In the Labour Court of South Africa
Held in Johannesburg

Case number: JR268/ 02

In the matter between:

Northern Training Trust	Applicant
and	
Josiah Maake	First Respondent
Sita Gesina Maria Du Toit	Second Respondent
CCMA	Third Respondent

Judgment

CELE AJ

Introduction

[1] This is an application to review and set aside a ruling of the first respondent who dismissed an application to rescind an arbitration award issued by him in the absence of the applicant. The notice of motion and founding affidavit state that the application to review the ruling is in terms of section 145 of the Labour Relations Act 66 of 1995.

Background Facts:

[2] The second respondent commenced employment with the applicant as from 11 March 1996 in terms of a written contract of employment. She was employed as a contract worker who would be remunerated at the rate of R 32-00 per hour for secretarial related duties. She had to submit a monthly invoice on hours she would have worked. The memorandum of agreement she made with the applicant described the agreement of employment as of an indefinite nature.

[3] On 27 January 1999 the second respondent entered into another contract of employment with the applicant. She was then appointed as a trainer consultant in terms of that memorandum of agreement, and with effect from 1 February 1999 to 31 March 1999 Clause 7 of the memorandum of agreement she made with the applicant, listed benefits of permanent employees which she was specifically excluded from.

[4] The second respondent continued to work after 31 March 1999. On 22 June 1999 she wrote a memorandum and addressed it to the applicant wherein she was questioning her status, that is, whether she was employed as a trainer consultant or as a contract worker. She said that she signed a contract of employment as a contract worker and not a trainer consultant. The two positions differed in terms of benefits which the incumbents would be entitled to.

[5] The applicant responded to the second respondent's letter, with a memorandum dated 28 June 1999. Her position was described as

one of a trainer consultant. There was a reminder that she would be completing another term of three months of the contract of employment on 30 June 1999. She was then advised to initiate the renewal of her contract of employment for another three months, if she wished to continue to render her services with the applicant.

[6] On 28 June 1999, the applicant issued a memorandum which it addressed to Giyeni training centre. This was its training centre and it is where the second respondent was based. It was an invitation which was extended to all contract workers of applicant to apply for voluntary severance packages. On 29 June 1999 the second respondent applied for the voluntary severance package.

[7] On 5 July 1999 the applicant wrote a letter which it addressed to the second respondent. It informed her that her contract of employment had expired and that her last working day had been 30 June 1999. The second respondent however, continued to report for work until on one day she come to work to find her office locked. She had no keys to use in opening it.

[8] A dismissal dispute then arose between the second respondent and the applicant. Second respondent took the position that she had become a permanent employee of the applicant who was dismissed without a hearing.

[9] On 26 July 1999 the second respondent referred a dismissal dispute to the third respondent for conciliation. The dispute was about whether there was employer / employee relationship and if so,

whether the termination of that relationship amounted to dismissal and if so, what the appropriate remedy was.

[10] A conciliation meeting attended to by both parties took place on 13 September 1999. Attempts at resolving the dispute were unsuccessful. A certificate of outcome was issued to the second responded who then referred the dispute for arbitration.

[11] On 9 March 2000 both parties attended the arbitration proceedings which were however postponed *sine die*, without a hearing, at the instance of the second respondent.

[12] On 25 August 2000 the third respondent issued an arbitration notification with a date of hearing. This notice was to be sent by telefax to both parties. The date of the arbitration proceedings was given as 22 September 2000 in the notice. The second respondent received the fax notification and attended the arbitration proceedings. The applicant did not attend those proceedings.

[13] The second respondent was represented by an attorney at the arbitration proceedings and she was called as a witness. At issue was the procedural and substantive fairness of her dismissal. The first respondent was the arbitrator who, once proceedings were concluded, issued an award with the finding that the second respondent had become a permanent employee of the applicant. He found further that the second respondent was dismissed by the applicant which dismissal he found, was without a fair reason. He then ordered the applicant to compensate the second respondent, who had found work elsewhere, in the sum of R 92 925=00. This amount was said to have been calculated at the rate of the

applicant's remuneration, given as R 63 00 per month, from the date of dismissal to the date of the arbitration proceedings.

[14] On 10 May 2001 the applicant received, by way of a fax transmission, a copy of the arbitration award with a demand calling on it to meet the claim or risk the execution of a writ. The applicant instructed its attorneys to handle this matter. On 21 May 2001 attorneys of the applicant wrote a letter addressed to the third respondent wherein a request was made for proof of a notification of set down of the arbitration proceedings. A second latter with a similar request was sent by the same attorneys on 13 June 2001. The record of these proceedings does not have any reply by the third respondent to the two letters of the applicant.

[15] On 5 July 2001 the applicant initiated an application for the rescission of an arbitration award of 5 May 2001 which the applicant received on 10 May 2001 through attorneys of the second respondent.

[16] The application for rescission was done by way of notice of motion accompanied by a supporting affidavit. The second respondent opposed this application which she did by filing and serving an opposing affidavit. The hearing of the application was set down for 22 September 2001. Both parties were represented by their attorneys. The first respondent was again the arbitrator. Both attorneys presented their arguments whilst they relied on affidavits which the parties had filed. At the heart of the dispute was the question whether the third respondent had notified the applicant of the date of set down of the arbitration proceedings. The case of the

applicant was that no such notice was either sent to or received by the applicant. The second respondent's version was to the contrary.

[17] The first respondent, *mero moto*, called a case management officer, one Ms Sannah Seltatjile as a witness. She was an officer of the third respondent whose names appeared in a telefax message. She testified to the effect that she was the officer who had sent notices of the arbitration proceedings to the parties.

[18] Ms Seltatjile was given two documents marked annexure D and E which she was asked to describe. Annexure D, she said was the notification itself and she described annexure E as fax report. Her evidence on annexure E was basically that there was an explanation *ex facie* the annexure namely, that the operation was completed with no errors. That to her, meant that the fax had gone through to both numbers. She said that she was satisfied that the fax went to both destinations and she said the annexure had both numbers of recipients to which it said it was successfully transmitted.

[19] When Ms Seltatjile was asked by the applicants counsel, she said that the notification showed only one fax number because it would only give the first number. That fax number was of the second respondent. The fax number of the applicant was not reflected on the notification. When asked if she could think that the fax might not have been transmitted to the other party, she said that, if it was not, it could show only one number. That concluded the hearing of the rescission application proceedings.

[20] On 28 October 2001 the first respondent issued a ruling for the rescission application. He dismissed the application. It is this ruling which the applicant seeks to have reviewed and set aside. The applicant has also filed an application to amend the notice of motion so as to include section 148 (1) (g) of the act as an alternative to section 145 of the act. Counsel for the second respondent adopted, correctly so in my view, a rather pragmatic approach in not strenuously opposing the application to amend. In this respect, I am guided by Mlambo J in **Transnet v Hospersa & Another (1999) 20 ILJ 1293 (LC)** when he said:

> "….In my view mis-characterization of the nature of the review is not fatal. This court has to look beyond the legal label and consider the substance of the application. To look no further than the heading would be unduly formalist".

That a review application based on section 145, is limited only to reviews of arbitration awards, to the exclusion of rulings issued by commissioners in proceedings which are about dispute resolutions during conciliation or arbitration proceedings, is now trite.

[21] The application for the amendment of the notice of motion is accordingly granted as prayed for.

The arbitration award:

[22] The first respondent articulated the question which he was called upon to answer in the application before him as:

> "At issue is whether or not the applicant had properly been notified by the CCMA of the date on which the arbitration hearing was to take place, to wit, the 22nd September 2000".

He repeated the essence of what he perceived was the issue to be resolved by him when he analysed the evidence before him. He

then concurred with the submission, made by the second respondent's representative that the fact that a notification had gone through to the other party, is sufficient proof of service and that once an arbitrator is satisfied *ex facie* the faxination document that the notification has gone through, he is at large to proceed with the hearing, in the absence of the other party. He found that there was sufficient service of relevant notification upon the applicant and that its internal lack of communication should not prejudice the respondent. He then refused the application to rescind the award.

The review application

[23] The application is made on the premise that the first respondent erred and therefore committed a gross irregularity in finding that there had been sufficient service of the relevant notification upon the applicant. The first respondent, it is further said, erred in finding that the applicant's internal lack of communication should not prejudice the respondent. It is said also that the first respondent did not allow himself to be guided by principles which are applicable in a rescission application. And therefore committed a gross irregularity.

[24] The second respondent submitted that there was overwhelming proof that the notification of the arbitration hearing date was properly transmitted and received by the applicant's office. She placed reliance on admissions by the applicant that the fax number allegedly used was a correct number, that applicant had received a notice of set down for conciliation proceeding through the same fax number and a concession by the applicant that the fax message

may have gone through to the office of the applicant. She also relied on the evidence tendered by Ms Seltatjile.

Analysis

[25] Section 158 (1) (g) of the Act provides that:

> **"(1) The Labour Court may-**
>
> (a)……..
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> (g) Subject to section 145, review the performance of any function provided for in this Act on any grounds that are permissible in law".

[26] Section 144 (a) of the Act gives the commissioner the power to rescind an arbitration award erroneously made in the absence of any party affected by that award.

[27] In **Northern Province Local Government Association v CCMA & Others (2001) 5 BCCR 539 (CC)** Sutherland AJ had this to say:

> "[46] It seem to me that a Commissioner 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. Axiomatically, in deciding whether or not fax transmission was received, proof that the fax was indeed sent creates a probability in favour of receipt, but does not logically constitute conclusive evidence of such receipt."

[28] The enquiry in an application for the rescission of arbitration award is consequently bipartite. The first leg is one which is concerned with whether or not the notice of set down was sent (for instance

by fax or registered post). Should evidence show that the notice was sent, a probability is then created that the notice sent was received. The second leg to the enquiry is one which concerns itself with the reasons proffered by the applicant who failed to attend arbitration proceedings. Such applicant needs to prove that he or she was not wilful in defaulting, that he or she has reasonable prospects of being successful with his or her case, should the award be set aside. However, the applicant needs not necessary deal fully with the merits of the case.

[29] The two requirements of fairness and expedition should be balanced. Where there is an apparent conflict between the two, fairness should be given precedence lest injustices are done. See **Foschini Group (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & others (2002) ILJ 1597 (LC); Halcyon Hotel (Pty) Ltd t/a Baraza v CCMA & Others (2001) 8 BLLR 911 (LC).**

[30] In the present case, the first respondent concerned himself only with the first stage of the probe and he made no attempt to look further. When he gave a background to the application, he said that at issue was whether or not the applicant had properly been notified by the CCMA of the date on which the arbitration hearing was to take place.

[31] He concluded the reasons for his ruling thus:

> "I am more than satisfied on the basis of the fore-going that there was sufficient service of relevant notification upon the applicant and its

> internal lack of communication should not prejudice the respondent. I here under proceed to hand down my ruling:
>
> Ruling:
>
> In view of the fore-going, the application fails"

[32] In the founding affidavit of the applicant filed of record at the CCMA, the applicant stated that he was not in wilful default, that he had a good and reasonable explanation for not attending the arbitration proceedings and that he had excellent prospects of success on the merits of the matter. This was all evidence which was properly available to the first respondent.

[33] The test to apply in review application such as the present, was laid down in **Carephone (Pty) Ltd v Marcus N.O. & Others (1998) 19 ILJ 1425 (LAC)** as:

> "Is there a rational objective basis justifying the connection made by the administrative decision – maker between the material properly available to him and the conclusion he or she eventually arrived at"

[34] Chaskalson P in **Pharmaceutical Manufactures of South Africa in Re ex parte President of the RSA 2002 (2) SA 674** then said;

> "[86] The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believe it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle".

[35] The first respondent placed undue emphasis on the fact that the transmission record showed a successful transmission of the fax

message. That was by no means, proof of proper notification and regard should have been had to the facts which the applicant placed before him.

[36] I am informed by the decisions in **Cerephone** and **Pharmaceutical Manufactures** supra, that the first respondents decision not to rescind his award is reviewable as he misconceived the nature of the discretion conferred on him by section 144 of the Act. He failed to take into account all relevant considerations. He failed to apply his mind to the relevant issues and has thus committed a gross irregularity. (See also **Hira & Other v Booysen & Another 1992 (4) SA 69 (A).** Accordingly, I am satisfied that the arbitration award was erroneously made in the absence of the applicant.

[37] In the notice of motion and in the founding affidavit, the applicant did not request this Court to rescind the award. The prayer was only for the review and setting aside of the rescission ruling. However, in the heads of argument and during the hearing of the application, the applicant asked for the reviewing and setting aside of the award. The second respondent submitted that the applicant should be restricted to the prayers as contained in the notice of motion. In the notice of motion, the applicant did ask though, for a further and or alternative relief. It is in the interest of the parties and of the administration of justice that there should be speedy resolution of this dispute. I believe I am entitled to adopt a practical come near in this matter- (See **Haleyon Hotel** case *supr*a). Reference back of the matter to another commissioner, will accord with the justice of this case

Orders:

1. The rescission ruling issued by the first respondent on 28 October 2001 in case number NP 9721 is hereby reviewed and set aside
2. The arbitration award issued by the first respondent on 5 May 2001 in case number NP 9721 is hereby reviewed and set aside.
3. The matter is remitted to the third respondent for arbitration proceedings to be started *denovo* before another commissioner.
4. The second respondent is ordered to pay the applicant's costs.

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Cele AJ

Date of hearing : 22 September 2005

Counsel for the applicant : Adv Grundlingh
Attorneys for the applicant : Jourbert & May Attorneys

Counsel for respondent : Johan Kotze
Attorneys for the respondent : Kruger & Nagel Attorneys

Date of Judgment : 02 December 2005