1**IN THE LABOUR COURT OF SOUTH AFRICA**

(HELD AT JOHANNESBURG)

CASE NO JR 2896/05

In the matter between:

SOUTH AFRICAN DEMOCRATIC

TEACHERS UNION

APPLICANT

AND

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **FIRST RESPONDENT**

HINTSO S.N.O **SECOND**

RESPONDENT

MEI S.R.L **THIRD**

RESPONDENT

THE SHERIFF (THE DISTRICT

OF JOHANNESBURG SOUTH) **FOURTH**

RESPONDENT

JUDGMENT

MOLAHLEHI AJ

Introduction

[1] This is an application to review and set aside the ruling of the Second respondent in terms of which she refused to rescind the award issued by the first respondent (the CCMA) under case number GA 43537/03 on 3rd September 2005. This matter has a complex history of having gone through the hands of several commissioners with two applications for rescissions of default arbitration awards. Having granted the first rescission, the matter was set down for another arbitration hearing which the applicant failed to attend. Both parties were at the first rescission application represented by their respective attorneys.

Background

[2] The third respondent to whom I shall refer to as "the employee" was formerly employed by the applicant, South African Teachers Union (SADTU) as an accountant. After his dismissal on the 28 November 2003, the employee referred an unfair dismissal dispute to the CCMA. The dispute was arbitrated by Commissioner Mbeleni who issued a default award in terms of which she ordered both the reinstatement and compensation of the employee.

[3] On the 11 August 2004, Commissioner Bernard van Eck issued a ruling in terms of which the award of Commissioner Mbeleni was rescinded. It is not necessary for the purpose of this review to go into the details of the background and the reasons for this rescission ruling. However, as will appear later in this matter, the said ruling is important in determining whether indeed there was no evidence before the third respondent regarding the appointment of attorneys of record at whose address all processes and documents were to be served.

[4] The dismissal dispute was subsequently rescheduled for another arbitration hearing and on the 22 November 2004, Commissioner Fitzcharles issued a default arbitration award in terms of which the applicant was ordered to reinstate the employee and compensate him in the amount of R324 234-00. Subsequent to this outcome the applicant applied for the rescission of this award. The second respondent refused to grant the application for the rescission of the arbitration award.

[5] The review application was opposed by the employee who represented himself in the proceedings. The employee argued that the review application should be dismissed because the applicant lost its right to have the arbitration award reviewed within the six

months period as required by the Labour Relations Act no 66 of 1995 (the LRA) and the rules of this court.

[6] According to the employee's answering affidavit, the applicant filed the review application on the 3rd November 2005, and the six weeks period as prescribed would have expired on the 8th November 2005. The delay that the employee is referring to, concerns the failure according to him by the employer to collect the record and ensure that the review progresses to another level as dating from 3rd November 2005.

[7] It would seem that the employee interprets s145 of the LRA to mean that the applicant was supposed to have completed the review process within six weeks calculated from the 3rd November. Section 145 of the LRA requires a party that challenges a CCMA arbitration award to do so within six weeks of the date on which the award was served on him or her. The LRA does not set the time frame within which the review proceedings must be completed. It is clear that the respondent was frustrated by the delay in the processing of the review by the applicant.

[8] There are three options available to a frustrated respondent on

review who is denied effective enforcement of an arbitration award by the failure of the applicant to expedite the production of the record.

[9] The first option available to the respondent was to apply to the Labour Court to compel the production of the record.

[10] The second option is that of brining an application in terms of rule 12(2) of the Rules of the Labour Court in terms of which the applicant could have been directed to comply with certain time frame within which to file the record, failing which it (the applicant) could have bared from seeking the relief through the review proceedings.

[11] The third option was that of bringing an application to make an award an order of court. See *National Education & Allied Workers Union v Director-General: Department of Labour* (2005) 26 ILJ 911(LC). These options are a challenge for a party faced with dilatory tactics on the part of the party that may have filed the review application. In my view these options do not go far enough to address and ensure expedited finalisation of disputes between parties. It would seem to me that there is a need for some intervention to address this particular challenge, in particular in

cases involving the weaker and vulnerable parties.

Legal Principles relating to rescissions

[12] Applications for the rescissions of the CCMA arbitration awards are governed by s144 of the LRA which provides:

> *"Any commissioner who has issued an arbitration award, acting of the commissioner's own accord or, on the application of any of the affected party, may vary or rescind an arbitration award-*
>
> *(a)erroneously sought or erroneously made in the absence of any of the affected by that award; of the parties.*
>
> *(b) in which there is an ambiguity or an obvious error or omission but only to the extent of the ambiguity; error or omission; or*
> *(c) granted as a result of a mistake common to the parties to the proceedings."*

[13] The courts and the dispute resolution bodies have in dealing with rescissions adopted a two phased investigation. Most of the judgements have adopted a broader approach in dealing with the first leg of the investigation. There are other judgments which restrict the investigation in the first phase to determining whether or not there was proper notice and not look into whether there are good reasons for the non-attendance.

[14] The first leg entails enquiring as to whether or not the notice of set down was sent to the party against whom the award was granted in default. Evidence showing that the notice of set down was sent to the correct address creates the probability that such notice was received. The probability created imposes a duty on the applicant to show that the default was not wilful and that there are good reasons for the failure to attend the hearing. See *Northern Province Local Government Association v CCMA & others* (2001) 22 ILJ 1173 (LC), *Foschini Group (Pty) LTD v Commissioner for Conciliation, Mediation and Mediation & Arbitration* (2002) 23 ILJ 1048 (LC)*; Halcyon Hotel (Pty) Ltd t/a Baraza v CCMA & Others* [2001] 8 BLLR 911 (LC) *and Northern Training Trust v Maake & others* (2006) 27 ILJ 828 (LC*).*

[15] In *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation & Arbitration & Others* (2005) 26 ILJ 1119 (LC*),* the court held that the investigation should be restricted to the inquiry of a determination whether or not notice was properly served and that there was no need to show good cause for non-attendance of the hearing.

[16] In arriving at this conclusion the *Shoprite' case* found that neither s

144 of the LRA nor rule 32 of the CCMA Rules requires an applicant for rescission of a CCMA award to show good cause. In this regard the court held that the plain meaning of s144 and rule 32, of not requiring good cause to be shown in the event of a default award, is consistent with the high priority placed as matter of policy on speedy and efficient resolution of labour disputes. The court accordingly disagreed with other judgements and CCMA awards which require good cause to be shown in considering application for a rescission of a CCMA award.

[17] In *Sizabantu Electrical Construction v Guma* (1999) 4 BLLR 387 (LC), the court in considering an application for rescission of a judgement given in default, in terms of rule 16A(1)(b) of the Labour Court rules, made reference in passing to s165(a) of the LRA whose wording is similar to that of s144. In this regard Seady AJ had this to say:

> "*In short, good cause is not required to be shown if a judgement or order was erroneously granted in the absence of a party.*"

[18] In *Goodyear SA (PTY) LTD v CCMA & others* (unreported Judgement) Case No P117/2001, the court in dealing with the review of a CCMA decision, said:

> *"As for the requirements for an application for rescission Section 144 of the Act provides no specific guidance. All it states is that any commissioner may rescind an arbitration award "erroneously sought in the absence of the any party affected by the award."*

[19] I agree with the *Shoprite Checkers* decision to the extend that it seeks to address one of the pillars of the LRA – expeditious dispute resolution. I however have a difficulty with its restrictive approach which has the potential to undermine another pillar of the LRA, being that outcomes of cases should be based on a fair hearing. The principles of fairness are also an integral part and fundamental to the LRA. There is therefore a need to balance this two key and fundamental aspects of the LRA which in given cases could be in conflict with each other.

[20] Francis J was correct in *Foschini's case* when he said:

> *"[21]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."*

[21] The views expressed by W J Hutchinson in the case note, "*Rescinding of Arbitration Awards Granted by the Way of*

Default", 1999 SALJ 744, are apposite when in analysing the decision in *Duarte v Carrim* [1998] 9 BLLR 935 (LC), he said :

> *"At the outset I think that it should be accepted that the use of the telefax notification is not infallible. The possibility exists that an illegible fax may be received if the fax machine's toner is faulty. I there is lack of paper in the receiving machine and it is subsequently switched off for a certain period of time the transmission may also be lost… Another possibility is that a document is that a document may be incorrectly set in the fax machine resulting in the blank side of the paper being transmitted."*

[22] The above was quoted with approval by Sutherland AJ in *Northern Province Local Government Association v CCMA and others* (2001) 22 ILJ 1173 (LC) and by Gering AJ in *Goodyear SA (PTY) LTD v CCMA & others* (unreported Judgment) Case no P117/200.

[23] The scenario in the *Shoprite Checkers* and the *Duarte* cases relate to a situation where there was proper service but the defaulting party claims not to have been aware of the hearing because the notice of set down never reached him or her. It may well be that in a given case the applicant seeking rescission had received the notice of set down, made all the appropriate arrangements to attend

the hearing. In this hypothetical situation, the party who has received the notice arrives late at the hearing due to circumstances beyond his or her control. At the time he or she arrives, the hearing had already concluded.

[24] It is not necessary in this matter to apply the first leg of the investigation because the matter turns around whether the applicant informed the CCMA of their address of service.

[25] I now proceed to deal with the second leg of the investigation. In *Local Government Association v CCMA & others* (2001) 22 ILJ 1173 (LC); [2001] 5 BCCR 539 (LC) Sutherland AJ had this to say:

> *"[46]It seems to me that the commissioner in considering whether or not a notification of an arbitration hearing has indeed been received by the respondent, it is necessary to consider all the facts bearing on that question. Axiomatically, in deciding whether or not a 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."*

[26] The court and dispute resolution bodies are in agreement with regard to the approach to be adopted during the second leg of the

investigation. The second leg of the investigation entails an inquiry into the prospects of success. It was held in *Foschini Group (PTY) LTD v Commission for Conciliation, Mediation & Arbitration & others* (2002) 23 ILJ 1048 (LC) that:

> *"[16]An applicant who wants to have a decision of a commissioner who has refused to rescind an award reviewed must show that he has a bona fide case to place before the tribunal and that it had not lost interest in having its case heard and that its absence at the hearing has been reasonably explained. ...*
>
> *[17] If the explanation given for a party's non-appearance at the arbitration proceedings does not demonstrate that the absent party was wholly blameless, the force of that explanation must still be balanced against the force of the case which that party seeks to present in support of its case. The weight of a solid bona fide case will usually make up for a thin explanation for default".*

<u>Evaluation</u>

[27] In refusing to grant the rescission the third respondent reasoned as follows:

> *"4 The applicant stated that they did not receive the faxed notice to their office. The applicant had officially appointed an attorney to receive all process and documents on its behalf and had notified the CCMA of this. I do not have evidence before me suggesting that the employer has informed the CCMA of its attorney's details. (my underlining.) The CCMA sent the notice of set down to the respondent's correct fax number. It was the responsibility of the respondent to notify its legal representative.*

[28] In its founding papers the applicant states that the only reason for non-attendance at the hearing was because it was unaware that the arbitration would take place on the 15 April 2004, until late that day when it was informed by the employee of the CCMA that the hearing had already taken place.

[29] The applicant did not dispute that the notice of set down was sent to its fax number but stated that it never received it because it is not recorded on its internal record as having been received. The applicant further contended that the CCMA failed to send the notice of set-down to its attorneys of record who they had appointed to receive correspondence and processes on their behalf.

[30] As indicated earlier, this case is distinguishable from all the cases

referred to above in as far as the first leg of investigation is concerned. The issue that the commissioner was properly confronted with was whether failure to serve the notice of set down on Cheadle Thompson & Haysom (CTH) amounted to improper service. The second issue is whether the commissioner misdirected herself and committed an irregularity in the manner in which she approached the issue of prospects of success.

[31] In *Carephone (Pty) Ltd v Marcus N. O & others* 1998 19 ILJ 1425 (LAC) the court set out the test to apply in review applications as follows:

> *"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."*

Chaskalson P in *Pharmaceutical Manufactures Association of SA: In Re Ex Parte President of the RSA* 2002 (2) SA 674 (CC) 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 believed it to be rational. Such a conclusion would place form over substance and undermine an important constitutional principle"

[32] The commissioner failed to apply her mind to the relevant evidence properly placed before her and committed an irregularity when she concluded that there was no evidence before her suggesting that the applicant had informed the CCMA to send notices to its attorneys of record. This decision is also unjustifiable in that there is no objective connection between the evidence which was properly before her and her conclusion.

[33] In the notice of application in the first application for rescission the applicant through its attorneys informed the CCMA on 1 June 2005, that CTH was appointed as its attorneys of record and *"will accept service of all processes and documents at the attorneys' address below." (*annexure NK2 page 14 of the record) The evidence before the commissioner required her to determine whether or not failure to serve notice of set-down on the attorneys of record constituted a proper service.

[34] The ruling of the Commissioner stand to be reviewed and set aside on this ground.

[35] As indicated above, the second ground upon which the ruling of the second respondent stands to be set aside relates to the approach she adopted in dealing with prospects of success. In this regard the commissioner said:

> *"With regard to the prospects of success, I do not have sufficient information to pronounce on the merits of this case."*

[36] The approach to be adopted in dealing with the issue of prospects of success is well established. In *Foschini's* case in dealing with this issue, Francis J said:

> *"[21] … To establish that there is a reasonable probability of success on the merits, it suffices if an applicant shows a prima facie case in the sense of setting out averments which, if established at the proceedings, would entitle that party to the relief asked for. An applicant need not necessarily deal fully with the merits of the case."* (my underlining).

[37] In *Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A) the court in dealing with the issue of prospect o success had this to say:

> *"(ii) that on the merits such party has a bona fide defence which, prima facie, carries some prospects of*

success…"

Kroon JP in *Kaefer Insulation (PTY) LTD v President of the Industrial Court & Others* (1998) 19 ILJ 567 (LAC), at para 27 said:

> *"The 'merits' element therefore required averments by or on behalf of the third respondent demonstrating that prima facie, he had some prospects of successfully securing a determination that, prima facie, he had some prospects of successfully securing a determination in his favour."*

[38] A commissioner in considering prospects of success does not have to pronounce on the merits of the case. All what the commissioner needs to do is to investigate whether on the averments made by the applicant there is a *prima facie* case, that there is a chance of succeeding when the main case is heard. In other words to establish whether there is a reasonable success on the merits, it suffices if an applicant can show a *prima facie* case through setting out averments which if established at the proceedings of the main case would entitle the applicant some relief. The applicant need not deal fully with the merits of the case.

[39] The commissioner misconceived the nature of her discretion in that

she failed to apply the correct principles governing how to deal with prospects of success in an application for rescission. Because of this the commissioner committed a gross irregularity in that she failed to analyse, fully and properly determine the likelihood or a chance of the applicant succeeding in its defence at the unfair dismissal hearing.

[40] I now turn to the applicant's prayer in its notice of motion that this court should rescind the arbitration award. In the time available I have not been able to find an appeal decision that interprets s144 or any section other section of the LRA that gives the court a concurrent jurisdiction with that of the CCMA in as far as rescissions of awards is concerned. The provisions of s144 is in my view perfectly clear on this point. The power to rescind arbitration awards is conferred on the commissioner and not this court. See *Deutch v Pinto & Another* (1997) 18 ILJ 1008 (LC) and – *Mimmo's Franchisee Cc & others v Spiro & others* (2000) 21 ILJ 2065 (LC).

Conclusion

[37] In the premises I make the following order:

1. The ruling issued under case number GA43537-03 on

3rd September 2005 is reviewed and set aside.

2. The application for rescission is remitted to the CCMA to be heard by a commissioner other than the second respondent.

3. There is no order as to costs.

MOLAHLEHI AJ

DATE OF HEARING : 12 DECEMBER 2006

DATE OF JUDGMENT : 15 FEBRUARY 2007

Appearances

For the Applicant : **ADV C ORR**

Instructed by : **CHEADLE THOMPSON & HAYSOM**

For the Respondent: MEI S.R.L (IN PERSON)