

**IN THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)**

CASE NO : JR1069/03

In the matter between:

POTCHEFSTROOM CITY COUNCIL

APPLICANT

and

**THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

FIRST RESPONDENT

T MAUMAKWA N O

SECOND RESPONDENT

R J WILLIAMS

THIRD RESPONDENT

J U D G E M E N T

LEEuw AJ:

Introduction:

[1] The Applicant has approached this Court seeking an order Reviewing and setting aside the “Rescission Ruling” by the Second Respondent (“the Commissioner”). The Commissioner refused to grant the application brought by the Applicant,

wherein Applicant sought an order to rescind a default Arbitration Award granted in the absence of the Applicant.

[2] The Third Respondent (Williams), who is an employee of Applicant, referred a dispute to the first Respondent (CCMA) alleging that the Applicant committed an Unfair Labour Practice by promoting one Fanie Sefako, also an employee of the Applicant, to a post of Superintendent instead of him (Williams), who was also qualified to be appointed to that post.

[3] The following award was made in favour of Williams by the Arbitrator, Prakash Roopa:

“6.1 I direct that the respondent is to pay the applicant the remuneration and benefits for the position of superintendent he had applied for; effective from the time Mr Sefako was appointed into such position.

6.2 This remuneration and benefits should be paid to him until he is promoted to such position which should have the effect of him receiving such remuneration or benefits that exceed that as I have directed, or upon the ruminantion of the contract of employment between the parties, whichever occurs sooner.”

Rescission Proceedings:

[4] At the hearing of the Rescission Application the Applicant was represented by Itumeleng Mosala (Mosala), who was then acting as the Human Resources Officer. A formal Application for Rescission in terms of section 144 of the Labour Relations Act No 66 of 1995 (The Labour Relations Act) was served on

Williams on 24 February 2003 and filed with the CCMA. There is nothing in the file to indicate that Williams opposed the application save for a handwritten letter dated 11 March 2003 and addressed to the Applicant and the CCMA, wherein he made allegations disputing certain facts in the Applicant's affidavit and himself stating facts which tend to prove that Applicant was notified about the Arbitration hearing.

- [5] Both parties to the rescission proceedings appeared on their own. The Commissioner conducted an informal enquiry pertaining to whether or not the Applicant was properly notified to attend the Arbitration proceedings.

- [6] Despite the fact that Williams had not filed opposing papers, the Commissioner allowed both parties to present their side of the story. The Commissioner allowed them to cross-examine each other, despite the fact that their evidence was not given under oath.

- [7] He thereafter summarized the two versions, and analysed same under the heading “**Analysis of Evidence and Arguments.**” Having made reference to section 144 of the Labour Relations Act, the Commissioner came to a finding that the Applicant was properly notified about the Arbitration hearing and consequently refused to rescind the Arbitration Award.

Were the grounds for rescission properly considered by the Commissioner?

[8] The Commissioner laid emphasis on whether or not the Applicant was properly notified about the date of the Arbitration hearing, which service was effected by telefax.

[9] The Commissioner did not call for any supporting affidavit or corroboration with regard to the issue of service of the Application for Arbitration as well as the notice of set down sent by the CCMA to the Applicant. It is not clear, from the submissions made before him, whether the person who received the telefax notice, was the appropriate person on whom service ought to have been effected.

[10] Rule 5 (1) of the CCMA Rules provide that:

“1 A party must serve a document on the other parties –

(a) by handing a copy of the document to –

(i) the person concerned;

(ii) a representative authorized in writing to accept service on behalf of the person;

(iii) a person who appears to be at least 16 years old and in charge of the person’s place of residence, business or place of employment premises at the time;

(iv) a person identified in subrule (2);

(b) -----

(c) by faxing or telefaxing a copy of the document to the person's fax or telex number respectively, or a number chosen by that person to receive service;

(2) A document may also be served

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(e) on a municipality, by serving a copy of the document on the municipal manager or any person acting on behalf of that person.”

[11] The Commissioner did not consider this Rule especially Rule 5 (2) (e) when he enquired as to whether the Applicant was properly served with the notices. Such enquiry was crucial for the purpose of establishing whether Applicant's failure to attend was willful or grossly negligent.

[12] In addition, in an application for rescission, it behoved the Commissioner to enquire whether the Applicant had a *bona fide* defence on the merits. See *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) at 476 – 477 referred by Counsel for the Third Respondent.

[13] The parties hereto are lay persons and there was a duty on the Commissioner to establish these grounds from Mosala, as these were necessary to determine an application of this nature.

[14] Counsel for the Third Respondent referred to a number of decisions of our Courts which held that “an order or judgement is erroneously granted” if there was an irregularity in the proceedings: See *De Wet v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1038 D; and where, if at the time the order or judgement was granted, there were facts which the presiding judicial officer was unaware of, which, if such facts were known to him, would have precluded him or her from granting the judgement at issue. See *Nyingwa v Moolman N O* 1993 (2) SA 501 (TK) at 510 G; *Athmaram v Singh* 1989 (3) SA 953 (1) at 956 D & 956 I; *Promedia Drukkers & Uitgawes (Edms) Bpk v Kaimowitz* 1996 (4) SA 411 (C) at 471 G-G.

[15] There is no transcribed record of the Arbitration proceedings filed with the papers. The Arbitrator states in the Arbitration Award, that the Respondent (referring to the Applicant in this matter) did not attend the hearing. He however failed to endorse in the Arbitration Award as to how he satisfied himself that the Applicant was properly notified about the hearing.

[16] Furthermore, Williams’ dispute of an unfair labour practice was that Sefako was promoted to a position which he (Williams) was better qualified to occupy. It was therefore necessary to join Sefako as a party to the proceedings in view of the fact that Sefako has a substantial interest in the outcome of the proceedings.

[17] Rule 26 of the CCMA Rules provides that:

“A Commissioner may make an order joining any person as a party in the proceedings if the party to be joined has a substantial interest in the subject matter of the proceedings.”

Rule 3 (a) of the CCMA Rules provides that the Commissioner may make such an order *mero motu*.

[18] This issue was not raised by the Applicant in this matter. However, in the interest of justice, I am entitled to raise this issue in the circumstances of this case. I am of the view that there was an irregularity committed by the Arbitrator during the arbitration proceedings.

[19] If I were to review and set aside the Commissioner’s rescission ruling, it would under the circumstances be appropriate to set aside the Arbitrator’s Award as well. See *Cash Paymaster services (Pty) Ltd v Mogwe* 1999 (2) ILJ 610.

[20] Both parties hereto have filed Applications for Condonation. I deem it unnecessary to delve with the merits thereof, in view of the issues raised in respect of the Arbitration Award itself, which impact on the crux of the dispute between the parties hereto. I will not make a costs order against either of the parties hereto.

[21] I accordingly make the following order:

- (1) The Second Respondent's (Commissioner's) ruling dated 7 May 2003, in which he dismissed the Applicant's application for rescission of the Arbitration Award dated 26 January 2003 is hereby reviewed and set aside;
- (2) The Default Arbitration Award granted by the Arbitrator Prakash Roopa and dated 26 January 2003 under Case No NW 5461-02 is rescinded;
- (3) The unfair dismissal dispute instituted by the Third Respondent is referred back to the First Respondent (CCMA) for Arbitration *de novo* before a Commissioner other than the Second Respondent or Prakash Roopa.
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- (4) Both parties hereto succeed in their condonation applications.
- (5) Each party is ordered to pay its own costs.

M M LEEUW
ACTING JUDGE OF THE LABOUR COURT

APPEARANCES:

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