IN THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable

Case no: C214/17

In the matter between:

MINISTER OF JUSTICE AND CORRECTIONAL SERVICES **Applicant**

and

THEMBINKOSI SIBIKA **First Respondent**

JACQUES BUITENDAG N.O. **Second Respondent**

GENERAL PUBLIC SERVICE SECTORAL

BARGAINING COUNCIL **Third Respondent**

Date heard: August 1 2019

Delivered: October 11 2019

JUDGMENT

RABKIN-NAICKER, J

[1] This is an opposed application to review a default arbitration award under case number GPBC1198/16. The applicant submits that the second respondent should have postponed the arbitration proceedings and seeks to review the award principally on this basis. It also applies for condonation for the late filing of the application. The condonation application was not opposed and I grant condonation and deal with the review on its merits.

[2] The Arbitrator deals with the history of the processes before the bargaining council in the default award. These paragraphs read as follows:

"3. Section 138 (5)(B) of the Labour Relations Act 66 of 1995 (LRA) provides arbitrators discretion when, a party who did not refer the matter, does not attend the scheduled hearing or is not represented. The arbitrator may proceed in the absence of that party and hear the matter on the Applicant's version, which will result in a default award, or adjourn the proceedings to a later date.

4. At the commencement of the arbitration held on 28 September 2016 Mr. Luphondo represented the Respondent. Mr. Luphundo [sic] applied for a postponement. Mr. Luphondo submitted that the investigation and disciplinary hearing was dealt with by the Respondent's Departmental Investigation Unit (DIU) in Pretoria. The Applicant was dismissed for alleged corruption. He did not receive the notice of set down and knows nothing about the case. Mr. Luphondo further submitted that he contacted the National Dispute Resolution Coordinator, Ms. Seshoba, and that she is also unaware of the case. Mr. Luphondo said that the DIU investigator is not at work and he does not answer his phone. In the circumstances he is requesting a postponement on behalf of the Respondent. Mr. Bester replied that the Applicant has no income to support his family and he requested for the arbitration to proceed.

5. I contacted the GPSSBC Dispute Resolution Unit and it was confirmed that the set down notice was faxed to the Regional Office in Pretoria (086 534 6847) as well as to the Respondent's Head Office in Pretoria (021 323 3476). The Respondent thus received proper notice of this arbitration. I have considered the personal circumstances of the Applicant but decided because a dismissal for corruption in the Public Sector is a serious matter that the Respondent must be given an opportunity to defend its decision and that Mr. Luphondo is clearly not in a position to represent the Respondent. I postponed the arbitration. I issued a written ruling in this regard on 28 September 2016.

6. The matter was then set down for 11 November 2016. I was unfortunately ill and could not arbitrate the matter. I informed the Bargaining Council. The matter was then set down for 20 January 2017 at 09h00.

7. At the commencement of the proceedings on 20 January 2017 Mr. Mooi represented the Respondent. He informed me that he has contacted the Respondent's representative, Mr. Ramotsa. Mr. Ramotsa informed him that he has not received the set down notice and that he is busy with another arbitration.

8. I contacted the GPSSBC Dispute Resolution Unit and spoke to Ms. Kekana. She informed me that the set down notice was faxed on 17 November 2016 to the Respondent's Provincial Offices on fax number 021 558 7350 and 086 533 7197.

The set down notice was also faxed to the Respondent's Head Office on 012 323 3476 and 086 5344524. The set down notice was also emailed on 17 November 2016 to Mr. Luphondo and Mr. Mooi (Cape Town) as well as to L Siykoza, S Kgoahla, T Silwane and T Khatswayo (Gauteng). The Respondent was thus properly notified of this arbitration. Mr Mooi said that he cannot dispute this.

9. Mr. Bester submitted that the matter was postponed on 28 September 2016 because the Respondent's representative was not present. When the matter was postponed on 11 November 2016 because of the commissioner being ill, the Respondent's representative was also not present. Mr. Bester submitted that the Applicant was dismissed in April 2016, has no income and will be prejudiced by any further postponements.

10. Mr. Mooi requested an adjournment at this stage. When he returned he handed me his cell phone and asked me to speak to Mr. Ramotse. Mr. Ramotse informed me that he was not aware of the set down date and is busy with another arbitration in Pietermaritzburg. When I asked him where he was on 11 November 2016, Mr Ramotse informed me that he was in Cape Town during that period.

11. Mr. Mooi argued that the Applicant was dismissed for serious misconduct and that he does not have the Applicant's file and is unable to represent the Respondent. Mr. Mooi then called Ms. Strydom, the Regional Head HR, to address me. She basically repeated what Mr. Mooi has already presented to me.

12. In *Northern Province Development Corporation v CCMA and Others* (2001) 22ILJ 2697 it was held that the LRA requires labour disputes to be resolved expeditiously and thus arbitrators have a wide discretion in granting to refusing to grant a postponement. In *Voster v CCMA and Others* (2002) 23ILJ 1899, the Court held that postponement in arbitration proceedings should not easily be granted. In *Coin Security Group (Pty) Ltd vs Mshengu and Others* 2001 (22) ILJ 910 (LC) it was held that a party applying for postponement should not assume that the postponement will be granted and should always be prepared in case it is refused.

13. I have already indulged the Respondent when I granted a postponement on 28 September 2016. On that occasion the Respondent's representative was also not present, even though the Respondent received proper notice.

14. Mr. Ramotse telephonically informed me that he did not receive the set down notice for 20 January 2017. It is not for the GPSSBC to decide who should represent the Respondent. The fact that the set down notice was faxed to several fax numbers and emailed to several officials, including Mr. Mooi and Mr. Luphondo, shows that the

GPSSBC has gone beyond what was necessary to inform the Respondent that this arbitration has been set down for 20 January 2017. If Mr. Ramotse was double booked, then the Respondent could have appointed someone else as representative or the Respondent could have sought an adjournment in terms of the Rules for Conduct of Proceedings before the GPSSPC (Resolution 4 of 2004). The Respondent did not do so. In any event, according to Mr. Ramotse, he was not aware of the matter. The argument that he is double booked is thus without substance. The fact that officials within the Department have apparently not informed Mr. Ramotse cannot be placed at the door of GPSSBC.

15. Both employees and employers are entitled to finality in unfair dismissal disputes. The CCMA and Bargaining Council has been established to deal with matters under its auspices quickly and fairly. This includes avoiding unnecessary delays in the administration of justice. The Applicant has been dismissed in April 2016 and further delays with prejudice the Applicant.

16. I ruled that the matter proceed. Mr. Mooi remained for the duration of the arbitration as an observer."

[3] The applicant brought a rescission application in terms of section 144 of the Labour Relations Act to set aside the Default Award. In a Ruling dated 6 October 2017, the Arbitrator dismissed the rescission application. That Ruling is not addressed in the Applicant's Notice of Motion in this review. Its content is not discussed in the pleadings. The only document which references the rescission application to set aside the Award is a copy of the applicant's affidavit seeking the rescission which is attached to the founding affidavit.

[4] In **Qibe v Joy Global Africa (Pty) Ltd: In re Joy Global Africa (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others** [1], the LAC considered the legal status of a default Award (albeit in the context of a consideration of section 142(2) and (3) of the LRA) and stated the following:

"Firstly, a default arbitration award made by an arbitrator in the absence of one of the parties is not final in effect, as it may be rescinded or revisited by the arbitrator who made the award. Therefore, although a default arbitration award will have full effect until set aside, it is not final for purposes of a review, as contemplated in the LRA, because the proceedings are not complete and

[1] (2015) 36 ILJ 1283 (LAC)

the award may be revisited or rescinded by the arbitrator who made the default award. It follows that only the decision of the arbitrator dismissing the rescission application may be reviewed — and not the default arbitration award itself — as it is not a final decision."

[5] In **Bloem Water Board v Nthako NO & others** [2] the LAC qualified the reach of the dictum above as follows:

"…..There are obvious disadvantages in attempting to review a default award where the one party's version has not been adduced as outlined in Magic Company v Commission for Conciliation, Mediation & Arbitration & others. But insofar as the Qibe judgment may be taken to state that the Labour Court is not entitled to review an award issued by the Commission for Conciliation, Mediation & Arbitration (CCMA) or the bargaining council that is made in the absence of a party at all, I would respectfully disagree. The conventional approach of a court of review to decisions of a court or administrative body, whether under the Promotion of Administrative Justice Act 3 of 2000 or otherwise, is that internal remedies should be exhausted and piecemeal reviews are to be avoided. But a court may intervene in medias res where the interests of justice require it (ie where injustices would otherwise occur), although it is to be used sparingly and only in exceptional circumstances. In Wahlhaus & others v Additional Magistrate, Johannesburg & another (Wahlhaus) the court expressed the principle this way:

'While a superior court having jurisdiction in review or appeal will be slow to exercise any power, whether by mandamus or otherwise upon unterminated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained. ... In general, however, it will hesitate to intervene, especially having regard to the effect of such procedure upon the continuity of the proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available.'"[3]

[2] (2017) 38 ILJ 2470 (LAC)
[3] At paragraph 12

[6] The application to review the default award in this case has not been made in *medias res* before the finalization of the rescission application. Rescission was refused. The applicant has chosen an unusual path in this matter: To review what is now a final default award, and let the rescission decision stand. This is not the norm. It is trite that when a rescission ruling is successfully reviewed and set aside, the setting aside of the default award automatically follows and parties return to arbitration.[4] The reason for not challenging the rescission ruling is not apparent from the papers before me.

[7] As the LAC stated in the **Bloem Water** matter, there are obvious disadvantages in reviewing a default arbitration award. In **Magic Company v Commission for Conciliation, Mediation & Arbitration & others**[5] the Court per Murphy AJ as he then was, reflected this when it stated: "The applicant legitimately maintained that the mere fact that it was not present at the hearing did not justify a finding of substantive unfairness. This may be so, but it is apparent from both the record and other paragraphs of the award that the commissioner did consider and weigh the uncontested evidence of the third respondent."

[8] This is also the case in this matter. The Award reflects a careful and lengthy weighing up of the evidence presented at arbitration. The arbitrator also took account of the onus in unfair dismissal disputes, as well as the serious nature of the offences. In these circumstances I cannot find the Default Award reviewable on the merits of the dismissal.

[9] However, the Award in effect contains an *in limine* ruling regarding postponement. The question for this Court then is whether the decision to refuse to postpone the matter is reviewable. The applicant has submitted that the Arbitrator did not exercise his discretion in line with judicial principles in making this decision.

[10] I return to the Award by the Arbitrator in which he states the following:

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[4] See for example SA Broadcasting Corporation v Commission for Conciliation, Mediation & Arbitration & others (2019) 40 ILJ 603 (LC) at paragraph 21
[5] (2005) 26 ILJ 271 (LC)

"I contacted the GPSSBC Dispute Resolution Unit and spoke to Ms. Kekana. She informed me that the set down notice was faxed on 17 November 2016 to the Respondent's Provincial Offices on fax number 021 558 7350 and 086 533 7197. The set down notice was also faxed to the Respondent's Head Office on 012 323 3476 and 086 5344524. The set down notice was also emailed on 17 November 2016 to Mr. Luphondo and Mr. Mooi (Cape Town) as well as to L Siykoza, S Kgoahla, T Silwane and T Khatswayo (Gauteng). The Respondent was thus properly notified of this arbitration. Mr Mooi said that he cannot dispute this."

[11] It defies belief that the applicant can submit that in the circumstances set out in paragraph 10 above, the Commissioner's decision to proceed with the arbitration is susceptible to review. Issues of whether Mr Ramotse was double booked, or had attended the hearing on the 11 November which are canvassed in the papers, are immaterial. The bargaining council had literally gone beyond the call of duty to inform the applicant of the set down of the arbitration, including sending the set down notice to applicant's head office where Ramotse was based. In addition to taking this into account, the Arbitrator considered the issue of prejudice to both parties; he considered that he had already indulged the applicant by granting a postponement when Ramotse had not been available on the first date of set down. He further applied the law, citing various cases, in relation to postponements at the CCMA.

[12] The applicant has emphasized in its papers that the first respondent was dismissed for serious charges including having pecuniary relations with an inmate. The charges were serious. This is why the applicant should have dealt with the dispute before the bargaining council in the requisite manner. The applicant now has to live with the result of its failure to do so. In my view, the decision to refuse to postpone the arbitration is not susceptible to review. Nor can the Arbitrator's findings on the merits be disturbed given the evidence before him.

[13] In the result, the application stands to be dismissed. I make no order as to costs given the ongoing relationship between the parties i.e. the Applicant and

Popcru which represented the first respondent in this review. I order as follows;

Order

1. The application is dismissed.

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H. Rabkin-Naicker

Judge of the Labour Court

Appearances:

Applicant: R. Nyman instructed by the State Attorney

First Respondent: Marais Muller Hendricks Inc