REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 2579-09

In the matter between:

NICOLENE ERASMUS N.O. **APPLICANT**

and

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION **FIRST RESPONDENT**

COMMISSIONER PIETER GREYLING N.O. **SECOND RESPONDENT**

W. PARKIN **THIRD RESPONDENT**

Heard: 2**0 December 2011**

Delivered: **22 December 2011**

Summary: Review proceedings – Applicant requested postponement on 29 July 2009 based on illness of the main witness contracted on 28 July 2009. Applicant sent a representative to request postponement. Costs were tendered should postponement be granted. Commissioner refused application and continued in default. Applicant took Default Judgement on Review.

Review granted. Default Award set aside. Matter referred back to the CCMA.

JUDGMENT

SWANEPOEL AJ

Introduction

[1] This is an application to rescind the default award handed down by the Second Respondent on 11 August 2009 in which the following award was made:

1.1 That the dismissal of the Applicant [Third Respondent] was declared to have been substantively and procedurally unfair.

1.2 That the Respondent [Applicant] Erasmus Labour Brokers Trust, pay the Applicant [Third Respondent] an amount of R 13 000.00 being the equivalent of two months remuneration as compensation

1.3 That the Respondent [Applicant] pay the Applicant [Third Respondent] the amount of R 5 502.00 being outstanding overtime due to the Applicant [Third Respondent]

1.4 That the total amount of R 18 502.00 must be paid no later than 31 August 2009.

[2] For the rest of this judgement I will be referring to the original Applicant as the Third Respondent.

[3] The Applicant became aware of the judgement and filed this application seeking the following order:

3.1 Reviewing and setting aside the arbitration award of the Second Respondent issued under Case no. NWKD 3733-09 on 11 August

2009 and which was received by the Applicant on 12 August 2009.

3.2 Remitting the matter back to the First Respondent for a *de novo* hearing before another Commissioner.

3.3 Directing any Respondent who opposes this Application pay the costs thereof (*Sic).*

3.4 Affording the Applicant further and/or alternative relief.

<u>The facts</u>

Applicant's submissions

[4] The Third Respondent was employed by the Applicant on 16 March 2009 and deployed to Crest Choice Chicken to render services to them.

[5] On 25 May 2009, the Third Respondent deserted his workplace and failed to render his contractual duties.

[6] Disciplinary procedures were instituted and the Third Respondent was found guilty and dismissed on 10 June 2009.

[7] He referred his dismissal to the First Respondent and the matter was set down as a con/arb for 29 July 2009 in front of the Second Respondent.

[8] The designated official and member of the Applicant, Nicolene Erasmus was tasked to deal with the matter. She lived in Pretoria and the matter was set down to be dealt with in Potchefstroom.

[9] In the afternoon of 28 July 2009 Liebenberg, the main witness of the Applicant was admitted to hospital. Smit, another employee of the Applicant became aware of it and brought it to the attention of Erasmus.

[10] Erasmus decided not to drive the 400 km drive to Potchefstroom and asked

Smit to attend and arrange a postponement.

[11] Smit had no prior knowledge of the matter and attended to the matter the next day. She was not in the position to furnish any information pertaining to the matter to the Second Respondent.

[12] The Second Respondent ruled that Smit had failed to lay a *bona fide* basis on which a postponement could be granted, *inter alia* because:

12.1 She could not provide documentary evidence or specific details pertaining to Liebenberg's [the witness'] admittance to hospital;

12.2 That she did not submit evidence as to an attempt to engage with the opposition in order to secure an agreed postponement;

12.3 She made no attempt to proceed with the matter or call other witnesses.

[13] Postponement was denied and the matter continued in default.

<u>Grounds for review</u>

[14] The Second Respondent committed gross misconduct in that he failed to apply his mind in making the award therein that:

14.1 He did not take into consideration the interest of justice and fairness when considering the application for postponement by no evidence or argument pertaining to this issue was put before him,

14.2 What prejudice was likely to be suffered by either party should postponement be granted or refused therein that

14.2.1 No evidence was presented by the legal representative of the Third Respondent on this issue and

14.2.2 The influence of Liebenberg's hospitalization, being the main witness of the Applicant and the inability for the matter to continue in his absence, led to the Second Respondent not properly considering the severity of the prejudice the Applicant would suffer.

14.3 The possibility of an appropriate order to cure the prejudice suffered was also not properly taken into account. The Second Respondent did not take into account that the Third Respondent's Legal Representative suggested that he could consider an appropriate order as to costs in the event of him considering granting a postponement in order to cure any prejudice that the Third Respondent might have suffered.

14.4 Whether the application was *bona fide* or a mere tactical manoeuvre. The Second Respondent did not take into account the fact that a *bona fide* basis was presented by the evidence that

14.4.1 The unavailability of the Applicant's witness was due to him having been hospitalized,

14.4.2 Smit was not prepared to continue with the arbitration since she was not mandated to deal with the matter,

14.4.3 Smit could not factually continue with the matter since she was not in possession of the file.

[15] It was admitted that Erasmus might have wrongfully pre-empted the Second Respondent's decision to postpone but such action could have been cured by an appropriate order as to costs.

[16] In a supplementary affidavit drafted after the recording was transcribed, Smit stated that she also indicated that if the Applicant was desirous to delay the proceedings it would have objected to the con/arb process, which it did not do.

[17] She also pointed out that even if there were other witnesses to testify, the matter would have had to be postponed for the evidence of Liebenberg since he was

an important witness and that the matter would therefore not have been concluded on 29 July 2009.

[18] The fact that the Second Respondent noted on record that the evidence presented in Afrikaans had to be translated into English was an indication that he was aware that he was making a mistake by not allowing the postponement.

[19] It also surfaced that no application was brought by the Legal Representative of the Third Respondent in terms of Rule 25 of the CCMA Rules pertaining to representation.

Third Respondent's submissions

[20] Since the issue pertaining to the citation was not regarded as that relevant by Mr. Badenhorst, who appeared on behalf of the Third Respondent, I do not intend burdening the record with the submissions on it.

[21] The Contract of Employment was incomplete since *inter alia:*

21.1 It indicated that he was employed as a dispatch supervisor; however he was fulfilling his duties at Crest Choice Chickens,

21.2 His working hours were left blank,

21.3 His salary was R 6 500.00 per month,

21.4 The contract was for a limited duration from 16 March 2009 – 31 March 2009.

[22] After 31 March 2009 no new contract was negotiated and he understood from it that he became a permanent employee.

[23] He stated that the incident that led to his dismissal took place on 25 May 2009 on which day he left his place of employment after he completed his normal 8-hour shift.

[24] He was not prepared to work overtime since he was informed, when he queried the non-payment of the overtime worked in April 2009 that the dates on which he indicated he worked overtime was deleted from the claim he submitted and he was only paid overtime for three public holidays worked in April.

[25] When he discussed the issue with Liebenberg, the owner of Crest Choice Chickens, on 25 May 2009, he was informed that Crest Choice Chickens would not pay for overtime worked.

[26] He discussed the issue at 18:00 with his immediate supervisor he indicated to the supervisor that he would not work more than an 8-hour shift.

[27] He therefore went home at 21:00 on 25 May 2009, having completed his 8-hour shift.

[28] He was telephoned by Liebenberg later that evening and asked why he was not at work. He indicated that since he was not paid overtime he was not prepared to work. Liebenberg informed him that disciplinary action would ensue, which eventually happened on 5 June 2009.

[29] He was found guilty of gross negligence. The Chairman committed a gross error when he arrived at the conclusion that the Third Respondent was supposed to work a 9-hour shift without there having been sufficient evidence for him to draw that conclusion.

[30] The chairperson was a certain Pieterse to whom he had previously complained about his unpaid overtime.

[31] His dismissal was pre-determined and evidence was manufactured. There was no rule in existence pertaining to the number of hours he had to work.

[32] The fact that the Applicant had not supplied a medical certificate to validate the reason for Liebenberg's absence on 29 July 2009 should be noted and taken into account.

[33] Since Smit had no knowledge of the matter, or the basic details such as who the witness was, or the nature of the evidence he was to present, she was not in a position to properly launch a postponement application.

[34] Smit and Erasmus wilfully and intentionally concluded (*sic)* on 28 July 2009 that the matter would merely be postponed on 29 July 2009.

[35] The Second Respondent applied his mind thoroughly when he considered the postponement application brought by the Applicant in that:

35.1 The Applicant was the party that should have presented argument on the interest of justice,

35.2 The prejudice that the Third Respondent would have suffered was properly indicated and contained in the award rendered,

35.3 The Applicant's unpreparedness to continue with arbitration on the day of the hearing had to be placed squarely at the door of the Applicant.

[36] As to the issue raised pertaining to costs, it was raised as an alternative by the Third Respondent's lawyer, should the Second Respondent decided to grant postponement and not offered by the Applicant.

[37] The issue raised by the Applicant that the Second Respondent did not apply his mind when he considered postponement is not a valid reason to review the default award since it was not a defect as envisaged in Section 145 of the Labour Relations Act, act 66 of 1995 as amended.

[38] As to the contents of the Supplementary Affidavit filed, the submission was made that the Applicant threatened the Second Respondent with further steps should the application be refused.

[39] As to the fact that the referral form was completed indicating that the Third Respondent did not know the actual reason for his dismissal he ticked the box "reasons unknown". He was assisted by his father at this time. No objection to legal

representation was raised prior to the Applicant wilfully leaving the proceedings.

The Default Award

[40] The Second Respondent, in his analysis of the evidence and argument pertaining to the postponement application, indicated that even though he was informed that Liebenberg was admitted to hospital, no documentary evidence could be produced to substantiate this averment and Smit could not provide any detail of the reason behind Liebenberg's admittance or detail of the specific hospital he was admitted to.

[41] He also indicated that the Applicant on its own decided that the proceedings would not continue and made no attempts to contact the Third Respondent to obtain its consent to postpone the matter, or to notify it of the impending application for a postponement.

[42] He indicated that the Applicant made no attempts to proceed with the matter by calling other witnesses that might have been necessary to call. No indication was given as to the readiness of other witnesses.

[43] Smit also indicated that she could not proceed since the file was with Erasmus.

[44] He concluded that there was no *bona fide b*asis on which a postponement could be granted; hence the application for postponement was dismissed.

Transcription of the proceedings

[45] From the transcription it seems clear that the Second Respondent demanded to know the extent of the evidence to be presented by Liebenberg. It is also clear that Smit told him that all the evidence pertaining to the matter would be presented by Liebenberg.

Evaluation

The test for Review

[46] The test for the review of the finding of the first respondent is now beyond doubt. In *Shoprite Checkers (Pty) Ltd v Ramdaw NO and Others*[1] it was held as follows:

'In considering whether or not the first respondent's award falls to be set aside on the ground that it is not justifiable in relation to the reasons given for it, I consider that one must have regard to the material that was properly available to the first respondent, the decision he took and the reasons that he gave for such decision. As one does this, one must bear in mind what Chaskalson P said in the Pharmaceutical Manufacturers' case, namely that a decision that is objectively irrational is likely to be made only rarely. Of course, I am saying this insofar as it seems that there is much commonality between justifiability and rationality. One must also bear in mind the importance of maintaining the distinction between appeals and reviews. It must also be borne in mind that the Act contemplates that the disputes that it requires to be referred to arbitration are meant to be put to an end by way of arbitration and that the dispute-resolution dispensation of the Act - which is meant to be expeditious - would collapse if every arbitration award could be taken on review and set aside.'

And

'In the light of what has been said above in regard to Carephone and the Pharmaceutical Manufacturers' case and what was said by the Constitutional Court in the latter case, and in the light of the possibility that the PAJA may well be applicable to arbitration awards issued by the CCMA, I am of the view that it would not serve much purpose for this court to consider whether or not its decision in Carephone was correct and whether or not such decision should be departed from. In those circumstances Carephone stays. This appeal can, therefore, be considered on the basis that, as was decided by this court in Carephone , CCMA awards can be reviewed and set aside if they are not justifiable in relation to the reasons given for them.'

[47] From the outset, the Second Respondent, in finding in favour of the Third Respondent, completely failed to properly determine the evidence before him, thereby committing a gross irregularity. Reference is made to the following extract from *Crown Chickens (Pty) Ltd t/a Rocklands Poultry v Kapp and Others* [2]

1 (2001) 22 ILJ 1603 (LAC).
2 (2002) 23 ILJ 863 (LAC) at 868.

'Arbitration awards issued by the CCMA may be reviewed on any of the grounds set out in s 145 of the Act more especially where the commissioner had committed a gross irregularity in the conduct of the arbitration proceedings. The decision of the arbitrator can also be set aside if it is not rationally related to the purpose for which the power was given from an objective view *(Shoprite Checkers (Pty) Ltd v Ramdaw NO & others (2001) 22 ILJ 1603 (LAC) para [26], Pharmaceutical Manufacturers' Association of SA & others: in re Ex Parte Application of the President of the RSA & others 2000 (3) BCLR 241 (CC)) or if it is not justifiable as to the reasons given. See Carephone (Pty) Ltd v Marcus NO & others (1998) 19 ILJ 1425 (LAC); (1998) 11 BLLR 1093 (LAC) at 1103C*. By rational I understand that the award of an arbitrator must not be arbitrary and must have been arrived at by a reasoning process as opposed to conjecture, fantasy, guesswork or hallucination. Put differently the arbitrator must have applied his mind seriously to the issues at hand and reasoned his way to the conclusion. Such conclusion must be justifiable as to the reasons given in the sense that it is defensible, not necessarily in every respect, but as regards the important logical steps on the road to his order.

A gross irregularity can occur patently where for example the right to cross-examination is denied or latently where the reasoning is so flawed that one must conclude that there has not been a fair trial of the issues. *See Toyota SA Motors (Pty) Ltd v Radebe & others (2000) 21 ILJ 340 (LAC).'*

[48] There was a duty on the Second Respondent to properly determine the evidence before him. This means that the Second Respondent had to properly, and in a reasoned fashion, assess all witnesses, documents, and the probabilities. In *Marapula and Others v Consteen* (Pty) Ltd[3] it was held as follows:

'The credibility of witnesses and the probability or improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of a single investigation into the acceptability or otherwise of the employer's version, an investigation where questions of demeanour and impression are measured against the content of the witnesses' evidence, where the importance of any discrepancies or contradictions are assessed and where a particular story is tested against facts which cannot be disputed and against the inherent probabilities, so that at the end of the day one can say with conviction that one version is more probable and should be accepted, and that therefore the other version is false and may be rejected with safety.'

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3 (1999) 20 ILJ 1837 (LC).

[49] The judgment in *S v Civa*[4] is particularly apposite. In particular, it was held as follows:

'The evidence must be weighed as a whole, taking account of the probabilities, the reliability and opportunity for observation of the respective witnesses, the absence of interest or bias, the intrinsic merits or demerits of the testimony itself, any inconsistencies or contradictions, corroboration, and all other relevant factors. It is in the context of this overall scrutiny of the evidence that demeanour, if there are sufficient indications thereof to be significant, must be assessed.'

[50] Simply put, the Second Respondent, in this instance, did not lawfully, reasonably and justifiably determine the issue of the postponement properly before him, as will be addressed hereunder.

<u>The Postponement Application before the Second Respondent</u>

[51] It is apparent from the award of the Second Respondent that he refused the postponement on two grounds only, being:

51.1 The Second Respondent, in his analysis of the evidence and argument pertaining to the postponement application, indicated that even though he was informed that Liebenberg was admitted to hospital, no documentary evidence could be produced to substantiate this averment and Smit could not provide any detail of the reason behind Liebenberg's admittance or detail of the specific hospital he was admitted to.

51.2 He also indicated that the Applicant on its own decided that the proceedings would not continue and made no attempts to contact the Third Respondent to obtain its consent to postpone the matter, or to notify it of the impending application for a postponement.

51.3 He indicated that the Applicant made no attempts to proceed with the matter by calling other witnesses that might have been necessary to

4 1974 (3) SA 844 (T).

call. No indication was given as to the readiness of other witnesses.

51.3 Smit also indicated that she could not proceed since the file was with Erasmus.

51.4 He concluded that there was no *bona fide b*asis on which a postponement could be granted; hence the application for postponement was dismissed.

[52] In terms of Rule 17(2) of the CCMA Rules a party that wishes to object to Arbitration following immediately after conciliation[5i]must deliver a written notice to the Commission and to the other party, at least 7 days prior to the scheduled date in terms of subrule (1).

[53] No such objection was filed and as such it is indicative that both parties were prepared to continue with the arbitration process should they fail to settle the matter during conciliation.

[54] Rule 23 (3) of the CCMA Rules state that any party may, apply in terms of Rule 31 to postpone an arbitration by delivering an application to the other parties to the dispute and filing a copy with the Commission before the scheduled date of the arbitration.

[55] It is clear from the evidence that prior to 28 July 2009 the Applicant had no intention to apply for the postponement of the arbitration proceedings. It is also clear from the Rule that a formal application must be made, should the parties not be able to agree to postpone the matter.

[56] From the submissions made it is clear that the Applicant found itself in a rather precarious matter since there was no way it could contemplate the unavailability of Liebenberg prior to the afternoon of 28 July 2009. I might interject that in the Applicant's Heads of Argument it stated that Liebenberg was involved in an accident on 28 July 2009. This specific evidence was however not in front of the Second Respondent on 29 July 2009 nor was it proffered in the papers of the

5 Section 191(5A) Labour Relations Act, Act 66 of 1995 as amended.

Applicant.

[57] Given the fact that there was no time to launch such an application, the Applicant had to rely on Smit to apply for a postponement on 29 July 2009.

[58] It is trite that the granting of an application for postponement is not a right but an indulgence granted by the CCMA or the Court in the exercise of a judicial discretion[6].

[59] An Application for postponement must be *bona fide* and not used simply as a technical manoeuvre for the purpose of obtaining an unfair advantage over the opposing party.

[60] In terms of the CCMA Practice and Procedure Manual an application for a postponement brought on the scheduled date of an arbitration should only be considered if it is shown that good cause exists for treating it as an urgent application in respect of which the requirements of Rule 31 may be dispensed with in terms of Rule 31(8). Factors to be considered include, where applicable

60.1 The explanation for not seeking the consent of the other party timeously,

60.2 ....

60.3 ....

60.4 Whether the other party was given as much notice of the application as was reasonably possible and, if not, the explanation for not giving such notice,

60.5 The prejudice that the Respondent would suffer should the application for the postponement be heard on an urgent basis or that the Applicant would suffer should it not be heard.

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6 *Real Estate Services (PTY) Ltd v Smith* (1999) 20 ILJ 196 (LC).

[61] The considerations that are relevant in deciding whether or not to grant a postponement are as follows:

61.1 The Commissioner has a discretion whether an application for postponement should be granted or refused.

61.2 The discretion must be exercised judicially and for substantial reasons and should not be exercised capriciously or on any wrong principle.

61.3 The CCMA/Commissioner must reach a decision after properly directing its/his/her attention to all the relevant facts and principles including ... good cause for a postponement.... The said factors are not individually decisive and the weight to be attached to each factor is within the CCMA/ Commissioner's discretion.

61.4 An application must be made timeously or as soon as the circumstances, which may justify an application, become known to the Applicant. In cases where fundamental fairness and justice justify a postponement, the CCMA/Commissioner may in appropriate cases allow a postponement even though the Application was not timeously made.

61.5 The Application for postponement must always be *bona fide* and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which the Applicant is not legitimately entitled.

61.6 Where a postponement will cause prejudice to the adversary of the Applicant for a postponement, it must be considered whether this can fairly be compensated by an appropriate order of costs or any ancillary mechanisms.

[62] Based on the submission made by the parties, the transcription of the proceedings it seems clear that the Second Respondent focused mainly on the expected contents of the evidence Liebenberg would have presented. He actually

pressed Smit to provide an overview or indication as to why Liebenberg was so important. Smit stated that the whole case turned on his evidence.

[63] It is also apparent that he did not take into account the fact that Smit was not in possession of a file or further information pertaining to the matter.

[64] I do agree with Mr. Wissing that indeed Erasmus acted incorrectly when she opted to not attend and to ask Smit, who clearly was not privy to the details of the matter, Liebenberg's evidence or the nature of his illness, to apply for a postponement.

[65] Be that as it may, clearly, given the significance of Liebenberg's evidence and the fact that he could instruct the Applicant to supply proper documentary evidence of Liebenberg's reason for hospitalization at the next hearing date he decided to deny the application for postponement.

[66] Further to this, it seems abundantly clear that he could have postponed the matter ordering the Applicant to pay the wasted costs of the Third Respondent.

<u>The Principles relating to Postponements *per se*</u>

[67] It is trite that the CCMA was established to ensure the speedy resolution of labour disputes and it is trite that postponements do impact the financials of the CCMA negatively. However, given the surrounding circumstances it would have been fair and just to allow the postponement giving the Applicant the opportunity to a fair and equitable process.

[68] It is apposite to first refer to the judgement in *Carephone (Pty) Ltd v Marcus No and Others*[7]. The Court held as follows on the issue of postponements before the CCMA:

'In a court of law the granting of an application for postponement is not a matter of right. It is an indulgence granted by the court to a litigant in the exercise of a judicial discretion. What is normally required is a reasonable explanation for the need to postpone and the capability of

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7 (1998) 19 ILJ 1425 (LAC).

an appropriate costs order to nullify the opposing party's prejudice or potential prejudice. Interference on appeal in a matter involving the lower court's exercise of a discretion will follow only if it is concluded that the discretion was not judicially exercised (Madnitsky v Rosenberg 1949 (2) SA 392 (A) at 398-9).

There are at least three reasons why the approach to applications for postponements in arbitration proceedings under the auspices of the commission under the LRA is not necessarily on a par with that in courts of law. The first is that arbitration proceedings must be structured to deal with a dispute fairly and quickly (s 138(1)). Secondly, it must be done with 'the minimum of legal formalities' (s 138(1)). And thirdly, the possibility of making costs orders to counter prejudice in good faith postponement applications is severely restricted (s 138(10)).'

[69] The general principles applicable to postponements was aptly summarized in the judgement of *Insurance & Banking Staff Association and Others v SA Mutual Life Assurance Society,* [8] where it was held as follows:

'In an application for postponement, the legal principles established in the High Court over the years apply equally in practice in the Labour Courts. For the purpose of the present application, the following principles apply:

1. The trial judge has a discretion as to whether an application for postponement should be granted or refused. (R v Zackey 1945 AD 505; Myburgh Transport v Botha t/a SA Truck Bodies 1991 (3) SA 310 (Nm).)

2. That discretion must at all times be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons. (R v Zackey ; Myburgh Transport ; Joshua v Joshua 1961 (1) SA 455 (G) at 457D.)

3. The trial judge must reach a decision after properly directing his/her attention to all relevant facts and principles. (Prinsloo v Saaiman 1984 (2) SA 56 (O); Johannesburg Stock Exchange & another v Witwatersrand Nigel Ltd & another 1988 (3) SA 132 (A).)

8 2000) 21 ILJ 386 (LC),

4. An application for postponement must be made timeously, as soon as the circumstances which might justify an application become known to the applicant. However, in cases where fundamental fairness and justice justify a postponement, the court may in an appropriate case allow such an application for postponement, even though the application was not timeously made. (Myburgh Transport ; Greyvenstein v Neethling 1952 (1) SA 463 (C).)

5. The application for postponement must always be bona fide and not used simply as a tactical manoeuvre for the purpose of obtaining an advantage to which the applicant is not legitimately entitled.

6. Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of a Court will be exercised.' What the court has primarily to consider is whether any prejudice caused by a postponement to the adversary of the applicant for a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanisms. (Herbstein & Van Winsen The Civil Practice of Superior Court in SA (3 ed) at 453; Myburgh Transport)

7. 'The Court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the Applicant if it is not.'

8. Where the applicant for a postponement has not made the application timeously, or is otherwise to blame with respect to the procedure which the applicant has followed, but justice nevertheless justifies a postponement in the particular circumstances of a case, the court in its direction might allow the postponement but direct the applicant in a suitable case to pay the wasted costs of the respondent occasioned to such a respondent on a scale of attorney and client. Such an applicant

> might even be directed to pay the costs of the adversary before the applicant is allowed to proceed with the action or defence in the action, as the case may be. (Van Dyk v Conradie & another 1963 (2) SA 413 (C); Tarry & Co Ltd v Matatiele Municipality 1965 (3) SA 131 (E); Myburgh Transport)'

[70] The above principles should have thus been applied by the Second Respondent in determining the postponement application of the Applicant, in terms of the facts set out above. The Second Respondent, in a grossly irregular manner, did not do so.

<u>Application: General principles</u>

[71] The principal reason for the Applicant's application that the matter be postponed was the unavailability of its main witness. This is proper basis for postponement per se (see *Sajid v Mahomed No & Others*[9]; *Mbuli v Spartan Wiremakers CC* [10].

[72] In *Foschini Group (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration and Others* [11] where it was held as follows:

'...The commissioner's failure to grant the applicant an opportunity to call witnesses (by adjourning the proceedings for a short while) was grossly irregular and unreasonable.

By refusing the applicant the opportunity to call witnesses, the commissioner ignored the principle of *audi alteram partem* and denied the applicant a proper opportunity to be heard which prevented a fair trial of the issues. In my view, the failure to observe the *audi alteram partem* rule renders the decision invalid...'

[73] On the common cause facts before the Second Respondent, as set out above, Liebenberg was not available to give evidence. It is also clear that Liebenberg was the principal witness. In fact, even on the default award and the record of the proceedings, it is clear that Liebenberg was the person that caused–

9 (2000) 21 ILJ 1204 (LC) par 24.
10 (2004) 25 ILJ 1128 (BCA).
11 (2002) 23 ILJ 1048 (LC).

according to the Third Respondent – that he left the workplace after his 8-hours had lapsed. It is clear that his evidence was indispensable, and crucial to the arbitration, and is clearly proper cause for a postponement.

[74] In fact, all that the Second Respondent did was to state that despite Liebenberg not being available, the Applicant could have presented the evidence of "other witnesses" who were available. Clearly, this is an untenable finding by the Second Respondent, and clearly not a valid basis at all to refuse the postponement. The Applicant was clearly entitled to call its central witness first. The Second Respondent was in effect saying to the Applicant what witnesses it should call and in what order. Also, even if the Applicant led the witnesses, the matter would still have to postpone to call Liebenberg later, as it is clear that Liebenberg was instrumental and vital to the Applicant's case. The Second Respondent clearly dealt with this issue in a grossly irregular manner.

[75] When the parties were in front of teh Second Respondent a very short period – two months- has lapsed. The Legal Representative of the Third Respondent claimed that he would be severely predujiced should the matter be postponed. He added though, that should the Second Respondent grant a postponement, a cost order could cure the prejudice.

[76] Mr. Badenhorst argued that the CCMA seldom grant cost orders and that as such it would have been unlikely that costs would have been granted.

[77] Mr. Badenhorst is wrong – cost orders as part of the final award is not made easily given the fact that aspects such as fairness and the possibility of a continued relationship must be taken into account.

[78] Wasted costs on the other hand is normally tendered or ordered to compensate for the inconvenience caused by the party responsible for an incidental postponement. The facts *in casu* would have warranted an order pertaining to the wasted costs for the day of 29 July 2009.

[79] Therefore, a further delay of a few months (at most) that may have been

caused by granting a postponement pales by comparison, to the current situation – after all, this matter was enrolled on the Con/Arb roll for 29 July 2009 and taken into account that today, on 22 December 2011 the matter has still to be determined. Any prejudice which may have resulted from the postponement to the Third Respondent could be fully cured by an appropriate interest and costs award (see *Anderson Transport (Pty) Ltd v Maqhina and Others*[12]; *Vorster v Commission for Conciliation, Mediation & Arbitration and Others*[13]). This factor was not considered by the Second Respondent at all.

[80] In essence, the Second Respondent placed requirements of expedition above requirements of the interests of justice. In *Commuter Handling Services (Pty) Ltd v Mokoena and Others*[14]**,** it was held as follows:

‘In this case the unseemly haste with which the commissioner wanted to 'finish' the case seems to have been the prime consideration that caused her to resist an application for postponement for the arrangement of a legal representative for the employer. She did not want to waste a day. She avoided the moment of postponement for the sole reason of avoiding to waste time. She subordinated the consideration of the interests of justice to the interests of speed. To compound issues, when the matter could not in any event be completed that day, she purported to reverse her decision to allow legal representation. Further, given the manifest inability of Ackermann to cross-examine effectively, even in the commissioner's own view, offering Ackermann legal representation was like closing the gate when the proverbial horse was already a considerable distance from the stable. It was in effect too late. Damage had already been done. In those circumstances it makes no difference whether the commissioner denied Ackermann legal representation on the first day, or merely refused a postponement. She misdirected herself grossly in first refusing to grant him an opportunity to arrange for a lawyer, and then, almost as a whim, in purporting to grant it to him at the end of the first day. She acted capriciously. The effective denial of legal representation was clearly going to lead to, as it in fact did in my view, incalculable and irreparable harm to the employer's case. The case could not be saved by her last minute and capricious purported grant of legal representative to the employer.’

[81] The Second Respondent should have assisted and guided Smit in her

12 (2003) 24 ILJ 522 (LC).
13 (2002) 23 ILJ 1899 (LC).
14 (2002) 23 ILJ 1400 (LC).

application pertaining to the requirements for a postponement. She was a lay person and he clearly, given the questions he asked, he should have guided her on the requirements or facts he needed to duly consider the application as was found in Xinwa & Others v Volkswagen of SA (Pty) Ltd[15], not simply kept on demanding to know the relevance and/or extent of Liebenberg's evidence.

[82] Based upon the above principles and facts, the Second Respondent, had he exercised his discretion judicially and properly, should have granted the Applicant's postponement application. He thus committed a gross and reviewable irregularity in his determination of, and refusal of, the postponement application.

[83] The basic principle applicable in this instance has been enunciated in President of the Republic of South Africa and Others v South African Rugby Football Union and Others[16]***,*** where it was held as follows at 65A - C:

'Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see s 33 as a mere codification of common-law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important, though not necessarily decisive, in determining not only the scope of s 33, but also the content.

The principal function of s 33 is to regulate conduct of the public administration and, in particular to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will of course, be informed by the common-law principles developed over decades.'

[84] In the *Simelane and Others NNO v Seven-Eleven Corporation SA (Pty) Ltd and Anothe*r[17] matter it was held as follows:

'To decide whether an administrative action has been taken fairly it is crucial that the decision-making process be viewed as a whole. The demands of fairness will depend on the context of the decision viewed within the procedural context in which it arises. An essential

15 (2003) 24 ILJ 1077 (CC).
16 2000 (1) SA 1 (CC).
1713 2003 (3) SA 64 (SCA).

feature of the context is the empowering statute, which creates the discretion, as regards both its language and the shape of the legal and administrative system within which the decision is taken'

[85] In the *National Director of Public Prosecutions and Another v Mohamed NO and Others*[18] matter the following was held:

'It is well established that, as a matter of statutory construction*, the audi* rule should be enforced unless it is clear that the Legislature has expressly or by necessary implication enacted that it should not apply or tha*t there are exceptional circumstances which would justify a court not giving effect to it. R v Ngwevela above n 22 at 131H; Du Preez and Another v Truth and Reconciliation Commission 1997 (3) SA 204 (A) (1997 (4) BCLR 531) at 231F; Cooper NO v First National Bank of South Africa Ltd 2001 (3) SA 705 (SCA) paras [23] - [25]; and Transvaal Agricultural Union v Minister of Land Affairs and Another 1997 (2) SA 621 (CC) (1996 (12) BCLR 1573) para [25].*

For stronger reasons this approach should apply when construing a statutory provision in order to determine its constitutionality. Accordingly, in construing s 38, where no express reference is made to the audi principle, or its exclusion, the question to be asked is not whether the audi principle can be implied in the section, but rather whether it has been excluded from the section by clear necessary implication, or whether there are exceptional circumstances which would justify a court not giving effect to it.'

[86] In this regard, the judgment in *N F Die Casting (Pty) Ltd v Metal & Engineering Bargaining Council and Others*[19] is apt, where it was held as follows:

'I am of the view that the application for postponement was not properly entertained on its merits because the arbitrator took the view that, having regard to the provisions of rules 17 and 19, it was not properly before him. The construction placed on these rules by the arbitrator was erroneous in law, since the rules are plainly designed for cases in which an application for postponement is made in the ordinary course.

a. Where the application is made from the bar, it is plain that these two rules, and in particular rule 17 cannot apply.

18 2003 (4) SA 1 (CC).
19 (2002) 23 ILJ 924 (LC).

b. The arbitrator's belief that the rules have the effect of precluding any application from the bar had the result that he failed to consider the application for a postponement on its merits, and in consequence, improperly rejected it. The approach that the arbitrator took was such that he shut his mind to the submissions that would have been made to him on the merits, and as a result, failed to properly apply his mind to the matter. In consequence, he rejected an application that should have been entertained by him and considered on its merits, thereby committing a reviewable irregularity.

c. The standpoint adopted by the arbitrator was based on a reading of the CCMA Rules that was, in the circumstances, vitiated by error of law so drastic as to constitute a material irregularity in the circumstances. The arbitrator by misconstruing the rules in the way he did, took a blinkered approach to the provisions of the rules and thus failed to apply his mind to the merits of the application.

d. If he had not committed this irregularity, he would have considered the application on its merits and decided it accordingly. It would have been open for him to decide that the application for postponement should be granted and then to decide, once the application for withdrawal of the concession and for a declaration that the referral was out of time and thus null and void had been made, to consider that on its merits and potentially to decide in favour of the applicant. This irregularity prevented a fair trial of the issues and a failure of justice.'

[87] Given all of the above I make the following order:

<u>Order</u>

[88] The Default Award issued by the Second Respondent is hereby set aside.

[89] The matter is referred back to the First Respondent to be set down for Arbitration to be conducted by another Commissioner at its earliest convenience.

[90] I make no order as to costs.

A.H. Swanepoel

Acting Judge of the Labour Court

<u>APPEARANCES</u>

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FOR THE RESPONDENT: Mr. Hennie Badenhorst of Hennie Badenhorst Attorneys

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