REPUBLIC OF SOUTH AFRICA

Reportable

THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

JUDGMENT

Case no: C 976/2014

In the matter between:

INNOVATION MAVEN (PTY) LTD Applicant

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION First Respondent

COMMISSIONER BELLA GOLDMAN *N.O* Second Respondent

MICHELLE FILIPPINETTI Third respondent

Heard: **16 September 2015**

Delivered: **29 October 2015**

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an application to review and set aside an arbitration award issued by the second respondent (the commissioner) on 22 September 2014.

[2] The dispute that gave rise to the present proceedings concerned a contention by the third respondent (the employee) that she had been unfairly dismissed in circumstances where she resigned from her employment with the applicant and claimed what is referred to as constructive dismissal. The arbitration proceedings commenced on 6 June 2014 and thereafter on 2, 3 and 4 September 2014. The second respondent (the commissioner) found that the employee had been unfairly dismissed and awarded her compensation in an amount of some R140 000, the equivalent of four months' remuneration. I venture to guess that the costs incurred in the conduct of the arbitration and the present proceedings far outstrip the value of the award.

[3] In its founding papers, the applicant raised 14 grounds of review. At the hearing of the application, the applicant's counsel relied on only one of those grounds – that the commissioner descended into the arena of the conflict between the parties and that she thus disabled herself from assessing with due impartiality the credibility of the witnesses and the probabilities relating to the issues. In addition, the applicant contends that the commissioner's intervention has clearly created the impression, at least in the minds of the applicant and its representative at the hearing, that the commissioner had so disabled herself that she was favouring or promoting the third respondent's cause and prejudging the case against the applicant.

Factual background

[4] Given the basis on which the review is brought, it is not necessary to canvass all of the facts that are material to the dispute. It is sufficient to record for present purposes that the employee was employed by the applicant as a business development manager in 2011, and that she resigned on 7 March 2014. At issue in the proceedings under review were a limited number of disputes of fact – the employee contended that the targets that she had been set could not reasonably be met; the applicant contended that the employee had failed to meet the reasonable and required performance standards. What was at issue particularly was a meeting held on 3 January 2014 at which the employee says that she was given an ultimatum to resign and be paid two months' salary, or face a performance management process. The subsequent engagements between the employee and the applicant's representatives are also disputed but the case advanced by the applicant was that the employee was opportunistically seeking to negotiate an enhancement of the severance package on offer and that this could never amount to a constructive dismissal. In any event, by the end of February 2014, it was clear that the employee had rejected any possible settlement and she was presented with a performance management plan. It was common cause that the employee did not participate in this process and that she resigned on 7 March 2014 and then referred a dispute to the CCMA contending that the applicant had made her continued employment intolerable.

Relevant legal principles

[5] The Labour Relations Act (LRA) sought to introduce a dispute resolution system that would resolve labour disputes expeditiously, informally and inexpensively. Section 138 (1) of the Act promotes this purpose and in relation to the conduct of arbitration hearings under the auspices of the first respondent (the CCMA) provides the following:

> The commissioner may conduct of the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and

> quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities.

[6] The application of the statutory injunction to determine a dispute fairly and quickly, having regard to the substantive merits but without legal formality, may often be fraught with internal tension. To determine a dispute quickly might require robust intervention by a commissioner, but the obligation to act fairly to both sides must not be compromised and may serve to limit the nature and extent of any intervention. Similarly, the injunction to conduct the proceedings with the minimum of legal formality may justify a decision by a commissioner to conduct proceedings with less regard for the formality that ordinarily characterises a trial in this court or any other civil court, but it is not an invitation or a license to disregard the parties' right to a fair hearing. The broad principle that emerges from the case law is that commissioners (and judges) ought to exercise caution when they intervene in the proceedings over which they preside.

[7] In *Solomon & another NNO v De Waal* 1972 (1) 575 (A) Potgieter JA said the following:

> However, by descending into the area of the conflict between the parties in that manner the learner judge might well have disabled himself from assessing with due impartiality the credibility of the witnesses, the probabilities relating to the issues, and the amount of the general damages sustained by the plaintiff. Even if that were not so, such interventions might well have created the impression, at least in the mind of defendants, that he had so disabled himself that he was favouring or promoting the plaintiff's cause and prejudging the case against defendants. In that regard it must be borne in mind that justice should not only be done but should manifestly and undoubtedly be seen to be done.

[8] In *Greenfield Manufacturers (Temba (Pty) Ltd v Royton Electrical Engineering (Pty) Ltd* 1976 (2) SA 565 (A), the same court dealt with a submission to the effect that a trial court had acted irregularly in unduly by interfering in the conduct of the case and putting a leading question to a witness in respect of a vital issue.

The court noted that what mattered was the nature rather than the frequency of a trial judge's intervention. The court held:

> Whilst the true role of a trial judge in civil proceedings is not necessarily that of a 'silent umpire', he must studiously avoid any form of intervention which is calculated to create the impression that he is descending into the arena which is ordinarily reserved for the litigants. Failure to do so, might have unfortunate consequences, e.g., an impression (albeit mistaken) might be created that his intervention evidence as bias or that he is prejudging the matters which are to be considered only at the end of the trial.

[9] In *National Union of Security Officers and Guards v Minister of Health and Social Services (Western Cape)* [2005] 4 BLLR 373 (LC) this court said the following regarding a commissioner's conduct during the questioning of witnesses:

> I do not wish to refer to each and every sentence uttered by the arbitrator or each and every question she had asked the applicant. Suffice to say that, in my view, she exceeded the bounds of the enquiry and created an impression that she was biased in favour of the first respondent. This is supported by the fact that I found that the manner in which she dealt with certain witnesses to be deferential to them as a result of their political positions or for any other reason she may have had. Her generosity in respect of those witnesses did not extend to the applicant and, in my view, he was entitled to hold the view that she was biased

And further:

> Courts have warned on several occasions the trial judges or arbiters often, and unfortunately quite unwarrantedly, intervene in proceedings while, for instance the defendant's counsel is cross-examining certain witnesses and during the hearing of argument. ..For this reason alone the award falls to be set aside.

[10] In *Vodacom Service Provider Co (Pty) Ltd v Phala No & others* (2007) 28 ILJ 1335 (LC), this court reviewed and set aside an arbitration award in circumstances where the court held that amongst other things, that the commissioner concerned had questioned a party's witnesses in a way that amounted to cross-examination and thus overstepped the boundaries of fair

procedure in the conduct of arbitration proceedings. The court went on to note that a commission has a discretion about how an arbitration should be conducted and that the commissioner may decide to adopt an adversarial or an inquisitorial approach but that irrespective of the approach adopted, the commissioner is required to conduct arbitration proceedings in a fair, consistent and even-handed manner. At paragraph 15 of the judgment, the court said the following:

> A commissioner cannot assist or be seen to assist, one party to the detriment of the other. A commissioner cannot put to witnesses his propositions, should not interrupt the witnesses answers, challenge the consistency of a witness with his own evidence, indicated that he doubted the witnesses credibility, or make submissions regarding the construction of evidence.

Analysis

[11] The starting point in any assessment of the applicant's submissions is the constitutional basis of the right to a fair hearing in statutory arbitration proceedings. The Constitutional Court has held that when commissioners conduct arbitration hearings, they perform an administrative function. While there are awards the requirements of fairness, consistent with the LRA and the Constitution, dictate that CCMA arbitration proceedings should be conducted in a fair manner are not reviewable in terms of the Promotion of Administrative Justice Act, 3 of 2000 the CCMA is an administrative body (see *Sidumo & another v Rustenburg Platinum Mines Ltd & others* 2008 (2) SA 24 (CC). Ngcobo J made the point in the following way:

> [266] The requirement of fairness in the conduct of arbitration proceedings is consistent with the LRA and the Constitution. First, a CCMA commissioner is required by s 138 (1) of the LRA 'to determine the dispute fairly and quickly'. Second, in terms of s 34 of the Constitution, everyone has the right to have any dispute that can be resolved by the application of the law decided in a fair public hearing before a court of law or an independent and impartial tribunal. The CCMA and Labour Court is well-established to resolve labour disputes. CCMA arbitrations provide independent and impartial tribunals contemplated in s 34 of

> the Constitution. The right to fair hearing before a tribunal lies at the heart of the rule of law. And a fair hearing before a tribunal is a pre-requisite for an order against an individual and this is fundamental to a just and credible legal order. A tribunal like the CCMA is obliged to ensure that proceedings before it always fair. And finally, 23 of the Constitution guarantees to everyone the right to fair labour practices.

And further:

> [267] It is plain from these constitutional and statutory provisions that CCMA arbitration proceedings should be conducted in a fair manner. The parties to CCMA arbitration must be afforded a fair trial. Parties to the CCMA arbitrations have a right to have their cases fully and fairly determined.

[12] The LRA spells out the nature and content of the right to a fair hearing in CCMA arbitration proceedings – these are established primarily by s 138(1), referred to above. A commissioner is required to conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities. Subsection (2) provides that subject to the discretion of the commissioner as to the appropriate form of the proceedings, a party to the dispute may give evidence, call witnesses, question the witnesses of any other party, and address concluding arguments to the commissioner. In *CUSA v Tao Ying Metal Industries & others* [2009] 1 BLLR 1 (CC), the Constitutional Court (per Ngcobo J) placed the following gloss on s 138:

> [65] Consistent with the objectives of the LRA, commissioners are required to 'deal with the substantial merits of the dispute with the minimum of legal formalities'. This requires commissioners to deal with the substance of a dispute between the parties. They must cut through all the claims and counter claims and reach for the real dispute between the parties. In order to perform this task effectively, commissioners must be allowed a significant measure of latitude in the performance of their functions. Thus the LRA permits commissioners to conduct the arbitration in a manner that the commissioner considers appropriate'. But in doing so, commissioners must be guided by at least three considerations.

> The first is that they must resolve the real dispute between the parties. Second, they must do so expeditiously. And, in resolving the labour dispute, they must act fairly to all the parties as the LRA enjoins them to do.

[13] The CCMA's practice and procedure manual advises arbitrators generally to opt for an inquisitorial approach or an adversarial approach in arbitration proceedings. The manual goes on to advise commissioners (at paragraph 12.3.5) that irrespective of the approach adopted, an arbitrator must conduct the arbitration impartially and not engage in conduct that might reasonably give rise to a party forming a perception of bias.

[14] The CCMA guidelines and misconduct arbitration (at paragraph 33) suggests that when the parties are primarily responsible for calling witnesses and presenting their evidence and cross-examining the witness of other parties an adversarial approach is to be recommended. An inquisitorial approach, on the other hand, he suggested if one or both parties is unrepresented, or where a representative is not experienced. The guidelines warn that arbitrators adopting an inquisitorial approach must be careful to ensure that the parties are aware of and have the opportunity to exercise their rights under s 138 (2).

[15] The guidelines go on to suggest that when an arbitrator questions witnesses, whether in an inquisitorial or adversarial process, the arbitrator should explain to the parties the reason for seeking the information sought and must allow the parties to address questions to witnesses on any issues raised by the additional evidence. In short, when an arbitrator adopts an inquisitorial role in arbitration proceedings, the commissioner may not abandon the well-established rules of natural justice. On the contrary, it calls for greater vigilance on the part of the commissioner particularly since the interventionist role that he or she adopts might easily lead to a perception or apprehension of bias, especially on the part of a lay litigant (*Mutual & Federal Ins Co v Commission for Conciliation, Mediation & Arbitration & others* [1997] 12 BLLR 1610 (LC)).

[16] The guidelines are consistent with judgments of this court and in particular, the judgment in *Vodacom Service Provider Co (Pty) Ltd v Phala & others* (*supra*). That decision, it will be recalled, specifically contemplated that the objective of fair, consistent and even-handed proceedings precluded commissioners from assisting the party to the detriment of the other, putting propositions to witnesses, interrupting witnesses answers, challenging the consistency of a witness, indicating doubt as to witnesses credibility or making submissions regarding the construction of evidence.

[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.

[18] I do not intend to traverse each and every instance of in appropriate intervention by the commissioner; a few examples will suffice.

[19] After the applicant's first witness had been sworn in, the applicant's representative, Mr. Pienaar, asked a single question before the commissioner took over his examination in chief. Some five pages later, Pienaar asks a second question, after which the commissioner again interrupts and poses a series of question of her own to Taylor. This pattern continued throughout Taylor's examination-in-chief, with some of her questions amounting to a cross-examination of Taylor (see, for example, pages 371, 376 and 379 of the transcribed record. During Taylor's cross-examination, the commissioner intervened by assuming the role of cross-examiner. The following is a typical example, the context being whether the third respondent's colleague, Ayesha, had met her monthly targets:

> MR TAYLOR: I have said she is meeting all of her targets.

MR O'DOWD: What does that mean? If it does not mean she is achieving (indistinct) … (intervenes)

COMMISSIONER: I will tell you how to, I will tell you how to… you are not, you are actually being quite evasive, because I am not getting, we are not getting answers.

MR TAYLOR: I said she is meeting her monthly target.

COMMISSIONER: Okay, but then she is not on her way to meeting the target.

MR TAYLOR: That what I said, I said she is meeting her targets.

COMMISSIONER: No, you did not say that.

MR TAYLOR: I did.

COMMISSIONER: She said, you said, you said she is on her way to meeting targets, so did I understand correctly, let us go to your bundle C, B, C, is it not, the last page, the last page is, so therefore, on the last page, if you have got it in front of you, so that, would that mean, let us say, for every month of 2014, she scored 100%? Have you got the bundle, has he got the bundle in front of him?

MR TAYLOR: This is Michelle's targets.

COMMISSIONER: I understand that, but she would have a similar one.

MR TAYLOR: You do not look it on a year to day basis, so as long as … (intervenes)

COMMISSIONER: Sorry?

MR TAYLOR: On a year to day basis (indistinct) to make the target (indistinct)

COMMISSIONER: Sorry, now I am really confused because now she was measured, Michelle measured on a monthly target … (intervenes)

MR TAYLOR: Yes, but they are.

COMMISSIONER: Sorry, sorry just stay with me.

MR TAYLOR: She is measured, she is measured on a (indistinct) … (intervenes)

COMMISSIONER: Alright, and that is what, and that…

MR TAYLOR: So month one, 102%, month two, 98%, month three, 101%, month four (indistinct), we add it up as well

COMMISSIONER: So what she was, what she was, performance, going to be performance manage on was the fact, and we had a big debate on that, in fact, it was a big debate and she said, she understood it was yearly and that, in fact, it was a big debate and she said, she understood it was yearly and that it was monthly and your representative really grilled her on that, so right, so now I am getting really confused. So now, actually I cannot understand why it was not monthly, yearly, divided by 12, but in any event, so are you saying that for every month, because that was what the measure of Michelle was, that Ayesha is getting 100% every month.

MR TAYLOR: I have not got those specific targets in front of me because I keep reminding everyone here, we are absolutely sure that Ayesha will meet her target for 2014.

COMMISSIONER: But then she, then she is not being measured the same way as Michelle was?

MR TAYLOR: Yes.

MR PIENAAR: Madam Commissioner, with all due respect, the correct person will come to testify, he asked for the figures, we will have the figures here … (intervenes)

[20] The commissioner adopted the same approach in relation the examination-in-chief and cross-examination of the applicant's witness Ms Ramos, and treated the third witness, Ms Sproates, in the same way, and the fourth, a Ms. Sayed. An example extracted from the record of Sayed's cross-examination by the third respondent's representative, Mr O'Dowd, and which includes an instance where the commissioner accuses Sayed of being untruthful, reads as follows:

COMMISSIONER: Yes, but nobody says: Listen guys, we have been very lacks (sic) with you, you have not achieved your targets in the past and now we are,

you know, I just want to warn you that this is what we are going to put I place, we are going to help you, blah-blah-blah, there is none of that.

MS SAYED: There is, and it is in the minutes of the meeting where it says things are going to change (indistinct) … (intervenes)

COMMISSIONER: Yes, but that is not really, that is not saying things are going to change, but not what we are now going to like hammer you on performance.

MS SAYED: Ja, and then, but Andy also said it in the mail and Lizelle said it in her mail that she sets targets … (intervenes)

COMMISSIONER: Your are not listening to me. You are not listening to me.

MS SAYED: Okay.

COMMISSIONER: That nobody says to, well, to Ayesha, that I have come across, we have, we have been lacks on you on … This is what would normally happen in a company, we have not really taken much note, you have not reached your targets, you have only got to 50% or 60% of them and we are allowed it up to now, but things are now going to change and we are expecting you to get to 80% or whatever the figure is. Andy said the figure was 100% and if my memory serves me correctly, Lizelle said it was about 80%. I do not know, what is the figure?

MS SAYED: I is about 80%.

COMMISSIONER: Okay

MS SAYED: (Indistinct) said Andy it is a maximum, but it is about 80%.

COMMISSIONER: Ja, but nobody tells them that but nowhere is the standard, In order to get a standard. In order to get to a standard, so even in the performance evaluation, it does not say: We expect you to get 80%, it is actually, there is no standard that is even told to them and all of a sudden, you hit them, so they do not even know what standard they are supposed to be getting to.

MS SAYED: No, no, because in our mind, they have to reach (indistinct)… (intervenes)

COMMISSIONER: Well, it cannot be in your mind,

MS SAYED: This is why in the discussions we have with them, is no target … (intervenes)

COMMISSIONER: Ja, where they say 80%.

MS SAYED: It does not say 80%, it says you have to reach your target, the full target.

COMMISSIONER: But that is not the truth. It is a target, sorry, nobody expects anyone to get their target because that is what you aim to. It is always like 75%, 80%, like we have settlement rate that you have to get to, we get measured, that is why, we get measured on our settlement rate, but nobody expects you to get hundred percent of it, sorry, I think it is 75% or something, 75% , 80%, whatever it is, it is a target. Okay.

MS SAYED: I just looked on (indistinct), so … (intervenes)

COMMISSIONER: Okay, that was page 40, what was it?

MS SAYED: That is 45 of C.

COMMISSIONER: 45 of C, did not get to target, let me just write that, did not get to target in 2012, 2014, getting stricter this year. No, so no correspondence. So you the correspondence, the only correspondence you can find was in the meeting of 10 January?

MS SAYED: It happened (indistinct), the 10th so…

COMMISSIONER: Sorry, correspondence is Lizelle, 10 January, and, okay, okay

MR O'DOWD: Can I ask her a few questions?

COMMISSIONER: Yes, you can.

CROSS EXAMINATION BY MR O'DOWD (Continued): So Michelle … (intervenes)

MR PIENAAR: You must do the re-examine after the Commissioner has cross-examined her. [Laughter]

> COMMISSIONER: But I am trying, but, maybe you can call it cross-examining, but I was just trying to clarify this.

[21] I stress that these are not isolated examples, nor are they drawn out of context. What the record illustrates is a pattern where the commissioner dominates the arbitration process, repeatedly assumes the role properly reserved for representatives, puts questions to witnesses to the extent that she leads their evidence and actively engages in their cross-examination. By any standard of conduct referred to in the *Vodacom Service Provider* judgment, the commissioner crossed the line.

[22] The CCMA guidelines referred to above suggest that where parties are represented (as they were for the larger part of the proceedings under review) a commissioner must respect the role of the representatives and not seek to assume or undermine them. Of course, there can be no harm in a commissioner asking questions in clarification of any responses given by a witness during the course of his or her evidence, but these should ordinarily be confined to the end of the witness's evidence and the parties afforded an opportunity to put further question to the witness following on those posed by the commissioner.

[23] To the extent that it might be suggested that the commissioner's interventions were consistent with the statutory obligation to conduct arbitration proceedings quickly, this is simply not the case. It should be recalled that the proceedings under review, which extended over four days (excluding a day on which a postponement was garnted), concerned an individual dismissal in circumstances where there was a relatively uncomplicated dispute of fact that required determination. Far from curtailing the proceedings and focusing the parties' representatives on the material issues in dispute, the commissioner's intervention served unnecessarily to protract the proceedings. I have no doubt that had she left the parties' representatives to present their cases and confined her intervention to genuine attempts to seek clarity on any particular issues that emerged from the evidence, the proceedings would have been completed sooner than they were. For the reasons referred to below, the only remedy available to

the applicant in the present circumstances is to have the matter remitted to the CCMA for rehearing. The further delay in the determination of this dispute and the additional costs that may be incurred are directly a consequence of the commissioner's conduct.

[24] There is another matter that is a cause for concern, one to which I have already alluded. When parties appoint representatives to act on their behalf, that is their prerogative. The parties' representatives must be afforded both courtesy and respect by a commissioner, and their role in the arbitration process must be respected. It is disrespectful for a commissioner to conduct the proceedings as if one or both parties' representatives were not there, or have some minimal role to play. Even when a commissioner decides to adopt an inquisitorial approach, this does not entitle the commissioner to reduce the role of a party's representative to that of an observer.

[25] In short, the nature and scope of the commissioner's interventions were such that she failed to afford the parties a fair hearing, and her conduct gave rise to a reasonable apprehension of bias. Her award therefore stands to be reviewed and set aside.

[26] To the extent that the notice of motion seeks to have the court substitute the commissioner's award, it seems to me that where a complaint of having been denied a fair trial is upheld, it follows that the matter should be remitted to the CCMA for rehearing before a different commissioner. The applicant cannot have it both ways – to seek to have arbitration proceedings set aside on the basis that it was denied a fair trial and then to rely on the tainted record of those proceedings to have the commissioner's award substituted by one in its favour.

[27] Neither the CCMA nor the commissioner have opposed these proceedings. To the extent that the applicant has been successful, I must necessarily take into account the host of grounds for review that it raised initially and the fact that late in the day, it reduced these to the single ground that forms the substance of this

judgment. In these circumstances, in my view, it is appropriate, having regard to the requirements of the law and fairness, that each party bears its own costs.

I make the following order:

1. The arbitration award issued by the second respondent on 22 September 2014 is reviewed and set aside.
2. The matter is remitted to the first respondent for a fresh hearing before a commissioner other than the second respondent.

ANDRÉ VAN NIEKERK
JUDGE OF THE LABOUR COURT

APPEARANCES

For the applicant: Adv G Elliott, instructed by Abrahams Gross Inc.

For the third respondent: Mr B O'Dowd, Brendan O'Dowd Attorney