

**IN THE LABOUR COURT OF SOUTH AFRICA
HELD IN JOHANNESBURG**

Case no: JR1076/06

In the matter between:

**RELYANT RETAIL LTD t/a BEARS
FURNISHERS**

Applicant

and

Commissioner CM DELL N.O.

**First
Respondent**

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

**Second
Respondent**

JOHANNES PETRUS BOTHA

**Third
Respondent**

JUDGMENT

HENDRICKS AJ

Introduction

- [1] This is an application in terms of section 158 (i) (g) of the Labour Relations Act 66 of 1995, to have the recission ruling made by the First Respondent in case number **FS 3530\05** reviewed and set aside (the Notice of Motion also states that this court can either determine it itself or referred it back to the Second Respondent so that it be determined either by the First Respondent or a commissioner other than the First Respondent) and that pending the determination of the review proceedings, any further proceedings be stayed.

Background

- [2] Mr. De Wet, the Group Industrial Relations Executive of the Applicant, states that his office received a Notice of Set Down on the 16th August 2005 indicating that the matter was set down for hearing on 19 September 2005. He personally only received the notice on 19 September 2005. He was however already scheduled to attend to a part heard arbitration hearing on the same day in Johannesburg. He contacted the attorneys of record for the Third Respondent in Bloemfontein indicating that due to the commitment he already had for that date, he was unable to attend the hearing. Instructions were to be sought by Mr. Hamman, the legal representative of the Third Respondent, from Mr. Botha (Third Respondent). On 08 September 2005 Mr. De Wet contacted Mr. Botha personally who indicated that he need to have the consent of his wife before agreeing to a postponement. On 09 September 2005 a follow up was made, whereupon it was agreed that the matter be postponed. On the same day (09\09\05) Mr. De Wet drafted a postponement agreement and faxed it to Mr. Hamman for his signature.
- [3] On 13 September 2005, Mr. De Wet received a notice from the Second Respondent (CCMA) stating that the postponement had been denied, due to the fact that the postponement agreement was only served on the CCMA on 12 September 2005 and that it was not in compliance with Rule 23 (2) of the CCMA Rules.
- [4] The attorneys of record in Johannesburg were instructed to attend to the postponement of this matter at the CCMA. They

instructed correspondent attorneys in Bloemfontein. Honey Attorneys in Bloemfontein was instructed to attend to the postponement. Documents were then faxed to Honey Attorneys on 16 September 2005 which was a Friday. Only on the Monday, 19 September 2005, the date of hearing, were these documents received by Honey Attorneys. The documents were therefore not timeously received and no one attended the hearing.

- [5] The hearing was conducted in the absence of the Applicant. The First Respondent states in the arbitration award dated 11 November 2005 that:

"The Employee Party appeared in person and was represented by his legal representation Mr. I. N. Hamman. The Employer Party was not present despite proper notification. From the Employer Party's side, however, it is recorded that that there was a request for postponement. The said request was dated 14th of September 2005, and received by the CCMA on 14th September 2005. The request for postponement was thus, not in terms of the CCMA Rules and thus not timeously submitted. At the hearing the Employer Party was not present, and the Employee Party requested that the matter be proceeded with in the absence of the Employer Party. It was so done, as the Employer Party cannot merely assume that postponement would be granted based on the application forwarded by the Employer Party".

- [6] On the 23rd November 2005, the Applicant received this arbitration award obtained by default. An application was made to have this award rescinded. On the 06th April 2006, the First Respondent gave the ruling on rescission, which

contains the finding that the arbitration award was not erroneously made in the absence of the Applicant because the Applicant was aware of the arbitration proceedings but was, due to its own fault not present at the proceedings.

- [7] Regard should be had to the fact that the parties agreed to have the matter postponed. This agreement was filed out of time but it was nevertheless brought to the attention of the First Respondent that the parties had reached such an agreement. This agreement was faxed to the attorneys of record of the Third Respondent on the 09th of September 2005 and they filed it with the Second Respondent (CCMA) on the 12th September 2005. Furthermore, after being informed that the postponement would not succeed, all reasonable steps were taken by the Applicant to have the matter attended to, even though it was unsuccessful in communicating it to the attorneys in Bloemfontein.
- [8] It must be stressed that Third Respondent's attorneys did communicate the agreement to postpone the matter to the First Respondent. The First Respondent in my view acted unreasonable in refusing to postpone the matter and continue hearing the matter knowing very well that it was agreed that the matter be postponed. This constitutes in my view, a gross irregularity.
- [9] As to why the Third Respondent requested that the matter be proceeded with in the absence of the Applicant, whilst knowing very well that he consented to a postponement, is highly questionable. In my view it was disingenuous of him to proceed with the matter under such circumstances.

[10] The First Respondent's decision that the award was not erroneously made in the absence of a party is therefore not correct. Furthermore, First Respondent stated in the rescission ruling:

"I have considered the merits of the Applicant and even though there may be prospects, which I am not saying there greatly is, I am still not satisfied as to the non attendance at the arbitration proceedings by the Applicant and therefore, make the following award".

This is in my view, a clear indication of the mindset of the First Respondent. Despite the fact that there may be prospects of success for the Applicant (though "not greatly" so) he nevertheless refuse to review his award.

Conclusion

[11] In my view, the First Respondent, upon being notified that the parties agreed, should have granted the postponement. The refusal to grant the postponement under the circumstances of this case clearly indicates that the First Respondent did not exercise his discretion (whether or not to grant a postponement) judiciously. Furthermore, the explanation advanced for the Applicant's absence is reasonable. In my view, the First Respondent should have rescinded the award. There is also no reason why costs should not follow the result.

Order

[12] In the result, I make the following order:

1. The rescission ruling made by the First Respondent dated 06 April under case number **FS 3530\05** is reviewed and set aside.
2. The matter is remitted to the Second Respondent for an arbitration hearing *de novo* before a commissioner other than the First Respondent.
3. Third Respondent is ordered to pay the costs of this application.

R D HENDRICKS AJ
Acting Judge of the Labour Court
Johannesburg

Appearances

For the Applicant	: Ms. Chenia
For the Respondent	: Adv Cronje
Instructed by	: Rossouws Attorneys
Date of hearing	: 26 September 2007
Date of Judgment	: 11 October 2007