Not reportable

THE LABOUR COURT OF SOUTH AFRICA,
HELD AT CAPE TOWN

Case no:C06/2021

In the matter between:

Super Group Trading (Pty) Ltd t/a Supergroup Dealerships t/a Orbit Commercial Vehicles Cape Town	**First Applicant**
and	
NUMSA obo E Carolus	**First Respondent**
N Abrahams N.O.	**Second Respondent**
The Dispute Resolution Centre of MIBCO	**Third Respondent**

Date of Hearing: 27 June 2022
Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Labour Court website and release to SAFLII. The date and time for handing down judgment is deemed to be 10h00 on 22 July 2022

Summary: Application to review granting of postponement in the absence of the referring party - Just and equitable to entertain review piecemeal under s 158(1B) of the LRA – Postponement ruling reviewably unreasonable – Application granted.

JUDGMENT

LESLIE AJ

Introduction

[1] This is an unopposed application, brought in terms of section 158(1)(g) of the Labour Relations Act 66 of 1995 ("the LRA") to review and set aside a postponement ruling made by the second respondent ("the arbitrator") in the course of arbitration proceedings on 24 December 2020.

[2] The relevant background facts may be summarised as follows:

2.1 The first respondent referred an unfair dismissal dispute on behalf of its member, Mr Emile Carolus ("the employee"). This dispute was set down for arbitration before the arbitrator, under the auspices of the third respondent ("the DRC"), on 10 December 2020.

2.2 On 8 December 2020, the first respondent addressed an email to the DRC's managing commissioner, on which the applicant was copied, requesting a postponement of the arbitration.

2.3 The stated reason for the postponement request was that that union organiser assigned to represent the employee had been booked off sick and was unable to attend the arbitration. A medical certificate was attached in support of the request.

2.4 On the same day, the applicant submitted correspondence opposing the postponement.

2.5 On 10 December 2020, the applicant was represented at the hearing by its attorney. (Also present were its HR Manager and another manager who would presumably have given evidence at the hearing). However, neither the employee nor any representative of the first respondent were in attendance.

2.6 On 24 December 2020, the arbitrator issued a ruling postponing the arbitration. It is this ruling which forms the subject matter of the present application.

Analysis

[3] At the outset, section 158(1B) of the LRA precludes this court from reviewing any ruling of a bargaining council before the issue in dispute has been finally determined, *"except if the Labour Court is of the opinion that it is just and equitable"* to review it. In short, a piecemeal review process is to be avoided unless there are some exceptional circumstances warranting the court's intervention before the merits of the main dispute have been determined. The court has a broad discretion in this regard which must be exercised judicially in light of the peculiar facts of each case. This is in keeping with one of the key purposes of the LRA, namely the effective resolution of labour disputes.

[4] As to the meaning of "just and equitable", in *Electoral Commission v Mhlope*,[1] albeit in the context of the courts' remedial powers under section 172(1)(b) of the Constitution, it was held that *"whatever considerations of justice and equity point to as the appropriate solution to a particular problem, it may justifiably be used to remedy that problem."*

[5] On the facts of this case, I am satisfied that it would be just and equitable to entertain the review application at this stage of the proceedings. But for the postponement, the matter would have been dismissed on 10 December 2020. If the applicant were to be compelled, nevertheless, to await the final outcome of the arbitration before approaching this court for relief, it would effectively lose its right to challenge the postponement ruling. For all intents and purposes, the postponement ruling would be moot. This distinguishes this case from other interlocutory rulings where, for example, an arbitrator has determined that he or she has jurisdiction, which can always be revisited by a reviewing court once the merits of the dispute have been finally determined.

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[1] 2016 (1) SA 1 (CC) para 132.

[6] Turning to the merits of the review, rule 31 of the DRC Rules provides that:

> *"(1) If a party to the dispute fails to attend or be represented at any arbitration proceedings before the DRC, and that party –*
>
> *(a) had referred the dispute to the DRC, a Commissioner may dismiss the matter by issuing a written ruling; or*
>
> *(b) had not referred the matter the DRC, the Commissioner may –*
>
> (i) *continue with the proceedings in the absence of that party; or*
>
> (ii) *adjourn the proceedings to a later date."*

[7] This rule is almost identical in its terms to section 138(5) of the LRA, in respect of which it has been held that, where the referring party fails to appear, the presiding commissioner has no option but to dismiss the case.[2]

[8] Assuming for present purposes that the arbitrator did have a discretion to postpone the matter, it is trite that a postponement is not simply there for the taking. A proper case must be made out for the indulgence sought, by the party seeking it.

[9] In the present matter, the stated reason for the postponement was that the representative assigned to the matter had been booked off sick by a medical practitioner. The first respondent alleged that their *"other Organisers are all engaged in other matters."* This allegation was not substantiated in any way. On the face of it, the impression gained is that the first respondent regarded the postponement as something to which it was entitled as of right.[3]

[10] These shortcomings may have been reasonably overlooked if the first respondent or the employee had bothered to attend the arbitration hearing on 10 December 2020. By 8 December the first respondent had been informed in no

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[2] *Vorster v CCMA* [2002] 11 BLLR 1110 (LC) para 27.

[3] For example, the first respondent failed to explain upfront why the medical certificate referred to a "C Carolus" when the representative was Deon Carolus.

uncertain terms that the postponement request was opposed by the applicant. Yet it appears that the first respondent merely assumed that the postponement would be granted nonetheless.

[11] No explanation whatsoever was put by, or on behalf of, the employee for his failure to be present on 10 December. On this point, the arbitrator made the (astounding) observation that:

> *"It stands to reason and is obvious that the employee would not have attended on the day as he was probably informed by the union official of then medical incapacity. I am unable to find that the employee's absence at the arbitration was deliberate and/or wilful. In the circumstances his absence is not out of the ordinary."*

[12] There was no factual basis for this finding. It was nothing more than speculation or conjecture on the part of the arbitrator. Bearing in mind that it was the employee who sought the indulgence of a postponement, it was incumbent on him to place cogent reasons for his absence before the arbitrator. In the absence of any such reasons, it was not open to arbitrator to divine what his explanation might be – less still to conclude that his conduct was not deliberate or wilful.

[13] Moreover, the arbitrator seemingly accepted the first respondent's unsubstantiated say-so that no other union organisers were available to represent the employee, or at least move for the postponement, on 10 December 2020.

[14] The prejudice to the applicant, on the other hand, was manifest. The applicant could not assume that the matter would be postponed and it responsibly took steps to enable it to proceed on 10 December 2020. It makes a mockery of the dispute resolution process that a postponement could have been granted in these circumstances. The arbitrator's ruling to this effect was so unreasonable that no reasonable decision-maker could have made it, and it falls to be reviewed and set aside on this ground.

[15] There is no reason why substitution should not follow in this case. The outcome of dismissal is a foregone conclusion and it would serve no purpose to remit the matter for determination afresh by another arbitrator.

[16] Costs were only sought against the respondents in the event of their opposition, which did not materialise.

Order

[1] The Second Respondent's postponement ruling dated 24 December 2020 under the Third Respondent's case number MICT 31958 ("the ruling") is reviewed and set aside.

[2] The ruling is substituted with the following ruling:

"The unfair dismissal dispute under case number MICT 31958 is dismissed."

[3] There is no order as to costs.

Leslie AJ
Acting Judge of the Labour Court of South Africa

Representatives:

For the Applicant: G Slingers, instructed by
William Berry Attorney