



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case no: JR 438/11

In the matter between:

ZURICH INSURANCE COMPANY SA LTD

Applicant

and

COMMISSIONER J S K NKOSI N.O. First Respondent

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION

Second Respondent

BIFAWU obo MANZINI S.N.

Third Respondent

Heard: 4 July 2014

Delivered: 13 September 2017

JUDGMENT

LANDMAN AJ

Introduction

[1] This is an application in terms of section 145 of the Labour Relations Act,¹ brought by Zurich Insurance Company SA Ltd, the applicant, to review and set aside a rescission ruling made on 21 January 2011 by the first respondent (to whom I shall refer as “the second commissioner”) under case number GAJB 2537/10. The third respondent (BIFAWU) on behalf of its member – Ms Manzini – opposes the application.

¹ 66 of 1995, as amended. (the Act).

- [2] The applicant employed Ms Manzini, until she was retrenched along with approximately 252 other employees pursuant to a large-scale retrenchment exercise. The applicant provided her with a notice of her retrenchment on 1 July 2010, and dismissed her with effect from 31 July 2010.
- [3] On about 14 September 2010, BIFAWU referred an unfair dismissal dispute to the second respondent, accompanied by an application for condonation.
- [4] The second respondent convened an *in limine* condonation hearing before Commissioner Boyce. The applicant's representative attended the *in limine* hearing. Ms Manzini and BIFAWU were absent. At the hearing held in their absence, the applicant's representative urged Commissioner Boyce to refuse condonation.
- [5] On 7 October 2010, Commissioner Boyce issued a written ruling refusing condonation. Commissioner Boyce attached weight to BIFAWU and Manzini's non-appearance before him and found that Ms Manzini had failed to provide a reasonable explanation for her failure to refer the dispute timeously and that there were no reasonable prospects of success.
- [6] On or about 4 November 2010, BIFAWU filed an application for the rescission of the ruling. BIFAWU explained why it and Ms Manzini did not attend the *in limine* hearing before Commissioner Boyce.
- [7] The applicant opposed the rescission application and filed an affidavit, which, *inter alia*, addressed BIFAWU's explanation for its non-attendance before Commissioner Boyce. BIFAWU did not file a replying affidavit.
- [8] The rescission application was set down for hearing on 7 December 2010.
- [9] The applicant's representative attended at the second respondent on 7 December 2010. After waiting over an hour, Commissioner Boyce informed the applicant's representative that he would determine the rescission application on the papers without argument. I point out that BIFAWU and Ms Manzini maintain that they too attended at the second respondent on

7 December 2011 albeit 30 minutes late. They too were informed that the application would be decided on the papers.

The rescission ruling

- [10] BIFAWU sought the rescission of “the default award issued by” Commissioner Boyce. On 26 January 2010 the matter, as we have seen was decided in the absence of the parties, by the second commissioner. He noted that the issue to be decided was whether rescission should be granted. The second commissioner rescinded “the dismissal ruling” (ruling refusing condonation) issued by Commissioner Boyce, and ordered that the matter be rescheduled for arbitration and that there be no order as the costs.
- [11] In arriving at his decision, the second commissioner noted Mr Nhlapo’s – a union official in BIFAWU’s employ – explanation that he only learnt of the ruling upon enquiring at the second respondent. He noted further that, in terms of section 144 of the Act, a commissioner may rescind an award or ruling if such award or ruling was erroneously issued or sought in the absence of an affected party. The second commissioner stated that the fact that the notice of set down was sent to a correct (fax number) is not proof that it was received. In the absence of a contrary version, the second commissioner considered himself bound to accept BIFAWU’s version.

The grounds of review

- [12] The applicant seeks an order setting aside the rescission ruling on the following grounds:
- (a) The second commissioner did not apply his mind to the facts. Had he done so the second commissioner would have realised that Ms Manzini’s unfair dismissal dispute had to be viewed within the context of a mass retrenchment of some 252 employees. Accordingly, the second commissioner ought to have recognized that the second respondent did not have jurisdiction to arbitrate the dispute. The dispute should have been referred to the Labour Court. The second commissioner thus exceeded his powers.

- (b) The second commissioner failed to apply his mind to the issue of condonation. Had he applied his mind he would have realised that Commissioner Boyce made a decision of a final nature that could be set aside only by way of review in the Labour Court.
- (c) The rescission application ought to have been conducted in the presence of the party or parties. The applicant attended while BIFAWU and Ms Manzini did not. The fact that BIFAWU and Ms Manzini were in default by not attending the rescission hearing, along with factors such as their failure to file their applications timeously; failure to attend proceedings; and filing a rescission application without a condonation application, were important factors for consideration by the second commissioner. I should point out that BIFAWU avers that although Mr Nhlapo and Ms Manzini were late for the hearing on 7 December 2010, they arrived within the thirty (30) minute grace period normally allowed by the second respondent. On their arrival, they were met by the Senior Commissioner who informed them that the matter would be decided on paper.
- (d) The applicant's right to a fair hearing and fair labour practices was infringed when the second commissioner and the second respondent chose to decide the matter on the papers rather than convene an oral hearing. The failure to hear oral submissions prejudiced the applicant because it was not able to submit, *inter alia*, that the rescission application should be dismissed due to a further non-appearance by BIFAWU or why the application should proceed on an unopposed basis (in line with the applicant's contention, which BIFAWU disputes, that BIFAWU and Ms Manzini were not in attendance).
- (e) The second commissioner failed to apply his mind to Commissioner Boyce's condonation ruling but reviewed the ruling. The second commissioner failed to consider what he was rescinding. The second commissioner was required to determine whether there was a proper explanation for BIFAWU and Ms Manzini's failure to appear before

Commissioner Boyce. The second commissioner was not required to determine whether condonation should have been granted or not.

- (f) The second commissioner found that: *“The fact that notice was sent to a correct fax number is not proof that it was received.”* However, the second commissioner failed to consider that the applicant constantly disputed BIFAWU's averment that BIFAWU only became aware of Commissioner Boyce's ruling on 28 October 2010. By finding that *“In the absence of a contrary version, I must accept the version of the applicant (Third Respondent)”*, the second commissioner failed to consider the evidence before him.
- (g) The second commissioner failed to consider evidence presented by the applicant that BIFAWU did not seek condonation for the late filing of the rescission application. The applicant avers that the rescission application ought to have been filed on or before 21 October 2010.
- (h) The second commissioner acted unreasonably by not recognizing that Commissioner Boyce considered all the factors relevant to condonation and there the ruling was not erroneously made for purpose of section 144 of the Act.

The test of review

[13] This application is brought in terms of section 145 of the Act. Section 145 provides, in relevant part, 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—

- (a) within six weeks of the date that the award was served on the applicant.

...

- (2) a defect referred to in subsection (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 had been improperly obtained."

[14] In *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*,² Navsa AJ held that in the light of the constitutional requirement (in section 33(1) of the Constitution) that everyone has the right to administrative action that is lawful, reasonable and procedurally fair, the reasonableness standard should now suffuse section 145 of the Act. The threshold test for the reasonableness of an award or ruling, expressed negatively, is whether the decision reached by the commissioner is one that a reasonable decision-maker could not reach.³

Evaluation

(i) *The law*

[15] Section 144 of the Act provides, *inter alia*, that 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*".

[16] The procedure for instituting a rescission application is set out in rule 32 of the Rules of the CCMA. Rule 32 of the CCMA rules reads as follows:

² [2007] ZACC 22; [2007] 12 BLLR 1097 (CC); 2008 (2) SA 24 (CC); (2007) 28 ILJ 2405 (CC); 2008 (2) BCLR 158 (CC).

³ *Id* at para 110.

“An application for the variation or rescission of an arbitration award or ruling must be made within fourteen (14) days of the date on which the applicant became aware of the arbitration award or ruling.”

- [17] The test for determining whether a rescission application should be granted is articulated in the judgment of *Superb Meat Supplies CC v Maritz*⁴ where it was held that:

“The applicant must give a reasonable explanation of his default; his application must be made bona fide; he must show that he has a bona fide defence to the plaintiff’s claim. This needs to be shown *prima facie* only and it is not necessary to deal fully with the merits of the case or to prove the case. It is sufficient to set out facts that, if established at the trial, would constitute a good defence. The defence must have existed at the time of the judgment.

In determining whether or not good cause has been shown, the court is given a wide and flexible discretion in terms of rule 31(3)(b). When dealing with words such as ‘good cause’ and ‘sufficient cause’ the Appellate Division has refrained from attempting an exhaustive definition of their meaning in order not to abridge or fetter in any way the wide discretion implied by these words. The court’s discretion must be exercised after a proper consideration of all the relevant circumstances.”

- [18] I turn to consider whether the second commissioner reached a conclusion that no reasonable commissioner could have reached.

- [19] First, the second commissioner did not afford the parties an opportunity to address him and make oral submissions. The rules of the CCMA permit a commissioner to consider an application in the manner he or she deems appropriate. Nonetheless, in *Satinsky 128 (Pty) Ltd t/a Just Group Africa v Dispute Resolution Centre*⁵ Snyman AJ held:

“Of course, there can be no hard and fast rules as to when such a hearing should be convened. This must be determined on a case by

⁴ (2004) 25 ILJ 96 (LAC) at paras 21 and 22.

⁵ (JR 1479/2012) [2013] ZALCJHB 38. (*Satinsky*)

case basis, by the arbitrator to whom the determination of the rescission application is allocated. In my view, the following can however serve as guidelines when the decision should rather be made to convene a hearing to determine the rescission application:

- 47.1. The determination of a rescission application only on the papers should principally be reserved for instances where the rescission application is unopposed;
- 47.2. Where the rescission application is opposed, a rescission hearing should be convened. This situation will leave parties with the view that justice is not only done, but is actually seen to be done in their presence. There may be instances however where even an opposed rescission would not necessitate a hearing. An example would be where it is clear from the documents filed that the default arbitration award was indeed erroneously made, as in such a case, it is not even necessary to determine the issue of willful default and prospects of success. Another example would be where the explanation for the default is not contested, and only the issue of prospects of success is contested, because of the manner in which the issue of prospects of success must be determined;
- 47.3. There have been several instances where arbitrators have determined unopposed rescission applications unfavourably, based on the arbitrator's own views gathered from external sources (such as the case file) or from the arbitrator's own contradiction of statements made the applicant's founding affidavit in the rescission, or where the arbitrator adopts his own negative views about the rescission applicant's bona fides. In these kind of instances it is imperative that the rescission applicant be confronted in a rescission hearing with these issues by the arbitrator, so the applicant for rescission can address the arbitrator on the same."⁶

[20] When the second respondent sets a matter down for oral hearing well knowing that the application is one for rescission, parties can expect that an

⁶ Id at para 47.

oral hearing will take place. To deny one or both of the parties an opportunity to be heard is unfair and can cause material prejudice. In my view, the second commissioner ought to have afforded the parties an opportunity to address him on issues material to the application.

- [21] The second commissioner's failure to receive oral argument constitutes a gross irregularity.
- [22] Secondly, there is no merit in the applicant's argument that the second commissioner failed to apply his mind to the issue of condonation and that Commissioner Boyce's decision was final in nature and could only be set aside on review by the Labour Court.
- [23] Thirdly, the second commissioner was obliged to satisfy himself that BIFAWU's application for rescission was brought timeously, that is to say, did he have jurisdiction to entertain the application. If the application for rescission is filed late and no application for condonation has been made and been granted, the commissioner does not have the power to entertain the application. It is trite that when an application is late, an application for condonation for the late filing of the application has to be made.
- [24] Mr Nhlapo averred in BIFAWU's founding affidavit that he became aware of Commissioner Boyce's ruling on 28 October 2010. He then convened an urgent meeting with Ms Manzini to discuss the matter. On 3 November 2010, Mr Nhlapo and Ms Manzini held a second meeting at which the latter provided Mr Nhlapo with documents relating to her maternity leave, which he attached to the founding affidavit. It was under those circumstances that the rescission application was filed on 4 November 2010. On this version, BIFAWU filed the rescission application within ten (10) days of becoming aware of the condonation ruling.
- [25] The applicant, on the other hand contended in its affidavit opposing the rescission application that Mr Nhlapo's assertion that the condonation ruling came to his attention only on 28 October 2010 was not fully explained, and that, in any event, BIFAWU waited another 6 days before filing the rescission application. In the ruling, the second commissioner appears to have accepted,

despite the applicant raising its concerns, that the rescission application was filed within the prescribed time limits. I do not find that the applicant's concerns raise sufficient doubt about Mr Nhlapo's version so as to require an application for condonation.

- [26] The second commissioner was entitled to hear the merits of the application.
- [27] Fourthly, the second commissioner was obliged to consider, as one of several factors, BIFAWU's explanation for its default. The second commissioner accepted that BIFAWU's Mr Nhlapo did not receive the notice of set down of the *in limine* hearing before Commissioner Boyce even though the second respondent faxed it to the correct number. The second commissioner addressed this issue directly by stating: "*The fact that notice was sent to a correct (address) is not proof that it was received. In the absence of a contrary version, I must accept the version of the applicant [BIFAWU]*".
- [28] In *MTN South Africa v Van Jaarsveld and Others*,⁷ it was held:

"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.

..."

- [29] And in *Northern Province Local Government Association v Commission for Conciliation, Mediation and Arbitration and Others*,⁸ it was held:

"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 a fax transmission was received, proof that the fax was indeed sent creates a probability

⁷ (2002) 23 ILJ 1597 (LC) at para 4.

⁸ (2001) 22 ILJ 1173 (LC) at para 46.

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 fair minded enquiry into whether or not as a fact the notice did not come to the attention of the party.”

[30] BIFAWU's Mr Nhlapo said that although it appears from the fax transmission slip that the notice of set down was sent on 16 September 2010 to BIFAWU's correct fax number, the union could not trace having received it. Mr Nhlapo states that ordinarily a faxed notice of set down would be brought to his attention and reiterates that at no time did he receive a notification of the set down of the matter for the condonation process on 16 September 2010 by fax or registered post.

[31] W J Hutchinson reminds us in a case note entitled “Rescinding of Arbitration Awards Granted by the Way of Default”,⁹ that:

“At the outset I think that it should be accepted that the use of the telefax notification is not infallible. The possibility exists that an illegible fax may be received if the fax machine's toner is faulty. If there is lack of paper in the receiving machine and it is subsequently switched off for a certain period of time the transmission may also be lost... Another possibility is that a document may be incorrectly set in the fax machine resulting in the blank side of the paper being transmitted.”

⁹ 1999 SALJ 744.

[32] The applicant endeavoured to provide reasons why Mr Nhlapo's assertion should be doubted. The second commissioner decided that there was insufficient reason to reject BIFAWU's version. The applicant has not shown that the second commissioner acted unreasonably. He applied his mind to the issue and accepted BIFAWU's version that it had not received the notice of set down.

[33] Fifthly, the second commissioner was required to be satisfied that BIFAWU had set out a *prima facie* case that its application for condonation would have been successful. BIFAWU needed to refer the dismissal dispute to the second respondent but as the referral was out of time condonation was required. In *National Union of Metalworkers of South Africa v Driveline Technologies (Pty) Ltd*,¹⁰ Zondo AJP (as he then was) held that:

“... the wording of section 191(5) imposes the referral of a dismissal dispute to conciliation as a precondition before such a dispute can either be arbitrated or referred to the Labour Court for adjudication.”¹¹

[34] The second commissioner was obliged to consider whether BIFAWU had placed before him facts showing that it had reasonable prospects of success in the condonation application.

[35] Commissioner Boyce had held that Ms Manzini did not have any reasonable prospects of success in that she was retrenched for a fair operational reason. However, Commissioner Boyce was alive to the fact that had Ms Manzini and/or BIFAWU attended the hearing before him, he may have heard a version establishing prospects of success. As he put it, albeit somewhat cryptically, “*Nothing to gainsay [company's] version in the absence of [Ms Manzini]*” It seems clear that Commissioner Boyce was prepared to entertain the possibility that BIFAWU and or Ms Manzini may have brought facts to light that might persuade him that there are prospects of success.

[36] In his affidavit supporting the rescission application, Mr Nhlapo states that Ms Manzini's dismissal was unfair in that she was retrenched while on

¹⁰ (2000) 21 ILJ 142 (LAC).

¹¹ *Id* at para 73.

maternity leave and that the written notice in terms of section 189(3) was served on the affected employees while she was on maternity leave. As I understand Ms Manzini's case, the applicant acted unfairly by commencing a retrenchment process against her while she was not at work but rather on maternity leave. The question is whether it is substantively unfair for an employer to do so.

[37] An employer is obliged to seek to reach consensus with its employees affected by a potential retrenchment exercise. It seems unfair to expect an employee who is on maternity leave to participate meaningfully in that process when she seemingly did not receive the notice and could not make submissions to the employer personally or via her union. Such conduct by employer would appear *prima facie* to be procedurally unfair. However, even if the dismissal was procedurally unfair, the question is whether such would assist Ms Manzini as, in cases of mass retrenchments falling within the ambit of section 189A of the Act, lack of procedural fairness must be addressed by way of urgent action before the Labour Court. An urgent application was launched but it was dismissed on grounds of lack of urgency.

[38] Was the second commissioner's finding that BIFAWU made out a proper case for rescission unreasonable?

[39] I note that the second commissioner failed to address Ms Manzini's prospects of success. As held by Snyman AJ in *Satinsky's* matter:

"The second issue to consider in rescission applications is that of prospects of success. This consideration must be dealt with on an equal footing as the explanation for the absence. The difficulty that often arises in rescission proceedings in the CCMA and the bargaining councils is that this consideration is either completely ignored by arbitrators dealing with the rescission application or is simply given cursory reference or consideration. Such conduct would clearly amount to a failure to properly apply the requisite principles in rescission applications, and would constitute a reviewable irregularity. As was said in *MM Steel Construction CC v Steel Engineering and Allied Workers Union of SA and Others*:

“An applicant who does not tender an acceptable explanation for his default, and demonstrate that he has a defence which is bona fide and has a prospect of succeeding, will generally not meet that test and his application will be bound to fail (*Chetty v Law Society, Transvaal* 1985 (2) SA 756 (A)). Those two essential elements ought nevertheless not to be assessed mechanistically and in isolation. While the absence of one of them will usually be fatal, where they are present they are to be weighed together with other relevant factors in determining whether it would be fair and just to grant the indulgence.”¹² (Footnotes omitted.)

- [40] In the absence of any indication that the second commissioner considered the second leg of the enquiry, I find that the second commissioner failed to apply his mind to the test he was meant to apply when considering whether to grant rescission of the *in limine* ruling.
- [41] Before considering the so-called rescheduling of the dispute for arbitration, it is necessary to point out that the second commissioner misconceived his role and had in effect granted condonation, which, I find, he was not entitled to do. The second commissioner was not empowered to substitute Commissioner Boyce’s findings on the condonation ruling with his own. The second commissioner’s role was to decide, firstly, whether BIFAWU was in wilful default of appearing at the condonation hearing and, secondly, whether BIFAWU had prospects of success should a further condonation hearing be convened. Although the second commissioner’s ruling does not expressly record that he substituted Commissioner Boyce’s ruling on condonation with his own, that the second commissioner ruled that the matter should be referred to arbitration, suggests that he did. If that is the correct interpretation of the second commissioner’s ruling, and I am of the view that it is, then the second commissioner exceeded his powers in granting condonation.
- [42] The second commissioner went further than he should have done by referring the matter to arbitration. He clearly did not appreciate that the second respondent did not have jurisdiction to arbitrate the dispute referred to it. It was common cause on the affidavits before him that Ms Manzini’s dismissal

¹² *Satinsky* above n 5 at para 37.

dispute had to be viewed against the background of a wider dismissal dispute concerning the mass retrenchment of some 252 employee. In BIFAWU's affidavit filed in support of the rescission application, Mr Nhlapo refers to a section 189(3) notice served on the affected employees of which Ms Manzini was but one. The applicant, too, pertinently referred, in its application, to the wide scale retrenchment of Ms Manzini and approximately 252 other employees and pointed out that section 189A of the Act applied.

[43] These allegations ought to have put the second commissioner on notice that Ms Manzini's dismissal was but one of several dismissals that took place within one retrenchment exercise. As such, the Labour Court, and not the second respondent, has jurisdiction to adjudicate such dismissal disputes.

[44] Nonetheless, the second commissioner's ruled that the matter should be scheduled for arbitration. The overall effect of his ruling was that the matter was to proceed directly to the next phase of dispute resolution, namely, arbitration, without requiring the parties to meet under the auspices of the second respondent for conciliation. In doing so, the second commissioner misconceived the nature of a rescission application and exceeded his powers. Had the second commissioner applied his mind, he would have realised that were he to rescind Commissioner Boyce's ruling, the proper course would be to remit the matter for a further *in limine* hearing on the question of condonation.

[45] In the circumstances, I am of the view that the ruling is reviewable on the grounds set out above and should be set aside.

[46] I do not consider it appropriate to remit the rescission application to the second respondent for reconsideration. This Court has the power and discretion to determine the rescission application, and in my view, the information, and evidence before me suffices for me to determine the application.

[47] In *Cementation Mining v Commission for Conciliation, Mediation and*

Arbitration and Others,¹³ it was held:

“The LAC and this Court have held that they should correct a decision rather than refer it back to the CCMA for a hearing de novo in the following circumstances: (i) where the end result is a foregone conclusion and it would merely be a waste of time to order the CCMA to reconsider the matter; (ii) where a further delay would cause unjustified prejudice to the parties; (iii) where the CCMA has exhibited such bias or incompetence that it would be unfair to require the applicant to submit to the same jurisdiction again; or (iv) where the Court is in as good a position as the CCMA to make the decision itself. In this matter, the factors listed under (i), (ii) and (iv) are present. In these circumstances, it is appropriate to grant a substituted order in terms of which the applicant's rescission application is granted.”
(Footnote omitted.)

- [48] In my view, BIFAWU tendered a reasonable and plausible explanation for its default in not appearing before Commissioner Boyce. I find that the explanation is reasonable and that BIFAWU was not in wilful default.
- [49] As to the second leg of the enquiry, I find that the primary basis upon which BIFAWU avers that Ms Manzini's dismissal was unfair, was because Ms Manzini was on maternity leave when the section 189(3) notice was served on the affected employees. I accept without deciding that such conduct may amount to procedural unfairness on the part of the applicant. BIFAWU does not appear to dispute that the applicant had sufficient operational grounds to carry out the retrenchment exercise. However, BIFAWU avers that the applicant agreed with the Employee Consultative Forum – in Ms Manzini's absence – to implement the retrenchment process and that employees were to re-apply for their jobs in order to be selected to the new business structure. As I understand BIFAWU's case, Ms Manzini was denied the opportunity to participate in the process of re-applying for her post. Her complaint is therefore that the selection process was unfair as she was excluded from the process simply because she was on maternity leave and

¹³ (2010) 31 ILJ 1167 (LC) at para 12.

could not participate in that process. I find that she has some prospects of success.

[50] In the exercise of the wide discretion afforded to a presiding officer in deciding rescission applications, together with BIFAWU's reasonable explanation for its absence from the *in limine* hearing and the existence of some prospects of success, and the need for fairness, I conclude that the *in limine* ruling by Commissioner Boyce ought to be rescinded and set aside.

Order

[51] I therefore make the following order:

1. The rescission ruling made on 21 January 2011 by the first respondent (the second commissioner) under case number GAJB 2537/10 is set aside.
2. The *in limine* ruling on condonation made on 7 October 2010 by Commissioner Boyce under case number GAJB 2537/10 is rescinded and set aside.
3. The second respondent is ordered to set down the *in limine* hearing on condonation before another commissioner.
4. There shall be no order as to cost.

A. Landman

Acting Judge of the Labour Court

APPEARANCES

FOR THE APPLICANT:

BIFAWU

FOR THE RESPONDENT:

Crawford and Associates Attorneys

LABOUR COURT