REPUBLIC OF SOUTH AFRICA

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JR 941/10

In the matter between:

L A CRUSHERS (PTY) LTD **Applicant**

and

THE COMMISSION FOR CONCILIATION **First Respondent**

MEDIATION AND ARBITRATION

COMMISSIONER: C MOKABANE (N.O.) **Second Respondent**

NATIONAL UNION OF MINEWORKERS

obo PHINEAS MALAZA **Third Respondent**

Heard: 18 January 2013

Delivered: 5 March 2013

Summary: Review Application – Refused application for a postponement of the arbitration proceedings – Whether there was a proper notice for hearing of

the matter – Court held that the commissioner could not have been satisfied that notice had been given – Review application upheld – Matter remitted back to the CCMA before another Commissioner.

JUDGMENT

HULLEY, AJ

Introduction

[1] This is an application for the review and setting aside of an arbitration award delivered by the second respondent (to whom I shall refer hereinafter as "the commissioner") in which he *inter alia* ordered the applicant to reinstate Mr Phineas Malaza on the same or similar terms and conditions of employment as those which operated "prior to the dispute" and to pay the applicant an amount of R7 290.00 as "arrear wages".

[2] The applicant challenges the award essentially on the basis that it had not been given proper notice of the hearing of the matter by the first respondent ("the CCMA") and that the commissioner ought, accordingly, not to have heard the arbitration proceedings and issued an award. There are other grounds of review, but they all flow from the main ground of review.

The factual background to this matter

[3] It appears from the papers that Mr Malaza had been in the employ of the applicant but was dismissed. He subsequently referred an unfair dismissal claim to the CCMA.

[4] The matter was scheduled for conciliation – arbitration (a process contemplated in s 191(5A) of the Labour Relations Act, 66 of 1995) before the CCMA for 25 March 2010. It was assigned to the commissioner who, it appears, duly conciliated the matter. The transcribed record relates (as it ought to) to what unfolded after conciliation had failed and arbitration commenced.

[5] The record reveals that when the matter was called, Mr Mmusi Dlamini of the National Union of Mineworkers ("the union") appeared on behalf of Mr Malaza; two people, Ms Lidia Magaro and Mr Sybrian Khoza, noted their presence on behalf of the applicant. Ms Magaro described herself as the applicant's HR supervisor and Mr Khoza as its HR Administrator.

[6] Ms Magaro explained that the company's representative was 'fully booked' for the day, was not available to appear at the hearing and that she would be representing the company for the purpose of requesting a postponement of the matter. She then moved for the postponement of the matter. In this regard, Ms Magaro explained to the Commissioner that the applicant had received the notice of set down on 18 March 2010 and that the legal representative had 'advised me to object because we did not have the fourteen days' notice period to object [to] the claims or the seven days to object against the con-arb'.

[7] She went on to explain that she was not mandated to proceed with the conciliation or arbitration of the matter and accordingly, requested that the matter be postponed.

[8] Mr Dlamini, for his part, opposed the application for the postponement on the bases that:

8.1 The notice of set down which had been posted to the applicant and received by it on 18 March 2010, constituted sufficient notice as the company 'had sufficient time to respond if they wanted to respond'.

8.2 The notice of set down had also been faxed to the fax number 086-525-3421 which he stated was the fax number of the company 'and the company confirmed that'. He contended that there was 'nothing in the CCMA file that says that the fax couldn't reach them and that is why they are here today.' (Of course, it was apparent that the company's representatives had responded to the notice which had been sent by registered post and not that which had been faxed.)

[9] As an aside, it appeared during argument before me that both counsel accepted that a fax number with the prefix "086" was a so-called "fax-to-computer" number. This means that the fax would be received on a computer and viewed in electronic format.

[10] When confronted with the assertion that the notice of set down had been faxed to the company, Ms Magaro stated that she had never seen the fax number before. Mr Khoza indicated that whilst he did not recognise the number, he was aware that the union had previously sent documents to the fax number of the company's Operations Director, Mr Brian Smith. He stated that this number was Mr Smith's personal fax number which he used at home.

[11] Mr Dlamini persisted with his opposition to the application for a postponement on the basis that the notice of set down had been faxed to a number which was one that the union had used 'in all cases that we have in the company' and had in fact been used as recently as the Friday preceding the conciliation – arbitration hearing. He, accordingly, contended that the applicant was relying upon a 'technicality' and questioned the *bona fides* of the applicant.

[12] The commissioner stood the matter down in order to deliberate. When he returned, he dismissed the application for a postponement. The matter then proceeded. Since neither Ms Magaro nor Mr Khoza was in a position to represent the applicant, the matter proceeded on an unopposed basis and an award was ultimately made in favour of Mr Malaza.

The arbitration award

[13] The commissioner provided no reasons at the hearing but subsequently, in his award, explained:

> 'On perusal of the case file, the commission's records show that the notice of set-down was faxed to the [applicant in the present case] on the 04 March 2010 and also posted on the 09 March 2019 respectively. Although the [applicant] claims that the fax number where notice was effected does not belong to the company, it is still in compliance with rule 5 of the CCMA rules as it belongs to the operations director of the [applicant]. The [applicant's] contention that it was not timeously notified cannot be sustained if one count[s] the 14 days notice required in terms of rule [?] it is apparent that the [applicant] was given sufficient notice by the commission.'

[14] I imagine the commissioner had rule 17 in mind and that his satisfaction that there had been proper notification in terms of that rule related to the notice sent by fax on 4 March 2010. It was in any event common cause that if there had been proper notification it could only have been pursuant to the notice sent by fax.

Grounds of review

[15] The applicant appears to challenge the award essentially on the basis that the notice of set-down which had been faxed, had not been received by it. Other grounds of review flow from this ground, but I need not consider them; if this

ground of review is good, the others do not matter; if it is bad, the others do not arise.

[16] Ms Magaro deposed to the founding affidavit on behalf of the applicant. In it she states:

> '4.15 The 1st Respondent… faxed a notice of set down on the 4th of March 2010 to a stand by (*sic*) fax no of the Applicant, which fax is situated in the reception of the Applicant, but which fax number is not the fax number cited on the Applicant's letterhead and only used by the Applicant in case of emergency (cited number not in working order), this the 2nd Respondent concluded is in compliance with Rule 5 of the Rules for the Conduct of proceedings before the CCMA.
>
> 4.16 …
>
> 4.17 The personal fax numbers of a co-employee is not a method of service or in compliance with the Rules. The co-employee is not the employer or a representative of the Applicant authorised in writing.'

[17] Paragraphs 4.15 and 4.16 appear to contradict each other.

[18] Paragraph 4.15 suggests that the standby number was that "of" the applicant and that the machine which corresponded with that fax number was located in the applicant's reception, but was not in working order.

[19] Paragraph 4.16, on the other hand, suggests that the service had been effected on a co-employee's personal fax.

[20] Mr Molebaloa, who appeared for Mr Malaza, made much of this apparent contradiction. He suggested that whatever deficiencies may have existed in the evidence at the arbitration hearing were overcome by the 'concession' made by the applicant in its founding affidavit.

[21] Mr Geldenhuys, who appeared on behalf of the applicant, disputed that the "standby fax number of the applicant" belonged to the applicant.

[22] There is much to be said for Mr Molebaloa's view. In general, a Court is bound to determine a review application on the strength of the evidence which was before the arbitrator. I do not, however, consider that to be an immutable rule. There may be circumstances in which an issue which was hotly contested before the arbitrator and was decided by him or her in favour of one of the parties may be conceded by such party in the review proceedings. There may be other circumstances in which the Court may consider evidence not led at the arbitration hearing. Such circumstances would, I venture, be rare.

[23] However, the change of heart may take place, before a Court is entitled to consider a matter on the basis of a concession apparently made by one party, it must be satisfied that such concession was indeed made and intended as a concession.

[24] One way of resolving the apparent conflict between paragraphs 4.15 and 4.16 is by understanding the standby number "of the applicant" not as a number corresponding with a fax machine belonging to the applicant, but as a number which was used by the applicant in cases where the applicant's fax machine was unavailable.

[25] At any rate, I am not satisfied that the applicant intended to make a concession or that one was indeed made. I, accordingly, prefer to deal with the matter on the basis of the 'facts' which were before the commissioner. (In any event, as will become apparent from my discussion of the legal position below, I do not think it makes a difference to the outcome.)

Provisions governing set down before the CCMA

[26] The principles governing conciliation – arbitration proceedings are to be found both in the LRA and the Rules for the Conduct of Proceedings before the CCMA (the CCMA Rules).

[27] Section 191 deals with the referral of unfair dismissal disputes to the CCMA. The relevant portions thereof read as follows:

> '**191. Disputes about unfair dismissals and unfair labour practices**
>
> (1) (a) If there is a *dispute* about the fairness of a *dismissal*, or a *dispute* about an unfair labour practice, the dismissed *employee* or the *employee* alleging the unfair labour practice may refer the *dispute* in writing to—
>
> (i) a *council*, if the parties to the *dispute* fall within the registered *scope* of that *council*; or
>
> (ii) the Commission, if no *council* has jurisdiction.
>
> (b) …
>
> (2) …
>
> (4) The *council* or the Commission must attempt to resolve the *dispute* through conciliation.
>
> (5) If a *council* or a commissioner has certified that the *dispute* remains unresolved, or if 30 days have expired since the *council* or the Commission received the referral and the *dispute* remains unresolved—
>
> (a) the *council* or the Commission must arbitrate the *dispute* at the request of the *employee* if—

(i) the *employee* has alleged that the reason for *dismissal* is related to the *employee's* conduct or capacity, unless paragraph (b)(iii) applies;

(ii) …

(b) …

(5A) Despite any other provision in the Act, the *council* or Commission must commence the arbitration immediately after certifying that the *dispute* remains unresolved if the *dispute* concerns—

(a) …

(c) any other *dispute* contemplated in subsection (5)(a) in respect of which no party has objected to the matter being dealt with in terms of this subsection.'

[28] Section 191(5A) is commonly understood to mean that the arbitration must commence immediately after the conciliation has failed.[1]

[29] If that was the intention of the legislature, it has, sadly, failed to express itself clearly. The use of the word "must" in s 191(5A) appears to be peremptory and implies that the CCMA is obliged to proceed immediately to arbitration after certifying that the dispute remains unresolved.[2] Although arbitration must take place immediately after certification, there is no indication as to when *certification* must take place. What is clear, however, is that the arbitration can *only* take place *after* certification.

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[1] Grogan,J. *Workplace Law* (2009), at 172; A. Rycroft, *Rethinking the Con-Arb Procedure* (2003) 24 *ILJ* 699 at 702.

[2] *Pioneer Foods (Pty) Ltd t/a Sasko Milling and Baking (Duens Bakery) v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 1988 (LC) at para 25.

[30] Certification must, of course, be in writing.[3]

[31] Rule 17 of the CCMA Rules is the rule by which effect is given to s. 191(5A) of the LRA. It reads, insofar as is relevant for present purposes, as follows:

> '17. **Conduct of Con-Arb in terms of section 191(5A)**
>
> (1) The Commission must give the parties at least fourteen days' notice in writing that a matter has been scheduled for Con-Arb in terms of section 191(5A) of the Act.
>
> (2) A party that intends to object to a dispute being dealt with in terms of section 191(5A), must deliver a written notice to the Commission and the other party, at least seven days prior to the scheduled date in terms of subrule (1).
>
> (3) …
>
> (4) If a party fails to appear or be represented at a hearing scheduled in terms of subrule (1), the commissioner must conduct the conciliation on the date specified in the notice issued in subrule (1).
>
> (5) Subrule (4) applies irrespective of whether a party has lodged a notice of objection in terms of subrule (2).
>
> (6) …
>
> (8) The provisions of the Act and these rules that are applicable to conciliation and arbitration respectively apply, with the changes required by the context, to con-arb proceedings.'

[3] Compare *Soobramoney and Others* v. *Moothoo and Others* 1957 (3) SA. 707 (D); *Hulett and Sons Ltd.* v *Resident Magistrate, Lower Tugela* 1912 AD 760 at 766.

[32] Rule 17(1) requires the CCMA to "give" the parties at least 14 days written "notice" of the fact that the matter has been scheduled for conciliation-arbitration.

[33] There does not appear to be any provision in either the LRA or the CCMA Rules which stipulates the method by which the CCMA is required to give written notice to parties of the fact that the matter has been scheduled for conciliation-arbitration in terms of s 191(5A). (I will revert to the provisions of Rule 8 later.) Whatever method is selected, the onus remains upon the person required to give notice (the CCMA) or the party seeking to prove that notice was in fact given (the third respondent in the present case) to prove it.

[34] The matter was argued before me on the basis that Rule 5 was applicable. However, that rule deals with the manner in which "service" of a document has to be affected by "a party". On the face of it, Rule 5 does not deal with the question of notification by the CCMA and, accordingly, has no application to the present case.[4] I do not consider that I am bound by the parties' incorrect understanding of the legal position.[5]

[35] My attention was drawn to the judgments in *Northern Province Local Government Association v Commission for Conciliation, Mediation and Arbitration and Others*[6] and *Mega Burger v Commissioner Louw, N.O. and Another*.[7] I consider it appropriate, however, to commence my analysis with reference to a case which preceded both of these judgments: *Duarte v Carrim, N.O.*[8]

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[4] *Halcyon Hotel (Pty) Ltd t/a Baraza v CCMA and Others* [2001] 8 BLLR 911 (LC), at 914.
[5] *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A), at 23C – 24G.
[6] (2001) 22 ILJ 1173 (LC)
[7] (2000) 21 *ILJ* 1375 (LC).
[8] [1998] 9 BLLR 935 (LC).

[36] In the *Duarte* case, Sutherland AJ (as he then was), was called upon to consider a review of a commissioner's refusal to rescind an award which had been granted in the absence of the employer party. The commissioner considering the rescission application refused it on the basis that he had before him a fax transmission report which demonstrated that the notice of set-down had been faxed to the employer. The Learned Judge said:

> '[18] The definition of "serve" in section 213 of the Labour Relations Act, means sent by registered post, telegram, telex, telefax or delivery by hand.
>
> [19] The only resistance which the applicant has put up is to say that he did not get the telefax. If one was to conclude that the explanation was adequate in order to establish a basis for a rescission, it would completely undermine the efficacy of the section in the Act.
>
> [20] It seems to me that when the section in the Act defines service as sending by telefax, then effect must be given to it.
>
> [21] The commissioner was of the view that a telefax had been sent. If one is to go further and conclude that notwithstanding the sending of the telefax there was an explicable and non-blameworthy reason for the non-receipt of the telefax, then it seems to me that the applicant should have done much more than it did in this matter. If the transmission (and to the extent that there is in documentary form an indication that the transmission took place) is to be challenged, it seems to me that it must be challenged on a proper footing. The applicant in this matter did no more than simply say "I didn't get it" and to suggest as a probability for not getting it that he gets many faxes and therefore there was no reason why he would not have got this one.

> [22] That seems to me to be insufficient.'[9]

[37] The judgment in that case was followed by that in *Mega Burger* in which a commissioner had granted an award in the absence of the employer party. The facts demonstrated that the employer party did not appear at the arbitration hearing and upon perusing the CCMA file the commissioner established that the case management officer had initially made an unsuccessful attempt to fax the notice of set-down to the employer, and had followed this up by sending the notice of set-down to the employer by registered post. On the day of the arbitration hearing, the commissioner requested the case management officer to contact the employer. He was informed (by the case management officer) that the employer claimed that it had not received the notice of set-down and was not aware of the arbitration hearing. The commissioner decided to proceed with the hearing. The employer subsequently applied for rescission of the award and the rescission application was dismissed on the basis that the employer had failed to controvert the "rebuttable presumption" that it had received the notice of set-down.

[38] On review to the Labour Court, Landman J held that:

> '[5] … The CCMA is charged with the arbitration of disputes which have been referred to it and which have not been resolved. Clearly the CCMA is obliged to comply with the principles of *audi alteram partem* and therefore to advise the parties timeously of the date and time of the commencement of arbitration proceedings. In practice this means that the notice of set down must be served in some fashion on the parties… The absence of a statutory rule permitting or requiring service by registered post has, however, the effect that s 7 of the Interpretation of Statutes Act 33 of 1957 has no application. That

[9] Ibid at para's 18 – 22.

section, if it were applicable, would have created a rebuttable presumption that the registered letter contained in the notice of set down would have been deemed to have been effected at the time at which the letter would have been delivered in the ordinary course of post.

[6] 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 commissioner ought to have postponed the arbitration proceedings *mero motu*. The commissioner did not do this. His action was, in my view, unreasonable and unjustifiable and constitutes a gross irregularity.'[10]

[39] It bears mentioning that at that stage the present CCMA rules had not yet been promulgated and although rules had been published pursuant to Government Notice No. R. 1737 (GG No. 17516 of 1 November 1996, as amended) the rules did not deal with the procedure by which notification that a matter had been set down had to be given to a party; they dealt only with the question of service by a party of any document required to be served.

[40] To summarise: in the absence of any rules governing the issue, Sutherland AJ dealt with the matter on the strength of the definition of "service" in the LRA and Landman J dealt with it on the basis of the principles of *audi alteram partem.*

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[10] *Mega Burger*, supra, at 5-6.

[41] In *Halcyon Hotels (Pty) Ltd t/a Baraza v CCMA and Others*,[11] the Court had to consider a rescission application in circumstances where the CCMA had caused the notice of set-down to be faxed to the employer party at the fax machine of a neighbouring business because the employer did not have a fax machine of its own. Faber AJ held:

> '[14] I am of the view that the second respondent has misdirected himself in not properly considering the facts placed before him and in particular the fact that the applicant disputed proper notification. Section 213 of the Act defines service as "to send by registered post, telegram, telex, telefax or delivered by hand". However, a telefax transmission slip or registered mail slip is only *prima facie* proof that a document has come to the knowledge of the party on whom it has been served. In any event, it should be noted that there is a clear distinction between service and notification. Service is defined in terms of rules 1 and 3 of the rules regulating CCMA proceedings to be limited to parties to the dispute serving documents on each other. This clearly excludes notification by the CCMA. That much is also clear from rule 23. In terms of the latter and based on general principle, the second respondent should have satisfied himself that the parties had been properly notified. If he was of the view that applicant had not been notified properly, he would not have granted the arbitration award in applicant's absence.'[12]

[42] In the subsequent case of *Northern Province Local Government Association*, Sutherland AJ (as he then was) was again confronted with an application to review a decision by a commissioner refusing rescission in circumstances where the employer party alleged that it had not received a notice of set-down.

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[11] *Halcyon Hotels (supra*) at para 14.
[12] Ibid at 914.

[43] The Learned Judge, without making reference to Faber AJ's judgment, arrived at a similar conclusion:

> '[44] It is therefore apparent that a 'notice of an arbitration hearing' is something which the commission must 'give' to the parties, and is not a process which is prescribed in the rules to be 'served on the parties'. Rule 3 defines service of documents in substantially the same way as s 213 of the Labour Relations Act defines 'serve'. In my view, the rules must be interpreted to mean that it was contemplated by the drafters that the officials of the first respondent would not themselves be burdened with having to 'serve' the notice of an arbitration hearing to the relevant parties and accordingly the presumptions inherent in the statutory definition of 'serve' can have no bearing on the weight which the second respondent ought to have given to the evidence of the transmission slip. These considerations contrast starkly with the circumstances in *Duarte v Carrim* which was, as is apparent from what is set out above, decided on a different footing and which imported the presumptive force of the term 'serve' as set out in s 213 of the LRA.'[13]

[44] After considering and agreeing with certain criticisms levelled at the *Duarte* judgment, Sutherland AJ continued:

> '[46] 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

[13] Ibid, at para 44.

> 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 fair-minded enquiry into whether or not as a fact the notice did not come to the attention of the party.'

[45] I agree, with respect, with most of the aforesaid views expressed by the court *Halycon* and *Northern Province.* In particular, I agree that the correct enquiry is whether notice had been given by the CCMA, rather than whether there had been "service" (in whatever manner contemplated by either the LRA or the CCMA rules).[14]

[46] That having been said, I should make certain additional observations.

[47] Now the proper approach, to my mind, is to consider the intention of the rule-maker in promulgating Rule 17(1) as expressed in the ordinary language of the rule.

[48] What is required is that the CCMA "give… notice" of a certain fact, *viz*. that the matter has been scheduled for conciliation-arbitration.

[49] The primary meaning of the word "give" is used in a proprietary sense and "appears to have been the placing of a material object in the hands of another person"[15] and the word "notice" is defined as "1. The act of perceiving;

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[14] See *Vidavsky v. Body Corporate of Sunhill Villas* 2005 (5) SA 200 (SCA), at 204I–205A.
[15] *Stroud's Judicial Dictionary of Words and Phrases*, 7th ed.

observation; attention… 4. Information about a future event; warning; announcement…"[16]

[50] When the two words are combined to form the phrase "give notice", they mean to place information about a future event in the hands of another.

[51] In *Vengatsamy v Scheepers,*[17] Broome J held:

> 'Now "notice" is defined in the *Shorter Oxford Dictionary* as "formal intimation of or warning of something"… It seems to me to be elementary that, where one person is required to give a written notice to another, the former is required to place the written notice *in the possession of* the latter.' (Emphasis added.)

[52] Where the statute or rule under consideration does not stipulate the manner in which notice is to be given, then the party contending that notice had been given must, using whatever evidence is available to him, her or it, prove that it was indeed given in the sense that the notice was placed in the possession of the other.

[53] Similarly, where the statute or rule under consideration does stipulate a method by which notice is to be given, but a different method is used, the party contending that notice was indeed given must, once again, using whatever evidence is available, prove that notice was indeed given in the sense set out above.

[54] In *Hastie and Jenkerson (a firm) v McMahon,*[18] the English Court of Appeal had to consider, among others, whether service by fax was acceptable under the rules of court. The rules did not authorise service to be so affected and the parties' representatives had not agreed on service using such method. It was

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[16] *Collins English Dictionary: Complete and Unabridged*.
[17] 1946 NPD 84 at 87.
[18] [1991] 1 All ER 255 (CA).

common cause that the document which had been sent by fax had in fact been received in a legible form by the opposing attorney; the issue was whether there had to be compliance with the rules of court.

[55] Three of the justices expressed opinions; two are instructive in the present case.

[56] Woolf LJ expressed the following views:

> 'The problem from the point of view of parties using fax as a means of service other than by agreement is that it may be difficult for a party to prove that a legible copy of the document has in fact been printed at the recipient's premises. As to this, he may be assisted by the activity report to which I have made reference, but clearly unless and until there is a special provision contained in the Rules of the Supreme Court expressly authorising service by fax a party to legal proceedings will be taking a considerable risk in relying on service by fax unless there is consent to this form of service.'[19]

[57] And later:

> 'Here giving the words of RSC Ord 65, r 5 their natural meaning they do not produce what I would regard as an absurd result. They do not preclude the result that because service by fax is not covered by the rules service has not taken place where it can proved that the other party has in fact received a legible copy of the document to be served by the use of fax.'[20]

[58] The other opinion was expressed by Glidewell LJ. He was more emphatic:

> 'I emphasise that, if a document is served by a means for which neither the rule nor statute provides, there will only be good service if it be proved that the document, *in a complete and legible state*, has indeed been received by the intended recipient. I realise that transmission of documents by fax is a

[19] Ibid at 260C–E.
[20] Ibid at 262F-G.

> relatively recent development. If, in a particular case, what emerges from the recipient's fax machine is, or may, not be complete or is not wholly legible, a court will be justified in concluding that the document has not been properly served.'[21] (Emphasis added.)

[59] I endorse those opinions wholly.

[60] Where, on the other hand, the statute or rule under consideration does stipulate a manner in which notice is to be given and notice has in fact been given using such method, then in the absence of any contrary intention expressed in the statute or rule under consideration, proof that there had been compliance with the method of notification contemplated in the statute or rule, would constitute *prima facie* proof that notice had been given. (I emphasise, however, that the issue is always one of interpretation of the statute or rule in question and it may appear from a proper interpretation of the statute that proof of compliance with the prescribed method of notification constitutes conclusive proof of the fact that notice was given.)

[61] Rule 8 appears to be the only rule which makes any reference to notice being given by the CCMA. It provides that:

> 'Any document or notice sent by registered post by a party *or the Commission* is presumed, until the contrary is proved, to have been received by the person to whom it was sent seven days after it was posted.' (Emphasis added.)

[62] Rule 8 does not, however, prescribe a method for the giving of notices; it only creates a presumption of receipt where notice *is* "sent" by registered post.

[63] Where notice has been sent by registered post, a party may be entitled to rely upon the presumption created by Rule 8 and it will then be for the party disputing receipt to prove otherwise.

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[21] Ibid at 264J-265A.

[64] In *Maseko v Minister of Law and Order*[22] (W) Flemming J (as he then was), noted that where in a statutory provision one party was required to give notice to another such wording caused 'the spotlight to fall not on the result achieved in the defendant's mind but upon the activity required of the claimant' and, therefore, if the first person has 'done everything which would bring the matter to the defendant's knowledge if only the defendant would himself without delay take possession of the arriving communication and read it' then the first person has in fact given notice as contemplated in the statutory provision. In short, the emphasis is upon the conduct of the first party who is required to give notice rather than on the second party, and whether such person has in fact acquired knowledge of the notice given is irrelevant provided he or she has been placed in a position where he or she could acquire knowledge if only he had considered the notice which had been given to him.

[65] Thus, if notice is given by registered post, proof that the intended recipient received the registered slip, but failed to collect the letter, will constitute the giving of notice.[23]

[66] The present case is concerned with the giving of notice by fax. At the risk of repetition, the commissioner had to be satisfied that the required notice had been given to the applicant; if he was not so satisfied he could not proceed with the matter.

[67] The commissioner had proof before him that the notice of set-down had been sent by fax to a computer. He had no evidence that the computer belonged to the applicant and he did not find that it belonged to the applicant; he found that it belonged to the company's Operations Director.

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[22] 1988 (1) SA 542 (WLD) at 544I-J.
[23] *Minister of Law and Order v Terrence* 1991 (4) SA 833 (E); *Matross v Minister of Police* 1978 (4) SA 79 (E) at 81H-82C.

[68] This finding was apparently based upon what Mr Khoza had stated. It will be recalled that Mr Khoza never stated that the fax number *was* that of Mr Smith; he stated that it *may* belong to the fax machine of Mr Smith. Mr Khoza also stated that the fax machine was the personal machine of Mr Smith and did not belong to the company. The commissioner's ruling does not reflect this uncertainty. Nevertheless, the review does not turn on this issue since it appears that the fax number was indeed the personal number of the Operations Director.

[69] In these circumstances, I fail to understand how the commissioner could ever be satisfied that notice had been given. To be fair, I think the answer stems from the fact that the commissioner operated under the assumption that rule 5 was applicable. But, even if rule 5 was applicable, the commissioner could not have been so satisfied because proof of "service" on the company's Operations Director does not, absent questions of condonation or substantial compliance, constitute proof of service on the company.[24]

[70] It is perhaps opportune at this stage to point out that even if it had been established that the computer belonged to the company (and not merely a director), the commissioner could not, having regard to the opinions expressed in *Hastie and Jenkins*, *supra*, and the understanding that the fax was sent to a computer (and would, until retrieved, be located somewhere in cyberspace), have been satisfied that notice had been "given" as contemplated in Rule 17.

[71] It was common cause that in the absence of notice having been given, the award could not stand. I am in agreement.[25]

[72] In the circumstances, I am satisfied that the review should succeed.

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[24] Compare *Federated Insurance Co. Ltd v Malawana* 1986 (1) SA 751 (A).
[25] *Vidavsky v. Body Corporate of Sunhill Villas*, *supra*, at 207B-F

[73] In general, I am of the view that costs ought to follow the result. Had the founding affidavit not created the confusion referred to above and had the applicant not continued to challenge the award with reference to rule 5 the third respondent may well have realised the folly of further opposition. Accordingly, I am not inclined to grant the applicant its costs.

[74] In all the circumstances, I make an order in the following terms:

74.1 The award of the second respondent delivered on 8 April 2010 and amended on 16 April 2010, is hereby reviewed and set aside.

74.2 The matter is remitted to the first respondent for determination before an arbitrator other than the second respondent.

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Hulley, AJ

Acting Judge of the Labour Court

Applicants:

For the Applicant: MR CJ Geldenhuys of Geldenhuys CJ at Law Inc.

For Third Respondent: Mr M.S. Molebaloa of M.S. Molebaloa Attorneys Inc.