Reportable
Of interest to other judges

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT CAPE TOWN

Case no: C 265/10

In the matter between:

PIONEER FOODS (PTY) LTD

T/A SASKO MILLING & BAKING (DUENS BAKERY) Applicant

and

CCMA	**First respondent**
Commissioner JOHN TAFT, N.O.	**Second respondent**
FAWU	**Third respondent**
TEMBEKILE MAKULENI	**Fourth respondent**

JUDGMENT

STEENKAMP J:

INTRODUCTION

[1] Does the commissioner in con-arb proceedings in terms of s 191(5A) of the Labour Relations Act[1] have a discretion whether to adjourn the proceedings after conciliation and before the arbitration stage, if neither party has objected to con-arb?

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[1] Act 66 of 1995 (the LRA)

[2] This question arose in the context of review proceedings in terms of s 145 of the LRA.

BACKGROUND

[3] The applicant, Pioneer Foods (Pty) Ltd, dismissed the employee, Mr Thembekile Makuleni (the fourth respondent), on 23 November 2009. The dismissal followed a disciplinary enquiry where it was found that the employee had had an altercation with a subordinate, Princess Makalima, on 16 November 2009.

[4] Makalima alleged that, during the altercation, the employee:

4.1 used abusive language towards her;

4.2 slapped her on the cheek with an open hand;

4.3 hit her with a fist on her eye.

[5] The employee was dismissed for misconduct in that it was found that he had assaulted a subordinate and used abusive language towards her.

[6] The employee referred an unfair dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA) (the first respondent). The CCMA enrolled the dispute for con-arb in terms of s 191(5A) of the LRA on 5 February 2010.

[7] The employee duly arrived for the con-arb process, represented by an official of the Food and Allied Workers' Union (FAWU) (the third respondent). There was no appearance for the employer. The commissioner, John Taft (the second respondent), recorded the following:

> "The respondent[2] was not represented. Notification was served on the respondent per fax on 12 January 2010, transmission slip on file, and accordingly I was satisfied that proper notice was given and proceeded in absentia. I spoke with the HR officer who informed me that the respondent did receive notification of the con-arb process and would be represented by their employer's organisation but they failed to arrive at the scheduled time."

[2] i.e. the employer

[8] The Commissioner issued a certificate that the matter could not be resolved at conciliation. He then proceeded with the arbitration in the absence of the employer. He found that the dismissal was procedurally and substantively unfair. He ordered the employer to reinstate the employee retrospectively with effect from 23 February 2010 and to pay him back pay equivalent to 3 months' remuneration.

THE REVIEW GROUNDS

[9] The applicant in essence submits that the Commissioner charged with presiding over a dismissal dispute in con-arb proceedings has no discretion to proceed with the arbitration in the absence of an employer that has not objected to the con-arb process. Alternatively, the applicant submits that even if the Commissioner does have the power to arbitrate in the absence of the employer, the Commissioner should exercise the discretion to do so in a reasonable manner and that this did not happen in the present case. The applicant submits that the arbitrator did not exercise his discretion, if any, judicially in the present instance and should have postponed the dispute.

[10] The third and fourth respondents (FAWU and the employee)[3] oppose the review application on the basis that the Commissioner had a power conferred on him by the CCMA rules and the provisions of the LRA to proceed with the arbitration in the absence of the employer in a con-arb process where no objection to con-arb was received by the Commissioner. They submit that any reasonable Commissioner could have exercised his discretion to proceed with the arbitration in the absence of the employer.

[11] At the outset, I should mention that it is inexplicable why the applicant did not use the simple procedure prescribed by the LRA in dealing with the award made in its absence, i.e. to apply to the CCMA to rescind the award in terms of section 144.

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[3] The third and fourth respondents oppose the application for review. The first and second respondents (the CCMA and the commissioner) abide the decision of the court. I shall, therefore, merely refer to “the respondents” when referring to the third and fourth respondents.

[12] Nevertheless, the respondents' attorney has raised no objection to my deciding the merits of the review application and I will proceed to do so. I must reiterate, though, that the preferable, less costly and more expeditious route for the unhappy employer would have been to make use of the provisions of section 144.

THE EMPLOYER'S NON-ATTENDANCE AT THE CON-ARB PROCEEDINGS

[13] The deponent to the applicant's founding affidavit, Mr Schalk Willem van der Merwe, was tasked with attending the con-arb scheduled for 5 February 2010. He is the applicant's Human Relations Manager.

[14] Van der Merwe states that one Naomi Swartz had sent him an e-mail to which she attached a copy of the notice of set-down. He does not state when she did so, nor does he attach a copy of that e-mail. He also does not tell the court who Swartz is.[4]

[15] What he does say, is that the e-mail did not come to his attention. He goes on to explain: "When I investigated the matter at a later stage, I did find the e-mail in my deleted items. The only explanation I can give for this oversight is that I must have inadvertently deleted the e-mail."

[16] It is common cause that the employer did not object to con-arb in terms of CCMA rule 17(2).[5] Van der Merwe says that he was not aware of the fact that the matter had been set down for con-arb on 5 February 2010. That is why he did not attend.

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[4] In her confirmatory affidavit she states that she is employed by the applicant "in Human Resources".

[5] That rule provides as follows: "A party that intends to object to a dispute being dealt with in terms of section 191 (5A), must deliver a written notice to the commission and the other party, at seven days prior to the scheduled date in terms of subrule (1)."

[17] On 5 February 2010, Van der Merwe was attending to another arbitration "in Qwa-Qwa".[6] While he was on the road, he received a telephone call from Swartz. She told him the following:

17.1 The Commissioner telephoned her and asked her why the company was not represented at the con-arb.

17.2 She told him that:

17.2.1 as far as she knew, Van der Merwe was meant to be attending to the matter;

17.2.2 she would investigate why he was not there; and

17.2.3 she requested that the matter be postponed.

[18] Later that morning – at about 11:40 – Swartz sent a letter to the Commissioner. She stated: "Due to miscommunication between Duens Bakery and the company representative, we kindly request that the matter be postponed at your convenience."

[19] Despite this request, the Commissioner proceeded with the arbitration in the absence of the employer and made the award as set out above.

First ground of review: Exceeding powers

[20] The applicant's first attack on the Commissioner's conduct is that the CCMA rules preclude the Commissioner from proceeding with the arbitration in the absence of the employer in a con-arb process.

[21] The respondents submitted that the Commissioner had powers conferred on him by the LRA to proceed with the arbitration in the absence of the other party in a con-arb process where neither party objected to con-arb.

[22] Section 191(5A) of the Act provides as follows:

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[6] Of course, this former Bantustan has been reintegrated into South Africa and has been a part of the Free State since 1994, but I presume the deponent to refer to that area of the Free State, rather than a nominally independent homeland.

"Despite any other provision in the Act, the council or Commission must[7] commence the arbitration immediately after certifying that the dispute remains unresolved if the dispute concerns –

(a) …

(b) …

(c) any other dispute contemplated in subsection (5)(a)[8] in respect of which no party has objected to the matter being dealt with in terms of this subsection."

[23] This section must be read together with CCMA rule 17. That rule is headed, "**Conduct of con-arb in terms of section 191(5A)".** Rule 17(2) provides that a party that intends to object to a dispute being dealt with in terms of section 191(5A), must deliver a written notice to the Commission and the other party, at least seven days prior to the scheduled date for the con-arb.

[24] Subrules (4), (5), (8) and (9) of rule 17 are also important for the decision in this case. These subrules read as follows:

"(4) If a party fails to appear or be represented at a hearing scheduled in terms of subrule (1), the Commissioner must conduct the conciliation on the date specified in the notice issued in subrule (1).

(5) Subrule (4) applies irrespective of whether a party has lodged a notice of objection in terms of subrule (2).

...

(8) The provisions of the Act and these Rules that are applicable to conciliation and arbitration respectively apply, with the changes required by the context, to con-arb proceedings.

(9) If the arbitration does not commence on the date specified in terms of the notice in subrule (1), the commission must schedule the matter for arbitration either in the presence of the parties or by issuing a notice in terms of rule 21."[9]

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[7] My underlining

[8] i.e. a dismissal for alleged misconduct or incapacity

[9] This rule specifies: "The Commissioner must give the parties 21 days notice, in writing, of an arbitration hearing, unless the parties agree to a shorter period."

Interpretation and application of the statutory provisions

[25] Section 191(5A) is clearly peremptory. It states in plain language that the commissioner must commence the arbitration immediately after issuing a certificate that the matter remains unresolved.

[26] The commissioner can only issue such a certificate after an attempt at conciliation. That is where rule 17(4) comes into play. Anomalous as it may seem – as it is surely a futile exercise to make any attempt at conciliation in the absence of one of the potential conciliating parties[10] – the subrule is also clear: If either party fails to arrive for con-arb, the commissioner must conduct (at least) the conciliation.

[27] Once this step has taken place, the waters become muddied. Must the commissioner then proceed with arbitration in the absence of the defaulting party, or does he or she have the discretion to adjourn the arbitration part of the proceedings to a later date? If not, why does subrule (9) provide that, if the arbitration does not commence on the scheduled date, the CCMA must schedule the matter for arbitration in the presence of the parties or by issuing a new notice of set-down?

[28] Mr *Boda*, for the applicant, argued that rule 17 (2) does not grant the commissioner the right to proceed with an arbitration in the absence of one of the parties where there is no objection to the con-arb process. He also argued that rule 17(4) should be interpreted to mean that, where a party fails to appear or be represented at a con-arb hearing, the matter ought to be conciliated only.

[29] The primary rule of interpretation is that the meaning of the words used in the Act and the rules ought to be established having regard to their natural, ordinary or primary meaning and also in the light of their context,

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[10] As Du Toit *et al* state in *Labour Relations Law* (5th ed p 110 para 3.5), citing Blain *et al* 'Mediation, conciliation and arbitration: An international comparison of Australia, Great Britain and the United States' (1987) 126 *International Labour Review* 179: "'Conciliation' means to 'reconcile or bring together, especially opposing sides in an industrial dispute'." It is hardly possible to do so in the absence of one of the disputing parties.

including the subject matter of the rule and its apparent scope and purpose.[11]

[30] Having regard to this guideline, I cannot agree with Mr *Boda*'s contention. Rule 17 must be interpreted in the light of s191(5A) of the Act. The purpose of the rule is to guide the application of that section. And the section is clear: The Commissioner must commence the arbitration immediately after certifying that the dispute remains unresolved. The absence of a discretion is the direct opposite of what Mr *Boda* contends for: In fact, it seems clear to me that the Commissioner has no discretion to adjourn the proceedings immediately after having issued a certificate. He must commence the arbitration immediately after certifying that the dispute remains unresolved.

[31] It is so that rule 17(4) only specifies that the Commissioner must conduct the conciliation on the scheduled date in the absence of a defaulting party. But, in the light of the clear peremptory language in s 191(5A), that cannot be read to mean that the rule maker or the legislator intended that the Commissioner could proceed with conciliation only, and did not have the power to proceed with arbitration.

[32] Rule 17(9) cannot be reconciled with s191(5A)(c). It must be borne in mind that subsection (5A)(c) concerns the situation where no party has objected to con-arb. Rule 17(9), on the other hand, refers back to rule 17(1). That subrule states that the CCMA must give the parties at least 14 days' notice in writing that a matter has been scheduled for con-arb in terms of s 191(5A). It is rule 17(2), and not rule 17(1), that deals with objections. And rule 17(5) makes it clear that rule 17(4) applies irrespective of whether a party has lodged an objection in terms of subrule (2). In other words, the commissioner must conduct the conciliation on the scheduled date, regardless of whether a party has objected; but the rule is silent on arbitration. Section 191(5A)(c), though, makes it abundantly clear that the

[11] *Equity Aviation Services (Pty) Ltd v CCDMA & ors* (2008) 29 *ILJ* 2507 (CC); *Republican Press (Pty) Ltd v CEPPWAWU & ors* (2007) 28 *ILJ* 2503 (CC); *Jaga v Donges NO & anor; Bhana v Donges NO & anor* 1950 (4) SA 653 (A) 662.

commissioner must commence the arbitration immediately after certifying that the dispute remains unresolved if no party has objected to the matter being dealt with in terms of that subsection.

[33] Although neither party's legal representative referred to it, I have considered the recent judgment of De Swardt AJ in *Inzuzu IT Consulting (Pty) Ltd v CCMA.*[12] There the learned acting judge expressed the following view:

> "The provisions of CCMA rule 17 make it clear that a commissioner is not empowered to proceed with the arbitration in circumstances where one of the parties fails to appear at con-arb proceedings. When a party is in default of appearance, the commissioner concerned may deal with the conciliation proceedings, but not the arbitration. The arbitration must be scheduled for a later date. In the instant case, the commissioner was either unaware of the provisions of rule 17 (4), or he disregarded or failed to apply his mind to such provisions. As a result, he acted outside the ambit of his powers and and/or authority."

[34] I find myself in respectful disagreement with the learned acting judge. As I have set out above, rule 17(4) must be read with, and is subordinate to, section 191(5A)(c).

[35] The solution may lie in the word "commence". In terms of section 191(5A)(c), the Commissioner must commence the arbitration immediately after certifying that the dispute remains unresolved if no party has objected to con-arb. It does not state that the arbitration must be completed on that occasion.

[36] The correct interpretation, having regard to the plain language of section 191(5A)(c) and the apparent scope and purpose of rule 17 in that context, seems to me to be the following:

36.1 If no party has objected to con-arb, the Commissioner must conduct the conciliation on the scheduled date, even if a party fails to appear or be represented.

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[12] [2010] 12 BLLR 1288 (LC) at 1293J

36.2 In those circumstances, there can obviously be no conciliation in the real sense. The Commissioner will then inevitably issue a certificate that the dispute remains unresolved.

36.3 The Commissioner must then commence the arbitration. There is no peremptory provision that he or she must conclude it.

36.4 Having commenced the arbitration, the Commissioner retains a discretion to adjourn it to a later date. This could be for a variety of reasons – for example, to enable a witness to attend the proceedings; or to provide the party who did not attend or who was not represented to attend or to obtain representation.

[37] After having commenced the arbitration, the Commissioner may have to entertain an application for a postponement of the proceedings in terms of CCMA rule 23 and rule 31 by the party who was not present at the conciliation stage.

[38] Rule 17(8) provides that:

> "The provisions of the Act and these rules that are applicable to conciliation and arbitration respectively apply, with the changes required by the context, to con-arb proceedings."

[39] One of those provisions is section 138(1) that provides:

> "The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities."

[40] In order to deal with the dispute fairly, circumstances may arise where the commissioner considers it appropriate to adjourn the arbitration to a later date in order to allow a party to appear or to be represented. One can, for example, envisage a situation where a party has the *bona fide* intention to attend the con-arb proceedings but is physically prevented from doing so. For example, a representative could be involved in a motor vehicle accident on the way to the con-arb. If that person phones the Commissioner and asks him or her to adjourn the arbitration to a later date, it is inconceivable that the Commissioner would consider it fair to

proceed in that party's absence or to insist on a formal application for postponement in terms of CCMA rules 31 and 23.

[41] In my view, the applicant's first ground of review must fail. The Commissioner did not act outside of his powers by proceeding with the arbitration immediately after certifying that the dispute remains unresolved.

Second (alternative) ground of review: Failure to exercise discretion not to proceed with arbitration

[42] The applicant submits in the alternative that, irrespective of the interpretation to be afforded to rule 17, the Commissioner failed to appreciate that he had a discretion in terms of rule 30 not to proceed with an arbitration in the absence of Pioneer Foods.

[43] Rule 30 provides that:

> "(1) If a party to the dispute fails to attend or be represented at any proceedings before the Commission, and that party –
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> (a) had referred the dispute to the Commission, a commissioner may dismiss the matter by issuing a written ruling; or
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> (b) had not referred the matter to the Commission, the commissioner may –
>
> (i) continue with the proceedings in the absence of that party; or
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> (ii) adjourn the proceedings to a later date.
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> (2) A commissioner must be satisfied that the party had been properly notified of the date, time and venue of the proceedings, before making any decision in terms of subrule (1)."

[44] The applicant argues that the use of the word "may" indicates that, even if the Commissioner were satisfied that the applicant had been properly notified in terms of rule 30(2), he could exercise his discretion not to proceed.

[45] In the context of con-arb proceedings, rule 30 must be read with rule 17. As I have set out above, my interpretation of that rule – read with section 191(5A) (c) of the Act – is that the commissioner must commence the arbitration part of the proceedings immediately after certifying that the

dispute is not resolved; but he retains a discretion to adjourn or postpone the proceedings after that.

[46] Mr *Boda* submitted that it is clear from the arbitration award that the Commissioner failed to appreciate that he has a discretion which hecould exercise in this regard. He submitted that a failure to appreciate what powers is afforded to a decision maker, and then by virtue of that failure to exercise such powers, axiomatically vitiates the decision ultimately taken.

[47] In this context, it is useful to reiterate what the Commissioner stated with regard to his decision to proceed without the employer party:

> "The respondent [employer] was not represented. Notification was served on the respondent per fax on 12 January 2010, transmission slip on file, and accordingly I was satisfied that proper notice was given and proceeded in absentia. I spoke with the HR officer who informed me that the respondent did receive notification of the con-arb process and would be represented by their employer's organisation but they failed to arrive at the scheduled time."

[48] It is not clear from this passage that the Commissioner failed to appreciate that he had a discretion which he could exercise. At the least, he took into account that the notice of set down was properly served by telefax. He then telephoned the HR officer of the company[13] [Swartz] who confirmed that the company had received the notification of the con-arb process. However, its representative[14] failed to arrive at the scheduled time.

[49] Despite a paucity of reasoning, it does appear that the Commissioner applied his mind to the question whether he should continue with the proceedings. He did so only after satisfying himself that the employer party had been properly notified of the date, time and venue of the proceedings, as envisaged by rule 30(2).

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[13] This appears to be Swartz. She states in her confirmatory affidavit that she "employed by the applicant in Human Resources".

[14] Neither party offered an explanation for the reference to an employer's organization. On the evidence before me, I must take this to mean a reference to Van der Merwe as the company's representative.

[50] The applicant further submits that, even if the Commissioner did appreciate his discretion to adjourn the matter, he did so unreasonably. This is so, the applicant says, because the employee was dismissed after he had slapped a female subordinate; the Commissioner had been informed that the employer had instructed a representative to attend the proceedings, ie it had the intention of opposing the proceedings; and Swartz had requested a postponement, albeit telephonically.

[51] Although the Commissioner does not mention any request for postponement by Swartz in his award, the respondents could not dispute Swartz's version in this regard, as set out in Van der Merwe's founding affidavit and her confirmatory affidavit.

[52] It is so that the company had an alternative remedy in terms of section 144(a) of the Act. It could have applied for rescission of the award that was made in its absence. Instead, it chose to review the arbitrator's decision to proceed with the arbitration after the conciliation phase.

[53] It seems to me that this election has led to unnecessary costs. I will return to that aspect later. However, I cannot see any bar in law for the applicant to have followed this route.

[54] Considering, then, whether the Commissioner properly exercised his discretion, it does not appear from the award or the transcript that he considered Swartz's request for a postponement. This failure was unreasonable in the circumstances.

[55] From the evidence of Van der Merwe and Swartz – that could not be disputed – it appears that Swartz made it clear to the Commissioner that the employer seriously intended to oppose the proceedings; that the only reason for its non-appearance was a miscommunication between her and Van der Merwe; and that they were not in wilful default.

[56] In those circumstances, the Commissioner's decision not to grant a postponement could not be said to have led to a fair and expeditious resolution of the dispute, or one that would determine the dispute "fairly" and "with a minimum of legal formalities" as envisaged by s 138(1).

[57] This alternative ground of review succeeds. I agree that the decision of the arbitrator should be reviewed and set aside on this ground; and that the dispute should be referred back to the CCMA to appoint another arbitrator to conduct an arbitration *de novo* in the presence of both parties.

COSTS

[58] The applicant has been partly successful. However, it eschewed the cheap, expeditious and preferred route prescribed by section 144 of the LRA, i.e. to apply for rescission at the CCMA, in favour of the costly process of a review in the Labour Court, necessitating the use of attorneys and counsel. Taking into account the principles of law and fairness, the respondents should not be ordered to carry the applicant's costs.

ORDER

[59] I order as follows:

59.1 The award of the second respondent issued on 15 February 2010 under CCMA case reference WECT 18312 – 09 is reviewed and set aside.

59.2 The unfair dismissal dispute between the applicant and the fourth respondent is referred back to the first respondent for a rehearing before a commissioner other than the second respondent.

59.3 There is no order as to costs.

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STEENKAMP J

Date of hearing: 24 February 2011

Date of judgment: 11 March 2011

For the applicants:	Adv F.A. Boda
Instructed by	Deneys Reitz
For the respondent:	Mr J Whyte
	Cheadle Thompson & Haysom