IN THE LABOUR APPEAL COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

Case Number: JA 52/98

In the matter between

CAREPHONE (PTY) LTD

Appellant

AND

MARCUS N O

First Respondent

CARLYSLE-MCCALLUM & SEVEN OTHERS Second to Ninth Respondents

THE COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION Tenth Respondent

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JUDGMENT

FRONEMAN DJP.

Introduction.

[1] The vast majority of labour disputes, if not successfully conciliated in terms of the Labour Relations Act 66 of 1995 ("the LRA"), end up in compulsory arbitration before the Commission for Conciliation, Mediation and Arbitration ("the Commission"). Arbitration is intended to dispose of a dispute finally (s 143(1) of the LRA). Where arbitration is consensual the rationale for this finality, without the further intervention of a court of law, is understandable (*Amalgamated Clothing and Textile Workers Union v Veldspun Ltd* 1994 (1) SA 162 (A) at 169G-H). In the case of compulsory statutory arbitration the failure to provide for further legal redress may be perceived as unsatisfactory by a losing party. The LRA does not provide for any appeal against an arbitration award made by a commissioner exercising the Commission's functions of arbitration in terms of the LRA. It does, however, provide for the review of the award by the Labour Court in certain circumstances.

[2] The nature and extent of that right to review is the legal issue to be addressed in this appeal.

[3] The facts giving rise to the application for review in the Labour Court before Mlambo, J will be dealt with in greater detail later in this judgment. Suffice to state at this stage that what was sought on review before Mlambo J was the setting aside of a commissioner's award, made in arbitration proceedings under the auspices of the Commission, in favour of the second to the ninth respondents ("the employees"). The appellant was ordered to pay the employees compensation for their wrongful dismissal. The grounds for the review were stated to be the commissioner's refusal to

grant a postponement of the matter at the request of the appellant on three occasions, which resulted in the eventual hearing of the matter and making of the award in the absence of the appellant.

[4] Mlambo J dismissed the review application but granted appellant leave to appeal against his judgment. In essence he found that the facts did not disclose proper grounds for review under s 145 of the LRA and that he did not have the power to review the award under s 158(1)(g) of the Act. The latter finding is one on which differing views have been expressed in decisions of the Labour Court. (Cf. *Ntshangane v Speciality Metals CC* [1998] 3 BLLR 305 (LC); *Pep Stores (Pty) Ltd v Laka NO and Others* Case No. J 1011/97 (LC); *Edgars Stores Ltd v Director for Commission for Conciliation Mediation and Arbitration* [1998] 1 BLLR 34 (LC), with *Deutsch v Pinto and Another* 1997 (18) ILJ 1008 (LC); *Kynoch Feeds (Pty) Ltd v CCMA and Others* [1998] 4 BLLR 384 (LC); *Rustenburg Platinum Mines Ltd v CCMA and Others* [1997] 11 BLLR 1475 (LC); *Shoprite Checkers (Pty) Ltd v CCMA and Others* [1998] 5 BLLR 510 (LC); and *Standard Bank of SA Ltd v CCMA and Others* [1998] 6 BLLR 622 (LC)).

Review provisions in the LRA.

[5] The LRA provides for the review of matters under the Labour Court's jurisdiction in three sections viz. ss 145, 158(1)(g) and 158(1)(h). It is convenient to quote them in full:

"**145 Review of arbitration awards**
(1) Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the

Labour Court for an order setting aside the arbitration award-

(a) within six weeks of the date that the award was *served* on the applicant, unless the alleged defect involves corruption; or

(b) if the alleged defect involves corruption, within six weeks of the date that the applicant discovers the corruption.

(2) A defect referred to in subsection (1), means-

(a) that the commissioner-

(i) committed misconduct in relation to the duties of the commissioner as an arbitrator;

(ii) committed a gross irregularity in the conduct of the arbitration proceedings; or

(iii) exceeded the commissioner's powers; or

(b) that an award has been improperly obtained.

(3) The Labour Court may stay the enforcement of the award pending its decision.

(4) If the award is set aside, the Labour Court may-

(a) determine the dispute in the manner it considers appropriate; or

(b) make any order it considers appropriate about the procedures to be followed to determine the dispute."

"158 <u>Powers of the Labour Court.</u>

(1) The Labour Court may

....

(g) despite section 145, review the performance or purported performance of any function provided for in *this* Act or any act or omission of any person or body in terms of *this* Act on any grounds that are permissible in law;

(h) review any decision taken or any act performed by the State in its capacity as employer, on such grounds as are permissible in law;"

[6] It should be noted that two of the provisions deal with the review of specific kinds of functions: s 145 with arbitration under the auspices of the Commission and s 158 (1) (h) with the review of actions of the State as employer. If these two sections had stood alone there would have been no express provision for the review by the Labour Court of other administrative functions performed under the LRA. Whether that gap

could have been filled by reliance on an inherent right of review, as a (superior) court of law, is an interesting and difficult issue which need not be considered further, because s 158(1)(g) attempts to provide the answer.

[7] The difficulties in determining the proper ambit of operation of s 158(1)(g) arise mainly from two sources. The first is the use of the words "despite section 145" in s 158(1)(g) itself, and the second is the perception that s 145 provides for a more restricted kind of review than that allowed for by the Constitution. Because of this, some judgments in the Labour Court found that arbitration proceedings under the auspices of the Commission should be reviewed under s. 158(1)(g), thereby effectively bypassing the provisions of s. 145. Mlambo, J refused to follow that route.

[8] In order to determine the parameters of the Commission's competence in the exercise of its compulsory arbitration function, and that of the Labour Court in reviewing such an arbitration award by the Commission, it is necessary to have regard to the provisions of the LRA against the background of the Constitution (Constitution of the Republic of South Africa 108 of 1996) (cf. *SACCAWU v Speciality Stores Ltd* [1998] 4 BLLR 352 (LAC) paras. 12-14). The need to do this flows from the provisions of the Constitution itself: it is the supreme law of the land and law and conduct inconsistent with its provisions are invalid (s 2(1)); legislation and law in force prior to the Constitution coming into operation remain valid only insofar as it is consistent with the Constitution (Item 2(b) of Schedule 6 to the Constitution); and, in any event, when interpreting legislation the spirit, purport and objects of the Bill of Rights in the Constitution should be promoted (s 39(2)).

The Constitutional context

[9] The Constitution established a democratic state based, amongst other values, on the rule of law (s 1(c)) and a multi-party system of democratic government to ensure accountability, responsiveness and openness (s 1(d)). The authority of the State is found in three arms of government: the legislative, the executive and the judicial (ss. 43, 85 and 165). Any public institution created by the Constitution or by legislation under its auspices (and there can be no other way), thus finds its ultimate authority and competence in the Constitution and is subject to its provisions (cf. *Executive Council, Western Cape Legislature and Others v President of the Republic of South Africa and Others* 1995 (4) SA 877 (CC); (1995) 10 BCLR 1289 (CC); at para. 62; *Hugo v President of the Republic of South Africa and Others* 1997 (4) SA 1 (CC); (1996) 6 BCLR 876; at paras. 11 and 28).

[10] In terms of s 34 of the Constitution everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court, or where appropriate, another independent and impartial tribunal or forum. The LRA created both the Commission and the Labour Courts to resolve labour disputes, but made the nature and extent of their respective competencies quite different.

The Commission

[11] Although the Commission is an independent body with jurisdiction in all the provinces, it was not created as a court of law (ss 112-114 of the LRA, read with ss

165 and 166 of the Constitution). It thus has no judicial authority in constitutional terms. It is, nevertheless, a public institution created by statute. When it (through duly appointed commissioners - ss 125 and 136 of the LRA) conducts compulsory arbitration in terms of the LRA this involves the exercise of a public power and function, because it resolves disputes between parties in terms of the LRA without needing the consent of the parties. This makes the Commission an organ of state in terms of the Constitution (see the definition of 'organ of state' in s 239 of the Constitution).

[12] The important implication of this is that the Commission is bound directly by the Bill of Rights in the Constitution (s 8(1) of the Constitution). It is also subject to the basic values and principles governing public administration (s 195(2)(b) of the Constitution).

[13] Parties subject to compulsory arbitration under the Commission's auspices are thus entitled to have their fundamental rights, as set out in the Bill of Rights, respected in the arbitration process.

[14] In terms of s 195(1)(d) of the Constitution the service provided to the parties by the Commission must also be impartial, fair, equitable and unbiased.

[15] It was contended in argument by Mr Davis, who appeared on behalf of the Commission, that the Commission's function of compulsory arbitration under the LRA was of a *judicial* nature and thus did not amount to "administrative action" for

the purpose of the administrative justice section in the Bill of Rights. This meant, he said, that the right to just administrative action in the Bill of Rights (s. 33 read with Item 23(2) of Schedule 6 of the Constitution) did not apply in arbitrations under the Commission's auspices. In my view this submission cannot be upheld.

[16] The relevant section reads as follows:

'23(2) Until the legislation envisaged in sections 32(2) and 33(3) of the new Constitution is enacted-

....

(b) section 33(1) and (2) must be regarded to read as follows:
"Every person has the right to-
(a) lawful administrative action where any of their rights or interests is affected or threatened;
(b) procedurally fair administrative action where any of their rights or legitimate expectations is affected or threatened;
(c) be furnished with reasons in writing for administrative action which affects any of their rights or interests unless the reasons for that action have been made public; and
(d) administrative action which is justifiable in relation to the reasons given for it where any of their rights is affected or threatened."'

[17] The distinction made between judicial, quasi-judicial and purely administrative functions of the state administration under the common law, found its historical origins in the need to make the English common-law writs of certiorari and prohibition applicable to acts categorised as quasi-judicial (Wiechers, *Administrative Law*, 1985, at 122 and 218). This, in effect, extended the scope of judicial review, a result which could have been, and eventually was, reached in South African law without the necessity of relying on these formal classifications (*Administrator, Transvaal, and Others v Traub and Others* 1989 (4) SA 731 (A) at 762-763; Baxter, *Administrative Law*, 1994, at 348). It would be ironic indeed if they are re-introduced at this stage of the development of our law to *limit* the scope of judicial review of

administrative action.

[18] The constitutional answer to this submission is that although the Commission or other organs of state may perform functions of a judicial nature they are not courts of law and thus have no *judicial authority* under the Constitution (ss 165, 166 and 239 of the Constitution). Their judicial functions do not transform them into part of the judicial arm of the State, nor does it make them part of the judicial process (cf. *Bernstein and ors v Bester and ors NNO* 1996 (2) SA 751 (CC); 1996 (4) BCLR 449 (CC); paras. 95-97).

[19] The substantive answer to the argument is to be found in the purpose of the administrative justice section of the Bill of Rights. That purpose is to extend the values of accountability, responsiveness and openness to institutions of public power which might not previously have been subject to those constraints. Courts of law were in any event always subject to the kind of requirements set out in the section. It would simply be incongruous to free other public institutions exercising judicial functions from those constraints. It is not necessary to seek the origins of those constraints in other provisions of the Bill of Rights, such as the access to justice provision (s.34). Administrative action may take many forms, even if judicial in nature, but the action remains administrative.

[20] The constitutional imperatives for compulsory arbitration under the LRA are thus that the process must be fair and equitable; that the arbitrator must be impartial and unbiased; that the proceedings must be lawful and procedurally fair; that the reasons

for the award must be given publicly and in writing; that the award must be justifiable in terms of those reasons; and that it must be consistent with the fundamental right to fair labour practices.

[21] The provisions of the LRA dealing with arbitration proceedings are not in conflict with these constitutional requirements. The arbitration of labour disputes by an independent body, the Commission, is permissible in terms of s 34 of the Constitution (para [10] above). The formal pre-conditions to arbitration are unobjectionable (ss 136 and 137 of the LRA). The same can be said for the general provisions for arbitration proceedings (s 138). In particular s 138(1) lays down the general requirement that the purpose of the proceedings must be to determine the dispute fairly, albeit also quickly and with the minimum of legal formalities. A commissioner must take into account any code of good practice issued by NEDLAC, or guidelines issued by the Commission itself in terms of the LRA (s 138(6)); all indications of adherence to the constitutional requirements of fairness. A commissioner is also obliged to give reasons for the award (s 138(7)(a)) and may make any appropriate award in terms of the LRA (s 138(9)).

[22] In short, there are no express or implied provisions in the LRA to suggest that the powers of a commissioner in compulsory arbitration under the LRA may exceed the constitutional constraints on those powers or may be given in conflict with constitutional values. It would have been surprising had there been any such provisions, given that the LRA is a piece of legislation emanating from the new constitutional order (under the interim Constitution) and that it seeks to promote the

specific and general provisions of the new order (s 1(a) and 3(b) of the LRA).

The Labour Court

[23] The Constitution provides for the establishment, by an Act of Parliament, of courts similar in status to a High Court (s 166(e)). The Labour Court is such a court, having authority, inherent powers and standing in relation to matters under its jurisdiction equal to that of a High Court in relation to matters under its jurisdiction (s 151(2) of the LRA). It is a court of law (s 151(1) of the LRA) with judicial authority in terms of the Constitution (s 165(1) of the Constitution).

[24] By virtue of its judicial authority and specific provisions of the LRA it may review the exercise of functions by the Commission. Where a commissioner exceeds the constitutional constraints on his or her powers on arbitration, this can be reviewed by the Labour Court under s. 145, in particular s. 145(2)(a)(iii). It is not necessary to resort to s. 158(1)(g) to achieve this end.

[25] What has bedevilled the interpretation of s 145 and has led to the conclusion that it provides for a narrow and unconstitutional basis of review, is the reliance placed on decisions interpreting a corresponding section in the Arbitration Act, 42 of 1965 (Cf. *Amalgamated Clothing and Textile Worker's Union v Veldspun Ltd* 1994 (1) SA 162

(A)). The meaning accorded to this section by the courts cannot be taken over without qualification. That Act's operation in respect of arbitration under the auspices of the Commission is expressly excluded in the LRA (s 146); it applies to private, consensual arbitration (in contrast to the compulsory arbitration under the LRA); and its provisions were assessed and interpreted in a different constitutional context. In any event, even under the provisions of the Arbitration Act an award could be reviewed and set aside if the arbitrator exceeded his or her powers by making a determination outside the terms of the submission (*Veldspun's* case, above, at 169C). These considerations augment the canon of interpretation that the legislature, by including an existing formulation in a statute, is presumed to intend to give it the meaning previously accorded by the courts.

[26] It must be admitted that the choice of the word "despite' in section 158(1)(g) is an unhappy one. It allows for an interpretation of s 158(1)(g) as granting a general review power to the Labour Court over any function, act or omission under the LRA, instead of it providing merely for the Court's residual powers of review for administrative functions not defined specifically in ss 145 and 158(1)(h). If the latter interpretation is accepted, the provisions of ss 145, 158(1)(g) and 158(1)(h) apply to distinct and different forms of administrative action and do not overlap. If, however, the former interpretation is accepted, the field of application of ss 145 and 158(1)(g) do overlap, with the result that the provisions of s 145 become superfluous.

[27] The reasoning supporting this interpretation of s 158(1)(g) found its justification in the suggestion that it was necessary to do so, because the grounds of review under s

145 of the LRA were limited in scope and thus did not give expression to what the Constitution demanded. In order to act in accordance with the Constitution one thus had to make use of s 158(1)(g). It has already been shown that review under s 145 is not in conflict with the Constitution.

[28] It is necessary to attempt to interpret s 145 in a manner which is consistent with the Constitution (See s 3(b) of the LRA; *S v Bhulwana*; *S v Gwadiso* 1996 (1) SA 388 (CC); 1995 (12) BCLR 1579 (CC); para. 28). It is capable of such an interpretation. If the result means that the word "despite" in s 158(1)(g) should be read as "subject to", then so be it. It is a lesser evil than ignoring the whole of s 145, including its sensible provisions relating to time limits.

[29] It follows that Mlambo J cannot be faulted for refusing to invoke the power of review in terms of s 158(1)(g), and holding that review of arbitration proceedings under the auspices of the Commission must proceed under s 145 of the LRA.

The standard of review

[30] It appears from a number of decisions of the High Courts that the effect of, particularly, the administrative justice section in the Bill of Rights is seen as broadening the scope of judicial review of administrative action (See *Tseleng v Chairman, Unemployment Board and Another* 1995 (2) BCLR 138 (T): 1995 (3) SA 162 (T): *Standard Bank of Bophuthatswana Ltd v Reynolds NO and Another* 1995 (3) BCLR 305 (B): 1995 (3) SA 74 (B); *Pennington v The Minister of Justice and Others* 1995 (3) BCLR 170 (C), *Kotze v Minister of Health* 1996 (3) BCLR 417 (T),

Maharaj v Chairman of the Liquor Board 1997 (2) BCLR 248 (N): 1997 (1) SA 273 (N); and in the Land Claims Court, *Farjas (Pty) Ltd and Another v Regional Land Claims Commissioner, Kwazulu-Natal* 1998 (5) BCLR 579 (LCC)).

[31] The peg on which the extended scope of review has been hung is the constitutional provision that administrative action must be justifiable in relation to the reasons given for it (ss 33 and item 23(b) of schedule 6 to the Constitution). This provision introduces a requirement of rationality in the *merit or outcome* of the administrative decision. This goes beyond mere procedural impropriety as a ground for review, or irrationality only as evidence of procedural impropriety.

[32] But it would be wrong to read into this section an attempt to abolish the distinction between review and appeal. According to the *New Shorter Oxford English Dictionary* 'justifiable' means 'able to be legally or morally justified, able to be shown to be just, reasonable, or correct; defensible.' It does not mean 'just', 'justified' or 'correct'. On its plain meaning the use of the word 'justifiable' does not ask for the obliteration of the difference between review and appeal. Neither does the LRA itself: it makes a very clear distinction between reviews and appeals.

[33] One must be careful not to extend the scope of review for the wrong reasons. One such wrong reason would be the fact that the Labour Court has no original or appeal jurisdiction in respect of the matters specified to be conciliated and arbitrated under the auspices of the Commission and to compensate for this by an extended review. There is no constitutional right to have matters capable of being decided by the

application of law determined by a court of law. It may be done by another independent and impartial tribunal (s 34 of the Constitution). The Commission is such a tribunal. It is (and was, see *Hira v Booysen* 1992 (4) SA 69 (A) at 91E-I) quite proper to give an independent and impartial administrative tribunal the exclusive competence to decide not only matters of fact, but also of law, with no right of appeal to a court.

[34] The particular conception of the State and the democratic system of government as expressed in the Constitution determines the power to review administrative action and the extent thereof (Cf. Craig, *Administrative Law*, 3rd ed. at 3-40). Of importance in this regard, for present purposes, is the constitutional separation of the executive, legislative and judicial *authority* of the state administration, as well as the foundational values of accountability, responsiveness and openness in a democratic system of government (s 1(d) of the Constitution). The former provides legitimacy for the judicial review of administration action (but not for judicial exercise of executive or administrative authority), whilst the latter provides the broad conceptual framework within which the executive and public administration must do its work, and be assessed on review.

[35] When the Constitution requires administrative action to be justifiable in relation to the reasons given for it, it thus seeks to give expression to the fundamental values of accountability, responsiveness and openness. It does not purport to give courts the power to perform the administrative function themselves, which would be the effect if justifiability in the review process is equated to justness or correctness.

[36] In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' of the matter in some way or another. As long as the judge determining this issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order.

[37] Many formulations have been suggested for this kind of substantive rationality required of administrative decision makers, such as 'reasonableness', 'rationality', 'proportionality' and the like (Cf. e.g. Craig, *Administrative Law*, above, at 337-349; Schwarze, *European Administrative Law*, 1992 at 677). Without denying that the application of these formulations in particular cases may be instructive, I see no need to stray from the concept of justifiability itself. To rename it will not make matters any easier. It seems to me that one will never be able to formulate a more specific test other than, in one way or another, asking the question: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material properly available to him and the conclusion he or she eventually arrived at? In time only judicial precedent will be able to give more specific content to the broad concept of justifiability in the context of the review provisions in the LRA.

[38] With the above in mind, it is now time to return to the facts.

Material facts

[39] The employees lost their employment with the appellant towards the end of 1996. During January - April 1997 attempts were made at conciliating the dispute that arose from their loss of employment under the LRA's provisions, but with no success. The disputes were then referred to arbitration under the auspices of the Commission in terms of s 141 of the LRA.

[40] The matters were set down for arbitration from 17 - 20 June 1997. The appellant alleged these dates were arranged by the commissioner with the consent of the employees, but that the appellant's consent was not sought. The employees and commissioner disputed this. It is, however, common cause that appellant was informed of the dates of the hearing on 3 June 1997 and that the firm of attorneys representing him was told of the dates on 4 June 1997.

[41] At the commencement of proceedings on 17 June 1997 counsel appearing for appellant on instruction from appellant's attorney made application for the appellant to be allowed legal representation, as well as for a postponement. The former was granted, the latter not, except to the extent that the commissioner allowed the matter to stand down until 09H00 the next day.

[42] An associate from the appellant's attorneys appeared the next day as counsel was not available. An application for legal representation for the rest of the arbitration proceedings was granted, but a further application for a postponement was refused. To assist the appellant, the commissioner let the matter stand down till 13H00 on 19 June 1997.

[43] On that day a professional assistant from the firm of attorneys appeared, once again requesting a postponement. It was refused. The commissioner warned the legal representative and Mr Isaacs, the appellant's chief executive officer, that the proceedings would continue in their absence if they left. They nevertheless did, Isaacs proceeding to a medical appointment made for that afternoon. Before leaving, the professional assistant allegedly informed the commissioner that Isaacs reserved his right to return after his medical appointment and that appellant intended launching interdict proceedings to prevent the continuation of proceedings in Isaacs' absence.

[44] Despite this the commissioner proceeded and finalised proceedings at 22H00 that evening by making an arbitration award in the employees' favour.

[45] On 20 June 1997 the progressive diminution in the formal status of appellant's legal representatives continued when a candidate attorney was sent to observe proceedings, only to find out that the proceedings had all ended the previous evening.

[46] The initial reason advanced for the need for a postponement was that the partner in the firm of attorneys who originally dealt with the matter became unavailable to do the matter because his daughter was diagnosed as seriously ill on 12 June 1997 and he had see to her needs over the next couple of days. Isaacs testified to this in an affidavit handed to the commissioner in support of the application for postponement on 17 June 1997. The material parts read as follows

> **"4. As chief executive officer of the respondent I appointed Mr A, of Webber Wentzel Bowens Attorneys as my legal representative in**

this matter. Mr A was appointed as the respondent's legal representative, who has worked the matter up and who at this stage is the only person who could proceed to represent the respondent in the arbitration.

5. **A formal notification of arbitration dates was forwarded to me by Mr W W Ferreira, CCMA Case Manager on 02 June 1997. However, the facsimile only came to my attention on 03 June 1997.**
6. **I contacted Mr A and informed him of the arbitration referral. The documentation relating to the matter was delivered to Mr A's office by hand on 04 June 1997.**
7. **I have since been advised by Webber Wentzel Bowens that on 12 June 1997 Mr A's young daughter was diagnosed as having a life threatening illness. Mr A's daughter was admitted to the Children's Leukemia Ward at the Johannesburg General Hospital on 13 June 1997.**
8. **Mr A has not been able to attend at his offices and has not been able to assist me in preparation of the respondent's case due to his personal circumstances. The case faced by the respondent is one of considerable complexity and difficulty, requiring extensive preparation.**
9. **At such short notice none of Mr A's associates at Webber Wentzel Attorneys are available to undertake the respondent's case on his behalf and neither has there been sufficient or any time at all for instructed counsel to prepare.**
10. **I would be neglectful of my duties and reckless towards the respondent if I attempted to conduct this case without legal representation. I believe that the proper conduct of such a case would be beyond my capabilities. The claims faced by the respondent are substantial. If the applicants were to be successful on all of their heads of claim respondent would face liability of approximately R 600 000,00.**
11. **There are certain aspects of the case, such as jurisdictional issues, which require specialised legal knowledge. The matter has also been complicated by various referrals to the commission on a number of issues.**
12. **In the circumstances, I believe respondent would be severely prejudiced if a postponement is not granted in this regard.**
13. **I am informed by respondent's attorneys that when making contact with the applicant's attorneys on Friday morning, 13 June 1997 they were informed that applicants had not contacted them in the last two months. Furthermore, with reference to the letter faxed by the author thereof Commissioner W W Ferreira received 02 June 1997, it is my respectful submission that the arbitration is nonetheless not ripe to proceed given that the process prescribed**

by Advocate Marcus has not been complied with.

14. Accordingly the respondent seeks a postponement in the circumstances.'

[47] The subsequent applications for a postponement were based on this original reason and the resultant inability of those who replaced the partner dealing originally with the matter, to prepare on the merits of the case and to be available for 4 days. These were augmented on 19 June 1997 by the alleged need of Isaacs to attend to his medical appointment.

[48] From the transcript of the commissioner's handwritten notes of the proceedings (no formal record was kept) it appears that he gave no substantive reasons on the postponement issue on 17 June 1997. This is understandable in view of the fact that he allowed the matter to stand down till the next day. His recorded reasons for refusal of the application for a postponement on 18 June read as follows:

"1. Mr Isaacs must know (and have known all along) of the circumstances of the termination of employment of his employees from his side.

2. Mr Isaacs could have instructed his attorneys in May 1997 when he says he received the request for arbitration. However he waited for receipt of the arbitration notice (received by employer 2 June 1997) and gave the instructions (to his attorneys) some 4 or 5 days later which, owing to intervening holidays, it is said was insufficient time for his attorneys to prepare (according to Mr van Rensburg).

3. Whilst I am sympathetic to any hardship caused to Mr Isaacs and his attorneys, this matter has, according to applicants, in the form of (this) and related disputes, been ongoing since October 1996 and delayed by constant point taking and dilatory tactics by Mr Isaacs (a submission which seems to find some support in Mrs De Jongh's report as conciliator of the dispute), (copy attached), whereas the CCMA is requested to adopt an expedited form of arbitration

proceedings in terms of its official policy and the provisions of Section 138(1) of the LRA)

4. **Ms Kieser had to travel by air from Cape Town [to this arbitration], in which regard, on my express invitation, the employer [represented by Mr Isaacs] declined to tender costs of air travel and accommodation should I be inclined to grant a postponement,**
5. **The requirements of expedited (arbitration proceedings) and the spirit of the Act (i.e. looking to expedite labour dispute settlement) aside; I cannot see why attorneys (if available) cannot take sufficient instructions to at least commence with the hearing of the 1st group of employees (i.e. in relation to the constructive dismissal claims), the factual grounds of which are not that complex and the circumstances of which were always known to Mr Isaacs, nor do I believe the employee's written submissions of issues are essential to the attorneys for this purpose, considering that in most dismissal arbitrations which I conduct this is not even a requirement and the issues are determined without the benefit of prior statements at all in a "narrowing of the issues" exercise. If laymen can participate (in such an exercise) in order to determine issues, why can't attorneys? An alternative representative must, if necessary, be found for Mr A. To meet the company's needs, I did agree to postpone the hearing of the 1st group's dispute to tomorrow 19 June 1997 at 13h00 when opening statements, followed by a narrowing of the issues exercise would commence. Owing to the degree of past lack of co-operation, I assumed it would serve little purpose to require parties to meet to arrange an agreed bundle of documents. The matter accordingly postponed to 19 June 1997 at 13h00 in respect of groups 1 and 2."**

[49] In his answering affidavit to the application for review the commissioner elaborated on these reasons. He made the additional point that from the time when the firm of attorneys' partner who originally dealt with the matter (Mr A) heard of the diagnosis of his daughter's illness to the hearing itself there were five days within which to make alternative arrangements. Neither Isaacs nor the attorney explained on affidavit what steps were taken during that period to make alternative arrangements or, if taken, when they were taken. This is no technical matter. How did the firm's

"industrial relations and employment law department" function? How many partners are there? Were they all contacted? Which counsel were contacted and when? Why did those persons who became formally involved later not depose to affidavits either at the hearing or in the review applications? In the absence of these details the Commissioner can hardly be faulted for doing what he did *on the information placed before him from 17 June to 19 June.*

[50] Similarly, the commissioner dealt with the additional reason given for the request for another postponement on 19 June 1997 in his answering affidavit. He considered this reason, namely, Isaacs' need to attend to a medical appointment, as inadequate, given that it was not raised earlier, no evidence on affidavit was given to this effect, and no proper reason appeared why it was so urgently necessary to attend to the appointment on that day.

[51] As far as the continuation of the arbitration proceedings was concerned, the commissioner warned both the legal representative and Isaacs on 19 June 1997 that if they left the hearing would continue in their absence. He was aware that some of the employees had come from afar and would incur further costs if the matter went on to the following day. At the employees' request he decided to continue and finish the proceedings in the evening.

Application of law to facts

[52] The facts as summarised above are largely common cause. Where there is a dispute the commissioner's version must be accepted as there was no application in the court

below for oral evidence to be heard on the disputed issues in the court below. It has not (and could not have been) suggested that the commissioner was acting in bad faith or that he was dishonest in giving his version of the events, or in giving the reasons for his decision.

[53] Accordingly, the only bases for review are (1), that the facts amount to misconduct or gross irregularity or impropriety under s. 145(2)(a)(i)- (ii) and s. 145(2)(b) of the LRA, or (2), that his actions are not justifiable in terms of the reasons given for them and that he has accordingly exceeded his constitutionally constrained powers under s 145(2)(a)(iii) of the Act.

[54] In a court of law the granting of an application for postponement is not a matter of right. It is an indulgence granted by the court to a litigant in the exercise of a judicial discretion. What is normally required is 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. Interference on appeal in a matter involving the lower court's exercise of a discretion will follow only if it is concluded that the discretion was not judicially exercised (*Madnitsky v Rosenberg* 1949 (2) SA 392 (A) at 398-399).

[55] There are at least three reasons why the approach to applications for postponements in arbitration proceedings under the auspices of the Commission under the LRA is not necessarily on a par with that in courts of law. The first is that arbitration proceedings must be structured to deal with a dispute fairly *and quickly* (s 138(1)).

Secondly, it must be done with '*the minimum of legal formalities*' (s 138(1)). And thirdly, the possibility of making costs orders to counter prejudice in good faith postponement applications is severely restricted (s 138(10)).

[56] The commissioner's rejection of the stated need for a postponement as being inadequate, because there was no explanation of the steps taken from 12 - 17 June 1997 to obtain other legal representation, appears to be well founded. Even if that explanation was acceptable, the employees' prejudice resulting from a postponement could not be cured by the commissioner making a costs order; indeed the appellant expressly declined to pay the costs resulting from a postponement. If the application for a postponement was brought in a court of law there would thus have been good grounds for refusing it and little or no reason to upset such a finding on appeal. The same applies to a continuation of proceedings after a refusal of a postponement where the unsuccessful applicant for the postponement elects to absent himself from the proceedings.

[57] But this is not an appeal from a court of law. It is a review of a decision of a tribunal where the statutory requirements for its functioning are less congenial to the granting of postponements than is the case in a court of law. The commissioner rejected as inadequate the reasons given for the need to postpone, mainly on the basis that preparations for the case could have been made earlier and that the appellant and his legal representatives failed to explain why adequate alternative arrangements could not have been made once the original legal representative became unable to continue with the case. There was sufficient material before him to come to that conclusion rationally and objectively. He weighed up the prejudice that would follow for the

appellant from a refusal of a postponement, against the prejudice the employees would suffer if a postponement was granted, and noted the absence of a solution to this predicament on the basis of a costs order. Once again his reasoning was rationally connected to the material before him. His decision and the reasons he gave for it do not support an inference of misconduct, irregularity or impropriety. The decision not to postpone and to continue the proceedings are rationally justifiable in terms of the reasons given for the decision by the commissioner. He thus did not exceed the substantive constitutional limits to the exercise of his powers in arbitration under the LRA. There was no basis to review his decision in the Labour Court. It follows that Mlambo J's order must stand.

[58] The appeal is dismissed with costs.

[59] In this judgment the reasoning in the various Labour Court judgments was not dealt with in separate detail. This does not mean that no assistance was drawn from these judgments. The contrary is true: without them the task would have been much more difficult than it has been. The same must be said for the helpful submissions by counsel representing the parties on appeal. The assistance of Mr Franklin, who acted as **amicus curiae** at the request of the Court, is also greatly appreciated.

JC FRONEMAN DJP.

I agree

JF MYBURGH JP.

I agree

E CAMERON JA

REPRESENTATIVES

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