



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Case no: JR2647/13
GAJB8509-13

Not Reportable

In the matter between:

ANDY EKSTEEN

Applicant

and

MARKETECH HOLDINGS (PTY) LIMITED

First Respondent

MARKETECH ENTERPRISES (PTY) LIMITED

Second Respondent

COMMISSIONER RICHARD BYRNE N.O

Third Respondent

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION HELD AT JOHANNESBURG**

Fourth Respondent

Heard: 8 July 2015

Delivered: 15 July 2015

**Summary: Unopposed section 158(1)(g) application to review a ruling by a
Commissioner who wrongly refused a postponement application
in a part-heard matter**

JUDGMENT

LEPPAN, AJ

Introduction

- [1] This matter is an unopposed review in terms of section 158(1)(g) of the Labour relations Act 66 of 1995 ("the LRA"), wherein a Ruling handed down by the Third Respondent is sought to be set aside.
- [2] The Applicant and the First and Second Respondents agreed that the review application will not be opposed by the First and Second Respondents and that no relief (including legal costs) will be claimed against them. This is evidenced by the email annexed to the Applicant's Founding Affidavit from the First and Second Respondent's attorneys, annexure "A" thereto which reads:
- "Dear Sir*
- We have taken instructions from our client. Our client will not oppose the review application on condition that no costs order is sought against our client."*¹
- [3] Further, no notice of intention to oppose was entered by the Third and Fourth Respondents (being the CCMA and CCMA Commissioner Richard Byrne).
- [4] The First and Second Respondents launched an urgent application out of the Labour Court seeking to stay the arbitration proceedings at the CCMA. The matter was set down for argument on 17 October 2013 and the parties were awaiting the outcome before taking any further decisions on the way forward, i.e. the proceedings before the CCMA.
- [5] Judgment in the Labour Court in the urgent application was handed down in favour of the Applicant in these proceedings. The order was handed down dismissing the urgent application launched by the First and Second Respondents on 18 October 2013. It serves to mention that the arbitration first commenced on 13 August 2013 before the Third Respondent and was a part-heard matter that was scheduled to continue on 25 October 2013. Following upon the outcome of the urgent application, the Applicant understood that this placed the First and Second Respondents in a predicament as their Counsel

¹ Rule 23 (2) is repeated in the revised rules of the CCMA.

was involved in a High Court trial on that date. Furthermore, the Applicant was in Mozambique on 25 October 2013 and could not return in time for the arbitration hearing without incurring substantial expense in that regard. Thereafter it was agreed between the parties that their respective attorneys would attend at the arbitration hearing to formally seek a postponement.

[6] The postponement was denied by the Third Respondent and the parties were ordered to appear within one hour, which was not possible, and the matter was dismissed.

[7] The Third Respondent's reasons for denying the postponement were that:

7.1 the First and Second Respondents were aware of the unavailability of their counsel for a period of one month before the scheduled arbitration date, and did not adhere to the rules of the CCMA in applying for a postponement (i.e. not later than 7 days before the hearing); and

7.2 the fact that an application to stay the proceedings was before the Labour Court did not prevent the First and Second Respondents from making an application to the CCMA for postponement.

The Applicant's Arguments before this Court

[8] It was argued that the requirements for a postponement had been met and reference was made to the case of *Insurance & Baking Staff Association & others v SA Mutual Life Assurance Society* 2000 (2) ILJ 386 (LC) which set out the requirements for postponement as follows:

8.1 The trial judge has a discretion whether an application for postponement should be granted or refused.

8.2 That the discretion must at all times be exercised judiciously and not capriciously or upon any wrong principles, but for substantial reasons.

8.3 The trial judge must reach a decision after properly directing his attention to all relevant facts and principles.

- 8.4 An application 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 warrant a postponement, the court may in an appropriate matter, allow a postponement even though an application was not timeously made.
- 8.5 An application for postponement must always be bona fide and not used as a tactical manoeuvre for the purpose of gaining some tactical or other advantage to which the applicant is not legitimately entitled.
- 8.6 Whether any prejudice caused by the postponement could fairly be compensated by an appropriate cost order or any other ancillary mechanism.
- 8.7 The court should weigh the prejudice which will be caused to the respondent if the postponement is granted against the prejudice which will be caused to the applicant if the postponement is refused.
- 8.8 Where the applicant for 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 discretion might allow the postponement but direct the applicant to pay the wasted costs.

[9] The Applicant argued that: *"Even though they [the Parties] had not complied with the rules and brought the application for postponement timeously they had an adequate explanation for why the application has not been brought by agreement prior to the 7 days as set forth in the rules."*²

[10] The Applicant further referred to the case of *Fundi Projects & Distributors (Pty) Ltd v CCMA & another* 2006 (27) ILJ 1136 (LC) where the following passage is quoted³:

² The Applicant's Heads of Argument at para 11.1.

³ The Applicant's Heads of Argument at para 15.

"Too often, as in the present instance, application for postponement are routinely, arbitrarily and misguidedly refused, frequently because there is no application of a principled approach to the competing interest of the parties."

[11] It is argued that there is no competing interest in the present matter.

[12] This Court was further referred to the *Fundi Projects* decision in quoting the following passage⁴:

"Having elected to consider the application, to use the language of Rule 21, 'in a manner that she deems fit', the commissioner was bound to apply the relevant legal principles referred to above. There is no evidence that the commissioner properly exercised her discretion, and in particular that she properly weighed the prejudice that might have been caused to the applicant and the 3rd respondent respectively had she granted the postponement".

[13] It was argued that the Third Respondent did not deal with the fact that the parties had agreed to the postponement. The Third Respondent did not even consider the prejudice to both the parties more especially where the arbitration was a part-heard matter.

[14] It was further argued that the *Fundi Projects* decision held that where there is evidence that the request for postponement was a tactical manoeuvre or made for some ulterior motive a commissioner would be required to consider this. No such ulterior motive is apparent in this matter.

[15] The absence of the First and Second Respondents' counsel was *"neither wilful nor mala fide"*⁵ and that the First and Second Respondents had briefed counsel from the outset of the matter and she was not available, and given the intricacies of the matter it would have been unfair to have expected them to brief new counsel at such a late stage more especially where it was a part-heard matter.

[16] The crux of the Applicant's argument is that the Third Respondent did not consider the agreement between the parties and that that he made a finding

⁴ The Applicant's Heads of Argument at para 17.

⁵ The Applicant's Heads of Argument at para 22.

without considering the prejudice that would be suffered by both parties, and in particular the Applicant where his claim of unfair dismissal was also dismissed. Therefore, regard should have been had to a consideration of the principles of fairness and justice and the lateness of the postponement application should have been condoned.

Analysis

[17] There appears to be no decisions annotated with regard to the *Fundi Projects* judgment, however that decision was referred to in the case of *Baur Research CC v Commission for Conciliation, Mediation & Arbitration & others* (2014) 35 ILJ 1528 (LC) where the Labour Court, in dealing with applications for postponement due to a lack of legal representation, noted the following and quoted from the decision of *Northern Province Development Corporation v Commission for Conciliation, Mediation & Arbitration & others* (2001) 22 ILJ 2697 (LC):

"[20] In the result, it is my conclusion that the second respondent erred in an unjustifiable manner in refusing a postponement on 7 February 2001, for the purpose of arranging properly prepared legal representation. In coming to that conclusion, **I do not lose sight of the fact that the granting or withholding of a postponement involves a considerable degree of discretion and that this court should interfere with the exercise of such discretion only in very limited circumstances.**

[21] It is my conclusion that the award made by the second respondent in the absence of the applicant should be set aside also on the ground of his refusal of the application for postponement, to the extent that this was for the obtaining of properly prepared legal representation." (emphasis added).

[18] The Applicant relies on the ground of review that the failure to grant the postponement was grossly unreasonable and therefore the Ruling award should be reviewed and set aside.

[19] Commissioners sitting as Arbitrators are required to apply their minds to the matter before them and consider the prejudice that would be suffered by either or both the parties in the event that the postponement is not permitted. I am satisfied that the Third Respondent erred in that regard.

Order

1. The Ruling handed down by the Third Respondent on 25 October 2015 under case reference GAJB 8509-15 is reviewed and set aside.
2. The Fourth Respondent is ordered to set the Applicant's unfair dismissal dispute down for arbitration before the Third Respondent on 21 days' notice to the parties as contemplated in terms of its Rules of Practice and Procedure in Arbitration Proceedings.
3. There is no Order as to costs.

Leppan, AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ramsay Webber Inc

For the Respondent: Adv. Geraldine Kinghan

LABOUR COURT