



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable/~~Not Reportable~~

Case No JR 1207/06

In the matter between:

MODIKWA PLATINUM MINE (PTY) LTD

Applicant

and

THE COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

First Respondent

RAYMOND DIBDEN

Second Respondent

BETUEL MOIME

Third Respondent

NATIONAL DOMESTIC, SECURITY,

AGRICULTURAL AND ALLIED WORKERS' UNION

Fourth Respondent

Heard: 13 December 2011

Delivered: 19 January 2012

Summary: An unfair dismissal dispute referred to a con-arb process. Commissioner has discretion to continue or postpone the arbitration. Commissioner refused to accept that the applicant had lodged an objection to the process and continued with the arbitration. This was held to be irregular. Applicant sought to stand matter down to get his witnesses. This was refused. Commissioner had misdirected himself. Award set aside.

JUDGMENT

SEEDAT AJ

[1] This is an application for the review of an arbitration award issued by the CCMA on 19 April 2006 on the ground that the Commissioner had committed a gross irregularity as envisaged in section 145(2)(a)(ii) of the Labour Relations Act (LRA).¹

Background

[2] Consequent to his dismissal, the employee, assisted by his union, referred an unfair dismissal dispute to the CCMA. It was subsequently set down as a con-arb process in terms of section 191(5A) of the LRA.

[3] A con-arb is a process that was introduced from 1 August 2002 specifically to reduce the often inordinate delay between conciliation and arbitration by permitting a commissioner to proceed immediately to arbitration in the event that the dispute was not resolved at conciliation. It is a compulsory process as regard to probation but requires the acquiescence of both parties in the case of a dismissal.

[4] The applicant objected to the con-arb process as section 191(5A)(c) of the LRA allows it to do. Though addressed to the provincial office of the CCMA in Witbank, the notice was faxed through to Polokwane. A copy of the objection was delivered to the satellite office of the CCMA in Burgersfort where the hearing was scheduled to be heard.

¹ 66 of 1995.

[5] On the unsuccessful conclusion of the conciliation hearing, the commissioner insisted on proceeding with the arbitration. He refused to accept the written notice of objection to the con-arb process asserting that the objection should have been sent to the Witbank office.

[6] Letebele, the applicant's representative at the hearing then requested a short adjournment so as to fetch witnesses for the arbitration from the applicant's workplace a little distance away. The commissioner refused.

[7] Letsebele, not having prepared for the arbitration and without any witnesses asked to be excused and the arbitration continued in his absence.

[8] An award was subsequently issued under the hand of the commissioner on 11 April 2006 holding the dismissal to be unfair and reinstating the employee.

Objection to the con-arb process

[9] Section 191(5A) permits the CCMA to immediately arbitrate a dispute if the conciliation has failed. Except for a dismissal of an employee for any reason relating to probation when the con-arb process is compulsory, in other disputes a commissioner can only arbitrate if no party has objected to the matter being dealt with as a con-arb.

[10] Landman J in *Ceramic Industries Ltd v Commission for Conciliation, Mediation & Arbitration and Another*² wrote:

'In my opinion the result of the provisions relating to con-arb is that if one party objects to taking part in con-arb the CCMA is precluded from invoking s 191(5A). The CCMA may not rely on rule 17 which provides for the conducting of the con-arb process.'

[11] In *Inzuzu IT Consulting (Pty) Ltd v Commission for Conciliation Mediation & Arbitration and Others*³ De Swardt AJ held that:

'The provisions of CCMA rule 17 make it clear that a commissioner is not empowered to

² (2005)26 ILJ 89 (LC) at 91F-H.

³ (2010) 31 ILJ 2638 (LC at 2645D-E)

proceed with the arbitration in circumstances where one of the parties fails to appear at con-arb proceedings. When a party is in default of appearance, the commissioner concerned may deal with the conciliation proceedings, but not the arbitration. The arbitration must be scheduled for a later date.'

[12] The learned judge based his finding on CCMA rule 17(9) which provides that should an arbitration not commence on the date specified by the CCMA, then the CCMA must schedule the matter for arbitration in the presence of the parties or by issuing a notice of set down.

[13] Steenkamp J in *Pioneer Foods (Pty) Ltd t/a Sasko Milling & Baking (Duens Bakery) v Commission for Conciliation, Mediation and Arbitration and Others*⁴ disagreed with this approach of De Swardt AJ in *Inzuzu*. The learned judge analysed CCMA rule 17 and came to the conclusion that rule 17(9) cannot be reconciled with section 191(5A)(c). However, for the learned judge the provisions of section 191(5A)(c) are peremptory in that 'the commissioner *must commence* the arbitration immediately after certifying that the dispute remains unresolved if no party has objected to the con-arb.'⁵ (emphasis supplied)

[14] While the learned judge's reasoning cannot be faulted, regard must be had of the general provisions pertaining to arbitrations.⁶

Section 136(1) states:

'If this Act requires a dispute to be resolved through arbitration, the Commission *must* appoint a commissioner to arbitrate the dispute...' (emphasis added)

Section 138(5) then provides:

'If a party to the dispute fails to appear in person or to be represented at the arbitration proceedings and that party-

a) had referred the dispute to

4 (2011) 32 ILJ 1988 (LC).

5 *Pioneer Foods (Pty) Ltd t/a Sasko Milling* at para 35.

6 Rule 17(8) says that the provisions of the LRA and the Rules that are applicable to conciliation and arbitration apply to con-arb proceedings.

the Commission, the commissioner may dismiss the matter; or

b) had not referred the dispute to the Commission, the commissioner may-

- i) continue with the arbitration proceedings in the absence of that party; or
- ii) adjourn the arbitration proceedings to a later date.’

[15] There is no reason why the practice should be different in a con-arb process for a dismissal dispute where the non-referring party, usually the employer, is not present at the arbitration. The commissioner retains the discretion to either continue with the arbitration or to postpone it. This view is consistent with section 138(5) and ties in with Steenkamp J’s argument in *Premier Foods* that even though the party steps into arbitration, the commissioner ‘retains a discretion to adjourn or postpone the proceedings after that’.⁷

[16] In the present case, apart from questioning the service of the objection to the con-arb process, the commissioner was not satisfied ‘that the objection had been upheld by the Commission prior to date of set down.’ Neither section 191(5A) of the LRA nor rule 17 of the CCMA requires that the objection to a con-arb must be considered. The fact of an objection itself is sufficient to stultify the process.

[17] By insisting on continuing with the arbitration in the face of an objection, the commissioner had committed a gross irregularity.

Request for a short adjournment

[18] As a general rule, courts are not amenable to postponements and have discouraged commissioners from adopting a casual approach to such applications.⁸

⁷ *Pioneer Foods (Pty) Ltd t/a Sasko Milling* at para 45.

⁸ *Ross & Son Motor Engineering v CCMA and Others* [1998] 12 BLLR 1168 (LC); *Carephone (Pty)*

Grogan relying on *Keerom Casa Hotel v Heinrichs and Another* [1999] 1 BLLR 27 LC, says that the 'proper test is whether the other party will suffer irreparable harm if the matter is postponed'.⁹

[19] Here, the employer did not seek a postponement but only a short adjournment of about an hour to allow witnesses to be brought to the hearing. The commissioner refused saying it was not the 'the Commissions [sic] responsibility to mollycoddle parties to attend processes' and that there is a consideration of costs in rescheduling cases.¹⁰

[20] The commissioner clearly misdirected himself. The employer was not applying for a postponement. The employee would have suffered neither irreparable harm nor any prejudice if the matter had stood down for approximately an hour.

[21] I am of the view that the refusal of the commissioner to adjourn the matter for a short while is a decision that a reasonable decision maker could not reach. The decision of the commissioner should be reviewed and set aside and remitted to the CCMA to be heard afresh by another commissioner.

[22] The applicant did not ask for costs.

Order

1. The award of the second respondent dated 11 April 2006 under CCMA case reference number MP143-06 is reviewed and set aside.
2. The dispute between the applicant and the third respondent is referred back to the first respondent for a rehearing before a commissioner other than the second respondent.
3. There is no order as to costs.

Ltd v Marcus NO (1998) 19 ILJ 1425 (LAC)

⁹ John Grogan *Labour Litigation and Dispute Resolution* (2010) Juta: Cape Town 128

¹⁰ But see *Western Cape Southern Suburbs Real Estate (Pty) Ltd t/a Seef Properties v Commission for Conciliation, Mediation & Arbitration* (2009) 30 ILJ 2158 (LC) where the court said that costs should not be an 'overriding consideration' (para 26).

SEEDAT AJ

APPEARANCES:

FOR THE APPLICANT: Advocate M Van As

Instructed by: Cliffe Dekker Hofmeyer INC

FOR THE RESPONDENT: There was no appearance