

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
(LIMPOPO DIVISION, POLOKWANE)

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED: 1/1
	
28/10/2022	

CASE NO: 6029/2019

In the matter between:

CHAIRPERSON OF THE CCMA GOVERNING BODY

1st APPLICANT

THE CCMA GOVERNING BODY

2nd APPLICANT

COMMISSION FOR CONCILIATION, MEDIATION

AND ARBITRATION (CCMA)

3rd RESPONDENT

NATIONAL DIRECTOR OF THE CCMA

4th RESPONDENT

and

LLALA PETER PHOSHOKO

RESPONDENT

JUDGMENT

MASHABA AJ

- [1] The Applicants in this matter have initiated an application for rescission of judgment of the Honourable Justice Semanya which was granted on 20 May 2021. The rescission application is brought in terms of Rule 42 (1) (a) and (b) of the Superior Court Practice.
- [2] The Applicants seek to rescind a review application judgment which was brought in terms of Rule 53 of the Superior Court Practice by the Respondent. Some issues leading to the granting of the review application judgment on 20 May 2021 are common cause and I will accordingly not divulge much into the historical background leading to the granting of the judgment save to mention a few salient issues.
- [3] On 10 May 2021 the Respondent served a Notice of Set Down for the review application on the Applicants by hand-delivering the said notice which was acknowledged by one Ms Petunia Soni. The said Notice of Set Down notified the Applicants that the matter would be heard in the Polokwane High Court on 20 May 2021 on an unopposed basis.

[4] it is worth noting that this Notice of Set Down is one of the many Notices of Set Down which were served on the Applicants but the Applicants did not file opposing papers against the review application. On 20 May 2021 the Honourable Justice Semenya made an order in terms of the Respondent's Notice of Motion. According to the Respondent the Honourable Justice Madam Semenya made an order in terms of the Respondent's Notice of Motion because the Respondent had not prepared a draft order to be made an order of Court. I will revert to this issue later in my judgment as it goes into the nub of this rescission application.

[5] It is the Applicants' argument that it is in the interest of justice that the order granted on 20 May 2021 be rescinded because the review application was prematurely set down and disposed of on unopposed basis contrary to the requirements of Rule 53 (5) (a) which constitute an error in terms of Rule 42 (1) (a) of the Superior Court Practice. The Applicants further argue that the High Court had no jurisdiction to grant the relief sought in paragraphs 1 – 4 of the order. The Applicants' argument is that the said paragraphs of the order (paragraphs 1–4) amounted to a review of the CCMA proceedings which fell within the exclusive jurisdiction of the Labour Court. The Applicants further argued that there was a patent error, in terms of Rule 42(1)(b) of the Rules, when the order was granted.

- [6] It is common cause that when the Court granted the order in favour of the Respondent a record of the CCMA proceedings had not yet been filed. These are the very proceedings which the Court reviewed. This is one of the arguments by the Applicants to indicate the error in the order. How could a Court reviewing the findings of the CCMA make an order to review when a record of the proceedings (to be reviewed) had not been presented to the court granting the review application?
- [7] The Applicants submitted that the order was granted on unopposed basis, despite the fact that Rule 53 (5) (a) required a party who decides to oppose the application for review to deliver its Notice of Intent to Oppose within 15 days after receipt of an amendment of the Notice of Motion and supplementary grounds of review, if any pursuant to applicant consideration of the report delivered in terms of Rule 53(1)(b).
- [8] The Applicants' argument is that, in terms of Rule 53(5)(b), a party desirous in opposing the review application must deliver an answering affidavit within 15 days after expiry of the timeframes referred to in Rule 53 (4) opposing the review application and such party is allowed to amend, and to vary the terms of his or her Notice of Motion and supplement the supporting affidavit, after receipt of a record. The Respondent does not dispute that when an order to review the CCMA findings was granted the Court was not in possession of the record of the CCMA proceedings. It is only after the party has complied with the provisions of Rule 53 (1) (b), that the other party may decide to oppose the review applications. Such

party is then required to deliver Notice of Intention to Oppose and an answering affidavit.

[9] The Applicants further argued that the Court committed a patent error in terms of R 42 (1) (b) in that when granting the order, the order itself was couched as if the Court had heard argument and submissions from both Counsel for the Applicants and Counsel for the Respondent. It is common cause that there was no appearance on behalf of the Applicants. Furthermore, despite the fact that a final order was granted, the order directs the Applicants to deliver their Notice of Intention to Oppose, to dispatch the record, to deliver answering affidavits, within the timeframes stated therein.

[10] The Applicants' Counsel submitted that the order should therefore be rescinded or varied, to the extent of the ambiguity and the error. During submissions of this matter the Respondent, who appeared in person, conceded that there was indeed a patent error on the court order. The Respondent submitted that the error occurred because after making submissions (during the review application hearing) he did not have a draft order prepared for it to be made an order of court. As a result the Presiding Judge made an order in terms of the Notice of Motion. According to the Respondent this error was not Court's error but the Registrar's error who typed the court order in its current state.

[11] Rule 42 of the Superior Court Practice provides 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, or omission;*
 - (c) *an order or judgment granted as a result of a mistake common to the parties.*
- (2) *Any party desiring any relief under this rule shall make application therefore upon notice to all parties whose interests may be affected by any variations sought.*
- (3) *The court shall not make any order rescinding or vary any order or judgment unless satisfied that all parties whose interests may be affected have notice of the order proposed.*

[12] The court has a discretion whether or not to grant an application for rescission under this subrule.¹ The purpose of the rule is to correct expeditiously and obviously wrong judgment or order.² Once one of the grounds in R 42(1)(a)-(c) has been established the rescission of the judgment should be granted. Once the court holds that an order or judgment was erroneously sought or granted, it should without further rescind or vary the order³ and it's not necessary for a party to show good cause for the subrule to apply.⁴

¹ *Tshivhase Cabral Council v Tshivhase* 1992 (4) SA 852 (A) at 862J – 863 A; *First National Bank of Southern Africa Ltd v Van Rensburg* NO 1994 (1) SA 677 (T) at 681 F.

² *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 471E–F.

³ *Tshabalala v Peer* 1979 (4) SA 27 (T) at 30 D; *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 467 (E) at 471 G

⁴ *Topol v LS Group Management Services (Pty) Ltd* 1988 (1) SA 639 (W) at 650 D – J; *Promedia Drukkers & Uitgewers (Edms)Bpk v Kaaimowitz* 1996 (4) SA 411 (C) at 417 I; *Zuma v Secretary of the Judicial Commission*

[13] It is accepted that in many cases an order erroneously granted may be apparent in the record of the proceedings. However in deciding whether a judgment was erroneously granted a court is not confined to the record of the proceedings.⁵

[14] It is clear from the facts of this case that the order sought to be rescinded was erroneously granted. This point the Respondent also conceded to. However, the argument of the Respondent, as I understood him, was that the judgment or order of the Honourable Justice Semanya should not be set aside or rescinded in totality. But only those paragraphs in the court order which are ambiguous should be rescinded.

[15] What the Respondent seeks to achieve is that those parts of Madam Justice Semanya's court order (which are not ambiguous) should still be declared valid and operational, and only those portions of the judgment which are found to be ambiguous should be rescinded. Deleting half of the paragraphs in the court order does not address the ambiguities in the order. On the contrary I will be deleting and changing the true meaning of Madam Justice Semanya's court order and substituting it with my new order and meaning.

[16] Subrule 42(1)(b) is primarily intended to address those cases where a court has pronounced a final judgment or order and as a result has no authority to correct, alter or implement it by virtue of it being *functus officio*. This subrule has created an exception to this general principle. This subrule clothes the court with discretionary power to correct errors in its judgment or order but this power is to be exercised sparingly.⁶

[17] The Appellate Division in the case of *Firestone SA (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A) at 306 – 7 recognised a number of exceptions to the general rule that once a court has duly pronounced a final judgment or order, it itself has no authority to correct, alter or supplement it. These are the exceptions which the Appellate Court indicated: -

- [a] The principal judgment or order may be supplemented in respect of accessory or consequential matters, for example, costs or interest on the judgment that which the court overlooked inadvertently and to grant.
- [b] The court may clarify its judgment or order if, on the 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.

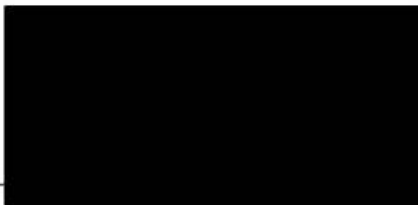
[c] The court may correct a clerical, arithmetic or other error in its judgment or order so as to give effect to its true intention.

[d] Where counsel has argued the merits and not the cost of the case, but the court has made an order regarding the costs, it may thereafter correct, alter or supplement that order.

[18] The matter in *casu* is in contrast to the exceptions that I have highlighted above. The facts of this case are clearly distinguishable from the exceptions in the *Firestone* case. Setting aside half of Madam Justice Semenya's order would not be clarifying the order or correcting some type of clerical or arithmetical errors in such judgment. By amending it would definitely be giving a new meaning and interpretation to the said order. The appropriate person who is in the proper position to give a proper interpretation and meaning to the judgment is not me but the judge who handed down the order (Madam Justice Semenya).

[19] In the circumstances I am satisfied that the Applicants have proven that the order has been erroneously granted and stands to be rescinded.

[20] I accordingly grant an order for the rescission of the judgment of
Semenya J granted on 20 May 2021.



pp **MG Mashaba**

Acting Judge of the High Court

Limpopo Division, Polokwane

APPEARANCES:

HEARD ON: 15/09/2022

FOR THE APPLICANTS: ADVOCATE RB MPHELA

INSTRUCTED BY: DIALE MOGASHOA ATTORNEYS, PRETORIA

C/O: PMK TLADI ATTORNEYS, POLOKWANE

FOR THE RESPONDENT: IN PERSON

DELIVERED: 28 OCTOBER 2022