



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Not Reportable

Case no: JR 1445/12

In the matter between:

CHEMSTOF (PTY) LTD

Applicant

and

**THE COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION**

First Respondent

**COMMISSIONER JACKSON MTHUKWANE
N.O.**

Second Respondent

**TANKIE KUOANE & SEVEN
OTHERS**

Third to Ninth Respondents

Heard: 06 January 2015

Delivered: 01 December 2015

Summary: Review of Ruling on Postponement

JUDGMENT

FOUCHE, AJ

Introduction

- [1] The applicant is applying, for the second respondent's ruling refusing the applicant's postponement application on 3 May 2012 and the second respondent's arbitration award dated 14 May 2012, issued under the auspices of the first respondent, to be reviewed and set aside in terms of section 158(1)(g) read with section 145 of the Labour Relations Act, 1995 (LRA).
- [2] The applicant also seeks the matter to be referred to the first respondent for a fresh hearing before a different commissioner than the second respondent.
- [3] The application is opposed by the third to ninth respondents. I will refer to them as the employees.
- [4] The Employees applied for condonation for the late filing of their answering affidavit, which was not opposed by the applicant. Having considered the application for condonation and the criteria generally applied to such applications I see no reason not to grant the application.

Facts

- [5] The employees were dismissed on charges of alleged gross misconduct during strike action that took place from 10 July 2011 to 19 August 2011. The employees referred an unfair dismissal dispute to the first respondent.
- [6] The matter was postponed on three previous occasions. Once because the applicant's representative had to give evidence in a criminal matter, on a second occasion when several employees were joined in the matter, and on a third occasion when one of the applicant's witnesses was not available. The matter was set down again for arbitration 3 and 4 May 2012.
- [7] Mr Herman Breedts, the official of the applicant's employers' organisation, acted on behalf of the applicant during the employees' strike, an urgent application in the Labour Court that resulted in an interdict, and the disciplinary proceedings against the employees. He also deposed to the applicant's founding affidavit in this matter.

- [8] Breedt was instructed to represent the applicant at the arbitration of the unfair dismissal dispute on 3 and 4 May 2012. However, Breedt, on 2 May 2012, suffered a back injury. Breedt attended a physiotherapist who diagnosed the injury as an *“injury to a lumbar disc with nerve route entrapment”* which meant that Breedt was *“unable to drive as the pressure on the nerve would cause a paralysis”*. Breedt was referred for an MRI scan to be done later in the afternoon of 2 May 2012.
- [9] On 2 May 2012, a letter from the applicant requesting a postponement of the arbitration set down for 3 and 4 May 2012, due to the injury to Breedt, including the letter from physiotherapist and the appointment for the MRI scan, was sent to Mr Mfikoe, a trade union official representing the employees. Mfikoe refused to agree to a postponement.
- [10] Mr Dlamini from the applicant contacted the first respondent telephonically and sent an application for postponement to the first respondent on 2 May 2012. The application for postponement was also served on the employees. The unsigned letter from the physiotherapist was attached to the application.
- [11] In the award the second respondent mentioned that a senior commissioner of the first respondent informed the respondent telephonically on 2 May 2012 that the respondent should present a properly completed medical certificate to the hearing on 2 May 2012. The respondent denies that it received a call from the said senior commissioner.
- [12] The applicant was represented by Mr Philip Bezuidenhout, its Safety Officer at the arbitration on 3 May 2012. The arbitration was scheduled to start at 9:00. It was not disputed that Bezuidenhout did not possess the qualifications or experience to represent the applicant in arbitration proceedings.
- [13] Bezuidenhout informed the second respondent that Breedt was consulting a neurosurgeon. The second respondent contacted Breedt telephonically. Breedt confirms that the second respondent did not accept the letter from the physiotherapist, which did not contain the practice number of the physiotherapist.

- [14] According to the second respondent he received an unsigned medical certificate from the neurosurgeon per telefax from Breedt at 12:29 on 3 May 2012.
- [15] According to Breedt he received two telephone calls from the second respondent on 3 May 2012. The second call was to inform Breedt that the medical certificate from the neurosurgeon was unsigned.
- [16] Breedt also confirmed that he faxed or caused the unsigned medical certificate from the neurosurgeon to be faxed to the second respondent twice on 3 May 2012. According to the relevant communication result or transmission reports the first fax was sent at 12:30 and the second at 12:36. The second fax included the first page of what seems to be the report from the radiologists on a MRI scan that Breedt underwent.
- [17] Breedt further refers to a third telefax that was sent to the second respondent containing a signed copy of the medical certificate, which seems to have been sent at 12:49. The second respondent did not refer to this medical certificate in the award.
- [18] According to Breedt the third fax was sent to his offices and thereafter faxed to the second respondent on 3 May 2012. The second respondent did not mention the third fax in his award and seems not to have been aware of the third fax.
- [19] The employees were represented by a trade union official on 3 May 2012. The employees' representative did not challenge the reasons presented by the applicant for the postponement. He did, however, request a cost order to cover the transport cost of the employees' and their representative.
- [20] The second respondent refused the applicant's application for postponement. The arbitration carried on in the absence of the applicant and the second respondent found in favour of the employees, granting them reinstatement and certain amounts constituting back pay.

Grounds of review

[21] It is the applicant's case that the award and the ruling are reviewable on the following grounds:

- i. the second respondent committed a reviewable irregularity in that he misconstrued what was required by failing to apply the appropriate test for postponements;
- ii. the second respondent acted unreasonably in reaching a decision without taking all the evidence and circumstances of the matter into account;
- iii. the second respondent failed to take into account the prejudice that would be suffered by the Applicant if postponement was refused.

Analysis

[22] Rulings on applications for postponement can be reviewed by the Labour Court under section 145, on the basis that such rulings form part of the exercise of commissioners' functions on arbitration. It is not necessary to resort to section 158(1)(g).¹

[23] The test to be applied in dealing with applications for review was formulated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*.² The test requires the review court to ask the question: "*Is the decision reached by the commissioner one that a reasonable decision maker could not reach?*"

[24] The *Sidumo* reasonableness test has not replaced the specific grounds for review permitted under s. 145(2) of the LRA. The specific grounds provided for in s. 145(2) of the LRA are suffused with the constitutional standard of reasonableness.³ In matters where the grounds for review include any of the grounds listed in s. 145(2) of the LRA, such as the present matter, it is

¹ *Carephone (Pty) Ltd v Marcus NO & others* [1998] 11 BLLR 1093 (LAC), at para 24

² (2007) 28 ILJ 2405 (CC), at para 110

³ *Herholdt v Nedbank Ltd* (2013) 34 ILJ 2795 (SCA) at para 14; *Fidelity Cash Management Service v CCMA and Others* (2008) 29 ILJ 964 (LAC) at para 101

appropriate to first consider those grounds and then apply the reasonableness test.⁴

- [25] During the arbitration proceedings the employees did not take issue with either Breedts's injury or the unsigned medical certificate from the neurosurgeon. The employees also did not seriously oppose the application for a postponement. The employees' opposition to the application for postponement was focussed on obtaining a cost award against the applicant for the postponement.
- [26] It was not in dispute that Bezuidenhout was not in a position to continue with the arbitration. He was a lay person and had no documents and no witnesses at the hearing. The record of the proceedings confirms that in the end Bezuidenhout decided to participate in the arbitration only as an observer.
- [27] The aspects that weighed the most to the second respondent were: the fact that the medical certificate from the neurosurgeon was unsigned, the matter had been postponed three times previously, and the employees' right to have their unfair dismissal dispute speedily resolved. The record of the arbitration proceedings also confirm that the second respondent regarded the multiple applications for postponement as almost constituting an abuse of the process.
- [28] In respect of the medical certificate the second respondent regarded the provisions of s.23 of the Basic Conditions of Employment Act, 1997, as the standard that the applicant had to meet. Relying on the decision in *Mgobhozi v Naidoo & Others* (2006) 27 ILJ 786 (LAC) the second respondent found that the applicant did not submit credible evidence to support the application for postponement.
- [29] In coming to his conclusions the second respondent lost sight of the general principles applicable to postponement applications and the fact that the application for postponement was brought on an urgent basis.
- [30] In the *Carephone* matter the Labour Appeal Court summarised the approach to postponement applications as follows:

"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

⁴ *Gold Fields Mining SA (Pty) Ltd (Kloof Gold Mine) v CCMA and Others* (2014) 35 ILJ 943 (LAC) at para 15

*the exercise of a judicial discretion. What is normally required is a reasonable explanation for the need to postpone and the capability of an appropriate costs order to nullify the opposing party's prejudice or potential prejudice."*⁵

- [31] Ms Pillay presented compelling arguments on behalf of the employees emphasising the weaknesses in the evidence that the applicant presented in support of the reasons for the postponement. She also argued that the second respondent's approach to the postponement application was the correct one, relying on the following passage in the *Carephone* judgement:

*"The first is that arbitration proceedings must be structured to deal with a dispute fairly and quickly (section 138(1)). Secondly, it must be done with "the minimum of legal formalities" (section 138(1)). And thirdly, the possibility of making costs orders to counter prejudice in good faith postponement applications is severely restricted (section 138(10))."*⁶

- [32] The facts in this matter are, however, distinguishable from the facts in the *Carephone* matter. In the *Carephone* matter the employer had five days to arrange alternative representation and failed to explain what steps were taken during that time period, the employer enjoyed legal representation, the employer was granted two adjournments/postponements to make alternative arrangements. The court was further satisfied that the commissioner properly weighed up the prejudice that the employer would suffer from a refusal of the postponement.
- [33] The facts in this matter more closely resembles those in *Erasmus NO v Commission for Conciliation Mediation & Arbitration & others* (2012) 33 ILJ 1670 (LC). The employer party's main witness was hospitalised on the day prior to the hearing of the matter. The commissioner refused the application for postponement for reasons that included the lack of proof of hospitalisation.
- [34] The Labour Court approached the matter on the basis that the application for postponement was brought on an urgent basis. In terms of rule 31(8) of the Rules of the second respondent the commissioner in an urgent application may dispense with the requirements of Rule 31 if good cause exists, and may

⁵ *Carephone*, supra, at para 54

⁶ *Carephone*, supra, at para 55

grant an order against a party that has had reasonable notice of the application. Further relevant considerations are 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.⁷

[35] The Labour Court summarised the approach to postponement applications as follows:

“[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.

⁷ Erasmus NO v Commission for Conciliation Mediation & Arbitration & others, supra, at para 60

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.”⁸

- [36] The Labour Court found that the commissioner had failed to exercise his discretion judicially and set aside the award.
- [37] It is not in dispute that Breedt informed the second respondent that the medical certificate was being signed by the neurosurgeon and that it would be faxed within minutes after the telephone discussion between the second respondent and Breedt. It is also not in dispute that a signed medical certificate was faxed to the same number as the number of which the second respondent earlier on 3 May 2012 received the previous faxes.
- [38] In these circumstances there was no need for the second respondent to act with the haste with which he did. The second respondent was aware that Breedt intended to provide him with a signed medical certificate.
- [39] The matter was set down for 2 days and there was nothing preventing the second respondent from standing the matter down to 4 May 2012 in order to provide Breedt with an opportunity to present a signed medical certificate.
- [40] It was not appropriate for the second respondent to rely on the statement from *Mgobhozi v Naidoo & Others* (2006) 27 ILJ 786 (LAC) quoted in paragraph 8 of the award, in circumstances where the postponement application was being brought on an urgent basis. If it was the second respondent's intention to hold Breedt to the standards set out in *Mgobhozi v Naidoo & Others* (2006) 27 ILJ 786 (LAC), he should have given Breedt a reasonable chance to submit the signed medical certificate.
- [41] The second respondent's suspicion of the validity of the medical certificates submitted by Breedt may well have been proven to be with some merit had the second respondent acted with more patience in pursuing the issue.
- [42] The second respondent's haste to make a ruling on postponement application also has to be considered within the context of the second respondent failing

⁸ *Erasmus NO v Commission for Conciliation Mediation & Arbitration & others*, supra, at para 61

to consider the prejudice that the applicant would suffer should the postponement application be refused.

- [43] The second respondent appropriately considered the employees' right to have their disputes resolved speedily. This should have been weighed up against the prejudice that the applicant would suffer if the postponement application was refused. The second respondent failed to do so.
- [44] The second respondent also failed to consider whether any prejudice to the employees could be cured by an order for costs. The employees indicated to the second respondent that postponement of the matter would be acceptable to them provided the second respondent made an appropriate order as to costs.
- [45] In this regard the approach of Van Niekerk AJ (as he then was) in *Fundi Projects & Distributors (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2006) 27 ILJ 1136 (LC), is instructive. Relying on the general principles applicable to applications for postponement as set out in *Insurance & Banking Staff Association & others v SA Mutual Life Assurance Society* (2000) 21 ILJ 386 (LC), Van Niekerk AJ came to the following conclusion:

*"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 third respondent respectively had she granted the postponement. Had the commissioner done so, she might have considered whether any prejudice to the third respondent could be compensated by an order for costs on an appropriate scale. On this basis, any financial prejudice to the third respondent (and to the CCMA and thereby the taxpayer) might have been cured, and the policy related concerns expressed by the commissioner met. Had she weighed the respective prejudice to the parties, the commissioner may well have concluded that the prejudice to the applicant was significant - it was effectively deprived of presenting its case for consideration prior to any award being made."*⁹

⁹ *Fundi Projects & Distributors (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2006) 27 ILJ 1136 (LC), at par 12

- [46] The second respondent acted unreasonably and committed gross irregularities by:
- i. making the ruling on the postponement application in circumstances where the second respondent had failed to properly consider Breedt's undertaking to fax a signed medical certificate and had failed to provide Breedt with a reasonable opportunity to submit signed medical certificate; and
 - ii. failing to weigh up the prejudice to the employees against the prejudice that the applicant would suffer if the postponement application was refused and failing to consider whether any prejudice to the employees could be cured by an order for costs.
- [47] The applicant did not ask for an order as to costs save in the event that any of the respondents unsuccessfully oppose the review application. When considering the appropriateness of a cost order Breedt's conduct cannot be ignored.
- [48] Breedt has a right of appearance in proceedings conducted under the auspices of the first respondent by virtue of being an official of an Employers' Association. There is no reason why his conduct should not be held to high standards.
- [49] There is no doubt in my mind that Breedt's conduct on 2 and 3 May 2012, fell short of such standards. His lack of attention to detail, specifically ensuring that medical certificates were signed by the medical practitioners and contained appropriate information on which the second respondent could rely, such as a practice number, created the impression that Breedt regarded a postponement as a matter of right and not a privilege or indulgence to be granted at the discretion of the second respondent.
- [50] Breedt was acting as the applicant's agent and as such the applicant must suffer the consequences of Breedt's conduct. Breedt could have done more at an earlier stage to ensure that second respondent was in possession of an appropriate medical certificate. The applicant, having been at least partially the author of its own misfortune is thus not entitled to a cost order.

Order

[51] I therefore make the following order:

- 1 The third to ninth respondents' application for condonation for the late filing of their answering affidavit is granted.
- 2 The postponement ruling of the second respondent under case number GATW11840/11 is reviewed and set aside.
- 3 The default arbitration award of the second respondent under case number GATW11840/11 is reviewed and set aside.
- 4 The matter is remitted to the Commissioner for Conciliation Mediation and Arbitration for arbitration before a commissioner other than the second respondent.

FOUCHE AJ

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Mr C P J Strydom
Instructed by GP Prinsloo Attorney

For the Respondents: Ms L Pillay
Instructed by M S Molebaloa Attorneys