REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR1343/2011

In the matter between:

INTERSITE PROPERTY MANAGEMENT SERVICES **Applicant**

and

KHULULEKILE MCHUBA **First Respondent**

COMMISSIONER FOR CONCILIATION,

MEDIATION AND ARBITRATION **Second Respondent**

COMMISSIONER KATLHOLO WABILE (N.O.) **Third Respondent**

Heard: **18 December 2012**

Delivered: **13 August 2013**

JUDGMENT

LANCASTER, AJ

Introduction

[1] This matter came before me as a review between the applicant, Intersite Property Management Services and the first respondent, Khululekile Mchuba, an employee of the applicant at the time. The third respondent is the CCMA Commissioner Kathlolo Wabile, hereinafter referred to as the commissioner. The CCMA itself is joined as second respondent, hereinafter referred to as the CCMA.

[2] Both the applicant and the first respondent filed comprehensive affidavits and heads of argument during the course of the proceedings and the record comprises some 600 pages of documents and the transcript of the arbitration proceedings.

Background facts

[3] The first respondent was employed by applicant (or PRASA whatever the case may be) since June 2005. There seems to be a dispute between the parties on the correct employer, however, this issue was not canvassed during the arbitration proceedings.

[4] Whilst the exact merits of the dispute are too extensive to canvass comprehensively in this judgment, the salient issue between the parties concerns the down-grading of the performance rating of the first respondent's performance for the 2009/2010 financial year. This, as the argument goes, prejudiced the first respondent in that the down-grading was premised on irrelevant grounds; was arbitrary and unfair; and caused the first respondent to fall short of the qualifying criteria for the payment of a performance bonus and performance based increase, which he had seemingly expected.

[5] The evidence presented to the arbitrator in this regard suggest and that the performance rating initially agreed to between first respondent and his line manager was 3.26, which according to the first respondent, would have entitled him to a performance bonus equal to 20% of his annual salary.

[6] This performance rating was, however, subsequently decreased by the CEO of the employer, to a score of 2.35, which performance score did not qualify the first respondent for the payment of a performance bonus or for a performance increase.

[7] The first respondent alleged that the lowering of the original rating utilised reasons or applied circumstances or facts that were not relevant to and ought not to have been considered for evaluation purposes of the first respondent's performance, alternatively that the applicant took into consideration, factors that were beyond the control of the first respondent. The allegations were therefore, as I understand it, that the assessment process was not rational or fair.

[8] The matter was referred to the CCMA as an unfair labour practice dispute and the arbitration commenced on 29 March 2011. Further evidence was led on 19 and 20 May 2011. But for certain points *in limine* dealt with on the first day, the most of the first and second days of the arbitration was taken up by the evidence of the first respondent, who testified on his own behalf.

[9] The applicant then started with the leading of its evidence after a lunch adjournment on 19 May 2011. The proceedings continued until 17:10 when it was adjourned to the next day.

[10] What transpired on 20 May 2011 is critical to the review grounds presented by the applicant and it is therefore important to canvass the events in detail.

[11] The applicant continued with the evidence of its first witness, a Mr Mphaphuli, on the second day, albeit that it seems that his name has been incorrectly cited in the transcript of 20 May as Mphafudi. This witness seemingly testified up until lunch time when the proceedings were adjourned for lunch.

[12] Prior to the lunch adjournment, an application for postponement was brought by the applicant's representative on the premise that he needed to call a witness, Mr Pierre Cronje, whom was stationed in Cape Town.

[13] The reasons given for the postponement, *inter alia*, were that the applicant did not see it as necessary to call Mr Cronje until the first respondent's evidence revealed that there was a dispute between the first respondent and the applicant over processes.

[14] The applicant further indicated that it would be necessary to call Mr Cronje in light of the fact that it only became apparent that his evidence was necessary on

19 May 2011. The record does not seem to bear out this ground for the requested postponed.

[15] Whilst the record is not complete in respect of the arguments presented or the ruling made, from the remaining portions of the record, it appears that the application was refused and that the reasons for the ruling would be provided in the arbitration award.

[16] The proceedings subsequently commenced at 14:22 and the first respondent called two further witnesses, being Mr Gudlhuza and Mr Sindane. After these two witnesses led evidence, the applicant again applied for a postponement on the basis that it wanted to call upon Mr Cronje from Cape Town. It was argued on behalf of the first respondent at this stage that the commissioner should not revisit his earlier ruling and the commissioner indicated that he would not.

[17] Subsequently, a request was made for the witness to be allowed to testify over the telephone, which request seemingly was also denied by the commissioner out of hand without any consideration.

[18] The applicant then indicated that it intended to call two further witnesses whom had to be called to attend and whom were at the applicant's offices. It was contended that these witnesses were senior and could not be requested to be at the CCMA for the entire day, for operational reasons. From earlier submissions made by the applicant's representative, it appears that one of these witnesses was the CEO of the particular division of the applicant.

[19] Applicant's representative also contended that he had assumed that the case would not finish by 16:00 on that day and had made arrangements to call these witnesses as and when they were needed. It was also put to the commissioner that an attempt had been made to call one of these witnesses during the lunch break but that he appeared to have turned his cellular phone off for unknown reasons.

[20] The commissioner seemingly find, in this regard, that that the witnesses should have been available on the day of the hearing from the morning and that were he to allow further delays, the matter would not be resolved expeditiously, as is his mandate.

[21] A heated debate followed after this ruling by the commissioner, during which point the applicant's representative was forced by the commissioner to close the applicant's case against vehement protestation by the representative that the applicant would be severely prejudiced should its further evidence, which seemingly included the evidence of Cronje, not be heard.

[22] At the conclusion of arbitration proceedings, the commissioner made an award in favour of the first respondent, finding that the applicant was guilty of an unfair labour practice and made an award for payment of a bonus amounting to 20% of the first respondent's annual remuneration.

[23] The applicant, in this matter, raises several grounds for review. I do not intend to deal with all of these grounds as I found only two of these grounds to be particularly compelling.

[24] The first ground I deal with is the contention by the applicant that the commissioner committed a gross irregularity in not allowing the applicant to present evidence by three witnesses who were not available on the day of the arbitration and refused several requests for postponement on these grounds.

[25] The first respondent, in turn, submitted that the commissioner's ruling was fair in that the applicant had been given the opportunity to have its witnesses present on the day of the hearing and the power for granting or denying a postponement to secure witnesses was entirely within the powers of the commissioner.

[26] The factors that have to be considered by a commissioner when considering a postponement or adjournment application have been crystalised in various judgments by this court.

[27] This Court, in the matter of *Insurance and Banking Staff Association and Others v SA Mutual Life Assurance Society*[1] discussed the applicable law regarding postponements. In that matter, Jajbhay AJ held that:

> 'In an application for postponement, the legal principles established in the High Court over the years apply equally in practice in the Labour Courts. For the purpose of the present application, the following principles apply:

[1] (2000) 21 ILJ 386 (LC) at para 44.

(a) The trial judge has a discretion as to whether an application for postponement should be granted or refused. (*R v Zackey* 1945 AD 505; *Myburgh Transport v Botha t/a SA Truck Bodies* 1991 (3) SA 310 (NM).)

(b) That discretion must at all times be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons. (*R v Zackey; Myburgh Transport ; Joshua v Joshua* 1961 (1) SA 455 (G) at 457D.)

(c) The trial judge must reach a decision after properly directing his/her attention to all relevant facts and principles. (*Prinsloo v Saaiman* 1984 (2) SA 56 H (O); *Johannesburg Stock Exchange and Another v Witwatersrand Nigel Ltd and Another* 1988 (3) SA 132 (A).)

(d) An application for postponement must be made timeously, as soon as the circumstances which might justify an application become known to the applicant. However, in cases where fundamental fairness and justice justify a postponement, the court may in an appropriate case allow such an application for postponement, even though the application was not timeously made. (*Myburgh Transport; Greyvenstein v Neethling* 1952 (1) SA 463 (C).)

(e) 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.

(f) 'Considerations of prejudice will ordinarily constitute the dominant component of the total structure in terms of which the discretion of a Court will be exercised.' What the court has primarily to consider is whether any prejudice caused by a postponement to the adversary of the applicant for a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanisms. (Herbstein and Van Winsen The Civil Practice of Superior Court in SA (3 ed) at 453; *Myburgh Transport*.)

(g) “The Court should weigh the prejudice which will be caused to the respondent in such an application if the postponement is granted against the prejudice which will be caused to the Applicant if it is not.”

(h) Where the applicant for a postponement has not made the application timeously, or is otherwise to blame with respect to the procedure which the applicant has followed, but justice nevertheless justifies a postponement in the particular circumstances of a case, the court in its direction might allow the postponement but direct the applicant in a suitable case to pay the wasted costs of the respondent occasioned to such a respondent on a scale of attorney and client. Such an applicant might even be directed to pay the costs of the adversary before the applicant is allowed to proceed with the action or defence in the action, as the case may be. (*Van Dyk v Conradie and Another 1963 (2) SA 413 (C); Tarry and Co Ltd v Matatiele Municipality* 1965 (3) SA 131 (E); *Myburgh Transpo*rt.)'

[28] This approach was confirmed in the matter of *Fundi Projects and Distributors (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others,*[2] also before this Court, where Van Niekerk AJ (as he then was), in discussing the *Insurance and Banking Staff* case, remarked that:

> 'In that case, this court (Jajbay AJ) [sic], referring to a number of judgments of the High Court, established a set of principles that might appropriately be applied in the Labour Court. In my view, these principles are equally appropriate and applicable to proceedings before the CCMA. They form a useful point of reference for the exercise of the discretion that commissioners must necessarily exercise when considering applications for postponement. Too often, as in the present instance, applications for postponement are routinely, arbitrarily and misguidedly refused, frequently because there is no application of a principled approach to the competing interests of the parties.'

[29] Similarly, in *Western Cape Southern Suburbs Real Estate (Pty) Ltd t/a Seeff Properties v Commission for Conciliation, Mediation and Arbitration and Others,*[3] this Court held that:

> 'One is alive to the fact that any application for a postponement impacts on the proper administration of the CCMA. Whilst that may certainly be a factor to consider, it can never be the overriding consideration. The commissioner ought to have applied the general principles regarding applications for postponements.

[2] (2006) 27 ILJ 1136 (LC) at 10.
[3] 2009 (30) ILJ 2158 (LC) at paras 26-27.

> In the first instance, the commissioner ought to have determined whether the employer had provided a suitable reason in support of the application for a postponement.
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> Secondly, the commissioner ought to have dealt with the question of prejudice to the other side. The facts before me now disclose that Tait immediately took up new employment. The issue of prejudice to the employee party does not appear to have been taken up at all, or considered, by the commissioner. To the extent that Tait was prejudiced by reason of having incurred the costs of legal representation, it was within the commissioner's powers to cure such prejudice by ordering the employer to pay the employee's costs occasioned by the postponement.'

[30] Insofar as it is contended that the commissioner committed a gross irregularity in consideration of the applications for postponement, I must determine:

30.1 whether the commissioner in this case properly considered the grounds put forward for the postponement;

30.2 the possible prejudice to the parties should the application be granted or refused;

30.3 any possible ways of curing such prejudice (if any); and

30.4 whether, even in the presence of such prejudice, justice will be served to grant the postponement regardless.

[31] It is trite law that where a postponement relates to securing evidence crucial to the matter at hand and where the postponement would not cause undue prejudice to the opposing party that could not easily be remedied by an order for costs, the postponement should be granted, if nothing else for the sake of justice being served. Arbitration proceedings are intended to be a final outcome to a dispute and as such it is in my view crucial that a commissioner ensures that all the relevant facts of the matter are available to him before coming to a decision.

[32] In the case before me, at least two applications for postponement were brought before the commissioner, seemingly on different grounds.

[33] After reviewing the record of the arbitration proceedings, it is clear that some confusion arose over the different reasons for the postponement applications. The first application for postponement was a request to procure a witness from Cape Town. The applicant claimed that the need for this witness only arose after hearing the first respondent's testimony. I agree with the commissioner's finding in this case that a postponement may not have been warranted in the circumstances, as the evidence in question given at the earlier sitting which occurred on 29 March 2012. The commissioner was correct in his ruling that this gave more than sufficient time to secure the witness's attendance on 19 May.

[34] In my reading of the record of proceedings, the confusion occurs shortly thereafter when the applicant brings a further application for adjournment and/or postponement in order to have a witness from the office of the applicant attend at the CCMA, whom the applicant's representative was struggling to contact. The commissioner in respect of this application merely found that the ruling in respect of the first postponement application also applied to this second application and that he was unable to revisit the ruling.

[35] Upon examination of the proceedings in their entirety, it becomes clear that this was in fact a new application for postponement or short adjournment of the proceedings. The commissioner was, in my view, required to rule again on this issue. Furthermore, in light of the fact that the witness needed only to travel from his office in Sandton to the CCMA premises in Johannesburg, an adjournment of the matter for an hour or so would not have prejudiced the first respondent or hampered the process of justice being served.

[36] Whilst it is true that the CCMA is charged with resolving issues between employers and employees in an expeditious manner, such expediency cannot be at the expense of justice being served to either of the parties. It has been the ruling of this Court numerous times that where a postponement does not cause prejudice to another party, which prejudice cannot be rectified by a costs order, it is not reasonable to deny a party that postponement, provided that the reasons for such postponement are material to the outcome of the matter.

[37] In the present instance, it is clear from a reading of the record that the later application for a postponement took place very late in the day, seemingly after

15:00. The applicant's representative at that stage intended to call at least three further witnesses that were identified during the proceedings. It would have been highly unlikely that the proceedings would in any event have been finalised on 20 May 2011 and that the prejudice which the commissioner sought to prevent, would in any event have been likely, even if the witnesses of the applicant had been present at the time that the indulgence was sought by the applicant. There is no indication in the record or the award of the commissioner that this aspect was considered properly or at all.

[38] Given the tests that have been formulated by the different courts in respect of postponements and adjournments as referred to herein above I am of the view the commissioner erred in not considering all of the circumstances and factors to be considered in respect of the indulgences sought by the applicant. In this regard, the applicant was prevented from leading evidence, ie that of the CEO, which was crucial to the applicant's case, thereby sacrificing justice in favour of expediency and prejudice to the first respondent, which could easily have been remedied in a way that was less prejudicial to the applicant.

[39] On a balance of the factors, it seemed that the prejudice that the applicant ultimately would have suffered and in fact ultimately suffered, far outweighed, in my view, the prejudice to the first respondent, which may ultimately in any event have been suffered even if the further witnesses that the applicant intended to call had been present at the time of the request for the adjournment or postponement.

[40] It is, therefore, my conclusion that the commissioner did not act reasonably in denying the second request for a postponement. The commissioner, therefore, committed a gross and reviewable irregularity in not granting the applicant's later applications.

[41] The second ground on which I believe the commissioner's finding falls short of what can be seen as a reasonable finding given the evidence that was presented to him is the issue of the bonus payment ultimately awarded to the first respondent.

[42] The commissioner, in this regard, finds that as a result of the unfair labour practice allegedly committed by the applicant, the first respondent was entitled to a bonus of 20% of his annual salary, which is calculated to be R240 000.00.

[43] Whilst the evidence in this regard was limited to the first respondent's attorney eliciting a concession from the applicant's representative that the remuneration policy (which was before the commissioner) dictated the bonus that the first respondent would have been entitled to had he achieved a rating of three, the only other evidence presented by the first respondent in this regard is ambiguous and inconsistent with the remuneration policy itself.

[44] In this regard, the first respondent on one occasions testifies that the remuneration policy applies and later testifies that he would have been entitled to 20% of his annual salary should the rating of three have been accepted.

[45] On a proper reading of the remuneration policy itself, this appears to be incorrect. In this regard, the policy determines that the maximum bonus value that a senior manager would have been entitled to is 35% of his annual base pay. This 35% is then multiplied by the percentage that the first respondent would receive in terms of his own performance rating.

[46] The commissioner's finding, in this regard, is therefore unreasonable and irrational given the evidence that was properly before placed before him during the arbitration proceedings and cannot be sustained.

[47] Having found that the award is reviewable on the grounds as set out heretofore, I do not believe it necessary to deal with remaining grounds for review for purposes of this judgment.

Order

[48] In light of the above, I, therefore, make the following order:

48.1 The application for review is upheld and the award of the CCMA under case number GAJB31597/10 is hereby reviewed and set aside.

48.2 The matter is referred back to the CCMA for arbitration before a different commissioner than the third respondent.

48.3 There is no order as to costs.

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Lancaster AJ

Acting Judge of the Labour Court of South Africa