IN THE LABOR COURT OF SOUTH AFRICA
HELD AT PORT ELIZABETH

CASE NUMBER: P483/06

In a matter between:

TOTAL FACILITIES MANAGEMENT

COMPANY (PTY) LTD (T. F. M C):

APPLICANT

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION:
FIRST RESPONDENT

COMMISSIONER JULIA CAMERON N.O:

SECOND RESPONDENT

SOLIDARITY:

THIRD RESPONDENT

FREDERICK CORDIER :

FOURTH RESPONDENT

JUDGMENT

MOLAHLEHI J

Introduction

1] The applicant seeks and order to review and set aside the ruling of the second respondent ("the commissioner") dated 18 October 2006 under case number ECPE2651-06**.**

2] In terms of the ruling, the commissioner refused to grant the rescission application of a default award which she issued in favour of the fourth responded dated 4 October 2006 under the same case number. The fourth respondents opposed the application.

The background facts

3] The fourth respondent who had been in the employ of the applicant for a period close to 18 years was charged for referring to one of his colleagues, Mr DE Jager as "Boesman."

4] The fourth respondent conceded during the arbitration hearing to having referred to De Jager as "Boesman." The response from De Jeger when the statement was made was to ask "wie as jou Boesman."

5] After two weeks of uttering the said statement the fourth respondent was summoned to the office of the human resource manager. Before going to the

office the fourth respondent telephonically contacted De Jager and enquired as to why he was summoned to the office of the human resources manager. De Jager informed him that he had lodged a complaint relating to the use of the word “Boesman” on him.

6] According to the fourth respondent he apologized to De Jager during the same telephone conversation. The fourth respondent further stated that in addition to accepting the apology, De Jager undertook to withdraw the complaint. He was, however, later informed by De Jager that the initiator of the disciplinary hearing and the human resource manager insisted in proceeding with the case against him.

7] The fourth respondent was disciplined and dismissed for the alleged abusive language. Subsequent to his dismissal the fourth respondent referred the dispute concerning his dismissal to the CCMA.

8] It is common cause that the arbitration hearing was conducted in the absence of the applicant. The applicant did not attend the arbitration hearing because the notice of set down was faxed to a computer fax number belonging to a former employee of the applicant. This fax number was no longer in use because the employee to whom the computer was assigned to, and through

which the fax would have been transmitted had resigned. The documentation in this computer could not be accessed because no one in the employ of the applicant had the password to access it.

9] In finding in favor of the fourth applicant in the default award the commissioner reasoned as follows:

> "*In the chairperson's own report it is state that this behavior is accepted as a norm in the Southern Region and the management condone such an unacceptable conduct and referred to it as a gesture or joke. The Chairperson went so far as to report that "the alleged offender to became the victim of such circumstances "the alleged offender became the victim of such circumstances and admitted that the purpose of the outcome of this hearing was to serve as a precedent for similar future incidents or offenses"*

10] The commissioner further found the dismissal to be substantively unfair and ordered the reinstatement of the fourth respondents including that he be compensated in the amount of R31600-00.

The commissioner's ruling

11] In considering the recession application the commissioner accepted as reasonable the explanation of the applicant that it did not attend the hearing

because it did not receive the fax intended to notify it of the date of the hearing. In this regard the commissioner found that the applicant was not in willful default.

12] However to the commissioner refused to grant the condonation on the basis that the applicant *"failed to address the crux of the substantive unfairness as indicated by the commissioner in that award."*

13] The commissioner arrived at this conclusion based on the reasons set out in her default award and in particular relying on the contents of the report of the chairperson of the disciplinary hearing, which is quoted above. The other reason for declining to grant the condonation is set out in the commissioners ruling in the following terms:

> *"It is trite that an employer may not discipline an employee for conduct that has become accepted as the norm without first informing or employees that it intends from here on to take a firmer stance on the matter. It would have been appropriate in this instance for the respondents to have given the applicant a written warning, and thereafter to have released a directive to all employee is regarding the respondent's renewed policy of zero tolerance of such conduct. It follows from the above evaluation that I undoubtedly find the dismissal of the applicants to be substantively unfair."*

The applicable legal principles

14] The rescission applications of the CCMA arbitration awards or rulings are governed by section 144 of the Labour Relations Act 66 or 1995 which provides as follows:

> "***Variation and rescission of arbitration awards and rulings***
> *Any commissioner who has issued an arbitration award or ruling, or any other commissioners appointed by the director for that purpose, may on that commissioner's own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling-*
>
> *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 omissions, but only to the extend of that ambiguity, error or omission; or*
>
> c) *granted as a result of a mistake common to the parties to the proceedings."*

15] The question of whether *"good cause"* is required when considering rescissions under section 144 has now been settled by the unreported judgment

of the Labour Appeal Court in the *Shoprite Checkers v CCMA and others* case number PA5/05.

16] The view that good cause was not required in terms of section 144 was initially expressed by Seady AJ in the case of *Sizabantu Electrical Construction v Guma (1999) 4 BLLR 387(LC)* and followed by the *Shoprite Checkers v Commission for Conciliation Mediation and Arbitration* (2005) 26 ILJ 828 (LC). The majority of the Labour Court judgments on the other hand held that good cause was required when applying for rescission under section 144. In this regard see the cases of *Northern Province Local Government v CCMA and others* (2001) 22 ILJ 1173 (LC), *Foschini Group v Commission for Conciliation, Mediation and Arbitration* (2002) 23 BLLR 1048(LC) and *Northern Training Trust v Maake and others* (2005) 26 ILJ 1119(LC).

17]

18] The Labour Appeal Court in the *Shoprite Checkers case* held that even though section 144 is silent as to the need to show good cause when applying for recession of an arbitration award such a requirement should be read into the section. The court further held that the test of good cause in an application for rescission involves the consideration of two factors namely, the explanation

for the default and whether the applicant has a prima facie defense.

19] Jappie AJA, in the *Shoprite Checkers (supra*) writing judgment in which Zondo JP and Khampepe AJA concurred, quoted with approval the decision in the *Northern Province Local Government case (supra)* at page 545 par 16 where the court when dealing with the same issue said:

> "An applicant for the rescission of a default judgment must show good cause and prove that he at no time he denounced his defense, and that he has a serious intention of proceeding with the case. In order to show good cause an applicant must give a reasonable explanation for his default, his explanation must be made bona fide and he must show that he has a bona fide defense to the plaintiff's claim."

20]

21] The court went further and again, quoted with approval the decision in *MM Steel Construction CC v Steel Engineering and Allied Workers Union of SA and others* (1994) 15 ILJ 1310 (LAC) at paras J-A, where it was held:

> "Those two essential elements ought nevertheless not to be assessed mechanistically and in isolation. While the absence of one of them would usually be fatal, where they are present the other to be weighed together with the relevant factors in determining whether it should be fair and just to grant the

indulgence"

22] In the *Shoprite Checkers' case*, the court found on the facts, that the commissioner:

> *"Failed to weigh together all the relevant factors in determining whether it was just and fair and therefore, whether good cause have been shown for the rescission of the arbitration award."*

23] There is no doubt, turning to the facts of the present case that the commissioner had a good understanding of the legal principles to be applied when considering a rescission application. In this regard she relied on the case of *Sizabantu Electrical Construction v Gumbi and Others* (1999) 20 ILJ 673 (LC) at 675 where the court held that the requirements of good cause entails the following:

> "*The applicant must give a reasonable explanation for his default. If it appears that the default was willful or that it was due to gross negligence, the court should not come to his assistance;*
>
> *the application must be bona fide and not made with the intention of mainly delaying plaintiff's claim;*
>
> *the applicant must show that he has a bona fide defense to the plaintiff's claim. It is sufficient if it makes a prima facie defense in the sense of setting out averments which, if established at the trial, wood and ten to him to the*

relief as for."

24] The commissioner also relied on *Chetty v Law Society of the Northern Transvaal* 1985 (2) SA 765 (A) at to 765 D-E where the court held that:

> "*A party showing no prospects of success on the merits will fail in an application for rescission of the default judgment no matter how reasonable and convincing the explanation of his default "*

25] In *Kaefer Insulation (PTY) LTD to v President of the Industrial Court and other* (1998) 19 ILJ 567 (LAC) at para 27 the court held:

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

26] 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 chance of succeeding when the main case is heard. The applicant need not deal with the merits of the case. In this regard to see the case of *Foschini (supra).*

27] In this case, whilst the principles governing the consideration for a rescission application were properly set out to by the commissioner, the problem arose

with the application thereof. The commissioner misconceived the nature of the discretion in that she failed to apply the principles governing how to approach the concept of prospects of success in as far as the facts and circumstances of this case were concerned.

28] The commissioner considered the prospect of success against the evidence, which was presented by the fourth respondent during the hearing where the applicant was absent which absence the commissioner found to have not been wilfull. The essence of her conclusion is that she required the applicant to prove that the dismissal was not unfair. To this extent her conclusion was as follows:

> "*This evidence is, therefore undisputed and it is the evidence on which the award was based. It is for this reason that I find that the applicant does not have a bona fide case."*

29] In its application for rescission of the arbitration award the applicant indicated that the dismissal was effected after following a fair procedure set out in its disciplinary code. The charge was based on the provisions of the disciplinary code, which also provides for a sanction to be imposed if an employee is found guilty of racism. The fourth respondent has not denied having made the statement he was accused of.

30] It is apparent from the above conclusion that the standard applied by the commissioner with respect to the prospects of success was much higher than the one required by the authorities she relied on. It cannot be said that there were no prospects of success as the commissioner herself found that:

"The applicant's prospect of success are, therefore, minimal."

31] In other words the commissioner did not rule out the chance, though least possible, of the applicant succeeding in the main case. On this ground alone the commissioner's ruling stands to be reviewed and set aside.

32] The question that remains is to decide is whether I should rescind the arbitration award or remit the matter back to the CCMA for a rehearing. In my view and on the authority of the *Shoprite Checkers (supra),* there is no need to remit the matter back to the CCMA.

33] In the circumstances of this case fairness would not support the approach that the cost should follow the result.

Order

34] In the premises the following order is made:

(a) The ruling of the commissioner dated 17 October 2006 is review and set aside.

(b) The arbitration award issued under case number ECPE 2651-06 and date 4 October 2006 is rescinded.

(c) The CCMA is to set the arbitration down for a hearing before a commissioner other than the second respondent.

(d) The applicant is to furnish the CCMA with its address and contact details where it will receive notices from both the CCMA and the fourth respondent.

(d) There is no order as costs.

MOLAHLEHI J

DATE OF HEARING : 21 AUGUST 2007

DATE OF JUDGMENT : 24 AUGUST 2007

APPEARANCES

For the Applicant : Advocate R B Wade

Instructed by : Chris Baker & Associates

For the Respondent: E van Niekerk of Solidarity Trade Union