REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, BRAAMFONTEIN

JUDGMENT

Reportable

case no: JR 3100/12

In the matter between -

RESULTANT FINANCE (PTY) LIMITED **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION **First respondent**

KATLHOLO WILSON Second Respondent

COREEN WILSON **Third respondent**

Heard: 6 June 2014

Delivered: 30 September 2014

Summary: Review of postponement ruling of a commissioner - The rightfulness of the Commissioner's decision to refuse a postponement must be judged on the basis of the information which the Commissioner had at the time of his ruling - Incidents that happened thereafter, as referred to by the applicant, are *ex post facto* considerations which merely confirm the rightfulness or wrongfulness of the decision – review granted.

JUDGMENT

CELE J

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act[1] ("the Act") to review and set aside an arbitration award dated 12 November 2012, issued in this matter by the second respondent, under the auspices of the first respondent. The basis of the application is that the second respondent:

a. in terms of refusing to grant the applicant a postponement, committed a latent gross irregularity in terms of section 145, alternatively his decision constitutes substantive unreasonableness in that he failed to apply his mind to materially relevant facts or considerations with the result that the applicant was deprived of a fair hearing because had the first respondent applied his mind to the facts which he ignored, he could have come to a different conclusion.

b. In failing to determine the applicant's jurisdiction point in *limine,* committed a latent gross irregularity in terms of section 145, alternatively his decision constitutes substantive unreasonableness because had the first respondent applied his mind to the facts which he ignored he could have come to a different conclusion.

c. In determining that the applicant did not have a fair reason for the dismissal based on operational requirements, the first respondent committed a latent gross irregularity in terms of section 145, alternatively his decision constitutes substantive unreasonableness because had the first respondent applied his mind to the facts which he ignored he could have come to a different conclusion namely that the applicant did have a fair reason for retrenching the third respondent.

[1] Act Number 66 of 1995.

d. In awarding the third respondent nine months compensation, the first respondent committed a latent gross irregularity, alternatively the award is substantively unreasonable because had the first respondent applied his mind to the facts which he ignored he could have come to a different conclusion.

[2] The third respondent opposed this application essentially on the basis that the second respondent committed no defect as defined in section 145 of the Act and that the award issued in this matter was one that a reasonable decision maker could issue.

Factual Background

[3] The third respondent, Ms Coreen Wilson was employed by the applicant as an Operations Manager on 3 June 2003. Sometime in July 2007, the applicant took the view that Ms Wilson had committed an act of misconduct relating to gross insubordination. The Chief Executive Officer (CEO) of the applicant, Dr Gama gave Ms Wilson a choice between being subjected to an internal disciplinary hearing or to accept an offer of what he termed a 'consultancy agreement'. As at that stage no copy of the charge sheet had been presented to Ms Wilson and therefore she was never formally charged for any misconduct. The consultancy agreement was entered into on 5 September 2007. Clauses 2 and 3 of this agreement read:

> '2. Relationship
>
> 2.1 It is recorded that nothing in this agreement, whether express or implied, shall be construed as creating an employment relationship between the Company and the Contractor.
>
> 2.2 The Contractor is not entitled to any of the rights, benefits or incentives available to employees of the Company including, *inter alia*, annual leave, pay for annual leave, sick leave, maternity leave, family responsibility leave, medical aid membership or Contributions to a Company medical aid scheme, membership of a Company pension or provident fund, bonus entitlement or severance pay.

2.3 The Company specifically waves any right to rely on any provisions of the Labour Relations Act 66 of 1995 as amended, the Basic Conditions of Employment Act 75 of 1997 as amended, the Employment Equity Act 55 of 1998 (“ the Acts”) and confirms that , in waiving such rights to rely upon the provisions of the Acts, she does so in the full and express knowledge that she is aware of the definitions of and presumptions in favour of employees in each of the Acts, and further confirms that the Contractor is not an employee as defined in any of the Acts.

2.4 The Contractor may conduct other business and conclude other contracts with third parties provided that such business and or contracts do not interfere with any of its obligations in terms of the consultancy agreement.

3. Duration

Notwithstanding date of signature hereof, this agreement shall commence on 1 August 2007 and shall remain in force for an indefinite period, unless terminated in accordance with the terms of this agreement. The employment agreement entered into between the parties on 2 June 2003 is hereby cancelled with effect from 31 July 2007’.

[4] The applicant supplied Ms Wilson with a computer laptop and a printer. According to the applicant Ms Wilson worked mostly from her house. Ms Wilson version is that she continued to work in the office as before. She had various responsibilities which included:

- Office administration;
- Preparations of financial proposals;
- The creation and monitoring of documents;
- Cash management;
- Liaison with client, vendors, business initiators and funders;
- Management of asset tracking and
- Project.

[5] On 1 May 2012, the relationship between the applicant and Ms Wilson was ended by the applicant. The applicant called it the termination of a consultancy agreement while Ms Wilson called it an unfair dismissal which she then referred to the first respondent for conciliation and when the dispute could not be resolved, she referred it for arbitration. The first date of hearing was 5 September 2012 when the matter was postponed on the basis that the attorney representing the third respondent was unable to procure him as legal practitioner. As such the matter was postponed till 31 October 2012. The second respondent advised both parties to ensure that they were properly legally represented if they chose to. On 31 October 2012, the matter was heard and the second respondent ("the commissioner") described the issue for a decision as:

> 'an alleged unfair termination of a contract however, Mr Louw has put before you that the matter, from where they stand, revolves around the question of whether or not the applicant was an employee. That will obviously be within the meaning of the Labour Relations Act, or whether she was an independent contractor, and you said you concur that that is the issue that, obviously, needs to be determined, Mr Gama?'.

[6] Dr Gama concurred with the proposition as did Mr Louw, appearing for Ms Wilson. At the instance of the second respondent Dr Gama disclosed that it was his first time to be involved in an arbitration hearing. The second respondent proceeded to give him an explanation of what the arbitration process entailed. Mr Louw furnished the Commissioner and Dr Gama with a copy of his opening statement which he proceeded to read into the record. In his opening remarks Dr Gama indicated that according to him the Commission was the incorrect forum for the determination of the issues between the parties. To get clarity of the real issue the Commissioner decided to go off the record to allow the parties to discern the issue and to mop the way forward properly in an informal pre-arbitration setting.

[7] When the Commissioner came back on the record he stated that Dr Gama had raised the jurisdictional issue which according to him had to be dealt with first and when submissions to the contrary were made off the record Dr Gama

then asked for a postponement of the matter to secure legal representation so as to deal with the jurisdictional issue appropriately. As at that stage the Commissioner understood that he was not dealing with a jurisdictional issue but whether Ms Wilson was an employee, in which case evidence had to be led to determine that consideration. Dr Gama was allowed to make a formal application for a postponement to procure services of an attorney. He submitted that the respondent was not properly legally represented to tackle all matters that had been presented, saying it had become clear that he was not helping the process to move forward progressively. Ha made two undertakings of getting a proper legal representative for the first respondent and to take care of the costs associated with the postponement. He noted that on the previous occasion he had accommodated a similar application by Ms Wilson and he contended that justice would be better served in the case if the first respondent was granted an indulgence as he had to serve as both a witness and evidence leader, in the absence of a legal representative.

[8] In opposing the postponement application Mr Louw highlighted the plight of Ms Wilson in respect of whom her creditors were then foreclosing up on and that her motor vehicle and furniture were about to be attached. He said that he found it strange that Dr Gama with no litigation experience was however able to draft a *point in limine* argument based on jurisdiction.

[9] The Commissioner dismissed the postponement application essentially on the bases that:

- Dr Gama ought to have reasonably foreseen the need to be legally represented more so as he was duly warned by the Commissioner to consider seeking a legal representative;
- On the issue of prejudice, the refusal to grant a postponement would be prejudicial to the applicant but that Dr Gama was responsible for such prejudice and that therefore the applicant was the architect of its own misfortune. Such prejudice had to be seen against that of Ms Wilson who had been without an income for a long time. Section 138 (1) of the Act assuaged the prejudice of the applicant in that the

Commissioner had to conduct the arbitration process with the minimum of the legal formalities.

[10] The arbitration hearing proceeded and the Commissioner gave an arbitration award, on 12 November 2012, in favour of the third respondent. The Commissioner, without probing on the applicability of the Act, assumed that the Act was applicable and relied on it to make various findings including that:

1 Ms Wilson was an employee of the applicant;

2 The applicant dismissed her;

3 Her dismissal was both procedurally and substantively unfair;

4. The applicant had to pay Ms Wilson compensation in the amount of R 391 986.00.

[11] The applicant has launched the present application seeking a review and setting aside order of the second respondent's award in terms of section 145 of Act on the bases of the four grounds already identified. During the presentation of this application Mr Venter for the applicant relied, in the main, on the ground relating to a failure to grant the applicant a postponement and he averred that the application stood to succeed on that ground alone. I proceed to deal with this ground for review. The submissions by the applicant were that the second respondent failed to adopt the correct test in determining whether to grant the postponement. Mr Venter placed reliance in support of his submission on the decision of this Court per Cawe AJ in Moshela v CCMA and Others[2] where she relied on the decision of the Constitutional Court in National Police Service Union and Others v Minister of Safety & Security and Others[3] to state that:

> '….The postponement of a matter set down for hearing on a particular date cannot be claimed as of right. An Applicant for a postponement seeks an

[2] (2011) 32 *ILJ* 2692 at para 20.

[3] 2000 (4) SA 1110 (CC) at H 1112F-H. See also Fundi Projects and Distributors (Pty) Ltd v CCMA and Others (2006) 27 *ILJ* 1136 (LC).

> indulgence from the Court. Such postponement will not be granted unless this Court is satisfied that it is in the interest of justice to do so. In this respect the Applicant must show that there is good cause for the postponement. In order to satisfy the Court that good cause does exist, it will be necessary to furnish a full and satisfactory explanation of the circumstances that give rise to the application. Whether a postponement will be granted is therefore in the discretion of the Court and cannot be secured by mere agreement...

[12] Mr Venter submitted that it was in the interests of justice that the Commissioner should have granted the postponement because:

a. The applicant would be compromised in its presentation of its case because Dr Gama was 'not helping the commissioner or this session move forward in a progressive way'.[4] During the arbitration it was abundantly clear that Dr Gama was not able to grasp neither the legal principles nor the manner in which he was required to represent the applicant's case.

b. The Commissioner acknowledged that it was clear Dr Gama was struggling to contend with the nature of the dispute.[5] It was Dr Gama's first appearance in arbitration and if the applicant was not legally represented the applicant would be compromised[6]. During the arbitration Dr Gama conceded that he was 'clueless when it comes to law'[7] .For example Dr Gama failed to put the applicant's full version to the Ms Wilson under cross-examination and when confronted with this under cross-examination Dr Gama's response was 'I do not think that I am under any obligation to dispute everything raised by Mrs Wilson, there are a whole lot of issues that I would like to dispute'. [8]

[13] He said that in dealing with prejudice' the Commissioner mistakenly conflated Ms Wilson's parlous financial position with the financial prejudice associated with a postponement. They are not the same and it was only the financial

[4] Page 26 lines 9-22 of the transcript of the arbitration proceedings, (the transcript).
[5] Page 25 lines 14-16 of the transcript.
[6] Page 26 lines17-20 of the transcript..
[7] Page 107 lines 23-25 and page 108 of the transcript where in Dr Gama wanted to submit his plea.
[8] Page 121 lines 20-25 of the transcript.

prejudice that Ms Wilson would suffer as a direct consequence of the postponement that was relevant because the financial prejudice that the Commissioner relied upon had not yet been established as a consequence of any unfair dismissal.

[14] Mr Driver, appearing for Ms Wilson relied on the same cases as of the applicant but added that in Carephone (Pty) Ltd v Marcus NO and Others[9] the court was of the view that the approach for dealing with application for postponement in arbitration hearings was different to those in the court of law because:

> 'There are at least three reasons why the approach for application for postponement in arbitration proceedings under the auspices of the commission (including the bargaining councils) under the LRA is not necessarily on a par with that in the courts of law. The first is that arbitration proceedings must be structured to deal with dispute fairly *and quickly*.(s 138(1)). Secondly, it must be done with '*the minimum of legal formalities'*. And thirdly, the possibility of making costs orders to counter prejudice in good faith postponement applications is severely restricted (138(10))'.[10]

[15] Dr Gama insisted in the arbitration hearing that the point in *limine* he was raising pertained to whether the Commission had jurisdiction to be seized with this matter. The submission in this respect by Mr Louw, as an attorney, is not on the record. It thus remained unclear if Mr Louw did attempt to explain to the Commissioner why Dr Gama raised a jurisdictional point. I have to assume in favour of Mr Louw that he came to the Commission prepared and having read the consultancy agreement entered into on 5 September 2007 by both parties and forming the very basis for the *point in limine* raised by Dr Gama. Clauses 2.1 to 2.3 which I earlier outlined read:

'2.1 It is recorded that nothing in this agreement, whether express or implied, shall be construed as creating an employment relationship between the Company and the Contractor.

2.2 The Contractor is not entitled to any of the rights, benefits or incentives available to employees of the Company including, inter alia, annual leave, pay

[9] 1999 (3) SA 304 (LAC)
[10] Ibid at para 55.

for annual leave, sick leave, maternity leave, family responsibility leave, medical aid membership or Contributions to a Company medical aid scheme, membership of a Company pension or provident fund, bonus entitlement or severance pay.

2.3 The Company specifically waves any right to rely on any provisions of the Labour Relations Act 66 of 1995 as amended, the Basic Conditions of Employment Act 75 of 1997 as amended, the Employment Equity Act 55 of 1998 (the Acts) and confirms that , in waiving such rights to rely upon the provisions of the Acts, she does so in the full and express knowledge that she is aware of the definitions of and presumptions in favour of employees in each of the Acts, and further confirms that the Contractor is not an employee as defined in any of the Acts'.

[16] What Dr Gama was telling the Commissioner, in describing the issue at hand was Ms Wilson had waved her rights to rely on the provisions of various acts, including the Act. What was at stake was thus the validity of the consultancy agreement and whether Ms Wilson could have lawfully waived her rights as were protected by the various Acts referred to in the consultancy agreement. It must have been clear to Mr Louw that the Commissioner's understanding of what the real issue was, when Mr Louw was called upon to confirm it, was wrong. Had Mr Louw been frank with the Commissioner, it could have helped the Commissioner realise how important it was for the applicant to be legally represented and therefore to be granted the adjournment sought.

[17] The rightfulness or wrongfulness of the Commissioner's decision to refuse a postponement must be judged on the basis of the information which the Commissioner had at the time of his ruling. Incidents that happened thereafter, as referred to by the applicant, are *ex post facto* considerations which merely confirm the rightfulness or wrongfulness of the decision. It has to be born in mind that in determining whether a jurisdictional point is reviewable, the test is not whether the Commissioner's finding was reasonable but whether it was correct[11].

[18] Indeed the postponement of a matter set down for hearing on a particular date cannot be claimed as a right for it remains an indulgence from the Court, and

[11] See *Fidelity Cash Management Service v CCMA* Others (2008) 29 ILJ 964 (LAC).

in this case from the Commissioner. Such postponement could not be granted unless the Commissioner was satisfied that it was in the interest of justice to do so. In this respect and in my view, the applicant had shown that there was good cause for the postponement to be granted. Dr Gama furnished a full and satisfactory explanation of the circumstances that gave rise to the application. Those circumstances were mainly the Commissioner's inability to comprehend the real issue for his determination and the applicant's tender for the costs of the adjournment. Such costs had nothing to do with the dire financial position of Ms Wilson which could be considered as a separate issue, in the event she would be successful. In any event, she had contributed to the delay in the matter when it was postponed at her instance and holding the applicant to blame for it was wrong. It was objectively wrong of the Commissioner to refuse the postponement. Accordingly and on this ground alone, this arbitration award cannot stand.

[19] In the circumstances, I issue the following order:

1. The postponement ruling of the second respondent in this matter is reviewed and set aside.
2. The arbitration award in this matter is consequently reviewed and set aside.
3. The matter is remitted to the first respondent for a *de novo* arbitration hearing before a commissioner other than the second respondent.
4. No costs order is made.

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Cele J

Judge of the Labour Court of South Africa.

APPEARANCES

For the Applicant:	Mr F Venter
Instructed by:	Allardyce and Partners Attorneys
For the Respondent:	Mr J Driver
Instructed by:	Webber Wentzel