

**IN THE LABOUR COURT OF SOUTH AFRICA
(Held at Johannesburg)**

Case No: J 5249 / 00

In the matter between:

Applicant

and

THE COMMISSION FOR CONCILIATION,

1st Respondent

2nd Respondent

3rd Respondent

JUDGMENT

SEMENYA AJ:

INTRODUCTION

1.This is an application, moved on an unopposed basis, to review and set aside the decision of the second Respondent made on 5 September 2000. The relief sought also includes the rescission of an arbitration award issued on 26 May 2000 alternatively referring the matter back to the Commission for Conciliation, Mediation and Arbitration for reconsideration.

2.The first and second Respondents do not oppose the relief sought by the Applicant and have indicated an election to abide the decision of this Court. The third Respondent, despite having filed a notice of intention to oppose, has

failed to file any opposing papers. The matter then proceeded on an unopposed basis before me.

BACKGROUND

3. On 22 August 2000, the Applicant brought an application to rescind an arbitration award granted against it in its absence. It was contended at that time of the rescission application that the Applicant had not had notice of the arbitration hearing and was therefore absent on the day. After argument, the second Respondent, acting in terms of section 144 of the Labour Relations Act No 66 of 1995 "the Act" refused the rescission application.
4. Section 144 of the Act makes it competent to rescind an award where such award was, inter alia, erroneously sought or erroneously made in the absence of any party. It was common cause that the award was made in the absence of the Applicant and the only question for decision being whether the order was erroneously sought or erroneously made.
5. It was common cause that the Applicant had earlier received the referral for conciliation that was telefaxed to a particular number. It was further common cause that the number of the telefax does not belong to the Applicant but was used by the Applicant's employee, who was the subject matter of the dispute, whilst running the affairs of the Applicant in Warmbaths.
6. The Applicant submitted, despite being present at the unsuccessful conciliation, was absent at the time the arbitration hearing because it had not received the notification for that hearing. It further contended that had it received the notification, it would have certainly defended its position.
7. The second Respondent found that since the Applicant had received the notification for the conciliation and the arbitration through the same telefax number, she rejected as correct the explanation offered by the Applicant that it had terminated its relationship with the persons from whom it had received the other process and was completely unaware of the arbitration hearing date. The second Respondent found that the Applicant had a duty to inform the other parties of its new telefax number immediately it terminated the use of the facility through which it received the conciliation and request for arbitration notices.

THE ISSUE

8. In this review, I am called upon to decide whether the second Respondent acted correctly and if not what the further conduct of the matter should be. If satisfied that the second Respondent's conduct is correct, I am to dismiss this application.

RATIO

9. The Court is enjoined by section 158 (1) (g) of the Act to review, despite section 145, the performance or purported performance of any function provided for in the Act on any grounds that are permissible in law.

10. To decide the issue, the Court is to investigate the performance of the second Respondent in refusing to rescind the arbitration award is reviewable on any ground permissible in law.

11. The second Respondent, in refusing the rescission application, considered the matter by reference to the provisions of section 213 of the Act and then concluded that since the Applicant knew that it was no longer using the fax number through which it received the earlier notifications, it had a duty to give notice of its new telefax number. The second Respondent does not state on what, in law, does the duty arise and whether failure to do so must be visited with a conclusion that the default was wilful.

12. Section 138 (5) of the Act provides:

"If a party to a dispute fails to appear in person or to be represented at the arbitration proceedings, and any party-

(a) had referred the dispute to the Commission, the Commissioner may dismiss the matter; or

(b) . . .

(i) continue with the arbitration proceedings in the absence of that party; or

(c) . . ."

13. Relevant to the enquiry are the provisions of section 23 (2) of the Rules Regulating Practice and Procedure for Resolving Disputes through Conciliation and at Arbitration Proceedings which provides:

"The Commissioner must be satisfied that the parties have been properly notified of the date, time and venue of the arbitration proceedings, before making any decision in terms of section 138 (5)."

14. In this instance, it would seem that the Commissioner had satisfied herself that the Applicant had received the notification of the date, time and venue of the arbitration proceeding before deciding on the award in terms of section 138 (5) of the Act.

15. Notwithstanding conduct consistent with the provisions of section 138 (5) of the Act, it is not uncommon that a party against whom an award was made in its absence would seek to have such an order rescinded. At that stage of the proceedings, the enquiry is not a criticism of the decision taken at the time of the award but whether there are facts placed before the Commissioner which if were known at the time would have brought a decision different to the one that was arrived at.

16. In this matter the enquiry is not whether there has been service or notification as required by the provisions of the Act or not but whether had the Commissioner known that despite proper notification, as a matter of fact, the other party did or did not know of the date, time and venue of the arbitration proceedings.

17. The Commissioner was told that the relationship that the Applicant had with the office from which they had received earlier processes came to an end and that the notification of the arbitration proceedings was not brought to its attention. The explanation does not seem to be inherently improbable that it could have been dismissed without much. On the contrary, the Applicant's conduct prior to the award was consistent with an intention to resist the claim against it. The application for the rescission is also conduct consistent with the Applicant's intention to defend the claim against it. To my mind these are considerations relevant to the exercise of the discretion placed on the Commissioner by section 144 of the Act.

18. In an as yet unreported judgment of Farber AJ in *Halcyon (Pty) Ltd t/a Baraza v CCMA & Others* Case No C 426 / 99 dated October 2000, the court concerned itself with a matter whose facts are not dissimilar to the present one. In that matter the court observed at paragraphs 14 and 15

"I am of the view that the second Respondent has misdirected himself in not properly considering the facts placed before him and in particular the fact that the Applicant disputed proper notification.

...

"The Applicant placed this notification in dispute and in fact placed evidence before second Respondent that it had not received the fax and that the fax had in fact been transmitted to Blues Restaurant and not to it. I am of the view that the second Respondent misdirected himself in disregarding the Applicant's contentions in total in finding that the notice to Blues Restaurant constituted sufficient notification to Baraza, a sister restaurant under the same roof."

19. I am in agreement with the ratio in the above quoted matter. It is my considered view that the Commissioner had misdirected herself in not properly considering the facts placed before her. To enquire whether service was proper or not leaves the enquiry unattended whether the explanation for the non-appearance was wilful or not.

20. It was submitted, correctly so in my view, that in considering whether or not a notification of an arbitration hearing has indeed been received by a Respondent, it is necessary to consider all the facts bearing on that question. Alternatively, in deciding whether or not a fax transmission was received, proof that the fax was indeed sent creates a probability in favour of receipt. A party to the proceedings who claims that it did not receive a telefax notification must be put in a position where it can consider the grounds upon which it is contended that a notification was furnished to it, and thereupon give an explanation as to whether or not it received it. Naturally, a Commissioner must be on guard against the abuse of the process by the parties who, having been properly notified but having neglected to participate in the proceedings, subsequently complaining once an adverse award is made, should have no comfort. On the other hand, prudence dictates that sufficient guard must be had that a fair minded enquiry should not be replaced with formalism excluding a proper ventilation of the dispute.

21. To my mind the Commissioner ought to have approached the matter on the basis of establishing whether the

explanation offered for the non appearance was reasonable or not and if reasonable, one ought to have granted the rescission. The approach would be consistent with the principles outlined by this court before. See *CAWU & Another v Federale Store (Pty) Ltd* 1998 (19) ILJ 642; *Cash Paymaster Services (Pty) Ltd v Mokgwe & Others* (1999) 20 ILJ 610.

22. In another unreported judgment of Sutherland AJ in *Northern Province Local Government Association v CCMA & Others*, Case no J 3747 / 2000 at paragraph 44, the court stated

"It is therefore apparent that a 'notice of an arbitration hearing' is something which the Commissioner must 'give' to the parties, and is not a process which is prescribed in the Rules to be 'served on the parties'."

23. Whereas no great distinction, in my view, exists in respect of the provisions of section 213, Rule 3 and the notification of an arbitration hearing in so far as all these permit notification by a mode of telefax, I am of the view that the Commissioner placed undue reliance on this aspect thereby misdirecting herself.

24. It was a further misdirection to hold that the Applicant had a duty to notify change of telefax whose breach was to be visited with a penalty of an adverse decision.

25. I have been urged to substitute the Commissioner's decision with the one setting aside the arbitration award. I do not think this is competent, at least in this instance. There are not sufficient facts placed before me to enquire into the award and to make a finding thereupon.

26. In the circumstances, the Commissioner's decision of 5 September 2000 is set aside and the matter is referred back to the first Respondent for reconsideration before a different Commissioner.

Signed and dated at BRAAMFONTEIN this 11th day of May 2001.

Semenya AJ

Acting Judge of the Labour Court of South Africa

g: 24 April 2001

ent: 11 May 2001

ant: S W Harrison, instructed by Sonnenberg Hoffmann & Galombik Inc.

For the Respondent: No appearance