THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR1870/14

In the matter between:

WADE WALKER (PTY) LTD **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **First Respondent**

NICHOLUS SONO N.O. **Second Respondent**

CLEMENT MASITE **Third Respondent**

Heard: 3 August 2017

Delivered: 8 August 2017

Summary: Commissioner misdirecting himself in refusing an application for a postponement – award set aside on review

---

JUDGMENT

MYBURGH, AJ

[1] The central issue in this section 145 review application is whether the commissioner committed a reviewable irregularity in refusing the company a postponement of the CCMA arbitration.

[2] The essential background is this. Following his dismissal by the company on 19 June 2014, the employee referred a dispute to the CCMA. On 25 June 2014, a notice of set down was issued by the CCMA enrolling the matter for con / arb on 21 July 2014. On that day, the commissioner first attempted to conciliate the matter and after having issued a certificate of outcome, proceeded to the arbitration phase. At this point, the company applied for a postponement on the basis that it was unprepared for the arbitration, with the application having been refused by the commissioner. The arbitration then proceeded, but the company was unable to produce witnesses and documentation necessary to defend the matter properly. On 25 July 2014, the commissioner issued his award, in which he found the employee's dismissal substantively unfair and ordered his retrospective reinstatement.

[3] Focusing on the application for a postponement, it is apparent that there was some discussion with the commissioner in this regard before he went on record. On the record, Mr Oosthuizen (the company's representative) motivated the application on the basis that the notice of set down had not come to the attention of the persons dealing with the matter, and that the company was thus unprepared – not having the necessary witnesses and documentation available. In response, the employee expressly *agreed* to the postponement being granted (indeed, he appears to have wanted a postponement himself). Immediately thereupon, and without any further engagement with the parties, the commissioner ruled that he was refusing the postponement, and would give reasons in his award.

[4] In his award issued four days later, the commissioner said this about the refusal of the application for a postponement:

> "I have analysed the application and applied my mind carefully hereon. The employer was notified of the date of the hearing on the 25th of June 2014 via

> fax number 086 557 4912. The employee has submitted proof that the fax number belongs to the respondent. The employer did not provide any explanation to show that there was a technical problem with the fax on the 25th of June 2014. The employer was afforded more than 21 days in order to prepare for the case. It was therefore my finding that the employer failed to submit convincing reasons for the postponement."

[5] This is a remarkable finding. In effect, the commissioner refused the application for a postponement because the notice of set down had been timeously issued. While that was a sound point of departure, the commissioner completely failed to address the basis for the company's application or the predicament that it found itself in. While Mr Graham (who appeared for the employee in this court) submitted that this could be excused in the light of the fact that the commissioner was only obliged to give brief reasons, this is without merit. Brevity is not an excuse for the lack of substance.

[6] The general principles applicable to applications for postponements are trite law and need not be repeated here, save to say that considerations of prejudice will ordinarily constitute the "dominant component" in the evaluation of an application for a postponement.[1] The commissioner 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. And in assessing prejudice, the commissioner should consider whether any prejudice caused by the postponement can fairly be compensated by an order of costs or any other ancillary mechanisms.

[7] In assessing the matter, I am mindful of the fact that in *Carephone* (decided in 1998) the LAC found that the requirements for the functioning of the CCMA

[1] See for a full rendition of these general principles, *Insurance & Banking Staff Association & others v SA Mutual Life Assurance Society* (2000) 21 *ILJ* 386 (LC) at para 44. These principles have been found to be applicable to CCMA arbitrations – see *MMMJN Supermarket CC t/a Riverside Spar v Collins & Others* [2002] 5 BLLR 442 (LC) at paras 13-14, *Masstores (Pty) Ltd t/a Builders Warehouse v CCMA & others* [2006] 6 BLLR 577 (LC) at para 41, and *Fundi Projects & Distributors (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others* (2006) 27 *ILJ* 1136 (LC) at para 10.

"are less congenial to the granting of postponements than is the case in a court of law".[2] But as found by Van Niekerk AJ (as he then was) in *Fundi Projects & Distributors*:[3]

> "… the *Carephone* case was decided at a time when CCMA commissioners had very limited powers to award costs. The discretion afforded them by the amendments to the Labour Relations Act introduced in 2002 enables commissioners to give full effect to the principles stated above, and in doing so, to address the policy concerns articulated in *Carephone* both in respect of the parties to a dispute and the public generally."

[8] Reverting to the facts of the present matter, while the dominant component of the commissioner's evaluation of the application for a postponement ought to have been the issue of prejudice, it is apparent from both the transcript of the arbitration and the award that the commissioner failed to consider it in the slightest. If the commissioner had considered the issue – as he ought to have – he would surely have concluded that the balance of prejudice favoured the granting of the postponement, *especially* where the employee agreed to a postponement. In failing to do so, the commissioner committed a material misdirection.

[9] To my mind, in the circumstances of this matter, the distorting effect of this material misdirection was that the commissioner committed a gross irregularity in the conduct of the arbitration proceedings in three respects. Firstly, he acted procedurally unfairly in refusing the company a postponement.[4] Secondly, he misconceived the nature of the enquiry, in that he failed to undertake an assessment of the balance of prejudice, which ought to have been the dominant component in the evaluation of the application for

---

[2] *Carephone (Pty) Ltd v Marcus NO & others* (1998) 19 *ILJ* 1425 (LAC) at para 57.

[3] Fn 1 above at para 14.

[4] The fundamental right to administrative action that is *procedurally fair* has been found to have suffused section 145 of the LRA: *Arends & others v SA Local Government Bargaining Council & others* (2015) 36 *ILJ* 1200 (LAC) at para 19. And where a commissioner acts procedurally unfairly, the reasonableness of the result of the award need not be assailed in order to succeed on review: Myburgh & Bosch *Reviews in the Labour Courts* at 84, para 4.5.2.

a postponement.[5] Put differently, the commissioner's misconception of the enquiry lay in his failure to "conduct the enquiry properly by asking the questions he ought rightly to have asked to decide" the issue before him.[6] Thirdly, he acted unreasonably in refusing the postponement. In relation to the latter, in circumstances where the matter was heard little more than a month after the employee's dismissal, where the employee agreed to a postponement, and where, in the circumstances, the balance of prejudice overwhelmingly favoured the grant of a postponement, a reasonable commissioner would not have refused the postponement.[7]

[10] In the result, the following order is made:

1) the second respondent's award is reviewed and set aside;

2) the dispute arising from the third respondent's dismissal is referred back to the first respondent for a fresh hearing by a commissioner other than the second respondent;

3) there is no order as to costs.

_____

Myburgh, AJ

Acting Judge of the Labour Court of South Africa

[5] The misconception of the nature of the enquiry is a gross irregularity distinct from unreasonableness; so where the former is established, the latter need not be. This is clear from *Herholdt v Nedbank Ltd (COSATU as Amicus Curiae)* (2013) 34 *ILJ* 2795 (SCA) at para 25, *Head of Department of Education v Mofokeng & Others* (2015) 36 *ILJ* 2802 (LAC) at para 33, and *Toyota SA Motors (Pty) Ltd v CCMA & others* (2016) 37 *ILJ* 313 (CC) at para 118.

[6] *Xstrata South Africa (Pty) Ltd (Lydenburg Alloy Works) v NUM obo Masha and Others* (JA4/15) [2016] ZALAC 25 (14 June 2016) at para 11.

[7] This being the test for reasonableness set in *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 *ILJ* 2405 (CC) at para 110.

Appearances

For the applicant: D Pretorius of Fluxmans Inc

For the third respondent: T Graham of Graham Attorneys