

**IN THE LABOUR COURT OF SOUTH AFRICA  
HELD AT JOHANNESBURG**

**CASE NO J3376/99**

In the matter between:

**SOUTH AFRICAN COMMERCIAL CATERING  
& ALLIED WORKERS UNION** First Applicant

**SONTO DLAMINI** Second Applicant

and

**COMMISSION FOR CONCILIATION  
MEDIATION & ARBITRATION** First Respondent

**BOYCE, T N O** Second Respondent

**SHOPRITE CHECKERS (PTY) LTD** Third Respondent

**JUDGMENT**

**JAMMY AJ**

1. On 13 November 1999, in an arbitration under Case No GA10139 convened by the First Respondent, the Commission for Conciliation Mediation & Arbitration ("the CCMA") in terms of s136 of the Labour Relations Act 1995 ("the Act"), a Commissioner of the CCMA, Mr G Shakoane, made an award in which he ordered the Third Respondent, which was also the Respondent in those proceedings, to reinstate the three Applicants in that matter, of whom the Second Applicant in these proceedings was one, "with retrospective effect (including salary back-payment) to the date of their dismissal on terms no less favourable than those applicable at the time of their dismissal and without forfeiture of any benefits which would have accrued to them."

2. On or about 28 June 1999, the Third Respondent applied to the CCMA for the rescission of that award in terms of s144 of the Act on grounds set out in a Founding Affidavit by its Industrial Relations Manager which, for reasons which will become apparent, I do not consider it necessary for me to traverse.
3. That application was heard on 14 June and 7 July 1999 by Mr T Boyce, another Commissioner of the CCMA and the Second Respondent in these proceedings. On 15 July 1999 Mr Boyce made the following ruling:  
**"The Applicant's application for rescission of the arbitration award of Commissioner Shakoane, dated 13 November 1998, is hereby granted."**
4. The two Applicants now before this Court, seek an order reviewing and setting aside the rescission order of the Second Respondent on a number of stated grounds, of which I consider the following to be material to this application.
  - 4.1 That the Second Respondent "rescinded the arbitration award of another Commissioner without statutory powers to do so."
  - 4.2 That he "failed to apply his mind to the statutory requirements regarding the determination of a rescission application, alternatively failed to comply with the legal requirements set out in terms of s144" of the Act.
  - 4.3 That he "granted an application or a rescission in circumstances where it was legally inapposite or impermissible to do so and accordingly misled himself in doing so."
5. Section 144 of the Act is explicit in its terms. It reads as follows:

**"144. Variation and rescission of arbitration awards. - Any commissioner who has issued an arbitration award, acting of the commissioner's own accord or, on the application of any affected party, may vary or rescind an arbitration award -**  
**(a) erroneously sought or erroneously made in the absence of any party**

- affected by that award;**
- (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or**
- (c) granted as a result of a mistake common to the parties to the proceedings."**

6. Material to this application, and indeed its core ground, is the express, unambiguous statutory requirement that variation and/or rescission of arbitration awards may, in a proper case, be effected by the "*Commissioner who has issued*" (*emphasis added*), the award in question.

7. It is common cause that that was not the case in the present instance. The Commissioner who issued the award was, as I have stated, Mr G Shakoane, whilst the Commissioner who rescinded it was Mr T Boyce.

8. This requirement is pertinently referred to in the Founding Affidavit in this application but its legal significance is dismissed by the Third Respondent in its Answering Affidavit in the following terms:

**"The Third Respondent avers that any Commissioner can use his discretion to rescind an award, provided that he is satisfied of the following:**

- 1. Sufficient reason why it should be rescinded.**
- 2. The party had a proper defence.**

**In any event, the Applicant did not object to Commissioner Boyce hearing the Respondent's rescission application."**

9. Mr J Mothibi, who appeared for the Third Respondent, motivates that contention on the basis that this Court, in interpreting the provisions of s144, must adopt a purposive interpretation of the section. The Commissioner who issued the award, moreover, - and although this is not alleged on the papers, it appears not to be in dispute, - "has ceased being an employee of the First Respondent" and in these circumstances the effect of the Applicant's submission would be "to effectively deny the Third Respondent access to

justice" and the right to a fair public hearing in terms of the Constitution.

10. This state of affairs, it is further submitted, is recognised by the recently promulgated **"Rules regulating the practice and procedure for resolving disputes through conciliation and at arbitration proceedings"** in the CCMA (Government Notice No R245: 31 March 2000), Rule 24.3 of which reads: **"The Commissioner who issued the arbitration award or ruling must hear the application for variation/rescission in terms of s144 of the Act, provided that the Commission may, on good cause shown, appoint any Commissioner to hear the application."**
11. The concept of purposive interpretation was recognised by the then Appellate Division in **Public Carriers Association & others v Toll Road Concessionaries (Pty) Ltd & others 1990(1) SA 925(A)**. Its approach in that regard however, did not seek to deviate from the well- established objective of seeking the intention of the legislature in cases of textual ambiguity. General principles of statutory interpretation require that words in a statute are given their literal meaning and it is only where two interpretations are linguistically feasible that it is appropriate to have regard to the purpose of the statutory provision in question in order to determine the legislature's intention.  
**Public Carriers Association & others v Toll Road Concessionaries (Pty) Ltd & others (*ibid*) at page 943B-C.**
12. There is no such textual ambiguity in s144 of the Act and no question of "purposive interpretation" arises in that regard. The wording of the section, as I have stated, is clear and unambiguous and is not capable of any interpretation other than that indicated by the language used. It is only the *"Commissioner who has issued an arbitration award"* who, *"may vary or rescind an arbitration award"*, where proper grounds to do so are established. To the extent that the new promulgated Rules relating to dispute resolution in the CCMA would appear to provide to the contrary, they are patently *ultra vires*. No rule of a quasi-judicial statutory body can purport to vary or

contradict the express wording of the statute which established it and from which its powers are expressly derived.

13. The Applicants, somewhat unusually, express uncertainty whether the relief which they seek in this application is in terms of s145 or s158(1)(g) of the Act, and appear, on the face of it, to bring their application in the alternative. The Third Respondent replies that the rescission order by the Second Respondent does not constitute an arbitration award in the context of s145 and is therefore not reviewable in terms of that section. Of necessity therefore, the order falls to be reviewed in terms of s158(1)(g), a submission with which the Applicants, on their papers, have no serious argument. Authority for that interpretation is to be found in

**Day & Night Investigators CC v Ngoasheng & others (2000) 4 BLLR 398 (LC).**

in which the Court held that an application for review of a refusal to rescind an arbitration award should be brought under s158(1)(g) of the Act and not under s145. I am in full agreement with that assessment.

14. Considerable attention is directed by the Attorneys for the respective parties, in their comprehensive Heads of Argument submitted to this Court, to the merits of the initial award and the rescinding ruling. For the reasons that I have stated, those are irrelevant to the issue here to be determined. If it was the Third Respondent's belief, as appears to have been the case, that the original arbitration award was for one or other substantive reason open to challenge on a basis rendering it reviewable, then its proper course of action would have been to attack it by way of an application for review, not an application for rescission.

15. In summary therefore and for the reasons which I have stated, I find that the Second Respondent did not have the authority or jurisdiction to rescind the arbitration award in question and that the ruling made by him on 15 July 1999 is invalid and of no force or effect.

16. I accordingly make the following order:

16.1 The ruling of the Second Respondent dated 15 July 1999 in the First Respondent's Case No GA10139 is reviewed and set aside.

16.2 The Third Respondent is to pay the Applicants' costs.

**B M JAMMY**  
**Acting Judge of the Labour Court**

13 July 2000

**Representation:**

For the Applicant: Mr V Zibi of SACCAWU

For the Respondent: Mr J Mothibi: Deneys Reitz