal Tree.

[37] What the Commissioner ignored was that it is the directors of a company, and not the shareholders, who manage the day-to-day business and operations of that company. The only shareholders of the applicant who were also directors of the applicant were van Wyk and Bouland. There were at least 2 other directors managing the applicant's business operations and consequently, business decisions for the applicant could not be made by van Wyk, Bouland and Vink.

[38] It was not for the shareholders of the applicant to decide what business the applicant would pursue. The directors of the applicant made a decision that the applicant would not engage in special projects. It was for this reason that van Wyk, Vink and Bouland decided to pursue special projects in Crystal Tree and offered the position of Managing Director and shareholder to the third respondent.

[39] When the third respondent cancelled his agreement with van Wyk, Vink and Bouland, there was in fact no longer any work for the third respondent in the applicant, other than the 10 percent of his time allocated to the applicant.

[40] A consultation process followed. The third respondent contended that the cancellation of the agreement with Vink, Bouland and van Wyk was their fault as the shares were not issued to him as agreed. He did not address the failure to conclude a shareholders' agreement.

[41] The third respondent also contended that he was unaware of the consulting agreement between the applicant and Crystal Tree, and that the special project he was working on was for the benefit of the applicant.

[42] The third respondent proposed that van Wyk should be retrenched, rather than himself. This was addressed by the applicant, and the third respondent was advised of his retrenchment on 18 August 2020.

[43] At the same time as referring the dispute to the CCMA, the third respondent also instituted action proceedings in this court against the applicant, van Wyk, Vink, Bouland and Crystal Tree, claiming unpaid salary. In his amended statement of claim, the third respondent pleaded that *"he would manage the business of Crystal Tree with a view to raising and managing an investment fund for Tsing Capital of China".*

[44] It is clear from this that the third respondent understood that the work he would be doing post the agreement in 2016 was for Crystal Tree, and not for the applicant.

[45] This confirms the stance taken by the applicant during its consultations with the third respondent that his service was for Crystal Tree and not for the applicant and that the sole reason for his employment by the applicant was to accommodate his FAIS registration and retain his VISA so that he could tender his services to Crystal Tree.

[46] When the Crystal Tree agreement was cancelled, and the applicant was no longer required to second the third respondent to Crystal Tree, the reason for

the third respondent's employment fell away. This is where the Commissioner lost sight of the evidence before him. His determination that an event in Crystal Tree was not capable of triggering a retrenchment by the applicant was a failure to understand or consider the evidence tendered.

[47] Had he properly understood the evidence, he would have realised that the only reason for the continued employment of the third respondent by the applicant was his secondment to Crystal Tree in terms of the consulting agreement and when the need for the third respondent's service to Crystal Tree fell away, so did the reasons for his continued employment.

[48] This failure resulted in an outcome that was disconnected from the evidence and consequently one that another reasonable Commissioner could not have arrived at.

Procedural fairness

[49] The Commissioner's finding of procedural unfairness is premised on his misconception of the evidence. He only found that there was procedural unfairness because the outcome was a foregone conclusion.

[50] In *casu* this was not the case, as is evidenced from the copious correspondence between the attorneys for the applicant and those for the third respondent. The process spanned nearly four months and included both 'numerous' meetings, according to the third respondent's email dated 6 August 2020, and correspondence between the attorneys for both parties.

[51] There was a clear and extensive ventilation of the issues that the parties were obliged to consult on, as well as a reference to some meetings between them.

[52] There was no evidence from the third respondent that the process was unfair. His only claim was that the consultations were not conducted in good faith.

[53] Having regard to the volume of correspondence between the parties, numerous meetings and the consideration of the third respondent's request that the applicant consider bumping van Wyk, I can find no indication that the outcome of the consultation was pre-determined.

[54] The finding of the Commissioner in his award that this was the case is not connected to any of the evidence that was before him, and consequently not an outcome that another arbitrator could have arrived at.

[55] Based on the volume and content of the consultation between the parties, I find that the procedure followed by the applicant was fair.

Costs

[56] Costs do not automatically follow the outcome in this court, but are instead made in accordance with the requirements of the law and fairness.

[57] The applicant was successful only in respect of the fairness of the dismissal, and not on its jurisdictional claim.

[58] The Constitutional Court in *Zungu v Premier of the Province of KwaZulu-Natal & others*[7] held that costs orders should not be made unless the requirements in s162 of the LRA are met.

[59] None of those conditions are present in this case and a cost order is not justified.

Conclusion

[60] For all the reasons set out above, I am satisfied that interference in the award is justified.

[61] In the results, the following order is made:

Order

1. The award issued by the second respondent under case number WECT12675-20 is reviewed and set aside and replaced with an order that the dismissal of the third respondent was substantively and procedurally fair.

[7] (2018) 39 ILJ 523 (CC).

2. No order is made as to costs.

L Myburgh

Judge of the Labour Court of South Africa

<u>Appearances:</u>

For the Applicant: Adv RGL Stelzner SC

Instructed by: Smith Tabata Buchanan Boys

For the Respondent: Adv F Rautenbach

Instructed by: Carelse Khan Attorneys