



REPUBLIC OF SOUTH AFRICA

Not reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG
JUDGMENT

Case no: JR 232/17

In the matter between:

SABC

Applicant

and

CCMA

First respondent

DANIEL DU PLESSIS N.O.

Second respondent

MATHOMA AND 13 OTHERS

Third to sixteenth respondents

Heard: 11 October 2018

Delivered: 9 November 2018

Summary: Review of rescission ruling and of refusal to postpone. LRA ss 144 and 145.

JUDGMENT

STEENKAMP J

Introduction

- [1] The third to sixteenth respondents were employees of the applicant, the South African Broadcasting Corporation SOC Ltd (SABC).
- [2] They were dismissed after disciplinary proceedings conducted by an independent dispute resolution agency, Tokiso. It was found that they had defrauded the SABC's medical aid scheme by acting in collusion with medical services providers. These 14 employees were part of a group of 113 employees who had been dismissed for the same dishonest misconduct.
- [3] The employees, mostly represented by different attorneys, referred unfair dismissal disputes to the CCMA¹ (the first respondent). The disputes of these individual employees (who were not represented by trade unions) were consolidated. The disputes were set down for arbitration. On the third day of the arbitration, the SABC's attorney, Mr Puke Maserumule, became unavailable in the unfortunate circumstances detailed further on. The SABC applied for a postponement. The commissioner, Daniel du Plessis (the second respondent), refused. Having heard only the evidence of the employees, he found that their dismissals were unfair. The SABC applied for rescission. The Commissioner refused. The SABC now seeks to review the rescission ruling; the refusal to postpone; the arbitration award; and the commissioner's earlier refusal to recuse himself. It also asks the Court to stay the enforcement of the arbitration award and to waive the security provided for in s 145(8) of the LRA.²

Background facts

- [4] As previously mentioned, the employees are part of a group of about 113 who were dismissed by the SABC for defrauding its medical aid scheme in collusion with some medical services providers. They belonged to a closed medical aid scheme, the SABC Medical Aid Scheme, which is administered by Medscheme. The SABC contributes 60% and the employees 40% of the monthly contributions.

¹ Commission for Conciliation, Mediation and Arbitration.

² Labour Relations Act 66 of 1995.

- [5] The SABC received a report that there was a syndicate operating amongst its employees which recruited employees, members of the medical scheme, to submit fraudulent medical aid claims and to share the proceeds with service providers and the syndicate leaders.
- [6] The SABC forensics department investigated the allegations. It found that approximately 200 employees had defrauded the medical scheme of hundreds of thousands of Rands. Employees would submit claims from service providers (mainly a dentist, doctors, a psychologist, a homeopath and two pharmacies) for medical services or medication not actually provided. When they received a refund, they would share the proceeds with the service providers.
- [7] The SABC instituted disciplinary proceedings against 134 employees. Given the large number, it was not reasonably practicable conduct individual disciplinary hearings. The SABC engaged an external service provider, Tokiso, to conduct the disciplinary proceedings. Tokiso appointed 10 chairpersons to do so. Each employee received a disciplinary charge sheet together with documentary evidence to support the misconduct allegations. They were given the opportunity to respond in writing. All of the documentation was handed to the chairpersons. At the end of the process, the chairpersons found that 113 had committed misconduct and 11 did not. The employees were given the opportunity to submit written mitigating factors. The SABC then considered the findings by Tokiso; the mitigating and aggravating factors; and dismissed those employees had committed misconduct gross dishonesty.
- [8] One of the trade unions whose members were dismissed, BEMAWU, brought an urgent application to this court to stop the process. In an *ex tempore* judgment on 14 January 2016 this Court dismissed the application and expressed the view – albeit *obiter* – that the process adopted for this ABC was fair under the circumstances.³ It noted with reference to the governing clause in the SABC disciplinary code:⁴

³ *BEMAWU and Others v SABC and Others* (J2239/2015) [2016] ZALCJHB 74.

⁴ Par [13]. (Ironically, in that case, Mr Van As – who now appears for the SABC – appeared against it for the trade union. In both cases, Mr Maserumule was the attorney for the SABC).

“Against the background of that clause it seems to me that the process envisaged by the SABC does ensure that discipline will be exercised fairly in accordance with the rules of natural justice, albeit not in the way that the SABC normally conducts its disciplinary procedures. In these circumstances, where the Corporation has to deal with similar allegations of misconduct against more than 100 employees, it would be unworkable to adopt a process where each employee must be heard individually, call witnesses and present evidence. The rules of natural justice, and especially the principle of *audi alteram partem*, will be satisfied, albeit in an attenuated manner in the process that the Corporation has decided to adopt.”

- [9] After the dismissal, the 113 dismissed employees – either through their trade unions, individually, or with the assistance of attorneys – referred unfair dismissal disputes to the CCMA. The SABC intended to call only one witness, being the investigator. It applied to have their individual referrals consolidated. Commissioner Dlamini ruled that those employees who were represented by trade unions would have their disputes heard separately. The individual respondents in this case, who were either represented by attorneys or representative source, at their disputes consolidated under a single case number.⁵

The arbitration proceedings and the refusal to postpone

- [10] The arbitration hearing for these employees was set down for the week of Monday 21 to Friday, 25 November 2016. The SABC was represented, as it has been throughout, by a senior attorney, Mr Puke Maserumule. The employees were represented by a number of different legal representatives.
- [11] It is not disputed that Mr Maserumule was fully prepared for the arbitration and to lead the sole witness for the SABC, Mr Michael Maletse, a forensic auditor, who had investigated the fraudulent claims and on the basis of whose report the disciplinary hearings were conducted and the employees were eventually dismissed.

⁵ In these proceedings, the employees were represented by a total of seven different counsel or attorneys.

- [12] On the first day of the arbitration Mr Maserumule was accompanied by the SABC's employee relations consultant, Mr Sello Xama, and two candidate attorneys. The first day was mostly taken up by preliminary issues regarding the admissibility of evidence and the way in which the hearing would be conducted.
- [13] At the conclusion of the first day's proceedings Mr Maserumule informed the Commissioner and the employees and their legal representatives that his wife had been diagnosed with cancer and that she was scheduled to undergo chemotherapy treatment the next day, Tuesday, 22 November 2016⁶. He asked to be excused until 11:00 the next day for him to accompany her. Mr *Lennox* – who represented Mr Mashigo at the arbitration and does so in these proceedings – mentioned that, to his knowledge, it was unlikely that the chemotherapy would be concluded by 11:00 and suggested that the arbitration be adjourned until Wednesday 23 November 2016. All present, including the commissioner, agreed.
- [14] Things did not work out as planned, given these unfortunate circumstances. During the afternoon on 22 November Mr Maserumule contacted Mr Xama and told him that, due to unexpected developments in his wife's treatment, he would be unavailable for the rest of the week. It transpired that the chemotherapy would take much longer than he had anticipated and that his wife would require his assistance afterwards. He told Xama that he would send his associate, Mr Nkosinathi Mbuyisa, to apply for a postponement the next day. On the same afternoon of Tuesday 22 November Maserumule sent a letter to all the attorneys representing the individual employees and informed them of the situation.
- [15] On the morning of Wednesday 23 November Mr Mbuyisa did apply for a postponement. He explained that, although he had applied for the initial joinder, he had not been involved in preparation for the arbitration, including leading and cross-examining witnesses. He explained that Mr Maserumule, who had prepared to present and argue the SABC's case,

⁶ It must unfortunately be noted that Mr Maserumule's wife passed away as a result of the cancer earlier this year.

was unable to attend the next two days due to sudden and unforeseen circumstances relating to his wife's terminal cancer.

- [16] Some, but not all, of the individual employees' legal representatives opposed the application for postponement. The arbitrator refused the postponement. He reasoned that the arbitration had been set down for five days and that "Mr Maserumule must have been aware prior to Monday already about the procedures his wife had to undergo". He was of the opinion that "there is no reason why counsel could not have been instructed or another colleague". He went further:

"The matter is going nowhere and it seems that it might well be tactical. I do not say it is in fact so, but one has the suspicion especially was not present on Monday, hence the matter was postponed at 3 PM already and today the witness is not in attendance again.

...

I am not satisfied that enough was done on the side of the SABC to ensure or try to get someone to lead the case today does seem that by Monday on their site must be known that there is a strong possibility of Mr Maserumule not being available for the rest of the week. Contingency plans should have been made. There is simply no adequate explanation of alternative arrangements for legal representation made."

- [17] The arbitrator stood the matter down until 12:30 "for the witness who is currently not here to get to the CCMA premises and for instructions to be given." He concluded: "The matter will proceed on a default basis should the witness not attend."
- [18] The arbitration then proceeded on the basis – without the SABC's witness presenting evidence – while Messrs Mbuyisa and Xama remained in the hearing room. They did not participate in the proceedings.
- [19] Each of the individual employees presented evidence under oath. They all denied any involvement in the fraudulent scheme. Based on that evidence, the arbitrator made an award on 5 December 2016 in which he found their dismissals to have been substantively and procedurally unfair. He ordered the SABC to reinstate them retrospectively, with back pay amounting to R 2 896 409, 84.

[20] The SABC applied for rescission of the award based on it been having granted by default, as the arbitrator had indicated in his earlier ruling. He refused and handed down his rescission ruling on 1 February 2017. He did not accept that the arbitration took place “in the absence of any party”, given that Xama and Mbuyisa remained in attendance after the arbitrator had refused to postpone the arbitration proceedings. And obviously the SABC did not present a case why the dismissals were for a fair reason; and although good cause may have been shown that a fair procedure was in fact followed, “the applicant was not absent the application in terms of section 144(d) cannot be successful” [sic].

This review and the relief sought

[21] The SABC seeks to have both the rescission ruling and the postponement ruling reviewed and set aside. On either basis, the effect would be that the arbitration award of 2 December 2016 would be set aside or rescinded and another arbitrator would have to consider the dispute on the merits, having heard all the parties.

Evaluation / Analysis

[22] I shall consider each of the rulings chronologically.

Refusal to postpone the arbitration

[23] When refusing to postpone the proceedings, the arbitrator quite correctly referred to *Carephone*⁷:

“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 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. Interference on appeal in a matter involving the lower court’s exercise of a discretion will follow only if it is concluded that the discretion was not judicially exercised (*Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 398-399).

⁷ *Carephone (Pty) Ltd v Marcus N.O.* (1998) 19 ILJ 1425 (LAC) pars [54] – [55].

There are at least three reasons why the approach to applications 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 be structured to deal with a dispute fairly and quickly (s 138(1)). Secondly, it must be done with 'the minimum of legal formalities' (s 138(1)). And thirdly, the possibility of making costs orders to counter prejudice in good faith postponement applications is severely restricted (s 138(10))."

- [24] Applying *Carephone*, the arbitrator found that the SABC could have made alternative arrangements when Mr Maserumule became unavailable. But the facts in this case are quite different from those in *Carephone*. In that case, the partner in a large law firm who had been assigned to the matter became unavailable a full five days before the arbitration was due to start. There was no explanation of any steps taken to get another practitioner to take over during that time. In this case, Mr Maserumule was taken by surprise. What he initially thought would be an interruption for a couple of hours on one day turned out to be a process over two full days. He could not have foreseen it. And his junior colleague was not in a position to proceed. There was nothing at all before the commissioner to suggest that Mr Maserumule's unforeseen unavailability was "tactical" or anything less than *bona fide*.
- [25] Mr Mbuyisa, the junior attorney, was not prepared to deal with the arbitration itself; nor could he prepare adequately at such short notice. He would have had to do so overnight in a matter where, as here, the 15 employees were represented by some seven or eight sets of counsel and attorneys and the documentary evidence comprised 14 bundles of documents. Xama also explained that he was not in a position to simply take over from his attorney.
- [26] In my view, the arbitrator's refusal to postpone the arbitration in the unique circumstances of this case was irrational and unreasonable. That decision should be reviewed and set aside.
- [27] The necessary consequence of that decision is that the dispute should be remitted for a full hearing on the merits. I shall nevertheless deal with the review of the rescission ruling as well, given that it raises an interesting –

and, as far as the Court and all the counsel that appeared before it are aware – novel question relating to s 144.

The rescission ruling

[28] The arbitrator refused to rescind the 2 December 2016 award on 1 February 2017. He did so on two grounds: Firstly, that it was not a default award “made in the absence of any party”; and secondly, given that he had refused the postponement on 23 November 2016, he could not revisit that decision by way of the rescission application.

[29] Section 144 of the LRA provides that:

“Any commissioner who has issued an arbitration award or ruling, or any other commissioner appointed by the director for the purpose, may on that commissioner’s own accord or, on the application of any affected party, vary or resend an arbitration ruling –

...

(d) made in the absence of any party, on good cause shown.”

[30] Did the Commissioner in this case make the award “in the absence of any party”?

[31] It is common cause that, having been unsuccessful in their application for a postponement, the SABC’s attorneys took no further part in the proceedings. Neither did the SABC present in evidence. But Mr Mbuyisa (Mr Maserumule’s colleague) and Mr Xama (the SABC’s employment relations manager) remained in the hearing room. It is in those circumstances that the Commissioner’s warned the parties that “the matter will proceed on a default basis should the witness not attend.”

[32] In his rescission ruling, the Commissioner found that the word “absence” means “not present” or “not in attendance” or “being away”. He had regard to the online Cambridge dictionary which defines absence as “the fact of not being where you are usually expected to be”. He found that the SABC was not absent from the proceedings and therefore s 144(d) did not apply.

- [33] In my view, that is to formalistic and interpretation of the subsection. I would go further and say that it is so far removed from the intention of the legislature that it is unreasonable and thus reviewable.
- [34] In my view, it cannot be said that a party to litigation or arbitration is truly “present” in the sense of meaningfully participating in the proceedings when both the attorney and the client had actively withdrawn from further participation in the proceedings. The fact that they were physically present in the room does not, in my opinion, preclude a finding that the proceedings took place “in the absence” of that party.
- [35] The finding of the arbitrator to the contrary seems to me to be so formalistic that it is irrational. The ruling on rescission should be reviewed and set aside as well.
- [36] The logical upshot of that finding is that the arbitration award of 2 December 2016 should be rescinded. It would serve no purpose to refer the decision on rescission back to another commissioner. The full facts are before this Court.

Enforcement and security

- [37] The SABC has asked for execution of the arbitration award to be stayed pending the resolution of this review application; and for the security provided for in s 145(8) to be waived. Given the outcome of this application, those issues have become moot.

Conclusion

- [38] The postponement ruling should be reviewed and set aside. So should the ruling on rescission. On either basis, the result is that the award of 2 December 2016 must either be set aside or rescinded. The dispute must be remitted to the CCMA for a proper hearing on the merits, giving all parties the opportunity to give evidence and to be cross examined. That hearing should be held on an expedited basis, given the number of employees involved and the delays to date.
- [39] In law and fairness, a costs award is not appropriate. The result of this ruling is that the dispute is not finalised; and although the SABC has been

successful, it would not be fair to hold the individual employees liable for costs.

Order

[40] I therefore make the following order:

40.1 The ruling of the second respondent, Commisioner Daniel du Plessis, issued on 1 February 2017 in which he refused to rescind his award issued on 2 December 2016 is reviewed and set aside, and the award is rescinded.

40.2 The ruling of the second respondent on 23 November 2016 when he refused to postpone the arbitration hearing is reviewed and set aside.

40.3 The dispute is remitted to the CCMA (the first respondent) for a fresh arbitration on the merits before a commissioner other than the second respondent. The CCMA is directed to set the matter down for hearing on an expedited basis.

40.4 No order as to costs.

Steenkamp J

APPEARANCES

APPLICANT (SABC):

M J van As
Instructed by Masreumule
Inc.

THIRD AND FOURTH RESPONDENTS:
(Mathoma & Muger)

E Furstenburg
Instructed by J F van Zyl.

FIFTH RESPONDENT:
(Nyathi)

Thabang Mathibe (attorney).

L Botha attorneys.

SIXTH RESPONDENT:
(Mtsweni)

EIGHTH RESPONDENT:
(Mashigo)

M A Lennox
Instructed by Douglin
Shapiro Dermantinis.

NINTH RESPONDENT:
(Mkhabela)

J S C Nkosi
Instructed by Choshane
attorneys.

TENTH AND ELEVENTH RESPONDENTS:
(Senna and Mhlanga)

S Gaju
Instructed by Sudeshnee
Naidoo attorneys.

THIRTEENTH RESPONDENT:
(Letsipa)

B Khoza (attorney).

FOURTEENTH RESPONDENT:
(Mavumengwana)

Mabaso attorneys.

FIFTEENTH RESPONDENT:
(Mothloki)

Narain attorneys.