

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NUMBER: J 3747/00

In the matter between:

**NORTHERN PROVINCE LOCAL
Applicant**

and

**COMMISSION FOR CONCILIATION,
First Respondent**

Second Respondent

Third Respondent

J U D G M E N T

INTRODUCTION

1 The Third Respondent was an employee of the Applicant. He was charged with misconduct and required to appear before a disciplinary enquiry. On the Third Respondent's version, owing to illness, he was unable to attend an adjourned hearing of the enquiry. However, the enquiry continued in his absence. Ultimately a decision was taken that he was guilty of misconduct and that he should be dismissed. The dismissal took effect on 14 January 2000. The Third Respondent

was aggrieved by this outcome and referred a dispute about an alleged unfair dismissal to the First Respondent for conciliation. Despite a conciliation meeting at which representatives of both the Applicant and the Third Respondent were present, the dispute remained unresolved. The Third Respondent thereupon referred the matter to arbitration before a Commissioner of the First Respondent. An arbitration hearing was held on the 28th of April 2000. On that occasion, the representatives of the Applicant did not appear. Second Respondent, who was the Commissioner assigned to hear the matter, notwithstanding the absence of the Applicant's representatives, continued with the enquiry. That enquiry concluded that the dismissal was indeed unfair. Because the Third Respondent did not wish to be reinstated, the Second Respondent was required to consider whether or not compensation should be ordered. She ordered compensation in the sum equivalent to twelve months' remuneration, in an award dated 17 May 2000.

2 A copy of the award was delivered to the Applicant on 28 May 2000. According to the Applicant, this was the first news which had been received by it of arbitration proceedings having been set in motion. Accordingly, on the 7th of June 2000 the Applicant launched an application to the Second Respondent to rescind the award in terms of Section 144 of the Labour Relations Act ("**LRA**"). The application was heard before the Second Respondent on the 26th of July 2000. On the 8th of August 2000 she furnished a decision in which rescission of the award was refused. On 30 August 2000, approximately three weeks thereafter, the Applicant thereupon launched two applications which are before this Court. The first application is to review and set aside the refusal of the Second Respondent to rescind the award and the second application is to review and set aside the award itself.

3 The application to review the award itself was self-evidently launched later than the six weeks period prescribed by Section 145 (1) (b) of the LRA. The Applicant sought condonation of the late

filing of that application on the grounds that the delay was explained by the attempt to procure a rescission of the award and only once that rescission had been refused, would it have been appropriate to approach the Court for relief in respect of the award itself. On behalf of the Third Respondent, it was contended that such an explanation was unsatisfactory and that condonation should not be granted. In my view, it is clear that the Applicant is not guilty of any dilatory conduct and its decision to exhaust the prospects of procuring rescission of the award prior to launching an application to review the award was both prudent and appropriate. Accordingly, in my view, condonation of non-compliance with Section 145 (1) (b) of the LRA should be granted.

The two applications will be dealt with in turn.

THE REVIEW PROCESS IN RESPECT OF RESCISSION APPLICATIONS

The application to review the decision of the Second Respondent to refuse an application to rescind the award was brought in terms of Section 158 (1) (g) of the LRA. The relevant provisions of that section state that the Labour Court may:

“Despite Section 145, review the performance or purported performance of any function provided for in this Act or any act or omission of any person or body in terms of this Act on any grounds that are permissible in law.”

The institution of the application under the provisions of that section was made consciously in preference to initiating proceedings under Section 145 of the LRA. The relevant provisions of Section 145 provide that:

“(1) *Any party to a dispute who alleges a defect in any arbitration proceedings under the auspices of the Commission may apply to the Labour Court for an order setting aside the arbitration award -*
...

(2) *A defect referred to in sub-section (1) means :-*

(a) *that the Commissioner -*

(i) *committed misconduct in relation to the duties of the Commissioner as an arbitrator;*

(ii) *committed a gross irregularity in the conduct of the arbitration proceedings;*
or

(iii) *exceeded the Commissioner’s powers; or*

(b) *that an award has been improperly obtained.”*

7 The question of the propriety of seeking to review an award of a Commissioner of the CCMA under Section 158 (1) (g) or under Section 145 of the Labour Relations Act has already been well rehearsed in the case law. The judgment in Carephone (Pty) Limited v Marcus N.O and Others (1998) 19 ILJ 1425 (LAC) drew the controversy to a close. Froneman DJP, after having analysed the sections in relation to the purposes of the Labour Relations Act and of the Constitution in

relation to review as a remedy, held that the word “*despite*” in Section 158 (1) (g) should be read as “*subject to*” and that in the light of that interpretation the two sections could be reconciled. At 1443 C - E he held:

“It must be admitted that the choice of the word ‘despite’ in Section 158 (1) (g) is an unhappy one. It allows for an interpretation of Section 158 (1) (g) as granting a general review power to the Labour Court over any function, act or omission under the LRA, instead of its providing merely for the Court’s residual powers of review for administrative functions not defined specifically in Section 145 and Section 158 (1) (h). If the latter interpretation is accepted, the provisions of Section 145, 158 (1) (g) and 158 (1) (h) apply to distinct and different forms of administrative action and do not overlap. If however the former interpretation is accepted, the field of application of Section 145 and 158 (1) (g) do overlap, with the result that the provisions of Section 145 become superfluous.”

8 The judgment of Nicholson J A in Toyota SA Motors (Pty) Limited v Radebe and Others (2000) 21 ILJ 340 (LAC) at 351 E which expressed reservations concerning the remarks made in the Carephone case in respect of the test for review under Section 145, in no way disturbs the interpretation of the two sections in regard to their scope.

9 The view taken by the Court in the Carephone case was that the scope of Section 158 (1) (g) provided for “*residual powers of review for administrative functions not defined specifically in Section 145*”. The question which arises for decision therefore is whether or not a decision of a Commissioner made pursuant to the provisions of Section 144 of the Labour Relations Act can be construed as an “*administrative function*” not defined specifically in Section 145. The phrase

adopted by the Court in Carephone “*administrative functions not defined specifically in Section 145*” tends to suggest that in Section 145 there are administrative functions which are encapsulated under that section, alternatively, the phrase meant to convey that the functions of Section 145 are other than administrative functions and therefore Section 145 is confined to non-administrative or judicial functions. In my view, it seems to be unnecessarily restrictive to suppose that Section 158 (1) (g) was drafted to encapsulate only “*administrative*” functions in contradistinction to judicial or adjudicatory functions.

10 It is self-evident that officials and Commissioners of the CCMA perform very many functions other than those directly involved in presiding over arbitration proceedings. The question arises whether or not proceedings under Section 144 should be understood to be “*arbitration proceedings*” as contemplated by Section 145. It would be odd to express the idea that a Commissioner who was called upon to decide whether or not circumstances contemplated in Section 144 were proven, was arbitrating a “*dispute*” as contemplated by the language of Section 145. The word “*dispute*” in Section 145 unquestionably refers to a labour dispute and not, for the sake of a contrasting adjective, a “*forensic*” dispute concerning the procedure itself. Of equal force, in my view, would be the oddness of regarding a decision by a Commissioner to either grant or refuse rescission of an arbitration award as being in that context an “*award*”.

11 It was contended on behalf of the Applicant that insofar as Section 145 contemplates “*arbitration proceedings*” such proceedings are concluded by the handing down of an award, and therefore, *ipso facto*, an application for the rescission of such an award is anterior to “*arbitration proceedings*” and thus does not fall within the scope of Section 145. The notion that the handing down of an award

“*concludes*” arbitration proceedings enjoys support from the provisions of Section 138 (7) which provides that within fourteen days of the conclusion of the arbitration proceedings, the Commissioner must hand down the award. The “*award*” is the fruit of the arbitration “*proceedings*”, and its visible and outward sign of its conclusion.

12 In my view, the ambit of Section 145 is confined to the particular proceedings and award handed down by a Commissioner who has presided over arbitration proceedings in respect of a labour dispute. This section does not seem to encapsulate proceedings which enquire into the propriety of whether or not the award itself was erroneously sought or erroneously made in the absence of any party affected by that award, as contemplated by Section 144 (a). If it had been the intention of the legislature that any conduct whatsoever, on the part of a Commissioner was to be regulated under Section 145 and under no other, it might simply have stated that any conduct by a Commissioner must be reviewed under that section as opposed to limiting the ambit of that section to a “*defect in any arbitration proceedings*” in relation, implicitly, to a dispute which must be a labour dispute.

13 In my view, Section 158 (1) (g) contemplates the category of controversies which would encapsulate a challenge to a decision of a Commissioner of the CCMA who acts pursuant to Section 144 of the Labour Relations Act.

THE PRINCIPLES GOVERNING A DECISION TO RESCIND AN AWARD

14 In the result, in my view, is that an application to review a decision of a Commissioner who has refused to rescind an award falls to be dealt with pursuant to the provisions of Section 158 (1) (g) of the Labour Relations Act.

15 When the application for rescission was placed before the Second Respondent, she was required to decide whether or not the award which she had made in the absence of any representation on the part of the Applicant had been erroneously made. The application for rescission was founded squarely on the contention that the Applicant was ignorant that the proceedings were taking place. This kind of issue is by no means novel, and has been thoroughly worked out in ordinary civil jurisprudence over a long time. In my view, no sound reason exists to invent anew, either law or practice in regard to such matter and the principles which govern the decision as to whether or not rescission ought to be granted of a judgment handed down in the absence of a party should be those derived from the experience of the civil courts.

16 The practice of the civil courts has been usefully summarised in the fourth edition of **Herbstein and Van Winsen, The Civil Practice of the Supreme Court of South Africa** at p 540 to 541 as follows:

“An applicant for the rescission of a default judgment must show good cause and prove that he at no time renounced his defence, and that he has a serious intention of proceeding with the case. In order to show good cause an applicant must give a reasonable explanation of his default, his application must be made bona fide and he must show that he has a bona fide defence to the plaintiff’s claim. When a defendant appears in order to have the judgment set aside he must, in addition to explaining the failure to deliver a notice of intention to defend, place before the court sufficient evidence from which it can be inferred that he has a bona fide defence to the action. It is not sufficient for the applicant to content himself with saying that he has a bona fide defence. In order to establish a bona fide defence, the defendant must set out

averments which, if established at the trial, would entitle him to the relief he asks for; he need not deal with the merits of the case or produce evidence that the probabilities are actually in his favour.”

(These principles have been endorsed in De Wet and Others v Western Bank Limited 1979 (2) SA 1031 (AD))

17 In essence therefore, an applicant who seeks to have an award of a Commissioner rescinded which was granted in its absence, must show, first that it has a *bona fide* case to place before the tribunal and that it had not lost interest in having its case heard, and secondly, its absence at the hearing has been reasonably explained.

18 The Applicant contends that the Second Respondent acted unfairly and unreasonably in the conduct of the rescission application proceedings. The material facts upon which the Applicant relies are largely common cause. It is necessary to set out in some detail the course of events pertinent to the controversy.

WAS THERE A *BONA FIDE* CASE MADE OUT BY THE APPLICANT?

19 The application to rescind the award, launched by the Applicant, named only the Third Respondent as a respondent in that application. A founding affidavit was deposed to by Chucheka Ben Mhlongo, the Chief Executive Officer of the Applicant. In that founding affidavit details of the circumstances which gave rise to the disciplining of the Third Respondent are set out. The papers include a charge sheet, a minute of the proceedings before the independent chairperson, Adv L

Nkosi-Thomas, and a copy of her reasoned judgment. From this documentation before the Second Respondent in the rescission proceedings, she would have been able to form a view about whether or not the Applicant had a *bona fide* case to advance in support of the dismissal of the Third Respondent. The nature of the charges were fraud, insubordination, poor work performance and a refusal to comply with an instruction of the Chief Executive Officer. These are self-evidently serious charges and in themselves expose a perpetrator to the risk of dismissal.

20 The Third Respondent deposed to an answering affidavit in the rescission proceedings. Although in that answering affidavit, the Third Respondent explained how it came about that he was absent from the hearing and that the hearing continued in his absence, the founding affidavit does not at all address the question of whether or not he has a cogent defence to the allegation of misconduct. It follows therefore that there was no rebuttal in the least degree of the case set out by the Applicant for the consideration of the Second Respondent.

21 In my view, on the material placed before the Second Respondent, she could not have avoided concluding, had she applied her mind to this matter, that a *bona fide* case to found an argument that would justify a dismissal of the Third Respondent on the charges levelled at him, was made out.

THE APPLICANT'S EXPLANATION FOR ABSENCE AT THE HEARING

22 The Applicant's founding affidavit explained why the representatives of the Applicant were not present at the arbitration hearing on the 28th of April 2000. It was recounted that when on the 27th of January 2000, a copy of the referral of the dispute to the First Respondent for conciliation was received by the Applicant, their representatives attended a conciliation meeting convened on the 2nd of March . The deponent himself was present at that meeting. Although that meeting failed to achieve a resolution of the dispute, the conciliator apparently invited the parties, so says the

deponent, to endeavour to resolve the dispute on their own and if successful, to revert to the conciliator by the 7th of March in order to finalise any settlement that might be reached. Subsequently, no settlement was reached between the parties. For that reason, says the deponent, the Applicant did not go back to the conciliator. The Third Respondent does not directly challenge any of those facts in his answering affidavit. He confines himself to a criticism of the representatives of the Applicant for not having presented themselves at the conciliator's office on the 7th of March 2000 as, apparently, he did. It is evident from the exchange in the affidavits that the Third Respondent understood that there would be a meeting on the 7th of March 2000 regardless of the outcome of the further settlement talks and that the representatives of the Applicant had a different understanding of the arrangements. Neither the First nor Second Respondents troubled to reply on any issue, least of all on this point.

23 The conciliator issued a certificate on the 7th of March noting that the dispute remained unresolved. A copy of that certificate was received by the Applicant's representatives during March 2000. However, according to the Applicant's deponent, subsequent thereto, no further notification of any further proceedings was brought to their attention. In the award of the Second Respondent, mention is expressly made that the Applicant was in default "*despite proper notification*". This statement was directly challenged in the papers of the Applicant. In several passages it was stated categorically that no notification had been received and the First Respondent was directly challenged to produce proof of such notification about the date of the hearing of the arbitration. In support of its stance that it would not have stayed away from the arbitration proceedings if it had known thereof, reference was made to the attendance of the Applicant's representatives at the conciliation proceedings at the 2nd of March 2000. The averment was also made that it had always been the Applicant's intention to participate in the proceedings until the dispute was finally

resolved, including any arbitration proceedings.

24 The Third Respondent in his answering affidavit, save for the criticism already referred to does not challenge any of the Applicant's allegations but comments as follows:

“I received my notice for the arbitration hearing scheduled for 28 April 2000 and duly attended. It would not be surprising if the employer decided not to attend the said arbitration hearing as was the case with the conciliation on the 7th of March.”

25 At the rescission application hearing, the Second Respondent heard argument from representatives of both the Applicant and of the Third Respondent. At the conclusion of the argument she adjourned the proceedings and left the room. What subsequently occurred is encapsulated in the Applicant's founding affidavit as follows

“She did not say why she was adjourning the proceedings nor where she was going. When the proceedings resumed, the Second Respondent asked me what the fax number of the Applicant was. I informed her that the Applicant's fax number was ----- . Thereafter the Second Respondent produced a copy of the fax confirmation slip, on which it appeared that a notice to attend the arbitration proceedings have been transmitted by the First Respondent to the Applicant on 5 April 2000. The slip also indicated that there had been a number of unsuccessful attempts to send the fax before it was apparently sent. Mabusa and I could not take the matter any further at that stage having been confronted with the slip at a time when I could not conduct any further investigations.... The Applicant was not afforded an opportunity to investigate the

correctness of the fax transmission slip produced by the Second Respondent. I submit that, had the First Respondent responded to my invitation before the commencement of the rescission application, the Applicant would have been in a position to investigate the matter further and would have filed an appropriate reply. The Second Respondent then adjourned the proceedings to consider the matter.”

26 The Third Respondent’s answering affidavit challenges none of those facts, which are in any event borne out by the transcription of the tape recorded proceedings, but points to the absence of a request on the part of the Applicant’s representatives for a postponement.

27 The Applicant has in its papers before this Court set out the fruits of a subsequent investigation into whether or not the fax referred to in the transmission slip was indeed received. In short, it appears that from a record system which is routinely maintained by a clerk, no mention is made of such a fax having been received in the office of the Applicant during that time. In my view these revelations ought not to play any part in an evaluation of whether or not the Second Respondent’s decision falls to be reviewed or not because those facts, for what they are worth, were not placed before her. I therefore ignore those revelations.

28 What is in my view more to the point, is a submission advanced on behalf of the Applicant after the production of the transmission slip which appears in the transcript as follows:

“There is an obvious doubt whether or not the Applicant received notification. Ms arbitrator, you can see even on the fax transmission it says busy, busy. Noone knows at what point it went through, if it even went to the very address, because there still is a dispute.”

THE SECOND RESPONDENT'S DECISION TO REFUSE RESCISSION

29 The Second Respondent refused rescission and stated the following in her decision:

“The Applicant argued that he never received a notification to attend the arbitration. He only received a certificate stating that the dispute remained unresolved. On the other hand the Respondent argued that is the matter to be dealt with by the CCMA as he himself had received a notification to attend the arbitration and he did attend. Further, that before the arbitration was proceeded with the Commissioner satisfied herself that there was proper notification to the Applicant. From the documents filed of record, I am satisfied that the notification to attend the arbitration was faxed by the CCMA to the Applicant on 5 April 2000. The notice was shown to the Applicant and his representative and Mr Ben Mhlongo confirmed the fax number to be that of the Applicant.

In Duarte v Carrim N.O (1998) 9 BLLR 935 (LC) per Sutherland AJ, it was held that:

‘A party applying for rescission must prove a bona fide case and provide a reasonable explanation for the default. A mere denial that he received the telefax notifying him of the hearing is not sufficient.’ On p 940 D - E, he goes on to say that ‘the definition of serve in Section 213 of the Labour Relations Act means by registered post, telegram, telefax or delivery by hand.’

The application for rescission is refused.”

30 The question arises whether or not the decision of the Second Respondent in all these circumstances
ought to be reviewed.

CRITICISM OF THE SECOND RESPONDENT'S CONDUCT

31 It is contended on behalf of the Applicant that the manner in which the transmission slip was
introduced was wholly improper. Further, it is contended that once the transmission slip had been
introduced in the way described above, an adjournment should have been ordered by the Second
Respondent to allow the Applicant's representatives to investigate the "*new*" facts. The counter
argument to these contentions is that the Applicant was at the time represented by legal
representatives and that if it chose not to apply formally for a postponement in order to investigate
the new facts then it ought to have no complaint that the matter was not adjourned for such
purposes and that the Second Respondent decided the matter on what was before her at the time.

32 In my view, the conduct of the Second Respondent was intrinsically unreasonable and wholly
improper.

33 The first factor of importance is that which the Second Respondent would have gathered from the
founding affidavit of the Applicant. In that document it was made crystal clear that from the
Applicant's point of view there was absolutely no reason to believe that any notification had ever
been furnished by the First Respondent to the Applicant. The Applicant expressly put the First
Respondent on terms to provide some proof that notification had been sent to the Applicant. When
the Second Respondent was reading the papers during the course of the argument, if not at any

earlier time, she must have become aware that there was nothing in the file before her to indicate that notification had ever been sent to the Applicant. In the argument advanced on behalf of the Third Respondent, it was stated by the Third Respondent's representative that at the time of the arbitration hearing she had gone elsewhere in the building in order to verify that notification had been sent. She did not at that time say that there was nothing in the file to bear out the furnishing of notification nor did she attempt to adjourn the proceedings at that time in order to procure a document evidencing proof of notification. Instead she allowed both parties to argue the whole of the case before adjourning to self-evidently conduct a search for the document evidencing a notification having been sent to the Applicant.

34 Her conduct in simply presenting the transmission slip as a *fait accompli* and without giving any apparent weight to the fact that the Applicant, in its founding papers and throughout the argument, had continually demanded proof of such notification is unquestionably an inappropriate procedure.

35 Landman J in Mega Burger v Commissioner Louw N.O and Another (2000) 21 ILJ 1375 (LC), considering an application to review a similar refusal of a rescission of an award where a notification sent by registered post was alleged by the employer not to have been received, expressed the following at 1377 H - J:

“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 somewhere 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.”

36 In my view, having regard to the flawed approach adopted by the Second Respondent it simply cannot be cogently argued that she had properly satisfied herself in the rescission application proceedings that a proper notification to the Applicant had taken place, still less that the Applicant’s explanation for non-appearance on the 28th of April 2000 was not reasonably explained.

37 It is of course true that the legal representative of the Applicant did not apply for a postponement when faced with the fax transmission slip. Perhaps it is correct to observe that he was remiss in that regard. However, it is equally probable that the circumstances of the presentation, especially after he had completed his argument, simply flustered him at the time when he ought to have thought to apply for a postponement. When invited to amplify his argument after the flourishing of the transmission slip, he persisted with pertinent argument calculated to draw attention to the fact that the mere transmission slip alone did not warrant the inference of receipt and in the absence of receipt the failure on the part of the Applicant’s representatives to be present on the 28th of April was wholly explained and reasonable.

38 In my view it does not seem to be proper that advantage should be taken of a failure to apply for a postponement, and in accordance with the notion articulated by Landman J in the **Mega Burger** case, it was incumbent upon the Second Respondent on her own initiative to invite the Applicant’s

representatives to take a postponement for the purposes of investigating the new facts if they did not think to formally request one themselves.

(In Mamabolo v Rustenburg Regional Local Council 2001 (1) SA 135 (SCA) at 141 H, the Court approved a similar approach in respect of points raised *mero motu* by a Judge in the course of proceedings)

39 As is evident from the passage from the decision of the Second Respondent refusing the rescission she relied on a judgment given by me in this Court in Duarte v Carrim (1998) 9 BLLR 935 (LC).

40 It was argued on behalf of the Applicant that Duarte v Carrim was distinguishable from the present case. Similarly to this case the question in Duarte v Carrim was whether or not the Commissioner who had refused rescission of his award had failed to apply his mind to the relevant considerations. The pertinent facts in that dispute appear from p 938 E ff of the judgment:

“It is common cause that notification was sent by telefax and in the judgment given by the Commissioner he says the following:

‘Further, in Section 213 of the Act (LRA) ‘serve’ means to send by registered post, telegram or to deliver by hand. I perused the file and I am still satisfied that the Applicant was given proper service. The Respondent in his evidence also said that it was possible that the notice of arbitration was faxed to him, but he could not have received it because he receives many faxes. According to the file the notice was faxed to the Respondent on 21 August 1997 at 15h51 at his

fax number and the transmission result report indicates that the fax was received.'

Mr Gerber for the employer contends that this is a fair reflection of what is recorded in the handwritten notes of the Commissioner upon which he was content to rely. What this boils down to is that a fax was ostensibly sent and the fax was on the employer's version ostensibly not received. Some play was made of the fact that during the hearing itself, the fax transmission slip was not produced. There is no indication whether or not it was requested, but it seems to me to be beside the point. It is not suggested that there was no telefax sent nor is it suggested that there was no telefax transmission in existence. If that was to be the case, it would be to challenge the Commissioner squarely on the facts. It is true of course that in the application before this Court, the point is made that the First Respondent could not 'produce any transmission report to prove that the notification of the arbitration was served'. But I do not see in the record of the hearing that there was any debate there about whether the remarks made by the Commissioner to the effect that there was a transmission was in fact put in doubt. It is evident from the explanation tendered in the hearing that it was not so much a challenge that the transmission had been sent, but to a challenge to the transmission having been received, and all we have on record is the Applicant saying he did not get it. The conclusion which the Commissioner reached on the basis of those facts was that no proper case had been made out for rescission. That decision of the Commissioner is now before me so that I may decide whether or not it is vitiated by any reviewable irregularity....."

The reasoning in that judgment appears at **p 940 C**:

“What did motivate the Commissioner? It seems quite clear that he had before him a bona fide and acceptable defence. He also had before him an explanation for non-attendance of the proceedings. His conclusion was that the explanation for non-attendance was not satisfactory. He based that conclusion on the ground that there was documentary evidence available to him which indicated that a telefax had been served on the employer. The definition of ‘serve’ in Section 213 of the LRA means sent by registered post, telegram, telex, telefax or delivery by hand. The only defence which the Applicant has put up is to say that he did not get the fax. If one was to conclude that the explanation was adequate in order to establish a basis for rescission, it would completely undermine the efficacy of the section in the Act. It seems to me that when the section of the Act defines ‘serve’ as sending by fax, then effect must be given to it. The Commissioner was of the view that a telefax had been sent. If one is to go further and conclude that notwithstanding the sending 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 must 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. That seems to me to be insufficient. More particularly one must bear in mind that I am not at liberty to substitute the view that I might have taken had I been sitting as a Commissioner of the CCMA. I have to evaluate whether or not there is a reviewable irregularity in terms of the

discretion which was vested in the Commissioner himself. I am of the view that I cannot fault the Commissioner's conclusion, having regard to the prima facie indication of a transmission having been sent, that proper service had been effected, that the Applicant was properly in default and that no satisfactory explanation had been tendered."

41 In my view, the contention that the two cases are distinguishable is well made. The most evident distinction from what has been set out above is that the Applicant in this matter sought earnestly to enquire into the circumstances upon which it was claimed by the First Respondent that notification of the arbitration hearing had been sent to it. This conduct on the part of the Applicant's representatives contrasts starkly with the conduct of the Applicant in Duarte v Carrim, as set out above. Moreover, it can be inferred from the facts which have already been surveyed, that had the representatives of the Applicant taken the trouble to call for and inspect the file of the First Respondent in this matter, they would, as the Second Respondent did at the inception of the rescission application hearing, have found no evidence of any notification having been sent to the Applicant.

42 When the Applicant invited, in its papers, the First Respondent to state clearly on what basis it could claim that notification it had given, it was entitled to an answer. It is not readily apparent why the First Respondent did not reply to that demand, save that it is evident from the rescission papers which are part of the documentation placed before this Court, that the First Respondent was not itself a respondent in those rescission proceedings. That in itself is not surprising given that it was the First Respondent, in its institutional form, which was called upon through the medium of the Second Respondent to decide whether or not the rescission was to be granted. It would be odd to cite the party before whom you appear as a respondent in such an application. However, a

common sense appraisal of these circumstances strongly suggests that it is likely that no person in the employ of the First Respondent applied his or her mind to the contents of the rescission application before it was placed before the Second Respondent on the day of the hearing. In regard to the critical question, the Third Respondent was understandably in no better position than the Applicant itself to know what had or had not taken place in the office of the First Respondent. Had an official of the First Respondent taken the trouble to acquaint him or herself with the contents of the Applicant's founding papers, the central question might have been resolved satisfactorily on an entirely different footing. Perhaps it may be a useful practice to adopt, notwithstanding the self-evident oddity, to cite the First Respondent in matters of this nature in the future and to serve papers upon the relevant Regional Director so that the officials of the First Respondent can be prompted to make the appropriate investigation into matters in respect of which they alone have knowledge and thereupon furnish a response. Perhaps this question might also usefully be considered by the Rules Board for Labour Courts.

43 There is a further matter in respect of which the Duarte v Carrim case is wholly distinguishable from the present one. At the time when Duarte v Carrim came before the Court, Rule 20 of the Rules of the First Respondent had not yet been promulgated. Those rules came into force pursuant to Regulation 245 on 31 March 2000. Rule 20 provides:

“The Commission must give the parties fifteen days’ notice of an arbitration hearing, unless otherwise agreed.”

This is the rule under which in this case, the First Respondent purported to give notice of the arbitration hearing on the 28th of April 2000. Of no little interest, is the fact that the word “*serve*”

defined in Rule 1 of those Rules means:

“To serve in accordance with Rule 3 and service has a corresponding meaning”.

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 Section 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 Section 213 of the LRA.

45 The judgment in **Duarte v Carrim** has been criticised by W C Hutchinson: **Rescinding of Arbitration Awards Granted by Way of Default (1999) 16 SALJ 744**. The learned author in that article points out quite correctly the dangerous illusion that transmissions by telefax are reliable and offers various common sense illustrations of what might go wrong. He then points to the judgment as lacking a proper appreciation of the need to balance the weight of a *bona fide* defence against a weak explanation for absence at the time when judgment was granted. He concludes that

the impact of that judgment is unnecessarily mechanical and in consequence unfair to the parties. Having had the opportunity of hearing argument in the present matter, and reflecting on the criticisms of Hutchinson, I am inclined to the view that my judgment in Duarte v Carrim does not adequately address the question of the balance between a *bona fide* defence on the one hand and a weak explanation for absence on the other hand and in consequence I am of the view that the criticism levelled at the judgment is warranted.

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 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.

47 In my view, having regard to all these considerations, the Second Respondent should have been alert to the fact that she was not in a position to reach a fair conclusion as to whether or not a

reasonable explanation had been furnished for non-appearance at the arbitration hearing on the 28th of April 2000, by reason of a non-receipt of a faxed notification. She should have allowed an opportunity for an investigation to take place, which might conceivably have produced further evidence which might have facilitated the presentation of a set of facts which would have afforded a basis for a conclusion different to that which she reached at the time. If that explanation was wanting in any respect to demonstrate that there was a wholly blameless absence at the time of the hearing, the force of that explanation should have been balanced against the force of the case which the Applicant sought to present in support of its decision to dismiss the Third Respondent. The weight of a solid *bona fide* case will usually make up for the thinness of the explanation for the default.

48 Accordingly, in my view the refusal of the Second Respondent to grant the application for rescission should be reviewed and set aside.

THE APPLICATION TO REVIEW THE AWARD *PER SE*

49 The second application before the Court is to set aside the award of the 17th of May, on the grounds that the Second Respondent conducted herself in breach of Section 145 (2) (a) (ii) of the LRA in that it was grossly irregular on her part to grant an order of compensation in ignorance of the employment circumstances of the Third Respondent at the time of the hearing on the 28th of April 2000.

50 It was contended in this Court that at the relevant time, the Third Respondent had already procured employment. This was not a fact known to the Second Respondent at the time of the hearing. In my view, for that reason, that fact can play no role in an evaluation of whether or not the Third

Respondent's decision falls to be reviewed. What must be given consideration, is her ignorance of whether or not the Third Respondent was in employment at that time, and her failure to inquire about such circumstances.

51 It is apparent from the record of the proceedings that the Third Respondent indicated to the Second Respondent that he did not wish to be reinstated in his employment. The only possible form of relief available to be granted by the Second Respondent to the Third Respondent was therefore an order of compensation. The impression created by a reading of the award, is that the Second Respondent thereupon simply awarded compensation without further reflection on the matter.

52 The power of a Commissioner of the CCMA to order compensation is in Section 193 (1) (c) of the LRA. The relevant portion provides as follows:

“(1) *If the Labour Court or an arbitrator appointed in terms of this Act finds that a dismissal is unfair the Court or the arbitrator may -*

(a)

(b)

(c) ... *order the employer to pay compensation to the employee.*”

Also of significance are the provisions of Section 193 (2) relating to the circumstances under which

the Labour Court or an arbitrator must “*require the employer to reinstate or re-employ*” an employee. The relevant portion provides as follows:

“(2) *The Labour Court or the arbitrator must require an employer to re-instate or re-employ the employee unless:*

(a) *The employee does not wish to be reinstated or re-employed;*

....

....

The dismissal is unfair only because of the employer did not follow a fair procedure.”

53 The decision of the Labour Appeal Court in **Johnson and Johnson (Pty) Limited v C W I U** (1999) 20 ILJ 98 (LAC) makes it clear that the mere fact of an unfair dismissal finding does not automatically lead to an award of compensation. The practical implications were articulated in the *dictum* of Marcus AJ in **Nel v Ndaba and Others** (1999) 20 ILJ 2666 (LC) at 2672 H - 2673A.

54 The first decision which the arbitrator must make is whether or not an unfair dismissal has taken place. If that finding is made, the Commissioner must enquire further into whether or not any reason exists why reinstatement should not be awarded. One of the circumstances which excludes that as an appropriate form of relief is the disinclination on the part of the employee to be

reinstated. In such a circumstance, a third decision must then be made by the Commissioner as to whether or not compensation should be granted in the given circumstances. It is conceivable that in a case where an unfair dismissal has been found that for a range of circumstances it is appropriate to decide that no consequent relief should be granted, even where reinstatement is unwanted or inappropriate. It can never follow as a matter of course that where reinstatement is unwanted or inappropriate, that therefore, compensation must automatically be granted in its stead.

55 Part of the reason why this is such a vexed enquiry, is because once a decision to grant compensation is made, the arbitrator is bound by the formula set out in Section 194 of the LRA in regard to the computation of compensation. The relevant provisions are:

“(1) If a dismissal is unfair only because the employer did not follow a fair procedure, compensation must be equal to the remuneration that the employee would have been paid between the date of the dismissal and the last day of the hearing of the arbitration or adjudication, as the case may be, calculated at the employee’s rate of remuneration on the date of dismissal. Compensation may however not be awarded in the respect of any unreasonable period of delay that was caused by the employee in initiating or prosecuting the claim.

(2) *The compensation awarded to an employee whose dismissal is found to be unfair because the employer did not prove that the reason for dismissal was a fair reason related to the employee’s conduct, capacity or based on the employer’s operational requirements, must be just and equitable in all the circum-stances, but not less than the amount specified in sub-section (1) and not more than the equivalent of twelve months’ remuneration calculated at the employee’s rate*

of remuneration on the date of dismissal.”

56 It follows therefore that in order to decide how to approach the question of an order for compensation, it is necessary for an arbitrator to characterise the nature of the unfairness of the dismissal as being either procedural or substantive in order to know whether or not to apply the provisions of Section 194 (1) or Section 194 (2). The Second Respondent held the dismissal to be both procedural and substantially unfair.

57 In my view, it is incontrovertible that it is not possible for a Commissioner to properly consider an order of compensation in the absence of material information having a bearing on the relief which may be granted. The provisions in Section 194 (2) requiring an award to be “*just and equitable in all the circumstances*” underscores the need for the arbitrator to be properly informed about all circumstances which would bear on justice and equity.

58 In the circumstances of the case, it seems to me that what needs to be evaluated is what the Second Respondent could have done with the information that the Third Respondent was or was not employed as at the date of the hearing, in relation to applying her mind to an award of compensation.

59 In my view, as a general rule, it is likely that in most cases where an individual declines to be reinstated it will be precisely because that individual has procured alternative employment. In **Whall v Brandadd Marketing (Pty) Limited** (1999) 20 ILJ 1314 (LC) a case dealing with a retrenchment Grogan A J at p 1323 [32] observed that a refusal to grant any compensation at all because the dismissed employee had obtained better paid work immediately after dismissal would

be consistent with the class of factors mentioned by Froneman DJP in the Johnson and Johnson case at p 100 [41], where it was held:

“The compensation for the wrong in failing to give effect to an employee’s right to a fair procedure is not based on patrimonial or actual loss. It is in the nature of a solatium for the loss of the right, and is punitive to the extent that an employer (who breached the right) must pay a fixed penalty for causing that loss. In the normal course a legal wrong done by one person to another deserves some form of redress. The party who committed the wrong is usually not allowed to benefit from external factors which might have ameliorated the wrong some way or another. So too, in this instance. The nature of an employee’s right to compensation under section 194 (1) also implies the discretion not to award that compensation may be exercised in circumstances where the employer has already provided the employee with substantially the same kind of redress (always taking into account the provisions of section 194 (1)), or whether the employer’s ability and willingness to make that redress is frustrated by the conduct of the employee.” (Amplification supplied)

60 The fact of whether or not an aggrieved dismissed employee has improved or sustained his employment prospects in consequence of the unfair dismissal, must, in accordance with this approach be necessary information which must be in the mind of the arbitrator when she considers the question of whether or not to award compensation, and if so, subject to the strictures of Sections 194 (1) and (2), how much is appropriate. A failure to know what the employment circumstances are at the time of making an award is thus a material irregularity contemplated by Section 145 (2) (a) (ii).

61 In the circumstances, in my view, the application to review and set aside the award of the 17th of
May 2000 *per se* ought to be granted.

THE ORDERS OF THIS COURT

62 In regard to the question of the costs of this application, I take the view that it would be
inappropriate to make an order against the Third Respondent. Costs are not sought against the other
Respondents.

63 I make the following orders:

The award of the Second Respondent on 17th May 2000 is reviewed and set aside.

The decision of the Second Respondent on the 8th of August 2000 refusing rescission
of the award made on the 17th of May 2000 is reviewed and set aside.

The dispute concerning the alleged unfair dismissal of the Third Respondent by the
Applicant is referred back to the First Respondent which shall assign a Commissioner, other than
the Second Respondent, to hear the matter *de novo*.

There will be no order as to costs.

DATED at JOHANNESBURG on this day of FEBRUARY 2001

ROLAND SUTHERLAND

Acting Judge of the Labour Court
of South Africa