

IN THE LABOUR COURT OF SOUTH AFRICA

CASE NO: J5507/00

In the matter between:

Applicant

and

First Respondent

Second Respondent

THE COMMISSION FOR CONCILIATION,  
Third Respondent

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JUDGMENT

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FRANCIS J

*Introduction*

13. This is an application to review and set aside an award made by the second respondent (“the arbitrator”) under the auspices of the third respondent (“the CCMA”). In terms of the award, the arbitrator found that the applicant had failed to re-instate the first respondent in terms of an agreement, which was an unfair labour practice in terms of item 2(1)(d) of Schedule 7 of the Labour Relations Act 66 of 1995 (“the Act”). The applicant was ordered to pay the first respondent an amount of R78 960,00, being the equivalent of twelve month’s remuneration.
14. The applicant had during the arbitration hearing applied for the postponement of the

matter as two of its witnesses had to attend a funeral. The arbitrator dismissed the application for a postponement. The applicant seeks to review in terms of section 145 of the Act, the ruling that the arbitrator made when he dismissed the application for a postponement.

15. The first respondent is not opposing the application and has indicated that she will abide by the decision of this Court.

*Background facts*

16. The applicant dismissed the first respondent for operational requirements as well as for reasons due to her medical condition with effect from 16 February 1999. A written agreement was concluded between the parties on 22 February 1999, in terms of which the first respondent would be afforded the first opportunity to return to the applicant should any vacancy arise on condition that she was found suitable to fill such a vacancy and was medically fit. This agreement was valid for a period of six months.
17. The first respondent alleged that there had been a suitable vacancy but that the applicant had failed or refused to re-instate her in terms of the said agreement, which constituted an unfair labour practice in terms of item 2(1)(d) of Schedule 7 of the Act.
18. The applicant referred a dispute to the CCMA on 3 August 1999. The dispute was

conciliated on 28 October 1999. The dispute was referred to arbitration after conciliation had failed. The matter was set down for arbitration on 26 June 2000 and came before the arbitrator. The applicant raised an objection that the first respondent's representative, who was a labour consultant, could not represent her. The arbitration hearing was postponed to 1 September 2000.

19. Mr Erhardt Smith, a close friend of two of the applicant's material witnesses, being Mike Ioannides and Elaine Flett, died tragically on Sunday 27 August 2000. Both witnesses had personal ties with the deceased and wished to attend his funeral which was going to take place at Potchefstroom on 1 September 2000 at 14H00. The witnesses stated that they had suffered severe trauma and emotional stress and considered themselves unable to testify under such circumstances immediately before the funeral.

20. The applicant sent a letter dated 28 August 2000 to the first respondent and requested a postponement. It cited the reasons contained in paragraph 7 above. This request was refused in a letter on behalf of the first respondent dated 29 August 2000. In a further letter dated 29 August 2000, the applicant informed the first respondent of its intention to apply for a postponement on 1 September 2000.

21. The applicant's counsel who had appeared on 1 September 2000 at the arbitration hearing, applied for a postponement. The first respondent's counsel opposed the

application. The arbitrator dismissed the application for a postponement. Thereafter the applicant's counsel left the arbitration proceedings and the arbitration proceeded in the absence of the applicant.

22. The arbitrator made the following ruling:

23. *“Having listened to both sides I'm not persuaded to grant a postponement on this particular matter for the following reasons:*

24. I'm a part-time commissioner, they've asked me to come and deal with this particular matter. I've not been aware of any situation that would, untoward, you know this particular event of death, I was not informed of that before today so that I can communicate with both parties to say that look I won't be coming that particular day, let's rather meet maybe next week or so.

Now the CCMA won't pay me for today, and if I have to find a date it will probably take quite some time. That's number 1.

25. I am not quite convinced that the two witnesses could not come because they were so much emotionally attached to the person who passed away. I don't hear any direct relationship between them, you know family relationship, he was just a friend. I understand a friend can be very, very attached to somebody but I would have difficulty to grant postponement on the basis that these two witnesses could not come because they were emotionally attached because this is just a friend.

Besides the judgement that was made by the Labour Court, I am not very convinced that the two witnesses could not come because they were emotionally

attached to this particular person.

We, I think what I would say I cannot grant postponement to your request for postponement. We can now take five, ten minutes so that we can reorganise our thinking and proceed with this matter.”

11. The applicant is seeking to review the aforesaid refusal to grant a postponement.

*The grounds of review*

12. The applicant contends that the arbitrator had:

“12.1 *committed misconduct in relation to the duties of a commissioner as an arbitrator; and/or*

12.2 *exceeded his powers as a commissioner; and/or*

12.3 *failed to apply his mind in the matter; and/or*

12.4 *made a ruling not justifiable in terms of the reasons given for such a ruling; and/or*

12.5 *committed a gross irregularity in the conduct of the arbitration proceedings.”*

*Postponements*

26. The legal principles in respect of postponements were summarised in *Insurance & Banking Staff Association and Others v SA Mutual Life Assurance Society* (2000) 21 ILJ 386 (LC) at paragraph 44 at 394 E - F as follows:

*“In an application for a 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:*

- (a) The trial judge has a discretion as to whether an application for a postponement should be granted or refused.*
- (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.*
- (c) The trial judge must reach a decision after properly directing his/her attention to all the relevant facts and principles.*
- (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 a postponement, even though the application was not timeously made.*
- (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 application for a postponement can fairly be compensated by an appropriate order of costs or any other ancillary mechanisms.*
- (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, if it 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 discretion 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."*

27. The above principles would apply equally to arbitration proceedings.

*Analysis of the facts and legal principles*

28. I am of the view that the arbitrator had misdirected himself in not approaching the application for a postponement on the basis that the first respondent had been granted an indulgence at the previous postponement of the matter on 26 June 2000. He had erred in respect of the relevant and correct facts. This fact should have been taken into account by the arbitrator.

29. The arbitrator misdirected himself about what the reasons for the first postponement was. During the application for postponement, the applicant's counsel submitted that the initial postponement was occasioned by the first respondent. On the other hand,

counsel for the first respondent suggested that it had been because the first respondent had been refused legal representation. Contrary to the true facts, the arbitrator stated that it had been the applicant as employer that had opted for the postponement. It is clear that the arbitrator assessed the facts incorrectly. He did not consider the appropriate facts when he refused to grant a postponement.

30. The arbitrator misdirected himself when using the fact that he would not be paid in the event of a postponement as a consideration. The financial considerations incorrectly weighed heavily with the arbitrator. This appeared to be the arbitrator's main reason for not granting the postponement.

31. The arbitrator erred in finding that the first respondent would suffer excessive prejudice. The first respondent had occasioned the first postponement. The previous delay from 26 June 2000 to 1 September 2000 was about two months. A further postponement would not have been more than that. The applicant did not cause the previous delay. The present dispute was referred to conciliation on 3 August 1999. It was conciliated on 28 October 1999. The arbitrator did not consider granting an order of costs to remedy any prejudice suffered by the first respondent. The first respondent was informed of the circumstances and reasons for the postponement without any delay. The possible prejudice for the applicant, having to pay R78 960.00 far outweighs any prejudice caused for the first respondent by a delay of a further two months which could have been rectified by an appropriate order as to costs.



32. Both witnesses stated in their affidavits that they were traumatised and stressed and would be unable to testify properly. The arbitrator rejected these facts without any justification or factual basis.

33. Mr J J Pretorius, who appeared for the applicant, conceded that it would only be fair for the applicant to be liable for the wasted costs incurred by the first respondent on 1 September 2000. I agree.

34. In the circumstances it is ordered that:

1. (a) The award dated 11 October 2000 under case number GA77248 is reviewed and set aside and is referred back to the third respondent for a hearing before a different commissioner.
- (b) The applicant is directed to pay the wasted costs incurred by the first respondent on 1 September 2000 on a party and party scale.
- (c) There is no order as to costs of the review application.

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FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

APPLICANT : JJ PRETORIUS INSTRUCTED BY ERIC H LOUW ATTORNEYS  
RESPONDENTS : NO APPEARANCE  
HEARING : 25 MARCH 2002

OGMENT : 25 MARCH 2002