

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: J4903/00

In the matter between:

FOSCHINI GROUP (PTY) LTD

Applicant

and

COMMISSION FOR CONCILIATION,  
MEDIATION AND ARBITRATION

First Respondent

W J HUTCHINSON

Second Respondent

SARAH NKABINDE

Respondent

Third

## JUDGMENT

FRANCIS J

### *Introduction*

1. This is an application to review and set aside a ruling made by the second respondent (“the commissioner”) on 5 September 2000 under case number GA 33402 in terms of which he dismissed the applicant’s application for rescission of the commissioner’s award of 27 July 1999. The third respondent opposes the application.

### *Background facts*

2. The third respondent was employed by the applicant as a floor manager at its Eloff Street store, Johannesburg.

3. On 3 and 8 April 1998, the third respondent attended a disciplinary enquiry to answer charges of gross misconduct. It was alleged that she had breached the company employment procedure when employing contract workers to permanent positions and in doing so, received personal gain. This, it was alleged, led down to the breakdown in the trust relationship.

4. The third respondent was found guilty as charged and was dismissed on 9 April

1998. The finding and sanction of dismissal were upheld at an appeal hearing on 29 and 30 April 1998.

5. The matter was referred to the first respondent (“the CCMA”) for conciliation on 12 May 1998, and conciliation having failed, to arbitration. The arbitration hearing was scheduled for 10 March 1999.

6. The arbitration hearing was postponed at the request of the applicant and with the agreement of the trade union which represented the third respondent. The applicant had requested a postponement on the grounds that it intended to call several witnesses and since the matter had been set down for the afternoon, the time allocated for it would have been insufficient and further that one of its witnesses was not available on the scheduled date. The CCMA was requested to allocate a new date and to reschedule the arbitration hearing for a full day in view of the number of witnesses that would be required to testify.

7. During or about August 1999 the third respondent reported for work at the Eloff Street store stating that the CCMA had found her dismissal to be substantively unfair and ordered that she be reinstated. The applicant was not aware that the arbitration had been rescheduled, and had not received any arbitration award. The applicant requested a copy of the award. The applicant then discovered that an arbitration hearing had taken place on 13 July 1999 presided over by the commissioner. The commissioner had in the absence of the applicant determined that the dismissal of the third respondent was substantively unfair. The commissioner had ordered that the applicant should reinstate the third respondent with retrospective effect.

8. The applicant applied for the rescission of the award by way of a letter addressed to the commissioner dated 6 September 1999. The following appears from the letter:

*“Dear Sir*

*Re: APPLICATION FOR RESCISSION OF AWARD - GA33402  
SACCAWU obo NKABINDE v FOSCHINI*

*We refer to the above matter and the Arbitration dd. 27 July 1999.*

*The company as Respondent had no knowledge that this matter was set down to be heard on 13 July 1999. We have made every effort to establish where this notice was sent, as the previous fax was directed to the Human Resources office (see attached – fax: 922 8191).*

*From the attached records it is clear that the Respondent has shown every intention to defend this matter (see attached). The company has a policy to attend & defend every Arbitration which is set down.*

*The Respondent’s first knowledge of the award was when the applicant and her union representatives arrived at the store to request compliance with the award. To date no copy of the award has been received by the company from the CCMA. In light of the above, we therefore request that the Arbitration award be rescinded. The company believes that we have a case to put forward and there is a strong prospect of success.*

*Yours faithfully*

*LIZETTE BESTER*

*HUMAN RESOURCES ”.*

9. The third respondent responded to the application for a rescission and stated

amongst others that the application was frivolous and did not comply with an application in that it did not deal with the reasons for the application for rescission, the prospects of success, prejudice to both parties and importance of the case.

10. The applicant replied with a supplementary submission and stated amongst others that it was not a prerequisite to deal with the prospects of success in the rescission application but that it had good prospects of success. The applicant indicated that it would elaborate further at the rescission hearing.

11. The commissioner made a ruling on or about 5 September 2000 dismissing the application for rescission.

12. The applicant seeks to review and set aside that ruling.

*The commissioner's ruling*

13. It is common cause that at the commencement of the proceedings the commissioner informed the applicant that it should have dealt with the prospects of success to establish whether there was a *bona fide* defence. The applicant's representative, Ms Bester, was advised that she could, if she wished, apply for a postponement of the matter to file a comprehensive application. Ms Bester applied for a postponement which was refused on the basis that the applicant had been given adequate time to consider its position prior to the hearing.

14. Ms Bester insisted that two well known labour consultants had advised her that it was not necessary to deal with the prospects of success. On the question of prospects of success the commissioner found that Ms Bester did not have personal knowledge of the matter and that little weight could be attached to her submissions. He found that no witnesses were in attendance to substantiate the allegations. He found that the explanation for the failure to attend the hearing was not altogether satisfactory and that the applicant's defence was not dealt with in a proper manner which would allow a meaningful evaluation of its veracity.

*The applicable legal principles*

15. Section 144 of the Act deals with variation and rescission of arbitration awards. At the relevant time of the rescission application this section was not supplemented by any rules stipulating the manner in which such applications had to be brought. The section provides that:

*"Any commissioner who has issued an arbitration award, acting of the commissioner's own accord or, on the application of any affected party, may vary or rescind an arbitration award*

- (a) erroneously sought or erroneously made in the absence of any party affected by that award;
- (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
- (c) granted as a result of a mistake common to the parties to the proceedings."

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. In this regard see *Northern Province Local Government Association v CCMA & Others* (2001) 22 ILJ 1173 (LC), and in particular at paragraphs 15 to 17 of the judgement.

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.

18. Section 138(1) of the Act provides: -

*"The commissioner may conduct the arbitration in a manner that the commissioner considers appropriate in order to determine the dispute fairly and quickly, but must deal with the substantial merits of the dispute with the minimum of legal formalities".*

19. At the time when the applicant brought the rescission application, there were no CCMA rules that were binding on the parties. There was nothing irregular about a party bringing such an application by way of a letter addressed to the CCMA. To establish good cause for failure to attend the arbitration, an applicant should furnish an explanation of his/her default in sufficient detail to enable the CCMA to understand how it really came about and to assess his/her conduct and his/her motives.

20. Where a party at all times intended to defend proceedings and its default is not wilful, then though the party may formally have received notice of the proceedings, the granting of an award in that party's absence may constitute an error sufficient to justify the rescission of the application. Even if no satisfactory explanation is given for the party's default, other factors, such as the strength of the defaulting party's case, should be taken into consideration.

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. 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.

#### *Analysis of the facts and arguments raised*

22. The commissioner had found that the applicant had not delivered a formal application for a rescission. I am of the view that the commissioner adopted an unduly technical approach that was inconsistent with the provisions of the Act, and the guidelines for proceedings in the CCMA at the applicable time. He attached undue weight to the fact that no formal application (a notice of motion supported by an affidavit) had been brought by the applicant. The commissioner in this regard failed to take into accounts that there was no formal requirement on the rules of the CCMA to make an application along the lines that he suggested. Section 144 of the Act made no such requirement.

23. It was the applicant's case that the notice of set down was not sent to the applicant. The applicant's representative was advised that there was no need to deal with wilful default. She only discovered at the hearing after she and the third respondent inspected the commissioner's file that a notice was sent to her. This was however not brought to her attention. She then requested a postponement to deal with the question of prospects of success. This was after she had been advised by the commissioner to do so. He refused the application and proceeded to deal with the question of prospects of success.

24. The commissioner's refusal to grant the applicant a postponement during the rescission hearing was grossly irregular. The applicant was represented by a layperson. The refusal to grant such an application constituted gross irregularity as it had the effect of seriously prejudicing the applicant's case. The commissioner had failed to apply his discretion fairly and in a judicious manner.

25. The commissioner applied an incorrect test in requiring the applicant to call witnesses to establish that it had a *bona fide* defence to the third respondent's claim. In finding that the applicant should have, the commissioner committed a material error of law which has resulted in a grave injustice to the applicant. The commissioner misunderstood the nature of the proceedings before him. The commissioner's failure to grant the applicant an opportunity to call witnesses (by adjourning the proceedings for a short while) was grossly irregular and unreasonable.

26. By refusing the applicant the opportunity to call witnesses, the commissioner ignored the principle of *audi alteram partem* and denied the applicant a proper opportunity to be heard which prevented a fair trial of the issues. In my view, the failure to observe the *audi alteram partem* renders the decision invalid. He misconceived the nature of the discretion conferred upon him in the rescission proceedings.

27. The question that remains to be decided is whether I should refer the matter back to the CCMA or deal with the rescission application myself. Mr Motane who appeared for the third respondent urged me to deal with the rescission application and to refer the matter to the CCMA for arbitration.

28. It is clear from the papers that the applicant did not abandon its defence against the third respondent. There were sufficient facts that were placed before the commissioner that indicates that the applicant has prospects of success in the matter. The rescission application is granted.

29. This is not a matter where costs should follow the results.

30. In the circumstances it is ordered that:

- (a) The application for a rescission of the commissioner's ruling is granted.
- (b) The arbitration award given under case number GA33402 is rescinded.
- (c) The CCMA is to set the arbitration down for a hearing before another commissioner by giving notice to both parties.
- (d) There is no order as to costs.

FRANCIS J

FOR THE APPLICANT : C TODD OF BOWMAN  
GILFILLAN INC

FOR THE THIRD RESPONDENT : A B MOTANE UNION  
OFFICIAL

DATE OF HEARING : 3 MAY 2002

DATE OF JUDGMENT : 9 MAY 2002