REPORTABLE

IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT JOHANESBURG

CASE NO. JR307/2003

In the matter between:

SHOPRITE CHECKERS (PTY) LTD Applicant

And

THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION First Respondent

COMMISSIONER N MASEKO Second Respondent

SACCAWU obo A MAKHUBELA Third Respondent

A MAKHUBELA Fourth Respondent

JUDGMENT

MURPHY AJ:

1. The applicant seeks an order reviewing and setting aside the ruling of the second respondent, a commissioner in the employ of the first respondent ("the CCMA"), dated 29 November 2002, rescinding an order of the CCMA dated 24 March 1999 dismissing the claim for relief arising out of the fourth respondent's alleged unfair dismissal. It further

seeks an order substituting the ruling of the CCMA with one in which the fourth respondent's application for rescission is refused.

2. The fourth respondent ("the employee") was employed by the Applicant at its OK Silverton store. In August 1998 she was involved in an incident in which she allegedly used her staff card dishonestly, and contrary to staff rules and policy, to purchase goods at a discounted price for a person who was not a close family member.

3. The alleged conduct was investigated at a disciplinary hearing on 13 August 1998. On the basis of findings and admissions made during the hearing, the chairperson found her guilty of the alleged misconduct. Taking into account the seriousness of the offence, balanced against mitigating factors, the chairperson imposed a sanction of dismissal.

4. The employee appealed internally against the chairperson's finding that her dismissal was procedurally fair, alleging that the branch manager was not entitled to impose a sanction of dismissal. On 14 September 1998 the internal appeal tribunal concluded that "the enquiry did follow the correct procedural steps for a dismissal and that the necessary authorisation was given". Consequently the dismissal was upheld.

5. On the following day, 15 September 1999, the employee with the assistance of the first respondent ("the union") referred her dismissal to the CCMA for conciliation in terms of section 191 of the LRA. When conciliation failed the CCMA issued a Certificate of Outcome to that effect on 11 November 1998. On the same day the union made a request for arbitration in terms of section 136 read with section 191(5)(a)(i) of the LRA.

6. An arbitration hearing was scheduled for 24 March 1999. When the employee and the union failed to appear, the arbitrator, presumably at the request of the applicant, dismissed the claim.

7. Some three months later, in July 1999, the union and the employee became aware of the arbitrator's order dismissing the claim. Yet, for reasons not entirely clear, they delayed for two months and only filed an application for rescission of the award in terms of section 144 of the LRA on 30 September 1999.

8. Section 144, as it then read, provided:

> "Any commissioner who has issued an arbitration award, acting of the commissioners 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.

9. The application for rescission lodged with the CCMA and served on the applicant averred that affidavits of the union and the employee would be relied upon to obtain the relief sought. However, the applicant was only served with the affidavit of the union representative in which he deposed that his absence at the arbitration hearing was the result of his ill health and not receiving proper notification of the arbitration. He offered no explanation for why it had taken him 6 months to make application for rescission of the award.

10. It is not clear when the application for rescission was served upon the applicant. However, on 24 November 1999 the applicant's attorneys addressed a letter to the union advising that it had knowledge of the application and stating the following:

> "Unfortunately our client is not in possession of the full documentation of your application and we therefore cannot prepare an appropriate response. We are not in possession of the supporting affidavit of Agnes Makhubela, referred to in your application and we therefore request that you fax us a copy, urgently, in order to enable us to respond to your application."

11. When no response to this request was forthcoming, the applicant's attorneys again wrote to the union on 6 December 1999 referring to their earlier correspondence and noting that they were unable to formulate a response without the affidavit of the employee.

12. Because this letter too failed to yield a satisfactory response, the applicant's attorneys wrote on 13 December 1999 to the Case Management Officer of the CCMA in the following terms:

> " An application for rescission has been brought by SACCAWU in this matter. Unfortunately a full set of papers has not been filed with Shoprite Checkers. We have been trying to obtain the documents from SACCAWU, but Mr. Lethole who is cited as the reference for SACCAWU, does not seem to have any knowledge of the matter. We have also attended at the officer of the CCMA to retrieve a copy of the file, but the file could not be traced.
>
> It is our intention to oppose the Application for Rescission in this matter, but we cannot draft opposing papers until we are in possession of the full

set of documents. In the circumstances, we request that you kindly attempt to locate this file and advise of the status of this matter".

13. When nothing came of these enquiries. The applicant's attorney wrote on 13 January 2000 to the union and copied the CCMA again requesting a full set of papers urgently.

14. Although the employee in her response to this application claims to have had no knowledge of this correspondence, neither the union nor the CCMA have put up any denial that the correspondence was despatched and received by them. Nor is there any denial of the applicant's averment that not a single response was received to any of these letters or that the applicant was unable to retrieve a copy of the CCMA file.

15. The applicant heard nothing further regarding the application for rescission for a period of 21 months until late June 2001 when the applicant's attorneys received a second application for rescission dated 6 June 2001 seeking an order rescinding "the decision by the commission to dismiss the matter on 24 March 1999" and for the matter to be heard afresh.

16. It is be noted that this application was filed 27 months after the arbitrator made his award, almost 3 years after the dismissal of the employee and 25 months after the union became aware of the arbitrator's ruling.

17. On this occasion the application for rescission was supported by an affidavit deposed to by the employee explaining that she had been unaware of the arbitration proceedings and that frequent attempts by her to get her union representative to proceed with the matter had

been fruitless. She further averred that her prospects of success were good and that she first became aware of the arbitrator's ruling in June 2000.

18. In response, the applicant's Regional Personal Manager filed an opposing affidavit contending that the employee was required to show an active interest in any proceedings instituted by her. She stated:

> "They cannot sit back and leave the matter in the hands of their representatives. I submit that in this instance the facts will clearly show that the deponent did not take appropriate action and did not pay this matter the necessary amount of attention and that the CCMA should not rescind the arbitration award".

19. The deponent goes on to submit that the employee's reasons for not prosecuting the application are vague and unsatisfactory, especially in the light of the fact that the union had been aware of the arbitrator's dismissal of the claim in June 1999 and that the employee's claim to have only became aware of the ruling in June 2000 is improbable. With reference to the then existing CCMA rule 24.2, the applicant further submitted that an application for rescission of an arbitration award must be made within 10 days of the date on which the applicant became aware of the award and that the rules made no provision for the late filing of an application for rescission to be condoned. Even had condonation been possible, it was contended that a 25 month delay was extraordinary and that the CCMA should not condone the application. Finally, it was submitted that the employee's prospects of success on the merits of the unfair dismissal claim were weak.

20. In its replying affidavit the employee claimed to have only become aware of the CCMA ruling of 24 March 1999 in mid 2001. The applicant contested this in replication drawing attention to the averment

in the union affidavit of 30 September 1999 in which the deponent stated that “the employee is not working up to this stage”, suggesting strongly that the union and the employee were in contact at a time when the union knew about the ruling of 24 March 1999.

21. After the close of pleadings in the second application for rescission before the CCMA, in October 2001, the applicant received no further communication from the union, the employee or the CCMA with regard to the application for rescission. The applicant’s attorneys attended at the CCMA in August 2002 to enquire about the matter. They were informed that “this was a very old matter and was ‘out of jurisdiction’ and no longer on the system”.

22. On 10 January 2003, some 15 months after the filing of the replication in the second rescission application, without having been afforded the benefit of an oral hearing to canvass the issues in dispute on the papers, the applicant received a ruling of the CCMA dated 29 November 2002 granting an order rescinding the arbitration award of 24 March 1999.

23. The Commissioner’s ruling is cryptic and sparse in its reasoning. It can be quoted in full:

> “The applicant asserts in her application that she was not notified to attend the arbitration hearing. As a result, she could not attend the arbitration hearing. On the prospects of success, she asserts her dismissal was unfair.
>
> Ruling
>
> The application must succeed for the following reasons:
>
> 1. The applicant was not in wilful default;
> 2. The applicant has good prospects of success.”

24. It is a notable feature of the ruling that it contains no reference whatsoever to of the extensive submissions made by the applicant in its opposing and replicating affidavits. Moreover, it is not evident from the ruling, which, if any, of the several documents filed with the CCMA in the four year period between September 1998 and November 2002, were taken into account by the Commissioner before he made the ruling.

25. The applicant seeks review of the rescission ruling in terms of section 158(1)(g) of the LRA, which empowers this court to review the performance or purported performance of any function provided for in the Act on any grounds that are permissible in law.

26. The commissioner's discretion to rescind an award erroneously sought or made in the absence of any party is a function provided for on the Act and hence is reviewable on the ordinary grounds recognized within the scope of judicial review of administrative action. Thus, a decision should not be capriciously or arbitrarily arrived at, should observe the tenets of natural justice, should take account of all relevant considerations and ignore irrelevant ones, requiring the decision maker to properly apply his mind, and should not be grossly unreasonable, *mala fides* or for an improper purpose. Moreover, the action should be within jurisdiction. Since *Carephone (Pty) Ltd v Marcus and others* (1998) 19 ILJ 1425 (LAC), labour law decisions are also expected to meet the test of rationality. The decision must be rationally justified in terms of the reasons given for the decision and be based on the material properly before the decision-maker. There must be a rational, objective basis justifying the connection made by the decision-maker between the material properly available to him and the conclusion eventually arrived at.

27. The applicant has raised a number of grounds upon which the decision of the commissioner to rescind the award of 24 March 1999 is reviewable. The employee re-asserts that the commissioner's ruling was justified on the material before him, that there was no wilful default and that the commissioner had properly applied his mind to the application. To my mind it is unnecessary to canvass all the grounds of review, as one ground in particular is fatal. The commissioner's apparent failure to give proper consideration to the time-frame in this matter is a strong indication that he failed to apply his mind properly to the application, the material and the submissions before him. Despite the applicant clearly placing the lateness of the application for rescission in issue, the eventual ruling fails completely to address the question. The commissioner's unexplained assumption that he was entitled without elaboration to set aside an award, made three and a half years previously, evinces a complete disregard for the submissions made by the applicant and the policy that labour disputes should be finalized expeditiously.

28. The first defective rescission application was made on 3 September 1999, six months after the award dismissing the claim. The applicant makes something of the fact that this application was not accompanied by an application for condonation for the late filing. For reasons which will become apparent an application for condonation may not have been necessary. In any event, I am persuaded that this application was defective in that the applicant was never afforded a proper opportunity to respond to it and indeed was never served with a complete application. The fact that the union and the employee served a second application for rescission more than two years after the award was made is an indication that the first defective application was abandoned. Hence, it was the application for rescission filed in June

2001 with which the CCMA was properly seised and in respect of which it was obliged to render a decision. *Litis contestatio* was reached in this matter in early October 2001 and the CCMA took another 13 months to render a decision. The second application for rescission included a prayer for condonation.

29. The rules of the CCMA prior to late 2002 did not provide for condonation and rule 24.2 of the then existing rules required a rescission application to be made within 10 days of knowledge of the judgment. Rule 32 of the amended rules requires an application for rescission to be made within 14 days of the date in which the applicant became aware of the ruling and rule 9 requires applications for condonation to be made in accordance with a detailed notice of motion procedure provided for in rule 31. Had the commissioner been obliged to entertain a condonation application and had such an application complied with the requirements of the existing rule 31, it is arguable that any failure by the commissioner to deal with the condonation application and to render a decision in relation to it would have resulted in an absence of jurisdiction on his part to make a ruling on the rescission application. On the assumption that the current CCMA rules applied to his decision of 23 November 2002 he may have been obliged to ensure that there was proper condonation application before him in terms of Rule 9 and rule 31 and either to condone or reject the late filing of the second rescission application. From his ruling it is apparent that he did not do this and thus arguably lacked jurisdiction.

30. Unfortunately, neither party has addressed me on the scope and application of the rules and their impact on the question of the commissioner's jurisdiction. However, for the reasons which follow, it is unnecessary to decide the point.

31. Rescission applications before the CCMA need not be brought in terms of its rules on account of section 144 of the LRA bestowing a statutory right upon litigants to seek rescission in appropriate cases falling within its terms. Section 144 imports no express time limit within which a rescission application must be made and the use of the word "may" in section 144 to delineate a commissioner's powers to grant rescission indicates that the power is discretionary. Moreover, the statutory power is founded on and borrows almost verbatim from Uniform Rule of Court 42(1). In interpreting rule 42(1) our courts have held consistently that rescission applications are: "a procedural step designed to correct *expeditiously* an obviously wrong judgment or order"- *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) @ 47IE-F. Thus even though rule 42(1), like section 144 of the LRA, imposes no specific time limit within which a rescission application should be brought, it is incumbent on a party bringing the application to do so as expeditiously as possible, and, in any event, within a reasonable time. What is a reasonable time depends on the facts of each individual case – (see *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 (4) SA 298 (A) @ 306H; *Promedia Drukkers en Uitgewers (Edms) Bpk v Karmowitz and other* 1996 (4) SA 411 (C) @ 421G.)

32. Put in another way, although there in no express time limit provided for in section 144 of the LRA it is incumbent on a commissioner exercising the discretion bestowed by the section to have regard to the common law requirement that applications for rescission should be brought expeditiously within a reasonable time in the interests of legal certainty and finality in judicial pronouncements. It appears from the Commissioner's ruling in this instance that he paid no heed at all to the fact that the application before him was made almost 2 years after the applicant obtained knowledge of the award, an inordinately long period

when compared with the standard of 14 days provided in CCMA rule 32.

33. Hence, I am satisfied that the commissioner failed to apply his mind properly to the highly relevant consideration that the application for rescission had not been brought within a reasonable time. Accordingly, his ruling fails to be set aside and corrected on that ground alone.

34. In all of this I am mindful that the employee has been less than well served by the union. The union's conduct in processing her application for rescission, a relatively simple matter, has been deplorable. Had the union responded to the applicant's attorneys correspondence addressed to it in December 1999 the defect in the original application would in all likelihood have been corrected and rescission may well have been granted on a proper basis. Unfortunately, good order in the conduct of civil proceedings does not permit the employee to hide behind the incompetence of her trade union representative. I am in any event persuaded that she must have known of the award in late September 1999 and ought to have acted sooner than June 2001. On this aspect I align myself with the remarks of Myburgh JP in *Mziya v Putco Ltd* (1999) 2 BLLR 103 (LAC):

> "The courts have traditionally demonstrated their reluctance to penalize a `litigant on account of the conduct of is representative but have emphasized that there is a limit beyond which a litigant cannot escape the results of his representatives lack of diligence or the insufficiency of the explanation tendered".

35. In the premises, I make the following order:

35.1 The ruling of the Second Respondent dated 29 November 2002 under case no. GA 45769 is hereby reviewed and set aside.

35.2 The application of the third and fourth respondents for rescission of the arbitration award of 24 March 1999 in terms of section 144 of the Labour Relations Act of 1995 is refused.

35.3 There will be no order as to costs.

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MURPHY AJ

ACTING JUDGE OF THE LABOUR COURT

Appearances:

For the Applicant:	Perrot, van Niekerk and Woodhouse Inc.
For the Fourth Respondent:	Mr. Knoza, Retail and Allied Workers Union.

Date of Judgment: