



THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JA21/25

In the matter between:

MOBILE TELEPHONE NETWORKS

(PROPRIETARY) LIMITED

Appellant

and

THE COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

First Respondent

XOLANI NYAMEZELE N.O.

Second Respondent

HERBERT SEETISO MONADIRA

Third Respondent

Heard: 18 November 2025

Delivered: 24 November 2025

Coram: Van Niekerk JA, Nkutha-Nkontwana J, et Waglay AJA

JUDGMENT

VAN NIEKERK, JA

Introduction

- [1] This appeal primarily concerns a refusal by the second respondent (the commissioner) to postpone an arbitration hearing and in particular, whether that refusal was the result of a proper exercise of judicial discretion.

Background

- [2] The third respondent (employee) was employed by the appellant on 1 September 2012 until he resigned on 28 September 2019. The employee contended that the appellant had unilaterally changed his terms and conditions of employment and that his continued employment was intolerable. The employee referred a claim of constructive dismissal to the first respondent, the Commission for Conciliation, Mediation and Arbitration (CCMA), a dispute that was ultimately referred to arbitration. In September 2020, a default award was granted in favour of the employee but later rescinded.
- [3] The matter was again set down for hearing on April 2021. On that date, the appellant's representative, Mr. Jacques Naude, an official of an employers' organisation, appeared at the CCMA and sought a postponement of the hearing. He did so on the basis that the official dealing with the matter, Mr Lotter, had been rushed to hospital after having fallen ill the previous evening. The CCMA's case management had been advised by the appellant of that fact earlier the same morning, and of the fact that a medical certificate would be provided as soon as it became available. Naude's mandate was limited to seeking the postponement – he had matters of his own to which he was obliged to attend on the same morning. The commissioner stood the matter down until 12h00 to enable the appellant's representative and its witnesses to appear. At that time, the commissioner continued with the proceedings on the basis that he considered the appellant to be in wilful default and issued an award by default in favour of the employee.

[4] The commissioner deals at some length in his award with the refusal to postpone the hearing. He states:

- '18 Postponements are dealt with in terms of Rule 23 of the CCMA Rules. I am not persuaded that this is an emergency as the Respondent seeks to present it. The Respondent is a big establishment that can easily make contingency plan in the event of an emergency.
- 19. I also take cognizance that in this regard the Respondent is represented by an employers organisation. John failed to explain the reasons behind the failure of the Respondent to attend the proceedings with its witnesses. I reckon that a sick note was later emailed to the CCMA. I hold a view that a sick note does not automatically qualify any party to a postponement. It can only be used as proof of incapacity where necessary.
- 20. It is trite that postponement is not a right but an indulgence with the presiding officer. In this matter the Respondent has already decided not to be part of the proceedings even before they can asked (sic) for a postponement. The application for a postponement was just to go through the motions.
- 21. The dispute dates back to 2019 and it is in the interests of both parties and justice that this matter must be finalized effectively by the CCMA. The prolonged delays did not only affect the parties but also the efficiency of the CCMA as it is entrusted a duty to expedite and finalize disputes effectively.
- 22. An inference to be drawn is that the Respondent was in wilful default of the proceedings.
- 23. Therefore, postponement is declined.'

[5] In his later ruling refusing to rescind the default arbitration award, the commissioner referred to his refusal to postpone the arbitration hearing, and said the following:

- '30. I have allocated quality time in this aspect in the Default Arbitration Award, I however, feel it is important to put more emphasis on it.
31. It is also crucial for me to record that representation of a party in CCMA proceedings does not take away responsibilities and accountabilities from that party. The essence of this view is that although the Applicant is represented by an employer's organization it has a duty to honour its obligation to attend the CCMA process in order to defend itself. It is due to this reason that I stood down the proceedings from 9:00 to 12:30 to allow the Respondent to be part of the proceedings. I will deal with this issue in detail very shortly.
32. The Applicant through its representative came to the CCMA proceedings to submit a request for a postponement. The conduct of the Applicant showed a preconceived decision of excluding itself from the proceedings. In fact I only regarded the actions of the Applicant as a postponement because someone indeed came to the proceedings. This is despite the fact that he was explicit that he came to tell the proceedings about the non-availability of the real representative. It was also clear that the Applicant did not seek an indulgence but had a foregone conclusion that the proceedings cannot proceed.
33. The Applicant decided upon itself not to be part of the proceedings on an assumption that they will automatically be granted postponement. I do not find any plausible explanation in the application of the Applicant that explains failure to attend the proceedings besides the non-availability of its representative. I alluded in the Default Arbitration Award to the fact that both the Applicant and employers organization are big institutions whom the absence of a single person cannot mean the death of the.
34. The Applicant cannot claim ignorance of not having details about the dispute at hand. It cannot also be genuine that out of the employees of the Applicant none had capabilities to handle the dispute in the absence of its representative. Then the CCMA should not be held into (sic) ransom by the wrong choices or delaying tactics of its parties. The rationale

behind standing down the process was to provide an opportunity for the Applicant to come and either state its case or indulge the proceedings that it did not have capacity in the absence of its representative from the employer's organization...

38. The relevance of the above precedence is that the Applicant in its approach took it for granted that it has a right to be granted a postponement. Secondly, it apportioned upon itself postponement before any indulgence with the proceedings. Hence there was no attendance by it or its witnesses. The dispute dates back to 2019 and makes it one of the oldest files the CCMA still grapples with finalizing. This is notwithstanding the fact that the CCMA has a statutory mandate to expedite and effectively finalize disputes.'

[6] In short, the commissioner's reasoning was that the dispute dated back to 2019 and that further unjustified delays would impede the resolution of the matter, that both the appellant and the employers' organisation of which it was a member were large organisations with the capacity to arrange another representative to replace Lotter, that Naude had sought to make an emergency out of none since Lotter had been hospitalised the previous evening (this despite Naude having informed the commissioner that Lotter had been hospitalised the same morning), and that the appellant's attitude was demonstrative of an entitlement to a postponement, given that neither a representative nor any witnesses for the appellant were present after the proceedings had been stood down.

[7] The appellant sought to rescind the default award on the basis that Naude was not able to represent it in circumstances where he had no knowledge of the matter and where he had matters of his own to which he had to attend. Further, the appellant submitted that the fact that Naude attended at the CCMA to request a postponement was demonstrative of the fact that it had not abandoned its defence of the employee's claim, and that it was not in wilful default. Further, the appellant submitted that Lotter's attendance would have posed a severe health risk to himself and other attendees, given the Covid 19 pandemic that prevailed

at the time. Finally, the appellant made submissions regarding the merits of the claim.

[8] The commissioner refused to rescind the default award.

Labour Court

[9] On review, the Labour Court declined to intervene in the commissioner's decision to refuse the postponement and came to the following conclusion:

[39] ...From the record it is apparent that the commissioner was not persuaded that there was an emergency as submitted by the applicant. He was of the view that in such a big establishment, contingency plans could have been easily made... Furthermore, he was of the view that sick note do not automatically qualify a party to a postponement. They are only proof of incapacity where necessary. Furthermore, a postponement is not granted as a right but an indulgence by the arbitrator. Lastly, he found the matter was one which had long been referred to the CCMA and that it was in the interest of both the parties that it be finalized as expeditiously as possible. Accordingly, the commissioner found that the applicant was in willful default and refused to grant the postponement as sought.

[40] The factors mentioned by the commissioner as stated above are all factors to be considered in deciding whether to grant or reject such an application or not. I do not find that the commissioner erred in any way in his refusal to grant the postponement and reach a decision which could not have been reached by a commissioner in his position. I do not doubt that the decision of the second respondent not to allow a postponement is a reasonable decision considering the facts which were before him. The decision that arrived at was a decision that a reasonable decision maker could have arrived at on the facts before him. Accordingly, I conclude that this decision does not warrant interference on the part of this court.'

Grounds of appeal

- [10] The appellant contends that the Labour Court erred in upholding the commissioner's refusal to postpone the arbitration proceedings because it accepted the commissioner's reasons that the appellant was in wilful default in circumstances where the appellant's representative had fallen ill the night before the hearing. Further, the appellant contends that the Court erred by failing to recognise that the commissioner relied on incorrect facts, in that given the circumstances, it was improbable or impossible for the appellant to make contingency plans to participate in the arbitration hearing.

Evaluation

- [11] In *National Police Services Union and Others v Minister of Safety and Security and Others*¹ the Constitutional Court affirmed that parties to a dispute do not have a right to a postponement, and that the court retains a discretion on whether or not to grant a postponement. That discretion is to be exercised by reference to whether the applicant shows good cause for the postponement to be granted, whether it is in the interests of justice that the postponement be granted, and a consideration of all relevant factors. The requirement for good cause entails the furnishing of a full and satisfactory explanation of all the relevant circumstances. The interests of justice require a balance of any genuine need for more time, against the need to finalise the matter without further delay. Relevant factors include whether the application was timeously made, the extent of any prejudice to any of the parties, and whether the application is opposed.

- [12] In the present instance, it was not in dispute that Lotter's illness and subsequent hospitalisation were sudden, could not have been predicted, and posed a danger to others in the context of the prevailing Covid 19 pandemic. Further, the authenticity of the medical certificate submitted on Lotter's behalf was not in dispute. Neither the appellant nor the employers' organisation acting on its behalf could have foreseen that Lotter would fall ill on the hearing date, to the extent

¹ 2001 (8) BCLR 775 (CC).

that he would be hospitalised. It follows that neither could have foreseen any need to make any prior or contingency arrangement to replace Lotter.

- [13] In terms of the applicable test, the commissioner was obliged to consider whether the appellant had shown good cause for the postponement sought, and whether the interests of justice required the matter to be postponed. As the Constitutional Court has indicated, the latter enquiry involves a balancing of interests – those of the party seeking more time and the statutory purpose of expeditious dispute resolution. The commissioner failed manifestly to consider the prejudice that the appellant would suffer consequent on a refusal of the request for a postponement, this prejudice being the denial of an opportunity to defend the employee's referral due to factors beyond its control in the form of the sudden, unpredictable illness and hospitalisation of Lotter. The failure by a commissioner to consider the element prejudice in similar circumstances was considered in *Chemstof (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*² where the Court said, where a postponement had been refused on account of an injury sustained by the party's representative:

'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 Breed's undertaking to fax a signed medical certificate and had failed to provide Breed with a reasonable opportunity to submit a signed medical certificate;
- 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.'

- [14] The commissioner's ruling makes no attempt to balance the interests of the parties. The appellant manifestly satisfied the requirement of good cause, having

² (JR1445/12) [2015] ZALCJHB 467 (1 December 2015) at para 46.

proffered a full and satisfactory explanation for its absence. The ruling comprises little more than a one-sided castigation of the appellant. Had the commissioner dismounted his high horse and reflected on the facts and the manifest prejudice that would be caused to the appellant were the postponement to be refused, a different outcome would have resulted. The commissioner failed to appreciate that the appellant was of right, entitled to representation by an employers' organisation and by a person sufficiently well-versed in the dispute. The time period within which the commissioner expected the appellant to replace Lotter was simply unrealistic. This is particularly so where the standard form for the referral of disputes for arbitration contains little if anything in the way of facts and conclusions of law on which the referring party intends to rely. There is no record of any pleaded case, or pre-trial minute that might have assisted a seasoned practitioner quickly to discern the case to be met. The commissioner's assumption that standing the matter down from 9:00 to 12:00 provided an alternative representative with sufficient time both to acquaint him or herself with the matter and prepare for an arbitration hearing, is simply not tenable.

- [15] Although, as the Labour Court appreciated, the threshold for review is ultimately the narrow ground of reasonableness, the failure by the commissioner to consider the prejudice that a refusal to postpone the matter would cause to the appellant and to balance the competing interests at stake is a reviewable irregularity, one that had the result of a decision that fell outside of the band of decisions to which a reasonable decision-maker could come on the available evidence. The ruling refusing a postponement of the arbitration hearing thus stood to be set aside, and the Labour Court erred when it upheld the ruling. It follows that the default award and rescission rulings issued consequent on the refusal to postpone the arbitration hearing should also be set aside, and the matter remitted to the CCMA for rehearing before a different commissioner.

Costs

[16] Neither party seriously pursued the issue of costs, and the requirements of the law and fairness dictate that each party should bear its own costs.

[17] In the result the following order is made:

Order

1. The appeal is upheld, with no order as to costs.
2. The order granted by the Labour Court is set aside and substituted by the following:
 - a. 'The first respondent's refusal to postpone the arbitration hearing set down for hearing on 9 April 2021 is reviewed and set aside.
 - b. The rescission rulings issued by the first respondent on 18 June 2021 and 21 July 2021 respectively are reviewed and set aside.
 - c. The default arbitration award issued by the second respondent on 21 April 2021 is reviewed and set aside.
 - d. The dispute between the parties is remitted to the first respondent for an arbitration hearing on the merits before a commissioner other than the second respondent.
 - e. 'There is no order as to costs'

A. van Niekerk

Judge of the Labour Appeal Court of South Africa

Nkutha-Nkontwana J and Waglay AJA concur.

APPEARANCES:

For the Appellant : Adv V Mdebele, with him Adv J Maboga,
Instructed by Webber Wentzel

For the Respondent : Adv O S Msimanga,
Instructed by Msikinya Attorneys & Associates