Conundrum and Nightmare in the Politics of the Laws Regulating Arbitration as Opposed to Mediation in the Workplace in South Africa

Submitted by:

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A mini-dissertation submitted in full-fulfilment of the requirements for the degree of Masters of Laws (LLM) in Labour Law in the School of Law, Faculty of Management and Law, University of Limpopo (Turfloop Campus)

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ABSTRACT

The South Africa labour law, particularly the Labour Relations Act, 66 of 1995 (LRA) provides for alternative labour dispute resolution that is quick, cost effective and accessible. By doing so, the LRA provides for establishment of the Commission for Conciliation, Mediation and Arbitration (CCMA) to serve as alternative dispute resolution body. Despite the benefits (quick, cost effective and accessible) of the CCMA, there are rising concerns about the impartial and biased conduct of the CCMA commissioners during arbitration. Consequently, this study critique the laws regulating arbitration as opposed to mediation in the workplace in South Africa. CCMA commissioners preside over labour disputes and make impartial decisions based on the facts and evidence presented to them. The LRA and CCMA Code of Practice require CCMA commissioners to be unbiased, fair, and objective when making decisions. There are however in contrary rising concerns that the CCMA commissioners are biased and partial during arbitration proceedings. The study found that the CCMA Code and LRA do not provide adequate provisions to ensure that CCMA Commissioners are always unbiased and impartial during arbitration. This was substantiated through comparative analysis between Canada and South African alternative dispute resolution laws. In South Africa, parties to arbitration often do not personally choose a CCMA commissioner to preside over their matter as that decision is often made by CCMA officials. In contrary, the Canada extensively encourage parties to mutually choose personally an officer to preside over their matter. This then makes the arbitration in Canada to be often impartial and unbiased in Canada as compared to South Africa. The study recommended that the South African law can learn from Canada to enhance the extent of unbiased and impartiality during CCMA arbitration.

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DEDICATION

This work is dedicated to the following people:

1. To my mother, Mabel Mashienyane Maleka for her financial, social and emotional support throughout my life more in particular for the support on my studies.
2. My husband Thabang Sathekge and children Mmaphuti and Modjadji, I hope that this work instils in you confidence and the ability to want and do great things that the sky is the limit and the sky has never limited anyone in doing anything and you can still go beyond the sky.
3. To my family at large, my sisters thank you for your support throughout my existence in this earth.

DECLARATION

I, Maleka LD [201107048] declare that the dissertation titled ‘an analysis of the laws regulating arbitration as opposed to mediation in the workplace in South Africa’ is my own academic work and has never been submitted elsewhere. I further declare that I did not commit any act of plagiarism as sources consulted are referenced using footnote and bibliography.

Miss. LD Maleka

DECLARATION BY THE SUPERVISORS

I, Adv. Lufuno Tokyo Nevondwe (Supervisor) and Mr. RM Matsheta (Co-supervisor), hereby declare that they have supervised this mini-dissertation by Maleka LD titled an analysis of the laws regulating arbitration as opposed to mediation in the workplace in South Africa for the degree Master of Laws (LLM) in Labour Law, and in my own view and its scope is suitable and be accepted for examination.

Adv. Lufuno Tokyo Nevondwe **Date: 14 June 2023**

Mr. RM Matsheta

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ABBREVIATIONS AND ACRONYMS

AASA – Association of Arbitrators South Africa

AFSA – Arbitration Foundation of Southern Africa

CC – Constitutional Court

CCMA – Commission for Conciliation, Mediation and Arbitration

HC – High Court

LAC – Labour Appeal Court

LC – Labour Court

SCA – Supreme Court of Appeal

CHAPTER ONE: INTRODUCTION

1.1. Historical background to the study

The need for quick and cost effective measures to resolve labour disputes in South Africa was inevitable and has long historical background which shaped its current state.[1] The LRA of 1995[2] is not the first labour legislation that attempted to introduce out of court cost effective and speedy and yet professional and fair mechanism to resolve labour disputes in South Africa. The repealed 1956 LRA also attempted to provide mechanism that attempted to efficiently resolve labour matters. The 1956 LRA unfortunately was inadequate to address the labour disputes loopholes. The Constitutional Court in the case of *Toyota SA Motors (Pty) Limited v CCMA*[3] stated that the dispute resolution dispensation of the old Labour Relations Act[4] was uncertain, costly, inefficient and ineffective.[5]

Considering the inadequacies of the 1956 LRA, the legislature thus enacted the 1995 LRA which repealed the 1956 LRA. The Constitutional Court in the *Toyota SA Motors* case stated that the 1995 LRA established the new mechanism to the labour dispute resolution arena in South Africa, which is the alternative dispute resolution through CCMA.[6] Section 112 of the LRA establishes the Commission for Conciliation, Mediation and Arbitration (CCMA). The CCMA aimed to provide efficient, accessible, effective, cost effective and less formal dispute resolution mechanisms entrenched in the 1995 LRA.[7] The CCMA encompasses three steps to dispute resolution: mediation, conciliation and arbitration, whereby

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[1] Benjamin P, "Assessing South Africa's Commission for Conciliation, Mediation and Arbitration (CCMA)" (2013) *International Labour Organization* 3.
[2] Labour Relations Act 66 of 1995.
[3] *Toyota SA Motors v CCMA* (2015) 39 ZACC 40 CC. (*Toyota SA Motors*).
[4] Act 28 of 1956.
[5] *Toyota SA Motors* para 1.
[6] *Ibid.*
[7] Basson A, Le Roux P.A.K and Strydom E.M.L, "*The New Essential Labour Law Handbook*," 5th Edition (South Africa: Butteworths, 2009) 63-69.

commissioners, councils and agencies play predominant roles in labour dispute resolution.[8]

The CCMA is a statutorily recognised judicial body that focuses, through its commissioners, on dispute resolution for labour only. The CCMA is undoubtedly believed to be the most convenient mechanism for resolution of labour disputes in South Africa. This is due to CCMA being easily accessible and quicker avenue for resolving labour dispute that even the low ranked employees can access conveniently.[9] It has was stated that CCMA is an effective dispute resolution system is one that is properly structured and functioning, and resolves disputes fairly and cost effective.[10]

The primary purposes of appointing commissioners in labour dispute resolution roles are that they should "facilitate, mediate and arbitrate labour disputes. Every province has full-time employed CCMA commissioners who are supported by part-time commissioners. CCMA commissioners are entrusted with powers and functions to usher mediation and preside over arbitration.[11] Mediation differs from arbitration but both means of labour dispute resolution are under CCMA and facilitated by CCMA commissioners.

Arbitration has been defined as a voluntary legal mechanism for alternative dispute resolution with which two or more parties agree to refer their matter to an independent third person who after hearing their

[8] Conradie B et al, "*Labour Relations Law: A Comprehensive Guide"* (Butterworths, 2006) 122.
[9] Benjamin P, "Legal Representation in Labour Courts" (1994) *ILJ* 22; Van Graan D.J, "The grounds for review of CCMA awards" (University of Pretoria, Mini-dissertation 2014) 18.
[10] Steenkamp A and Bosch C, "Labour Dispute Resolution under the 1995 LRA: Problems, Pitfalls and Potential" (2012) *Acta Juridica* 121; *Pep Stores v Laka* (1998) 19 ILJ 1534 (LC)
[11] Section 115 of the LRA.

arguments determines a binding outcome of their matters.[12] On the other hand, mediation is a voluntary process whereby an independent and neutral person sits with two or more parties have an issue and assist them to resolve their issue through mutual agreements but does not determine the outcomes of issues negotiated.[13] These definitions are aligned with the Intentional Labour Organisation (ILO) Voluntary Conciliation and Arbitration Recommendation,[14] which recommends that both conciliation and arbitration should be voluntary. Since mediation is also considered as alternative dispute resolution (ADR), a mediator facilitates negotiation processes between parties having disputes and even assists them with possible acceptable solutions and they then decide to choose an option, come with their own and disagreed on everything.[15]

Commissioners CCMA have limited powers to decide the outcomes of mediations than in Arbitration. This limited capacity is due to commissioners only playing the facilitative role to resolve despite during mediation and during arbitration they play the roles of adjudicators. Section 138 of the Labour Relations Act (LRA)"[16] entrusts to the commissioner the power to conduct the arbitration in a manner which does not constitute a deviation from dealing with substantial facts although they are free to pursue measures which may be deemed to serve justice fairly and without waste of time. Consequently, commissioners for CCMA have much opportunity to decide impartially in arbitration than in mediation.

Section 145(1) of the LRA allows parties in CCMA arbitration to apply at Labour Court (LC) to set aside an arbitration award if one or both parties allege material defects in arbitration proceedings. The legislature also

[12] Bosch D, Molahlehi E and Everett W, "*The Conciliation and Arbitration Handbook A comprehensive Guide to Labour Dispute Resolution Procedures* (LexisNexis Butterworths, 2004)" 149.
[13] Vettori S, "Mandatory mediation: An obstacle to access to justice" (2015) 15 *African Human Rights Law Journal* 355.
[14] Voluntary Conciliation and Arbitration Recommendation, No.92 of 1951.
[15] Vettori S (2015) 15 *African Human Rights Law Journal* 357.
[16] Labour Relations Act 66 of 1995.

made use of section 117 of the LRA to introduce the Code of Good Conduct for Commissioners.[17] The Code is coordinated at furnishing commissioners with direction on issues of proficient conduct, general practice and guaranteeing that the CCMA's great notoriety reputation is kept high.

Commissioners are mandated to act in a manner in which they appear to totally lack bias but demonstrate fair-mindedness when complying with their work obligations and duties.[18] The motive and aim for the Code was to develop a comprehensive and yet understandable legal framework with which CCMA commissioners will accomplish fairness, independence and impartiality before, during and after arbitration.[19]

The Code binds every commissioner and operates as a guiding legal instrument with which CCMA are anticipated to align their conduct whenever they perform their duties. Failure to obey the Code constitutes gross irregularity of CCMA proceedings and worse than that is that a commissioner who constantly or material fails to adhere to the Code can be struck off as a commissioner.

The Code incorporates provisions which outline conducts which are prohibited for commissioners and among such prohibited conduct and the fundamentals ones among prohibited conduct includes "conflict of interest and disclosures, outside interest, responsibilities of commissioners, competence, and jurisdiction of commissioners."[20] In addition, it enlightens CCMA on their "availability, recording equipment, access to electronic communication and property of the CCMA."

In the interest of a convenient, quick and cost effective mechanism for resolving disputes, the LRA as well entrenches various provisions which

[17] Section 4 of the Code.
[18] Section 115 the LRA and section 4 of the Code.
[19] Section 1 of the Code.
[20] Section 4 of the Code.

grant a wide range of powers to CCMA commissioners.[21] Therefore, the CCMA regulates the functionary powers of the CCMA commissioners.[22] Consequently, commissioners are by law obliged to perform only duties which they are permitted by the LRA and avoid by all means committing ultra vires conducts.[23] The main issue is that there is sometimes abuse of power leading to ultra vires conduct or decision by the commissioners of CCMA.

A critical example of obeying the legislated duties of CCMA commissioner has been demonstrated by the LC in the matter of *Kwazulu Transport (Pty) Ltd v Mnguni.*[24] In this matter, the LC firmly averred that the Commissioner had an obligation to disclose to litigants that he is recusing himself from presiding over the matter due to have been litigated against one of the parties. The LC further held that the commissioner did not comply with LRA and Code since he also failed to disclose that he once represented one of the parties. This according to the LC constituted violation of the mandates commissioners have since chances are very slim that the commissioner would be impartial on his adjudication in that case.

Another example is the case of *Buckas v Ethekwini Municipality*[25] which involves a commissioner who once did a job privately for one of the litigants before him and failed to disclose this fact. The LC also inferred that the commissioner's failure to disclose such fundamental information also constituted a substantial breach of the Code and LRA and thus the commissioner's judgments should be set aside. These cases demonstrated the manner in which commissioners are anticipated to conduct themselves for the sake of serving justice in the labour law arena.

[21] Chapter VII of the LRA, 1995.
[22] Section 115 of the LRA.
[23] Section 117 of the LRA.
[24] *Kwazulu Transport v Mnguni & others* (2001) 22 ILJ 1946.
[25] *Buckas v Ethekwini Municipality* (2003) 24 ILJ 1962 (LC).

A last example is the case of *Glencore Operations SA (Pty) Ltd v CCMA*[26] which involved a Commissioner reviewing an award of another commissioner, where the commissioner that presided over the review had no jurisdiction. The LC also outlined that the reviewing commissioner acted outside the scope of his powers and duties hence he neither had powers from the LRA nor from the Code to review the matter which was decided by another commissioner of the same level. The court arguably suspicious of abuse of power further directed that the Director of the CCMA should investigate the conduct of such commissioner because the award he made are far from being awards which can be made by a reasonable commissioner.

The above case also reveals that CCMA commissioners sometimes can deviate from their official mandates and however use their employment positions as commissioners to serve their personal desires. Recently, a person was dismissed and his dismissal was approved by a CCMA commissioner that was facing impeachable gross misconduct charges.[27] Most of the practical examples above outline that the misconducts committed by CCCMA commissioners involve biasness or partiality during the arbitration. It is preliminarily alleged that the laws regulating CCMA powers are too wide and grant CCMA commissioners a platform to easily commit gross misconducts relating biasness or partiality. This study seeks to investigate the laws regulating arbitration and the abuse of powers and gross misconducts by CCMA commissioners.

1.2. The statement of the research problem

CCMA Commissioners have been granted a wide scope of powers and functions during arbitration proceedings in order to perform their labour

[26] *Glencore Operations SA v CCMA* (2021) 42 ILJ 2446 (LC).
[27] Msindisi Fengu, "Fired spouse takes on Right to Care, while CCMA commissioner faces corruption claims" (2021) *City Press* https://www.news24.com/citypress/news/fired-spouse-takes-on-right-to-care-while-ccma-commissioner-faces-corruption-claims-20211013 accessed on 19 May 2022.

dispute resolution functions in a manner which suits the establishment of CCMA. Such powers and functions include “attempt to settle labour disputes amicably, hear evidence at arbitration hearings and issue arbitration award.” These powers are granted to CCMA commissioners by the LRA and Rules for the Conduct of Proceedings before the CCMA (CCMA Rules).[28] It appears that the mentioned laws grant powers to CCMA commissioners than necessary during arbitration. This has resulted in having many complaints relation to gross misconducts relating to biasness or partiality of CCMA commissioners during arbitration. This is the current and on-going issue in CCMA arbitrations and that is what the study seeks to investigate. Thus that study extensively examines how the laws regulating arbitrations contribute to this phenomenon.

1.3. Research questions

i. Which laws regulate the powers and functions of CCMA commissioners in regard to arbitration as opposed to conciliation in South Africa?
ii. To what extent do irregularities in the CCMA occur due to ultra vires conduct, bias or partial decision of CCMA commissioners?
iii. What are the causes for gross irregularities relating to biasness or partiality committed by CCMA commissioners during arbitration?

1.4. Aim and objectives of the study

(a) Aim

The aim of this study is to analytically examine the laws which regulate arbitrations as opposed to conciliation in South Africa.

[28] Rules for the Conduct of Proceedings Before the CCMA Act, 2003.

(b) Study objectives:

i. To determine the manner and extent at which CCMA commissioners abuse their powers during CCMA proceedings

ii. To study the nature and cause of gross irregularities during arbitration in CCMA.

iii. To expound the legislative framework that confers powers to CCMA commissioners during CCMA arbitration proceedings.

iv. To determine the prejudice that is suffered when CCMA commissioners abuse their powers and engage in unethical conduct of biasness or partiality when making awards during arbitrations.

1.5. Literature Review

Section 145(1) of the LRA provides that "any party to a dispute, who alleges a defect in any arbitration proceedings under the auspices of the CCMA, may apply to the Labour Court for an order setting aside the arbitration award. The definition of such a defect is stipulated in section 145(2) of the LRA."

Bosch defines arbitration as a voluntary process whereby parties to a dispute agree to resolve their matter before an independent person who after hearing the arguments of the parties makes an outcome called arbitration award.[29] Arbitration usually takes place at the CCMA and CCMA in terms of section 117 of the LRA and CCMA code conferred with powers to make final decisions on labour disputes (subject to review).

Mcgregor corroborated this and stated that the LRA confers wide powers to CCMA commissioners to decide or resolve labour disputes the way they

[29] Bosch D, Molahlehi E and Everett W, *The conciliation and arbitration handbook A comprehensive guide to labour dispute resolution procedures* (LexisNexis Butterworths, 2004)" 149. Voluntary Conciliation and Arbitration Recommendation, No.92 of 1951.

deem fair and just but they are obliged to handle the substantial merits of the dispute with the minimum of legal formalities.[30] McGregor here admits the fact that CCMA is not having absolute powers to decide or conduct themselves as they wish but ought to act according to the law. If the CCMA commissioners indeed acted according to the law, many parties during CCMA arbitration would not face the conundrum and experience nightmares as they currently do.

According to Eksteen, the powers of CCMA commissioners are regulated by the provisions of the LRA. Eksteen further stated that commissioners are obliged to act in a manner which is consistent with the Code and abide themselves by their relevant scope of functions in the LRA.[31] This also confirms the fact that CCMA commissioners should comply with laws that confer powers to them and not do what they are prohibited from doing.

Most of the ultra vires decisions or conduct of CCMA lead to irregularities that ought to be reviewed by the Labour Courts. However, sometimes not following the legal rules does not constitute irregularity and therefore should be interpreted to assess the cause and justification of deviation from general rules and procedures.

For example, the Labour Appeal Court (LAC) in *Fidelity Cash Management Service v CCMA*[32] considered the absence of reasonableness as an independent ground for review. This was further evident when the court held that: “nothing said in Sidumo means that the CCMA’s arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in section 145 of the Act.” The court stated that “if the CCMA had no jurisdiction in a matter, the question of the reasonableness

[30] Mcgregor et al, *Labour Rules* , (3rd Edition, 2017, Siber Link) 222.
[31] *Aletta Eksteen, “Commissioners at the CCMA, their conduct and powers”* (2021) *https://ceosa.org.za/commissioners-at-the-ccma-their-conduct-and-powers/ accessed 19 March 2022.*
[32] *Fidelity Cash Management Service v CCMA and Others* [2008] 3 BLLR 197 (LAC).

of its decision would not arise. Also, if the CCMA made a decision that exceeds its powers in the sense that it is ultra vires its powers, the reasonableness or otherwise of its decision cannot arise."[33]

Ray Howett argues that following a different approach does not denote that a defect in regard to reasoning process qualifies the matter for review in regard to such ground. The researcher supports this claim and adds that the point is sound and has substantial weight as it highlights that courts rather establish an approach that would deal with commissioners reasoning and in cases of material defects, review suffices for reasonableness.[34]

The Supreme Court of Appeal in the case of *Rustenburg Platinum Mines Limited v CCMA*[35] decided on how irregularity should be adjudicated in review matters to assess the powers performed by the CCMA. The summarised facts of this case are that Mr Sidumo was dismissed due to underperformance as a security patrolman. Among the reasons given by the commissioner, it was also stated that the reason for overturning the dismissal is that S*idumo's* disciplinary record had been clear for over the past 15 years. The SCA found that: "even if the commissioner advances reasons (such as mitigating circumstances) that validly suggest that dismissal might not be appropriate, this does not mean that the dismissal must be overturned if there are other factors that mitigate in favour of dismissal, CCMA commissioners do not have the power to replace dismissal decisions made by employers with other corrective action such as written warnings and CCMA commissioners should not, without compelling reasons, second-guess employers who have decided to dismiss employees."

[33] *Fidelity Cash Management* para 101.
[34] Ray-Howett,"Is it reasonable for CCMA commissioners to act irrationally?" (2008) 29 *ILJ* 1634.
[35] *Rustenburg Platinum Mines v CCMA* [2007] 1 All SA 164 (SCA).

Botma and van der Walt argue that there can never be reasonableness without a standard review approach.[36] This standard review approach entails that cases with the same circumstances should be treated similarly, otherwise, there is no reasonableness. No doubt that there is no fairness without reasonableness. Van Graan agreed with Botman and affirmativeely added that what needs to be assessed is whether there was a conflict of interests or not.[37] An example of conflict of interests could be demonstrated in the case of the *Buckas v Ethekwini Municipality*[38] whereby it was held that there was an irregularity in the CCMA proceedings and misconduct since the CCMA decided not to disclose the historical occasion that he once had a private work with one of the litigants which appeared before him.

Sometimes Commissioners in CCMA abuse their powers as CCMA commissioners by acting outside their scope of function and subsequently causing injustice to parties at CCMA. For example, Matebele reported an issue regarding lawlessness and injustice at CCMA in 2018. The issue involved a Commissioner that told him that he will go around informing and influencing other CCMA Commissioners that Matebele should not be successful in all his matters in CCMA.[39] This abuse of power is a clear indication that CCMA commissioner causes nightmares to parties on arbitration at the CCMA.

Du Toit et al stated that the manner in which one can exceed his or she given scope of powers assumes two forms. “Firstly it denotes a situation where the commissioner strays from the ambit of his jurisdiction or where he makes a ruling which is beyond the powers conferred by the LRA 76 and the Constitution in as far as it relates to the regulation of

[36] Botma & Van der Walt, “The role of reasonableness in the review of arbitration awards” (Part 2)’ (2009) *Obiter* 541.
[37] DJ Van Graan (2014) University of Pretoria 38.
[38] *Buckas v Ethekwini Municipality & others* (2003) 24 ILJ 1962 (LC).
[39] People’s Assembly, (2018) Letter: Lawlessness and Corruption at CCMA https://www.pa.org.za/write-committees/message/849/ accessed 30 August 2023.

administrative power.[40] Secondly, the phrase denotes a failure to use a power or a discretion that ought to be used."[41] This literally means CCMA commissioners deviate from his or her given scope of powers and functions and thereby act according to unregulated and unpermitted proceedings and powers.

Motswakhumo affirmed that the ultra vires conduct of CCMA commissioners cause miscarriage to justice and often only the power and vulnerable suffer than the privileged ones.[42] Motswakhumo reasleased a statement that"

> "My recent experience with CCMA tells me that there is still no access to justice for the poor and vulnerable people including the rest of the working class. I experienced very bad treatment at the CCMA where a commissioner told me that he will talk to the other commissioners to ensure that I don't succeed in my matter."

This is one of the most incidents and conducts which render the CCMA partial commissioners during arbitration as opposed to mediation and which make the CCMA to lose the grip of its essence and significance.

Herholdt v Nedbank[43] the Supreme Court of Appeal (SCA) stated that the term of 'gross irregularity' in regard to CCMA commissioners should not be construed in a rigid manner which confines it only to where a commissioner misconstrued the nature of proceedings but should be adjusted to also refer to where a commissioner's award is not reasonable.[44] Many other issues relating to partiality and abuse of powers in CCMA arbitration proceedings were expounded by many scholars

[40] Du Toit et al, "Labour Relations Law: A Comprehensive Guide" 1st Ed 2006, 619.
[41] Du Toit et al*, ibid* 620.
[42] Motswakhumo E.D, "A study on the grounds upon which the commission for conciliation, mediation and arbitration awards are reviewed by the labour courts with specific reference to challenges posed to arbitrators" 2006 LLM Dissertation, University of Natal Durban, 26 – 43.
[43] *Herholdt v Nedbank* (2013) 34 ILJ 2795 (SCA).
[44] *Herholdt* para 14.

including Steenkamp and Bosch,[45] who studied the labour dispute resolution under the 1995 LRA considering the problems, pitfalls and potential.

1.6. Research Methodology

This research is being carried out using a desktop research method, which refers to the analysis of the already existing content mainly found in the internet and other forms of primary and secondary sources of law. These primary and secondary sources of law include judicial precedents, Acts of parliament, international and regional instruments, books, journal articles and the Constitution relevant to conundrums and nightmares caused by biasness and abuse of powers in CCMA arbitration than in conciliation.

1.7. Study scope and limitation

The mini dissertation comprised of five chapters which the research drafts logically. Chapter one will be introduction and lays a solid foundation about the whole mini-dissertation. Chapter two elucidates applicable legislative framework. Chapter three will focus on critically analysing case law. Chapter four focuses on presenting the comparative study between South Africa and Canada. Lastly, Chapter five concisely draws conclusion based on all previous chapters and also make recommendations.

[45] Steenkamp and Bosch (2012) *Acta Juridica* 120-147.

CHAPTER TWO: LEGISLATIVE AND REGULATORY FRAMEWORK

2.1. Introduction

Courts have been emphasising over the past years that judicial impartiality is the fundamental requisite to effective dispute resolution, justice and fair trial.[46] Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable in all labour arbitrations.[47] The impartiality of CCMA commissioners makes the public, especially vulnerable members of societies gain confidence that the CCMA is available to resolve labour disputes.[48] Considering that CCMA commissioners are not immune to being influenced by different factors which may erode their impartiality, there are various legislative frameworks which are designed to regulate the conduct of commissioners in CCMA proceedings. This chapter will discuss the historical background and legal framework for labour arbitrations in South Africa.

2.2. Historical background

The history behind the establishment of labour arbitrations is connected with the rationale for Alternative Dispute Resolution (ADR). ADR was established due to the need to substitute the poorly functioning, lengthy and costly formal dispute resolution systems with more flexible and easily accessible processes for fostering peaceful, quick and cost effective legal dispute resolution.[49]

The ADR was introduced into the South African legal system through colonisation. South African ADR system was based on Roman-Dutch law

[46] *S v Le Grange* 2009 (2) SA 434 (SCA); President of the RSA v SARFU 2 supra par 48.
[47] *R v S (RD)* [1997] 3 SCR 484 par 104–105.
[48] BTR Industries SA (Pty) Ltd v MAWU supra 694F.
[49] Greenwood L, 'The Rise, Fall and Rise of International Arbitration: A View from 2030' (2011) *Arbitration* 435; Ferreira G, 'The Commission for Conciliation, Mediation and Arbitration: its effectiveness in dispute resolution in labour relations' (2004) 23 *Politeia* 73 – 74.

ADR system and the Dutch settlers introduced ADR in South Africa for a peaceful, non-violent means of resolving disputes, presided over by an arbitrator whose integrity was beyond reproach.

Although the formal ADR system is absorbed from the Roman-Dutch law, even South African indigenous communities had their own ADR. The South African communities used community courts, family dispute resolution and kingship courts to resolve matters peacefully and quickly without incurring unnecessary legal costs.[50]

The need to use ADR, mainly mediation and arbitration in South Africa can be traced back to 1886 when gold and diamonds were discovered and the labourers increased.[51] The increase in the number of labour meant an increase in the number of labour disputes which most were not necessary to take to the court for adjudication. However, due to the lack of appropriate mechanisms which would provide quick and effective labour dispute resolution, many employees in mines embarked on strikes in an attempt to enforce demands.[52]

Despite having the Dutch people on the forefront as employers, and governors, neither arbitration nor mediation was introduced and most labour issues had to be solved through general courts. Therefore, justice in labour dispute resolution continued to be a mystery to many people, especially black people hence they were impoverished and illiterate.

A little dawn for justice in the labour law arena appeared when the Commission of Enquiry was held which resulted in the establishment of the Industrial Court, which was given extensive powers to specifically adjudicate labour matters, mould, change, shape and develop the law.

[50] Pretorius P, *Dispute Resolution* (Juta Cape Town 1993) 124.
[51] Ferreira G, 'The Commission for Conciliation, Mediation and Arbitration: its effectiveness in dispute resolution in labour relations' (2004) 23 *Politeia* 73 – 74.
[52]; Neneh N.B & Van Zyl J.H, 'Achieving Optimal Business Performance through Business Practices: Evidence from SMEs in Selected Areas in South Africa' (2012) *SABR* 118-144.

The Commission of Enquiry also led to the enactment of the Industrial Conciliation Act,[53] which is the first legislation to specifically attempt to provide legislated ADR mechanisms. The 1956 LRA's preamble specifically outlined that one of its aims is to provide speedy and cost effective mechanisms to resolve conflicts between employers and employees.[54] In order to achieve this, the 1956 LRA further established industrial councils, conciliation boards, the Industrial Court and the Labour Appeal Court.[55]

The industrial council was the main legislative body which was responsible for ADR in the South African labour realm. The Industrial Council was made of the Department of labour and its core focus was to enable employers, employees and trade unions to conduct negotiations, collective agreements and resolve their disputes without the use of the Industrial Court. The Industrial Court reserved minor labour minors to ADR.[56]

The 1956 LRA style of ADR required that labour disputes should be referred to conciliation before they are referred to arbitration and litigation.[57] The Industrial Council was entrusted with the authority to conduct conciliation and mediation and in the event the two mechanisms failed to resolve the dispute, the Industrial Council had to refer the matter to Industrial Court for arbitration.[58]

After the transition of power from the apartheid government to the democratic government, the LRA of 1956 ADR system has continued to address labour disputes. Another enquiry was subsequently conducted on

[53] Act 11 of 1924. The Act was an Act of parliament of South Africa, which was enacted to channel industrial disputes by negotiating machinery. Employees were allowed to form trade unions which would be approved, recognized and registered. They could then be represented in industrial Council.
[54] Rycroft A & Jordaan B, *'A Guide to South African Labour Law'* (1992) 57 – 58.
[55] Kwakwala *opcit* at page 7.
[56] Cameron E, Cheadle H & Thompson C, The New Labour Relations Act: The Law After the 1988 Amendments, (1989) 60.
[57] Rycroft and Jordaan (1992) *OPCIT* 62.
[58] Cameron et al *opcit* at page 60.

the effectiveness of the 1956 LRA system of ADR and it was found in the Explanatory Memorandum,[59] that the 1956 LRA failed to achieve the required levels of the goals of quick, effective and cheap labour. This loophole became the rationale for the enactment of the LRA of 1995.

The CCMA was established when the LRA of 1995 was promulgated. This became the progressive step towards achieving well-regulated labour ADR which responded to the rationale of having ADR. The 1995 LRA introduced conciliation, mediation and arbitration as compulsory means of labour dispute resolution in the CCMA before labour matters are taken to Labour Courts. The LRA is still the main legislation in South Africa which establishes and regulates labour arbitrations.

2.3. The nature and definition of labour arbitration

The LRA recognises the CCMA as a juristic person and also entrusted arbitrators or CCMA commissioners with powers to conduct arbitration proceedings and issue arbitration awards.[60] This means that the CCMA as a juristic entity to engage in dispute resolution proceedings but as an independent person. It should be noted that the Voluntary Conciliation and Arbitration Recommendation,[61] requires that arbitration should be voluntary and parties should not be forced to arbitrate their matters.

Section 1 of the Arbitration Act[62] states that 'arbitration' means legal proceedings in the CCMA whereby two or more parties appear before a commissioner who is entrusted with powers to make determination or award to their disputes. Similarly, the CCMA defines arbitration proceedings as proceedings where parties before a CCMA commissioner present their cases, call their witnesses, lead their evidence, conduct

[59] Lacob Z, Anonymous, Explanatory Memorandum to the Draft Labour Relations Bill (1995) *Industrial Law Journal* 278.
[60] Sections 112 and 113 of the LRA.
[61] Voluntary Conciliation and Arbitration Recommendation, No.92 of 1951.
[62] Arbitration Act 42 of 1965 (Arbitration Act).

examinations of witnesses and a commissioner fairly decide the outcomes of the case.[63]

The use of the word 'fairly' means that commissioners of CCMA should not pick sides through favouritism or be partial when making arbitration awards. Section 2(2.2) of the CCMA Code demands that CCMA commissioner conduct themselves in a fair manner during arbitration proceedings and be impartial when determining outcomes of every case without being influenced by fear, favouritism or matters of self-interest. This, therefore, dictates that commissioners appointed to preside over arbitration proceedings should ensure that he or she is impartial and all the proceedings are adhered to equally among parties.

Furthermore, in the case of *Satan V Department Of Education, Western Cape* it was held that CCMA commissioners are entitled to conduct arbitration proceedings in a manner they regard proper under certain circumstances, whether inquisitorial or accusatorial, they can decide. The court however warned that CCMA commissioner should guard against intervening or conducting proceedings in manner that suggests or gives impression that they are biased.[64] This means that CCMA Commissioners are required by all means to uphold impartial standards of judicial nature and not the other way around.

2.4. Legislative regulation of labour arbitrations

Arbitration law in South Africa is regulated by the Arbitration Act of 1965,[65] the CCMA Code,[66] and the LRA.[67] The first legislation to regulate arbitration is the Arbitration Act, followed by the LRA and the CCMA Code

[63] CCMA (2022) 'Arbitration' https://www.ccma.org.za/arbitration/ accessed 20th September 2022.
[64] *Satani v Department of Education Western Cape and Others* (C447/2017) [2019] ZALCCT 5.
[65] Arbitration Act 42 of 1965.
[66] CCMA Code of Conduct.
[67] Labour Relations Act 66 of 1995.

is the last regulation to be adopted. It is worth noting that the procedure to arbitration is fundamental to the applicability of the above legislations. For example, the applicability of the Arbitration Act is dependent upon parties entering into written agreement that avers that parties should refer disputes including future disputes to arbitration The Arbitration Act deals mostly with the arbitration agreement and does not regulate sufficiently the conduct and standards of CCMA Commissioners hence the LRA and CCMA Code closed this loophole.

2.4.1. Procedures for and during arbitration

Legal representation is allowed in CCMA arbitration except for matters relating to dismissal for misconduct, ill-health, or poor performance (incapacity), or is referred in terms of section 69(5), 73 or 73A of the BCEA. In regard to matters that legal representation is not allowed, parties and a commissioner may allow use of legal representation or parties can apply to use legal representation. Parties that apply to use legal representation should motivate their application in terms of Rule 25(1)(c) of CCMA Rules. This rule lists various factors which parties may rely on to justify the need to use legal representation on matters which legal representation is generally excluded.

Parties can by agreement choose to take their matter to arbitration especially after when conciliation did not resolve their dispute. The parties can own their own choose an arbitrator from a list of available arbitrators or use the CCMA-chosen arbitrator. Organisations such as the Arbitration Foundation of Southern Africa (AFSA) or the Association of Arbitrators (South Africa) (AASA) can assist parties to choose their own suitable arbitrator.

A hearing is conducted whereby both parties are allowed to call witnesses and present their case. Parties can conduct the examination-in-chief,

cross examination and re-examination as done in ordinary courts of law. After leading their evidences and witnesses, parties will make closing addresses. If they have legal representation, these processes are done by their legal representatives. After closing addresses, commissioners should give a written outcome of the matter.

The outcome made by the commissioner is referred as arbitration award, which is final and binding to the all parties. Parties need to receive the written arbitration award within 14 days of the verbal outcome. Parties can review the arbitration award by submitting it for review at the Labour Court (LC). Matters such as unfair discrimination can instead of been reviewed, be appealed in the Labour Court. As it has been outlined above that CCMA commissioners are free to adopt either adversarial or inquisitorial approach, but should guard against raising apprehension of biasness, biasness is the on-going issue in South African CCMA arbitration. Impliedly, CCMA commissioners deviate from the aims of establishing CCMA, which were to find fast, cost effective and effective labour dispute resolution. However, it has become a trend that some CCMA commissioners preside over arbitration proceedings wherein they are likely to be partial and therefore not accomplish the objectives of establishing CCMA.

2.4.2. Powers and Functions of arbitrators

In terms of the LRA,[68] individuals who are suitable to be appointed as CCMA commissioners should be independent from the State, workplace trade union, federation unions, employer's association and political parties. CCMA commissioners therefore should be independent and free from any external obligations that may interfere with their duties as commissioners especially that may influence their impartiality. CCMA commissioners are required to resolve any labour dispute referred to CCMA in terms of the

[68] Chapter 7 of the LRA.

LRA. CCMA commissioners assist clients starting from mediation, to conciliation and until arbitration. Commissioners are required to be independent and impartial during all these processes.

Section 138 of the LRA determines the scope within which CCMA proceedings should be conducted by commissioners and which arbitrators should abide during arbitration proceedings. The LC in the *Naraindath v CCCMA*[69] has outlined that the role of the arbitrator during arbitration proceedings should be limited to conducting arbitration proceedings in a manner that is fair and legal. The LC concluded the fact that an arbitrator dealt with the matter in a manner that is different from what the same dispute would have been dealt with cannot be accepted as a ground for irregularity.[70] The LC mentioned that only when fairness is proved the court can overturn the CCMA award on account that the arbitrator exceeded the scope of his powers and functions.[71] This outlines that Commissioners have powers to use their own procedures but should just remain impartial as adjudicators. Failure of the commissioners to conduct the CCMA processes in a fair manner often leads to irregularity and is indicative of the fact a commissioner might have engaged in a miscount or being partial and biased.[72]

2.4.3. Code of Conduct and standards of commissioners

The CCMA Code of Conduct stems from section 117 of the LRA and the Code is purported to regulate the manner in which CCMA Commissioners handle themselves during arbitrations. It is necessary in terms of section 2 of the CCMA Code that conciliation, mediation and arbitration processes

[69] *Naraindath v Commission for Conciliation Mediation and Arbitration* [2000] 6 BLLR 716 (LC).
[70] *Naraindath v CCMA* Supra para 27.
[71] Same as above.
[72] See section 145(2)(a)(i) and (ii) of the LRA; *Cash Paymaster Services (Proprietary) Limited v Hlatswako NO and Others* (JR906/13) [2017] ZALCJHB 217 para 11. Naraindath v Commission for Conciliation Mediation and Arbitration and Others (2000) 6 BLLR 716 (LC)

are conducted in a manner that they appear to be fair and effective mechanism that the society can be confident enough to make use of to resolve their labour disputes. Therefore, impartiality and biasness are two aspects which should not be compromised during arbitration proceedings at the CCMA. This is emphasised by subsection 2.1 of the Code as it requires CCMA commissioners to conduct arbitration proceedings with honesty, integrity, independence, diligence and impartiality.

More precisely, subsection 2.5 dictates that in order to CCMA commissioners to be impartial in their role as adjudicators, they should refrain from engaging in matters of business, financial and societal relationship that are likely to erode their impartiality. This can instil confidence to the society that CCMA commissioners are impartial and also to be consistent with the judicial impartiality presumption. Clearly, these are the factors which often make CCMA commissioners be partial during arbitration proceedings. These are the standards set by the CCMA Code.

The above provisions in the CCMA Code are aligned with the Basic Principles on the Independence of the Judiciary.[73] Article 1 of the Basic Principles on the Independence of the Judiciary requires that the independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It further puts the States and all organisations on the duty to to respect and observe the independence of the judiciary. In addition, article of the Basic Principles on the Independence of the Judiciary dictates that the judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. The CCMA Code of Conduct thus is aligned with these provisions from the Basic Principles on the Independence of the Judiciary.

[73] The Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offender, Basic Principles on the Independence of the Judiciary adopted in 06 September 1985.

There are many loopholes which practically appear during court proceedings which may indicate that some CCMA commissioners undermine the CCMA Code and tend to be partial in their adjudication. The surprising factor is when nothing effective is done to deter other CCMA commissioners from acting in a manner which violates the integrity and impartiality standards in the CCMA Code.

As required by section 2 of the CCMA Code that CCMA Commissioners presiding over an arbitration matter should disclose all factors which are likely to render them partial, some do not in fear of recusal. This means that there is also abuse of powers by CCMA Commissioners whereby they use their positions as Commissioners to partially adjudicate cases in a manner which suits them and the parties they favour but is nonetheless detrimental to other parties/persons.

2.5. Conclusion

The CCMA is a legislative body established in terms of the LRA. The CCMA commissioners source their powers and functions from the Arbitration Act, LRA and CCMA Code. These legal frameworks determine the scope of functions and standards of CCMA commissioners. An accepted jurisprudence is that CCMA commissioners are presumed to be impartial. This is supported by the CCMA Code that requires CCMA commissioners to refrain from engaging in personal, financial, business an political matters that can influence their decision making during arbitration proceedings. It is noted that CCMA commissioners are human beings which are also influenced by various factors and they are never without fault. Sometimes CCMA commissioners are impartial and biased. The LRA and Arbitration Act protect the prejudiced parties by allowing them to take the matter to review in case there is reasonable apprehension of bias. Parties can also apply for recusal of CCMA commissioner if they

reasonably suspect that such commissioner will be biased.[74] However, as demonstrated above that CCMA Commissioners are required to conduct arbitration proceedings with integrity and partiality, this is not the case for some CCMA commissioners.

CHAPTER THREE: PARTIALITY OF CCMA COMMISSIONERS AND CASE LAW ANALYSIS

3.1. Introduction

It was discussed above arbitration serves as a legal mechanism to labour dispute resolution and forms part of the South African judicial system. It was stated as obiter dictum in the case *BTR Industries South Africa (Pty) Ltd v Metal and Allied Workers Union*[75] that the integrity of the justice system is anchored in the impartiality of the judicial officers and therefore judicial officers should bear in mind that the public invested to the judiciary their hopes of justice.[76] The public becomes hopeless once the judiciary as their last hope becomes partial when adjudicating labour matters. There have been many incidents and cases whereby CCMA

[74] *Mphaphuli & Associates (Pty) Ltd v Andrews* 2009 4 SA 529 (CC) para 197, *Du Toit v Minister of Transport* 2006 1 SA 297 (CC) para 29.
[75] *BTR Industries South Africa v Metal and Allied Workers Union* (1992) 3 SA 673 (A). (Hereinafter referred as *BTR Industries v MAWU*).
[76] *BTR Industries v MAWU* spra 694F.

commissioners were alleged to have been due to different reasons impartial when they adjudicated certain cases in CCMA arbitration. This chapter focuses on critically discussing the case law and incidents of partial CCMA commissioners.

3.2. Factors that affect the impartiality CCMA commissioners

The term judicial partiality has been generally defined as a departure from officially established standards which relate to achieving fairness and justice by the judicial system.[77] This literally means a judicial officer is being biased and in the context of this study the term means a CCMA commissioner is being biased during labour arbitration.

In common usage, the term biasness refers to when the person who is in deciding role is influenced by various factors and consequently leans, inclines or bends towards one side regardless of the material facts which favour the other side.[78] The implications of partiality in the legal sense are that one party will be favoured by a CCMA commissioner while another party falls out of CCMA commissioners' favour. Furthermore, it means CCMA commissioners will make an award in favour of a party they favour despite the degree of evidence an opposition party presents.

It was stated in the case of *R v S (RD)* that partiality is a state or condition of a mind which makes judicial officers not able to carry out their judicial functions in an impartial manner, but not in all cases but only in certain cases.[79] Therefore, partiality is a state of mind that exists in judicial officers' mind when they adjudicate certain maters only. This means judicial officers are influenced by various factors which erode their impartiality when they are called upon to adjudicate certain cases. This

[77] *S v Roberts* 1999 (4) SA 915 (SCA) para 25; See also, Okpalubal M.C & Maloka T.C, 'The fundamental principles of recusal of a judge at common law: Recent developments' (2022) 43(2) *Obiter* 88, 90.
[78] Okpalubal M.C & Maloka T.C (2022) 43(2) *Obiter* 88, 90.
[79] *R v S (RD)* supra par 106.

transpires mostly if judicial officers have personal interests in a matter they are adjudicating.

As directly opposed to partiality, the term judicial impartiality refers to the standards set in the adjudication of legal matters which require judicial officers to be not biased in favour or against any party to the lawsuit.[80] As being partial is the opposite of being impartial, both terms are judges' state of mind which is affected by related factors. For example, being partial and impartial is affected by financial interests, personal interests and various forms of personal and professional affiliations. Being impartial means that judicial officers have to set aside personal matters, religious views, financial interests and other factors which can make them to have conflict of interests when they adjudicate legal matters.

For example, in the case of *South African Rugby Football Association (SARFA) v President of the Republic of South Africa*,[81] Chaskalson P held that total neutrality is impossible and the rationale for stating this is that judges are also human beings and they are of course also influenced by their subjective views and factors when they adjudicate legal matters.[82] However, a judge can be partial when influenced by factors such as religious beliefs, political views, financial interests, personal and family interests and social status and this is against judicial impartiality.[83]

The case *President of RSA v SARFA* concerns a commission of inquiry that was appointed by the President to investigate the affairs of the (SARFU).[84] The commission was set aside by the Transvaal High Court.[85] The President appealed at the Constitutional Court against the decision of

[80] Tsele M, 'Rights and religion; bias and beliefs: Can a judge speak God?' (2018) 43 *Journal for Juridical Science* 1, 3.
[81] *South African Rugby Football Association v President of the Republic of South Africa* 1999 (4) SA 147(CC). (Hereinafter referred as *SARFA v President of RSA*).
[82] Tsele M, 'Rights and religion; bias and beliefs: Can a judge speak God?' 4.
[83] Tsele M, (2018) 43 *Journal for Juridical Science* 1, 3.
[84] *President of RSA v SARFA* para 20.
[85] Ibid.

the Transvaal High Court. However, the SARFA applied for recusal of five judges of the Constitutional Court arguing on existence of reasonable apprehension of biasness.[86] The applicants argued that the five judges should be recused from the matter since they had closer ties with the President and therefore the likeliness of biasness in favour of the President is very high.[87]

The applicants further argued that the five judges were appointed by the President and would therefore by way of showing gratitude be biased on his favour.[88] The applicants further substantiated their views by stating that Chaskalson P, (one of the five judges) had a family relationship with the President and the same judge also had political association with the President and have good history together, which would make the judge impartial.[89]

The judgment of the above case has been discussed in the below subheading whereby the author has discussed the test for partiality. However, the point of citing the legal matter was identifying the factors which led to the applicant believing the Constitutional Court judges will be partial in favour of the then president. The applicant identified friendship, political associations, the appointment of judges by the President and family ties between the then president and the President as factors which are likely to make judges partial in favour of one party. The same factors affect CCMA Commissioners' impartiality during arbitration and this has been identified in many cases discussed below.

Another factor which affects the impartiality of CCMA commissioners was identified in the case of *Kwazulu Transport v Mnguni.*[90] It was identified in the case that the Commissioner had previously, litigated against one of the

[86] Okpalubal & Maloka (2022) 43(2) *Obiter* 92.
[87] Ibid.
[88] Ibid.
[89] *President of RSA v SARFA* para 20.
[90] *Kwazulu Transport v Mnguni & others* (2001) 22 ILJ 1946.

party and can therefore raise apprehension of biasness on the party he once litigated against.[91] This factor implies that previous conflicts between Commissioners and litigants also have the likelihood of eroding commissioners' impartiality. Practically, Commissioners can during arbitration affected by biasness make the award in favour of one party to the prejudicial of another party, which they litigated against previously.

Lastly, on factors which affect commissioners' impartiality, financial interest is among the factors which also determine the likelihood of commissioners' partiality. Financial interests have been the main issue in the case of Another example in the case of *Buckas v Ethekwini Municipality* whereby the commissioner was held to be likely to be partial on the account that the commissioner had previously engaged in private business with one of the litigants whereby the commissioner benefit monetarily.[92]

The above-mentioned factors should also be borne in mind when the partiality of CCMA commissioners is in question. The existence of the above-mentioned factors when a commissioner presides over arbitration can cause violation of the CCMA Code and LRA. Article 2 of the CCMA Code avers that CCMA commissioners should avoid being conflicted by social, financial and business interests in order to remain impartial during arbitration proceedings.

Similarly, the LRA requires CCMA commissioners to be fair when they perform their CCMA duties. This is in terms of section 145(2)(a)(i) and (ii) of the LRA states that failure of the commissioner to be fair cause gross irregularity. Fairness during arbitration requires commissioners to hear both sides and make an award without being influenced by any factor mentioned above.

[91] *Kwazulu Transport v Mnguni* at 1651C-F.
[92] *Buckas v Ethekwini Municipality* (2003) 24 ILJ 1962 (LC).

Thus, there is a clear link between judicial impartiality and the principle of *audi alterema partem* but the two notions differ. Judicial impartiality is not limited only to hearing all sides of testimonies as the latter notion does but goes as far as considering judicial officers affiliations which can make them deviate from neutral adjudication and make unfairly favour one party. CCMA awards made under the influence of partiality factors are regarded as ultra vires awards and may lack practical force owing to the violation of the CCMA Code and the LRA.

3.3. The test for judicial impartiality

The fact that a certain CCMA commissioner has interests or might have close ties with someone involved in the case does not mean that such a presiding officer will not be impartial.[93] However, whenever there is the allegation that a certain presiding officer may not be partial owing to the presence of factors mentioned, the test for impartiality should be applied.

The courts approach matters with presumption of impartiality when they are called to determine whether there was a reasonable apprehension of biasness or whether a CCMA commissioner was biased or not.[94] Put differently, in cases where it is allege that a certain CCMA commissioner was impartial or reasonable apprehension of biasness is raised, such an allegation must be proved to the standard that overcomes this presumption.[95] This is the presumption which parties should rebut in order to win a case where they alleged that the CCMA commissioner would be or was partial. This means that a party that alleges biasness or raises a

[93] *South African Rugby Football Association v President of the Republic of South Africa* 1999 (4) SA 147(CC).
[94] *Mbana v Shepstone & Wylie* 2015 (6) BCLR 693 (CC) par 41; *Bernett v ABSA Bank Ltd s*upra par 33 and 86; *S v Basson* 2007 (3) SA 582 (CC) par 42; *SACCAWU v Irvin & Johnson Ltd (Seafoods Division Fish Processing)* supra para 12 and 49; *President of the RSA v SARFU 2* supra para 41; *Abernethy v Ontario [2017] ONCA 340 (CanLII)* para 18–19; *Carbone v McMahon* supra par 61–63.
[95] *Malton v Attia [2016] ABCA* 130 (CanLII) par 82; *R v GRS [2018] ABQB 4* (CanLII) par 5.

reasonable apprehension of biasness has an onus of proof against the presumption of judicial impartiality and integrity.

The court in the case of *Hefferman v Mechanical Contractors,*[96] stated that this presumption of judicial impartiality and integrity places a huge burden to parties alleging judicial biasness to prove their allegations.[97] It was stated in *President of the RSA v SARFU* that this presumption requires sufficient evidence to rebut it and parties raising allegation relating to impartiality ought to rely on realistic evidence that bears enough weight.[98] Therefore, a mere existence of factors that are likely to make a CCMA commissioner biased is not enough to rebut the presumption, but rather there should enough evidence, mainly proving that a certain judicial officer was impartial of certain case or occasion owing to been induced by related factors.

The test for determining judicial partiality was laid in the case of *BTR Industries v MAWU* wherein the Appellate Division (AD) set out the test.[99] The AD held that the test to determine judicial partiality is based on reasonable person standards and therefore is an objective test.[100] The AD stated that there should be a reasonable suspicion of impartiality and a mere apprehension of impartiality does not serve a prerequisite to disqualify impartiality.[101]

The material facts of the *BTR Industries v MAWU* case are that the employees of the appellant and the appellant had a labour dispute. The president of the then Industrial Court took part in a seminar hosted by one

[96] *Hefferman v Van Mechanical Contractors Inc* [2017] ONSC 2381.
[97] *Hefferman* para 14; *Morse Shannon LLP v Fancy Barristers LLP* [2016] ONSC 7574 par 19–21.*SL v Marson* [2014] ONCA 510 (CanLII) para 24–29; *Lloyd v Bush* [2017] ONCA 252 (CanLII) para 113.
[98] *President of the RSA v SARFU 2* supra para 41; *Cojocaru v BC Women's Hospital and Health Centre* [2013] 2 SCR 357 par 22.
[99] *BTR Industries South Africa (Pty) Ltd. and Others v Metal and Allied Workers' Union and Another* (151/89) [1992] ZASCA 85; 1992 (3) SA 673 (AD); [1992] 4 All SA 701 (AD).
[100] *BTR Industries v MAWU* para 3, 4 and 5.
[101] *BTR Industries v MAWU* para 3, 4 and 5.

of the appellant whereby the legal representative of the appellant presented papers in relation to the purpose of the seminar.[102] The president of the then Industrial Court also presided over the matter when it was taken to court proceedings. The respondents raised the allegation that the president of the Industrial Court will not be impartial as he will be influenced by his participation in the seminar for the same matter.[103] The AD found that such involvement sufficed to give rise to reasonable suspicion of biasness during the proceedings.[104]

The test in the *BTR Industries v MAWU* case appeared to lack clarity as the question raised was whether any reasonable suspicion suffices to grant applications to recuse certain judicial officers. The SCA clarified this test in the case of *S v Roberts.*[105] The SCA in case of *S v Roberts* listed the requirements that should be met to satisfy the test for biasness and such requirements are: "(i) there must be a suspicion that the judicial officer might, not would, be biased, (ii) the suspicion must be that of a reasonable person in the position of the accused or the litigant, (ii) the suspicion must be based on reasonable grounds, and (iv) the suspicion is one which the reasonable person referred to would, not might, have".[106]

The above test for judicial partiality was advanced in the case of *SARFU v President of the RSA* whereby the Constitutional Court clearly outlined the test.[107] It became clear from the above precedent that the test for impartibility requires a party to have a reasonable apprehension of bias. This means a party should have a reasonable fear that a certain judge will not be impartial when adjudicating a certain specific case. The test for impartiality was well determined by Chaskalson P in the case *of SARFA v*

[102] *BTR Industries v MAWU* paras 6, 7 and 8.
[103] *BTR Industries v MAWU* paras 56 and 57.
[104] *BTR Industries v MAWU* para 62.
[105] *S v Roberts* 1999 (4) SA 915 (SCA).
[106] *S v Roberts* 1999 (4) SA 915 (SCA).
[107] *President of the Republic of South Africa v South African Rugby Football Union 1999* 4 SA 147 (CC) (President of the RSA v SARFU 2). President of the RSA v SARFU 2 supra par 48. See also Nwauche "Administrative Bias in South Africa" 2005 8(1) *PER/PELJ* 36–75.

President of the RSA.[108] In the stated case, Chaskalson P elaborated on the test as he stated that question is whether an informed and reasonable person under similar circumstances would reasonably apprehend that a certain presiding officer would be or likely to be biased by not been open-minded in his adjudication.[109]

The challenging part of the test for impartiality is that the test is objective in its nature and is based on reasonable person standards and thus every case is judged on its own merits. As mentioned by Chaskalson P, factors such as judges' experiences, abilities, commitment to oath of office and training should be considered on one hand while on the other hand, a litigant's reasonable apprehension of bias should be considered.[110] Therefore, in deciding whether a certain judge should be recused or not, all factors favouring recusal and against recusal should be weighed against each other and the heavier side gets chosen.

3.4. Case law analysis

It is now clear that CCMA Commissioners must conduct arbitrations impartially and in an unbiased fashion.[111] When there is a perception of bias, a prejudiced party can take the matter for review and through reviews of CCMA arbitration proceedings. Many reported and unreported cases have been reviewed whereby CCMA commissioners were found to have been biased intentionally. This part discusses the cases whereby CCMA commissioners were found to be biased during the arbitration.

The first example where a CCMA commissioner was biased found to have been biased is in the SCA case of *Commissioner of Competition*

[108] *South African Rugby Football Association v President of the Republic of South Africa* 1999 (4) SA 147(CC).
[109] Tsele, 'Rights and religion; bias and beliefs: Can a judge speak God?' 4; *South African Rugby Football Association* case para 48.
[110] *President of RSA v SARFU* para 48.
[111] Item 2 of the CCMA Code.

Commission v General Council of the Bar of South Africa.[112] The SCA in this case decided that pointed out that a failure to observe the principle of fir hearing by administrative body does not always mean that such administrative body is biased.[113] The SCA held that as not observing the *audi alterema partem* rule is not indicative of bias, judicial officers need to focus on the factors or circumstances influenced the administrative body to not observe the *audi alterema partem* rule. This is because only circumstances can assist courts to determine a state of mind, whether biased or not, of a decision maker.

However, impartiality was conceded in the case of *Cash Paymaster Services v Hellen Hlatswako*[114] whereby it was proved in a review application that the CCMA Commissioner conduct the CCMA proceedings in a manner which was consistent with cross examination and also made two personal attacks to the witnesses.[115] It was further found that due to biasness, the Commissioner awarded a relief that is outside her powers and the Commissioner's award was set aside.[116] This indicates that as it was stated that commissioners are free to conduct arbitration proceedings as they want, but they should not abuse the proceedings as that would otherwise lead to the apprehension of biasness. In addition, the *audi alterema partem* rule should be applied with limits such that no party should assume biasness on Commissioners.

This is precisely what occurred in the recent Labour Court case between *Dorothy Khosa v City of Johannesburg*.[117] As noted in the judgment that the main grounds for the review are that it is contended that the Commissioner failed to apply his mind, committed misconduct was biased,

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[112] *Commissioner of the Competition Commission v General Council of the Bar South Africa and Others* [2002] 4 All SA 145 (SCA). (Hereinafter referred as *Commissioner v General Council of the Bar*).
[113] *Commissioner v General Council of the Bar* paras 17, 18 and 19.
[114] *Cash Paymaster Services (Proprietary) Limited v Hlatswako NO and Others* (JR906/13) [2017] ZALCJHB 217.
[115] *Cash Paymaster Services v Hlatswako* para 14.
[116] *Cash Paymaster Services v Hlatswako* paras 19 and 21.
[117] *Dorothy Khosa v City of Johannesburg & 2 others* [Case no: JR135/16].

committed a gross irregularity and/or acted unreasonably or unjustifiably and/or irrationally. It was argued that the arbitrator descended into the arena of the conflict between the parties and thus prevented himself from assessing with due impartiality the credibility of the witnesses and the probabilities relating to the issues.[118]

The court found that the commissioner deviated from his ordinary duties and assumed the role of legal representatives as he placed himself on a position to lead evidence and conduct cross-examination. The further found that the commissioner did not conduct the arbitration proceedings in a fair and proper manner which if proved can be ruled to have led to irregularity and reasonable grounds for apprehension for biasness.[119]

However, the court averred that this does not excuse the applicant from the duty to rebut the presumption of impartiality. The applicant needs to prove that the manner in which the arbitration proceedings were conducted favoured the City of Johannesburg by giving them unfair advantage. The applicant failed to do so. The court held that the Commissioner was, on a holistic consideration of the in consistent when he cross-examined the witnesses and never had any intention to be biased for the benefit of one party to the detriment of another party and thus never intended to disadvantage the applicant. The Court held that since the commissioner conducted the cross-examination in a consistent manner without favouritism, there can never be a reasonable ground for apprehension of bias. The court ruled that the commissioner intervened when he needed clarity from witnesses and controlled the processes and thus conducted the proceedings in a regular and fair manner.

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[118] https://tonyhealy.co.za/when-the-impartiality-of-a-commissioner-is-disputed/ accessed 22 November 2022; *Baur Research CC v Commission for Conciliation, Mediation and Arbitration and others* [2014 (35) ILJ 1528 (LC) paras 18 and 26; see also, *Colyer v Essack NO (1997) 18 ILJ 1381 (LC) 1384; ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman N. O.* (2013) 34 ILJ 2347 (LC) paras 38-39; *Toyota SA Motors (Pty) Ltd v CCMA* [2016] 3 BLLR 217 (CC) paras 105 and 192; *Kievits Kroon Country Estate (Pty) Ltd v Mmoledi* [2014] 3 BLLR 207 (LAC) at par 20.

[119] See CCMA Codes, Item 2 and Item 4.

Apprehension of bias is common in CCMA considering that the CCMA processes start from mediation and pass through conciliation, where commissioners get involved to assist parties to resolve their disputes. Thus, it is common parties that lose a matter in arbitration may seek to blame commissioners instead of facing the bitter truth that they lost the matter based on the merits, or demerits of their case. This is often caused by the manner in which CCMA Commissioners run arbitration proceedings by seemingly acting too much as a party to arbitration proceedings. Technically, failing to observe limits in regard to questioning witnesses does not necessarily mean commissioners are biased but it only raises an apprehension of unfairness and partiality.

The judgment above appears to perpetuate the running of arbitration proceedings in a manner whereby some parties will always believe that arbitrators were biased and partial. This is due to CCMA commissioners over-participating in leading evidence on one side of the case while neglecting another side. For example, the judgment noted that in *Baur Research CC v Commission for CCMA,*[120] entering into an arena of conflict between parties may lead to an arbitrator acting ultra vires his or her powers or committing misconduct that would deprive a party of a fair hearing. So ultra vires conducts of CCMA often lead to biasness or partiality and therefore should be discouraged in all means.

It is therefore necessary that instead of assisting parties to prove their side of contention, CCMA commissioners should obey the duties of commissioners embodied in the CCMA Code and LRA.[121]

A critical example of obeying the legislated duties of CCMA commissioner has been demonstrated by the LC in the matter of *Kwazulu Transport (Pty)*

[120] *Baur Research CC v Commission For Conciliation, Mediation and Arbitration and Others* (JR 28/2011) [2013] ZALCJHB 338; (2014) 35 ILJ 1528 (LC). (Hereinafter referred as *Baur Research case*).
[121] Item 2 and Items 5 to 12 of the CCMA Code and section 15 of the LRA.

Ltd v Mnguni.[122] In this case, the LC firmly averred that the Commissioner had an obligation to disclose to litigants that he is recusing himself from presiding over the matter due to having been litigated against one of the parties. The LC further held that the commissioner did not comply with LRA and Code since he also failed to disclose that he once represented one of the parties. This according to the LC constituted a violation of the mandates commissioners have since chances are very slim that the commissioner would be impartial in his adjudication in that case.

Furthermore, the partiality of CCMA Commissioners was also found in the case of *Buckas v Ethekwini Municipality*[123] which involves a commissioner who once did a job privately for one of the litigants before him and failed to disclose this fact. The LC also inferred that the commissioner's failure to disclose such fundamental information also constituted a substantial breach of the Code and LRA and thus the commissioner's judgments should be set aside. These cases demonstrated the manner in which commissioners are anticipated to conduct themselves for the sake of serving justice in the labour law arena.

A last example is the case of *Glencore Operations SA (Pty) Ltd v CCMA*[124] which involved a Commissioner reviewing an award of another commissioner, where the commissioner that presided over the review had no jurisdiction. The LC also outlined that the reviewing commissioner acted outside the scope of his powers and duties hence he neither had powers from the LRA nor from the Code to review the matter which was decided by another commissioner of the same level. The court arguably suspicious of abuse of power further directed that the Director of the CCMA should investigate the conduct of such commissioner because the award he made is far from being awards which can be made by a reasonable commissioner.

[122] *Kwazulu Transport v Mnguni & others (2001) 22 ILJ 1946.*
[123] *Buckas v Ethekwini Municipality* (2003) 24 ILJ 1962 (LC).
[124] *Glencore Operations SA v CCMA* (2021) 42 ILJ 2446 (LC).

3.5. Recusal of CCMA Commissioners: Guarding against partiality

There are various ways with which litigants can invoke to ensure that they remedy or prevent partiality of CCMA commissioners in labour arbitrations. As the review of CCMA awards has been elucidated above, the recusal of CCMA commissioners then is discussed under this subheading. There are several cases whereby CCMA commissioners were recused after the apprehension of biasness by both or either party in arbitrations.

According to Black's Law Dictionary, "recusal" is the process which a presiding officer is removed and disqualified to preside over a certain case owing to conflict of interests that may lead to biased decision.[125] In a simple sense, this basically means a presiding over is removed from presiding over and judging a certain case which he or she would judge had he or she not recused.

CCMA are required by the CCMA Code of Conduct to make pre-disclosure of any fact of conflict of interests and decide whether they recuse themselves or not.[126] The CCMA Code does not state that CCMA commissioners should always recuse themselves in cases where there is existence of conflict of interests. CCMA commissioners only need to disclose their personal and professional relationship with parties to case they preside over and this should be done before the arbitration proceedings commence.[127] CCMA commissioners have a duty to impartiality and fairly resolve labour disputes and not the other way around.[128] Should a commissioner fail to conduct himself or herself in a manner which is impartial, an apprehension of bias arises, which then becomes a ground for recusal of the CCMA Commissioner concerned.

[125] Okpalubal & Maloka (2022) 43(2) *Obiter* 89.
[126] Item 3 of the CCMA Code.
[127] Item 3 of the CCMA Code.
[128] Item 5 of the CCMA Code.

It should be noted that a job of a commissioner during CCMA conciliation is to assist parties to resolve their dispute by themselves without an independent adjudicator. Therefore, a commissioner may discuss the merits of the case and enlighten parties about issues concerned and possible applicable law. However, a commissioner does not control the final outcome of conciliation. If the involvement of the commissioner during conciliation appears to have exceeded the boundaries and one of the parties reasonably beliefs that such commissioner may be biased during arbitration, section 136 (3) of the LRA comes to rescue. This provision allows parties to apply for recusal of a commissioner within seven days counting from the day such commissioner issued a certificate of non-resolution.

This means a matter has to be set down for arbitration but should be presided by a different commissioner as the commissioner that conducted conciliation is recused. It should be noted that however that Rule 31(10) of the CCMA Rules does allow a commissioner to refuse an application to recuse himself. It is however prudent for the sake of ensuring the society that justice will be served that if a recusal application is brought of reasonable, objective and realistic grounds, a commissioner should recuse himself or herself.

NUPSAW celebrated a victory in 2019 after when a CCMA commissioner it complained about was found guilty of biasness and recused from presiding over a case in which NUPSAW was a party.[129] The celebration of the victory depicts the satisfaction NUPSAW had that justice would be served when a Commissioner that is likely to be impartial in his or her adjudication presides over their labour matter. There are also many cases in which CCMA Commissioners were recused due to suspicion of biasness which may transpire if they preside over certain cases.

[129] https://www.sabcnews.com/sabcnews/nehawu-in-nelson-mandela-bay-accuses-ccma-commissioners-of-bias/

A clear example could be set with reference to the case of *Premier Foods (Pty) Ltd (Nelspruit) v CCMA.*[130] In this case, a commissioner was requested by one of the parties that he (the commissioner) should recuse himself from the case. This was due to the commissioner having made statements during the discussions concerning the case the commissioner was to preside over. The statements of the commissioner related to possible outcomes of the arbitration proceedings in case parties take their matter to arbitration. The applicant alleged that this statement indicated that the commissioner prejudged the matter before hearing the evidences from the parties.[131] The Commissioner dismissed without hearing in details the recusal application and proceeded with the arbitration. The Court ruled that the commissioner acted irregularly for failing to consider the recusal application even though valid grounds were raised.[132]

Requesting that a Commissioner should recuse himself requires meeting the test for recusal discussed above with reference to the *Republic of South Africa v SA Rugby Football Union* case.[133] The test for recusal of Commissioner is thus whether an objective and informed person would on such facts apprehend on reasonable basis that a certain commissioner would not bring an open mind to impartially judge a certain case considering various personal factors that are likely to influence such commissioner.[134]

Thus, requiring that a commissioner should recuse himself or herself merely because you do not like him or her does not constitute a sufficient ground for the recusal of CCMA commissioners in arbitrations. The test outlined above should be applied. If it is found that a commissioner is likely to be biased, he or she will be recused. If found that a commissioner is not

[130] *Premier Foods (Pty) Ltd (Nelspruit) v CCMA* (2017) 38 ILJ 658 (LC).
[131] *Premier Foods paras* 1, 2 and 3..
[132] *Premier Foods* paras 42, 43 and 46.
[133] *Republic of South Africa v SA Rugby Football Union and Others* [1999] ZACC 9; 1999 (4) SA 147 (CC).
[134] *President of RSA v SA Rugby Football Union* para 48

likely to be biased, he or she will not be recused. However, in the circumstances whereby commissioners continue with arbitration proceedings albeit complaints that they will be biased, their awards are referred to review in Labour Courts. If Labour Courts find that they were indeed biased, they set aside the awards and remit the matter back to CCMA for fresh adjudication by a different CCMA commissioner.[135]

The test for recusal implicates that when an application for recusal is brought it must be brought based on a reasonable suspicion of biasness.[136] This apprehension for biasness can arise due to the presence of any of the factors mentioned above. Thus, one party can foresee, due to the CCMA commissioner's conduct that a reasonable impartiality is totally impossible to achieve and they may request for recusal of a Commissioner concerned.

The last issue to consider in this section is determining whether a CCMA commissioner can be recused due to racial factors causing an apprehension of biasness on one or more parties in arbitration. Put differently, is it reasonable or consistent with the test for judicial impartiality for a party in CCMA to request that a certain CCMA commissioner should be recused on the basis of race? This could be in a situation whereby a CCMA Commissioner is a black person while one party is also a black person and the other party is a white person. So, can such white person request that the CCMA commissioner who is black be recused from the case due to apprehension of biasness?

The Labour Court dealt and determined the issue above in the case of *Cell C (Pty) Ltd v Finger.*[137] The facts are that a black person who was a party to a CCMA case demanded a recusal of an Indian (race) CCMA

[135] *Premier Foods* para 46.
[136] *President of RSA v SA Rugby Football Union* para 48.
[137] *Cell C (Pty) Ltd v Finger and Others* [2006] 10 BLLR 919 (LC).

commissioner who was appointed by the CCMA.[138] The party (black person) argued that since the Commissioner, opposing party and legal representative of the opposing party are all Indian in race, this racial imbalance served as reasonable apprehension of bias against him.[139]

The Commissioner recused himself from the matter but noted that the grounds raised by the party are not valid or sufficient to determine that the Commissioner would be biased.[140] The party (Indian) went to the LC seeking that the LC sets aside the decision of the Commissioner to recuse himself in the matter. The LC found that a mere race cannot be used as the only factor to determine whether a certain judicial officer is likely to be biased or not especially in the rainbow nation like South Africa with many races.

The LC turned down the decision of the Commissioner to recuse himself.[141] The LC noted that it is not prudent to recuse the Commissioner since the test for judicial impartiality is not satisfied.[142] This judgment by the LC reinforced the fact that a mere existence of factors that may or likely to render a judicial officer biased is not sufficient to rebut the presumption of impartiality. Parties however need to substantiate their apprehension of biasness with other factors or circumstances that prove that a certain judicial officer may deviate from the established standards of judicial integrity and impartiality. Then, that can be enough to rebut the presumption of impartiality.

It should be noted that the LC in the above case dismissed the employer's case and did not set aside the Commissioner's decision to recuse himself. This is because another Commissioner was already appointed to preside over the case. However, the LC also ordered the employee (black party) to

[138] *Cell C (Pty) Ltd v Finger* para 1.
[139] *Cell C (Pty) Ltd v Finger* para 2.
[140] *Cell C (Pty) Ltd v Finger* para 3.
[141] *Cell C (Pty) Ltd v Finger* paras 11 and 12.
[142] *Cell C (Pty) Ltd v Finger* para 14.

apologise to the commissioner for making baseless allegations which impede the judicial operations.[143] This means had another commissioner not appointed to preside over the case, the LC would have set aside the decision of the Commissioner to recuse himself.

The above precedents could be linked to section 165(2) of the Constitution. The mentioned constitutional clause requires that the Courts and judicial bodies such as CCMA serve justice by being impartial on their adjudications. Therefore, the standard of impartiality set to courts is constitutional in nature considering that lack of impartiality by judicial officers have higher likeliness of violating the fundamental human rights. Partiality and biased judicial decisions can violate the rights such as the right to equality in section 9 and right to dignity in section 10 of the Constitution.

However, what is essential is that courts should approach matters with diligence where impartiality or its likeliness is alleged. This requires courts to observe and apply the test for judicial impartiality in order to reach a fair and reasonable decision. In addition, litigants should be mindful that a mere existence of conflict of interests should not be confused to biasness, especially when judicial officers disclose their conflict of interests as required.

3.6. Conclusion

The chapter has demonstrated that the impartiality of CCMA commissioners during arbitrations is influenced by different factors including but not limited to financial interests, social experiences and political affiliations. These factors do not on mere presence render the CCMA commissioner biased, but they are weighed on the likelihood of biasness. This means that one should apply the recusal test established in

[143] *Cell C (Pty) Ltd v Finger* para 17.

the President of RSA v *President of RSA v SA Rugby Football Union* which is objective and based on reasonable and informed person.[144] CCMA commissioners are recused from arbitration proceedings if the application of the test for recusal reveals that a concerned commissioner is likely to be biased. Alternatively, litigants can also review CCMA awards in case it was suspected that a certain commissioner was biased.

CHAPTER FOUR: THE COMPARATIVE STUDY BETWEEN SOUTH AFRICA AND CANADA ARBITRATION LAWS

4.1. Introduction

The previous chapters dealt with the analysis of the laws regulating arbitration as opposed to mediation in the workplace and the extent of biasness of CCMA Commissioners in South Africa. This chapter deals with analysing the laws regulating arbitration in Canada and also the comparison between Canadian laws and South African laws pertinent to arbitration.

4.2. Regulation of labour law arbitrations in Canada

The Canadian Labour Code of 1985 (Labour Code) is the legislation that regulates labour matters including alternative labour dispute resolution in Canada.[145] The Canadian Labour Code makes provision for use of arbitration to resolve labour disputes. However, the Code also entrenches mechanism to alleviate the possibilities of biasness and partiality of presiding officers during arbitration.[146] The Labour Code entitles parties in arbitration the right to mutually choose an arbitrator of their choice among

[144] *President of RSA v SA Rugby Football Union* para 48.
[145] Canada Labour Code, (R.S.C., 1985, c. L-2).
[146] Ibid.

experienced, skilled and experts of adjudicator.[147] The Labour Code also seeks to achieve impartial and unbiased mechanism that effectively resolves labour disputes.[148]

It should however be noted that there is no specific clause in the Labour Code that states adjudicators in arbitration should be impartial and unbiased. The Labour Code inherently makes it necessary for adjudicators in arbitration to be impartial and unbiased so to achieve fairness and justice to the Canadian societies. This is supported through section 13 of the Labour Code. This provision permits parties in arbitration to challenge a decision of an adjudicator on a ground of an apprehension of bias. A court further has powers in terms of section 15 of the Canadian Code to order for removal of an arbitrator. In addition, a court can set aside an arbitration award if it is proved that an arbitrator was biased and partial when making an arbitration award.[149]

The above laws appear to be grounded in section 19(1) of the Canada Labour Code which further requires that there should be equality and fairness arbitrations such that arbitrators should treat parties equally and fairly without fear and favouritism. Section 46(1) of the Canada Labour Code also on a party's application allows courts to set aside an award on any of the following grounds: an arbitrator has committed a corrupt or fraudulent act or there is a reasonable apprehension of bias.

There are various cases whereby courts in Canada have set aside arbitration awards on basis that adjudicators were or likely to biased and partial when making the decision. The factor that prevailed most was arbitrators failing to disclose the existence of conflict of interests such as failing to disclose that they have a personal relationship or business interests with one of the parties. However, it should be borne in mind that courts do not just assume or infer that an arbitration award was induced by

[147] Ibid.
[148] Cohen T.M, https://adric.ca/arbitrator-bias-when-do-you-cross-the-line/
[149] Section 45 of the Canadian Labour Code.

factors relating to biasness. The Canadian courts apply a judicial test to determine whether a certain arbitrator was biased or not.

The Supreme Court of Canada established the test to determine existence of partiality and biasness in the case of *Szilard v Szasz*.[150] The test requires that courts draw inference while taking into account the standards of an informed person and from realistic and practical point of view and then assess whether a certain presiding officer prejudged the matter even before receiving evidence and arguments from parties of a case. The same was held in the Canadian case of *MDG Computers* that one of the indicators of potential impartiality of presiding officers is making pre-judgments before hearing evidences from litigating parties.[151] So, this sounds so much considering that judges in Canada, as the same applies in South African CCMA arbitration and judiciary as whole, arbitrators are madndated to apply the *audi alterem partem* principle when judging cases to avoid biasness and impartiality.[152]

The above test is an objective test by its nature and an alleging party should present adequate evidence or argument that a certain arbitrator did not approach the matter with an open mind but was rather induced by various personal or business factors.[153] Therefore, the standards are that of a reasonable person and not subjective person.

The court in the case of *Adams v. B.C*,[154] stated that the gravity of presumption of impartiality elevates when courts apply the above test. The case provides two different types of biasness. The first type of biasness exists when there is an interest, pecuniary or otherwise on the side of an arbitrator and such interests or pecuniary is relevant to case in hand. This

[150] *Szilard v. Szasz, 1954* CanLII 4 (SCC).
[151] *MDG Computers Canada* para 14.
[152] *Baur Research CC v Commission For Conciliation, Mediation and Arbitration and Others* (JR 28/2011) [2013] ZALCJHB 338; (2014) 35 ILJ 1528 (LC); subsection 2.1 of the CCMA Code.
[153] *Adams v. B.C. (Workers' Compensation Board),* 1990 CanLII 1952 (BCCA).
[154] Adams v. B.C. (Workers' Compensation Board), 1990 CanLII 1952 (BCCA).

kind of biasness is most simple as it relates to conflicts of interests. The second kind of biasness concerns the objective impartiality to which parties to a proceeding are entitled.

The second kind of biasness exists when an arbitrators starts acting like a legal practitioner representing one of the parties before him or her. It is well comprehended that an arbitrator expressing a preliminary point of view on the matter before he or she hears all the evidence would not qualify to disqualify such as an arbitrator. However, what qualifies to disqualify an arbitrator is when makes a final determination before he or she hear all the evidence to be presented in a case. Therefore, arbitrators' final preconceptions are the ones leading to parties to objectively allege existence of biasness and partiality by arbitrators.

The issue concerning the second type of biasness was adjudicated by the Court of Appeal in *Canada Post Corp. v. Canadian Union of Postal Workers*.[155] The court took into account the following factor: "the questions posed by the arbitrator, the arbitrator's interjections during the hearing, and the arbitrator's limitation on cross-examination on the basis of irrelevancy or remoteness". The court concluded these factors are sufficient to meet the test for partiality as from realistic and practical point of view, an informed person would allege the biasness on the side of the arbitrator. Therefore, arbitrators in Canada should control the arbitration proceedings without making proceedings to favour one party and be detrimental to another party. Failure to do so would otherwise lead to apprehension of biasness.

In the *Szilard v. Szasz,* the court held that arbitrators are required to exercise their powers and execute their functions as impartial and reasonable adjudicators and not as legal representatives of parties.[156] In particular, arbitrators should apply their mind and the law to resolve

[155] *Canada Post Corp. v. Canadian Union of Postal Workers,* 1991 CanLII 434 (BCCA).
[156] *Szilard v. Szasz* at para 370.

matters and they should be ruled by values of impartiality, independent, rationality and biasness. The court in *Szilard* stated that the need for arbitrators to demonstrate the highest level of impartiality is due to the fact that recusal of arbitrators can transpire even when there is reasonable apprehension of biasness.[157]

In the case of *MDG Computers Canada Inc. v. MDG Kingston,*[158] the test for partiality was discussed and applied. The applicant, MDG Computers, sought to remove the arbitrator from an on-going arbitration on the basis of a reasonable apprehension of bias. The arbitrator, Mr. Goldman, was a lawyer who was involved in franchise agreements. Mr. Goldman was involved as counsel in another proceeding where he had hired an accounting expert to discuss damages from the rescission of a franchise agreement. The allegation of bias arose because the expert Mr. Goldman had hired for the other proceeding was the same expert that would be appearing in the MDG arbitration.[159]

When partiality was raised as a ground of appeal, the court averred that the test for partiality should be applied. The court emphasised on the objective nature of the test that partiality should be asses from an informed person, practical and realistic point of view. In addition, the court made it clear after considering these factors, which are prerequisite, one should therefore assess whether an arbitrator prejudged the matter or not before he or she heard parties' evidence.[160]

The Court noted that "reasonable apprehension of bias" could be extracted from the facts of the case. In realistic and practical point of view, every informed individual would infer that the arbitrator had biased mentality as he contracted experts to handle the case of his client. The court however did not detach itself from the fact that no actual biasness or

[157] Ibid.
[158] *MDG Computers Canada Inc. v. MDG Kingston Inc.,* 2013 ONSC 5436, 2013.
[159] *MDG Computers Canada* para 9.
[160] *MDG Computers Canada* para 14.

intended biasness was proved sufficiently but it was a mere apprehension for biasness and therefore there is no necessity to meet the test.[161] So the conflict of interests was on the side of the expert hired, who appraisal could influence the decision of the arbitrator.

The main objective of making use of party-appointed arbitrator is to limit the probabilities of biasness during arbitration. Furthermore, biasness is another factor that makes arbitrators appear not credible and therefore ineligible to preside over matters that there is conflict of interests or they are likely to be biased.[162] Arbitrators are expected to be impartial and unbiased when they perform their adjudicating functions. This applies despite their amount of experience and position they hold in specific field and despite interest they have over certain issue.[163] For example, religious arbitrators in Canada are expected to be impartial even to matters which the issue in matter concerns religious beliefs.

It should be taken into account that arbitrators are qualified and trained professionals so that they play their judicial role appropriately.[164] It is however a misfortunate fact that few arbitrators that abuse their powers often lead to people infer and create a misconception that alternative dispute resolution through arbitration is ineffective and time wasting mechanism of resolving labour disputes. Thus, the main objective should be appointing arbitrators that shall perform their adjudicating duties while observing the rule of law.

[161] *MDG Computers Canada* para 30.
[162] Ibid.
[163] Ibid.
[164] MacDonald, Q.C and Rosalia N, 'Removal of an Arbitrator for Reasonable Apprehension of Bias (2017) *Bottom Line Research* 7.

4.3. Comparison: Similarities and differences

The similarities are that both countries allow parties to arbitration to choose their own arbitrator which can best achieve choosing an arbitrator who is likely to be impartial.

Another similarity is that the laws from both countries require arbitrators in labour proceedings to be impartial and fair to parties. This means that both countries observe the same rule against biasness in arbitration proceedings.

The differences are that South African law does not seem to address the matter of arbitration agreement. Only the Arbitration Act speaks of the arbitration agreement and the mentioned law is not comprehensive enough to address the lingering and emerging problems.

Another example is that South African law has comprehensive laws regarding CCMA arbitration although somehow the law appears to be ineffective considering the rate of biasness on CCMA arbitration.

In regard to the tests for partiality, both countries approach the objective test and have the presumption of impartiality. This means that the laws of South Africa and Canada place a burden of proof on a party alleging biasness and partiality to prove his or her allegations.

Courts in South African held that arbitrators are free to conduct arbitration proceedings as they wish and can freely question witnesses and parties. In doing so, it is held that that does not necessarily mean arbitrators will or are biased but the test for partiality should be invoked for any challenge on biasness grounds. On the other hand, courts in Canada are of the point that arbitrators should not assume the advocacy role during arbitration proceedings as that would otherwise give rise to an apprehension of biasness.

4.4. Lesson to learn from Canada

The lesson to learn from Canadian law relating to arbitration is that they put more emphasis on arbitration agreements. The arbitration agreement also has a clause whereby parties should choose an arbitrator of their choice and this therefore limits the rate of arbitrators being biased due to conflict of interests. If South Africa learns this lesson, it would assist the mitigate the extent of cases reviewing arbitration awards on the ground of biasness of CCMA Commissioners and would comply with the purpose of establishing ADR.

Another lesson is that Canadians appear to have good implementation of their laws. Even South Africa should strengthen its arm of law implementation and enforcement hence this would assist to deter commissioners from abusing their powers maliciously. This would necessitate that whenever there is an issue, such as the issue of impartiality during CCMA arbitration, South African government should consider making use of legislative and enforcements measures to address the issue.

The Canadian courts take into account the manner in which arbitrators conduct their cases and question parties and their witnesses when determining the biasness of arbitrators. Arbitration awards are set aside if they are made by arbitrators who exceeded the scope of their duties by entering into an arena conflict by questioning parties and their witnesses. The Canadian courts held that setting aside such kind of awards limits the extent or rate of biasness in arbitrations. Thus, South African ADR specifically in arbitration should heed to learn this lesson which can be a good improvement towards achieving impartiality in the CCMA arbitration. This is because parties can have the powers to choose CCMA arbitrators which are likely not be induced by factors which can cause conflict of interests and make them impartial.

4.5. Conclusion

It appears from the discussion above that Canadian law in relation to arbitration is not comprehensive and too much reliance is invested on the test for partiality. Although the laws between Canada and South Africa are quite similar, the differences are quite important to the extent that the lessons drawn from them can assist the South African regulators to minimise the extent of biasness in CCMA arbitration.

CHAPTER FIVE: CONCLUSION AND RECOMMENDATIONS

5.1. Conclusion

The aim of this study is to analytically examine the laws which regulate arbitrations as opposed to conciliation in South Africa. The study particularly focused on the powers and functions of CCMA commissioners during arbitration and the biasness that transpires during CCAM arbitrations. In doing so, the study also compared the Canadian laws and South African in regard to biasness and conduct during labour arbitrations. The study discussed the CCMA Code of Conduct, LRA, and the Constitution as regulatory framework for CCMA commissioners' conduct, powers and duties.

The foundation is laid by the Constitution when it dictates that judiciary officers are required to resolve legal disputes impartially and fairly. This provision is also depicted in the LRA. According to the LRA, CCMA is an independent juristic entity which is responsible for fairly and impartially resolving labour disputes. In addition, the CCMA Code requires that CCMA commissioners disclose factors which can cause a conflict of interest hence CCMA Commissioners are required to be fair and impartial in their adjudication.

In addition, the test for recusal was expounded with particular reference to case law. The study demonstrated that there are sufficient laws in South Africa that deal with the conduct and powers of the CCMA commissioners in a manner which attempt to curb the biasness and impartiality in arbitrations. However, due to power application of the above mentioned and discussed laws, the extent of biasness during CCMA arbitration in South Africa is higher than in Canada.

What could be best adopted is that Canadian law deposits an excess amount of focus on pre-arbitration settlement and agreements which furnish to litigant an opportunity to choose appropriate arbitrators. This appeared to have lessened the extent of biasness in arbitration. Unlike in South Africa whereby parties in arbitration sometimes have CCMA, AFSA and AASA choose CCMA commissioners for their cases. This style of selecting CCMA commissioners appeared to be not effective as intended, hence there are many cases as demonstrated going for review in LC on grounds of biasness. However, the recusal of CCMA is the preventive mechanism which mitigates consequences and spread of biasness in CCMA arbitration proceedings.

5.2. Recommendations

CCMA Commissioners should have formal proceedings that they should observe to conduct arbitration proceedings. This would set the limits that CCMA Commissioners do not participate beyond reasonable limits when they conduct arbitration proceedings. This would prevent CCMA commissioners from being blurred by the dust from the arena of conflict between parties. In addition, it would avoid apprehension of biasness on parties.

The second recommendation is that the Code of Conduct for CCMA Commissioners should incorporate a clause whereby it outlines grounds

under which CCMA commissioners can be recused. The grounds should outline the nature of misconducts and extent of apprehension of biasness required for CCMA commissioners to be recused.

The third recommendation is that, instead of the Arbitration Foundation of Southern Africa (AFSA) or the Association of Arbitrators (South Africa) (AASA), choosing the most competent commissioner for parties, they should allow parties to choose their own commissioner or the Arbitration Foundation of Southern Africa (AFSA) or the Association of Arbitrators (South Africa) (AASA) should provide a list of competent commissioners and parties chose the one they want. This can avoid the rate of CCMA commissioners presiding over matters whereby there are conflicts of interests.

Lastly, the Law Society should impose harsher punishments on CCMA Commissioners who mala fide use their position as commissioners to act maliciously and biased in favour of their interests and the interests of parties.

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