THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: **JR 1029/2019**

In the matter between

ZEDA CAR LEASING (PTY) LTD	Applicant
t/a AVIS FLEET	
and	
NOMVU BALOYI	First Respondent
TEBOGO SHADRACK MAFUHJANE *N.O*	Second Respondent
COMMISSION FOR CONCILIATION, MEDIATION AND	
ARBITRATION	Third Respondent

Date of hearing: 02 November 2021

Date of judgment: 02 November 2021

JUDGMENT

VAN NIEKERK J

[1] The applicant seeks to review and set aside an arbitration award issued by the second respondent (the arbitrator). In his award, issued on 24 April 2019, the arbitrator held that the dismissal of the first respondent (the employee) was unfair and ordered the applicant to pay the compensation in an amount of R 170 700,00 the equivalent of 10 month's remuneration. The award was issued in circumstances where the applicant's representative had led no witnesses and requested that the matter be postponed on account of the unavailability of its key witness. The application for postponement was refused and the arbitrator heard only the employee's evidence, which he accepted as credible.

[2] The applicant contends that the arbitrator committed a reviewable irregularity by failing to afford the applicant a fair and unbiased hearing.

[3] The material facts are not disputed. The applicant provides vehicle leasing and fleet maintenance services and in doing so, employee specialist employees including fleet procurement offices, of which the employee was one. The employee was engaged in April 2012 and dismissed on 18 December 2018 on charges of fraud. The employee referred a dispute to the CCMA, which after an unsuccessful conciliation on 25 January 2019, was referred to arbitration.

[4] On 29 January 2019, the applicant's HR manager (Zondani) wrote a letter to the CCMA indicating dates on which he would be available to participate in the arbitration of the dispute. On 2 February 2019, without any apparent regard for the communication, the CCMA scheduled an arbitration for 5 March 2019. On 6 February 2019, Zondani emailed the case management officer and again informed of the dates on which he was available. One of the dates that he had indicated was 11 April 2019. Zondani did not receive any confirmation that the initial set down of

the matter for 5 March 2019 had been postponed. Instead, the CCMA addressed an email to the arbitrator stating that the matter would be heard on 11 April 2019. On 25 February 2019, Zondani consulted with the group industrial relations manager. It became apparent that the matter could not proceed on 11 April 2019 on the basis that the principal witness was on maternity leave and would return to work only in May. The manager was instructed to seek a formal postponement of the matter set down for 11 April. On 27 February 2019, the manager once again emailed the case management officer and requested that the matter be postponed to May 2019. He pointed out in the communication that a formal set down of the proceedings for 11 April 2019 had not been transmitted and avers that to his mind, the matter had not been scheduled for hearing on that date. Zondani states that he met with resistance with the case management officer who advised him that it would not be possible for the matter to be rescheduled, given that an agreement had been reached that the matter would be heard on 11 April 2019.

[5] On 18 March 2019, Zondani received formal notification of the set down of the arbitration proceedings for 11 April 2019, to commence at 13h00. On 3 April 2019, after unsuccessfully attempting to engage with the CCMA to postpone the matter, Zondani filed a formal request for postponement, without addressing a copy to the first respondent. On 8 April 2019, the CCMA issued a postponement ruling in which the application for postponement was refused. In the ruling, which was not the subject of any review application, the senior commissioner concerned took into account particularly the fact that the employee had been dismissed in December 2018 and that any further delay would be prejudicial to her.

[6] Zondani duly appeared at the hearing on 11 April 2019. An effort was made to conciliate the dispute but when impasse was reached, the arbitrator ruled ultimately that the matter must proceed to arbitration. Zondani then requested a postponement on the basis that the applicant's principal witness was not available. This request was refused by the arbitrator. The record indicates that the arbitrator requested Zondani to make an opening statement, which she did. The employee

likewise made an opening statement. The arbitrator then requested Zondani to lead evidence. Zondani stated that he had no witnesses, given the fact that Mothibi was on maternity leave. At this stage, Zondani says that it was 16h27. He states:

> 33. I was under, what is now apparently the illusion, that the second respondent would not continue with the case, given the lateness of the day and the fact that to all intents and purposes, the CCMA had closed for the day. This irritated the second respondent even further and he indicated that he would not entertain any further discussion with me and that the matter would continue.
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> 34. The second respondent then enquired of the first respondent if she had any witnesses. He swore her in and allowed her to give her evidence. This process lasted approximately 15 minutes.
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> 35. At 16h50, the second respondent asked me whether I wish to cross-examine the first respondent. I indicated that I was not in a position to commence the cross examination because the matter would simply not finish. I needed to take instructions in respect of the evidence led on to consider the evidence carefully. This was especially so given that I would need to consult with Mothibi. I informed the second respondent as such and requested an adjournment in order to prepare the cross examination.
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> 36. Furthermore advised the second respondent that I had to pick up somebody at 17h00 and that this was an additional reason why I would require the adjournment. The second respondent would not hear of my protestations and stated that he was not willing to postpone the matter in order for me to take instructions to commence the cross examination, let alone to attend to my personal obligations, apparently regardless of the hour of the day.
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> 37. I indicated to the second respondent that I was not seeking a postponement but an adjournment. This was more so by virtue of the fact that it was ready after 17h00. The second respondent indicated that he was not prepared to listen to me and asked me if there was anything that I wish to say. I stated to the second respondent at this stage that I disputed everything that the applicant had said and I had indicated emphatically to the second respondent, that I simply was not in a position to commence the cross examination. At 17h05, the second respondent indicated that the “matter

> was concluded". He got up and stated to me that he would make a ruling and that if I was dissatisfied with it, I could "appeal" it.

[7] The grounds for review are broadly expressed, but the gravamen of the applicant's complaint is that the arbitrator conducted himself in a manner that denied the applicant a fair hearing. In particular, the applicant contends that the arbitrator ought properly to have postponed the matter when advised that the applicant's principal witness was not available, or at least have stood the matter down after the employee had given evidence so as to enable him to take instructions.

[8] The starting point is section 138 (1) of the LRA, which requires a commissioner to deal with a dispute fairly and quickly, and with a minimum of legal formality. The arbitrator in the present instance sought to achieve precisely this purpose. To the extent that the applicant is critical of the arbitrator for extending the hearing after normal working hours, the arbitrator ought to be commended rather than admonished. In so far as his refusal of a postponement of the proceedings is concerned, this must necessarily be viewed in the light of the postponement ruling issued on 8 April 2019, when the senior convening commissioner ruled that the matter would proceed on 11 April 2019, a date initially agreed with the applicant, on the basis that the matter would proceed on the day 'with the evidence and witnesses that are available'. The ruling further records that 'The Respondent is urged to make the necessary arrangements to have its witnesses available on the day'.

[9] Despite this sage advice, Zondani elected to attend the hearing on 11 April 2019 with no evidence to present and no witnesses to call. I fail to appreciate any basis on which the applicant can now be heard to complain that the proceeding sought to have been stood down or further postponed on the basis that a single witness was not available. The sense one gains reading the papers is that the applicant appears to regard the CCMA and its processes as subject to the applicant's convenience. The CCMA is a statutory body charged with the efficient and

expeditious resolution of disputes. That statutory mandate is compromised when parties regard their convenience as paramount, and where commissioners' attempts to discharge their mandate are met with applications for review. This is not to say that there are genuine cases where decisions to refuse postponements ought to be reviewed and set aside; there are many cases in the law reports that delimit the grounds for intervention. In the present case however, the applicant had sought a hearing on a particular date. This request was granted. When the applicant subsequently discovered that its primary witness was not available on that date, it sought a postponement by way of an interlocutory application, which was refused. The ruling made clear what was expected of the applicant's representative on 11 April 2019. That directive was simply ignored, with the consequence that at the appointed time, Zondani had no evidence to lead or witnesses. To shift the blame to the arbitrator and suggest that he was somehow vindictive because he directed that the matter continue after normal business hours is not justifiable, by any means. Finally, the submission that the seriousness of the charges brought against the employee warranted a postponement of the matter is not sustainable. If the charges are as grave as the applicant suggests, one would have expected that the applicant's representatives would have conducted themselves in a less cavalier manner and treated the matter with the seriousness and diligence that it warranted.

[10] In short, I am unable to fund that the arbitrator committed any reviewable irregularity. The applicant is the author of its own misfortune, and the application stands to be dismissed. I accept the applicant's submission that the application was filed in good faith and without malice or any frivolous intent. In these circumstances, for the purposes of section 162, the interests of the law and fairness are best served by each party bearing its own costs.

I make the following order:

1. The application is dismissed.
2. There is no order as to costs.

Andre van Niekerk
Judge of the Labour Court of South Africa

APPEARANCES:

For the applicant: Mr J Jones, MacGregor Erasmus Attorneys

For the first respondent: Adv SW Tjale, instructed Mr T Matladi