

**REPORTABLE**

**IN THE LABOUR COURT OF SOUTH AFRICA**  
**SITTING IN DURBAN**

**D950/2001**

CASE \_\_\_\_\_ NO \_\_\_\_\_

2002/07/23

DATE

In the matter between:

**S E F VORSTER**

Applicant

and

**COMMISSION FOR CONCILIATION  
MEDIATION AND ARBITRATION  
AND OTHERS**

Respondents

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**BEFORE THE HONOURABLE MR ACTING JUSTICE  
NGCAMU**

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ON BEHALF OF APPLICANT:

MR J A VENTER

ON BEHALF OF FOURTH RESPONDENT:

MS L NAIDOO

TRANSCRIBER

SNELLER RECORDINGS (PROPRIETARY) LTD - DURBAN

CASE NO: D950/2001

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23 July 2002

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S E F VORSTER

and

COMMISSION FOR CONCILIATION MEDIATION AND  
ARBITRATION

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J U D G M E N T

NGCAMU AJ

[1] The applicant in this matter seeks to review and set aside the decision of the Commissioner in dismissing the applicant's dispute of unfair dismissal.

[2] The dispute came before the CCMA for arbitration on 3 October 2000. The applicant's attorney indicated that the matter was not going to be finalised in one day. The

arbitration was then postponed to 19 February 2001. On this date the applicant asked for a postponement because her attorney had withdrawn. The matter was postponed to 21 May 2001 to proceed for five days.

- [3] Prior to 21 May 2001 the Commissioner, Mr Oakes, contacted the applicant's labour consultant, Eric Botha, and advised him that the second respondent was seeking an adjournment and wanted to contact the applicant.
- [4] On 7 May 2001 Mr Eric Botha informed the applicant and the applicant's attorney about the proposed adjournment. This was at a meeting during a consultation. At this meeting the applicant, the attorney and Mr Botha took a decision to agree to a postponement. This decision was, however, never communicated either to the Commissioner, Mr Oakes, or to the second respondent.
- [5] On 10 May 2001 the Commissioner contacted the applicant direct and indicated that the second respondent requested a postponement. The applicant indicated that she had no objection but that first a letter had to be sent to her attorney.

The applicant did not advise the Commissioner that an agreement to postpone had been reached with her attorney. No letter was sent to the applicant's attorney regarding the respondent.

[6] On 18 May 2001 the Commissioner sent a letter to the applicant's attorneys confirming that the matter would proceed on 21 May 2001 as the consent to the postponement had not been provided. The applicant was advised about this by her labour consultant. The applicant also contacted her attorney about this.

[7] On 20 May 2001 the attorney sent a letter to the Commissioner as well as a medical certificate indicating that he was ill.

[8] The matter came before the Commissioner on 21 May 2001. The applicant then requested a postponement which was refused. The Commissioner granted applicant an opportunity to have her attorney present for the matter to proceed on 22 May 2001.

[9] On 22 May 2001 the applicant came without her attorney and

asked for a postponement on the same grounds as raised on the 21st. This application again was refused. After the postponement was refused the applicant left the hearing. The Commissioner dismissed the application.

[10] Several grounds have been raised in the review application by the applicant, including the allegation of bias. It was submitted that the Commissioner committed gross irregularity and misdirected himself in refusing to grant the postponement.

[11] Rule 17 of the CCMA rules provides the following:

"17.1 Postponement will be granted without the need for the parties to appear if both of the following conditions are met:

- (a) all the parties to the dispute agree in writing to the postponement, and
- (b) the request for the postponement is received by the Commissioner more than ten days prior to the scheduled date of arbitration.

17.2 A formal application in writing for postponement must be made if

- (i) the parties cannot agree whether or not an arbitration should be postponed, or

(ii) the request for a postponement is made within ten days of the scheduled date of arbitration.

The application must be served before the scheduled date for the arbitration. The Commissioner must decide whether to grant the request for a postponement on the written document presented or whether to convene a formal hearing."

[12] There was no written agreement forwarded to the Commissioner regarding the postponement of the arbitration as required under Rule 17.1. There was also no formal application contemplated in Rule 17.2.

[13] The applicant seeks to rely on the telephone conversation with the Commissioner in which it was indicated that the second respondent wanted a postponement. It is evident from the record that the second respondent contacted the first respondent about the postponement because it was unsure of the applicant's conduct.

[14] The Commissioner contacted applicant's labour consultant to facilitate an agreement for a postponement. The applicant's attorney as well as the applicant's labour consultant never

confirmed the postponement with the second respondent.

[15] In paragraph 32 the applicant stated the following:

"Due to the discussion with Mr Botha, it was agreed that the latter would confirm with the Commissioner (first respondent) that the matter be adjourned and that my attorney Mr *Grundlingh* would suspend all consultations with witnesses pending the outcome of discussions with the second respondent's representative."

It is interesting to note that Mr Botha did not confirm the adjournment with the Commissioner as agreed.

[16] When the Commissioner phoned the applicant on 10 May regarding the postponement, there was no indication that the postponement had been agreed but a condition was put forward in that a letter had to be faxed to the attorneys. No letter was faxed to the attorneys. This meant that the matter remained on the roll for 21 May as there was no communication with the Commissioner.

[17] Mr Botha and the applicant gave conflicting versions as to the agreement of postponement. On page 86 of the bundle,

lines 1 to 4, Mr Botha stated the following:

"So, Mr Commissioner, you approached me. I phoned the CCMA. I had discussions with you on two occasions where I confirmed and you accepted the fact that the matter was postponed."

At page 87, lines 1 to 4, the applicant stated the following:

"Mr Commissioner, Mr Anthony Oakes called me and asked for a postponement because he could not, according to him, get hold of my witnesses. I declined and I refused. I said I want to carry on, to go on with the matter."

[18] Mr Botha confirmed that they needed a request to be on paper so that they would not be held liable for the postponement. It is common cause that nothing in writing came along. After considering the matter the application for a postponement was then refused.

[19] The applicant was granted an opportunity to contact an attorney for the matter to proceed on the 22nd. On 22 May the applicant knew that a postponement had been refused and the matter was to proceed. She again came with an



application for a postponement. As a result of the Commissioner's refusal to grant a postponement applicant decided to withdraw. This resulted in the dismissal of the application.

[20] It is common cause that the postponement was not communicated to the first and second respondents. The applicant approached the arbitration on the basis that the matter was going to be postponed. She knew that there was nothing in writing. The applicant was ill-advised to abandon the hearing on refusal of the postponement. A 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. This is the position with the Commissioners as well. See *Carephone (Pty) Ltd v Marcus N.O. and Others* [1998] 19 ILJ 1425 [LAC] at para. 54.

[21] The Commissioner dismissed the application for a postponement on the basis that there had been previous postponements requested by the applicant. It was also rejected on the basis that there was no agreement to have the matter postponed. The Commissioner afforded applicant an

opportunity to obtain another lawyer. She failed to do this and did not explain why another attorney could not be found. She did not explain if all the witnesses were unavailable. The applicant had to deal with this question of alternative lawyer but failed to do so.

[22] In the *Carephone* case, at paragraph 56 of the judgment, the Court stated the following:

"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 to 17 June 1997 to obtain other legal representation, appears to be well-founded. Even if that explanation was acceptable, the employee's 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 were brought in a court of law, there would thus have been good grounds for refusing it and no reason to accept such a finding on appeal. The same applies to a continuation of proceedings after refusal of a postponement where the unsuccessful applicant for the postponement elects to absent himself from

the proceedings."

[23] The *Carephone* case is similar to the present one. I fully agree with the decisions of the Labour Appeal Court in this matter. The applicant placed herself in difficulties by making an election to absent herself. The postponement in the CCMA arbitrations are not to be easily granted. This is so because the Labour Relations Act provides for effective resolution of labour disputes. Section 138(1) of the Labour Relations Act therefore directs Commissioners to determine disputes fairly and quickly. The employee is entitled to finality of the dispute. There was in this case no tender for costs but the applicant sought to rely on the agreement which was disputed by the Commissioner. See further in this case *Chemical Workers Industrial Union v Darmag Industries (Pty) Ltd* [1999] 20 ILJ 2037 [LC] at paras. 29 to 32.

[24] In *Real Estate Services (Pty) Ltd v Smith* [1999] 20 ILJ 196 [LC] at paras. 12 and 13 REVELAS J stated the following:

"12. In my view postponements in arbitration proceedings in terms of the Act should be granted on a less generous basis than is done by the Courts. Arbitrations are designed to finalise

disputes fairly and quickly with minimum legalities [Section 138(1) of the Act]. Cost orders in postponements are limited by section 138(10) of the Act. Therefore the discretion exercised by the Commissioners of the CCMA in this regard should be even less open to interference by the Labour Court sitting as a court of review.

13. The CCMA is an institution which, from all accounts, is a very busy one. Commissioners set down dates for conciliation and arbitration and they have a discretion whether to grant postponements or not."

[25] It is to be noted that this case was set down for five days. The Commissioner notified the parties that the matter was going to be proceeded with as there was no written consent. Applicant was well aware of the fact that the matter was going to proceed and she was also aware of the refusal to postpone the matter and was, therefore, given a chance to obtain another lawyer. A refusal to allow a postponement in the circumstances cannot be said to have been irregular. The Commissioner exercised his discretion based on the facts before him. The rules relating to the postponements had not been adhered to and therefore the second respondent was at

this stage refusing to agree to a postponement. Had the applicant remained in the proceedings the result could have been different. What counts against the applicant is that although the lawyer was not present she had the labour consultant on her side for advice. Mr Botha was always at the arbitration where the matter appeared. Even on the date when the postponement was refused on the 21st, Mr Botha was present. Again on the 22nd he was present and in fact gave evidence regarding the alleged postponement.

[26] For the applicant to abandon the proceedings she left the Commissioner with no option. Section 138(5) of the Labour Relations Act provides the following:

"If a party to the dispute fails to appear in person or to be represented at the arbitration proceedings and that party-

- (a) had referred the dispute to the Commission, the commissioner may dismiss the matter; or
- (b) had not referred the dispute to the Commission, the commissioner may-
  - (i) continue with the arbitration proceedings in the absence of that party; or
  - (ii) adjourn the arbitration proceedings to a later date."

[27] It would be noted from this section that although the commissioner is given a discretion to dismiss the dispute, he is not given an alternative if the defaulting party is the person who had referred the dispute. Accordingly, the commissioner had to dismiss the application in this matter.

[28] It is unwise or negligent on the part of the applicant in a dispute to abandon the proceedings in order to force a postponement. Even if the decision to refuse a postponement is prejudicial to the applicant, this did not give her a right to abandon the proceedings. The applicant abandoned the proceedings and was therefore the author of her own misfortune. There is therefore no merit in the review based on the refusal to have the matter postponed. The Commissioner did not commit any irregularity in refusing the postponement.

[29] The applicant also raised the question of bias on the part of the Commissioner. It is evident from the record that the Commissioner did not consent to the postponement. He could not on his own consent to a postponement without the consent of the respondent. It is the parties involved who had to agree.

His conduct in contacting Mr Botha or the applicant was merely to facilitate a postponement. This cannot be said to be an act of bias. The argument that the Commissioner is employed by the Municipality or local government has no merit as well. The fact that the sector in which the dispute fell was indicated as a Municipality/Local Government does not mean that the Commissioner is employed by the second respondent as alleged by the applicant and therefore this could not have created an impression of bias on the part of the applicant. This ground of review is therefore dismissed.

[30] The applicant's attorney indicated an intention to apply for a recusal of the Commissioner. This he did in his letter that was addressed to the Commissioner. No such application was, however, raised. The applicant, if she wanted to have the Commissioner recuse himself, should have instructed another attorney at least to move this application. This was never done by the applicant. As a result of that the Commissioner never recused himself.

[31] After considering the facts presented I cannot find any irregularity entitling the applicant to have the award reviewed

and set aside. I am of the view that the decision to refuse a postponement was rational and correctly made. The applicant did not want to involve herself in the hearing after the refusal of the postponement. Whether or not the two other postponements were opposed or were by consent does not assist the applicant as they were both at her request to the Commissioner to exercise his discretion in allowing the further postponement. In the result the application for review cannot succeed.

[32] The application for review was not without merits which could influence the Court to make a costs order against the applicant. I am, therefore, satisfied that I should not make any costs order in this case. In the circumstances the order that I make is the following:

- (a) The application for review is dismissed.
  - (b) There is no order as to costs.
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