

EMPLOYMENT LAW ALERT

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INCORPORATING
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Black skin, white masks? Can a litigant request the recusal of a presiding officer on the basis of race in labour disputes?

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Black skin, white masks? Can a litigant request the recusal of a presiding officer on the basis of race in labour disputes?

Can an employee in a labour dispute request that a presiding officer recuse themselves on the basis that the presiding officer is the same race as the employer's legal representatives? That was the question that the Labour Court had to determine in *Cell C (Pty) Ltd v Finger and Others* [2006] 10 BLLR 919 (LC).

The facts are briefly as follows: during arbitration proceedings before the Commission for Conciliation, Mediation and Arbitration (CCMA), an employee, who described himself as being a "*Black male*", demanded the recusal of the CCMA-appointed Commissioner, an Indian male, on the basis that the Commissioner and the employer's attorney and counsel were also Indian and therefore the arbitration proceedings were "*racially imbalanced*" against him.

The Commissioner found that this was not a valid ground for his recusal but nonetheless withdrew from the matter and stated that "*the affront to [his] dignity may lead to the seeds of bias being planted*". The Commissioner also made a punitive costs order against the employee's attorney. The employer approached the Labour Court on an urgent basis to set aside the Commissioner's decision to recuse himself.

The Labour Court found that an objection primarily premised on the race of a presiding officer can never in itself be an appropriate ground for them to recuse themselves. Furthermore, the Labour Court noted that South Africa is a multi-racial society and therefore if presiding officers were allowed to recuse themselves on the basis of race then litigation "*would be rendered impossible*". In turning to the Commissioner's decision to recuse himself, the court noted that courts will usually intervene in a situation where a presiding officer has failed to recuse themselves but the converse seldom applies. In conclusion, the court found that it would be "*imprudent*" and could possibly defeat the ends of justice to compel the Commissioner to preside over a case in which he had recused himself because the order could ultimately play into the hands of the employee if the Commissioner's award ultimately went against the employee.

The court noted that the correct cause of action would have been to debar the employee from proceeding with the arbitration until he had apologised to the presiding officer for the baseless allegations. However, another Commissioner had already been appointed by the CCMA. The court ultimately dismissed the employer's application to set aside the Commissioner's decision to recuse himself.

Section 34 Constitution of the Republic of South Africa, 1996 gives everyone the right to have any dispute that can be resolved by the application of law decided in a fair public hearing by an impartial presiding officer. Moreover, section 165(2) of the Constitution requires the courts (and forums such as the CCMA) to apply the law impartially and without fear, favour or prejudice.

Redefining reasonable grounds for the remittance of non-compliance penalties

CONTINUED

The right to fair legal proceedings is constitutionally enshrined and therefore an allegation of bias against a presiding officer is serious and should not be taken lightly. A litigant who brings an application for the recusal of a presiding officer on the basis of alleged bias must demonstrate, amongst other things, that there is a reasonable apprehension of bias.

However, this case has shown that an allegation of bias, premised on the fact that the opposing attorneys, opposing counsel and the presiding officer are of the same race and/or gender and consequently the situation is “*racially imbalanced*” will not suffice as a reasonable ground to request the recusal of a presiding officer, especially in a multi-racial and diverse society like South Africa.

**MICHAEL YEATES AND
THATO MARUAPULA**



The Legal 500 EMEA 2022 recommended our **Employment practice** in **Tier 1** for employment.

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