

SOUTH AFRICA / JUDGMENT

Carephone (Pty) Ltd v Marcus and Others (J842/98) [1998] ZALC 14 (22 May 1998)

[1998] ZALC 14**COURT**

Labour Court

BEFORE

Mlambo

CASE / FILE NUMBER

J842/98

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**VIC & DUP/JOHANNESBURG/LKS
IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANNESBURG
CASE NO. J482/97**

In the matter between: CAREPHONE (PTY) LIMITED Applicant
and
MARCUS, M.N.O. First respondent
ANDREW McCULLUM AND
SEVEN OTHERS Second to Ninth Respondents
COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION Tenth Respondent

JUDGMENT

MLAMBO, J:

[1] This matter poses certain questions regarding the reviewability of the exercise of a discretion by a Commissioner of the Commission

for Conciliation, Mediation and Arbitration (“the Commission”) sitting as an arbitrator appointed in terms of section 136 of the Labour Relations Act, No. 66 of 1995 (“the Act”).

[2] The second to ninth respondents, (“the individual respondents”) referred certain disputes between themselves and

the applicant to be conciliated by the commission. The conciliation could not resolve the disputes whereafter the individual respondents

requested that the disputes be arbitrated. The arbitration was set down for 17 to 20 June 1997. The parties were advised by the

commission on 2 June 1997 that the arbitration was enrolled on those dates.

[3] The applicant was until then represented by Mr J P Araujo ("Araujo") a partner at Webber Wentzel & Bowens

attorneys. Mr Brian Isaacs ("Isaacs"), of the applicant, contacted Araujo and handed him the documentation relating to the matter on 4 June 1997 and also advised him of the date of the arbitration. Mr Araujo's daughter was diagnosed to be suffering from leukemia on 12 June 1997 and was admitted on 13 June

1997. As a result of this Araujo was unable to perform his normal duties meaning that he did not attend to the applicant's pending arbitration matter.

[4] On 17 June 1997 applicant, represented by Isaacs, and the individual respondents attended the arbitration proceedings. The

applicant was represented by adv Nigel Willis, instructed by attorneys Webber Wentzel Bowens. At the commencement of the proceedings Mr Willis made an application for the postponement of the proceedings, and for the applicant to be allowed legal representation. The first respondent granted the application for legal representation for purposes of arguing the postponement application. He, however, stood the matter down until 09H00 the next morning to hear both applications.

[5] The next morning the applicant was this time represented by Mr van Rensburg an associate from attorneys Webber Wentzel Bowens. The explanation for this change in representation was that Adv Willis was not available on that day. The applicant's application for legal representation for the duration of the arbitration proceedings was heard and granted. The commissioner however refused the application for a postponement. The basis for the postponement application was primarily the unavailability of Araujo. This, it was submitted, occurred at such short notice that it was not possible for Araujo's associates to take over the matter or for Isaacs to find alternative legal representation. To assist the applicant find alternative representation and to prepare the commissioner stood the matter down until 13H00 the next day, 19 June 1997.

[6] The next day the applicant was now represented by a Mr Burgess, a professional assistant from attorneys Webber Wentzel Bowens. The explanation for this is that Mr Van Rensburg was not available that day. Mr Burgess made an application for the postponement of the proceedings on the same facts relied on in the two previous postponement applications. A further reason advanced this time was that Isaacs had a medical appointment that afternoon and also had another medical appointment the next day. This postponement

application was again refused by the commissioner whereafter Isaacs and Burgess walked out of the proceedings despite being told by the commissioner that the proceedings would proceed in their absence. Before they left, however, Burgess advised the commissioner that Isaacs reserved his right to return to the proceedings at any time after his medical examination and that the applicant intended to interdict the commissioner from continuing with the proceedings in Isaac's absence. Isaacs did not return to the proceedings that day. The commissioner continued with the proceedings and sat until about 21:00 when he finalised the proceedings.

- [7] He awarded compensation to the individual applicants totalling plus-minus R480 000. It is essentially the commissioner's refusal to postpone the arbitration proceedings which is sought to be reviewed and set aside by the applicant.
- [8] This is therefore an application to review the exercise of a discretion by a commissioner. Although the award is sought to be reviewed and set aside in terms of the provisions of Section 145, Mr Van As, counsel for applicant, argued that the court should consider the application in terms of the wide review basis provided for in Section 158(1)(g).
- [9] This court has in a number of decisions held that Section 158(1)(g) also gives this court jurisdiction to review awards of the commission. Some decisions have held the view that only Section 145 gives this court the jurisdiction to review arbitration awards of the commission. I do not intend to consider the merits in each argument for purposes of this judgment. Suffice to say that, as this matter involves the exercise of a discretion, the sole enquiry is whether the commissioner in fact exercised the discretion as required by the Act. I align myself with the views of Botha J A in *Schoch N O & others v Chetty & Others* 1974 (4) SA 860 (A) where at 866E he said:

"It is abundantly clear from the authorities that, in reviewing the proceedings of a statutory body lawfully vested with a discretion, the jurisdiction of a court of law is limited to the question whether in fact that body has in fact exercised its

discretion, it has no jurisdiction to enquire into the correctness of the conclusion arrived at by it in the evidence before it."

- [10] The Act accords the Commission the jurisdiction to arbitrate certain disputes. The Act does not make provision for appeals from arbitration proceedings. The Act specifically provides for the review of arbitration awards in Section 145 and that same should be within a specified time period. A review is very different to an appeal and the fact that the Act provides for the one and not the other is significant. The review function of a court is described by Rose-Innes in his work *Judicial Review of Administrative Tribunals in South Africa* Cape Town, Juta, 1963, at page 14 as follows:

"A court of review will not enter into, and has no jurisdiction to express an opinion on the merits of an administrative finding of a statutory tribunal or official, for a review does not import the idea of a reconsideration of the decision of the body under review."

[11] The choice of arbitration as a process by the legislature and the lack of appeal from such process accords with the legislature's

objective to provide simple procedures for the effective resolution of labour disputes. An effective dispute resolution process is one that resolves disputes effectively, quickly and finally. The structure of the Act regarding arbitration is found from Section 136 to 145. An award is final and binding in terms of Section 143 in the absence of a legal challenge to it. Such legal challenge can only be in terms of Section 144 and/or Section 145 i.e. by way of rescission and/or review.

[12] The limitation of the review jurisdiction of this court set out in Section 145 especially in relation to awards involving the exercise of a discretion can be understood in the light of the limited nature of the enquiry concerned. As a matter of policy this court should not be seen to be interfering too much in the discretionary arena of commissioners, as a consequence thereof would be to deprive such commissioners of that discretion. The provisions of Section 158(1)(g) have the potential to lead to this unpalatable consequence. The wide review ambit of Section 158(1)(g) in relation to awards in general has the potential to entice this court to embark on a reconsideration of the merits and the conclusion reached by commissioners. This can only amount to an appeal of a commissioner's award, a consequence not envisaged not provided for by the Act. The well known rule of interpretation *generalia specialibus non derogant* is particularly apposite here especially if read with the legislative objective of providing an effective dispute resolution process that will not repeat the mistakes and problems of the past dispensation. The integration of Section 158(1)(g) preferred in judgments such as *Standard Bank of South Africa v CCMA & Others* (unreported case number J642/97), and *Shoprite Checkers (Pty) Ltd v CCMA & Others* (unreported case number J852/97) will render Section 145 ineffectual and this would never have been intended by the legislature. It follows that my view is that Section 158(1)(g) is not applicable. I do not therefore intend to follow the decisions suggesting this route.

Did the commissioner exercise his discretion properly?

[13] The applicant's reasons for seeking a postponement to the arbitration proceedings were basically the unavailability of its

legal representatives. The commissioner says he considered that Araujo practised as a partner of a large firm of attorneys and that one of his partners, professional assistants or associates could have timeously taken the matter over. If none of his partners had been in a position to do so counsel should have been briefed. He further says that the applicant should not have simply neglected to prepare for the arbitration. If proper and timeous steps had been taken to prepare for the matter another legal practitioner could have been timeously briefed. He further makes the point that he considered that he had a discretion as to whether or not to grant the postponement. He stated that the applicant had shown no cogent reason for the granting of the indulgence it sought. This was particularly so in the light of the fact that Araujo's daughter's illness had been diagnosed on 12 June 1997, giving the applicant five days in which to make alternative arrangements.

[14] He further states that there was no explanation as to why the application for a postponement was not made timeously. It was left to the morning upon which a four day arbitration was due to begin. He states that it was significant that neither the applicant nor his attorney had given any evidence demonstrating that they in fact tried but had not been able to brief counsel. The commissioner states further that prejudice to the individual respondents, consisted not only in the wasted costs in attending the proceedings but also that they were without income as a result of having been dismissed. A speedy resolution of the dispute was therefore important.

[15] He says he further considered that he had taken two days to hear argument on the question of legal representation and the

application for a postponement and that he had already indulged the applicant in order to ensure that the matter proceeded. He says further that he was not satisfied that the true reason for the applicant's non-preparedness was fully explained. The reasons

furnished for the non-appearance and non-preparedness were in his view not satisfactory for the grant of a postponement.

[16] As to the medical appointments of Isaacs the commissioner states that this was raised for the first time on 19 June 1997 despite the fact that the postponement issue had been raised on two previous occasions. He says he found it strange that urgent medical

appointments had already been made on 13 June 1997 for 19 June 1997 and yet this fact had not been mentioned on 17 and 18 June

1997. He states that no evidence was tendered that Isaacs needed urgent medical attention. He says he was not advised that Isaacs was in pain, nor was any evidence tendered to this effect. He states that there was no evidence that Isaacs' health had suddenly taken a turn for the worst and that he could not have made alternative arrangements in order to attend the arbitration proceedings. He says there are many specialists in Johannesburg and he was not persuaded that this was an emergency, that Isaacs could only be treated by a Dr Baskin on the date and at the time when the appointment was made. He says that he was not persuaded that there were genuine reasons necessitating a postponement. He says Isaacs did not motivate his health as being a reason for postponement in an affidavit, these reasons were simply put by Burgess.

[17] He states that having already granted the applicant two adjournments in order to allow it an opportunity to prepare for the

hearing on the 17th until the 18th of June and on 18th to the 19th June there were no indications that the applicant intended to return on 20 June. He therefore continued to conduct the arbitration to finality. He states that the continuance of the proceedings was not intended to prevent the applicant from attending or from having its matter heard. The applicant had made its election in this regard and had been fully warned of the consequences. In any event, he says he had no indication that any representative of the applicant would return on Friday morning the

20th of June as Isaacs had indicated that he had an urologist appointment. He states that the applicant declined any request to give any undertaking that he would return on the afternoon of 19 June 1997 or the morning of 20 June 1997. He states lastly, that on Friday, 20 June 1997, neither Isaacs nor Burgess came to the arbitration, only an articled clerk from the firm came to the commissioner's office where he was informed that the matter had been finalised. Needless, to say but the threatened interdict did not materialise.

[18] It is clear that not only did the commissioner consider all aspects of the applications for postponement, he also gave extensive

reasons why he refused the postponement requests. There is therefore no doubt that he applied his mind to all aspects of the application.

He has set out cogent reasons why he exercised the discretion in the way he did. No cogent basis has been laid before this court on why this court, on review, should interfere with his ruling. It can therefore not be said that he failed in his function, as far as I am concerned he exercised his discretion properly and judicially: See in this regard *Colyer v Essack* N O [1997] 9 BLLR 1173 (LC).

[19] The role of this court towards the commission is a crucial one. While it has review powers over any function performed by the commission, as a matter of policy, it should also protect the commission from practices that could gain it disrespect. This court will not countenance conduct that is designed to interfere with the work of the commission or even hinder it in its functions. The commission is an institution that was created with the specific objective of not repeating the mistakes of the past. The commission plays a crucial role in the dispute resolution dispensation under the Act. For this dispensation to be effective the commission must not be hindered in its work.

[20] The commission goes through elaborate preparation in enrolling arbitrations and appointing commissioners to arbitrate disputes. It is a statement of the obvious that the date allocation by the commission should be respected and complied with. It is only in those exceptional circumstances when unforeseen circumstances beyond a party's control prevent it from attending an arbitration that an indulgence may be considered. The application must however be made timeously. The commission is not obliged to succumb to unnecessary postponement requests which result in serious disruptions to its work. It is high time that parties recognise the important role performed by the commission and give it the respect it deserves. This court will ensure this.

[21] It is clear that the applicant in this matter took it for granted that it was entitled to legal representation and could also

obtain a postponement of the proceedings as it wished. These are issues on which the commission must exercise a discretion and a party who takes this for granted does so at its own peril.

[22] I am therefore of the view that no case for review of the commissioner's award or the exercise of his discretion has been made and I dismiss the review application with costs, including the costs of previous appearances.

[23] I am now left with the application in terms of section 158(1)(c) whose fate depended on my view on the review. Having dismissed the review it follows that I am of the view that there is nothing untoward with the award and I therefore make it an order of court. I order the respondent, in this application, to pay forthwith to the individual applicants the following amounts:

1. Andrew Carlisle McCullum the amount of R84 124,32.
2. Eben Stephanus Herselman the amount of R79 942,08.
3. Patrick Leeds the amount of R19 896,00.
4. To Pandora Elizabeth Filamina Pieterse the amount of R63 200,00.
5. Charlotte Caroline Kieser, the amount of R63 000,00.
6. Christina Fransina Groenewald, the amount of R31 500,00.
7. Gert Cornelius Booyzen the amount of R129 300,00.
8. Randal Eden Van Heerden the amount of R14 500.

Interest at the rate of 15.5% is payable on the above amounts with effect from 20 June 1997 to date of payment.

MLAMBO J

LABOUR COURT: JOHANNESBURG

DATE OF HEARING: 21 April 1998

DATE OF JUDGMENT: 22 May 1998

For the Applicant: Mr Van As instructed by Webber Wentzel & Bowens Attorneys

For the First and Seventh Respondents: Ms J Cane as amicus curiae instructed by Cheadle Thompson & Haysom

For the other respondents: Mr P Gooyzen

This judgment is available on the Internet at: <http://www.law.wits.ac.za/labourcrt>.

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