IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG

CASE NUMBER: J1713/04

and

J1052/04

In the matter between

THABANG MOKHESENG **APPLICANT**

and

KAREE MINE **RESPONDENT**

JUDGMENT

CELE AJ

INTRODUCTION

[1] There are two applications before me. The first one is in terms of section 158 (1) (c) of the Labour Relations Act 66 of 1995, the Act, to make an arbitration award dated 8 June 2004 an order of Court. The respondent who is opposing this application, is itself an applicant in an application to review and set aside the same

arbitration award which was issued by the second respondent while he was acting under the auspices of the first respondent, the CCMA. The applicant in the first application opposes the second application and is the third respondent. Both applications were argued simultaneously before me.

[2] In my view, the success of the first application will depend on the success or otherwise of the review application. I will accordingly, examine the review application first and will refer to the parties as they appear in the review application.

[3] Before I proceed with the review application it is expedient that I should first deal with the background facts, in so far as are applicable to both applications.

Background Facts:

[4] The third respondent was employed by the applicant company in the capacity of a locomotive driver. He commenced such services with the applicant on 6 October 1994.

[5] One of the duties of the third respondent was to assist the production team members to re-rail an underground locomotive which would have derailed during the shift. A derailed locomotive underground, constituted a hazard which had the potential to lead to an occupational accident and had therefore to be re- railed without undue delay.

[6] The third respondent reported to a person who occupied the position of a "team leader", one Mr Bomela.

[7] On 24 August 2000, the third respondent reported on duty. His

working shift started at 06H00 until 14H00. At about 13H30, a locomotive derailed underground. An instruction was given to the third respondent to help re-rail the said locomotive. The time of the giving of the instruction is in dispute. The third respondent did not comply with that instruction.

[8] On 25 August 2000, the third respondent was served with a notification of a formal disciplinary hearing. The act of misconduct with which he was charged was described as –

> "Refusal to carry out reasonable instruction in that on 24 August 2002, you refused to re-rail the loco."

The hearing was to take place on 1 September 2000.

[9] On 1 September 2000 the internal disciplinary hearing was postponed till 4 September 2000 to allow the third respondent to bring his representative. On 4 September 2000, the hearing continued. The third respondent was then found to have committed the act of misconduct with which he had been charged.

[10] On 5 September 2000 the third respondent was dismissed by the applicant. He was aggrieved by such dismissal and so a dismissal dispute arose between the parties. The third respondent then referred the dispute to the Commission for Conciliation, Mediation and Arbitration, the CCMA, in Gauteng Province, timeously. The dispute was not capable of resolution and a certificate of outcome was issued to that effect. The third respondent then referred the dispute for arbitration. A ruling was issued by the CCMA- Gauteng that it had no jurisdiction over the matter and advised the representative of the third respondent to refer it to the CCMA in North West. The representative failed to give effect to such referral thus causing a delay in the matter.

[11] On 8 November 2001, the third respondent, acting personally referred the dispute to the CCMA in North West. As he did so, he then applied for condonation for the late referral of the dispute. A ruling was issued in his favour to the effect that condonation was unnecessary as he had timeously referred the dispute to the CCMA in Gauteng.

[12] There were further delays in the hearing of this matter but arbitration proceedings were finally scheduled to commence on 3 June 2004. Notices of set down were sent by telefax to and received by both parties on 30 March 2004.

The arbitration Proceedings

[13] The second respondent was assigned to this matter as an arbitrator on 3 June 2004 and both parties appeared before him. After the parties had deliberated on the matter, the proceedings began with the applicant applying for a postponement of the proceedings.

[14] Two reasons were given and canvassed by the applicant in justification of the postponement, namely:-

(1) As a result of deliberations of the parties, Mr Nkisi, who appeared for the applicant, said that he needed to get a mandate from top management to reinstate third respondent;

(2) One of the witnesses of the applicant had left the company on 28 May 2004 for his annual leave. Attempts made by the applicant to trace him were all in vain. Applicant considered the witness to be crucial in the matter. He was Mr Bomela who had issued the instruction in question to the third applicant.

[15] Mr Luthuli, who appeared for the third respondent, opposed the application on four grounds namely:-

(1) The applicant knew all along that the third respondent

was disputing the fairness of dismissal. Correspondence had been exchanged to this effect. The company ought therefore to have come to the arbitration proceedings prepared for a proof that the dismissal was for a fair reason;

(2) The application for postponement was not lodged in compliance with the rules of the CCMA;

(3) The notice of set down was given to the parties in time for them to arrange for their witnesses

(4) A postponement would be prejudicial to the third respondent.

[16] The second respondent refused to grant the postponement and he ordered the parties to present their cases.

[17] The applicant had only one witness, a Mr Hindmarsh – Russell who was the applicant's mine overseer. He was also the chairperson of the internal disciplinary hearing of the third respondent. He had not been present when the incident in question took place underground. The fairness of the disciplinary hearing was not in dispute. As to whether the dismissal of the third respondent was or was not substantively fair, Mr Hindmarsh – Russell testified on there being an urgent need to re- rail a derailed locomotive. He said that the team of the next shift might not know about the derailed locomotive and compared it with leaving a broken car in the middle of the road. He recognised a rule, taken from the Basic Conditions of Employment Act number 75 of 1997 that an employer might not require or commit an employee to work overtime except in accordance with an agreement. He however said that, in the case of an emergency, where people's lives are in

danger, people might work overtime to remove that danger or to safeguard other people's lives.

[18] Mr Luthuli put it to Mr Hindmarsh – Russell that the third respondent came in the morning of that day, and reported to his team leader that he was not well as he was feeling seek. The third respondent was said to have come to work only out of the respect of his job and he was to go and seek treatment after work. Mr Luthuli said that the third respondent was in no position on that day to carry anything heavy with his hands on that day. Mr Hindmarsh – Russell retorted by saying that the third respondent ought to have said that in the disciplinary hearing. Mr Luthuli suggested that the third respondent had disclosed that fact at the hearing.

[19] Mr Luthuli put it to Mr Hindmarsh – Russell that the team leader did not want to charge the third respondent due to his (third respondent) medical condition. However, another senior supervisor of the company threatened to charge the team leader instead, if he did not charge the third respondent. Mr Hindmarsh – Russell's evidence was that he bore no knowledge of such facts. So much for his evidence.

[20] In his evidence, the third respondent said that he had been suffering from flue and was booked off sick for four days. On the day of the incident he had come to submit his medical certificate but was asked by his team leader to go to work. He duly complied. He said at 13H30 he left his working post, as did others. All congregated at

the station to be taken out by 14H00. He said that his team leader did ask him to go back to the locomotive but he reminded the team leader of his condition and was allowed to leave.

[21] The third respondent said that, at the disciplinary hearing, he had spoken about his medical condition on the day in question but Mr Hindmarsh – Russell did not want to hear anything about it. He said that he had not been asked to produce the medical certificate at the disciplinary hearing and that if he had been asked, he would very easily have done so as the offices of the Clerks to whom he had submitted the certificate were close-by. That, in brief, concluded his evidence.

The arbitration award.

[22] The second respondent found that-

- The large part of the evidence of Mr Hindmarsh-Russell was hearsay as he relied on what he was told by his supervisors.
- Mr Hindmarsh-Russell had been absent underground when the incident took place. He did not know that the applicant was given permission by his supervisor to leave,
- The third respondent's team leader had not come to give evidence at the arbitration proceedings to dispute the version of the third respondent,
- The applicant had failed to show that the third

respondent had breached any rule at the applicant's work place.

- The third respondent was indeed sick on the day and duly reported the fact to his team leader, who in turn had told him to go and see a doctor at knock off time.
- The third respondent had finished the shift work of the day. He did not agree to work overtime and was sick.
- The dismissal of the third respondent was substantively unfair.

[23] The second respondent then ordered the applicant to reinstate the third respondent retrospectively and to compensate him, as a back pay for lost income.

[24] It is this award which caused grief to the applicant which now seeks to have it reviewed and set aside.

Grounds for review

[25] The applicant submitted, *inter alia*, that the second respondent committed misconduct and a gross irregularity in the conduct of the arbitration proceedings when he refused to grant a postponement of the proceedings. Further it was submitted that the second respondent unjustifiably and irrationally rejected important

facts and evidence relating to the postponement of the proceedings. Further, the applicant submitted that the second respondent misdirected himself by refusing the postponement. In finding that the reasons provided for the postponement were not plausible, it was said that the second respondent had divorced himself from the main reason for the postponement. The applicant submitted further that there was no rational connection between the facts properly presented to the second respondent, on the application for a postponement, and outcome he reached.

[26] In assessing compensation payable to the third respondent, the applicant submitted that the second respondent took into account completely inaccurate information and relied on an inflated remuneration figure. It was said in this regard, that there was no evidence presented at the arbitration proceedings about the third respondent's salary or earnings.

[27] The third respondent in opposing the review application submitted that the parties were given enough time to prepare for the hearing. It was submitted that the applicant ought to have sought the consent of the third respondent when seeking a postponement and that such application ought to have been filed and served in terms of the rules of the CCMA. It was submitted further that the second respondent had not committed any misconduct or gross irregularity and had neither failed to apply his mind to the evidence before him nor had he made any decision which was irrational or unjustifiable in relation to the application for a postponement of the arbitration

proceedings.

Analysis

[28] Section 138 (1) of the Act provides that the commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, must deal with the substantial merits of the dispute with the minimum of legal formalities.

[29] There are a number of decisions of this Court that have been handed down wherein for the postponements of matters were dealt with. A decision whether or not the application ought to be granted is discretionary and therefore the granting of it, is rather an indulgence given to the successful litigant.

[30] Jajbhay AJ, in **Insurance & Banking Staff Association & others v SA Mutual Life Assurance Society (2000) 21 ILJ 386 (LC),** listed such principles of an application for postponement as he found to be applicable in that case. He was dealing with an application for postponement of proceedings before him and that touched on the availability difficulty of Counsel together with logistical difficulty.

[31] In as much as these legal principles were established in the High Court over years, Jajbhay AJ found that they applied equally in practice in the Labour Courts.

[32] The following are such legal principles:

(a) The trial judge has discretion as to whether an application for 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 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 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) Consideration of prejudice will ordinary constitutes 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 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, or is otherwise to blame with respect to the procedure which the applicant has to follow, 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 application might even be directed to pay the costs of the adversary before the applicant is allowed to proceed with the action or defense in the action, as the case may be.

[33] I then proceed to examine the relevant facts which the applicant placed before the second respondent in support of the application for a postponement.

[34] The first reason for the postponement given by the applicant was that, the applicant needed to consult with its top management to reinstate the third respondent. This consideration, the applicant said came about because Mr Luthuli had informed it, apparently in the pre – arbitration proceedings, that its case had no prospects of success on merits.

[35] In opposing the application on this ground Mr Luthuli submitted that the ground was not plausible as the applicant would have known all along that the substantive fairness of dismissal was being challenged by the third respondent.

[36] In my view, the second respondent correctly found that the ground raised by the applicant was not plausible. The matter had previously been conciliated upon. The applicant was therefore aware not only that the third respondent was challenging his dismissal, but also the basis of such challenge. There does not appear to have been anything then which Mr Luthuli added when he intimated that applicant's case was weak. If there was, it has not been shown to exist. I find that no defect has been committed by the second respondent in this respect.

[37] The second reason for the application to postpone arbitration proceedings was based on the absence of a material witness for the applicant. The applicant has failed to show why it did not apply timeously for a postponement when it was realised that the tracing of the relevant file was taking too long. The applicant was discourteous in not alerting other parties of its predicament and to ask for an indulgence in time.

[38] However, this enquiry does not stop there, as has been shown in **Insurance & Banking staff case,** supra. The second respondent appears to have been aware that his duty did not lie only in looking at the *form* in which the application was brought but had to consider the *substance* thereof. He considered the *form* as part of the s*ubstance* of the application. In doing so, the second applicant had this to say –

> "Certainly the respondent should have taken same sort of measures for them to make sure that they inform whoever was going on leave that, look, you are an important witness in our case. That person certainly works for the respondent, they should have informed that person that on this day please make yourself available for the CCMA case. This was not done and I do not know the reason why this was not done"

[39] The reason why the witness of the applicant was not warned was of course given to the second respondent. That he did not know the reason overwhelmingly shows that he did not apply his mind to it. The applicant only found the file dealing with the matter when the witness had already left for his vacation. Before the file could be

located, the applicant did not know which of its employees had dealt with the matter. Consequently, the second respondent has failed, in his duty, to apply his mind to the issue at hand. Such failure has denied the applicant a fair hearing.

[40] The second respondent also found that the matter had been dragging for quite sometime. He did not look any further. Had he done so, he would have found that the third respondent had, taken about one year to refer the dispute to the correct offices of the CCMA. He incorrectly treated the parties equally in relation to the delay, when in fact; the applicant played no part in it. That was another incident of a failure on his part to apply his mind properly to the issue at hand.

[41] The second respondent went on to examine the prejudice which would have been suffered by the parties in the event of him granting the postponement. He found that the respondent stood to suffer more prejudice than the applicant. He did not give any reason for this. The second respondent failed to investigate whether or not there was an order he could have issued to circumvent the prejudice. To this extent, he committed a gross irregularity in the cause of performing his duties.

[42] The result is that the application to make the arbitration award an order of this Court should not succeed.

Order:

1. The arbitration award issued by Commissioner Hlalele Molotsi on 8 June 2004 in case number G A 11205 is reviewed and set aside.
2. The application to make that award an order of Court is dismissed.
3. The matter is remitted to the CCMA to be placed before another Commissioner for a *de novo* arbitration hearing.
4. No costs order is made.

CELE AJ

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Date of hearing: 22 September 2005
Date of Judgment: 24 February 2006

Appearances

For the Applicant: Adv Snider

Instructed by: Leppan Beech Attorneys

For the Respondent: Mr Luthuli
Instructed by: United Peoples union of SA