IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO. JR 1959/06

In the matter between:-

NESTLE SOUTH AFRICA (PTY) LIMITED **Applicant**

And

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION **1st Respondent**

E L E MYHILL N.O. **2nd Respondent**

CRAIG BROWN **3rd Respondent**

JUDGEMENT

Molahlehi J

INTRODUCTION

1.This is an application in terms of which the applicant seeks to review and set aside the arbitration award of the second respondent (the Commissioner), issued under case number GAJB31544-05, and dated 24th June 2006.

2.The applicant based its review application on two main grounds. The first ground concerns the ruling in terms of which the Commissioner refused to grant an application to postpone the matter at the instance of the applicant. And the second ground relates to the finding that the dismissal of the third respondent, Mr Brown was both procedurally and substantively unfair. As concerning the second ground the Commissioner ordered the applicant to reinstate the third respondent and

compensate him in back-pay in the amount of R318 855.25.

3.The applicant refused to give effect to the award and consequently the third respondent applied to the CCMA to have the award certified as if it was an order of the Court. Thereafter the applicant obtained a Court order staying the execution of the writ pending the finalisation of this review application.

Background facts

4. On 29 November 2005, the applicant terminated the employment of the third respondent on the ground of poor work performance. Thereafter, the third respondent referred the dispute concerning unfair dismissal to the CCMA for conciliation. The dispute was then referred to arbitration, the parties having failed to reach a consensus on the resolution of the dispute at the conciliation hearing. The third respondent referred the matter to arbitration and on the 3rd April 2006, the CCMA notified the parties that the arbitration hearing would take place on the 23rd June 2006.

5.It is common cause that on receipt of the notice of set down the third respondent forwarded the copy of the same to the applicant's human resources manager. In addition Mr Mills (Mills) the attorney of record for the third respondent sent an email concerning the set down to the applicant and three days later the applicant acknowledged receipt thereof. The reason for this according to the third respondent was to anticipate and avoid the risk of a postponement.

6.On 30th May 2006, Mills contacted Mr Mvambo (Mvambo) of the applicant and as a further precautionary measure suggested a pre-arbitration meeting. Mvambo then advised Mills that the matter was now handled by Mr Ngcukaitombi (Ngcukaitombi) of applicant's attorneys of record. And following this advice Mills immediately contacted Ngcukaitombi and left a massage for him to contact him as soon as he was available. Ngcukaitombi returned this telephone call on the 20th May 2006 and requested a postponement of the arbitration which was scheduled for the 23rd May 2006. This request was some three days away from the scheduled hearing. In response to this request, Mills informed Ngcukaitombi that the third respondent would not agree to the postponement.

7. The case of the applicant is that Mvambo informed Mills when he requested the pre-arbitration hearing that he would be instructing an attorney to handle the matter on its behalf. He then on 14th June 2006 instructed Mr Smith of the applicant's attorneys of record and informed him that the matter was set down for the 23rd June 2006, and that there would be a need to apply for a postponement as witnesses were not available to attend on that day.

8.According to Mvambo, it turned out that Smith did not have the details of this matter and had to refer the matter to Ngcukaitombi who handles most of the

applicant's matters. On the 19th May 2006, Smith contacted Mvambo and informed him that the applicant's attorneys of record did not have the documents relating to this dispute including the contact details of Mills.

9.On the 20th June 2006, Ngcukaitombi contacted Mills and informed him that he would not be in a position to proceed with the arbitration hearing and requested that the hearing be postponed by agreement between the parties. According to the applicant Mills then enquired as to whether the applicant would pay the wasted costs for the day. Mills rejected the request for postponement by agreement when Ngcukaitombi informed him that he did not have instructions regarding payment of the wasted costs that would arise from the postponement.

10.After the rejection of the proposal for a postponement, both Mills and Ngcukaitombi engaged in the discussion regarding the possibility of settling the matter including the thought of referring the matter to private arbitration. After discussing the percentage contribution by each party to the proposed private arbitration Ngcukaitombi undertook to revert to Mills as soon as he has obtained instructions. The percentage contribution towards the costs of the private arbitration was, 75% for the applicant and 25% for the third respondent.

11.According to Mvambo he could not give instructions regarding the proposed

settlement and the 75/25% contribution towards private arbitration to Ngcukaitombi at the time he contacted him because of his unavailability. The instructions were finally given to Ngcukaitombi on the 22nd June 2006. The instructions were to reject the settlement proposal but to accept the referral of the dispute to private arbitration.

12. Smith conveyed the applicant's instructions to Mills on behalf of Ngcukaitombi on the 23rd June 2006 at about 8H10, the day of the arbitration hearing. Smith then proceeded to the CCMA where on arrival apparently, Mills informed him that the third respondent was not prepared to make any contribution towards the payment of the proposed private arbitration.

13. On being informed about the position taken by the third respondent, Ngcukaitombi after having a discussion with Mills over the phone arranged to have the matter to stand down for him to attend at the CCMA personally. On arrival at the CCMA, Ngcukaitombi found that indeed the third respondent had not changed his position and was insisting that the matter should proceed and not be postponed.

14. In its application for the postponement the applicant proffered in essence two reasons. The first reason was that the applicant was under the impression that arising from the discussions, that the parties had the matter would be transferred to private arbitration and secondly that two of its

witnesses were overseas and the third was no longer in the employ of the applicant.

Grounds for review and the award

15.The applicant contended that the Commissioner committed a gross irregularity in that he failed to properly balance the relevant factors in refusing to grant the postponement. In this regard the applicant contended that the Commissioner failed to take into account that one of the key witnesses was not available and two others who were still employed by the applicant were overseas and thus the main witnesses of the applicant were unavailable.

16.The other fact which the applicant contended the Commissioner failed to take into account is the fact that this was the first time that the matter would have been postponed and the fact that the applicant attended the conciliation was a clear indication that the applicant was intent on opposing the matter.

17.In refusing to grant the postponement the Commissioner reasoned at page 347 paragraph 3 of his award that:

> "... The respondent was seeking a postponement simply because it was not prepared. *This was an unacceptable ground for postponement. The applicant had been employed for 20 years and had been summarily dismissed for poor performance without a proper procedure having been*

followed or without there being good reasons for the dismissal. He has not been able to find alternative employment and seeks for a reinstatement. He will be prejudiced by the delay in hearing this matter. The conduct of the respondent showed disrespect for the CCMA as it could and should have followed the Rules in applying for a postponement. It had failed to do so. The conduct of respondent is indicative of its lack of interest in the case."

18. After considering the submissions of both parties the Commissioner refused the application for condonation on the grounds that the applicant had received the notice of set down on 3rd April 2006 and that the applicant should have instructed its attorneys to prepare for the case at the stage when it became aware of the date of the hearing. It was therefore the applicant's fault, according to the Commissioner, that its attorneys were not ready to proceed with the case on that day.

19. Another factor which influenced the Commissioner in arriving at the decision, as he did, was the fact that there was no agreement reached between the attorneys of both parties regarding the withdrawal of the matter for referral to private arbitration and for this reason the applicant was obliged to present its case on that day.

20. The Commissioner relied upon the decision of the Constitutional Court in ***National Police Services Union and Others v Minister of Safety and Security and Others 2000 (4) SA 1110 (CC),*** where it is stated that an applicant for a postponement seeks an indulgence which will not be granted unless the Court is satisfied that it is in the interest of justice to do so. It was on the basis of this decision that the Commissioner found that it was not in the interest of justice to grant the postponement, for the following reasons:

> "20.1 The company had failed to provide a full and satisfactory explanation of the circumstances giving rise to the application. There was no explanation for the delay in instructing the attorneys. If the attorneys had been instructed in advance, it may have been possible to arrange for the witnesses to attend the hearing.
>
> 20.2 While it is accepted that the respondent will probably be prejudiced by the refusal of the application, account must be taken of the prejudice to the employee, Brown, in the form of delay. The prejudice which the company would suffer is the result of its own tardiness"

Legal principles

21. It is trite that in considering whether or not to grant a

postponement the Commissioners exercise a discretion which they have to exercise judicially. In exercising this discretion the Commissioners have to ensure that it is not exercised capriciously or upon wrong principles but for good and fair reasons.

22. The principles governing an application for postponement was set out in the ***Myburgh Transport v Botha Sa t/a Truck Bodies* 1991 (3) *SA 310 (NmSC) at 314*** as follows:

"*1. The trial Judge has a discretion as to whether an application for a postponement should be granted or refused (R v Zackey 1945 AD 505).*

2 That discretion must be exercised judicially. It should not be exercised capriciously or upon any wrong principle, but for substantial reasons. (R v Zackey 1945 AD 505) (Supra), Madnitsky v Rosenberg 1949 (2) SA 392 (A) at 398-9, Joshua v Joshua 1961 (1) SA 455 (SW) or 457 (A)

3. An appeal Court is not entitled to set aside the decision of a trial Court granting or refusing a postponement in the exercise of its discretion merely on the ground that if members of the Court of appeal had been sitting as a trial Court they would have exercised their discretion differently.

4. *An appeal Court is, however, entitled to, and will in an appropriate case, set aside the decision of a trial Court granting or refusing a postponement where it appears that the trial Court had not exercised its discretion judicially. Or that it had been influenced by wrong principles or misdirection on the facts, or that it had reached a decision which in the result could not reasonably have been made by a Court properly directing itself to all the relevant facts and principles.*

5. *A court should be slow to refuse a postponement where the true reason for a party's non-preparedness has been fully explained, where his unreadiness to proceed is not due to delaying tactics and where justice demands that he should have further time for the purpose of presenting his case.*

6. *An application for a postponement must be made timeously, as soon as the circumstances which might justify such an application became known to the applicant. Where, however, fundamental fairness and justice justifies a postponement, the Court may in an appropriate case allow such an application for*

postponement even if the application was not so timeously made.

7. *An 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.*

8. *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 can fairly be compensated by an appropriate order for costs or any other ancillary mechanisms.*

9. *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 cause to the applicant if it is not.*

10. *Where the applicant for a postponement has not made his application timeously, or is otherwise to blame with respect to*

the procedure which he 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 the scale of attorney and client. Such an applicant might even be directed to pay the costs of his adversary before he is allowed to proceed with his action or defence in the action, as the case may be".

23. In **Carephone (Pty) Limited v Marcus NO and others (1998) 19 ILJ 1425 (LAC),** the Court held that in order to succeed in an application for postponement the applicant is required to provide a reasonable explanation for the need to postpone and the capability of an appropriate costs order to nullify the opposing party's prejudice or potential prejudice.

24. It cannot be denied that in the light of the case load of the CCMA and the provisions of section 138 (1) of the Labour Relations Act 65 of 1995 (LRA), the approach to be adopted by the CCMA commissioners in dealing with postponements has to be more stringent than that of the courts. The reason for this is that arbitration proceedings must be structured to deal with disputes fairly and expeditiously, but more importantly it must be

done with a minimum of legal formalities. The overriding consideration however is fairness or prejudice to either of the parties. Fairness must in my view always override the consideration of speed where the two outweigh each other in the assessment of whether or not to grant a postponement.

25. In **Real Estate Services (Pty) Ltd v Smith (1999) 20 ILJ 196 (LC) in para 12 and13** the Court held that:

> *"[12] In my view postponement in arbitration proceedings in terms of the Act should be granted on a less generous basis than is done by the court. Arbitrations are designed to finalize disputes fairly and quickly with minimum legalities (s138 (1) of the Act). Cost orders in postponements are limited by s138 (10) of the Act. Therefore he discretion exercised by the commissioners of the CCMA in this regard should be even less open to interference by the Labour Court sitting as a court of review".*
>
> [13] The CCMA is an institution which, from all accounts, is a very busy one. Commissioners set down dates for conciliation and arbitration and they have discretion whether to grant postponement or not.

26. It is apparent from the reading of the arbitration award that the Commissioner in the present case focussed his mind on the tardiness of the applicant in particular that of failing to brief its attorneys of record in time to prepare for the

hearing. It is therefore clear that instead of applying his mind to the prejudice factor, the Commissioner's dominant criterion or factor in the decision to refuse the postponement was the tardiness of the applicant in giving instructions to their attorneys. The Commissioner was also strongly influenced in his reasoning by the fact that the applicant was disrespectful to the CCMA in not applying for the postponement in terms of the rules. In doing so the Commissioner misdirected himself and accordingly failed to follow the correct principles in his determination whether or not to grant the postponement.

27. I agree with the applicant that the overall criterion in the assessment of the postponement being the interest of justice requires the factors of the culpability of the party seeking the postponement and the issue of prejudice to be considered separately. The danger of considering the two together will result with in culpability becoming, as was the case in the present case, the only determinative criterion.

28. Thus in the present case what was required of the Commissioner was the balancing of the prejudice to the applicant seeking the postponement and the expeditious resolution of the third respondent's dispute. The Commissioner was required to balance the prejudice on the third respondent which would have been occasioned by the delay arising from the postponement and the prejudice on the applicant that would have arisen from denial of the opportunity to ventilate its case.

29. The reading of the award reveals the Commissioner having recorded all the relevant factors applicable in the consideration of an application for postponement but having failed to weigh them appropriately in terms of the principles governing postponement.

30. The failure of the Commissioner to apply his mind arose from the fact that he failed to consider whether the prejudice of the third respondent could have been addressed by the tender of costs. In my view had the Commissioner considered the question of whether the award of costs may have alleviated any prejudice the third respondent he would have suffered, arising from the postponement he would have come to a different conclusion. He would have come to the conclusion that the cost order would have addressed the prejudice that would have arisen as a result of the postponement, particularly having regard to the fact that the matter had been set down for one day and this was the first time the applicant had requested a postponement.

31. It would seem from the reading of the award that the Commissioner in criticising the applicant for the delay in instructing its attorneys, of record focussed on the 19 June 2006 as the date on which the instructions were given to them. It is not clear why the Commissioner ignored the fact that the applicant instructed its attorneys on the 14 June 2006, but at that stage the instructions were received by Smith and not Ngcukaitombi.

32. It is also not clear what influenced the Commissioner to arrive at the conclusion that the applicant was not interested in opposing the matter. I have not found evidence pointing to this fact on the record. In fact to the contrary there is strong evidence pointing to the applicant not only showing interest in defending the matter but also bringing the matter to finality in a speedy manner. I would assume in that regard that consideration for referring the matter to private arbitration was influenced by the fact that the parties would have been able to determine the dates of the hearing with less constraint as opposed to the CCMA. The applicant also attended the conciliation hearing and was throughout in discussion with the third respondent's attorney about this matter. There was indeed some delay in Ngcukaitombi returning Mills first call, but there is no evidence that this was because of lack of interest in seeing to the finality of the matter. In fact at some point the applicant's attorney did not have the contact details of Mills and had to request the same from the applicant.

33. Another factor which the Commissioner ought to have taken into account relates to the bona fide of the applicant in applying for the postponement. There is no evidence that the applicant was using the postponement as a tactical manoeuvre for the purposes of obtaining an advantage to which it was not legitimately entitled to nor was there evidence that the applicant

was using the postponement as a strategy in delaying the resolution of the dispute.

34. In summary the Commissioner failed to apply his mind to all the factors applicable in the consideration of the postponement particular the dominant factor of prejudice. He focussed his mind on the single factor relating to the tardiness of the applicant to the exclusion of or provided less attention to the other factors. The decision of the Commissioner therefore is not reasonable and is one which a reasonable decision-maker could not have reached.

35. In the light of the above I do not deem it necessary to deal with the merits of the award.

36. In the circumstances of this case it was not unreasonable for the third respondent to have defended this review. It would therefore not be fair to order costs.

37 In the premises I issue the following order:

37.1 The ruling of the second respondent, refusing the postponement of the arbitration proceedings as contained in his award dated 24 June 2006, is reviewed and set aside.

37.2 The matter is referred back to the CCMA for rehearing on the merits before another Commissioner.

37.3 There is no order as to costs.

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Molahlehi J

Date of Judgment: 22 MARCH 2008
Date of Hearing: 29 NOVEMBER 2007

APPEARANCES

For the Applicant: CRAIG WATT PRINGLE SC

Instructed by: BOWMAN GILFILLAN

For the Respondent: CLIFFE DEKKER INC