



IN THE LABOUR COURT OF SOUTH AFRICA JOHANNESBURG

CASE NO: JR822/15

CASE NO: JR769/15

CASE NO: JR974/15

Reportable

In the matter between:

IMPALA PLATINUM REFINERIES LIMITED

Applicant

and

NUM obo RETSELISITSOE

First Respondent

LEHLOHONOLO TAOLE

COMMISSIONER BONGE MASOTHE N.O.

Second Respondent

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION**

Third Respondent

Heard: 21 September 2016

Delivered: 10 May 2017

Summary: Failure by a commissioner to consider established principles relating to the postponement of applications in respect of arbitration proceedings may constitute a reviewable irregularity.

JUDGMENT

MTHOMBENI AJ

Introduction

- [1] This application concerns three separate applications which have been consolidated in terms of a court order, dated 8 June 2016.
- [2] The following three applications have been consolidated:
- 2.1 An application brought by the applicant, under case number JR 822/15, in terms of Section 145 of the Labour Relations Act 66,1995 ("the LRA") for the reviewing and setting aside of an arbitration award under case number GAJB 19923-14 ("the award"), dated 5 May 2015 and issued by the second respondent. ("the Award Review Application")
- 2.2 An application brought by the applicant, under case number JR 769/15, in terms of Section 158 (1) (g) of the LRA for the review and setting aside of a ruling made by the second respondent during the arbitration proceedings prior to the issuing of the award. ("the Ruling Review Application")
- 2.3 An application brought by the first respondent, under case number JR 974/15, in terms of Section 158 (1) (c) of the LRA for the enforcement of the award issued by the second respondent. ("the Award Enforcement Application").

Background

- [3] The same material facts outlined below are common to all the consolidated three applications.
- [4] The first respondent represents Retselisitsoe Lehlohonolo Taole ("Taole") who had been in the applicant's employ since 1 July 2007.
- [5] On 3 June 2014, Taole approached the third respondent and referred an unfair labour practice dispute relating to promotion, following Taole's grievance emanating from the appointment of John Scott Stevenson ("Stevenson") to the position of General Manager.
- [6] Following a disciplinary enquiry where Taole had been found guilty of misconduct, on 1 July 2014 the applicant dismissed Taole. At the time of his dismissal, Taole was employed as the Senior Chemical Engineer.
- [7] Aggrieved by his dismissal, during August 2014 Taole approached the third respondent and referred a dispute, alleging unfair dismissal.
- [8] The disputes were conciliated, but remained unresolved.
- [9] Consequently, the third respondent set down the unfair dismissal and unfair labour practice disputes for arbitration for 17 March 2015 and 19 March 2015, respectively.
- [10] On 17 March 2015, Thami Mvumbi ("Mvumbi") represented the applicant at the arbitration proceedings in respect of the unfair dismissal dispute over which the second respondent ("the commissioner") presided. The applicant commenced leading its witnesses, but the matter could not be finalised and was, therefore, adjourned whilst Teke Mothibe ("Mothibe") was still under cross-examination.
- [11] On 19 March 2015, Mothibe represented the applicant at the arbitration proceedings relating to the unfair labour practice dispute. Owing to Stevenson's absence at the arbitration hearing, the matter was postponed 22 April 2015. To secure his presence, a subpoena was issued under the third respondent's auspices ordering Stevenson to be in attendance at the arbitration proceedings on 22 April 2015.

- [12] On 27 March 2015, the applicant received a notice of set down in respect of the unfair dismissal dispute which was scheduled for 22 April 2015.
- [13] On that day, the unfair labour practice dispute did not proceed as commissioner Shardlow, who had been allocated the matter, realised that the unfair dismissal dispute had also been set down for the same day. Eventually, the commissioner called the parties to the hearing venue. Mothibe advised the commissioner that, owing to an administrative error on the part of the CCMA, the applicant had only prepared for the unfair labour practice dispute and, thereupon, made an application for a postponement.
- [14] Thereafter, commissioner made a ruling that he would proceed. Consequently, Mothibe and the applicant's witnesses left the arbitration hearing venue. The commissioner proceeded in the absence of the applicant and issued an award in terms of which he found Taole's dismissal to have been both procedurally and substantively unfair and ordered the applicant to reinstate Taole with retrospective effect.

Events prior to and including the ruling

- [15] In the circumstances, it is in my view appropriate at this juncture to determine the Ruling Review Application as the result of such a determination would be dispositive of the Award Review Application and the Award Enforcement Application.
- [16] As alluded to above, the third respondent set down the unfair dismissal dispute for 17 March 2015. The applicant was represented by Mvumbi and the matter was part heard. The cross-examination of Mothibe had not been concluded. The commissioner and the parties had a discussion concerning a possible date to which the matter would be adjourned. At this stage Mvumbi had left the proceedings.
- [17] The commissioner stated that there were no dates available in April for the continuation of the matter. Taole mentioned that he would be in Europe in May 2015 and in Asia in June 2015.

- [18] Thereupon, the commissioner advised the parties that the matter would proceed on 6 and 7 May 2015.
- [19] It appears that the commissioner and the parties got engaged in another discussion, which is not captured in the record, concerning dates. Thus, on 18 March 2015, Mothibe addressed an email to the commissioner advising that Mvumbi would be available in June 2015. In reply. The commissioner indicated that he had already submitted the file to case management and undertook to retrieve it and advise the parties about the new dates. Evidently, the commissioner did not revert to the parties in this regard.
- [20] On 22 April 2015, Mothibe and the applicant's witnesses for the unfair labour dispute attended at the CCMA. However, commissioner Shardlow could not proceed because apparently the unfair dismissal dispute had also been set down for that day. The commissioner, thereupon, took over and proceeded to continue with the unfair dismissal dispute.
- [21] On that day, Mvumbi and other applicant's witnesses were not present at the CCMA. but Mothibe was in attendance.
- [22] Mothibe advised the commissioner that Mvumbi was not present and explained that Mvumbi's absence was due to an administrative error on the part of the CCMA as the applicant had been, on receipt of the notice of set down for the unfair dismissal dispute been advised telephonically by the CCMA that the notice of set down was in respect of the unfair labour practice dispute.
- [23] This notwithstanding, the commissioner made a ruling that the matter would proceed and gave the following reasons:
- 23.1 the parties were properly notified to attend the arbitration hearing;
 - 23.2 there was no indication on the file that the arbitration hearing should not proceed;
 - 23.3 had the applicant approached the CCMA and was advised that the unfair labour dispute would take precedence, there was no reason why the unfair dismissal was placed on the roll;

- 23.4 Mothibe did not furnish the commissioner with evidence that there was an agreement between the parties that the unfair labour practice dispute would proceed on 22 April 2015; and
- 23.5 in the event of double booking, it is the prerogative of the CCMA to determine which matter should proceed having considered all the facts and the circumstances.

Grounds of review

[24] The applicant's grounds of review in respect of both applications are as follows:

First Ground of Review

24.1 The applicant submits that the commissioner committed misconduct and/or gross irregularity in the proceedings and/or exceeded his powers and/or made a ruling that a reasonable decision maker could not have come to in that:

24.1.1 during the arbitration proceedings the commissioner advised the parties that the matter would not proceed in April 2015 and made a ruling to the effect that it would continue on 6 and 7 May 2015;

24.1.2 the CCMA had telephonically advised the applicant that the unfair labour practice, not the unfair dismissal dispute, had been set down for 22 April 2015;

24.1.3 the subpoena issued to secure Stevenson's attendance clearly pointed to the unfair labour practice dispute being set down for hearing on 22 April 2015;

24.1.4 Mvumbi and the remaining witnesses for the unfair dismissal dispute were not present at the arbitration hearing on 22 April 2015 and Mothibe, who was not the

applicant's representative in respect of the unfair dismissal dispute, was still under cross-examination;

24.1.5 the commissioner failed to take into consideration the administrative error on the part of the CCMA in setting down both the unfair labour practice and unfair dismissal disputes on the 22 April 2015.

24.1.6 the commissioner overlooked and rejected important factors and considerations relevant to the issue of postponement; and

24.1.7 The commissioner's ruling resulted in the applicant being denied a fair hearing, in violation of the *audi alteram partem* principle.

Second Ground of Review

25.2 The applicant submits that the commissioner committed misconduct and/or a gross irregularity in relation to his duties as a commissioner by failing to accurately construe and record the submissions made to him, and consequently relying on the incorrect version of the applicant's submissions in making the ruling, thereby acting irrationally and unreasonably in that:

25.2.1 the commissioner misconstrued and incorrectly captured the applicant's case by recording that the applicant had received two notices of set down for the 22 April 2015, while the applicant had only received one notice of set down in respect of which it was advised by the CCMA that it related to the unfair labour practice dispute.

Analysis and applicable legal principles

[26] In my view, it is opportunistic of the applicant to assert that on 7 March 2015 the commissioner made a ruling that the arbitration proceedings would continue on 6 and 7 May 2015, considering that on 18 March 2015 Mothibe

had communicated with the commissioner suggesting alternative dates in June 2015 on which Mvumbi would be available. It cannot, thus, be said the commissioner had made a ruling on which the applicant had solely relied.

[27] There is no corroborative evidence that the applicant had been telephonically advised by the CCMA that the notice of set down it had received on 27 March 2015 in respect of the unfair dismissal dispute had been, in fact, intended for the unfair labour practice dispute. This notwithstanding, given the events which unfolded prior to the 22 April 2015 it is, as it shall be set out below, probable that the applicant had been so advised.

[28] I am convinced that the applicant had prepared for the unfair labour practice dispute, considering that a subpoena had been issued to secure Stevenson's attendance, coupled with the CCMA advice. Moreover, I am satisfied that the applicant was sincerely labouring under the impression that the unfair dismissal dispute was not set down for that day. To illustrate, on 30 March 2015 Nicollette Jansen van Rensburg, a Senior Human Resources Officer at the applicant, addressed an email to Babalwa, a case management officer at the CCMA, confirming that the unfair labour practice dispute would proceed on 22 April 2015 and that the unfair dismissal dispute would be scheduled for a date in June.

[29] Contrary to the first respondent's contention, in my view it would have been unreasonable in the circumstances to expect the applicant to make a formal application for a postponement as contemplated in Rule 23 of the CCMA Rules, for the applicant did not consider it necessary to do so. This Court has held that mere non-compliance with the rule relating to postponements is not adequate reason for declining an application for a postponement. (See *NF Die Casting (Pty) Ltd v Metal and Engineering Bargaining Council and Others* [2002] BLLR 560 (LC) at [23] and [25].

[30] On 22 March 2015, Mothibe made submissions on why the applicant was not ready to proceed owing, *inter alia*, to the absence of Mvumbi, that Mothibe was still under cross-examination and that the applicant's witnesses were not present. In my view, it is unfathomable for the commissioner to have refused postponement in the circumstances. The commissioner erred in that:

- 30.1 he insisted on that the applicant had received a notice of set down in respect of the unfair dismissal dispute for 22 April 2015, while downplaying the fact that on 18 March 2015 he had undertaken to revert to the applicant concerning alternative dates of the hearing;
- 30.2 he disregarded that Mothibe had indicated that a number of witnesses that were crucial to the applicant's case were not present at the hearing;
- 30.3 he, despite the fact that he had advised the parties on 17 March 2015 that there were no dates in April for the arbitration to be continued, declined to postpone the matter;
- 30.3 he disregarded the fact that Mothibe was not the applicant's representative in respect of the unfair dismissal dispute; and
- 30.4 he disregarded that Mothibe ought to be re-examined after completion of his cross-examination in circumstances when Mvumbi was absent.

[31] This Court has well-established principles in respect of postponement of arbitration proceedings. These principles, which are also equally applicable to the CCMA arbitration proceedings, are encapsulated in *Insurance and Banking Staff Association and Others v SA Mutual Life Assurance Society* (2000) 21 ILJ 386 (LC).

[32] It follows that the commissioner should have considered, *inter alia*:

- 32.1 whether it was in the interest of justice and fairness that the postponement be granted or refused;
- 32.2 what prejudice was likely to be suffered by either party should the postponement be granted or refused;
- 32.3 whether such prejudice could be cured by an appropriate costs order; and
- 32.4 whether the application was *bona fide* or a mere tactical manoeuvre. (See *Petzer v Independent Broadcasting Authority* (2000) 5 LLD 409 (LC) at 410, *Massstores (Pty) Ltd t/a Builders Warehouse v CCMA* and

Others [2006] 6 BLLR 577 (LC) *Keerom Casa Hotel v Heinrichs and Another* [1999] 1 BLLR 27 (LC)).

- [33] Instead, the commissioner failed to observe these principles, thereby denying the applicant a fair hearing. Had he done so, he would have investigated the merits of the application of the postponement and reach a reasonable conclusion.
- [34] I am, therefore, of the view that the commissioner, while he gave extensive reasons which were unsupported by the material before him for his ruling, had failed to apply his mind to the merits of the application, misdirected himself and made a gross irregularity. Thus, it cannot be said that the commissioner exercise his discretion in a proper and judicial manner.
- [35] From this perspective, it cannot be said that the commissioner reached a decision that a reasonable decision maker could have made.
- [36] The applicant has asked for costs. I am, however, not convinced that there are factors which in law and fairness warrant that costs should follow the result.
- [37] In the circumstances, I order as follows:
- 37.1 The ruling made on 22 April 2015 by the commissioner is reviewed and set aside;
 - 37.2 The arbitration award under case number GAJB 19923-14, dated 5 May 2015 and made by the commissioner, is consequently set aside;
 - 37.3 The dispute is remitted to third respondent to be heard *de novo* before a commissioner other the second respondent;
 - 37.4 The application to enforce the arbitration award is dismissed; and
 - 37.5 No costs order is made.

MTHOMBENI AJ

Acting Judge of the Labour Court

Appearances

For Applicant: Adv R Itzkin

Instructed by: Edward Nathan Sonnenberg Inc.

For the First Respondent: Adv MV Sehunane

Instructed by: Sehunane Attorneys

LABOUR COURT