IN THE LABOUR COURT OF SOUTH AFRICA

(HELD AT CAPE TOWN)

CASE NO: C726/2005

In the matter between:

EDGARS CONSOLIDATED STORES (PTY) LTD	Applicant
and	
JOAQUIM KILSON KALANDA	First Respondent
COMMISSION FOR CONCILIATION MEDIATION & ARBITRATION	Second Respondent
DAVID MIAS N.O.	Third Respondent

J U D G M E N T

NEL AJ:

[1] This is an application to review and set aside the ruling of the third respondent ("the Commissioner") dated 8 September 2005 ("the rescission ruling") in which the Commissioner dismissed the applicant's application for the rescission of an

arbitration award made by the Commissioner in the absence of the applicant.

[2] The application for review herein has been filed eight days late. Reasons have been provided for the late filing of this review application. I have had the opportunity to consider the prospects of success. I have concluded that the rescission award herein should be reviewed and set aside. I am satisfied that the prejudice, which the applicant will suffer, if the late institution of the review application is not condoned, far outweighs that of the first respondent ("Kalanda"). I am satisfied that on a conspectus of all the relevant considerations, the late filing by the applicant of its application to review should be condoned.

[3] Following his dismissal on grounds of misconduct, Kalanda referred a dispute to the second respondent ("the CCMA"). It would appear that conciliation took place telephonically but the dispute was not resolved. Thereafter the matter was set down to be arbitrated before the Commissioner on 30 June 2005. The applicant, however, contends that it was unaware of the set-down date and therefore did not attend the arbitration hearing. The Commissioner proceeded with the arbitration in the absence of the applicant, and on 12 July 2005 issued an arbitration award in favor of Kalanda, finding

that his dismissal was substantively unfair and ordering the applicant to pay Kalanda the sum of R40 480 as compensation.

[4] The applicant thereafter applied for a rescission of the award on the basis that it had not been aware that the matter had been set down for 30 June 2005. In his rescission ruling, the Commissioner rejected the applicant's evidence that it had not been notified of the set-down for arbitration. In reaching this conclusion, the Commissioner apparently relied solely on the telefax transmission slip in the CCMA file.

[5] The applicant contended that despite having been called upon to do so, the CCMA and the Commissioner had failed to place the contents of the CCMA file before this Court. It was initially therefore argued by the applicant that this situation led thereto that this Court is not in a position to assess the material which served as the basis for the Commissioner's finding that the applicant had been properly notified of the arbitration. It therefor contended that the rescission ruling fell to be reviewed and set aside on this basis alone.

[6] The applicant, in its supplementary affidavit, made reference to the fact that although the CCMA had finally purported to lodge the contents of its file with the Registrar of this Court,

several material documents remained missing, including the proof that notice of set-down for arbitration had been transmitted to the applicant. The supplementary affidavit having been filed on the CCMA, having been alerted to the fact that it was alleged that the contents of the CCMA file had not been fully discovered, the CCMA then proceeded to file further contents of its file with the Registrar of this Court. It provided no explanation why these documents did not form part of the original contents of the CCMA, or where they were ultimately located by the CCMA.

[7] In any event, amongst the documents now filed by the CCMA was a printout of an e-mail ("the document"). On the face of the document it appears as if it was sent from "Faxination" to a certain Zahiera Price ("Price") on 4 May 2005. In the absence of any explanation by the CCMA, the Commissioner or Price, it must be presumed that this document served as the sole proof before the Commissioner that the arbitration notice of set-down had been transmitted by the CCMA to the applicant.

[8] It was argued that the Commissioner's reliance on the document amounted to a fundamental misdirection as there was no indication as to who the author of the document was. There also, so it was argued, was no evidence from the

author of the document to the effect that the notice of set-down had been transmitted to the applicant. It was also submitted that there was nothing before this Court to suggest that the Commissioner had regard to the evidence of the author of the document, or had any contact with the author whatsoever. The document does not in and by itself indicate what it was that was purportedly transmitted by "Faxination" to the fax number in question. For example, the first page of the document that had been transmitted was not reproduced, as is often the case. The document from "Faxination" is directed to Price. It advises Price that:

> "Your fax with subject: WE2948/05 sent to "011 4917846 addressed to "011 4917846" was successfully transmitted!"

There is, however, no affidavit or statement from Price to the effect what it was that was successfully transmitted. There is also nothing before this Court to suggest that the Commissioner had any contact with Price, or confirmed with her that it was the notice of set-down that had been transmitted to the applicant by a third party, "Faxination". It may be so that the CCMA uses computerized facsimile services. I am speculating, as I have not been advised by the

CCMA or the Commissioner what it means that not the CCMA itself, but a body called “Faxination” sent the document. The fact is that on the face of the document, the reader cannot without more establish what it is that was forwarded by the third party “Faxination”.

[9] This document which apparently played a pivotal role in the Commissioner’s decision to dismiss the applicant’s rescission application was not filed by the CCMA, as I said, until after the applicant had filed its supplementary affidavit. The applicant, rightly so, complains that it had not been afforded any opportunity to address the Commissioner on this document, or to question the author and/or recipient thereof (Faxination) in a hearing before the Commissioner.

[10] As this appears to be the only document received from the CCMA in support of the contention by the Commissioner that notice of set-down for the arbitration had been sent by telefax to the applicant, I am of the view that the Commissioner could not, on the face of this document alone, justifiably have come to the conclusion that it was the notice of set-down of the arbitration from the CCMA which had been transmitted to the applicant. Therefor, I am of the view that in the absence of other, and better evidence, the Commissioner could not justifiably determine that proper notice of set down had been

dispatched to the applicant. It was argued before me that, as the Commissioner apparently solely relied on this facsimile transmission slip in the CCMA file as proof that the applicant had been notified of the set-down, he reached a finding that was not rational or justifiable in relation to the material before him. I concur with this proposition.

[11] Commissioners ought by now to appreciate the inherent danger of accepting facsimile transmission slips as conclusive proof that notification of legal proceedings had taken place.

[12] It is clear that, in terms of CCMA Rule 21, read with CCMA Rule 30(2), a Commissioner is required to ensure that the party who had failed to attend proceedings had been properly notified of the date, time and venue of the proceedings before making any decision to proceed in the absence of that party or to adjourn the proceedings to a later date.

[13] As was held in Northern Province Local Government Association v CCMA & Others [2001] 22 ILJ 1173 (LC), at 1186G-I, notice of an arbitration hearing is not a process to be "served" on the parties. Accordingly the Court found at 1186I that:

> "…the presumptions inherent in the statutory definition of "serve"

> can have no bearing on the weight which the second respondent (the Commissioner) ought to have given to the evidence of the (facsimile) transmission slip".

The Court continued at 1187D:

> "Axiomatically, in deciding whether or not a fax transmission was received, proof that the fax was indeed sent creates a probability in favor of receipt, but does not logically constitute conclusive evidence of such receipt".

[14] Similarly, in Halcyon Hotels (Pty) Ltd t/a Baraza v CCMA & Others [2001] 8 BLLR 911 (LC) at 914C-E, the Court, faced with similar facts to the matter under consideration herein, held that:

> "...A telefax transmission slip or registered mail slip is only *prima facie* proof that a document has come to the knowledge of the party on whom it has been served. In any event, it should be noted that there is a clear distinction between service and notification. Service is defined in terms of Rules 1 and 3 of the Rules regulating CCMA proceedings (now mirrored in Rules 5 and 41) to be limited to parties to the dispute serving documents on each other. This clearly excludes notification by the CCMA. That much is also clear from Rule 23 [now Rule 30(2)] in terms of the latter and based on general principle, the second respondent (the Commissioner) should have satisfied himself that the parties had been properly notified".

The Court concluded at 914G-H:

> "The second respondent (the Commissioner) placed undue emphasis on the technical definition of service and the fact that the transmission slip shows a successful transmission. This is in no way conclusive proof that there was proper notification and due regard should have been had to the facts that the applicant placed before him. The same argument holds true for the registered mail. Applicant stated under oath that it never received it. There was no evidence to the contrary. I am satisfied that the arbitration award was erroneously made in the absence of the applicant and thus falls squarely within section 144(a) of the Act".

[15] In the matter under consideration, the Commissioner likewise accepted the facsimile transmission slip as proof of service. The document in and by itself, and on the face of it, certainly does not provide conclusive proof that the applicant had been notified of the arbitration set-down. The Commissioner, at the time of deciding to proceed with the arbitration in the absence of that party, was in my view not justified in assuming that he may do so on the documents or evidence before him. Particularly as the applicant's allegation that it had not received this notice of set-down stood uncontested, I believe that the Commissioner, in addition to ignoring this uncontroverted fact, in the rescission application again relied on the transmission slip as conclusive proof that the applicant had been notified of the arbitration set-down. This amounts to a reviewable misdirection. I believe the Commissioner's approach in the rescission award, and his conclusions arrived at, are not justifiable having regard to the reasons given therefore and the material which was before the Commissioner.

[16] It would also appear as if the Commissioner, in reaching his conclusion, had regard to a number of facts appearing from the CCMA file, and from which the Commissioner drew adverse inferences. He in his rescission award refers to the fact that the applicant had not in the course of the telephonic

conciliation hearing objected to the use of the fax number in question. The applicant contends, correctly so I believe that it was not afforded an opportunity to present its case on this point to the Commissioner or to address any concerns the Commissioner might have had in this regard.

[17] The applicant further contended that it appears from the answering affidavit of Kalanda that he in fact filed opposing papers in the rescission application. These papers were not properly served on the applicant and the applicant contended that it had no opportunity to respond thereto.

[18] Clearly implicit in the requirement of a fair hearing is the need for full disclosure of material information to the affected party, which in turn of course requires that the person affected by impending administrative action be "put in possession of such information as will render his right to make representations a real, and not an illusory one". (See Heatherdale Farms (Pty) Ltd v Deputy Minister of Agriculture 1980(3) SA 476 (T) 486G)

[19] In similar vein it was held in Yeun v Minister of Home Affairs 1998(1) SA 958 (C) at 965B-C that:

> "In this connection, it must be remembered that the right to a hearing also implies the right to be informed of facts and information detrimental to the interests of a private individual. It is not necessary that this information be given in the exact form in which it was received, but essential facts should be divulged to the interested person to enable him to reply".

[20] I am of the view that the Commissioner having taken material into account to the detriment of the applicant without having afforded it any opportunity to state its case on these aspects did amount to a violation of the *audi alteram partem* principle and rendered the proceedings irregular from this point of view as well.

[21] For all these reasons I am satisfied that the rescission ruling falls to be reviewed and set aside. I am satisfied that the arbitration award was erroneously made in the absence of the applicant.

[21] The matter was opposed. I am of the view that there are no reasons why the costs should not follow the result. The following order is made herein:

1. The late filing of the review application is condoned.
2. The rescission ruling of the third respondent under case number WE2948/05 dated 8 September 2005 is reviewed and set aside.
3. The aforesaid rescission ruling is replaced with the following ruling:

"In the premises the arbitration award under case number WE2948/05 dated 12 July 2005 is rescinded".

4. The first respondent is directed to re-enrol case number WE2948/05 for arbitration before a Commissioner other than the third respondent.
5. The first respondent is ordered to pay the applicant's costs of suit.

Deon Nel

Acting Judge of the Labour Court

Date of Hearing: 22 November 2006

Date of Judgement: 15 March 2007

Appearances:

For the Applicant: Advocate G A Leslie.

Instructed by Deneys Reitz Attorneys.

For the Respondent: Mr J K Kalanda (in person)