



IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: JR 2465/12

In the matter between:

LIBRA PRODUCTIONS CC

Applicant

and

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

First Respondent

COMMISSIONER MABEL SIKITI N. O

Second Respondent

KLO obo PIKIWE W MKANSI

Third Respondent

Heard: 10 October 2018

Delivered: 12 October 2018

Summary: Review of a ruling refusing postponement – since the granting or refusal of a postponement involves an exercise of discretion, interference is limited. The test remains that of whether the decision to refuse or grant postponement falls

within the bounds of reasonableness. Held: (1) The application for review is dismissed with no order as to costs.

JUDGMENT

MOSHOANA, J

Introduction

[1] The applicant is seeking to review and set aside a ruling made by the second respondent in refusing to postpone the arbitration proceedings scheduled for a hearing. The basis of the review is that the second respondent ought to have granted a postponement application, which was predicated on the absence of the main witness. The application is opposed by the third respondent. Before the review application could be heard, Mr Mkansi (Mkansi), the individual employee, dismissed his Union representative. He, there and then, launched an application for the postponement of the application.

[2] The grounds for the application for postponement being that his newly appointed legal representative asked him to seek a postponement to enable him to source the necessary funds for representation. I pause here to mention that, an attorney once approached by a party would either take or refuse an instruction. Once an instruction is accepted, the attorney must carry out his or her mandate. It is inappropriate for an attorney to still require his or her client to make an appearance and move a postponement application in order to enable finalisation of the fees issue. In such instances, the attorney has not accepted a mandate. Therefore, seeking a postponement on the basis that a fee arrangement is still to be finalised is not a good enough reason to postpone a matter. For these reasons, I refused an application to postpone the review application.

Background facts

[3] Mkansi was employed as a Team Leader effective from September 2010. Mkansi was arraigned before a disciplinary hearing to respond to seven allegations of misconduct. Two of the allegations were withdrawn at the internal enquiry. He was found guilty of four of the allegations. In respect of the one charge, he was found not guilty. At the disciplinary hearing, the applicant presented evidence of three witnesses, namely Thapelo Mmutle, Sam Motebo and Thomas Gibson. Following a guilty finding in respect of the four charges, Mkansi was dismissed.

[4] Aggrieved by his dismissal, Mkansi, with the assistance of his Union referred a dispute alleging unfair dismissal. The dispute was enrolled for arbitration on 14 June 2014. On this day, an application for postponement was sought and granted. The dispute was enrolled for arbitration yet again on 20 July 2012. Approximately four days before the sitting, the applicant launched another application for the postponement of the arbitration hearing. The reason for the postponement was presented thus:

‘Mr Mmutle informed Mr Du Preez that he would (be) willing (to) testify at the CCMA but unfortunately cannot attend the proceedings on Friday 20 July 2012 at 12H00 since he needs to attend induction in Cape Town with his current employer. Please see attached hereto Mr Mmutle’s letter Annexure C stating that he will be out of town.’

[5] Prior thereto, Mmutle was served with a *subpoena* to appear and had signed an agreement to make an appearance. After considering the reasons for the postponement application, the second respondent made a ruling refusing postponement. Faced with such a ruling, the applicant opted to not present any evidence but to only cross-examine Mkansi.

- [6] On 27 July 2012, the second respondent issued an award in favour of Mkansi. Aggrieved by the award, the applicant chose to apply for a rescission as opposed to a review. On or about 28 September 2012, the rescission application was refused.
- [7] On or about 30 November 2012, the present review application was launched together with a condonation application owing to the fact that the prescribed six weeks' period had lapsed. Both the application for condonation and for review were opposed by Mkansi.

The basis of the condonation application.

- [8] The application is launched four weeks outside the prescribed period. The applicant alleges that on the basis of an advice from Mr Bothma, it chose the rescission route as opposed to a review route. It only realised that it chose a wrong route after the rescission ruling. In October 2012, the applicant took legal advice and launched the present application after collation of the relevant documents.

The grounds for review

- [9] The applicant contends that the second respondent committed a reviewable irregularity by failing to apply the appropriate test for postponements. The second respondent failed to exercise her discretion in a judicial manner. In short, the second respondent acted unreasonably by refusing postponement of the arbitration due to the absence of a witness, Mr Mmutle.

Evaluation

[10] For condonation to be granted, a party seeking it must show a good cause. Absent good cause, condonation must be refused. In determining whether good cause has been shown, amongst others, a court must be satisfied that a reasonable and an acceptable explanation has been offered. The explanation provided in *casu* is that of acting on a wrong advice. This can never be a reasonable and acceptable explanation. The Labour Appeal Court in *Edcon Ltd v Steenkamp and others*¹, concluded that the explanation that a failed legal choice of strategy is the reason why a delay occurred to exercise a legal option is not an acceptable explanation.²

[11] Accordingly, I conclude that the applicant did not provide an acceptable explanation thus the condonation application must fail. Therefore, the review application ought to be dismissed for want of jurisdiction.

[12] However, even if I am wrong above, I firmly believe that the review application lacks merits nonetheless. The test for review is whether the decision is one that a reasonable decision maker may not arrive at.³ It is unclear to me why the applicant was unable to proceed with arbitration due to the absence of one witness. At the disciplinary hearing, the applicant managed to secure a guilty finding on four charges by presenting the evidence of three witnesses. There is no indication whether the other two witnesses mentioned earlier in this judgment were also unavailable. It does not assist the applicant to dub Mmutle as the

¹ [2018] 3 BLLR 230 (LAC).

² Paragraph 46.3 of the judgment. See also *Parkinson v Edcon* [2016] ZALCJHB 540 (28 June 2016) and *Ramyidal v Clinix Selby Park Hospital (Pty) Ltd* [2016] ZALCJHB (17 June 2016).

³ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (CCT 85/06) [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC) ; (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC) (5 October 2007).

main witness. I do not understand why he is being dubbed as 'the main witness'. At the very best he was an unavailable witness.

[13] I cannot fault the reasoning of the second respondent. He was dissatisfied with the explanation of Mmutle's unavailability. Mmutle sought to prioritize an induction course over the arbitration process. It was inappropriate for Mr Du Preez to have entertained a witness subpoenaed by a commissioner. Failure to adhere to a *subpoena* is an offence.

[14] Mr Jacobsz, appearing for the applicant, placed heavy reliance on the decision of my brother Molahlehi J in *Nestle SA (Pty) Ltd v CCMA and others*⁴. I am of the view that the decision is distinguishable from the present matter. In that matter, *Nestle* had two reasons for the postponement. Firstly, it was under the impression that the dispute would be referred to private arbitration. Secondly, all of its witnesses were unavailable, two having gone overseas and the one no longer in their employ, probably untraceable. My brother was persuaded by the fact that the arbitration was set down for one day and the request for postponement was the first one. In *casu*, the request was for the second time and for the same reason. For the above reasons I am not prepared to follow my brother.

[15] I take a view that the test to be applied in applications of this nature is the one mentioned in *Carephone (Pty) Ltd v Marcus N.O and others*⁵. The Court stated the following, which in my view, is still good law to this day.

[55] There are at least three reasons why the approach for postponements in arbitration proceedings under the auspices of the Commission under the LRA is not necessarily on a par with that in courts of law. The first is that arbitration proceedings must

⁴ [2008] ZALC 32 (22 March 2008)

⁵ [1998] 19 ILJ 1425 (LAC)

be structured to deal with a dispute fairly and *quickly* (s138 (1)). Secondly, it must be done with '*the minimum of legal formalities*'... And thirdly, the possibility of making costs orders to counter prejudice in good faith postponements applications is severely restricted...

[57] ...It is a review of a decision of a tribunal where the statutory requirements for its functioning are less congenial to the granting of postponements than is the case in a court of law. The commissioner rejected as inadequate the reasons given for the need to postpone...There was sufficient material before him to come to that conclusion rationally and objectively...His decision and the reasons he gave for it do not support an inference of misconduct, irregularity or impropriety. The decision not to postpone and to continue the proceedings are rationally justifiable in terms of the reasons given for the decision by the commissioner.

[16] It is clear from this judgment that as a court of review, I must consider the reasons given for the refusal and establish whether that decision was rationally justifiable. Effectively, it is the same test as expounded in *Sidumo v Rustenburg Platinum Mines Ltd and Others*⁶. The second respondent gave the following reasons:

[10] ...The witnesses' (sic) message was not convincing, no supporting documents and even not dated for that matter. The argument by the respondent's representative that the witness was in contempt is noted, however, that did not prevent the respondent and its other witnesses from attending the hearing... [My own underlining and emphasis]

[17] The above reasoning is justifiable given the material placed before her. I bear in mind that granting or refusal of a postponement involves an

⁶ [2007] 12 BLLR 1097 (CC).

exercise of discretion. Interference is thus limited.⁷ The decision is not one that a decision maker may not arrive at given the same material placed before the second respondent. It is not one that a reasonable decision could not have made. It falls within the bounds of reasonableness. As pointed out earlier, the applicant had other witnesses who had testified at the internal hearing. There was no indication why such witnesses were not called to justify a dismissal. As an example: Charge 2 made reference to one Cindy Van Rooyen and Ruan Cloete, who allegedly instructed the third respondent. I enquired from Mr Jacobsz as to whether Mmutle was the only witness to have justified the dismissal by proving the allegations? He was unable to confirm whether such was the case. It must follow axiomatically that in refusing the postponement, the second respondent did not commit any irregularity. The application must thus fail.

[18] Accordingly, I conclude that the applications should fail.

[19] In the result, I make the following order:

Order

1. The condonation application is refused;
2. The review application is dismissed for want of jurisdiction, alternatively, on its merits;
3. There is no order as to costs.

⁷ See *Kemp t/a Centralmed v Rawlings* [2009] 30 ILJ 2677 (LAC) and the authorities cited therein

GN Moshwana

Judge of the Labour Court of South Africa

LABOUR COURT

Appearances

For the Applicant: Advocate A Jacobsz
Instructed by: Barnard Inc, Centurion.
For the Third Respondent: In Person.

LABOUR COURT