

IN THE LABOUR COURT OF SOUTH AFRICA.  
**HELD IN PORT ELIZABETH**

**CASE No: P228/06**

**IN THE MATTER BETWEEN:**

**WIMPY GAME CENTRE**

**APPLICANT**

**AND**

**THE COMMISSION FOR CONCILIATION  
MEDIATION AND ARBITRATION**

**FIRST RESPONDENT**

**COMMISSIONER MATSHAKA**

**SECOND RESPONDENT**

**ICHAWU obo SAMANTHA CROWLEY**

**THIRD RESPONDENT**

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**JUDGMENT**

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**MOLAHLEHI J**

**Introduction**

- 1] The applicant seeks an order to review and set aside the ruling, issued by the second respondent under case number WE11519 / 05 on 28 November 2005, in terms of which

the second respondent refused to rescind the default award issued under the same case number.

- 2] The default award was issued on 24 November 2005, following the referral of an unfair dismissal to the first respondent by the third respondent. The dismissal of the employee arose out of an alleged refusal to obey lawful instruction and insubordination. According to the applicant she was afforded an opportunity to consider apologizing for her conduct but refused to do so.
- 3] In its founding affidavit the applicant states that the reason for the failure to attend the arbitration hearing was due to the fact that it did not receive the notice of set down.
- 4] In its criticism of the award the applicant contended that the second respondent *“lost sight of the fact that proof of the notification amounts to prima facie proof that the notice have been received by the applicant and that such prima facie proof could be discharged by the applicant stating that it did not receive the same.”*
- 5] The applicant further contended that the second respondent ignored the applicant's evidence that it did not receive the notice notifying it of the date of the hearing and that since the arbitration was brought to its attention *“has looked for the fax in its*

*records to no avail.”*

- 6] The commissioner in his ruling found that the applicant was notified by means of a fax which was successfully transmitted in the 24 October 2005 and it was on this basis that the commissioner ruled that the award was not issued erroneously in terms Section 144 of the LRA.
- 7] It is apparent from the reading of the ruling that the only issue that the commissioner concerned himself with was the issue of whether or not there was proper service. It is in this regard apparent that the commissioner did not apply his mind to the issue of whether or not the applicant had shown good cause for not attending the arbitration hearing. The other issue which the commissioner failed to consider related to the prospects of success.
- 8] It is apparent from the reading of the default award and founding affidavit of the applicant that the prospects successes in defending its case are good for the applicant. It seems even from the evidence of the third respondent which was not tested by way of cross-examination by the applicant, she does concede to the issue of insubordination.

## **The applicable legal principles**

- 9] The rescission applications of the CCMA arbitration awards or rulings are governed by section 144 of the Labour Relations Act 66 of 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.”*

- 10] 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.

11] 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).

12] 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.

- 13] 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.”*

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

*“These 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 the present the other to be weighed together with the relevant factors in determining whether it should be fair and just to grant the indulgence”*

15] In the *Shoprite Checkers’ case*, the court found on the facts, that the commissioner:

“In my view, the second respondent, 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. It follows that the second respondent did not apply his mind to all the issues before him and if he did, he ought to, in the circumstances of this case, to have rescinded his earlier default award.”

16] In 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, would entitle him to the relief as for."*

17] In the circumstances I make the following order:

- (a) The ruling issued by the second respondent is reviewed and set aside.
- (b) The arbitration award issued by the second respondent is rescinded.
- (c) The first respondent is directed to enroll the matter for arbitration.
- (d) There is no order as to costs.

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**MOLAHLEHI J**

**DATE OF HEARING : 06 JUNE 2007**

**DATE OF THE ORDER : 21 SEPTEMBER 2007**

**DATE OF THE TYPED JUDGMENT: 17 OCTOBER 2007**

**APPEARANCES**

**FOR THE APPLICANT : ADV M GROBLER**

**INSTRUCTED BY : DE BEER, UNWIN & CO.**