

Sneller Verbatim/MS

IN THE LABOUR COURT OF SOUTH AFRICA

BRAAMFONTEIN

CASE NO: J940/00

2003-05-02

In the matter between

CLUB MOTORS SELBY

Applicant

and

M L MATLALA

Respondent

J U D G M E N T

LANDMAN, J: On 12 August 1999 a Commissioner of the CCMA delivered an award in favour of the Steel Mining and Commercial Workers Union, acting on behalf of Mr Mazibuko and Mr Zwane. The notice of set down was sent to the employer Club Motors Selby by fax on 6 July 1999. Club Motors did not attend the arbitration proceeding. When Club

Motors became aware of the award it launched an application in the CCMA to rescind the award.

The first respondent, the CCMA Commissioner, heard the application. Both parties were represented at the hearing. The Commissioner refused to rescind the award. Club Motors now applies to review and set aside the ruling.

Club Motors file a detailed affidavit in support of its rescission application. The deponent to its affidavit, Mrs Grobler, said the following about the receipt of the fax:

"Upon learning that a default judgment was taken against the respondent various investigations were carried out and it was established that the notice of set down was telefaxed to telefax number 4938775. The aforementioned telefax number is clearly not a business telefax number and does not appear on the letterhead of the respondent. The telefax number to which the notification was sent, belongs to a telefax machine in the service department, which is only utilised for communications between BMW SA and Club Motors. I attach hereto Annexed PAG1, a letterhead of the respondent, clearly indicating that the telefax number to which the notification was sent, does not appear on the respondent's letterhead.

This is not the first occasion that a notification transmitted to

the abovementioned telefax number has not been received by the respondent. During May 1998, a judgment by default was also granted against the respondent in these same proceedings, on account of the fact that the respondent did not attend the arbitration set down for 15 May 1998, which notification was also sent to telefax number 4938775. On that occasion an application for rescission of judgment was also launched by respondent's attorneys of record wherein it was explained that the notification was not transmitted to a fax number that is utilised by respondent."

The Commissioner recorded the following:

"The notice of the arbitration hearing and the award were faxed to telefax number 4938775. In their founding affidavit, the employer contended that the telefax number belonged to a telefax machine in the service department, which is only utilised for communications between BMW SA and Club Motors and that telefax number did not appear on their letterheads.

The employer party further stated, that in another arbitration hearing involving the same parties where a default award was also made in favour of the employee party, the Commissioner subsequently rescinded the award after the same submissions were made to him."

The Commissioner concludes:

"In the present dispute an arbitration award was made in default in favour of the employee party. The employer party contended, that they did not receive the notice of the set down, because the telefax number used belong to a service department and is used for communication between BMW and Club Motors and it does not appear on their letterheads.

I found it hard to accept that explanation by the employer party. The telefax machine with that number is not situated somewhere outside the employer's premises but is physically present all the time on the employer's premises. The employer party also did not dispute that the same telefax number was used in all correspondence between Club Motors and STEMCWU. The employer representative only relied on the affidavit by Grobler and did not have any knowledge of previous correspondence between STEMCWU and Club Motors. Grobler did not attend the hearing."

In the result the Commissioner refused to rescind the award. In my opinion, the Commissioner has committed a gross irregularity by entertaining and relying upon facts, which were submitted to him by the union at the hearing. These facts were not submitted nor received under oath. Club

Motor's representative was clearly unable to deal with them. This course of action prejudiced Club Motors. Moreover the Commissioner took these facts into account, when he rejected the employer's explanation. Had he not done so, then in all likelihood, his ruling would have stood.

In the premises therefore:

1. The ruling of the first respondent, dated 17 December 1999, is reviewed and set aside. As a proper case has been made out for rescission, his ruling is replaced by the following ruling:
"The application for rescission is granted."

**SIGNED AND DATED AT BRAAMFONTEIN ON 27 MAY
2003**

A A LANDMAN

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA