

**DELETE WHICHEVER IS NOT APPLICABLE**

(1) REPORTABLE: YES/NO.  YES  NO

(2) OF INTEREST TO OTHER JUDGES: YES/NO.  YES  NO

(3) REVISED.

12/03/2021 *[Signature]*

DATE SIGNATURE



**IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG**

Not Reportable  
Case No: JR 1619/17

In the matter between:

**VEA ROAD MAINTENANCE AND CIVIL (PTY) LTD** **Applicant**

and

**MOHAU NTAOPANE N.O** **First Respondent**

**THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION** **Second Respondent**

**DAVID GRAIG LUPKE** **Third Respondent**

Date heard : 20 January 2021

Date delivered: 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 is deemed to be 10h00 on 12 March 2021.

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## JUDGMENT

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**BALOYI, AJ**

Introduction

- [1] There is no doubt that the litigation of labour disputes requires prompt attention as they are in their nature urgent. The Courts have on countless occasions restated this point. The Constitutional Court has also reaffirmed this, in *Toyota SA Motors (Pty) Ltd v CCMA & Others* on this aspect where the following was said:<sup>1</sup>

“[1] Time periods in the context of labour disputes are generally essential to bring about timely resolution of the disputes. The dispute resolution dispensation of the old Labour Relations Act was uncertain, costly, inefficient and ineffective. The new Labour Relations Act (LRA) introduced a new approach to the adjudication of labour disputes. This alternative process was intended to bring about the expeditious resolution of labour disputes which, by their nature, require speedy resolution. Any delay in the resolution of labour disputes undermines the primary object of the LRA. It is detrimental not only to the workers who may be without a source of income pending the resolution of the dispute but, ultimately, also to an employer who may have to reinstate workers after many years.”

- [2] The default award that is subject matter of this review application was issued in the midst of conflicting interests around the speedily resolution of the dispute as against the fairness. The very issue of fairness appears to be clouded with convenience of the parties that was preceded by pushing and shoving between them. While noting that litigation is generally characterized by animosity

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<sup>1</sup> [2016] 3 BLLR 217 CC at paragraph 1

between the parties, the legal representatives have a duty to ensure that the parties' emotions do not suppress the exercising of their highly obtained skills. There is nothing much to be done by legal representatives if their clients do not appreciate the realistic consequences of the instruction they give to their representatives. Sadly, this matter has missed out on the protection of speedy resolution available to the labour disputes. There are various causes for this and more details appear below.

#### Factual background

- [3] The employment relationship between the applicant and the third respondent came to an end on 09 November 2016 when the applicant was dismissed on account of misconduct. The disciplinary hearing proceeded in the third respondent's absence. The third respondent accused the applicant of deliberate miscommunication regarding the correct venue of the hearing. The third respondent referred unfair dismissal dispute to the CCMA. It was on the eve of the date of arbitration when the parties' legal representatives came to an agreement for the postponement of the matter. This agreement was precipitated by the third respondent's representative's approach to the applicant's representatives. It transpired during such discussion that the third respondent was not ready to proceed with arbitration. The third respondent's reason was premised on the absence of certain documents he requested from the applicant.
- [4] The parties ultimately agreed to bring the applicant's predicament to the attention of the Commissioner in order to secure a postponement. Both parties agreed to send representatives for the purpose. The matter came before the second respondent. The applicant's representative was not present when the matter was called. The third respondent's representative brought the crux of the parties' agreement to the second respondent's attention. The second respondent rejected the arrangement between the parties and ruled that the matter must proceed in the absence of the applicant and its representative. The second respondent further warned the third respondent that his unfair dismissal

claim will be dismissed if he dared sticking to the postponement agreement. The third respondent found himself with no option but to proceed in default despite being not ready. Prior to proceeding as ordered, the third respondent's representative made a suggestion to contact the applicant's representative. The second respondent pronounced that it was unnecessary.

- [5] As a result, the arbitration proceeded in default and the default award was subsequently issued. The second respondent found that the dismissal of the third respondent was both procedurally and substantively unfair. He went on to order the applicant to pay the third respondent compensation equivalent to six months' remuneration.

#### The review application

- [6] This whole background of undisputed facts, most particularly on what transpired before the second respondent regarding the postponement appears in the third respondent's answering affidavit. He articulated the events as they unfolded with his representative deposing to a confirmatory affidavit. The third respondent nevertheless opposed the application on reasons that the applicant failed to send a representative. In essence the third respondent argues that the applicant is the author of its misfortune. The applicant contends that the second respondent's failure to apply his discretion to the issues as presented before him rendered the default award reviewable as it has brought an unreasonable result.

#### Evaluation

- [7] The actual ruling refusing a postponement appears neither in the record nor in the default award. Based on what is placed before me I have no doubt that a ruling refusing postponement was made. Furthermore, it was made after the second respondent had rejected the parties' arrangement. It is well accepted that the application for postponement must be made at least 7 days prior to the

date of arbitration in terms of the rules<sup>2</sup>. Furthermore, the parties' agreement to have the matter postponed is not binding on the Commissioner. There is no doubt that the parties did not comply with the rules.

[8] Faced with the situation as presented by the third respondent, the second respondent appeared to have acted in an undue haste. When taking into account that he does not mention anything about the ruling refusing postponement in the award coupled with his discouraging response to a suggestion to contact the applicant's representative, I do not find any reason why his decision should not be interfered with. The unreasonableness of his decision cuts across this application. I am in this regard inclined to find in favour of reviewing and setting aside of the default award. The only order to be made on further handling of the dispute is to remit it to the CCMA for arbitration *de novo*.

[9] On costs, there are several issues to be considered before making an order as such. The facts of the matter clearly demonstrate that this matter should have been resolved by way of consent to an order in terms of rule 17. Both parties elected not to act timeously in the matter, that is, prior to the date of arbitration. Each party has a hand in the problems experienced in this matter. Remittal of the matter indicates that the dispute between the parties is still ongoing. It will not under these circumstances be in the interests of law and fairness to make a cost order.

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<sup>2</sup> Rule 23 of Rules of conduct of proceedings before the CCMA:

- (1) An arbitration may be postponed –
  - (a) by written agreement between parties; or
  - (b) by application to the Commission and on notice to the other parties in terms of sub-rule (3).
- (2) The Commission must postpone an arbitration without the parties appearing if –
  - (a) all the parties to the dispute agree in writing to the postponement; and
  - (b) the written agreement for the postponement is received by the Commission at least seven (7) days prior to the scheduled date of the arbitration.
- (3) If the conditions of sub-rule (2) are not met, any party may apply in terms of rule 31 to postpone an arbitration by delivering an application to the other parties to the dispute and filing a copy with the Commission before the scheduled date of the arbitration.
- (4) After considering the written application, the Commission may –
  - (a) without convening a hearing, postpone the matter; or
  - (b) convene a hearing to determine whether to postpone the matter.

[10] In the circumstances the following order is made:

Order:

1. The default arbitration award issued under case number GATW16775-16 is reviewed and set aside.
2. The dispute is remitted to the first respondent for arbitration *de novo* before any other arbitrator than the second respondent.
3. There is no order as to costs.

A handwritten signature in black ink, appearing to read 'Baloyi M', is written over a horizontal line. The signature is stylized and cursive.

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Mr Higgs - of Steenkamp Van Niekerk Inc.

For the respondent: Adv. Greyling

Instructed by: Hutten Odendaal Inc.