



REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR496/12

In the matter between

STANDARD BANK OF SOUTH AFRICA

APPLICANT

and

COMMISSIONER BABALO METU N.O

FIRST RESPONDENT

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION

SECOND RESPONDENT

ISAAC THABANG MOSETLE

THIRD RESPONDENT

WALTER KAGISO MNISI

FOURTH RESPONDENT

THULANI MKHWANAZI

FIFTH RESPONDENT

REUBEN GOILSEMANG

SIXTH RESPONDENT

Heard: 15 January 2011

Delivered: 23 April 2013

Summary: Objection to con-arb; application for the postponement of arbitration proceedings; objection to consolidation of matters referred to arbitration

JUDGMENT

GAIBIE, AJ

- [1] This is an application to review and set aside an arbitration award made by the first respondent on behalf of the second respondent. The first respondent will be referred to as the 'commissioner'. In the award, the commissioner gave his reasons for refusing a postponement of the proceedings on the day on which the con-arb had been scheduled.
- [2] After dismissing the application for postponement and related matters, the commissioner proceeded to deal with the merits of the dispute. The commissioner found that the third to sixth respondents were unfairly dismissed, and awarded them reinstatement backdated to the date of their dismissal, and specified the amounts that they were entitled to in relation thereto.
- [3] The applicant, Standard Bank of South Africa Ltd, attacks the arbitration award in relation to the following three issues: 1) the applicant's objection to the con-arb process; 2) the applicant's application for the postponement of the arbitration proceedings; and 3) the applicant's submission that the matter of the four individual respondents was incorrectly consolidated.
- [4] The applicant contends that the commissioner committed a reviewable irregularity by unreasonably and/or incorrectly failing to properly consider the merits of the objection in relation to or the merits of the issues related to the con-arb notice, the application for postponement and the objection to the consolidation of the matters.

Con-arb notice

- [5] I proceed to deal with each of these issues in turn.

It is common cause that the applicant received the notice of set down of the con-arb in relation to the referral of 'Masetle and Three Others', with no indication as to who the three others were, on 20 December 2012.

- [6] It is also common cause that this is a matter that involved no less than six referrals of the dispute to the CCMA, four of the referrals were in relation to the individual employees, and the other two referrals were in respect of "Masetle and One Other", and the final one being for "Masetle and Three Others".

- [7] The applicant sent a letter objecting to the con-arb process to the CCMA and the employees by registered mail, in a letter dated 4 January 2012, which was dispatched by registered post on 5 January 2012. The applicant, it appears, also attempted to send the objection by telefax unsuccessfully. In terms of the Rules of the CCMA, service by registered post will be deemed to have been received on the seventh day after dispatch. That being the case, the objection would have been deemed to have been received by close of business on 12 January 2012, the day on which the con-arb was scheduled.

- [8] The commissioner in his award indicated that the applicant was unable to furnish the CCMA with a copy of the successful telefax transmission report and that in his view the applicant had not complied with Rule 7 of the CCMA Rules pertaining to the filing of documents. Despite receipt of the notice of the con-arb and proof that the notice of objection had been served by registered post, the commissioner indicated that that was simply not sufficient and that nothing was before the CCMA for it to deal with it on that basis.

Application for postponement

[9] The second issue that the commissioner dealt with was the application for postponement. The applicant applied for the postponement of the arbitration proceedings on the basis that being faced with the dismissal of the objection to the con-arb process, it had no option at that stage but to apply for the postponement of the proceedings.

[10] The applicant was, according to Mr Alastair Kennedy, its representative, under the impression that the documentation for the objection to the con-arb was in order. Kennedy also explained that:

‘He was standing in for a colleague who was not able to attend to the conciliation on 12 January;

The applicant had not had a proper opportunity to prepare all the required documentation because it was under the impression that the conciliation was for Masetle’s matter originally and not for all four employees;

He did not have the mandate to run with arbitrations on behalf of the bank.’

[11] In response to the application for postponement, the employees did not address the issues raised by Kennedy, they simply asserted, in broad terms, that the matter should be proceeded with.

[12] The commissioner was of the view that the applicant had not provided sufficient grounds that would justify a postponement, that there had not been any tender for costs flowing from the set down and that he was inclined to proceed with the arbitration. The commissioner also indicated that the notice of set down reflected that the matter was in respect of four employees and that if the applicant was uncertain as to who the other applicants were, they

had ample time from 20 December 2011 to find out who the others were.

- [13] The commissioner also indicated that Kennedy had informed him that he was standing in for a colleague but did not give details as to why he was not available or what had happened to the colleague. Despite these remarks, it is apparent from the award, that the commissioner eventually dismissed the application for postponement on the basis that the applicant had not complied with the Rules for applying for a postponement of the proceedings.
- [14] In other words, that given that the Rules provide that this must be done prior to the actual hearing, and on application, the application for postponement was dismissed. Consequently, the commissioner lost focus of the circumstances in which the application for postponement was made. It was clearly made after the objection to the con-arb was made, it must therefore be seen in its totality.
- [15] The commissioner failed, in my view, to weigh up the prejudice which would be caused to the applicant, and the prejudice that would face the individual employees or the third to sixth respondents. The commissioner did not also consider the fact that the applicant had genuinely made an attempt to serve and file the objection to the con-arb notice and that non-receipt of this was delayed in terms of the Rules by less than a day.

Consolidation of matters

- [16] The third issue that the commissioner had to deal with was in relation to the consolidation of the referrals. The applicant, in relation to both the postponement and the consolidation issues, contended that the commissioner acted unreasonably and/or incorrectly or committed a reviewable irregularity in failing to

properly deal with or consider the merits of the application for the postponement and the merits of the objection to the consolidation of the matters.

- [17] In the arbitration proceedings, the applicant objected to the consolidation of the various referrals. In the context of applying for the postponement of the matter, Kennedy said the following:

‘We have not had a proper opportunity to prepare all the required documentation, especially because the matter was for originally for Masetle, the additional, we do not have the documentation with us to proceed with the arbitration.’

- [18] Implicitly, it appears that Kennedy suggested that the applicant was simply not in a position to deal with all four matters on that day. Apart from the above excerpt, the issue of the consolidation of the various referrals was not properly addressed by the commissioner. He indicated in his award, at paragraph 2.3.3, that the employees informed him that they had been suspended on the same day for a similar transgression. That they contended, in addition, that to a large extent their cases were similar and that they were of the view that it was more than likely that the same witnesses would be called to present the evidence.

- [19] It is possible that these issues were raised or discussed before the recording mechanism was switched on during the arbitration proceedings, in which case the commissioner was obliged to weigh the relative contentions in relation to this issue, that raised by the applicant and that raised by the individual employees. The commissioner did not do so, and then with no reference to the issues raised by the parties in relation to the consolidation issue, indicated the following as his reasons for not agreeing to the objection relating to the consolidation of the matters:

‘There is no prejudice to be suffered by any parties if the disputes

are fused together and heard at the same time. On the contrary, the resources shall be efficiently utilised and expeditious finalisation of the dispute shall be efficiently achieved.'

- [20] With respect, that view does not take into account the issues raised by the applicant, and in fact, does not deal with the contradictory views held by both the parties in relation to that matter. It would have been prudent in those circumstances for the commissioner to consider the matter properly and comprehensively on another occasion.
- [21] Rule 23 of the Rules of the conduct of proceedings before the CCMA regulates the postponement of arbitrations set down before commissioners. In summary, that Rule indicates or envisages postponements either by agreement or on application. In the first instance, the parties to a proceeding may agree to postpone a matter provided there is written agreement. In the second instance, an application must be brought in terms of Rule 31 and may be filed at any time before the scheduled date of the arbitration.
- [22] Rule 31 contemplates applications on motion. Finally, there is a third option, and in terms of Rule 31(10), a commissioner may despite the provisions of the Rule, determine an application for postponement in any manner that the commissioner deems fit. Once the commissioner in this matter commenced hearing the application for postponement, he was seized with the matter and should have applied the relevant principles in determining whether and in what circumstances the postponement should be granted.
- [23] For the reasons indicated already, and based on the well-established and often quoted test to be applied in applications of this nature, it is my view, that the decision reached by the commissioner was not a decision that a reasonable decision

maker would have reached. In fact, it is my view that the commissioner in this matter was far too hasty in proceeding with the merits of the matter.

[24] I, accordingly, make the following order:

1. The arbitration award dated, 23 January 2012, under case number GAJB32889-11, is reviewed and set aside.
2. The matter is referred back to the CCMA for a rehearing on the merits before another commissioner.
3. There is no order as to costs.

Gaibie, AJ

Judge of the Labour Court of South Africa

Appearances

For the Applicant: Mr B Masuku of Tabacks Attorneys

For the Respondents: Adv J. Botha

Instructed by: MD Swanepoel Attorneys

LABOUR COURT