REPUBLIC OF SOUTH AFRICA

THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 1479 / 2012

In the matter between:

SATINSKY 128 (PTY) LTD t/a JUST GROUP AFRICA **Applicant**

and

DISPUTE RESOLUTION CENTRE **First Respondent**

COMMISSIONER W FERREIRA **Second Respondent**

DALEEN SWANEPOEL **Third Respondent**

Heard: **17 January 2013**

Delivered: **26 February 2013**

Summary: **Bargaining Council rescission proceedings – Review of proceedings, decisions and awards of arbitrators – Test for review – Section 145 of LRA 1995 –**

Requires the arbitrator rationally and reasonably consider the evidence as a whole – determinations of arbitrator compared with evidence on record in rescission – arbitrator's decision unreasonable and irregular – award reviewed and set aside

Bargaining Council rescission proceedings – Requirements for the proper consideration of rescission application – arbitrator failing to properly conduct rescission proceedings

Rescission applications – principles applicable to rescission applications – application of such principles by arbitrator unreasonable and irregular – award reviewed and set aside

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JUDGMENT

SNYMAN, AJ

Introduction

[1] This matter concerns an application by the applicant to review and set aside an arbitration award (in this case a rescission ruling) of the third respondent in his capacity as an arbitrator of the National Bargaining Council for the Motor Industry (DRC) (the first respondent). This application has been brought in terms of Section 145 as read with Section 158(1)(g) of the Labour Relations Act[1] ("the LRA").

[2] The matter before the first and second respondents concerned a rescission application brought by the applicant as a result of a default award granted against the applicant and in favour of the third respondent. In an award dated 31 March 2011, the second respondent dismissed the applicant's rescission application. In the founding affidavit in the applicant's review application, the applicant contended that this rescission ruling came to the attention of the applicant for the first time on

[1] 66 of 1995.

18 June 2012,[2] and it then promptly filed the review application on 22 June 2012. It is this rescission ruling by the second respondent that forms the subject matter of the current review application brought by the applicant.

Background facts

[3] This matter has a rather involved background. It all started when the applicant was sent a letter by the third respondent's attorneys on 1 October 2010 informing the applicant that there was an award given against the applicant and demanding compliance with such award. This letter also had attached the default award itself which was dated 23 August 2010. What is significant, for reasons as will be apparent hereunder, is that this letter was sent to telefax number 086 616 4177 which is the applicant's correct telefax number.[3]

[4] On 8 October 2010, the applicant filed a rescission application. The applicant stated in its founding affidavit to the rescission, at the time, that it never received the set down notice in this matter. Subsequent investigation showed that the arbitration hearing was set down for 19 August 2010 and that the set down notice had been sent on 16 July 2010 to fax number 086 616 4711 and not the applicant's actual fax number of 086 616 4177.[4] It was further apparent that the fax number 086 616 4711 was provided by the third respondent in her referral documents to the first respondent.[5]

[5] On 22 October 2010, arbitrator B J van Niekerk of the first respondent found that the applicant had shown good cause for the granting of rescission and rescinded the default award dated 23 August 2010.[6]

[6] The arbitration was then again set down for 9 February 2011. The notice of set

[2] Record of pleadings page 8 para 5.3.
[3] Record of pleadings page 45.
[4] Record of documents page 156 and 158.
[5] Record of documents page 167 and 179.

down was dated 22 December 2010 and was once again sent to the applicant at telefax number 086 616 4711.[7]

[7] The applicant then again did not appear at the arbitration on 9 February 2011, and once again, and on 17 February 2011, the third respondent's attorneys sent a letter to the applicant informing it that a default award that had been granted against the applicant and demanded compliance. The third respondent's attorneys attached this default award which was issued by arbitrator E Maree and was dated 10 February 2011 to this letter as well. The first page of the default award records the applicant's telefax number as 086 616 4711.[8] Once again, this letter by the third respondent's attorneys to the applicant was sent to telefax number 086 616 4177 and not the number 086 616 4711 used by the first respondent.[9]

[8] On 25 February 2011, the applicant once again applied for rescission.[10] The applicant specifically recorded in the rescission application that its telefax number was not 086 616 4711 but was actually 086 616 4177. The applicant contended that as the wrong telefax number was used, it never received notice of the set down of the arbitration for 9 February 2011. The applicant also in detail addressed the issue of prospects of success.

[9] The third respondent opposed the applicant's rescission application and filed an answering affidavit on 11 March 2011.[11] The third respondent contended that the telefax number 086 616 4711 was that of the applicant and that her attorneys used this telefax number successfully when communicating with the applicant and that the applicant received documents when her attorneys used this fax number. The third respondent stated that these documents were the arbitration award of August

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[6] Record of documents page 126
[7] Record of documents page 214 – 215
[8] Record of pleadings page 53 – 58
[9] Record of pleadings page 52
[10] Record of documents page 39 – 48
[11] Record of documents page 57 – 65.

2010, an application for a postponement[12] and the second arbitration award of February 2011. This of course is not correct, because as can be seen from what is set out above, the applicant actually received these documents when the third respondent's attorneys used telefax number 086 616 4177. The third respondent also refers to the fact that telefax number 086 616 4711 is on the business card used by the chairman of the applicant. The third respondent further stated that the applicant did not explain why notices sent to its representatives were not received.

[10] The applicant further contended that in the default award dated 10 February 2011, arbitrator Maree recorded that the set down notice had been sent to telefax number 086 616 4711 and that there was proper service on the applicant as a result, and that the third respondent's attorney, who was present, did not correct this.

[11] The second respondent then gave his rescission ruling, dated 31 March 2011, in terms of which the applicant's rescission application was dismissed. This ruling was not preceded by a hearing. It is this ruling that forms the subject matter of these proceedings.

The relevant test for review

[12] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others,*[13] Navsa AJ held that in the light of the constitutional requirement (in s 33 (1) of the Constitution) that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, the reasonableness standard should now suffuse s 145 of the LRA. The majority of the Constitutional Court set the threshold test for the reasonableness of an award or ruling as the following: '[i]s the decision reached by the commissioner one that a reasonable decision-maker could not reach?'[14] In *CUSA v Tao Ying Metal Industries and Others,*[15] O'Regan J held: '[i]t is clear…. that

[12] Record of documents page 73.
[13] (2007) 28 ILJ 2405 (CC).
[14] Id at para 110.
[15] (2008) 29 *ILJ* 2461 (CC) at para 134.

a commissioner is obliged to apply his or her mind to the issues in a case. Commissioners who do not do so are not acting lawfully and/or reasonably and their decisions will constitute a breach of the right to administrative justice.'

[13] The Labour Appeal Court had the occasion to fully ventilate the issue again in *Herholdt v Nedbank Ltd.*[16] In this judgment, the Court concluded:[17]

> 'Where a commissioner fails to have regard to material facts, this will constitute a gross irregularity in the conduct of the arbitration proceedings because the commissioner would have unreasonably failed to perform his or her mandate and thereby have prevented the aggrieved party from having its case fully and fairly determined. Proper consideration of all the relevant and material facts and issues is indispensable to a reasonable decision and if a decision maker fails to take account of a relevant factor which he or she is bound to consider, the resulting decision will not be reasonable in a dialectical sense. Likewise, where a commissioner does not apply his or her mind to the issues in a case the decision will not be reasonable.
>
> Whether or not an arbitration award or decision or finding of a commissioner is reasonable must be determined objectively with due regard to all the evidence that was before him or her and what the issues were. There is no requirement that the commissioner must have deprived the aggrieved party of a fair trial by misconceiving the whole nature of enquiry. The threshold for interference is lower than that; it being sufficient that the commissioner has failed to apply his mind to certain of the material facts or issues before him, with such having potential for prejudice and the possibility that the result may have been different. This standard recognizes that dialectical and substantive reasonableness are intrinsically interlinked and that latent process irregularities carry the inherent risk of causing an unreasonable substantive outcome.'

[14] The *Nedbank* judgment in is in any event in line with what Labour Appeal Court had earlier said in *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[18] when specifically interpreting the *Sidumo*

[16] (2012) 33 ILJ 1789 (LAC)
[17] At para 36 and para 39.
[18] (2008) 29 ILJ 964 (LAC) at para 92.

test. The Court held as follows: '[t]o this end a CCMA arbitration award is required to be reasonable because, if it is not reasonable, it fails to meet the constitutional requirement that an administrative action must be reasonable and, once it is not reasonable, it can be reviewed and set aside.'

[15] As the Labour Appeal Court in *Nedbank* referred with approval to the judgment in *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others,*[19] reference is made to the following extract from such judgment, where it was held as follows:

> 'In summary, s 145 requires that the outcome of CCMA arbitration proceedings (as represented by the commissioner's decision) must fall within a band of reasonableness, but this does not preclude this court from scrutinizing the process in terms of which the decision was made. If a commissioner fails to take material evidence into account, or has regard to evidence that is irrelevant, or the commissioner commits some other misconduct or a gross irregularity during the proceedings under review and a party is likely to be prejudiced as a consequence, the commissioner's decision is liable to be set aside regardless of the result of the proceedings or whether on the basis of the record of the proceedings, that result is nonetheless capable of justification.'

[16] In *Lithotech Manufacturing Cape - A Division of Bidpaper Plus (Pty) Ltd v Statutory Council, Printing, Newspaper and Packaging Industries and Others,*[20] the Court held:

> 'Even where the reasoning of the arbitrator may be criticized, this in itself does not render the award reviewable particularly where the ultimate result arrived at by the arbitrator is sustainable in the light of the record. I must, however, qualify this statement by pointing out that there may be cases where, although the ultimate conclusion reached by the commissioner or arbitrator is reasonable, the reasoning adopted by the arbitrator or commissioner is so flawed (even if the ultimate result is

[19] (2010) 31 ILJ 452 (LC) at para 17.
[20] (2010) 31 ILJ 1425 (LC) at para 18.

> reasonable), that it cannot be concluded that the arbitrator duly exercised his or her functions as an arbitrator by taking due consideration of matters that are vital to the dispute. In such circumstances the reviewing court may well be inclined to review and set aside the award.'

[17] In specifically dealing with the above principles when it comes to the review of a rescission ruling, the Court in *Martin v Commission for Conciliation, Mediation and Arbitration and Others*[21] held as follows:

> 'A reasonable decision maker in the present circumstances would apply the relevant test - in other words, the test referred to in *Northern Training Trust* and affirmed by the Labour Appeal Court in *Shoprite Checkers*. This required her to establish that the notice of set down was sent (which she did) and then to determine whether the applicant's default was wilful, and whether she had reasonable prospects of success in her claim. A commissioner's decision cannot be said to be reasonable when the commissioner fails to consider all the materially relevant factors prior to making that decision.'

[18] The applicant's application for the review of the rescission ruling of the second respondent must therefore be determined on the basis of the principles as set out above.

<u>The principles relating to rescission applications</u>

[19] As one of the central issues in the determination of this matter is whether or not the second respondent properly applied the principles relating to rescission applications, it is important to set out exactly what these principles are. The fact is that the failure by the second respondent to apply all the required principles in determining a rescission application as required by law would constitute a reviewable irregularity.

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[21] (2008) 29 ILJ 2254 (LC) at para 25.

[20] The basic test for determining a rescission application is found in the judgment of *Superb Meat Supplies CC v Maritz,*[22] where it was held as follows:

> 'The applicant must give a reasonable explanation of his default; his application must be made bona fide; he must show that he has a bona fide defence to the plaintiff's claim. This needs to be shown prima facie only and it is not necessary to deal fully with the merits of the case or to prove the case. It is sufficient to set out facts which, if established at the trial, would constitute a good defence. The defence must have existed at the time of the judgment.
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> In determining whether or not good cause has been shown, the court is given a wide and flexible discretion in terms of rule 31(3)(b). When dealing with words such as 'good cause' and 'sufficient cause' the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words. The court's discretion must be exercised after a proper consideration of all the relevant circumstances.'

[21] In specifically dealing with the rescission test in arbitration proceedings, the Court in *Shoprite Checkers (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[23] said the following:

> 'It seems to me that in applying s 144 of the Act a commissioner is in the same position as a judicial officer in the civil courts when considering an application for rescission.
>
> Moreover, s 3 of the Act directs any person applying the Act to interpret its provisions in such a way that it gives effect to the primary objects of the Act and for the interpretation to comply with the Constitution.
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> As there are circumstances which can be envisaged, such as in the present case, and which fall outside the circumstances referred to in s 144 of the Act, in such cases both logic and common sense would dictate that a defaulting party should, as a

[22] (2004) 25 ILJ 96 (LAC) at paras 21 and 22.
[23] 2007) 28 ILJ 2246 (LAC) at para 29 – 30; 33; 35.

matter of justice and fairness be afforded relief. It follows, that if one was to hold that s 144 of the Act does not allow for the rescission of an arbitration award in circumstances where good cause is shown and that an applicant who seeks rescission of an arbitration award was compelled to bring the application within the limited circumstances allowed by the wording of the section it could lead to unfairness and injustice. In my view this would be inconsistent with the spirit and the primary object of the Act referred to above. Furthermore, I am of the view that to interpret s 144 of the Act so as to include 'good cause' as a ground for rescission is to give the Act an interpretation that is in line with the right provided for in s 34 of the Constitution because, if s 144 is not interpreted in that way, a party who can show good cause for his default would be denied an opportunity to exercise his right provided for in s 34 of the Constitution despite the fact that he may not have been at fault for his default. That could be a grave injustice.

The test for good cause in an application for rescission normally involves the consideration of at least two factors. Firstly, the explanation for the default and, secondly, whether the applicant has a *prima facie* defence.'

[22] In *Northern Training Trust v Maake and Others,*[24] the Court said:

'The enquiry in an application for the rescission of an arbitration award is consequently bipartite. The first leg is one which is concerned with whether or not the notice of set-down was sent (for instance by fax or registered post). Should evidence show that the notice was sent, a probability is then created that the notice sent was received. The second leg to the enquiry is one which concerns itself with the reasons proffered by the applicant who failed to attend the arbitration proceedings. Such applicant needs to prove that he or she was not wilful in defaulting, that he or she has reasonable prospects of being successful with his or her case, should the award be set aside. However, the applicant needs not necessarily deal fully with the merits of the case.

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

[24] (2006) 27 *ILJ* 828 (LC) at paras 28 and 29.

injustices are done.'

[23] What the above authorities clearly show is that in the case of the determination of rescission applications in the CCMA or in bargaining councils, as the case may be, the arbitrator determining the same must conduct himself or herself in the same manner as a civil court would in making such determination. This requires a proper determination of the issue of whether "good cause" exists to rescind a default award. The determination of "good cause" requires a two tier investigation, the first being the consideration of the explanation for the default and the second being a consideration of the issue of prospects of success. Added to the two issues is a consideration whether the application was brought bona fide. Finally, there has to be considerations of fairness applied, so as to avoid any injustice being done. All these issues must be fully considered and dealt with in the reasons given by the arbitrator when making the rescission determination.

The issue of the explanation

[24] The first question then is what is required from an arbitrator in making a determination of the explanation submitted for the default as the first issue for consideration? In this regard, and in the judgment of *Martin v Commission for Conciliation, Mediation and Arbitration and Others,*[25] the Court said:

'Insofar as the application for rescission in the present instance required the commissioner to establish that her ruling had been erroneously made, there are two issues that, in my view, the commissioner failed to consider. The first is that the applicant was herself unaware that she was required to attend at the CCMA on 30 January...

In my view, therefore, the ruling made on 30 January was erroneously made. Insofar as the absence of the applicant on that date is concerned, there is no dispute that the notice of set down of the arbitration hearing on that date was sent and received. I

[25] Above n 21 at para 19 and 20.

have dealt with the applicant's explanation, in her affidavit filed in support of the application for rescission, for her failure to attend. There was patently no wilful default on her part...'

[25] The judgment in *Ndhlela v Transnet Ltd*[26] is instructive, and the following extract from the judgment is pertinent:

'An ingredient of the requirement that good cause be shown is that the element of wilfulness must be absent. The reasons for an applicant's absence or default must be set out because they are relevant to the question of whether or not the default was wilful. Before an applicant can be said to be in wilful default the following elements must be shown:

• knowledge that the action is being brought against him or her;

• a deliberate refraining from entering an appearance or appearing, though free to do so; and

• a certain mental attitude towards the consequences of default.'

I further regard the following extract from the judgment in *Ndhlela* as quite pertinent to the current matter, especially considering the third respondent's attorneys had several times in the events preceding the arbitration set down on 9 February 2011 actually dealt with and corresponded with the applicant, but yet the third respondent's attorney who was present on 9 February 2011 could simply not call the applicant and find out where it was. The Court in *Ndhlela* said:

"Viewed in this light, it is difficult to understand how it came about that when the matter was called at the trial roll and then allocated to Revelas J for hearing, and there was no appearance by any representative on behalf of Transnet, no effort was made by Mr Ndhlela's attorney to make contact with Transnet's attorney, or to ask the presiding judge for an opportunity to stand the matter down to make a telephone call

[26] (2004) 25 ILJ 565 (LC) at para 30.

to Mr Mazwai or his counsel. That would have been a simple and quick process (particularly in the age of the cellphone).'[27]

[26] With regard to the issue of the explanation provided by the applicant in this matter, the simple explanation of the applicant was that the wrong telefax number was used in sending the notice of set down to it, and thus it did not receive the same and consequently was unaware of the arbitration hearing. In my view, there is little doubt from the record of the proceedings that telefax number 086 616 4711 is not the telefax number of the applicant. This fact must have the consequence that any notice sent to that telefax number would not constitute proper service of the notice on the applicant. In my view, the most important factor that confirms that the telefax number 086 616 4711 is not of the applicant is that every time the third respondent obtained a default award and required the applicant to comply (this happened twice), the default award and letter of demand was sent to telefax number 086 616 4177. If the applicant's fax number was indeed 086 616 4711, then why is this telefax number not used by the third respondent's attorneys when they were seeking enforcement of the default awards? The same contention applies with regard the instance when the third respondent's attorneys sought that the applicant agree to a postponement, which request was once again sent to 086 616 4177. The conduct of the third respondent, through her attorneys, leaves a bad taste in the mouth. To make matters even worse, and in the answering affidavit to the rescission application of the applicant filed by the third respondent, it is contended that specific documents were sent to the applicant at telefax number 086 616 4711 and received by it, when the actual documents referred to in the answering affidavit show that these documents were actually sent to 086 616 4177. What the evidence in my view clearly shows is that every time a document was sent to the applicant at 086 616 4177, the applicant reacted and reacted promptly. Every time a document was sent to 086 616 4711, the applicant did not react. In my view, this can only mean that documents sent to telefax number 086 616 4711 were not received by

[27] Id at para 32.

the applicant. It can thus comfortably be concluded that any service on telefax number 082 616 4711 is not service on the applicant and the applicant certainly did not receive such documents.

[27] The difficulty with the award of the second respondent is that he does not deal with any of the above issues. The second respondent accepts that the telefax number 086 616 4711 was used on 22 December 2010 to notify the applicant of the arbitration on 9 February 2011, and then simply records that "evidence presented by the employee" suggested this was indeed a number used by the employer. As I have indicated above, the evidence did not show this. The "evidence" presented by the employee (the third respondent) of such number being used was in fact completely misleading, as I have set out above. A proper analysis of the evidence in fact shows that the telefax number 086 616 4711 is not used by the applicant. Insofar as the second respondent concluded that telefax number 086 616 4711 was indeed used by the applicant, this conclusion is unsustainable and irregular, and falls to be reviewed and set aside.

[28] The next issue to consider is the issue of the issue of telefax number 086 624 5544. It appears from the documents on record that this telefax number belongs to the applicant's representatives at the time, being LWO. The second respondent records in his award that the applicant does not explain why documents sent to that telefax number (082 624 5544) were not received. The problem with this conclusion is simply that such telefax number does not appear on the notice of set down of 22 December 2010 as being an address for service of the notice of set down. The only telefax number that appears on the notice of set down itself is 086 616 4711. Added to this, and if regard is had to the default award of arbitrator Maree dated 10 February 2011, this arbitrator, in discharging her duties of determining valid service of the set down, only refers to the telefax number 086 616 4711 and this is the only address also recorded in the default award. The fact is that the address on the notice and on the default award does not include telefax number 086 624 5544, and

thus it is irrelevant. In any event, and in bringing its rescission application, the applicant would not know that it would need to deal with telefax number 086 624 5544, as this number appears nowhere on the set down notice or default award, so the applicant would not even know it was used. I therefore conclude that the second respondent's referral to and reliance on service at telefax number 086 624 5544 is misplaced and irregular. In the end, this is still not the telefax number of the applicant.

[29] In *Mega Burger v Commissioner Louw NO and Another*,[28] the Court dealt with an explanation that a notice of set down which was ostensibly properly sent but was never received, as follows:

> 'The commissioner was obliged to satisfy himself on 7 August that the notice of set down had been served on Mega Burger. The fact that it was sent by registered post goes some way to showing that there was, at least, an attempt at service. When informed that Mega Burger said that it had no notice of the set down, it was on the facts before him, reasonable for him to suppose that this was true. This is particularly so in the light of the fact that Mega Burger had attended the conciliation proceedings. There was no evidence to the contrary before him that Mega Burger did not receive the notice of set down.'

The point that needs to be made from what the Court said in *Mega Burger* is that all the arbitrator that conducted the default arbitration proceedings satisfied herself on, when the default award was made on 10 February 2011, is that there was service on telefax number 086 616 4711. On the facts that then came to light in the rescission application, it was quite reasonable to suppose that it was true that service on that telefax number was not received by the applicant. It should also have been considered that when this happened before, the applicant immediately brought rescission proceedings, which were successful for the very same reason.

[28] (2000) 21 ILJ 1375 (LC) 1377 H - J.

There was also no contrary evidence that the applicant in fact did receive the notice of set down.

[30] In *MTN South Africa v Van Jaarsveld and Others,*[29] it was held as follows, which in my view can equally be applied in the current matter:

> 'Rescission applications of this nature require the presiding officer who is responsible for deciding them to give consideration to whether or not in truth the party who was in default at the time of a scheduled hearing was unaware of the hearing. If that fact is established, the explanation for the unawareness must be considered and if the explanation is reasonable that provides the basis for the rescission of the award made by default.'

In terms of the above, it is my view that the explanation by the applicant in the current matter is not only reasonable, but truthful. The second respondent unfortunately made no enquiry or determination into this issue.

[31] The Court in *MTN* also dealt with the very issue of communication by telefax in litigation proceedings, which is problematic, and held as follows,[30] which once again in my view can equally be applied in this instance:

> 'It is plain from anyone who attends the hearings of the Labour Court, that the enormous growth in the number of applications for rescission in circumstances where the respondent party claims that albeit on the face of it a telefax transmission was sent, it was not received or did not reach the person responsible for giving it attention, leads to the conclusion that the provisions of the Act in this regard require reconsideration. In my view, it is appropriate that the statute be reappraised in this regard and that the Rules Board for the Labour Courts gives its attention to this matter of procedure.'

[29] (2002) 23 ILJ 1597 (LC) at para 4.
[30] Id at para 13.

[32] Reference is also made to *Northern Province Local Government Association v Commission for Conciliation, Mediation and Arbitration and Others*[31] where it was held as follows:

> 'It seems to me that a commissioner in considering whether or not a notification of an arbitration hearing has indeed been received by a respondent, it is necessary to consider all the facts bearing on that question. Axiomatically, in deciding whether or not a fax transmission was received, proof that the fax was indeed sent creates a probability in favour of receipt, but does not logically constitute conclusive evidence of such receipt. A party to proceedings who claims that it did not receive a telefaxed notification, must be put in a position where it can consider the grounds upon which it is contended that a notice was furnished to it, and thereupon give an explanation as to whether or not it was received, could have been received, and any other germane circumstance, which has a bearing on the explanation tendered that the party was ignorant that the matter had been set down. Naturally, commissioners must be on their guard against abuse of the process by parties who, having been properly notified but having neglected to participate in the proceedings, subsequently wail once an adverse arbitration award is served on them. Nevertheless, the prudent need to guard against those circumstances should not disturb a fairminded enquiry into whether or not as a fact the notice did not come to the attention of the party.'

In my view, the second respondent did not conduct a fair minded enquiry in the current matter. Especially as to the issue of telefax number 086 624 5544, the applicant was never put into a position where it could provide an explanation for this, but yet it formed a central part of the second respondent's reasoning against the applicant. There is also no evidence of abuse of process by the applicant – after all its previous rescission was successful which it would not have been if it was abuse of process. The explanation that the applicant was unaware of the hearing date was in the end reasonable and acceptable.

[33] It is accordingly my view that in the end, there was a proper and in essence undisputed explanation as to why the applicant did not attend the arbitration, being

[31] (2001) 22 ILJ 1173 (LC) at para 46.

that it in fact never received the set down notice and was unaware of the arbitration hearing on 9 February 2011. Reference is accordingly made to *Electrocomp (Pty) Ltd v Novak*[32] where the Court held as follows:

> 'The principle laid down in *Federale Stene* and a line of preceding cases including *Topol and Others v L S Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W), establishes that where a party to an application was genuinely unaware of the date of set down, the granting of judgment by default would be erroneous and it is not necessary for the party concerned to have shown or proved good cause.'

[34] A final appropriate reference is to the judgment in *Inzuzu It Consulting (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others,*[33] where it was held as follows:

> 'It is quite clear that the commissioner, if he had read and considered the application for rescission, could not have failed to notice that (a) the address to which the notice of set down for the con/arb proceedings had been sent, was incorrect; (b) the aforesaid error was perpetuated when the notice of set down for the rescission application was sent to the same incorrect address; and (c) when the applicant launched the rescission application, it appointed a particular service address, but that the notice of set down in respect of the rescission application had not been sent to such address.
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> The conclusion is accordingly inescapable that the commissioner either failed to read the application for rescission, or failed to give any consideration thereto, prior to making the ruling. Such conduct on the part of the commissioner clearly constitutes a gross dereliction of duty.'

[35] The logical conclusion in this matter is simply why would an applicant, who had taken so much effort to have his matter actually heard by the first respondent and actually applying for and obtaining rescission in the first instance, then simply

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[32] (2001) 22 ILJ 2015 (LC) at para 12.
[33] [2010] 12 BLLR 1288 (LC) at 1293.

ignore and abandon the very last and most important part of the process, being the ultimate arbitration hearing date in February 2011. This makes no sense. Fairness dictates that the applicant must be given an opportunity to present its case in the circumstances of this matter, and reference is made to *Foschini Group (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others*[34] where it was held as follows:

> '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.
>
> 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.'

[36] I conclude that the applicant has thus, in the rescission application before the second respondent, provided a bona fide and acceptable explanation for not attending at the arbitration on 9 February 2011. I further conclude that the explanation submitted by the applicant was truthful and on the probabilities it must be accepted that the applicant did not receive the notice of set down for 9 February 2011. The fact is that an incorrect address was used by the first respondent in serving the set down notice. In the end, it therefore cannot be said that the applicant was in willful default, and I indeed accept that this was not the case. Finally, fairness in this instance dictates that the applicant be afforded the

[34] (2002) 23 ILJ 1048 (LC) at paras 20 and 21.

opportunity to present its case on the merits of the matter in the first respondent. It is therefore my view that the award of the second respondent in this respect cannot be sustained, and falls to be reviewed and set aside.

The issue of prospects of success

[37] The second issue to consider in rescission applications is that of prospects of success. This consideration must be dealt with on an equal footing as the explanation for the absence. The difficulty that often arises in rescission proceedings in the CCMA and the bargaining councils is that this consideration is either completely ignored by arbitrators dealing with the rescission application or is simply given cursory reference or consideration.[35] Such conduct would clearly amount to a failure to properly apply the requisite principles in rescission applications, and would constitute a reviewable irregularity. As was said in *MM Steel Construction CC v Steel Engineering and Allied Workers Union of SA and Others:*[36]

> 'An applicant who does not tender an acceptable explanation for his default, and demonstrate that he has a defence which is bona fide and has a prospect of succeeding, will generally not meet that test and his application will be bound to fail (*Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A)). Those two essential elements ought nevertheless not to be assessed mechanistically and in isolation. While the absence of one of them will usually be fatal, where they are present they are to be weighed together with other relevant factors in determining whether it would be fair and just to grant the indulgence.'

The current matter is a case in point, as the second respondent clearly considered only the issue of the explanation in isolation, and actually did not determine prospects of success.

[35] See for example *Martin v Commission for Conciliation, Mediation and Arbitration and Others* (*supra*); *Wimpy Game Centre v Commission for Conciliation, Mediation and Arbitration* (2008) 29 ILJ 775 (LC) at para 7.
[36] (1994) 15 ILJ 1310 (LAC) at 1311I – 1312A

[38] In considering the issue of prospects of success, it is not necessary to make a final conclusion on the merits of the case. It is equally not necessary to determine if the case offer is true or not. The merits simply need not be fully ventilated. The proper enquiry is whether the case of the rescission applicant, if ultimately found to be true and accepted, would constitute a proper case which could lead to such party succeeding in the merits of the matter. As the Court said in *Superb Meat Supplies:*[37] '[t]he applicant... must show that he has a *bona fide* defence to the plaintiff's claim. This needs to be shown *prima facie* only and it is not necessary to deal fully with the merits of the case or to prove the case. It is sufficient to set out facts which, if established at the trial, would constitute a good defence.'[38]

[39] The finding by the second respondent on the issue of prospects of success is, as paraphrasing from his award, the following: '[i]t seems that the employer does have some prospect of success in the matter. It is clear that extensive oral evidence would be required on the specific issue of whether the employee was dismissed fairly and whether a proper procedure was followed in the matter.' With respect to the second respondent, this conclusion in the second respondent's own award as it stands meets the requirements of prospects of success as contemplated by law for the purposes of granting rescission. The point is simply that if true, the employer (the applicant) would have a proper case. The final determination of the merits of the case would then deal with the issue whether the applicant's case is true or not. This requires the case to be heard on the merits and thus, insofar as it concerns the issue of prospects of success in a rescission application, for rescission to be granted. It is clear to me that the second respondent did comprehend the true nature of the test of prospects of success, and did not appreciate what he was required to determine. This is a material failure, and a reviewable irregularity.

[37] Above n 22 at 21
[38] See also *Foschini Group (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* above n 34; *Northern Training Trust v Maake and Others* above n 24.

[40] The facts of the current matter also confirm that the second respondent simply did not properly consider the issue of prospects of success as required by law, and only paid the requirements, as stated above, a "cursory reference". It appears from the case advanced by the applicant in the founding affidavit in the rescission application that the very issue of the dismissal of the third respondent is in dispute. The applicant contended that the third respondent was dissatisfied with what she considered to be unacceptable conduct on the part of her CEO, there was an altercation between the third respondent and the CEO, and the third respondent then verbally told the CEO that she was resigning with immediate effect. When asked to put this resignation in writing, she refused and left. In her answering affidavit in the rescission application, the third respondent also refers to an altercation with her CEO. The third respondent however contends that pursuant to this altercation, she was told in no certain terms by her CEO to leave, with some swear words added. The third respondent contended she never resigned and left because she was told to do so. What is clear from these two versions is that the issue of dismissal is not common cause. This means that the onus would be on the third respondent in the arbitration proceedings to prove she was dismissed. The second respondent does not even deal with this issue, or make any reference to it. In my view, the fact that dismissal is in issue and having regard to the above two cases of the parties, there can be no doubt that the second respondent should have concluded that proper prospects of success had been shown by the applicant for rescission to be granted.

[41] I accordingly conclude that the applicant had indeed satisfied the second requirement in rescission applications of illustrating prospects of success. The second respondent committed a gross and reviewable irregularity in not so concluding.

Further requirements and issues

[42] As I have already dealt with above, fairness in this matter dictates that the rescission application of the applicant should have been granted, especially considering, at the very least, the doubt about the telefax number and the issue that dismissal is in dispute.

[43] A further issue to consider is whether the applicant's rescission application was bona fide. The third respondent certainly does not make out a case in the answering affidavit to the contrary. It appears from the award of the second respondent that he appreciated the need to deal with this issue, as the second respondent concludes that the evidence suggests a "pattern" on the part of the applicant of not attending DRC processes. The second respondent makes this determination because of the fact that the applicant also did not attend the first arbitration hearing. I have several difficulties with this conclusion of the second respondent. The first is that the evidence does not show a "pattern" of conduct as suggested by the second respondent, on the part of the applicant. What the evidence in a nutshell does show, if considered properly and as a whole, is that whenever documents were sent to the right telefax number, the applicant immediately acted, and when not, no response or action was forthcoming from the applicant. This can only lead to the reasonable conclusion that the applicant did not attend at the arbitrations because it did not receive the notice, and thus its conduct is bona fide, and the application for rescission had to be bona fide. The only "pattern" shown in the evidence is the persistent sending of the notices of set down to the wrong address.

[44] The reliance by the second respondent on the fact that the applicant did not attend the previous (first) arbitration proceedings is misplaced. What the second respondent seems to ignore is that the applicant did not attend the first arbitration for the same reason for not attending the second arbitration, and in the case of the first arbitration, rescission was in fact granted by the DRC itself. The point is that if the applicant was successful in seeking rescission of the default arbitration award

the first time around, then surely the bringing of the second application for rescission on the same basis has to be bona fide.

[45] A further concern I have in this matter is the absence of a rescission hearing before the second respondent made his ruling. Whilst I accept that the DRC Rules dictate that the first respondent can determine applications in the manner its deems appropriate, and it thus can be argued a rescission hearing is not required,[39] my concern remains that in certain instances, it is simply not appropriate to just deal with rescission applications on the documents filed. There seems to be a blanket approach by the CCMA and the bargaining councils to determine all rescission applications just on the documents filed, which approach in my view cannot be correct. In certain instances, fairness and the requirements of the principle of *audi alteram partem* dictates that a hearing to determine the issue of rescission must be convened, no matter what the Rules of the CCMA or bargaining council may provide as to conducting proceedings in a manner deemed appropriate. Reference is made to the judgment of *Kungwini Residential Estate and Adventure Sport Centre Ltd v Mhlongo NO and Others*[40] where the Court dealt with a condonation application in the CCMA. It is my view that the following ratio in this judgment can equally be applied to the consideration of rescission applications:[41]

> 'Another point is that in terms of rule 31(9)(a), the commission must allocate a date for the hearing of an application, including an application for condonation, and in terms of rule 31(9)(b) the commission must notify the parties of the date, time and place of the hearing of the application. Rule 31(10) provides that: "Despite this rule, the Commission or a commissioner may determine an application in any manner it deems fit."
>
> However, I do not think that this provision can possibly be relied upon to dispense with the giving of notice to the parties, or at least to the applicant if the respondent is

[39] See Rule 32(9) of the DRC Rules. This rule is identical to the provisions of Rule 31(10) of the CCMA Rules.
[40] (2006) 27 ILJ 953 (LAC) at para 13.
[41] CCMA Rule 31(1) specifically provides that the Rule 31 process also applies to rescission applications.

> in default, of the commissioner's intention to hear a matter. For a commissioner to hear and determine an application for condonation without notice to the parties would be to ignore the audi alteram partem rule. There is no indication in the papers that any such notice was given to either the third respondent, who had applied for condonation, or the appellant. Although it may be argued that it was not necessary to give notice to the appellant, since, although it was a party as contemplated by rule 31, it had not given notice of intention to oppose the application (leaving aside annexure A), the same cannot be said about notice to the third respondent. Had notice of the intention to hear the condonation application been given to the third respondent's legal representative, Hawyes, he would surely have had an obligation to call annexure A to the attention of the CCMA or at least to advise the appellant's attorneys of the set down of the application. Had that occurred it is unlikely that the condonation ruling would have been made in the absence of both parties and the huge wastage of time and effort which has occurred in this matter would have been avoided.'

[46] In *National Director of Public Prosecutions and Another v Mohamed NO and Others,*[42] the following was held:

> 'It is well established that, as a matter of statutory construction, the *audi* rule should be enforced unless it is clear that the Legislature has expressly or by necessary implication enacted that it should not apply or that there are exceptional circumstances which would justify a court not giving effect to it. (footnote omitted)'

In my view, there is no express or necessary implied exclusion of the *audi alteram partem* principle where it comes to the determination of rescission applications in terms of either the CCMA or bargaining council Rules. As such, this principle must still find application.

[47] Of course, there can be no hard and fast rules as to when such a hearing should be convened. This must be determined on a case by case basis, by the arbitrator to whom the determination of the rescission application is allocated. In my view, the

[42] 2003 (4) SA 1 (CC) at para 37.

following can however serve as guidelines when the decision should rather be made to convene a hearing to determine the rescission application:

47.1 The determination of a rescission application only on the papers should principally be reserved for instances where the rescission application is unopposed;

47.2 Where the rescission application is opposed, a rescission hearing should be convened. This situation will leave parties with the view that justice is not only done, but is actually seen to be done in their presence. There may be instances however where even an opposed rescission would not necessitate a hearing. An example would be where it is clear from the documents filed that the default arbitration award was indeed erroneously made, as in such a case, it is not even necessary to determine the issue of willful default and prospects of success. Another example would be where the explanation for the default is not contested, and only the issue of prospects of success is contested, because of the manner in which the issue of prospects of success must be determined;

47.3 There have been several instances where arbitrators have determined unopposed rescission applications unfavourably, based on the arbitrator's own views gathered from external sources (such as the case file) or from the arbitrator's own contradiction of statements made the applicant's founding affidavit in the rescission, or where the arbitrator adopts his own negative views about the rescission applicant's bona fides. In these kind of instances it is imperative that the rescission applicant be confronted in a rescission hearing with these issues by the arbitrator, so the applicant for rescission can address the arbitrator on the same.

[48] In the current matter, it is my view that this is certainly an opposed rescission that deserved a rescission hearing. Added to this, the second respondent in this

instance certainly formed his own views about the applicant's bona fides, and in my view the second respondent should have afforded the applicant the opportunity to address him on this in a hearing. It is my conclusion that the failure to convene a rescission hearing in this instance constitutes a failure of *audi alteram partem* and is a reviewable irregularity.

[49] A final issue to consider in favour of the applicant is the fact that the applicant immediately when it received both default awards in this matter acted promptly and immediately in seeking and applying for rescission. In this respect, it is apposite to refer to the following extract from the judgment in *Theron NO v United Democratic Front and Others,*[43] where it was held as follows:

> 'In my view the Court will normally exercise that discretion in favour of an applicant where... he was, through no fault of his own, not afforded an opportunity to oppose the order granted against him, and when, on ascertaining that an order has been granted in his absence, he takes expeditious steps to have the position rectified.'

Conclusion

[50] Based on all of the above, it is my view that the rescission award of the second respondent constitutes a gross and reviewable irregularity and cannot be allowed to stand. I conclude that the applicant had in fact provided an acceptable explanation for its default and had shown the requisite prospects of success. I also accept that the applicant's conduct was bona fide. Finally, it is in the interest of justice and fairness that the applicant be given an opportunity to present its case on the merits of this matter.

[51] With the rescission award of the second respondent being reviewed and set aside, what must next be done? I am of the view that it would be inappropriate to remit the rescission application itself back to the first respondent for consideration. This

[43] 1984 (2) 532 (C) at 536G.

Court has the power and discretion to determine the rescission application,[44] and in my view, I have sufficient information and evidence before me to do so. Reference is made to *Cementation Mining v Commission for Conciliation, Mediation and Arbitration and Others',*[45] where it was held as follows:

> 'The LAC and this court have held that they should correct a decision rather than refer it back to the CCMA for a hearing de novo in the following circumstances: (i) where the end result is a foregone conclusion and it would merely be a waste of time to order the CCMA to reconsider the matter; (ii) where a further delay would cause unjustified prejudice to the parties; (iii) where the CCMA has exhibited such bias or incompetence that it would be unfair to require the applicant to submit to the same jurisdiction again; or (iv) where the court is in as good a position as the CCMA to make the decision itself. In this matter, the factors listed under (i), (ii) and (iv) are present. In these circumstances, it is appropriate to grant a substituted order in terms of which the applicant's rescission application is granted.'

Based on these principles and the evidence in this matter, I intend to substitute the rescission award of the second respondent with a determination that the applicant's application for rescission is granted.

[52] This then only leaves the issue of costs. The third respondent only belatedly sought to engage the applicant in the matter, and in the end did not even oppose the matter. Considering this, and the fact that a hearing on the merits between the parties, and in the first respondent, is still to come, I do not believe a costs order is appropriate. In the interests of fairness in this instance, I intend to make no order as to costs, save for the order I have already made on 8 January 2013 where the third respondent was ordered to pay the wasted costs occasioned by the postponement on that day.

<u>Order</u>

[44] See *Cash Paymaster Services (Pty) Ltd v Mogwe and Others* (1999) 20 ILJ 610 (LC); *Martin v Commission for Conciliation, Mediation and Arbitration and Others* (*supra*) at para 28 and 29.
[45] (2010) 31 ILJ 1167 (LC) at para 12.

[53] In the premises, I make the following order:

53.1 The rescission ruling of the second respondent under case number MIPT 9610 dated 31 March 2011 is reviewed and set aside.

53.2 The rescission ruling of the second respondent under case number MIPT 9610 dated 31 March 2011 is substituted with a ruling that the applicant's application for the rescission of the default arbitration award of arbitrator E Maree dated 10 February 2011 is granted and such award is rescinded.

53.3 The second respondent is directed to set the arbitration proceedings down for hearing on the merits thereof.

53.4 There is no order as to costs, save for the order pertaining to wasted costs against the third respondent granted on 8 January 2013.

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Snyman, AJ

Acting Judge of the Labour Court

APPEARANCES:

For the Applicant:	M Duvenhage of Duvenhage Attorneys
For the Third Respondent:	Advocate H Groenwald
Instructed by:	Clarinda Kugel Attorneys