IN THE LABOUR COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH

REPORTABLE

CASE NO: P394/2004

DATE HEARD:04/05/05
DATE DELIVERED: 05/05/2005

In the matter between

SHOPRITE CHECKERS (PTY) LTD **APPLICANT**

and

COMMISSION FOR CONCILIATION
MEDIATION AND ARBITRATION **1ST RESPONDENT**

COMMISSIONER JOHN ROBERTSON **2ND RESPONDENT**

NYAMEKO WYCHIFFE YENGENI **3RD RESPONDENT**

JUDGMENT

Pillay D, J

[1] This application is a review against the ruling of the second respondent Commissioner who dismissed an application for rescission.

[2] The applicant had been notified of the arbitration. However, its representative inadvertently mis-diarised the date for a day later, that is 5 May 2004. The Commissioner applied his mind to this explanation of the applicant's absence at the arbitration and rejected it as not amounting to good cause.

[3] The crux of the Commissioner's reasoning is set out in the following extract:

> "In the circumstances it cannot be said that the award was erroneously sought or erroneously made in the absence of any party effected by that award in that the notice given to the applicant complied in all respects to the rules in question. The fact

> that the applicant's employee made an incorrect diary [2]reference does not effect the question of proper notice and therefore does not make the award erroneously sought or erroneously made. The fact that the entry was incorrectly diarised does not amount to good cause for rescission. If this were so then any person could claim that a matter be rescinded under section 144 by virtue of the fact that he either forgot or made an incorrect diary reference regarding an arbitration hearing. This would obviously defeat the purpose of section 144 which was enacted to address the three categories listed hereunder only."(*sic*)

[4] The application for rescission was brought in terms of all the sub-sections of section 144 of the Labour Relations Act No 66 of 1995 (the LRA). As it turned out, submissions in this review were made only in terms of sub-section (a). Nevertheless the Commissioners ruling comprehensively covered sub-section (b) and (c).

[5] Mr Van Zyl, for the applicant, attacked the decision on the basis that the Commissioner did not look beyond establishing that the applicant had notice of the arbitration. As pointed out by Mr Quinn for the third respondent, that is all the Commissioner was required to do.

[6] Neither section 144, nor Rule 32 of the CCMA require an applicant for rescisson to show good cause. I am in respectful disagreement with judgments and awards that require it in applications for rescission of a CCMA decision. (*Goodyear South Africa (PTY) Limited v CCMA & Others* P117/01 unreported at paragraph 15, per Gering A J.)

[7] Section 165 also does not require good cause to be shown in rescission applications before the Labour Court. (See *The Bantu Electrical Construction v Gina & Others* 1999(4) LLR 387 LC) Only Rule 16A(2)(b) of the Rules of the Labour Court require it in the limited circumstances of an application by a party to rescind an order granted in its absence. Labour Court judgments on what constitutes good cause are therefore irrelevant for CCMA rescission applications. The requirement of good cause is a substantive enquiry. It cannot be implied

from the provisions of either section 144 or Rule 32 of the CCMA.

[8] The parties were not able to refer me to any decision of the Labour Appeal Court on this issue. I have also not been able to find, in the time available, any authority to the contrary either. The plain meaning of the statute and the rule is not to include an enquiry into good cause in the rescission of decisions of the CCMA. This interpretation is consistent with the high priority placed as a matter of policy on the speedy and efficient resolution of labour disputes.

[9] Mr Van Zyl's reliance on *Goodyear* is also inappropriate as that case dealt with whether there had been proper notice of the hearing. Good cause is not relevant to an enquiry as to whether there has been notice. Either there is or there is no notice.

[10] I disagree with Mr Van Zyl that the Commissioner did not look beyond Rule 30(2) of the CCMA rules, which require the Commissioner to be satisfied that the applicant was properly notified. The Commissioner rejected the explanation because it could be tendered by anyone seeking rescission under section 144. The explanation is hard to verify by reference to objective factors. Mis-diarising may be *bona fide*. It is human error. However, it is also negligence. The applicant, especially as it is a large corporate, should have in place mechanisms to avoid such mistakes.

[11] In the circumstances, I hold that good cause is not a requirement in an application for the rescission of a decision of the CCMA, and that the Commissioner was not required to take it into account. However I also find that to the extent that he did take it into account, he justifiably rejected the explanation as not amounting to good cause.

[12] The applicant set out a detailed account of the misconduct leading to the third respondent's dismissal for a dishonesty related offence. The Commissioner found that it was not relevant for him to deal with the prospects of success and the balance of convenience because of his decision to dismiss the application on the basis of his analysis of section 144 of the LRA. His analysis passes the narrow review test of misconduct or a gross irregularity, and the broad test of irrationality. As it happens, he went further than he needed to in considering the application by applying his mind to the issue of good cause and sub-section (b) and (c) of sub-section 144

when the award was never challenged on those bases.

[13] The applicant alleged in his application for rescission that it was always its intention to challenge the third respondent's claim for unfair dismissal. The Commissioner was aware that the applicant had attended the conciliation. Accordingly, the Commissioner ought not to have proceeded with the arbitration. The applicant submitted that the Commissioner ought to have realised that the it was seriously intent on resisting the claim.

[14] The facts taken into account by a Commissioner when deciding whether to continue or adjourn an arbitration when the respondent fails to appear are not necessarily the same as for an application for rescission under section 144.

[15] The applicant's attendance at the conciliation was not the only information before the Commissioner. The third respondent had submitted to the Commissioner that -

(a) the notice that was received by the applicant was clear;

(b) the applicant did not take the matter seriously because he either failed to diarise it or negligently and recklessly mis-diarised it;

(c) The third respondent should not be punished for the applicant's mistake;

(d) the applicant was aware of the arbitration because Mr Claassen, a manger of the applicant, was one of the witnesses and the third respondent had informed him of the date of the arbitration;

(e) The pages attached to the applicant's affidavit could have been taken from any diary and written into and therefore was not necessarily authentic evidence of the applicant's error;

(f) Mr Claassen had advised the third respondent that he was not in Grahamstown and that he was in Port Elizabeth and could not attend the hearing, and had enquired whether there was any other representative for the applicant at the arbitration;

[16] The third respondent informed the Commissioner of the aforegoing and, after waiting for an hour with no appearance for the applicant, the Commissioner proceeded with the arbitration.

[17] These allegations are denied in the replying affidavit in the rescission application. However, the applicant is in no position to

dispute what the third respondent says he communicated to the Commissioner. If he did communicate that 5to the Commissioner, even if that information was false, the Commissioner was entitled to rely on it at that time in exercising his discretion in terms of section 138(5)(b). The Commissioner committed no reviewable irregularity by not telephoning the applicant before commencing the arbitration. On the basis of the information before him he was entitled to be satisfied that the applicant had received proper notice of the arbitration.

[18] The criteria when exercising a discretion in a rescission are different. The discretion under section 138(5)(b) is open ended and subject only to the common law requirement that it be exercised judicially. On the other hand, the discretion exercised in a rescission application is strictly regulated by section 144. The exercise of the discretion in terms of section 138(5)(b) is a separate ground of review and must be specifically pleaded. That was not done here.

[19] In *Goodyear* the learned Judge erroneously, in my respectful view, conflated the exercise of the discretion in terms of section 138(5)(b) and 144 at paragraphs 18 and 19 of that judgment. The facts in support of a section 138(5)(b) may be relevant to the discretion exercised under section 144, for example, to show that the Commissioner was misled and hence the granting of the award was erroneous. This is a review of the refusal to rescind the arbitration award. The material facts on which this application is based are not in dispute.

[20] The applicant contends that the Commissioner did not apply his mind to the prospects of success. It is not prejudiced for, even if the Commissioner had applied his mind to the issues relating to the prospects of success, he probably would not have been able to make any findings in view of the disputed facts apparent from the affidavit. Alternatively, he might well have come out on the side of the third respondent by applying the *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A)* test. Furthermore, the third respondent had been unemployed for some time and there was no reason why relief should be delayed on account of the applicant's error.

[21] Effectively, the rescission was brought to cure the inefficiencies within the applicant's administration. It claimed an indulgence and was unsuccessful before the Commissioner. Now it attempts to find fault with the Commissioner. The Commissioner's decision is not reviewable on any of the grounds. As grounds of the appeal, the

applicant still has a hard row to hoe.

[22] In my view there is an emerging consensus in the industrial relations community that the systems and institutions established under the LRA eight years ago, in particular the CCMA and the labour courts, are not functioning optimally. Originally, these institutions were conceived as providing a quick, efficient and free public service. The CCMA was devised as a one stop dispute resolution shop. Dismissals which constitute the bulk of the disputes were meant to be resolved by a two stage process of conciliation and arbitration. An attempt was made by introducing the con-arb in the 2002 amendment to the LRA to make the two stage process seamless. As it is used so infrequently, it has not succeeded in improving the efficiency of dispute resolution.

[23] Whereas the review was intended to be exceptional, it is now fast becoming the norm. This change was brought about somewhat unexpectedly when the new Constitution (Act 108 of 1996), which was adopted after the LRA was drafted, was so interpreted by the Labour Appeal Court as to introduce rationality as an additional ground of review. However, the rationality test has become so distorted, that it has blurred the distinction between appeals and reviews.

[24] A critical stage has been reached in our labour law jurisprudence. A serious attempt must be made to restore dispute resolution to the two stage process as originally intended, instead of the five stage process that it is fast becoming. If this is not done urgently the efficiency of the CCMA and the labour courts are at stake. Needless to say the impact of that on the economy can only be adverse. To reverse the current trends, responsibility rests on the litigants to be circumspect about the cases they prosecute to avoid abusing the free dispute resolution services. Equally, the courts have a duty to discourage appeals that present in the guise of reviews.

[25] To conclude: good cause is not a requirement for rescission before the CCMA. Negligence, even it if is *bona fide*, is not good cause. A review is not a remedy to cure the inefficiency of a party seeking an indulgence. It is a cost that must be contained the moment inefficiency is discovered. There is no reason to allow it to infect the efficiency of either the CCMA or the labour courts that are straining under great costs to the taxpayer to operate efficiently.

[26] In the circumstances the application for review is dismissed with costs.

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Pillay D, J

FOR THE APPLICANT:	Mr C. Van Zyl Van Zyl Incorporated
FOR THE RESPONDENT: INSTRUCTED BY:	Adv. R. P. Quinn SC Mili Attorneys