

IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT JOHANNESBURG

CASE NUMBER: JR991/01

In the matter between:

Applicant

and

First Respondent

**COMMISSION FOR CONCILIATION,
Second Respondent**

Third Respondent

J U D G E M E N T

- 1 On the 9th of November 2000 the Applicant employer dismissed its employee, the First Respondent. The dismissal is confirmed in an appeal heard on the 23rd of December 2000. The First Respondent was not satisfied with the outcome and

referred the matter to the CCMA for conciliation. When that failed, the matter was referred to the CCMA for arbitration. Communication of the hearing of the CCMA arbitration was communicated to the Applicant by telefax. The date for the hearing was 16 March 2001. On the date of the hearing, the Applicant was not represented. The Commissioner who heard the matter, the Third Respondent, concluded that service had been properly effected on the Applicant and dealt with the matter in the absence of any representation. The Third Respondent heard the case put forward by the First Respondent and decided that the dismissal was unfair. He ordered consequent relief.

- 2 When the award was drawn to the attention of the Applicant, and application to rescind the award handed down on the 24th of March was launched. That application is before me.
- 3 The basis for the rescission is essentially that although the telefax communication may well have been received at the telefax number of the Applicant used by the officials of the CCMA, the notice did not reach the desk of anyone who appreciated its significance and could react thereupon. It was contended by the Applicant to the Third Respondent at the rescission application hearing that the telefax number used by the CCMA was the general fax of the Applicant's reception and not the fax in the Human Resources Department. It was further suggested that huge delays took place in identifying who was the responsible

person to give attention to faxes which arrived at the general office and that such difficulty was exacerbated by the fact that the notice faxed to the Applicant's office had no reference number on it which could easily identify to whom it should be referred within the organisation of the Applicant. The Applicant's organisation it is said is a large and bureaucratic one.

- 4 Rescission applications of this nature require the presiding officer who is responsible for deciding them to give consideration to whether or not in truth the party who was in default at the time when judgment was granted or an award handed down, was unaware of the hearing. If that fact is established, the explanation for the unawareness must be considered and if the explanation is reasonable that provides the basis for the rescission of the award or judgment as the case may be. The Third Respondent, in articulating the test which he employ expressed himself as follows:

1 *“The test in matters of this nature has always been whether the Applicant in failing to attend the hearing was in wilful default and was negligent.”*

No criticism can be advanced of articulating the test in those terms, although one may well quibble as to whether or not it correctly articulates the whole test which is required.

- 5 The Third Respondent goes on to identify the essence of the debate which was

conducted before him. He points, appropriately, to the fact that the Applicant expressed its grievance at the choice of the general fax number and the omission of any reference number on the document which would have facilitated a speedy redirection to the appropriate person. Axiomatically, implicit in that articulation of the Applicant's complaint is the consequence thereof that it did not come to the attention of a person who could responsibly deal with it.

6 The Third Respondent then articulates himself as follows:

“It is common cause that the Respondent was dismissed on 9 November 2000. An appeal hearing was held on 23 December 2000. It is admitted by the Applicant that the Respondent did mention in that appeal hearing that the matter was already with the CCMA. The Applicant by its own admission decided not to take the Respondent's word seriously and concluded that because the Respondent could not “furnish them with documentation and because he also participate fully in the appeal process” he was lying. It took no steps to verify that aspect further with the Applicant or the CCMA. The Respondent was under no obligation to “furnish” the Applicant with the CCMA documents in the appeal hearing. Again the Applicant admits to having received the letter dated the 14th of December 2000 from the Applicant's attorney in January 2001. In the letter the attorneys clearly mentioned that the matter had been referred to the CCMA for arbitration already. Yet again the Applicant did nothing to verify with either the attorneys themselves or the CCMA the so-called “validity of the information”. (In this

passage of course, the reference to Applicant and Respondent is as they were in the CCMA and not in this application).

7 In my view the criticism of the Third Respondent of the Applicant is inappropriate. It appears that he took the view that once there was correspondence or an informal communication that the matter would indeed come before the CCMA at some time, some obligation then arose on the part of the Applicant to investigate why no service of documentation had arrived. That cannot be correct. No party who is threatened with litigation can be burdened with the obligation to verify whether or not that has taken place. It is the very purpose of the initial service of documentation initiating litigation, which warrants imposing any kind of obligation whatsoever on a party to litigation. In my view the assumptions are implicit in the Third Respondent's criticism are wholly invalid.

8 The Third Respondent articulates himself further as follows:

“Bu its own admission again, the Applicant states that the letter in question was too urgent and was received late due to the fax number that was used. It however did nothing to alert the relevant parties about the delay it was experiencing as a consequence of the fax number that was being used. The Respondent and his representative were therefore entitled to continue to use that same fax number and

from which the Applicant had received and responded to their correspondence. The question of the delays were never brought to the Respondent or his attorney's attention, nor was it brought to the CCMA's attention. I find therefore on the facts that proper notice was served on the Respondent and its failure to attend the hearing was caused by its willful and negligent conduct in its handling of its correspondence."

- 9 In my view this passage illustrates yet again a misconceived approach on the part of the Third Respondent. In the first place, the notion that the correspondence of the Applicant was dealt with in an allegedly "*willful and negligent conduct*" is not to be confused with the enquiring as to whether or not the reason for the absence of the Applicant at the CCMA hearing is the result of willful neglect. Moreover, to construe the failure to take the initiative to communicate to the First Respondent or his representative or to the CCMA's officials, that the fax number which they were using was less appropriate than another fax number, is not something which properly should be given weight in determining that the Applicant has behaved willfully and negligently. Axiomatically, it is a nonsense to suggest that the CCMA should have been informed when the very problem was that the Applicant was unaware that the CCMA was endeavouring to communicate with it. The suggestion that the First Respondent or his representatives should have been told that the letter of the 14th of December took a long time to reach the desk of the responsible person via a particular fax number,

is not something that can be given weight to determine that the absence of the Applicant at the hearing was the result of any wilfulness or negligence.

- 10 The Third Respondent then seeks to distinguish certain authorities in the High Court and in this Court, which gave weight to the fact that parties who were absent at hearings, intended at all times to proceed and defend the claims made against them. He justifies the distinctions between the cases illustrated by those authorities, and the present by saying the following:

“... (there) it was held in favour of a party who would have at all times intended to proceed or defend the relevant application and it was found that the reasons why it had not been present was that it had no knowledge of the set down. The current situation is the result of the Applicant’s inept and reckless attitude towards this matter.”

- 11 It is not altogether plain to me whether the Third Respondent made a finding that the Applicant in this matter did not have an intention to proceed and defend the relevant application or indeed made a finding that they had such an intention, but notwithstanding that intention they had behaved in an inept and reckless attitude. As there is no factual foundation for the former conclusion, I am inclined to interpret his remarks as meaning the latter. However, his characterisation of the conduct of the Applicant on these facts as inept and reckless is wholly without

foundation. It is manifestly obvious from the Third Respondent's own findings of fact that as a matter of fact the Applicant did not have knowledge of the hearing. The real enquiry should have been into whether or not that genuine ignorance on the part of the Applicant and its officials was attributable to some factor that was blameworthy. The high point of blameworthiness from the perspective of the Third Respondent is that they did not take the trouble to initiate cheques when they had heard that litigation was pending and that they did not alert the First Respondent or his representatives that there was an unavoidable delay if a particular telefax number was used to communicate with them.

- 12 The test to be applied as to whether or not the Third Respondent conducted himself appropriately is that which is set out in Carephone (Pty) Limited v Marcus N.O and Others (1998) 19 ILJ 1425 (LAC) in which it was stated that there must a rational connection between the conclusions reached by the Commissioner and the material which is placed before him. In my view, there is a clear absence of a rational connection between the material considered by the Third Respondent and the conclusion reached by him. The problems which arose for consideration by the Third Respondent illustrate the dangerous practice of service by telefax, provided for in the Labour Relations Act. It is one thing for parties who have formally communicated with each other and aware that they are engaged in litigation, to furnish one another a telefax number at which they will accept further service of documentation. However, it is plainly clear that

telefaxing the initial documentation, which sets in train the rest of the pre-hearing steps which must be taken by litigating parties, and which reasonably should put them on their guard to look out for further communications in regard to the litigation, is not well served by the method of telefaxing. It is plain from anyone who attends the hearings of the Labour Court, that the enormous growth in applications for rescission in circumstances where the Respondent party claims that albeit on the face of it a telefax transmission was sent, it was not received or did not reach the person responsible for giving it attention, leads to the conclusion that the provisions of the Act in this regard require reconsideration. In my view, it is appropriate that the Rules Board for the Labour Courts gives its attention to this matter of procedure.

- 13 Having regard to the view which I have taken as set out above, it is not necessary for me to entertain the contentions and counter contentions on the other issues raised in the matter before me. It is clear that the refusal of the rescission by the Third Respondent must be set aside.

- 14 Accordingly, I make an order as follows:

14.1 The decision of the Third Respondent handed down on 29 June 2001 refusing rescission of an award handed down by the Third Respondent on 24 March 2001 in case number GA 118744 is set aside.

- 14.2 The First Respondent, at his election, may refer the matter afresh to the CCMA for

a hearing into whether or not his dismissal was fair or unfair within ninety days of the date of this judgment.

14.3 There will be no costs order.

ROLAND SUTHERLAND
ACTING JUDGE OF THE
LABOUR COURT OF
SOUTH AFRICA
25 June 2002