

CCMA matters: Who will watch the watchers?

 By [Johan Botes](#)

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Employers and employees rely on employment tribunal commissioners to discern between appropriate and inappropriate conduct, and to remedy the incorrect classification and consequences attached to employee conduct. If an employee committed misconduct, the commission is tasked with considering the facts afresh, and determining the appropriate sanction in deserving cases. Faith in the statutory dispute resolution system hinges on the sound exercise of judgment by commissioners every day. Our legal system even tolerates the fact that a commissioner may occasionally get it wrong. But what happens when the commissioner is the one committing the misconduct?



Source: Andrea De Martin – [123RF.com](#)

This was the interesting, if disturbing, question posed to the labour court in the recent matter of *Glencore Operations SA (Pty) Ltd v CCMA & others* (delivered 28 June 2021). The employer implored the court to review and set aside an arbitration award that held that the company unfairly dismissed an employee, and that it ought to reinstate him. Furthermore, the business sought to review the conduct of another commissioner who became involved in the matter. Whilst it is common to cite the tribunal commissioner who issued the award or ruling in review proceedings, it is quite uncommon for other commissioners to find themselves dragged before court in review applications (where they did not preside over a matter).

The scene that played out at the employment tribunal was that the employee failed to arrive for the arbitration at the scheduled time. The presiding commissioner then (correctly and lawfully) dismissed the matter based on the employee's absence. As the employer and trade union representatives exited the tribunal, dismissal ruling in hand, the procrastinating employee arrived for the arbitration. Another commissioner, Commissioner N, overheard the employee remonstrating and then "ordered" the parties (including the presiding commissioner) back into the venue. For reasons not clear to the casual observer, the presiding commissioner disregarded his dismissal ruling and proceeded with the arbitration!

The review court dealt with the legal technicalities relating to the tribunal's lack of jurisdiction to determine the matter after the commissioner had issued a ruling dismissing the employee's dispute. The judgment reflects on various higher

court utterances on this issue. The high-water mark for the employee appears to be that, at best, he could have referred the matter to arbitration again, with the ruling having the effect akin to striking the matter off the roll or having it withdrawn.

The vexed issue was the conduct of Commissioner N who directed the parties to proceed with the arbitration. Allowing parties not ceased with the dispute to interfere undermines the integrity of the statutory dispute resolution process. As found in most organisations, the CCMA has various levels of functionaries who exercise oversight over the presiding commissioners. One can accept that there should be a level of quality control to limit the risk of a rogue commissioner going off-piste. But to allow a commissioner casually overhearing a discussion between parties to interfere and direct another commissioner to reconsider his findings, smacks of misconduct. Commissioners should be held in high regard by users of the employment tribunal's services. Whilst there will always be winners and losers in dispute resolution, the CCMA's function is undermined by commissioners who conduct themselves as a law unto themselves.

Tribunal commissioners are bound by the statutory Code of Conduct for Commissioners. Interfering in an already determined dispute that was not before you, strikes me (and the court) as conduct inconsistent with the Code. Commissioners are required "... to act with honesty and conduct in a manner that is fair to all CCMA users and the public at large."

Had Commissioner N, overhearing the matter, advised the employee to contact the CCMA, his trade union or legal representative to seek advice on the matter, the employer may not have enjoyed such advice but would hardly have been able to cry foul. One may have even understood if the Commissioner advised the employee to bring a fresh application for arbitration. But in directing another commissioner to rehear the matter under circumstances where the tribunal lacked jurisdiction, he clearly overstepped the mark.

The court ordered the Director of the CCMA to investigate the conduct of Commissioner N. On these facts, one could probably also question whether the presiding commissioner should be reprimanded for allowing his colleague to direct him into rehearing the matter. Whether one or both commissioners erred, ensuring that the functionaries empowered to resolve our labour disputes act beyond reproach is critical to our quest for fair labour practices, labour peace and workplace stability in our jurisdiction.

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