



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

Signature

03/09/2026

Date

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Case no: 382/2023

In the matter between:

GAVIN ADAMS

Applicant

and

**GENERAL PUBLIC SERVICE
SECTORAL BARGAINING COUNCIL**

First Respondent

**REZA SLAMANG, COMMISSIONER
(N.O.)**

Second Respondent

**DEPARTMENT OF WATER &
SANITATION**

Third Respondent

Summary: (Opposed review of recusal ruling – Consideration of test – Ruling set aside and remitted for de novo hearing)

JUDGMENT

LAGRANGE, JIntroduction

- [1] This is an application to review an interlocutory ruling by an arbitrator dismissing an application to recuse himself in an unfair labour practice dispute hearing, brought by a job applicant, Dr. G Adams ('Adams'). Unusual as this is, it is even more unusual in not being enrolled on an urgent basis, but on the ordinary opposed motion roll. Nonetheless, the arbitration did not proceed while the review application was pending.
- [2] Adams is working at the Department of Trade, Industry and Competition ('DTIC') and occupies the post of Director: Spatial Industrial Development. He had applied for the post of Chief Director: Provincial Head (Western Cape) in the Department of Water and Sanitation ('the DWS' or 'the employer'). He is aggrieved because he was not even shortlisted for the post and believes there was no justification for excluding him without even granting him an interview.
- [3] The employer stated that the reason for not shortlisting him for the post was because he failed to meet the minimum qualification requirements of the post, which required an appropriate degree at NQF Level 7 in Natural Science, Environmental Science, Agriculture, Engineering, Economic Science, or Hydrology. His qualifications were a PhD in Quality Management / Human Resource Development (HRD), a Master's in HRD, and a National Diploma in Structural Construction, which did not satisfy the criteria.

Context in which the recusal application arose

- [4] Adams represented himself and he had two legal representatives appearing for it. Understandably as a lay litigant that might have caused him some anxiety. However, his complaint is that the arbitrator, in effect displayed bias towards him, in the way he conducted the arbitration hearing.
- [5] Things came to a head when the arbitrator gave the DWS an opportunity to make an application under Rule 30 of the bargaining council Rules for the

Conduct of Proceedings before the GPSSBC¹ to compel him to discover his previous 9 years performance agreements and performance assessments at the DTIC. A1 is of the view that those documents were irrelevant to whether he qualified to be shortlisted or not, because that was supposed to be determined by measuring the applicant's CV against four criteria. The DWS claimed that the documents were necessary to verify what Adams actually did at the DTIC. It appears to be common cause that these were not documents he had to submit for the shortlisting. Accordingly, he argued the documents are completely irrelevant to whether he was unfairly refused an interview. On the face of it his argument has some merit, especially in relation to his actual performance assessments.

- [6] Be that as it may, events unfolded as follows. Although the arbitrator initially set timetables during the 12–13 April 2023 sittings for the employer to file a formal application for disclosure under Rule 30 and 32 and for Adams to respond, Adams pre-emptively delivered an objection and recusal request on 13–14 April 2023 before any disclosure ruling could be argued or finalised on the merits.
- [7] Rather than immediately deciding the disclosure dispute, the arbitration was adjourned to allow the parties to exchange formal written affidavits regarding Adams' recusal application. On 19 June 2023, the arbitrator issued a written ruling on 19 June 2023 dismissing Adams' recusal application and ordered the employer to serve and file a formal Rule 32 / Rule 30 application if it still wished to persist with obtaining the disclosure of the performance documents.

The arbitrator's reasons for dismissing the recusal application

- [8] The arbitrator dismissed A1's recusal application, primarily because he believed that the complaint was based primarily on his decision to entertain an application by the employer to order him to disclose past performance records and agreements.

¹ GPSSBC Resolution 4 of 2004.

[9] He reasoned that issuing procedural directions to regulate a disclosure application under the rules of the bargaining council did not constitute bias or pre-judgment. It affords both parties an equal procedural opportunity to argue relevance and admissibility before any decision is made.

[10] The arbitrator did express the view that the application was brought as an opportunistic litigation strategy, because it was conditional, baseless, and designed to manipulate the forum and evade potential adverse procedural rulings on disclosure. His reference to it being conditional was presumably because Adams phrased his request for recusal in a curious fashion, namely:

"That being said, the Applicant herewith requests recusal of the current commissioner if he were to continue with his openness toward granting access to evidence involving documentation other than the CVs of candidates who had applied for the position in question".

(emphasis added)

The arbitrator took offence as Adams was clearly indicating that he would proceed with the application if the arbitrator ruled against him on the requested disclosure the employer was pressing for.

[11] Because he viewed the recusal application as a baseless abuse of the council's processes, he dismissed the application and ordered that costs stand over for determination at the conclusion of the proceedings.

Dispute over appropriateness of the recusal application and interlocutory review of the ruling

[12] The DWS raised a preliminary point about the recusal application was opportunistic and brought prematurely to derail ordinary interlocutory directions regarding discovery under Rule 30. Relying on the cases of *SA Commercial Catering & Allied Workers Union & others v Irvin & Johnson Ltd (Seafoods Division Fish Processing)*² *SACCAWU v Irvin & Johnson Ltd and*

² (2000) 21 ILJ 330 (LAC) at paragraph 4.

*Public Protector v Chairperson of the Section 194 Committee*³, the employer argued that a party must await the final determination of the arbitration before taking interlocutory decisions on review unless grave, irreparable injustice is shown.

- [13] An additional hurdle that faces an applicant who wishes to review a decision of an arbitrator in an incomplete arbitration is section 158(1B) of the Labour Relations Act, 66 of 1995, which states:

'The Labour Court may not review any decision or ruling made during conciliation or arbitration proceedings conducted under the auspices of the Commission or any bargaining council in terms of the provisions of this Act before the issue in dispute has been finally determined by the Commission or the bargaining council, as the case may be, except if the Labour Court is of the opinion that it is just and equitable to review the decision or ruling made before the issue in dispute has been finally determined.'

(emphasis added)

- [14] This provision was introduced to strongly discourage the piecemeal review of arbitration proceedings, and to avoid this court being overwhelmed by reviews on all manner of rulings in part-heard proceedings. In a review of a recusal application which essentially is a claim that the proceedings have already been so tainted by the conduct of the arbitrator, that there is no reasonable prospect of the merits of their case being fairly tried. The following extract from the *Public Protector* decision is relevant here:

[44] Reliance was also placed by counsel for the applicant on the decision in *Bernert v ABSA Bank* in which it was held that it is not in the interests of justice for a litigant to wait until an adverse judgment before seeking recusal when the facts relied on were known to the applicant during the proceedings. However not only is that matter distinguishable from the present in that the litigant in *Bernert* failed to apply for the recusal of judges when

³ *Public Protector of South Africa v Chairperson: Section 194(1) Committee and Others* [2023] 2 All SA 818 (WCC) (13 April 2023)

the facts that he raised later on appeal, after the finalisation of the case, were known to him during the proceedings, but the test is rather whether the applicant suffered resultant material and irreversible harm at the stage complained of during the proceedings. It is in this crucial respect that she bears a formidable burden. Put differently, the applicant must show that it is not the nature of the irregularities complained of per se that entitles her to relief in this application, but rather that the proceedings themselves have been irremediably tainted thereby, resulting in grave injustice which cannot be corrected by a court in due course.'

- [15] Accordingly, Adams will only be entitled to relief if he can meet this threshold. To assess that it is necessary to look at the various grounds of review which he has raised to overturn the recusal ruling to see if any are sufficient to warrant intervention at this stage.

Grounds of review

Adams's complaints

- [16] Adams argued that the arbitrator acted in concert with the employer's counsel or functioned as a "third legal opponent". He identified a number of issues which he believes illustrated the arbitrator's lack of neutrality and why his decision was wrong, without indicating whether he was contending that the arbitrator committed an error of law or whether his ruling was one no reasonable arbitrator could have reached. His criticism of the arbitrator's ruling reads more like a direct appeal against it. Be that as it may, given his lack of expertise in the nuances of the arcane law of review in this court, his complaints will be evaluated against the review test as if he had framed them as attacks on the reasonableness of the award, or mistakes of law. The same indulgence would not be appropriate if he were legally represented. His complaints and the evaluation thereof are summarised below:

- [17] His grounds can be categorised in two groups. One group concerns substantive rulings the arbitrator has ostensible made on issues such as the admissibility of evidence, and the like. The other concerns whether he is being treated even handedly in the conduct of the hearing. I appreciate, that he may interpret some of the issues like the admissibility of evidence as also relating to whether he is getting a fair hearing, but they are issues which will also affect the viability of the arbitrator's reasoning in the award. As such they can appropriately be dealt with when the award has been handed down, by way of a review of the award itself. Importantly, they will usually be matters that the court on review can correct is the award is reviewable, without remitting the matter back for a rehearing.

Grounds of review pertaining to the arbitrator's general conduct of the hearing

- [18] The following grounds have been raised concerning how the arbitrator has managed the arbitration proceedings.
- [19] Assisting the employer in prosecuting its case: Adams complained that the arbitrator actively encouraged and directed the employer to lodge a Rule 30/Rule 32 application compelling Adams to disclose 9 years of past performance agreements from the DTIC. Adams asserted that the dispute strictly concerned non-shortlisting based on candidate CVs evaluated against four criteria, making past performance assessments irrelevant, prejudicial, and a breach of privacy.
- [20] Demeaning behaviour of employer's representatives: Adams alleged that the employer's representatives (Advocate Holby and Advocate Sibisi) engaged in continuous unruliness, shouted across the table (such as stating he was "lying" on his CV), laughed, and ridiculed him while the arbitrator failed to intervene, protect a self-represented employee, or maintain proper order.
- [21] The DWS argued that Adams misunderstood that what was said to him was that it would be 'put to him that he was lying in his CV' and that this would be demonstrated if the employer obtained the documents it was asking for. While that might seem a somewhat harsh statement, in the context of cross-

examination it is not beyond the bounds of what is permissible, even it might be more gently rephrased to say it would be put to him that he 'is not telling the truth'. In the end the thrust or the proposition is the same and is a legitimate one to put to a witness when a basis is laid for making it. The arbitrator did not display bias by permitting the advocate to state that he intended to put that proposition to Adam under cross-examination. The representative denied laughing at him and argued that he too, had laughed on occasion in the proceedings. The question of not being protected from the two representatives is discussed in more detail below.

- [22] Lack of impartiality: Adams contended that the arbitrator acted in concert with the employer's counsel, frequently warning Adams to heed the employer's arguments, telling Adams that "we don't operate with feelings," and functioning as a "third legal opponent" rather than an impartial referee providing guidance to a layperson.
- [23] Inappropriate Personal Remarks: Adams took offense at the arbitrator's remark advising him to take "a glass of wine tonight or whiskey" to prepare for cross-examination, which Adams construed as a derogatory and unprofessional comment.
- [24] Failure to Record Proceedings: Adams highlighted that the arbitrator failed to record the proceedings of day two (13 April 2023), resulting in the loss of his evidence-in-chief from the official record.

Grounds of review pertaining to the arbitrator's rulings on evidence

- [25] Adams did not believe his previous performance records in his current job were relevant and was unwilling to provide them voluntarily
- [26] The arbitrator properly advised what needed to be done procedurally, given that the parties were at an impasse on the disclosure issue His direction to bring an application was not the same as admitting the documents, he was merely advising on the procedure to be followed, which would lead to finality on whether Adams should disclose the documents. The reason the

performance record documents came up was because the employer had obtained another CV of Adams which it claimed was different from the one he submitted to the DWS and it argued that the performance agreements could reveal which CV truly reflected the work he claimed to do at DTIC. On the face of it, an agreement describing performance objectives he was expected to achieve, might clarify what he was expected to do and might support or undermine what he had written in his CV. On the other hand, I can appreciate that Adams might have had good reason to believe those documents had no relevance to the shortlisting decision.

- [27] It is less obvious what use his actual performance assessments would have been in determining his duties. In any event, the appropriate process for deciding whether they should be admitted was for the arbitrator to rule on a disclosure application brought by the party wanting the documents, in this case the employer. In any event, advising on the only procedural way of resolving the impasse is not an indication of bias.
- [28] Admitting irrelevant and prejudicial documentation: Adams complained that the arbitrator permitted the employer to introduce a different CV from another unrelated dispute (involving the Department of Higher Education and Training), creating prejudice and prompting bad-faith accusations of dishonesty.
- [29] Adverse rulings: Adams claimed the arbitrator coerced him into abandoning lines of argument and evidence, namely -
- 29.1 excluding his "probability chart" illustrating the statistical improbability of two internal candidates taking both nominated spots;
 - 29.2 disallowing arguments and references under the Employment Equity Act regarding suitability criteria and demographic and scoring calculation errors in the employer's tables;

29.3 treating supporting documents (such as a referee letter confirming his water and sanitation work and academic prospectus materials) as inadmissible hearsay or requiring expert witnesses.

The employer's response

[30] The employer denied that its representatives were unruly or abusive, submitting that they were exercising their legitimate right to probe Adams' claims, challenge the veracity of his qualifications and experience, and test the discrepancies between two contradictory CVs.

[31] All prior *ex tempore* and procedural rulings during the proceedings had been made in Adams' favour, disproving any systematic bias.

[32] The employer argues that the only reason that Adams brought the recusal application was to head off an anticipated ruling against him, which would have required him to produce his performance records.

Evaluation

Arbitrator's rulings on evidence

[33] Having regard to all the rulings the arbitrator made on admissible evidence or on permissible submissions made in argument, I am satisfied that these are matters, which if they turn out to have a material impact on the final award, are issues that can and should be dealt with by reviewing the final award. They are not the kind of rulings which a court should hear on review when the arbitration proceeding is incomplete.

[34] If one has regard to his recusal application, these issues account for the bulk of his grounds.

Arbitrator's conduct of the arbitration hearing.

[35] I accept that things came to a head when the arbitrator advised the DWS representatives to bring an application to compel disclosure of Adams's performance agreements and assessments.

- [36] Nevertheless, his concerns began on the first day of the arbitration when the arbitrator was asking questions of Adams to clarify the nature of his case. He complained of the unruly behavior of the two advocates representing the DWS, Messrs Holby and Sibisi, and the arbitrator's failure to control them interrupting him. He complained that this continued on the second day when he was giving his evidence in chief.
- [37] It appears that Holby was an employee of the DWS and Sibisi was the appointed legal representative. However, both interjected during Adam's explanation of his case and when he was giving his evidence in chief, as if they were sharing the role of the legal representative. One of the complaints which Adams raised in his recusal application was that the arbitrator had effectively allowed the DWS to have two legal representatives at the hearing instead of one as the bargaining council provided for.
- [38] An examination of the transcript reveals a pattern of persistent interruption of Adams both when he was trying to explain the nature of his complaint to the arbitrator and when he gave his evidence in chief. What is noteworthy is that the interjections were mostly simply put directly to Adams while he was speaking, without raising the issue with the arbitrator. The arbitrator occasionally cautioned the pair to wait until Adams was cross-examined but it was far too seldom and a sterner response in the form of a firm rebuke was called for.
- [39] Why he let both Sibisi and Holby speak during the hearing, let alone allowing them to interject during Adams's presentation and evidence in chief in the way they did, is a mystery.
- [40] Under the guise of seeking clarification during Adams's presentation about the nature of his case he was interrupted by one or the other of the pair over twenty times. During his evidence in chief, he was also interrupted by their interjections approximately thirty times. This was on the first day only. There was no transcript available of the second day.
- [41] Some examples of the interruptions Adams was subject to were:

- 41.1 Rather than noting the point for cross-examination, Holby flatly contradicted Adams while he was explaining his credentials:

MR ADAMS: "Remember I am a Structural Engineer. I have taught... [intervenes]"

MR HOLBY: "You an HRD Expert... That is what you are... You did an internship in, in for three years. That does not necessarily make you... [intervenes]"

- 41.2 When Adams brought up NQF ratings, Holby again interposed:

MR ADAMS: "And it is before and it is before 1990... [intervenes]"

MR HOLBY: "Yes, it is still a NQF6 by the way."

MR ADAMS: "Ja."

MR HOLBY: "It has not changed even after 1996."

- 41.3 Likewise, when Adams was talking about a candidate's qualifications, Holby butted in directly, as if they were in a discussion, not a proper adversarial process:

'MR ADAMS: "Remembering we still need to confirm whether, whether Ms Ayesha was in fact at the time an internal candidate, the Indian lady."

MR HOLBY: "Not at the time, but she had been an internal... [intervenes]"

- 41.4 Sibisi routinely stopped Adams's presentation to raise formal evidentiary hurdles regarding the origins of documents, even though Adams was not even giving evidence at the time. For example -

- 41.4.1 Sibisi interrupted Adams when he was trying to refer to university prospectus material:

'Wait a bit. If I may just come in here, Chair. Do you know who the author of this document is? ... How authentic is this? ...

Chair, I really have a problem with this, the authenticity of this document.'

41.4.2 Likewise, when Adams cited an academic article, Sibisi interjected:

'If I may just establish something... And you want to lead evidence on that is, it will amount to hearsay evidence... The author, is he going to come testify?'

41.5 Holby repeatedly interrupted Adams's answers regarding the directorships he held at DTIC.

41.6 When Adams was giving his understanding of the Job Evaluation and Equate System Holby interrupted him more than once to argue that Adams was attacking the DPSA Equate system and job profiling rather than the shortlisting decision.

41.7 The arbitrator merely cautioned Holby and Sibisi to stop or leave their point for cross-examination on seven occasions, whereas the interruptions were far more frequent and they paid no heed to the arbitrator's cautionary words. Adams asked the arbitrator, from time to time to curb the barrage of interjections. Other examples of the interruptions by Holby and Sibisi are mentioned below.

41.8 Adams protested that the representatives were being allowed excessive leeway:

'MR ADAMS: I'm sitting up here against three legal people and they are having a field day. I'm just an employee.'

COMMISSIONER: Ja but... [intervention]

MR ADAMS: Who identified some issues that ...[intervention]

COMMISSIONER: Sir my role is not to defend

you or them. I'm required to give guidance to lay people yes.'

41.9 Shortly thereafter, following an intervention by Mr Holby, the Commissioner explained his approach:

'COMMISSIONER: It is an adversarial one, and they going to, they must, if you want to call it have a field day, they are doing their job. They must do it with proper respect and dignity and decorum but ultimately, they want to win.'

41.10 While the arbitrator had chosen to run the arbitration in an adversarial form, which he was entitled to do, he failed to appreciate that he was not being fair to Adams, by not stopping the constant interruption of his presentation and testimony. He did not make Holby and Sibisi conduct themselves in an orderly and professional manner, but allowed Adams to be engaged in debate and subjected to criticism while he was trying to explain his case and lead his evidence.

41.11 Right after Adams detailed the calculation errors in the Employment Equity calculations, Holby intervenes and launches into a misconceived attack on the evidence Adams was trying to present, until the commissioner eventually explains that Holby misunderstood what Adams was saying:

'MR ADAMS: 44%, yes. 44% and so, now, Commissioner, with, with that little bit of examples that I am just showing you there, you can test the, the rest of the yellow and it is all, it is, it is, it is all, it is all mistakes. I can go through each one, but I just showed you, showed you, showed you the grave mistakes. They have added up all these percentages as if you can just add up percentages across both levels. You cannot. It is the percentage of the subtotal over there and

so, the proper figure is or the proper figures are, are on this table and it is highlighted in yellow and so, I am just saying the scoring was to be generous clumsy and the Employment Equity stats that is supposed to inform decision making regarding who you want to take was also clumsily full of errors and therefore misguided or were unreliable forms of, of, of information for whether it is the DG to take his decision on who he must and, and I am hoping that all the evidence that, that I give, if it gets looked at together that you can see this whole process as a question mark of ... [indistinct]

COMMISSIONER: A question of —?

MR ADAMS: I am just saying, as a question mark.

COMMISSIONER: Oh.

MR ADAMS: In my — I am, I am alleging.

MR HOLBY: Chair, Mr Chair, with all due respect and this is very dangerous territory we are traversing. The Head of HR who endorses this process is a White male. The person who approved this process, the DG, is a White male. This is suggesting that they are racist and this is something that should be dealt with in the Equity Court, because you are, what are you are suggesting and implying is that these people prejudiced you because of your race.

MR ADAMS: No.

MR HOLBY: Well... [intervenes]

MR ADAMS: [Indistinct]

MR HOLBY: It is just a coincidence that both happened to be White... [intervenes]

MR ADAMS: I answered the question.

MR HOLBY: And they both happen to be White males and the suggestions and the ... [intervenes]

MR ADAMS: I do not even know that.

MR HOLBY: What you are suggesting is — yes, you did not know that. You made an assumption that perhaps maybe they also Black males like the whole Panel was.

MR ADAMS: That person was not appointed.

MR HOLBY: Because you mentioned that earlier on. Now, we, we caution you not to go down this, this road and what you are suggesting is that the two White people who made this determination did not study this thing correctly, did not see it as inaccurate and such the process was flawed.

MR ADAMS: Did I say that?

MR HOLBY: That is what you are implying.

MR ADAMS: No, you cannot, you cannot imply. If you do not want me to speculate, you cannot imply

MR HOLBY: No, but you have been — that is what I am saying. You can read the names, Dr Sean Phillips. It is a White person.

MR ADAMS: No, this, this is ... [indistinct]

MR HOLBY: And it is, it is come, it is coming through Mr Conrad Grebe, who is a German guy. Now, what are you implying by suggesting the Employment Equity was not considered in this process, because you are saying the information that they relied on was incorrect.

MR ADAMS: Mr Holby... [intervenes]

MR HOLBY: What implication can we draw from this?

MR ADAMS: Mister — no, no, no. Do not draw implications. Listen to what I say rather. I am saying, that this as an instrument alongside the scoring of criteria for sure this as an instrument, I am saying, these two things are indications that the process to some degree was fraud.

COMMISSIONER: It was done in a slapdash haphazard way. That is the unfairness he is — not talking about. Not the implications of discrimination or any of the sort. He is saying... [intervenes]

MR HOLBY: Ja, because the, the person who prepared it happened to be a White German guy.

COMMISSIONER: Okay, but that is not his argument.

MR HOLBY: Okay.

COMMISSIONER: His argument is saying — let us call it — these incompetences whoever perpetrated the, the errors is an indication of how slapdash this entire requirement process was done.

MR HOLBY: Okay. I understand what you are saying now.

COMMISSIONER: Ja.

MR HOLBY: But my concern is it is — if you know who these people are and the coincidence that they happen to be both White males it is very dangerous.

MR ADAMS: No, for them maybe not for me as I am not alleging that.

COMMISSIONER: Okay.

MR HOLBY: Okay.'

[42] Although the commissioner eventually persuaded Holby he misunderstood what Adams was saying, he did not stop Holby from embarking on his critique, which was not even a formal objection to Adams's testimony. Holby's challenge, misconceived though it was, should have been raised in cross-examination but he was allowed to engage Adam's in a debate about his evidence while Adams was trying to give his evidence-in-chief.

[43] Considering the above, it must be said that the arbitrator did not exercise sufficient control over Holby and Sibisi. This would naturally lead a reasonable litigant to believe that the arbitrator was allowing a lopsided form of a hearing to take place, in which his legally qualified opponents were permitted to constantly interject during his presentation and evidence, raising issues which should have been raised in cross-examination, not by way of interrupting his outline of his case and evidence-in-chief. The arbitrator's indulgence of this irregular conduct, in my view is enough reason to believe that Adams will not receive a fair hearing, even if his application for recusal was also triggered by the prospect of an adverse ruling on the disclosure of his performance records. There is no point in allowing the enquiry to run its course before the present arbitrator. As there is no record of the second day's evidence, the most practical solution would probably require Adams to lead the missing portion of his evidence again. In effect it means the arbitration is not at an advanced stage which is also a factor in favour of starting afresh before another arbitrator.

Order

1. The recusal ruling of the Second Respondent on 19 June 2023 under case number GPBC 937/2022 is reviewed and set aside.
2. The said ruling is substituted with a ruling that the application for recusal is granted, and the Second Respondent is recused from presiding over the dispute.
3. The matter is remitted back to the First Respondent, for enrolment for a hearing *de novo* before an arbitrator other than the Second Respondent, within 30 calendar days of receipt of this order.
4. No order is made as to costs.



R Lagrange

Judge of the Labour Court of South Africa

Appearances:

For the Applicant : In Person

For the Third Respondent : M Dyalivane

of the Office of the State Attorney (Cape Town)

LABOUR COURT