



**REPUBLIC OF SOUTH AFRICA
IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT**

Not reportable
Case no: JR 1231/12

In the matter between:

PAUL REFILOE MAHAMO

Applicant

And

**CMC di RAVENNA SOUTH AFRICA –
PG MAVUNDLA JOINT VENTURE**

First Respondent

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

Second Respondent

BHEKI KHUMALO N.O

Third Respondent

Date heard: 17 December 2014

Date delivered: 09 April 2015

Summary: Review application. Incomplete record and no reviewable irregularity shown. CCMA in any event has a discretion to grant or refuse a postponement. No reasonable explanation for delay in launching review. Condonation application and review dismissed.

JUDGMENT

VAN DER MERWE AJ

Introduction

- [1] This is an unopposed Review Application in which the Applicant (the “employee”) seeks the review and setting aside of the Third Respondent's (“the arbitrator”) arbitration award in terms of Section 145 of the Labour Relations Act 66 of 1995, as amended.
- [2] The matter concerns the refusal of the arbitrator to grant a further postponement to the employee and proceeding to hear the matter without the employee having legal representation present.
- [3] The employee was employed by the First Respondent on the 12th of March 2008 as a mine shift boss on a project based employment contract for a project numbered 4600008065 which was phase one (main access tunnel) at Ingula Pump Storage Scheme.
- [4] According to the CCMA default award, the employee was charged with the failure to observe safety rules and regulations and a disciplinary hearing was held on 18 July 2008. The Applicant pleaded guilty and was subsequently dismissed on the 23rd of July 2008.
- [5] The employee then proceeded to refer a dispute regarding an unfair dismissal to the Second Respondent (the “CCMA”) for conciliation. The matter could not be resolved and was subsequently referred to arbitration. The matter was heard by the arbitrator on the 12th of October 2011.
- [6] At the arbitration proceedings, the First Respondent called three witnesses in support of its case. The First Respondent closed its case on the 12th of

October 2011 but due to time constraints the matter could not be finalised and was postponed *sine die*.

- [7] The matter was to reconvene on the 11th of November 2011, but the employee's legal representative, Mr Tshifura, could not attend as he was to appear in the Labour Court on that day. The matter was therefore postponed by the arbitrator. The CCMA then proceeded to set the matter down for continuation on the 10th of January 2012 at 12h00.
- [8] The employee's attorney, Mr Tshifura, received notice on the 21st of December 2011 that he was to sit for a supplementary examination on 10 January 2012. Mr Tshifura contends that he had no support staff available to him and therefore could not type and send a letter to the CCMA and the First Respondent to request a postponement.
- [9] On the 3rd of January 2012 Mr Tshifura managed to dictate the letter requesting postponement of the matter scheduled for 10 January 2012.
- [10] The First Respondent contacted the employee's attorney on 9 January 2012 informing him that the First Respondent would oppose the postponement. The employee's attorney also ascertained that the CCMA had not received his letter of 3 January 2012 and as such Mr Tshifura faxed through the letter once more.
- [11] The employee's attorney thereafter contacted the arbitrator who indicated that he would not grant a further postponement and that the matter would commence on the scheduled date.
- [12] The employee attended the arbitration proceedings on 10 January 2012 without the presence of his attorney and attempted to request a further postponement which was opposed by the First Respondent. The request was denied by the arbitrator.
- [13] The arbitrator stated in paragraph 3 of his award that:

"By their letter dated 3/1/2012 which was faxed to CCMA on the 9/1/2012, the applicant's attorney Mr Tshifura purportedly applied for postponement. Attached to such letter was a notice to Tshifura of a supplementary examination scheduled for 10/1/2012. The applicant appeared without a representative on the 10/1/2012 and further requested a postponement. The respondent's representative opposed the postponement application. I considered and refused the postponement application. Reasons for my decision are that the applicant's request does not comply with Rules 23 and 31 of the CCMA rules and by his own admission, Tshifura became aware of the supplementary examination date on 21/12/2011 but failed to apply for postponement."

- [14] The arbitrator dealt with various issues in his award and concluded at paragraph 12¹ that:

"The second issue to be determined is the fairness of the applicant's dismissal. The evidence tendered by the three witnesses who worked with the applicant at the time of his dismissal was not unchallenged. The applicant chose not to testify. Therefore based on such evidence, I find that on the balance of probabilities, the applicant's dismissal was procedurally and substantively fair. In terms of section 192 of the Labour Relations Act, the employer bears an onus to justify the dismissal. In this case I find that the respondents succeeded to justify the dismissal of the applicant, therefore, in the circumstances, I deem the following award fair and equitable."

Review Proceedings - Incomplete Record

- [15] This court is presented with an incomplete record of the CCMA proceedings. The employee's Supplementary Affidavit in fact records that the record of arbitration proceedings is incomplete and that the Commissioner's notes are not clear and cannot be read². In addition, even though the Notice of Filing by

¹ See page 32 of the court bundle

² See Record page 54 paragraphs 4 and 5

the CCMA is included in the paginated Labour Court Bundle ³ which indicates that the Rescission Application dated 10 February 2012 was filed, this application was not placed before this court in the current proceedings. Therefore the record of the rescission proceedings is also incomplete.

- [16] A complete record allows a review judge to ascertain the full facts that were before an arbitrator.
- [17] It is true that sometimes, in the absence of a complete record, the courts have been robust in determining the matter on the available information. But these instances are limited to where the "irregularity may be so patent from the award that a record might not be necessary" or because there was no "material dispute of fact going to the very heart of the review."⁴
- [18] The Applicant was obliged to place a complete record before this court and in the absence thereof, this court is in no position to properly adjudicate the review application before it and the review application should on this ground alone be dismissed.⁵
- [19] The employee's legal representative, at the conclusion of his submissions, requested a postponement in this court so as to allow him to obtain a complete record of the CCMA proceedings. The request for a postponement is refused as the employee party had sufficient time to file the record prior to the enrollment date and, in any event, I do not find any merit in the employee's review application as will appear from what is stated below.

³ See Record pages 43 and 57

⁴ See *Shoprite Checkers (Pty) Ltd v CCMA* (2002) 23 ILJ 943 (LC) at par 11, *Ram Hand-to-Hand Couriers v National Bargaining Council for the Road Freight Industry* C174, 2007 and *Lifecon Special Health Services (Pty) Ltd v CCMA et al* DA 15/02.

⁵ See *Metalogic Engineering and Manufacturing CC v Fernandes and Others* (2002) 10 BLLR 985 (LC).

Review Proceedings

- [20] According to the Notice of Motion the employee seeks the review and setting aside of the arbitrator's rescission ruling dated 15 March 2012 alternatively the review and setting aside of the arbitrator's default arbitration award of 11 January 2012.
- [21] The employee however fails to allege any reviewable irregularities in his Founding Affidavit as supplemented in his Supplementary Affidavit.
- [22] The only complaint appearing from the papers seems to be that the employee is alleging that it was improper for the arbitrator to refuse the request for postponement on 10 January 2012 since the employee was previously represented by his legal practitioner. It is patently clear that this attack is only against the so-called "Default Award" and there is thus no challenge on the papers to the Rescission Ruling.
- [23] The challenge to the "Default Award" is also doomed to fail. The arbitrator had a discretion to determine whether a postponement should have been granted. This discretion is judicially exercised. I find nothing untoward in the arbitrator's decision to refuse the postponement especially when the following factors are taken into account:
- 23.1 as stated by the arbitrator, the employee's request for a postponement did not comply with rules 23 and 31 of the CCMA rules and the employee's legal representative, by his own admission, became aware of his unavailability on 21 December 2011;
- 23.2 the applicant' and his legal representative should have been aware of the fact that this matter has already been postponed once before and that it is generally accepted that unlike in the courts of law, postponements in arbitration proceedings are not readily granted; and

23.3 the employee and his legal representative or an alternative legal representative should have become prepared to the arbitration on 10 January 2012 especially given the fact that they were informed that the request for postponement would be opposed and were given prior warning that the arbitrator was not willing to postpone the arbitration⁶.

[24] The review of the default award is furthermore excessively late. The proceedings should have been instituted within six weeks of receiving the award according to Section 145 (i)(a) of the Labour Relations Act, No. 66 of 1995, as amended. The review proceedings were only instituted on 8 June 2012 thus some 15 weeks late. Condonation in this regard is refused for the reasons set out below.

Condonation

[25] In *Melane v Santam Insurance Co Ltd*⁷ Holmes JA explained the relevant principles applicable to an Application for Condonation as follows: “the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant, is the degree of lateness, the explanation thereof, save of course that if there are no prospects of success there would be no point in granting condonation”

[26] No reasonable explanation has been offered on the papers for the delay of some 15 weeks.

[27] The prospects of success in these review proceedings are also very poor given the above and the fact that the employee pleaded guilty to the offence in the disciplinary hearing and chose not to testify and refute the evidence offered by the First Respondent’s witnesses in the arbitration proceedings. I therefore cannot see any reason for this Court to overturn the ruling of the arbitrator.

⁶ See Record page 11 paragraph 14)

⁷ 1962 (4) SA 532 (A)

Conclusion

[28] In the circumstances, I make the following order:

28.1 The Applicant's Condonation Application is dismissed.

28.2 The Applicant's Review Application is dismissed.

28.3 There is no order as to costs.

G Van Der Merwe

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: R T Tshifura Attorneys

For the Respondent: Unopposed