VARIATION AND RESCISSION OF ARBITRATION AWARDS AND RULINGS IN TERMS OF SECTION 144 OF THE LABOUR RELATIONS ACT

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SUMMARY

Section 144 of the Labour Relations Act 66 of 1995 provides for the rescission and variation of arbitration awards. Two schools of thought have emerged from the Labour and Labour Appeal Court judgments dealing with rescission. This is to a large extent attributable to the similarity of the wording of section 144 and the wording of Rule 42(1) of the Uniform Rules of Court. The first view is that a wide meaning should be given to section 144. This approach requires a reasonable explanation and a *bona fide* defence on the merits of the matter. The second view is that a narrow interpretation should be applied and that a reasonable explanation and a *bona fide* defence are not relevant to applications for rescissions in terms of section 144(a). This approach requires that the application should be founded on one of the specific grounds stated in section 144(a) and on those grounds alone. Both approaches have advantages and disadvantages, but both the Labour and Labour Appeal Courts have indicated that the narrow approach would be the correct one to follow.

1 INTRODUCTION

The rescission of arbitration awards and rulings has been a contentious issue ever since the promulgation of the Labour Relations Act.[1] The Labour and Labour Appeal Court's decisions on this matter appear to be contradictory and the interpretation and application of section 144 of the Act has become an issue in dire need of clarification.

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[1] 66 of 1995 (hereafter referred to as "the Act").

The most obvious reason for this confusion can be found in the similarity of the wording of Rule 42(1) of the Uniform Rules of Court,[2] sections 144 and 165 of the Act, and Rule 16A of the Rules of the Labour Court.[3] In drafting the Labour Relations Act, the legislature borrowed the wording of sections 144 and 165 of the said Act verbatim from Rule 42(1) of the Uniform Rules of Court.

The Labour Court held in *Lumka and Associates v Bontle Maqubela*[4] that,

> "it is thus not surprising that this Court has held in applying sections 144 and 165 it should be guided by cases dealing with Rule 42(1)[5] … [i]ndeed, the legislature must be presumed to have been aware, when enacting the Labour Relations Act, of the judicial interpretation which has been placed on Rule 42(1) and to have intended sections 144 and 165 to have the same meaning."

This article includes a discussion of the general principles of common law governing rescission, common law and statutory exceptions to the general rule and, ultimately, the suggested correct interpretation and application of section 144.

2 THE COMMON LAW APPROACH

The common law position, based on Roman Dutch writers,[6] was that a judgment, once duly delivered, cannot be recalled or altered, because the judge had become *functus officio*.[7] In *De Wet v Western Bank*,[8] the Appellate Division settled the true scope of the common law power of the Court to rescind its own judgments where it held, after a detailed consideration of the authorities and the Rules of Court, that the Courts of

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2 Rule 42(1) governs applications for rescission in the High Court. The Uniform Rules of Court are also known as the Rules Regulating the Conduct of the Proceedings of the Several Provincial and Local Divisions of the High Court of South Africa published in GG Extraordinary GN R48 (Regulation Gazette 437) (as amended) of 1965-01-12.

3 S 165 and Rule 16A govern applications for rescissions in the Labour Court.

4 2001 4 SALLRJ 139 (LC) J5407.01 par 24.

5 In this regard see *Enzo Panelbeaters CC v Commission for Conciliation Mediation and Arbitration* (1999) 20 *ILJ* 2620 par 7.

6 Voet 42.1.27. and in this regard see other authorities referred to in *Estate Garlick v CIR* 1934 AD 499 502.

7 In *Firestone South Africa (Pty) Ltd v Genticuro AG* 1977 4 SA 298 306H-307H the Court set out the circumstances in which the Court could, if approached within a reasonable time of pronouncing the judgment or order, correct, alter or supplement its own judgment or order:

(i) The principle judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment debt, which the Court overlooked or inadvertently omitted to grant;

(ii) The Court may clarify its judgment or order, if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention, provided it does not thereby alter "the sense and substance" of the judgment or order;

(iii) The Court may correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention;

(iv) Where counsel has argued the merits and not the costs of a case, but the Court, in granting judgment, also makes an order concerning the costs, it may thereafter correct, alter or supplement that order.

8 1979 2 SA 1031 (A).

Holland were generally empowered to rescind judgments obtained on default of appearance. This could be done only on sufficient cause shown.

No rigid limits were set as to which circumstances constituted sufficient cause. Over time, general principles were developed in case law to guide the Courts as to how their discretion was to be exercised.[9] The Court observed that the exercise of these discretionary powers appeared to be influenced by considerations of justice and fairness, having regard to the circumstances of the particular case.[10] It stated "one can envisage many situations in which both logic and common sense would dictate that a defaulting party should, as a matter of justice and fairness, be afforded relief."[11]

In order for a litigant to succeed with an application for rescission it must satisfy two requirements. Firstly it must provide the Court with a reasonable explanation why the judgment was allowed to be issued by default and secondly, on the merits, show a bona fide defence, which *prima facie* carries some prospects of success.[12] Both these requirements must be satisfied before an application will succeed.[13] The Court held, in *Chetty v Law Society, Transvaal*,[14] that "for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of the default judgment against him, no matter how reasonable and convincing the explanation for his default. An ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain for the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."

This common law jurisdiction was preserved when the Uniform Rules of Court were introduced. The Court's jurisdiction to rescind its own orders and judgments on good cause shown was embodied in Rule 31(2)(b) of the Uniform Rules. In addition to this, Rule 42 of the Uniform Rules also allowed for rescission applications, but on different grounds.

3 RULE 42(1) OF THE UNIFORM RULES OF THE HIGH COURT

Rule 42(1) of the Uniform Rules reads as follows:

> "(1) The Court may, in addition to any other powers it may have, *mero motu* or upon the application of any party affected, rescind or vary –
>
> (a) An order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
>
> (b) An order or judgment in which there is an ambiguity, or a patent error or omission, but only to the extent of such ambiguity, error or omission;

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9 *De Wet v Western Bank supra* 1042F-G.

10 *De Wet v Western Bank supra* 1042H.

11 *De Wet v Western Bank supra* 1042A.

12 *Lumka & Associates v Maqubela* 2003 6 SALLRJ 34 (LAC) – J31.03 par 22.

13 *Ibid.*

14 1985 2 SA 756 (A) 765D-E.

(c) An order or judgment granted as a result of a mistake common to the parties."

When Rule 42(1) of the Uniform Rules was introduced, it formulated grounds of rescission which were not dependent on the requirement of showing of sufficient or good cause. This set Rule 42(1) apart from Rule 31(2)(b). The Court commented, in the *Lumka & Associate v Bontle Maqubela*[15] case, that it was apparent that Rule 42(1) could not have been intended to cover the same ground as Rule 31(2)(b). Rule 42(1)(a), in contrast to Rule 31(2)(b), is limited to orders "erroneously" granted in the absence of an affected party and does not require that good cause also be shown.[16]

3 1 "In addition to any other powers it may have"

The wording of Rule 42(1) is similar to section 144 except for the reference made to "in addition to any other powers it may have". In the absence of these words being used in section 144, it follows that the Commission for Conciliation Mediation and Arbitration[17] can only vary or rescind an arbitration award or ruling in terms of the grounds stated in section 144. The CCMA has no other powers in this respect and, most certainly, cannot use the common law test referred to above.[18]

In *Day and Night Investigators v Ngoasheng*[19] the Court held that this conclusion is reinforced when one compares the provisions of section 144 and 165 of the Labour Relations Act and Rule 16A of the Rules of the Labour Court. The wording of section 165 includes the qualification "in addition to any other powers it may have". The conclusion is irresistible that the legislature intended to restrict the powers of commissioners, but to increase the powers of the Labour Court.[20]

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15 *Supra* par 8.

16 *Lumka & Associates v Maqubela supra* par 28. The Court in this case cited numerous examples in case law that made it abundantly clear that to show good cause is not a requirement when applying for rescission in terms of Rule 42(1)(a). Examples where rescission has been granted under Rule 42(1)(a):

(i) Where there was no or defective service of process on the Defendant or Respondent (*Custom Credit Corporation (Pty) Ltd v Bruwer* 1969 4 SA 564 (D); *Fraind v Nothmann* 1991 3 SA 837 (W); and *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz* 1996 4 SA 411 (C));

(ii) Where an order was granted ex parte without citation of and service on an affected party (*Clegg v Priestly* 1985 3 SA 950 (W));

(iii) Where an order was taken supposedly by consent in circumstances where the Respondent's attorney had acted without authority (*Ntlabezo v MEC for Education, Culture and Sport, Eastern Cape* 2001 2 SA 1073 (Tk));

(iv) Where the Court lacked jurisdiction to entertain the case (*Transport & General Workers Union v Kempton City Syndicate* (2001) 22 *ILJ* 104 (W)); and

(v) Where default judgment was granted on a summons which was excipiable (*Marais v Standard Credit Corporation Ltd* 2002 4 SA 892).

17 Hereafter referred to as "CCMA".

18 See par 2 above.

19 2000 4 BLLR 398 (LC) 400F-G.

20 *Day and Night Investigators v Ngoasheng supra* 400H. An application for rescission of judgment in the Labour Court may be made in terms of the common law, section 165 of the

3 2 Rule 42(1)(a): Erroneously sought or granted in the absence of party

The Labour and Labour Appeal Court has often cited the comments of Erasmus,[21] who states the following regarding Rule 42(1)(a):

> "An order or judgment is erroneously granted if there was an irregularity in the proceedings or if it was not legally competent for the Court to have made such an order or if there existed at the time of its issue a fact of which the Judge was unaware which would have precluded the granting of the judgment and which would have induced the Judge, if he had been aware of it, not to grant the judgment. Though in most cases such an error would be apparent on the record of the proceedings, it is submitted that in deciding whether a judgment was erroneously granted, a Court is not confined to the record of the proceedings. Judgments have been rescinded under this subrule where the capital claimed had already been paid by the defendant; where the summons had not been served on the respondent; where counsel for the applicant in an *ex parte* application had led the Court mistakenly to believe that the respondent had deliberately decided not to consult his attorney or to appear at the hearing; where a final order had been granted in an ex parte application which had not been served on the respondent whose right were affected by the order; where parties had not been represented at an application for leave to appeal because they had no knowledge of the set-down of the application. Rescission was refused where the applicant had failed to notify the Registrar of Companies of a change of address and a summons had been served in accordance with the Rules at the office properly notified to the Registrar as the applicant's registered head office. The Courts have also consistently refused rescission where there was no irregularity in the proceedings and the party in default relied on the negligence or physical incapacity of his attorney."

In *Nyingwa v Moolman NO*,[22] after having analysed a number of authorities dealing with the interpretation of Rule 42(1)(a), the Court stated the following:

> "It therefore seems that a judgment has been erroneously granted if there existed at the time of its issue a fact of which the Judge was unaware, which would have precluded the granting of the judgment and which would have induced the Judge, if he had been aware of it, not to grant the judgment."[23]

In *Topol v LS Group Management Services (Pty) Ltd*[24] it was held that a judgment had been "erroneously" given within the meaning of Rule 42(1)(a) of the Uniform Rules of the High Court where it was found on the probabilities that the applicants for rescission had at all times intended proceeding with the relevant application and that the reason why they had not been represented at the application hearing was that they had been unaware that the matter had been set down. It was further held that there was, in the circumstances, no need for a party to show good cause in order for a judgment to be rescinded in terms of the provisions of Rule 42(1)(a).

Labour Relations Act or Rule 16A of the Rules of the Labour Court. *Sizabantu Electrical Construction v Guma* 1999 4 BLLR 387 (LC) 388I.

[21] *Superior Court Practice* (1994) B1-308.

[22] 1993 2 SA 508 (Tk) 510G.

[23] Erasmus B1-307 to B1-308.

[24] 1988 1 SA 639 (W).

It is clear from the above that the wording of Rule 42(1) requires that an applicant for rescission need only show that the judgment was erroneously sought or granted in the absence of a party. It follows that no additional requirement, such as "good cause", needs to be shown.

3 3 Rule 42(1)(b): An ambiquity, or patent error or omission

Erasmus[25] describes an ambiguity, patent error or omission in a judgment, as one that has the result of the judgment being granted not reflecting the intention of the judicial officer pronouncing it. The ambiguity, error or omission must be attributable to the Court itself.[26]

Rule 42(1)(b) refers mainly to the Court's discretionary power to correct errors in its own judgments.[27] This discretionary power is in addition to the to the common law power the Court has to rescind its own judgments in certain circumstances.[28]

3 4 Rule 42(1)(c): A mistake common to the parties

In a situation where both parties assume the correctness of some common fact and the Court bases its judgment thereon, Rule 42(1)(c) provides a remedy where a party subsequently finds those facts to be incorrect.[29] The Appellate Division held that in order for the Applicant to succeed with an application for rescission in terms of this subrule, the following two requirements must be satisfied:

(i) There must have been a mistake common to the parties;[30] and

(ii) there must be a causative link between the mistake and the grant of the order and the judgment.[31]

4 SECTION 144

The CCMA does not have inherent jurisdiction like that of the High Court, but is a creature of statute. Accordingly the CCMA only has those powers accorded to it by legislation.[32] Section 144 makes it quite clear that a commissioner may rescind an award. In this respect the CCMA is different from other statutory bodies, which in the absence of a specific power of reconsideration, are not ordinarily entitled to reopen decisions once made.[33]

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25 B1-310.
26 Erasmus B1-310.
27 Erasmus B1-309 to B1-310.
28 As set out in *Firestone South Africa (Pty) Ltd v Genticuro AG supra*.
29 *Tshivase Royal Council v Tshivase; Tshivase v Tshivase* 1992 4 SA 852 (A).
30 *Tshivase Royal Council v Tshivase; Tshivase v Tshivase supra* 863A.
31 *Tshivase Royal Council v Tshivase; Tshivase v Tshivase supra* 863C.
32 *Lumka & Associates v Bontle Maqubela supra* par 50.
33 *Mtshali v CCMA* 1999 9 BLLR 961 (LC) 965G-H.

Section 144 of the Act provides:

> "144. Variation and rescission of arbitration awards and rulings
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> 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;
>
> (b) in which there is ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
>
> (c) granted as a result of a mistake common to the parties to the proceedings."

Rescission of an award or ruling means that the award or ruling will be set aside and that the proceedings must commence afresh. The variation of an award or ruling will have the effect that the wording of the award or ruling will be amended. Variation does not necessarily result in the nullification of an award or ruling and causing the proceedings to commence afresh.

Section 144 grants the CCMA express and very specific powers to vary or rescind arbitration awards and/or rulings already issued. In this respect, the commissioner considering an application for rescission enjoys similar powers to those conferred on the High Court by Rule 42(1).[34]

Section 144 clearly identifies three grounds upon which an applicant may approach the CCMA to vary or rescind an arbitration award or ruling. Each of these three grounds will be briefly analysed with reference to case law.

4 1 Section 144(a)

The Labour Court has consistently held that section 144(a) is derived from, or is similar to, Rule 42(1)(a) of the Uniform Rules of Court. Commissioners and judges of the Labour Court should be guided by decisions of the High Court regarding Rule 42 in interpreting and applying section 144.[35]

Two schools of thought have emerged from the Labour and Labour Appeal Court judgments dealing with rescission. The first view is that a wide meaning should be given to section 144. This approach requires a reasonable explanation and a *bona fide* defence on the merits of the matter. The second view is that a narrow interpretation should be applied and that a reasonable explanation and a bona fide defence are not relevant to applications for rescissions in terms of section 144(a). This approach requires that the application should be founded on one of the specific grounds stated in section 144(a) and on those grounds alone.

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[34] *Mtshali v CCMA supra* 965I-966A

[35] *Lumka & Associates v Bontle Maqubela supra*; *CAWU v Federale Stene (Pty) Ltd* (1998) *ILJ* 642 (LC); *Day & Night Investigators CC v Ngoasheng* (2000) 21 *ILJ* 1084 (LC); and *Cash Paymaster Services (Pty) Ltd v Mogwe NO* (1999) 20 *ILJ* 610 (LC).

4 1 1 Wide interpretation of section 144(a)

The first school of thought entails that the interpretation and application of section 144(a) is taken beyond the exact wording of section 144(a). The test applied should be whether the applicant can offer a good explanation for the default as well as a bona fide defence to the respondent's claim.

The court in *Duarte v Carrim NO*,[36] citing Herbstein and Van Winsen,[37] held that the following test should apply when it considers an application for rescission:

> "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 bona fide and he must show that he has a bona fide defence to the plaintiff's claim."[38]

The wide interpretation of section 144(a) was similarly applied by the court in *Northern Province Local Government Association v CCMA*.[39] In this matter the Labour Court was faced with the review of a commissioner's refusal to rescind an arbitration award. The court, once again citing Herbstein and Van Winsen,[40] held that 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.[41]

The court held that this issue was by no means novel and had been thoroughly worked out in civil jurisprudence over a long period time. In the Court's opinion, no sound reason existed to invent anew either law or practice in regard to the principles which govern the decision as to whether or not rescission of a judgment should be granted or not.[42]

In *Foschini Group (Pty) Ltd v CCMA*[43] the Court cited with approval the way in which section 144(a) was interpreted in *Northern Province Local Government Association v CCMA*.[44] The Court stated furthermore that if an explanation given for a party's non-appearance at the arbitration proceedings does not indicate that the absent party was wholly blameless, the explanation must still be balanced against that party's prospects of success. The Court held that a solid *bona fide* case would usually compensate for a thin explanation for default.[45]

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36 1998 9 BLLR 935 (LC).
37 *The Civil Practice of the Supreme Court of South Africa* 4ed (1997) 450.
38 *Duarte v Carrim supra* 939C-E.
39 2001 5 BLLR 539 (LC).
40 450.
41 *Northern Province Local Government Association* v *CCMA supra* 545G.
42 *Northern Province Local Government Association* v *CCMA supra* 545B-C.
43 2002 7 BLLR 619 (LC) 622F-H.
44 *Supra.*
45 *Foschini Group (Pty) Ltd v CCMA supra* 622H-I.

The Labour Court in *Lumka & Associates v Bontle Maqubela*[46] criticised the wide interpretation of section 144(a) and rejected the test adopted by Sutherland AJ in *Northern Province Local Government Association v CCMA.*[47] The passage Sutherland AJ referred to in Herbstein & Van Winsen cited summaries of the practice of the High Court with reference to rescission applications brought under Rule 31(2)(b), and not the practice of the High Court regarding rescission applications brought under Rule 42(1)(a). One cannot fault the Labour Court's reasoning in this regard, as Rule 31 (2)(b) contains a ground for setting aside a default judgment very dissimilar to Rule 42(1)(a) and section 144.

The Labour Court's criticism in the *Lumka & Associates* case, of the wide interpretation of section 144, was reiterated by the Labour Appeal Court in the same matter where the court held[48] that

> "where the rescission is sought on the basis that an order was erroneously granted, the applicant is not required over and above that, to show good cause. Proof of the fact that the order was erroneously granted suffices for having rescission provided that such an order was granted in the absence of the applicant … If the collective compliance with the requirements of erroneously made and good cause would be required, it is difficult to imagine an instance where a commissioner would act on his own accord to rescind an award as he cannot himself establish essential elements of good cause".

4 1 2 Narrow or strict interpretation

The Labour Appeal Court held, in the *Lumka & Associates* case, that irrespective of the meaning attached to section 144(a), the basic requirements of erroneously sought or made must be retained when applying it.[49] The essential requirements for the exercising the power of rescission conferred upon commissioners by section 144(a) are as follows:

(a) an error committed in either seeking or making the award;

(b) in the absence of a party affected thereby.[50]

The judgment in *Lumka & Associates v Bontle Maqubela* provided a detailed analysis of the two different approaches followed in applying section 144(a). The court referred to *Day & Night Investigators v Ngoasheng*[51] and agreed with the principle that, once it was established that the notification of the arbitration date had been duly faxed to and received by the applicant, the making of an award in the absence of the applicant had not occurred "erroneously" within the meaning of section 144(a). It held further that, once actual notification of arbitration proceedings has been given to both parties, the presiding officer is empowered, in terms of section 138(5), to proceed in the absence of a party who fails to appear. The fact that a non-appearing party may have a good explanation for his default does not mean that an

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46 *Supra* par 41-45.

47 *Supra.*

48 *Lumka and Associates v Bontle Maqubela supra* par 28.

49 *Lumka and Associates v Bontle Maqubela supra* par 27.

50 *Lumka and Associates v Bontle Maqubela supra* par 25.

51 *Supra.*

award in such circumstances is made "erroneously" for purposes of section 144(a). On the contrary, so the court held, the commissioner is expressly empowered to proceed in the absence of such a party once he has satisfied himself that there has been due notification.

The court, on the strength of authorities cited from the High Court, and especially so the judgment of the Appellate Division in *De Wet v Western Bank Limited*,[52] concluded as follows:

> "Where there has been due service and compliance with any other applicable procedural requirements, the Rules entitle a company or plaintiff to take default judgment in the absence of the other party. The Court entertaining the matter is not obliged to investigate why the defendant or respondent is in default, and the Court can thus not be said to have acted 'erroneously' by granting an order in the absence of the affected litigant."

The court reiterated that the test of a reasonable explanation for the default and a *bona fide* defence in the main case with prima facie prospects of success, applicable to rescission applications in terms of the common law and Rule 32(1)(b) of the Uniform Rules of the High Court, is not applicable to section 144 of the Act.

Turning to the merits of the rescission application, the Court held that the company had received due notice of the arbitration hearing and that it was initially represented at the hearing. The representative withdrew from the proceedings when the application for postponement was refused. The court held that the word "erroneously" in section 144 certainly does not mean an erroneous decision with reference to facts known by a commissioner. To give section 144(a) this wide meaning would have the result that the commissioner could effectively be asked to reconsider, on the same facts, the merits of a decision he has already made. The court held that this proposition is untenable, for the commissioner would then hear an appeal against his own decision.

The court duly noted the injustice that may be occasioned from the narrow approach to section 144, but stressed the fact that the legislature has set a premium on the simple and expeditious resolution of labour disputes.[53]

In *Els Transport v Du Plessis*[54] the commissioner did not regard the award as having been erroneously made where the employer did not argue that there was no service, but rather that it did not come to its attention. The court confirmed the commissioner's dismissal of the rescission application.

In *Cash Paymaster Services (Pty) Ltd v Mogwe NO*[55] the Court also referred to decisions relating to Rule 42(1)(a) and stated that it was held that an order or judgment has been erroneously granted if there was an irregularity in the proceedings; or if it was not legally competent for the Court to have made such an order; or if there existed at the time of its issue a fact

52 *Supra*.
53 *De Wet v Western Bank Ltd supra* par 60; s 138(1) of the Act; *Carephone (Pty) Ltd v Marcus NO* (1998) 19 *ILJ* 1425 (LAC); and *Shoprite Checkers (Pty) Ltd v Ramdaw NO* (2001) 22 *ILJ* 1603 (LAC).
54 2001 6 BLLR 599 (LC).
55 *Supra* 615A-D.

of which the judge was unaware, which would have precluded the granting of the judgment and would have induced the judge, if he had been aware of it, not to grant the judgment. The commissioner's ruling was reviewed and set aside on the basis that the commissioner did not have the necessary jurisdiction to make the award as the wrong employer had been cited.

4 1 3 Conclusion

It is clear from the case law above that the narrow or strict interpretation and application of section 144(a) is the correct approach to be followed by CCMA commissioners. This approach endorses the fact that the CCMA is a creature of statute and that it has only those powers accorded to it by means of legislation. It is also in line with those decisions arising from the High Courts where Rule 42(l)(a) was interpreted and applied.

4 1 4 Practical application of section 144(a)

It is evident from the case law on the application of section 144(a) that application for the rescission of an award or ruling is often based on one of two reasons for the default of appearance of the applicant. The first consists of the negligence of the applicant's legal representative or labour consultant, and the second of the contention that the applicant was unaware that the matter had been set down.

These reasons become relevant when the commissioner has to make a decision whether the award or ruling was erroneously sought or granted. If the non-receipt of the notice of set down or the negligence of the applicant's representative qualified as a fact that would have induced the commissioner not to make the ruling or award, rescission will be granted.

4 1 4 1 Negligence of the applicant's representative

In *Construction and Allied Workers Union v Federale Stene*[56] the Court, with reference to a long list of precedents, held that where a party was genuinely unaware of the date of set down, the granting of the judgment by default would be erroneous.[57] The Courts have qualified this principle by holding that the Court has consistently refused to grant rescission orders where there was no irregularity in the proceedings and the default can be attributed to the negligence or incapacity of the applicant's legal representatives.[58] Where there is no evidence or submissions before the commissioner that the ruling or award is irregular, the conduct of the applicant or its legal representatives warrant critical examination.[59]

In *Saloojee v Minister of Community Development*[60] the Appellate Division held that there is a limit beyond which an applicant cannot escape the

56 1998 4 BLLR 374 (LC).

57 *CAWU v Federale Stene supra* 642G.

58 *Electrocomp v Novak* 2001 10 BLLR 1118 (LC) 1120E.

59 *Electrocomp v Novak supra* 1120G-H.

60 1965 2 SA 135 (AD).

results of his attorney's lack of diligence or the insufficiency of the explanation tendered. The attorney is the representative whom the applicant has chosen for himself, and there is little reason why the litigant should be absolved from the normal circumstances of such a relationship, no matter what the circumstances of the failure are.[61]

Where an applicant wishes to rely on the negligence of its legal representatives, it must prove that it:

(a) Did not show disinterest in the conduct of its own case;

(b) Maintained close contact with its attorneys;

(c) Must have had no reason to distrust its legal representative's competence to look after its affairs.[62]

These factors will weigh more heavily on a party that initiated a matter.[63]

These principles will also be applicable where a party is represented or assisted by a labour consultant. In *Enzo Panelbeaters CC v CCMA*[64] the Court held that by advertising his services as a labour consultant, the consultant purported to have the knowledge and expertise required to assist his clients with labour disputes properly in terms of the Rules and practice of the Court. The Court could see no reason why the principles applicable to legal representatives should not apply to labour consultants.[65]

4 1 4 2 The applicant being unaware of set down of the matter

As stated above,[66] the fact that a non-appearing party may have a good explanation for his default does not mean that an award in such circumstances is made "erroneously" for purposes of section 144(a). Due to the fact that the CCMA Rules provide for service of documents to be effected by means of fax transmission a whole body of case law has developed where an applicant seeks rescission on the basis that it did not receive the notice of set down after it was served on the applicant by means of fax transmission.

The Rules of the CCMA provide for service of a notice of set down to be effected by means of fax transmission[67] and for the fax transmission slip to serve as proof of service.[68] The Court has held numerous times that where there is proof of service in terms of the Rules, a default judgment will not be considered erroneously sought or granted.[69]

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61 *Salojee v The Minister of Community Development supra* 141C-F.
62 *Fuller v Megacor Holdings* 2003 7 BLLR 711 (LC) 713H-714A.
63 *Fuller v Megacor Holdings supra* 714A.
64 1999 20 ILJ 2620 (LC).
65 *Enzo Panelbeaters CC v CCMA supra* 2625A-B.
66 Par 4 1 2 above.
67 Rule 5 of the Rules for Conduct before the CCMA.
68 Rule 6.
69 *Day Night Investigators v Ngoasheng supra;* and *De Wet v Western Bank Limited supra.*

In *MTN SA v Van Jaarsveld*[70] the Labour Court held that the presiding officer deciding a rescission application should give consideration to whether or not in truth the party who was in default at the time of the hearing was unaware of the scheduled hearing.[71]

The Court came to the conclusion that the amount of the rescission applications based on the non-receipt of a notice of set down that was faxed suggests that the legislature should reconsider the provisions of the Act that allows for service by fax transmission.[72] It further stated that:

> "[T]he arrival of a document in the midst of a deluge of others, handled by staff not inducted to divine, in the absence of some clue, who should be given the document nor how rapidly it should happen, may predictably lead to delay or misplacement or outright loss of the document."[73]

The Labour Court has also cautioned commissioners of the CCMA not to place undue emphasis on the technical definition service and the fact that the fax transmission slip shows a successful transmission.[74] Where the applicant states under oath that it did not receive the notice of set down and there is no evidence to the contrary, the Court will be satisfied that the arbitration award was erroneously granted in the absence of the applicant in terms of section 144.[75]

4 2 Section 144(b)

The second ground upon which the CCMA can vary or rescind an arbitration award or ruling is in cases where there is a need for the correction of an ambiguity or where there is an obvious error or omission in an award or ruling. The general principle referred to above must be taken into account when an application is made in terms of section 144(b). It has already been established that a commissioner becomes *functus officio* upon issuing an award and that provision does not allow a commissioner to replace a previous award with a substantially different award.[76] The Appellate Division has recognised certain exceptions to the general rule. The applicant must however approach the Court for rescission within reasonable time of the judgment or order being pronounced.[77] The Court may be approached, in terms of these exceptions, for an order to supplement the principle judgment or order in respect of accessory or consequential matters; for the Court's order to be clarified if, on a proper interpretation, the meaning thereof remains obscure, ambiguous or otherwise uncertain, so as to give effect to its true intention and to correct a clerical, arithmetical or other error in its judgment or order so as to give effect to its true intention.

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70 2002 10 BLLR 990 (LC).

71 991G.

72 994D.

73 994E.

74 *Halycon Hotels (Pty) Ltd t/a Baraza v CCMA* 2001 8 BLLR 911 (LC) 914G-H.

75 914H-I.

76 *Benicon Earthworks and Mining Services (Pty) Ltd v Dreyer NO* 1999 4 LLD 18 (LC).

77 *West Rand Estates Ltd v New Zealand Insurance Co Ltd* 1926 AD 173; *Marks v Kotze* 1946 AD 29; and *Wessels & Co v De Beer* 1919 AD 172.

The Labour Court held, in *Day & Night Investigators CC v Ngoasheng*[78] that an "error" contemplated in section 144(b) means that the judgment does not reflect the intention of the judicial officer concerned. It does not refer to the correctness or otherwise of the decision.[79]

4 3 Section 144(c)

The last ground upon which the CCMA may vary or rescind an arbitration award or ruling is where such an award or ruling was granted as a result of a mistake common to the parties. The wording of this paragraph seems to indicate that a mistake by only one of the parties is not sufficient; it must be a mistake common to both parties to the proceedings, for example where parties have agreed that the salary of an employee was a certain amount but it later transpired that the amount agreed upon was not correct. The parties could then approach the commissioner, by agreement, to vary or rescind the award or ruling in question. In *De Wet v Western Bank Ltd*[80] the Court refused to rescind a default judgment on the basis that the only error which the applicants for rescission of default judgments could advance, was that their agents failed to notify them.

5 CASE LAW ON RELATED ISSUES

5 1 Effect of certification on section 144

The Labour Court, in the matter of *Tony Gois t/a Shakespeare's Pub v Van Zyl*[81] was asked to intervene in a matter where the CCMA refused to entertain an application for rescission due to the award already having been certified by the Director of the CCMA. The Labour Court severely criticised the CCMA view that an applicant for rescission must first approach the Labour Court for the setting aside of the certification order. It held that the certification of an award does not have the effect that the award becomes an order of the Labour Court.

Certification of an award in terms of section 143(3) has the effect that an award may be enforced "as if it were" an order of the Labour Court. This does not however mean that the award became an order of the Labour Court and that the Labour Court should be approached for the certification of the award to be set aside. The Labour Court has not issued any order for it to rescind. The matter was thus referred back to the CCMA for a consideration of the application for rescission, together with an application for condonation for the late filing thereof.

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78 *Supra.*

79 See also *First Consolidated Leasing Corporation Ltd v Mc Mullin* 1975 3 SA 606 (T) 608E-F.

80 1977 2 SA 1033 (W).

81 2003 11 BLLR 1176 (LC).

5 2 Director's powers in terms of section 144

The once very contentious issue of whether a commissioner other than the one who issued the ruling or arbitration award could vary or rescind an award has been put to bed with the 2002 amendments to section 144. Section 144 now allows the Director to appoint any other commissioner to vary or rescind an arbitration award or ruling. The director's powers in this respect will still be subject to scrutiny in terms of section 158(1)(g) of the Act.

It is however to be noted that the Director has very recently delegated his powers to appoint another commissioner, in terms of section 144, to the Convening Senior Commissioners of the provinces. The delegation was done in terms of section 118(6) in consultation with the Governing Body.

A practice has developed in the CCMA, that where any such other commissioner is appointed, proof of such appointment would be attached to the ruling issued.

5 3 Procedures regarding section 144 applications

Rule 32[82] reads as follows:

> "How to apply to vary or rescind arbitration awards or rulings
> (1) An application for the variation or rescission of an arbitration award or ruling must be made within 14 days of the date on which the applicant became aware of:
> (a) the arbitration award or ruling; or
> (b) a mistake common to the parties to the proceedings.
> (2) A ruling made by a commissioner which has the effect of a final order, will be regarded as a ruling for the purposes of this Rule."

The purpose of this Rule is to give effect to section 144 of the Act and to regulate procedural aspects in relation to the application of section 144.

Any application to vary or rescind an award or ruling, in terms of section 144 and Rule 32, must be made in accordance with Rule 31 of the CCMA Rules and it must be made within fourteen days as prescribed. The non-compliance with the time limit of fourteen days may, in terms of Rule 9 and upon an application made in terms of Rule 31, be condoned on good cause shown. This application for condonation should preferably be made simultaneously with the application for rescission or variation. The other party to the dispute will have the right to oppose the application and, if needed, the applicant for variation and/or rescission may reply to the other party's opposition.

It goes without saying that legal representation is allowed in these applications. A commissioner's refusal to rescind an award or ruling can have serious consequences for parties and in many instances leads to unnecessary delays and legal costs in taking such decisions on review. Most

[82] Rules for the Conduct of proceedings before the Commission for Conciliation, Mediation and Arbitration published in GN No R1448 of 2003-10-10.

of such refusals however can be blamed on the parties' failure to state a proper case on the papers submitted.

6 CONCLUSION

The Labour Appeal Court has indicated clearly that where rescission is sought on the basis that an order was erroneously granted, the applicant is not required to show additional "good cause". Rescission of an award where there is no proof of it having been erroneously sought or granted would effectively amount to an impermissible amendment of section 144. The correct interpretation of section 144 is a narrow one, in terms of which the application of section 144 is not extended beyond the wording thereof.

It is suggested that the legislature amend section 144 so as to bring the wording thereof in line with the rescission applications in other forums. Following the narrow approach may well be in the interests of expediency and quick resolution of matters in the CCMA, but excluding rescissions based on good cause may well sacrifice justice and fairness on the altar of expediency.