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SECTORAL BARGAINING COUNCIL**

PHSDSBC VETTING PROCESSES AND PANELISTS' OBLIGATIONS

Presentation by Adv JN Matshekga

INTRODUCTION

- ❖ **In 2013 the PHSDSBC created position of Part-time Resident Panelist**
- ❖ **One of duties of a Resident Panelist is to vet outcomes submitted by Panelists**



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PURPOSE OF VETTING

- ❖ **QUALITY CONTROL**
- ❖ **CONSISTENCY**
- ❖ **LEGAL COMPLIANCE**
- ❖ **SUPPORT**



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Ngcobo v Standard Bank of South Africa and Others [2013] ZALCD 33 (25 September 2013)

[7] It was common cause that the issue the Commissioner had to determine related to whether the First Respondent had committed an unfair labour practice. The issue of condonation was not a matter before the Commissioner, and the above paragraph signifies those instances where a Commissioner had clearly used a template in writing the award and had not proof read it prior to submitting it. This is a clear case of lack of vetting prior to awards being issued to the parties.



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LC expectations

- ❖ **Labour courts expect CCMA and Councils to vet awards and/or outcomes BEFORE they are SERVED on the parties.**



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Panelists' obligations

- ❖ **Obligations in terms of Contract and LRA**
- ❖ **Comply with CCMA Code of Conduct and Council's Contract and Code of Conduct**



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Maepe v CCMA and Another [2008] 8 BLLR 723 (LAC)

[21] The first respondent is a very important statutory institution specially established to resolve certain labour disputes in the country. For it to function effectively, it requires to have integrity and enjoy the confidence of the users of its services. That is workers, trade unions, employers and employers' organisations. Its contact with those who use its services is, I have no doubt, often, through its commissioners who, throughout the length and breadth of this country, conciliate and arbitrate disputes every working day. By and large commissioners are the face of the institution. If commissioners do not have integrity and do not enjoy the confidence of society and the users of the first respondent's services, the first respondent, as a dispute resolution institution, will fail. Everything possible must be done to avoid that eventuality.



Maepe v CCMA and Another [2008] 8 BLLR 723 (LAC)

[47]... a person who holds the position of a commissioner, not to speak of a convening senior commissioner, must be a person of integrity in order to be considered a fit and proper person to hold such a position. When circumstances are present which cast serious doubt on the integrity of a person holding a position such as that previously held by the appellant, then, in my view, such a person is not a fit and proper person to be entrusted with such a position.



Panelists' obligations

In terms of paragraph 6 of the Panelist's contract, a Panelist of the Council is expected to:

- ❖ Act in accordance with the Panelist' Code of Conduct;
- ❖ Perform all work assigned to him/her diligently and to the best of his/her ability;
- ❖ Promote the objectives of the Council and uphold its reputation and integrity;
- ❖ Be true and faithful to the Council in his/her dealings with the Council and in all transactions and affairs affecting its interests; and
- ❖ Not conduct him/herself in any way which may tend to call into question his/her fitness to be a Panelist or the integrity of the office of Panelist.



Panelists' obligations

In terms of paragraph 6 of the panelist's contract, a panelist of the Council is expected to:

- ❖ **Within five (5) working days of the conclusion of conciliation proceedings, provide the Council with the outcome form, settlement agreement or written report.**
- ❖ **Within eight (8) days of the conclusion of arbitration proceedings, an award or ruling, bundle of documents, hand-written notes and mechanically recorded record of arbitration proceedings.**
- ❖ **Within five (5) working days the outcome of any interlocutory process held within conciliation or arbitration proceedings. This will include a written report in cases where arbitration is part-heard, postponed, etc.**



Sasol Infrachem v Sefafe and Others [2015] 2 BLLR 115 (LAC)

[55] The Code of Conduct for Commissioners of the Commission for Conciliation, Mediation and Arbitration (“CCMA”) ... also applies to arbitrators of Bargaining Councils...



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CCMA code of conduct

- ❖ A material violation of the provisions of this code of conduct, or a serious failure to comply with its terms, may constitute grounds for removing a commissioner from office in terms of the provisions of section 117(7)(c) of the LRA (Para 2).



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Panelist obligations (sec 138 (1) & (2) of LRA)

- ❖ **The commissioner may 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.**
- ❖ **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.**



Panelists' obligations (sec 137 of the LRA)

Within 14 days of the conclusion of the arbitration proceedings –

- ❖ **(a) the commissioner must issue an arbitration award with brief reasons, signed by that commissioner;**



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Issues of concern

- ❖ **Conduct of proceedings (oral v written submissions) (refer to para 11-15 of Arbitration Guidelines, Sondolo IT, Chabalala and SASSA matters)**
- ❖ **Failure to identify issues in dispute during proceedings (CUSA CONCOURT JUDGEMENT, OSD AND ULP, INTERPRETATION/ APPLICATION OF COLLECTIVE AGREEMENTS AS E.G.)**
- ❖ **Unsigned awards (SAMWU matter)**
- ❖ **Late awards (Refer to State Mining and Mosome matters)**
- ❖ **Settlement agreements (Refer to article)**
- ❖ **Postponements (Cash Paymasters matter and Council Rules)**
- ❖ **Post hearing conduct (Refer to section 138(7)(b))**



Conduct of proceedings

❖ Arbitration guidelines



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CUSA v Tao Ying Metal Industries and Others 2009 (1) BCLR 1 (CC)

- ❖ [64] 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.



Sondolo IT (Pty) Ltd v Howes and Others(2009) 30 ILJ 1954 (LC)

- ❖ Section 138 (1) of the LRA thus places two distinct but related obligations on the commissioner. The first is to determine the manner in which the arbitration will be conducted. This discretion will be exercised bearing in mind the legislative instruction to determine the dispute fairly and quickly. Secondly, the commissioner must deal with the substantial merits of the dispute. In dealing with the matter the commissioner may rule on the evidence which may be presented to the arbitration and may also make rulings which may restrict the range of issues on which the parties are required to give evidence. The commissioner may therefore narrow down the issues and in doing so the commissioner may decide what evidence it wants to hear. In exercising this discretion, the commissioner will consider the facts and circumstances of the particular case and also the nature of the dispute that was referred to arbitration.



Chabalala v MEIBC and Others[2014] 3 BLLR 237 (LC)

- ❖ [31] I am fully aware that in terms of section 138(1) of the LRA, a commissioner may conduct arbitration proceedings in any manner that a commissioner deems fit. I accept that these provisions equally apply to arbitrators conducting arbitrations under the auspices of bargaining councils.



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CCMA code of conduct

[4.22] A direct settlement by the parties of some or all issues in a case, at any stage of the proceedings, should be accepted by a commissioner as relieving him or her of further jurisdiction in respect of such issues. This does not prevent the Commissioner from scrutinising the settlement, in appropriate cases, to ascertain if the parties understand the terms and Implications of the settlement. If the parties request that a settlement agreement be made an arbitration award, the Commissioner must ensure that such an award is legally competent and capable of being enforced.



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SASSA v NEHAWU Obo Punzi and Others

[2015] ZALCCT 35 (30 April 2015)

- ❖ **Labour Court had to decide whether an arbitration award, in which the commissioner based her finding purely on documentary evidence in the absence of a stated case, was reviewable in terms of s145 of the LRA.**
- ❖ **A 'stated case' – also referred to as a 'special case' – is a written statement of facts, agreed to by the parties, so that a judiciary authority can apply the law to the agreed facts. Importantly, the NEHAWU decision did not involve a stated case. Rather – as noted in the commissioner's arbitration award – the parties had agreed that no evidence would be led and that the case would be decided on the written submissions and bundles of documentary evidence.**



SASSA v NEHAWU Obo Punzi and Others

[2015] ZALCCT 35 (30 April 2015)

Held that:

❖ **[5] I fail to comprehend how a dispute which hinges on the fairness of the conduct of an employer can be decided (in the absence of a stated case) without parties giving oral evidence. A decision made in such a way means that the Labour court must answer all the following questions in the negative:**

“(i) In terms of his or her duty to deal with the matter with the minimum of legal formalities, did the process that the arbitrator employ give the parties a full opportunity to have their say in respect of the dispute? (ii) Did the arbitrator identify the dispute he or she was required to arbitrate? (This may in certain cases only become clear after both parties have led their evidence.) (iii) Did the arbitrator understand the nature of the dispute he or she was required to arbitrate? (iv) Did he or she deal with the substantial merits of the dispute? (v) Is the arbitrator's decision one that another decision maker could reasonably have arrived at based on the evidence?”



SASSA v NEHAWU Obo Punzi and Others

[2015] ZALCCT 35 (30 April 2015)

[8] In the absence of such a stated case, oral evidence should be led on the material facts in dispute at arbitrations in terms of the LRA. Commissioners and arbitrators should not condone an agreement between parties that no oral evidence be led unless such a stated case has been agreed, and on which they may draw legal conclusions. Although parties may regard submitting documents and argument as a fast way of resolving a dispute on the day of arbitration, it in fact renders the award issued susceptible to review. In the result, the principle of speedy resolution of disputes is ultimately sacrificed.



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Zuma and Another v (PHSDSBC) and Others [2015] ZALCD 54 (8 September 2015)

[42] There is merit in the Respondents' submission that the application format does not readily allow for the determination of disputes of fact. It is by no means an ideal method of adjudication in cases rich in disputes of fact. Having said that, it is not simply that the party bearing the onus loses the case whenever a dispute of fact arises. It is possible in application proceedings to rationally prefer one factual submission over its polar opposite by attention to the pleadings, although this is not always the case.



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(2) CUSA v Tao Ying Metal Industries and Others 2009 (1) BCLR 1 (CC)

[65] A commissioner must, as the LRA requires, “deal with the substantial merits of the dispute”. This can only be done by ascertaining the real dispute between the parties. In deciding what the real dispute between the parties is, a commissioner is not necessarily bound by what the legal representatives say the dispute is. The labels that parties attach to a dispute cannot change its underlying nature. A commissioner is required to take all the facts into consideration including the description of the nature of the dispute, the outcome requested by the union and the evidence presented during the arbitration. What must be borne in mind is that there is no provision for pleadings in the arbitration process which helps to define disputes in civil litigation. Indeed, the material that a commissioner will have prior to a hearing will consist of standard forms which record the nature of the dispute and the desired outcome. The informal nature of the arbitration process permits a commissioner to determine what the real dispute between the parties is on a consideration of all the facts. The dispute between the parties may only emerge once all the evidence is in.



(3) SAMWU v South African Local Government Bargaining Council and Others [2014] 7 BLLR 711 (LAC)

[16] For a commissioner to comply with... s 138(7)(a) of the Act, it is necessary for him/her to a) issue the arbitration award, b) provide reasons for the award and c) sign the award.

[18]...For there to be an electronic signature, there must be compliance with s 13 of the Electronic Communications and Transactions Act.



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(4) State Mining Association Ltd t/a Alpha Farm v SACCAWU & Another 1999 (3) BLLR 223 (LC)

It is quite clear that having regard to human nature, an arbitrator may not always be able to sign and issue an award within the 14-day period. If a arbitrator were to sign or to issue the award after that period, it would not be in accordance with the aims of this Act to visit such an omission with invalidity. If that were to be done it would simply mean that the dispute had not reached finality and the arbitration proceedings would have to take place de novo. This could not have been intended. There may, of course, be circumstances where an award is issued so late that different consequences may follow.



MEYER V CCMA [2002] BLLR 186 (LC)

[5] The requirement in the Act that a commissioner take responsibility for his or her award by signing it and doing so within the stipulated time is, in my view, not so onerous a task that the failure should simply be excused. While a short delay does not render the award invalid, an extended delay, in my view, may well have that effect, but a total failure to comply must have that effect.



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Mosome v GPSSBC and Others [2012] ZALCJHB 91 (31 August 2012)

[18]...although the delay in issuing the award was regrettably excessive it would not be in the interest of justice to visit it with invalidity.



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CCMA code of conduct

[5.16] Commissioners must comply with all statutory time limits applicable to them, and with all CCMA policies and standard operating procedures in place from time to time. This includes, without limitation, policies and procedures relating to the postponement of matters, adjournments, extensions for the submission of closing argument, and the time period for the submission of awards including any request for extension of that period.



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(5) Cash Paymaster Services (Pty) Ltd v CCMA and Others[2008] ZALC 191 (12 March 2008)

While parties to proceedings in the CCMA should comply with the relevant rules, their failure to do so is not always fatal. An appropriate admonition by a Commissioner may be a reasonable response in the circumstances, for example, an order that a party failing to comply strictly with the Rules, pay the wasted costs...



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(6) Sec138 (7)(b)

The **Commission** must serve a copy of that award on each party to the dispute or the person who represented a party in the arbitration proceeding



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CCMA code of conduct

[5.2] Commissioners should have no casual contact with any of the parties or their representatives while handling a matter without the presence or consent of the other, This does not preclude exchanges of greetings or conversation unrelated to the matter with one of the parties prior to the matter commencing, during an adjournment, or at its completion.

[6.2] Commissioners should not disclose a prospective award to either party prior to it being issued by the CCMA to both parties.



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(7) Leboho v CCMA and Others [2005] ZALC 65 (14 April 2005)

[6] The position in civil procedure is different. A presiding officer has no power to mero motu to call witnesses. He can only do so with the consent of the litigants. However, a civil court has the power to recall witnesses that have already testify before it for purposes of further examination or cross-examination. It can do this at any stage of the proceedings before judgement. However this is done not by the Court mero motu but upon application by one of the parties.



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Leboho v CCMA and Others [2005] ZALC 65 (14 April 2005)

[8] Having said that, it is a fact that arbitration proceedings are generally conducted in line with the rules of civil procedure and the standard of proof is the same. Proof is established on a balance of probability. In this sense, the rules of civil procedure are broadly adhered to; at the very least they provide valuable guidelines. In my view, whereas the Act gives an arbitrator a wide discretion on how to conduct proceedings, the bottom line is that the procedure followed must be fair and should not result in prejudice to any of the parties involved.



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Leboho v CCMA and Others [2005] ZALC 65 (14 April 2005)

[11] The rationale for forbidding a Court hearing a civil case from mero motu calling witnesses is, in my view, equally valid in respect of arbitration proceedings...



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DISCUSSION & CLOSING REMARKS