

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NO: JR874/05

In the matter between:

CHECKPORT SA (PTY) LTD

Applicant

and

MAPALO TSATSIMPE N.O.

First Respondent

THE COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION

Second Respondent

GOVENDER, YOSHAN

Third Respondent

JUDGMENT

FRANCIS J

1. This is an application to review a rescission ruling made by the first respondent (the commissioner) in February 2006 under case number GA13934/04 after she had refused to rescind a default arbitration award.
2. The application was opposed by the third respondent.
3. It is common cause that the third respondent had referred an unfair dismissal dispute to the second respondent (the CCMA) for conciliation and arbitration. It is further common cause that both parties were notified by the CCMA that the matter had been enrolled for a hearing on 25 July 2005. The applicant did not attend the arbitration proceedings. The commissioner went on with the matter and issued a default arbitration award in favour of the third respondent on 1 August 2005.

4. When the default award came to the attention of the applicant, it filed an application for rescission with the CCMA. The third respondent opposed the application.
5. The commissioner issued a ruling in February 2006 in terms of which she dismissed the rescission application. The commissioner said that she was required in terms of section 144 of the Labour Relations Act 66 of 1995 (the Act) to decide whether the rescission should be granted or not. She said that any commissioner could consider a rescission application. An award or ruling could be rescinded if erroneously made. In this case, both parties were properly notified about the scheduled process. Before the relevant commissioner could proceed, she satisfied herself, on behalf of the Commission, that the parties had been properly notified. She then went on with the process after satisfying herself that both parties had been notified about the scheduled process. The employer did not attend and its explanation is that there was a strike on the day of the process. The commissioner said that she had perused all the documents before her. The strikers informed the employer on 08 July 2005 that they would be starting their strike within 48 hours. The strike did not start on 25 July 2005. The employer indicated in its rescission application that the necessary arrangements had been made to ensure that operations continue and that its clients do not suffer. According to it, everything ran smooth as if there was no strike. It had a contingency plan. The commissioner said that it was her view that the contingency plan should have been expanded to its CCMA matters. It should have done the same with regard to important processes like the Commission's processes. It was clear from the rescission application that the applicant knew that it could be ask for a postponement. According to its rescission application, it chose not to apply

for a postponement. The commissioner did not accept the explanation that there was a strike as a ground to rescind this award. She did not grant the rescission.

6. The applicant was unhappy with the ruling and filed an application to review and set aside the ruling. It was contended that there is no rational objective basis justifying the connection made by the commissioner between the material available to her and the conclusion she eventually arrived at. The grounds of review are:

- 6.1 The commissioner did not consider at all in her ruling the applicant's prospects of success. It is necessary for the applicant in a rescission application to display that it has *bona fide* reasons for its default and prospects of success on the merits. The ruling only deals with the default of the applicant and not with prospects of success.

- 6.2 The commissioner failed to appreciate and apply her mind to the fact that David Masina who was to attend the arbitration proceedings on behalf of the applicant, was involved in negotiations with Union Officials acting on behalf of the striking workers on the day of the arbitration proceedings. In addition the commissioner failed to take into account that key witnesses, who would be required in the matter, could not be released on the day of the arbitration proceedings as they were filling in for employees already on strike.

- 6.3 The commissioner failed to take into account that the strike was still ongoing on the day of the arbitration proceedings.

7. The applicant indicated in its rescission application that the rescission application was made in terms of section 144(a) of the Act. Section 144(a) of the Act reads as follows:

“Any commissioner who has issued an arbitration award or ruling, or any other commissioner appointed by the director for that purpose, may on that commissioner’s own accord or, on the application of any affected party, vary or rescind an arbitration award or ruling -

(a) erroneously sought or erroneously made in the absence of any party affected by that award;”

It is similar to the provisions of section 165 of the Act that deals with rescission applications of judgments or orders of the Labour Court. Both provisions of the Act do not require a party to show good cause. The requirement for good cause was introduced by Rule 16A(2)(d) of the Rules of the Labour Court that only applies to judgements or orders of the Labour Court. The CCMA rules do not have a similar Rule 16A(2)(d) provision.

8. A default award would have been made erroneously if there was for example no proper notice to the absent party; where the CCMA did not have jurisdiction in the matter; or the commissioner could legally not make the default award; or if the commissioner was unaware of facts, if known to him or her, would have precluded him or her from making the default award. So where for instance a party attends the offices of the CCMA and is struck down by a vehicle at the doors of the CCMA and is unable to attend the hearing but this fact was brought to the attention of the CCMA before the default award was made, the commissioner would have been obliged to postpone the matter. If he were to proceed with the matter despite this knowledge, the default award would have been made erroneously in the absence of the other party. If he was unaware of the incident and went on with the matter and issued a default award, the defaulting party can have the default

award rescinded on the basis that had such facts been placed before the commissioner in the first place, the commissioner would not have proceeded with the matter. The default award would have been made erroneously.

9. The CCMA and its commissioners derive their powers mainly from the Act. They do not have inherent powers and must always act within the confines of the Act or relevant statutes. They can rescind awards made erroneously in the absence of a party. Where such an application is made, the commissioner is enjoined to ascertain whether the default award was made erroneously in the absence of another party.
10. It is clear from the facts presented before the commissioner that the applicant had been notified by the CCMA that the matter had been set down for arbitration. The third respondent's attorney reminded the applicant that the matter had been set down for arbitration and that they should hold a pre-trial meeting. The applicant simply failed to attend the arbitration hearing. It did not apply for a postponement. The CCMA rules make provision for a party to apply for a postponement either before the hearing or on the day of the hearing. There is simply no explanation given why no application was made for a postponement.
11. It is clear from the facts of this case that the applicant has treated the CCMA with disdain. It has undermined the authority of the CCMA. This is unacceptable. It did not bother informing the CCMA that it would not be able to attend the CCMA hearing for whatever reasons. The impression that one is left with is that it adopted the misguided attitude that it would apply for a rescission and that the rescission application would as a

matter of course be granted.

12. Counsel for the applicant was asked why it was contended that the default award was made erroneously in the absence of the applicant. He submitted that it was made erroneously in that the applicant was denied the right to be heard or the *audi alteram partem* principle was not applied. There is no substance in these contentions. The applicant was notified that the matter was set down for a hearing. The applicant in embarking on the course of action that it took, denied itself the right to be heard.
13. The rescission application was made in terms of section 144(a) of the Act. The applicant had to show that the award was made erroneously in its absence. It had failed to place facts before the commissioner indicating that the default award was made erroneously in its absence. There was no duty on the part of the commissioner to have considered the prospects of success. Even if there was, the applicant would still have to indicate that the award was made erroneously in its absence. It has failed to do so. Its conduct bothers on contempt for the CCMA.
14. The commissioner has not committed any irregularity and the application stands to be dismissed.
15. It is a pity that the third respondent did not seek punitive costs on the highest possible scale. This is one matter that would have warranted such a cost order. There is no reason why costs should not follow the result. The costs are limited to a party and party scale.

16. In the circumstances I make the following order:

16.1 The review application is dismissed with costs.

FRANCIS J

JUDGE OF THE LABOUR COURT OF SOUTH AFRICA

FOR APPLICANT : C ASCOR INSTRUCTED BY FLUXMANS
INCORPORATED

FOR THIRD RESPONDENT : G J ROSSOUW INSTRUCTED BY ALAN C
KNIGHT ATTORNEYS

DATE OF HEARING : 20 FEBRUARY 2007

DATE OF JUDGMENT : 22 FEBRUARY 2007