



IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: **JS165/2016**

In the Rescission Application between:

G4S CASH SOLUTIONS (PTY) LTD

Applicant

and

MATLALA, JERRY

Respondent

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G4S CASH SOLUTIONS (PTY) LTD

Applicant

and

MATLALA, JERRY

Respondent

Decided in Chambers: 11 March 2025

JUDGMENT: RESCISSION APPLICATION I.T.O S165(a) AND (c) OF LRA

NORTON AJ

Introduction

1. The Applicant in this matter, the employer / G4S Cash Solutions (Pty) Ltd seeks to rescind and set aside the leave to appeal judgment, which I issued on 20 June 2024 under case number JS165/2016. The Applicant seeks to do so in terms of section 165(a) and (c) of the Labour Relations Act 66 of 1995 (“LRA”).

2. In addition, the Applicant seeks to have the leave to appeal application heard afresh, on the basis that their submissions should be considered. The thrust of the Applicant’s rescission application is that I failed to consider their opposing submissions in the leave to appeal application.

3. In terms of paragraph 8 of the leave to appeal judgment, I indicated that the Applicant did not file opposing submissions (when in fact it did). The pleadings were not in the court file before me.

4. To avoid confusion I am going to refer to the parties by their common description of “employer” and “employee”.

Salient chronology

5. On 21 December 2010 the employee was dismissed by the employer for misconduct.

6. The employee successfully pursued an unfair dismissal claim and the bargaining council (the National Bargaining Council for the Road Freight and Logistics Industry) found that his dismissal was unfair and ordered reinstatement.

7. The employee tendered his services, but was the employer refused to accept the tender.

8. In April 2016 the employee instituted a contractual claim for payment of his arrear salary amounting to R262 500,00 plus interest. This was opposed by the employer.

9. On 29 February 2024 the dispute was ventilated before me in a trial.

10. On 29 April 2024 I dismissed the employee's claim as I found that the employee had followed the wrong legal path by pursuing a contractual claim in terms of section 77(3) of the BCEA, rather than contempt proceedings.

11. On 3 May 2024 the employee made an application for leave to appeal.

12. On 13 May 2024 the employee delivered his submissions.

13. On 20 June 2024 I granted leave, but unbeknown to me the employer had filed opposing submissions on 28 May 2024.

14. On 16 July 2024 the employer brought an application to rescind my judgment made in the application for leave to appeal. There are no papers before me from the employee opposing the rescission application. I therefore assume that there is no opposition from the employee.

15. It was as late as 25 February 2025, some 7 months later, when the matter was first brought to my attention by the court, and the file delivered to my chambers on 27 February 2025.

Legal considerations

16. In terms of section 165 of the LRA,
The Labour Court, acting of its own accord or on the application of any affected party, may vary or rescind a decision, judgment, or order 'erroneously sought or erroneously granted in the absence of any party affected' by the decision, judgment or order".

17. Rule 46 of the Labour Court rules makes provision for such an application. At the time I considered the leave to appeal application, the employer's opposing submissions were not in the court file. The judgment was therefore granted erroneously in the absence of the employer.

18. I have now had the benefit of reading the employer's submissions, with which I generally concur.

19. When considering the standard in applications for leave to appeal, section 17(1) of the Superior Courts Act 2013 (the "Act") applies. That section reads,

"Leave to appeal may only be given where the judge or judges concerned are of the opinion that (a)(i) the appeal would have a reasonable prospect of success; or (a)(ii) there is some other compelling reason why the appeal should be heard, including conflicting judgments on the matter under consideration."

20. The threshold to cross for an audience with an appeal court is a high one, requiring a strong prospect that another court would come to a different decision, or that there are compelling reasons justifying the attention of that court.

21. In *Seathlolo & others v Chemical Energy Paper Printing Wood & Allied Workers Union & others*¹ Judge Van Niekerk, discussing the test to be applied states,

"The traditional formulation of the test that is applicable ...requires the court to determine whether there is a reasonable prospect that another court may come to a different conclusion to that reached in the judgment that is sought to be taken on appeal. ...the use of the word "would" in s 17(1)(a)(i) is indicative of a raising of the threshold since previously, all that was required for the applicant to demonstrate was that there was a reasonable prospect that another court might come to a different conclusion...Further this is not a test to be applied lightly – the Labour Appeal Court has recently had occasion

¹ (2016) 37 ILJ 1485 (LC). See too *Sepheka v Du Pont Pioneer (Pty) Ltd* (2019) 40 ILJ 613 (LC)

to observe that this court ought to be cautious when leave to appeal is granted...The statutory imperative of the expeditious resolution of labour disputes necessarily requires that appeals be limited to those matters in which that there is a reasonable prospect that the factual matrix could receive a different treatment or where there is some legitimate dispute on the law..."²

22. I do not think that there are reasonable prospects that the Labour Appeal Court would arrive at a different finding, not that there are legitimate disputes of law to consider.

23. It is settled law that an employee may pursue a contractual claim in terms of section 77(3) of the BCEA if the employee has been reinstated following a finding of an unfair dismissal and the employee tenders service and the employer accepts the tender of service. This was the situation in *Coca Cola v Van Wyk*³ and the case the employee sought to rely on.

24. An order of reinstatement does not automatically revive the contract of employment. The contract is only revived when the employer accepts the employee back to work. If that occurs and the employer does not make payment of backpay, then the employee may pursue the matter as a contractual claim as *Van Wyk* did.

25. The situation of the employee, Mr Matlala, was however materially different. The employer never accepted his tender of service and therefore he could not pursue a contractual claim – as simply put – the contract of employment had not been revived.

26. The courts have held that in such circumstances, the employee's recourse is to pursue contempt proceedings.

² At para 3

³ (2015) 36 ILJ 2013 (LAC)

27. In *Kubeka & others v Ni-Da Transport (Pty) Ltd*⁴ the Labour Appeal Court held quite clearly that

[35] The decision of the Constitutional Court in Hendor therefore leaves little doubt that a reinstatement order does not restore the contract of employment and reinstate the unfairly dismissed employees. Rather, it is a court order directing the employees to tender their services and the employer to accept that tender. If the employee fails to tender his or her services or the employer refuses to accept the tender, there is no restoration of the employment contract. If the employer fails to accept the tender of services in accordance with the terms of the order, the employee's remedy is to bring contempt proceedings to compel the employer to accept the tender of services and thereby to implement the court order.

28. Recently in *Mahlanga NO v Rand Water*⁵ Judge Prinsloo in discussing the principles of reinstatement stated that,

"The governing principle that the contracts of employment of unfairly dismissed employees are terminated by dismissal and revive only when they tender their services pursuant to a reinstatement order and the tender is accepted by the employer. The reinstatement order does not in and of itself reinstate the contract of employment, it is rather directing the employees to tender their services and for the employer to accept those services. In Hendor, it was confirmed that if an employee presents her- or himself for work, but the employer refuses to accept him or her back, the remedy is not contractual, but it is to bring the employer before the court for contempt of court."

29. In summary the employee should have filed a contempt of court application as opposed to an action for breach of contract.

Analysis

⁴ (2021) 42 ILJ 499 (LAC)

⁵ (2023) 44 ILJ 569 (LC), para 16. See too *National Union of Metalworkers of SA on behalf of Fohlisa & Others v Hendor Mining Supplies (A Division of Marschalk Beleggings (Pty) Ltd)*⁵ (2017) 38 ILJ 1560 (CC), para 51

30. I am persuaded that my previous judgment granting the employee leave to appeal should be rescinded.

31. I am also persuaded that there is little prospect of the LAC coming to a different decision on the matter. The jurisprudence has gained the necessary clarity over time. If an employer does not accept an employee's tender of service upon an order of reinstatement, then the contract of employment does not revive, and a contractual claim in terms of the BCEA does not arise. The employee's recourse is to pursue contempt proceedings. The employee, regrettably, took a wrong procedural step by pursuing a contractual claim in terms of the BCEA, and the LAC is unlikely to come to his assistance.

Order

32. In the circumstances, I make the following order:

32.1. The application for leave to appeal issued on 20 June 2024 under case number JS165-2016 is hereby rescinded and set aside.

32.2. The leave to appeal is dismissed.

32.3. No order as to costs.

D Norton

Acting Judge of the Labour Court of South Africa