

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO:  
JR102/05

In the matter between:

METCASH TRADING AFRICA T/A  
METRO CASH 'N CARRY

Applicant

and

THE COMMISSION FOR CONCILIATION,  
MEDIATION AND ARBITRATION

First Respondent

COMMISSIONER T NKADIMENG

Second  
Respondent

G RAKGALAKANE

Third Respondent

—

JUDGMENT

—

FRANCIS J

*Introduction*

1. This is an application to review a rescission ruling made by the second respondent (the commissioner) on 27 November 2004 under case no MP1031/03 in terms of which the commissioner dismissed the applicant's application for rescission.

2. The review application was opposed by the third respondent.

*The background facts*

3. The third respondent is a former employee of the applicant. On or about 4 December

2002, she was handed a notice to attend a disciplinary enquiry where she was charged with most complaints. She appeared at a disciplinary enquiry on 5 December 2002 and was found guilty of the complaints lodged against her. Her appeal was dismissed on 21 January 2003 and the sanction of dismissal was upheld.

4. The third respondent referred a dispute to the Commission for Conciliation, Mediation and Arbitration (the CCMA) in Witbank. The applicant denied having received a referral. On or about 12 November 2003 the CCMA issued a notice of set down advising the parties that the matter had been enrolled for con/arb on 9 December 2003. The dispute was arbitrated on 9 December 2003. The applicant denied having received the notification of the con/arb set down date.
5. On or about 7 January 2004, the applicant received through the post a copy of the CCMA's default arbitration award. In terms of the arbitration award, the commissioner stated that the notification of the con/arb date had been served successfully on the applicant by telefax.

#### *The rescission application*

6. The applicant applied for a rescission of the arbitration award. Tshepo Kubayo the Divisional Industrial Relations Manager applied on behalf of the Groblersdal branch of the applicant. The telephone number is given as 013 2624024 and the fax number as 013 2622032. The application reads as follows:

*“This application is pursuant to an Arbitration Award related to case number MP1031-03 we received through post on Monday the 05th January 2003 at Metro*

*Groblersdal.*

*This application for Rescission of the Award in a form of sworn affidavit will show good cause that:*

- 1 - Had we received the notice of set down we would have attended the Arbitration process.*
- 2 - Had we attended the arbitration process, re-instatement would not have been awarded.*
- 3 - The misconduct is of serious and severe natures that go to the root of the employment relationship, and in our view re-instatement was inappropriate under the circumstances.*
- 4 - We also note that the Fax number on the Award on the respondent's column is unknown to us and does not belong to our Metro Groblersdal Branch.*

*Summary of case:*

*The case involves the applicant and her former colleague Anna Shokwane, were rolling money at the tills, Internal Auditors came to audit the store and a cheque of R25 000.00 was in the takings of the applicant, however there was no corresponding invoice for such purchases amounting to R25 000-00. It was later discovered that the applicant and Anna Shokwane to cover for a shortage, which existed at the time of auditing, used the R25 000-00 cheque. They were both charged with Misconduct and subsequently dismissed. There is overwhelming evidence which was presented at the initial enquiry to prove that the misconduct was committed.*

*Prejudice.*

*The Company will be prejudiced if the Award is not rescinded, as it is also evident that the fax number provided by the applicant does not belong to the respondent. The award has far reaching financial implications for the respondent party. The respondent did not receive any documents from the CCMA that is the 7.11 form, notice to attend Conciliation or Con/Arb, the only document we received through the post is the Arbitration Award.*

*Thanking you in anticipation”.*

- 7. The third respondent opposed the application for rescission on the following basis:*

*“4. AD PARAGRAPH 1*

*It is correct that the respondent's application is brought pursuant to an Arbitration Award issued by Commissioner Thabe Nkadimeng of the Commission for Conciliation and Arbitration.*

*I emphatically deny that the respondent did not receive the set down notice of this matter for conciliation and arbitration which was scheduled for the 9 December 2003 at the CCMA House, Room 26, Witbank.*

*On the 12th day of November 2003, a notice of set down for conciliation and arbitration was*

*dispatched to both parties. I state that the set down was posted and faxed to the respondent to P.O. BOX 365, Groblersdal 0470 and to fax number (013) 262 2032.*

*The above mentioned details are indeed the respondent's details and I wonder why the respondent is alleging that it did not receive set down notice. A copy of notice of set down is attached hereto marked, annexure "GR1".*

*The respondent in its own papers confirms that indeed fax number (013) 262 2032 is their fax number at their Groblersdal Branch. This is the fax number that appears in all the documentation and in particular the notice of set down for the conciliation and arbitration hearing, and in page 1 (one) of the respondent's as deposed by Tshepo Kubayi.*

*The respondent's contention that the fax number which appears on the face of the award is unknown to them does not hold water. The fact of the matter is that the respondent was properly served with all the necessary documents calling it to appear before the commission on the 9th day of December 2003, as it is clear from the set down notice attached hereto.*

*It is quite apparent that the respondent did wilfully defaulted by not attending the conciliation and arbitration as scheduled in that the notice of set down was served on both their postal address and fax line. The respondent is not denying that the address belongs to them hence they claim having received the award through their postal address. I re-iterate that the respondent's explanation is unreasonable and without basis it must be dismissed with costs.*

*I further state that the respondent is in actual fact abusing the commissioner's resources by bringing this application, and further that the respondent is applying delaying tactics in not complying with the award.*

### **THE MERITS OF THE CASE**

*I was instructed by my immediate supervisor (Chief Cashier) to give R28 000 (twenty eight thousand) to balance her books. She informed me not to worry as the customer was coming to pay the respondent that day and will use the payment to balance her books.*

*Anna also informed me that the branch manager has authorised the deal. I then wrote a petty cash slip and put it in my till and give Anna R28 000. She gave me a blank cheque to balance my till, and I then destroyed the petty cash register in accordance with the respondent's till procedure.*

*The respondent's papers for rescission contradicts with its disciplinary papers in that it is now claiming that the amount of R25 000.00 has been taken by the applicant.*

*I deny that there is enough evidence against me as alleged by the respondent.*

### **PROCEDURAL ASPECTS**

*I wish to state that my dismissal was procedural unfair in that I was not given sufficient opportunity to cross examine Anna during the disciplinary hearing. Every*

*time when I ask her questions she kept on saying I am a fool and the chairperson of the disciplinary hearing did not interfere and/or ordered her to answer my questions.*

*I also fail to understand why the respondent charged me with the offences as Anna accepted responsibility during the hearing.”*

8. The applicant did not deem it necessary to file a replying affidavit to the applicant's opposition.

*The rescission ruling*

9. The commissioner states in his rescission ruling that the CCMA had set down the matter for con-arb proceedings for the 9 December 2003 in Witbank. The applicant did not attend the con-arb proceedings. He had satisfied himself that the CCMA had properly notified the applicant about the conciliation hearing date and then continued with the arbitration hearing.
10. The commissioner then records that the applicant admitted that it had received the arbitration award on 5 January 2004. The fax number of the applicant as it appears on the award is unknown to the applicant. It does not belong to Metro Cash Carry Groblersdal branch. The applicant did also not receive the 7.11 LRA forms and the notice to attend the conciliation or con-arb. The applicant only received the award through the post.
11. The commissioner states that the third respondent denied that the applicant did not receive the set down notice of the conciliation and arbitration proceedings. On 13 November 2003 a notice of set down for conciliation and arbitration was sent to both

parties. The notice was posted to the applicant at P O Box 355, Groblersdal, 0470 and fax to the applicant at fax no 013 262 2032. The fax number is confirmed by the applicant in all its papers. This fax number belongs to the applicant's Groblersdal branch. The CCMA had used the same fax number to send the applicant the notice of the hearing. The same fax number also appears on the applicant's affidavit deposed by Tshepo Kubayi. The applicant was therefore properly served with all the documents calling it to appear before the CCMA on 9 December 2003. The applicant defaulted wilfully by not attending the conciliation and arbitration proceedings. The applicant acknowledged that the postal address belongs to it as it had received the award through it. The applicant's explanation is unreasonable and without basis.

12. The commissioner then analysed the arguments raised. He said that the applicant had argued that it did not attend the con-arb proceedings because it did not receive the 7.11 LRA forms. The fax number used to send all the documents, including the notice to attend the con-arb and the award to the applicant is unknown to the applicant. The third respondent on the other hand had argued that the fax number 013 262 2032 belongs to the applicant and it appears on the applicant's affidavit supporting the rescission application. The CCMA had used the fax no 013 262 2023 to serve the applicant with the notice of the set down. The commissioner said that he echoed the third respondent's argument that the same fax number appears on the third respondent's affidavit supporting its application for rescission. The applicant's argument that fax no 013 262 2032 is unknown to it (the applicant) cannot be true as the same fax number appears on its official document (applicant's affidavit supporting the application for rescission). The commissioner emphasised his finding in the

default award that the CCMA had properly notified the parties about the date, venue and time of the con-arb proceeding.

13. The commissioner found that the applicant had failed to show good cause why it failed to attend the con-arb proceedings. He did not order costs against either party to the dispute. The commissioner refused to rescind the ruling under MP1031-03 and dismissed the application for rescission.
14. This prompted the applicant to file a review application.
15. The commissioner's ruling contains a few typographical errors which the commissioner corrected when he issued a variation ruling. The first error is the postal address of the applicant's branch which is given as PO Box 355 instead of P O Box 365. The second is the fax number which is given as 013 262 2023 instead of 013 262 2032. The notice of set down reflects the correct postal address and fax number.

*The grounds of review*

16. The applicant contended that the commissioner's award was not rationally justifiable on the evidence placed before him for, *inter alia*, the followings reasons:

- 16.1 The commissioner unjustifiable and/or incorrectly found and/or committed a gross irregularity in finding that the applicant had failed to show good cause why it had failed to attend the con/arb proceedings. In this regard, the commissioner ignored the representations contained in the applicant's application for rescission setting out why it had not attended at the con/arb

proceedings.

16.2 The commissioner unjustifiably and/or incorrectly found and/or committed a gross irregularity in finding that the applicant's contention that the telefax number contained on the notice to attend the con/arb and the award were unknown to the applicant were untrue. In this regard, the commissioner states that the telefax number (013) 262 2032 was the fax number which belongs to the applicant and was the fax number used by the CCMA in dealing with the applicant. However, it is quite clear from the arbitration award that the fax number used was (013) 690 2433 which the applicant has no knowledge of and which does not belong to it at all. This was undisputed. It was to this number that the CCMA apparently communicated the award.

163 The commissioner unjustifiably and/or incorrectly found and/or committed a gross irregularity in finding that the applicant had been properly notified of the con/arb process by the CCMA which had used a number (013) 262 2023. This is not a fax number that belongs to the applicant. In addition to this, the Post Box address which is referred to in paragraph 4 of the commissioner's ruling, being P O Box 355 Groblersdal, 0470, differs from that in the award, being P O Box 365, Groblersdal, 0470. The latter box number is the correct one, but it is evident the notice was posted to the incorrect box number.

16.4 The commissioner unjustifiable and/or incorrectly failed and/or committed a gross irregularity in failing to take into account that clearly there was merit in the applicant's contention that it had not received the notice of set down, when the CCMA's own communications to the applicant, on its version, a variety of fax numbers had been used. The fax number on the award does not belong to the applicant. The fax number referred to in paragraph 7 of the commissioner's ruling, being (013) 262 2023 also does not belong to the applicant.



16.5 The commissioner unjustifiable and/or incorrectly failed to take into account and/or committed a gross irregularity in failing to take into account the applicant's prospects of success in this matter and the prejudice to it should it not be able to contest the third respondent's alleged unfair dismissal.

*Analysis of the facts and arguments raised*

17. A commissioner's award must be lawful, reasonable and procedurally fair. If it is not reasonable, it fails to meet the constitutional requirement that an administrative action must be reasonable and, once it is not reasonable, it can be reviewed and set aside. In this regard see *Sidumo and Another v Rustenburg Mines Ltd and others* (2007) 28 ILJ 2405 (CC).
18. The test for good cause in an application for rescission normally involves the consideration of at least two factors. Firstly, the explanation for the default and, secondly, whether the applicant has a *prima facie* defence. In this regard see *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others* (2007) 28 ILJ 2246 (LAC).
19. The applicant was required to explain its failure to attend the arbitration hearing and that it has a *prima facie* defence. The commissioner was therefore required to decide the rescission application by considering the two requirements. He had to examine the explanation that given by the applicant about its failure to attend the arbitration hearing. The commissioner found that the applicant had failed to show good cause

about why it failed to attend the con/arb hearing.

20. The applicant's explanation for failing to attend the con/arbitration hearing does not hold water. The applicant was somewhat opportunistic when it latched on an error made in the commissioner's ruling about the fax number and postal address of the applicant's branch in Groblersdal. The arbitration award contains a fax number that clearly does not belong to the applicant. The postal address is that of the applicant. The notice of set down dated 12 November 2003 however correctly contains the applicant's Groblersdal fax number which is (013) 262 2032 and the postal address as P O Box 365 Groblersdal. This is the same fax number reflected on the applicant's application for a rescission. I find it somewhat strange that the applicant did not admit that the fax number (013) 262 2032 belongs to it but made a big issue about fax number (013) 262 2023 which is a typing error. The commissioner has stated in his award and ruling that he had satisfied himself that the notice of set down was transmitted to the applicant which was not contradicted by the applicant. In the third respondent's opposing papers, the third respondent stated categorically that the notice of set down was transmitted and posted to the applicant's correct address. The applicant did not deem it necessary to file a replying affidavit to contradict this. All that the applicant is saying is that it had it received the notice of set down it would have attended the arbitration process. It had noted that the fax number on the award is unknown to it and does not belong to its Metro Groblersdal. It had conveniently failed to deal with the correct address and fax number reflected in the notice of set down. It has only raised the issue of the incorrect fax number referred to in the rescission ruling in the review papers before this court.

21. The commissioner's finding that the failure to appear at the arbitration hearing was not adequately explained was reasonable.
22. The commissioner was after that required to deal with whether the applicant has a *prima facie* defence. The commissioner found that the applicant had failed to show good cause why it failed to attend the con/arb proceedings. It is not clear what the commissioner meant by using the words "good cause". Good cause relates to the explanation for failing to attend the hearing and a *prima facie* defence. The commissioner should have dealt with the issue of the *prima facie* defence. The commissioner has failed to do so which renders his ruling as unreasonable.
23. The application stands to be granted and be referred to the CCMA to consider the rescission application afresh. The issue must be determined by another commissioner on the papers that served before the commissioner.
24. I do not believe that this is a matter where costs should follow the result.
25. The third respondent had applied for condonation for the late filing of her answering affidavit. I am satisfied that a proper application was made out for it.
26. In the circumstances I make the following order:

26.1 The third respondent's late filing of the opposing papers is condoned.

26.2 The commissioner's rescission ruling dated 27 November 2004 under Case No  
MP1031/03 is reviewed and set aside.

26.3 The dispute is referred to the CCMA for reconsideration of the rescission application  
by another commissioner other than the second respondent.

26.4 There is no order as to costs.

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FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR THE APPLICANT : AL COOK INSTRUCTED BY  
PERROT, VAN NIEKERK & WOODHOUSE  
INC

FOR THIRD RESPONDENT : D BROWN INSTRUCTED BY  
KRISHNEE PILLAY ATTORNEYS

DATE OF HEARING : 18 APRIL 2008

DATE OF JUDGMENT : 25 APRIL 2008