



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case No: JR 577 / 23

In the matter between:

CONVEYOR AND PLANT SERVICES (PTY) LTD **Applicant**

and

CHARMAINE LUBBE **First Respondent**

MORNE LUBBE **Second Respondent**

DAWID VAN NIEUWENHUIZEN **Third Respondent**

MARIA DOROTHEA VAN NIEUWENHUIZEN **Fourth Respondent**

COMMISSIONER VUSI MOYO, N.O. **Fifth Respondent**

**COMMISSION FOR CONCILIATION MEDIATION AND
AND ARBITRATION** **Sixth Respondent**

Heard: 02 July 2025

Delivered: 29 August 2025

**Summary: The Applicant seeks to review and set aside the refusal to
rescind a default arbitration award dated 2 January 2023.**

JUDGEMENT

PRETORIUS, AJ

Introduction

[1] This is a review application brought by the Applicant in terms of section 158(1)(g) of the Labour Relations Act¹ (LRA) wherein it is sought to review and set aside a ruling of the Fifth Respondent under case number GAEK7090/22, as issued on 2 January 2023.

[2] In this ruling that is sought to be reviewed, the Commissioner refused to rescind a default arbitration award issued by him. The Applicant seeks to have the rescission ruling reviewed and consequently that the default arbitration award be rescinded and the matter be remitted to Sixth Respondent to be dealt with *de novo* by a commissioner other than the Fifth Respondent.

Background

[3] The Applicant is a member of the AHI Employer' Organisation. The Employers' Organisation official who was instructed to represent the Applicant at the arbitration process was Mr T Nel.

[4] The First to Fourth Respondents contend that they have been unfairly dismissed by the Applicant and referred an unfair dismissal dispute to the Sixth Respondent. They contend that they were collectively dismissed by the Applicant in a meeting held on 13 July 2022.

[5] On 3 November 2022, the arbitration process took place which resulted in a

¹ Act 66 of 1995, as amended.

default arbitration award being issued. On this date, the attorney for the First to Fourth Respondents attended the CCMA along with the First to Fourth Respondents. Neither the Applicant nor his representative were in attendance.

[6] After the issuing of the default arbitration award on 15 November 2022, a rescission application was launched by the Applicant and was set down for hearing on 23 December 2023.²

[7] The Fifth Respondent ruled that the rescission application was refused and that the default arbitration award '*is upheld and must be enforced*'. This ruling was signed on 2 January 2023.

[8] The application for rescission indicates the following:

8.1. Mr Nel's non-attendance at the arbitration process was due to his ill-health;

8.2. An agreement was reached with the First to Fourth Respondents' attorneys to postpone the matter due to Mr Nel's ill-health;

8.3. Mr Nel suffers from a back deformity which occasionally results in excruciating pain where he finds it difficult to walk. His condition unexpectedly worsened on 1 November 2022, and he immediately made an appointment with his doctor who was available on 2 November 2022 at 07h30;

8.4. Mr Nel immediately communicated with the First to Fourth Respondents' attorneys by email at 11h38 on 1 November 2022 seeking a postponement, wherein he stated, *inter alia*, that '*I will not be able to find a replacement to represent the company on such short notice and kindly ask that you will consider my request*'.

8.5. Ms J Djordjevic of Gilpen Attorneys who represented the First to Fourth Respondents answered on the same date at 12h57 as follows:

'Good afternoon Mr Nel

The abovementioned matter refers.

Our offices are amenable to postponement provided upon receipt of a medical certificate. ...'

² Annexure "C", Rescission Ruling, p. 36, pleadings bundle.

8.6. On the morning of Wednesday, 2 November 2022, Mr Nel authored an email to the attorneys of the First to Fourth Respondents at 08h43, annexing the medical certificate and confirming that he was booked off ill until 7 November 2022 due to the injury to his back. He also thanked the attorneys for agreeing to the postponement. This email was forwarded to the CCMA. As such, the Applicant contends that there was an agreement between the parties to postpone the matter;

8.7. On 2 November 2022, a certain K Motshabi of the Sixth Respondent copied all the recipients at the attorneys of the First to Fourth Respondents as well as Mr Nel and stated that '*... we acknowledge receipt of your respond please take note that it will be filled (sic) for the Commissioner's attention*'.

8.8. It appears that the attorneys of the First to Fourth Respondents had a change of heart and indicated to Mr Nel at 09h27 that instructions had been received to oppose any application for postponement and that the Applicant had to make a formal application for postponement as the request for a postponement was viewed by the First to Fourth Respondents as a delaying tactic.

8.9. Mr Nel did not see the email from the attorneys of the First to Fourth Respondents that purported to resile from the agreement to postpone. He no longer checked his emails since he had been booked off ill.

8.10. After the default arbitration was issued in favour of the First to Fourth Respondents, and in the rescission application, Mr Nel dealt with the reasons for the default as well as the Applicant's prospects of success in defending the unfair dismissal allegation.

8.11. Mr Nel contended that good cause existed for the default arbitration award to be rescinded.

[9] Ultimately the Fifth Respondent refused the rescission of the default arbitration award. As a result, this review application was launched.

Issues for determination

[10] The First to Fourth Respondents submitted that the following issues arise from the affidavits before me for determination:

- 10.1. whether or not there is a proper and pending review application before me;
- 10.2. whether the Fifth Respondent failed to properly apply his mind to evidence of an alleged agreement to postpone the arbitration proceedings between the representatives of the parties; and
- 10.3. whether the Fifth Respondent committed a gross irregularity and/or misconducted himself when he made a determination on the existence of an agreement in the absence of the Applicant at the arbitration.

First to Fourth Respondent's contentions

[11] The First to Fourth Respondents contended that:

- 11.1. the Applicant seeks to review the rescission ruling of the Fifth Respondent issued on 2 January 2023 wherein the Fifth Respondent refused to rescind the default arbitration award made against the Applicant dated 15 November 2022.
- 11.2. the Applicant only filed its application for review on 4 April 2023 and filed same in terms of section 158(1)(g) of the LRA instead of section 145 of the Act. In terms of section 145 of the LRA, the Applicant had six weeks from the date of the rescission ruling, being 2 January 2023, to file its application for review, meaning that the application for review had to be filed on or before 13 February 2023.
- 11.3. The application for review was only filed on 4 April 2023, some 13 weeks after the rescission ruling of the Fifth Respondent was handed down.
- 11.4. In addition, the review application ought to have been brought under section 145 and not section 158(1)(g) of the LRA.
- 11.5. No proper application for condonation has been filed by the Applicant and thus the matter is not currently before me.
- 11.6. That no basis existed for the rescission of the default award. Having regard to the Applicant's founding affidavit as well as its supplementary affidavit, the Applicant has failed to point out any single incident relating to the Fifth Respondent's conduct and/or irregularities, and instead the Applicant, in its application and founding affidavit is challenging the decision of the Fifth Respondent as they are unhappy with the merits of the matter and not his

conduct in that the Applicant stated '*the refusal of the commissioner to grant a rescission of the default arbitration award is deemed to be wrong and stands to be reviewed*' and '*the Applicant further states that there was no dismissal of the First to Fourth Respondents during the meeting of 13 July 2022 and as such, the CCMA lacked the necessary jurisdiction to arbitrate the matter*'.

11.7. Lastly, that the Applicant was attempting to bring an appeal instead of a review.

The Applicant's contentions

[12] With reference to condonation, the Applicant contended that:

12.1. Initially no condonation was required in respect of section 158(1)(g) reviews, and that it was sought in the founding affidavit *ex abundanti cautela*.

12.2. In argument, it was conceded that condonation was in fact required and that grounds exist for condonation to be granted to the applicant.

[13] With reference to the merits, the Applicant contended that:

13.1. In terms of section 144 of the LRA, a commissioner may rescind an arbitration award or ruling by an affected party erroneously sought or erroneously made in the absence of that party or granted as a result of a mistake common to the parties to the proceedings.

13.2. There were historically two schools of thought that emerged from the Labour Court dealing with rescission. The first view was that a wide meaning should be afforded to section 144 with this approach requiring a reasonable explanation and a *bona fide* defence on the merits of the matter.

13.3. The second view that developed 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 brought in terms of terms of section 144 of the LRA. This approach requires that the application should be founded on one of the specific grounds stated in section 144 and on those grounds alone. The Applicant meets the threshold as established by both of these historical views. It has demonstrated in the rescission application that there was indeed a reasonable explanation for not attending the arbitration process on the day and that should have been the end of the enquiry. In addition,

however, the Applicant has shown that it has a *bona fide* defence on the merits of the matter.

13.4. An applicant for the rescission of a default arbitration award must show good cause and prove that it had at no time renounced its defence and has serious intention of proceeding with the case. In this matter, the Applicant opposed the initial application for a postponement brought by the attorney of the First to Fourth Respondents in order to bring the matter to finality and requested consent to a postponement when Mr Nel's medical condition worsened, without any delay.

13.5. The jurisdictional challenge mounted by the Applicant was not entertained by the Commissioner, but this also shows the Applicant's intention to defend the matter on the merits.

13.6. In *Northern Province Local Government Association v CCMA and Others*³ (*Northern Province*), the Labour Court was faced with a review of a commissioner's refusal to rescind a default arbitration award. The Court held that to have an arbitration award rescinded that was granted in a party's absence, such an applicant must show firstly, that it has a *bona fide* case to place before the CCMA and that it had not lost interest in having its case heard and secondly, its absence at the hearing has been reasonably explained.

13.7. In *Foschini Group (Pty) Ltd v CCMA and Others*⁴, the Court cited with approval the matter of *Northern Province* and stated 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 confirmed that a strong *bona fide* case would usually compensate for a less than satisfactory explanation for default. In the current matter, the Applicant was not to blame for its absence since it was caused as a result of a postponement agreement between the parties and the submission of a medical certificate that was also brought to the CCMA's attention. Furthermore, the Applicant appeared to have a *bona fide* defence on the merits but wrongly held in his rescission ruling that there was not a reasonable

³ [2001] 5 BLLR 539 (LC).

⁴ [2002] 7 BLLR 619 (LC) at 622F – H.

explanation for the default. The Commissioner erred on the law by holding that, without a reasonable explanation, prospects of success are immaterial. He conflated the current test for a rescission of a default arbitration award with that of a party seeking condonation.

13.8. The Labour Appeal Court (LAC) recently in *Mohube v Commission for Conciliation, Mediation and Arbitration and Others*⁵ dealt with a commissioner's refusal to grant a rescission of a default arbitration award. It confirmed the legal principles applicable to rescission applications and rescission rulings and elaborated on the meaning of the term 'good cause'. 'Good cause' entails that an Applicant for rescission must show at least the following:

13.8.1. An absence of wilfulness:

13.8.2. That it has a reasonable explanation for the default;

13.8.3. That the application for rescission is *bona fide* and not made with the intention to delay; and

13.8.4. That it has a *bona fide* claim against the other party.

13.9. The Court held that all these elements must be considered, weighed and, for example, proof of a *bona fide* claim may make up for a weaker explanation.⁶

13.10. The LAC confirmed that the commissioner was wrong in concluding that the appellant's prospects of success appeared to be weak and that this was an unreasonable assumption. A reasonable commissioner would have found that the appellant's referral was *bona fide* and that his failure to appear was reasonably explained and was not wilful and/or intended to delay the resolution of the dispute. The commissioner's ruling was subsequently set aside.

13.11. In *Professional Transport Workers' Union v Malema and Others*⁷, the LAC upheld an appeal setting aside a rescission ruling where the commissioner did not consider 'good cause'. The Court held good cause to be an independent ground for rescission in addition to the grounds as set out in Section 144 of the LRA.

⁵ (2023) 44 ILJ 1683 (LAC).

⁶ Ibid at para 25.

⁷ [2016] JOL 35710 (LAC).

13.12. In *Senator International Logistics (Pty) Ltd v Raphela and Others*⁸, the Court reviewed a refusal by a commissioner to rescind a default arbitration award because the commissioner did not consider the second aspect of the test, i.e. the prospects of success. He simply stated that he ‘*was satisfied with the award issued*’ as the commissioner stated *in casu* in his rescission ruling. The Court held that there was no indication that the commissioner considered the employer’s submission on its prospects of success in the arbitration and as such, the commissioner failed to apply the test for good cause by the LAC. In doing so, a gross irregularity was committed.

Analysis

Condonation

[14] The Applicant launched its review in terms of section 158(1)(g) of the LRA (a topic that I will return to hereunder). Even though no time limit is set in this section as to when such a review must be launched, given the section’s close proximity to section 145, such review application had to be launched within a reasonable time which has been found to also be six weeks.⁹

[15] As such, the review application is a month late and the applicant required condonation.

[16] Every application for condonation must show good cause and set out grounds for condonation and include the following details:

1. Degree of lateness;
2. The reasons for the lateness;
3. The referring party’s prospects of success;
4. Any prejudice to the other party; and
5. Any other relevant factors.¹⁰

⁸ [2019] JOL 44325 (LC).

⁹ See: *Weder v Member of the Executive Council for the Department of Health, Western Cape* [2013] 1 BLLR 94 (LC).

¹⁰ *Melane v Santam Insurance Co Ltd* 1962 (4) SA 531 (A); *Sasol Infrachem v Sefafe and Others* (2015) 36 ILJ 655 (LAC).

[17] The other relevant factors to be considered include:

17.1. The Respondent's interest in finality; and

17.2. Avoidance of unnecessary delay in the administration of justice.¹¹

[18] The onus is on the applicant for condonation to satisfy the court that condonation should be granted. In *NUMSA and Another v Hillside Aluminium*¹², Murphy AJ held that:

'Condonation is not there simply for the asking. Applications for condonation are not a mere formality. The onus rests on the applicant to satisfy the court of the existence of good cause and this requires a full, acceptable and ultimately reasonable explanation.'¹³

[19] The LAC held as follows in *NUM v Council for Mineral Technology*:¹⁴

'...without a reasonable and acceptable explanation for the delay, the prospects of success are immaterial, and without prospects of success, no matter how good the explanation for the delay, an application for condonation should be refused... '

[20] The explanation of the Applicant consists of a reliance on the fact that ordinarily in the High Court there would be *dies non* which would cover the period when this award was received. This however does not apply in the Labour Court and thus the delay would not be unreasonable in that context. Also, the Applicant indicates that its attorneys of record's office closed during this period and the Applicant could not consult with its attorneys during such time. The affidavit is vague and bereft of detail in regard to when the offices of the Applicant's attorneys opened for business in January 2023.

¹¹ *Academic & Professional Staff Association v Pretorius NO and Others* (2008) 29 ILJ 318 (LC).

¹² [2005] 6 BLLR 601 (LC) at para 12; *City of Cape Town v SA Local Government Bargaining Council and Others* (2014) 35 ILJ 163 (LC).

¹³ See also: *A Hardrodt (SA) (Pty) Ltd v Behardien and Others* (2002) 23 ILJ 1229 (LAC); *Meintjies v H D Combrinck (EDMS) Bpk* 1961 (1) SA 262 (A) at 263H-264A; *Saloojee and Another v Minister of Community Development* 1965 (2) SA 135 (A) at 138E-F; *Glazer v Glazer* 1963 (4) SA 694 (A) at 702H.

¹⁴ [1999] 3 BLLR 209 (LAC); *Production Institute of Southern Africa (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2011) 32 ILJ 1712 (LC).

[21] The second basis upon which the Applicant seeks to rely relates to an attempt made to resolve the default arbitration award with the First to Fourth Respondents as they are close family members of the deponent to the founding affidavit, but that such attempt bore no fruit. It is a pity that paragraph 20 of the Applicant's founding affidavit, which deals with this attempt at reconciliation, is met with a generic denial rolled up with five other paragraphs in the opposing affidavit and is not dealt with specifically. As such, I have no basis but to accept that an attempt was made by the Applicant to resolve the dispute with the First to Fourth Respondent notwithstanding the paucity of information regarding when and how this attempt was made.

[22] It appears as if the Applicant was somewhat laconic in regard to the reasons for the delay based on the misguided understanding of the requirement of condonation even in matters where reliance is placed on section 158(1)(g) of the LRA.

Prospects of success

[23] Turning to prospects of success, the test for prospects of success has been stated as follows:

'The fact that the onus of proving the fairness of the dismissal rests on the employer, does not relieve an applicant in a condonation application of the obligation of proving that it has prospects of success. It means that the test for prospects of success will be applied in the context of a dismissal dispute where the onus of proving the fairness of the dismissal rests ultimately on the respondent employer. The test is not that it will, but could succeed. It is a preliminary and not final assessment of the merits of an applicant's case.'¹⁵

[24] In this instance, the Applicant relies primarily on a defence that no dismissal occurred on 13 July 2022, which he also raised as a point *in limine* that goes to the jurisdiction of the Sixth Respondent to arbitrate.

¹⁵ *Mould v Roopa NO and Others* (2002) 23 ILJ 2076 (LC) at para 30. See also: *Overberg District Municipality v Independent Municipal & Allied Trade Union on behalf of Spangenberg and Others* (2021) 42 ILJ 1283 (LC) at para 60.

[25] In addition, the Applicant contends that the Fifth Respondent failed to acknowledge that a postponement agreement had been concluded between Mr Nel and the First to Fourth respondents' legal representatives, and that the medical certificate of Mr Nel was submitted, and as such, this postponement should have been granted and the matter should not have proceeded in default.

[26] The Applicant contends that the Fifth Respondent erred in finding that there was no agreement between the parties to postpone the matter, and as a medical certificate was submitted, it should have resulted in the rescission application succeeding.

[27] Ultimately, the prejudice to be suffered by the Applicant in these circumstances would be that the doors of court would be closed to it (so to speak), without it having any opportunity to state its case.

[28] In this instance, the explanation for the delay is less than satisfactory. The delay however is not extreme. If this is balanced against the prospects of success and the prejudice to the Applicant that the doors of court would be closed to it without having had an opportunity to be heard, in circumstances where it believed that a postponement had been agreed, to refuse condonation would not be in the interests of justice.¹⁶

[29] I am accordingly inclined to grant condonation to the Applicant for the late serving and filing of its review application.

Review application competent in terms of Section 158(1)(g)?

[30] The First to Fourth Respondents contend that:

30.1. the Applicant's review application was brought in terms of section 158(1)(g) which empowers the Court, subject to section 145, to review the performance or purported performance of any function provided for in the LRA

¹⁶ *Ferris and Another v Firstrand Bank Ltd* 2014 (3) SA 39 (CC) at para 10.

on any grounds that are permissible in law.

30.2. Section 158(1)(g) of the LRA empowers this Court to review the performance of any function provided for in the LRA on any grounds permissible in law. What permissible grounds for purposes of section 158(1)(g) are have been defined and accepted as a review based on section 6 of the Promotion of Administrative Justice Act¹⁷ (PAJA), or a review based on the principles of legality or common law grounds.

30.3. As such, the application for review instead should have been brought in terms of section 145 of the LRA.

[31] In argument, I was referred to three judgments that held that refusals to rescind a default arbitration award are reviewable in terms of section 158(1)(g) of the LRA, namely *Day & Night Investigators CC v Ngoasheng and Others*¹⁸, *SACCAWU v CCMA & Others*¹⁹ and *Northern Province*²⁰. This approach has been adopted in more recent judgments as well.²¹ I am in respectful agreement with this approach and as such, there is no merit in this contention raised on behalf of the First to Fourth Respondents.

Review test in respect of applications brought in terms of Section 158(1)(g) of the LRA

[32] Section 158(1)(g) of the LRA creates a jurisdictional footprint for review by the Labour Court. What constitutes permissible grounds of review is dependent on the nature of the impugned decision, and three grounds are potentially available, namely a review based on Section 6 of PAJA, the principle of legality, or common law grounds.²²

[33] From the judgments dealing with refusal to rescind default arbitration awards

¹⁷ Act 3 of 2000.

¹⁸ [2000] 4 BLLR 398 (LC) at para 12.

¹⁹ [2000] 10 BLLR 1215 (LC) at para 13.

²⁰ *Northern Province* supra at para 13.

²¹ See: *Retail & Allied Workers Union on behalf of Ngweletsana v PT Operational Services (Pty) Ltd & others* (2010) 31 ILJ 1926 (LC) and *Mahlangu v Commission for Conciliation, Mediation and Arbitration and Others* (JR1679/13) [2015] ZALCJHB 307.

²² *Building Industry Bargaining Council (Southern and Eastern Cape) v CCMA* [2011] 4 BLLR 330 (LC) at para 13. See also C Bosch, A Myburgh 'Reviews in the Labour Courts', Juta at pp 130-140.

in terms of section 158(1)(g) of the LRA, the principle of legality in the form of rationality has been applied to refusals to rescind default arbitration awards.²³ The founding affidavit and the Applicant's heads of argument also appear to be based on an irrationality argument. It must be remembered that in terms of section 158(1)(g) of the LRA, the review may be based on any grounds that are permissible in law.

Refusal to rescind the default arbitration award

[34] The Applicant highlights the following from the rescission ruling:

34.1. Mr Gilpen, the attorney of the First to Fourth Respondent, criticised the Applicant's rescission application as the application was never served on the employees personally, but only on the attorneys.

34.2. Mr Nel is not an employee of the Applicant and the employer has more than 50 employees and could have attended the arbitration process.

34.3. Mr Nel stated in the replying affidavit that no one at the Applicant is educated and experienced in labour law to deal with the complexities of the arbitration and that a replacement could in any event not have been secured on such short notice. Importantly, the Commissioner captures the reply of Mr Nel that he was *'under the impression that there was agreement'*.

34.4. In paragraph 13 of the ruling, the Commissioner reached the conclusion that there was *'no evidence'* of an agreement between the parties to postpone the matter and there was also no application to postpone the matter.

34.5. The Commissioner attempted to justify his ruling by referring to the Oxford Dictionary meaning of *'amenable'*²⁴, as not being evidence of an agreement to postpone.

34.6. That Mr Nel erred in not directly contacting the four individual employees about his *'request for a postponement'* but only the employees' attorneys. *'The request was rejected by the legal representative in no uncertain terms, and he was advised to file a proper application for postponement in terms of Rule 31 of the CCMA rules'*.

²³ In this instance, the basis for the review appears insignificant as the outcome would have been the same applying either PAJA or common law grounds for review.

²⁴ *'Open and responsive to suggestion; easily persuaded or controlled; capable of being acted upon in a particular way; susceptible'*.

34.7. That the Commissioner was not persuaded that the Applicant was not in wilful default.

34.8. That the Applicant's inaction *'is evidence that the employer was not at all material times prepared to deal with the matter and defend its case'*.

34.9. Finally, the Fifth Respondent held, on the aspect of prospects of success, that both parties are *'clearly confident of their respective cases'* but that the legal question that arises is whether he had any reason to interfere with the default arbitration award as issued and *'as things stand, while there might be a case to be argued, the employer failed to provide a plausible reason for non-attendance due to a non-existent agreement by both parties'*.

[35] Having regard to the record it is clear that:

35.1. At the commencement of the arbitration process, Mr Gilpen stated to the Commissioner that *'yesterday afternoon for the first time from an unknown gentleman or another party, they said look they are not going to be attending today from an employer's representer ...'*

35.2. Mr Gilpen failed to inform the Fifth Respondent about the request for postponement based on sudden illness or to the exchange of emails in that regard. Also, he failed to indicate that a medical certificate had been provided which indicated that Mr Nel was booked off for a medical condition. Mr Gilpen stated that in his *'opinion there is no excusable or plausible reason or explanation for the employer himself not to be here'*.

35.3. The Fifth Respondent then states that *'it is fine. Look, on our side, the last mail that I saw was at 09h27 yesterday in the morning. So but then you made it clear to the Respondent that you are opposing their request for a postponement'*.

35.4. Mr Gilpen argued at the default arbitration process that some individual from the Applicant should have been present, like the Managing Director.

[36] Having regard to the facts of the matter before me, it is quite apparent that Mr Nel sought a postponement and understood the email of the attorneys of the First to Fourth Respondents as agreeing thereto subject to him producing a sick note. On the production of the sick note, Mr Nel cannot be faulted in thinking that an

agreement was reached. In fact, the quoted meaning of '*amenable*' clearly supports that the attorneys of the First to Fourth Respondents was open to a postponement as long as a medical note was produced. When it was in fact produced, an agreement was reached to postpone the matter based on Mr Nel's illness.

[37] I am troubled by Mr Gilpin's sailing close to the wind by not disclosing the content of the emails on the day of the arbitration to the Fifth Respondent. He was duty bound to do so as the matter was being heard effectively as an *ex parte* application (in the absence of the other party) where full disclosure of all relevant information is required.²⁵ I trust that this will not happen again.

[38] With reference to a defence to the claim, the Applicant raised a jurisdictional challenge that no dismissal occurred. As such, the First to Fourth Respondents would bear the onus to establish that a dismissal occurred before the issue of fairness of an alleged dismissal can be entertained.

[39] For all of the above reasons, I am satisfied that the rescission application was not wilful, the applicant has provided a reasonable explanation for its non-attendance and has a *bona fide* defence in the sense of setting out averments which, if established at trial, would entitle it to succeed.²⁶ Also, the rescission application was not made with the intention to delay.

[40] The Fifth Respondent became aware of the email correspondence surrounding an agreement to postpone during the rescission application. To not find that the Applicant's non-attendance was due to Mr Nel being under the impression that agreement was reached and suggesting that the Applicant was in wilful default is irrational. In addition, the Fifth Respondent concedes that the Applicant '*might have a case to be argued*'. This indicates that the Fifth Respondent considered that the Applicant had prospects of success. An agreement to postpone and prospect of success cries out for rescission to be granted. Not to grant rescission was

²⁵ Section 57.1 of the Legal Practice Council's Code of Conduct for all Legal Practitioners, Candidate Legal Practitioners and Juristic Entities of 2019.

²⁶ *Melomed Hospital Holdings (Pty) Ltd v DENOSA obo Fourie and Others* (C589/2020 ZALCCT 31 (21 June 2023)) at para 26.

completely irrational.²⁷

[41] Lastly, having regard to the facts and contentions in this matter, the review application of the Applicant is not an attempted appeal under the guise of a review.

Conclusion

[42] In the premises, I find that the ruling by the Fifth Respondent is reviewable as he ought to have found that the arbitration award granted was erroneously sought or erroneously made in the absence of an affected party or granted as a result of a mistake common to the parties to the proceedings.

[43] The ruling of the Fifth Respondent made under case number GAEK 7090-22 dated 2 January 2022 in which he refused to rescind the default arbitration award under the same case number falls to be set aside.

Costs

[44] Even though both parties sought costs in the papers, there is a measure of culpability on both sides in how this matter was conducted.

[45] Moreover, this Court has a discretion in terms of Section 162 of the LRA to order costs in accordance with the requirements of the law and fairness. Furthermore, in *Union for Police Security and Corrections Organisation v South African Custodial Management (Pty) Limited and others*²⁸, the Constitutional Court has made it clear that costs should only be awarded by this Court in exceptional circumstances. I am of the view that this is a matter that, in the interests of fairness and equity, does not warrant a cost order being made.

[46] In the premises, I make the following order:

²⁷ *MEC for the Department of Health, Western Cape v Weder; MEC for the Department of Health, Western Cape v Democratic Nursing Association of SA on behalf of Mangena* (2014) 35 ILJ 2131 (LAC) at para 34.

²⁸ 2021 (11) BCLR 1249 (CC) at para 40.

Order

1 Condonation for the late service and filing of the review application is granted.

2 The ruling of the Fifth Respondent made under case number GAEK 7090-22 on 2 January 2022, in which the Fifth Respondent refused to rescind the default arbitration award made under case number GAEK 7090-220 is reviewed and set aside in terms of section 158(1)(g) of the Labor Relations Act 66 of 1995, and substituted with an order that the default arbitration award is rescinded and set aside;

3 The dispute is remitted to the Sixth Respondent for arbitration *de novo* to be conducted by a commissioner other than the Fifth Respondent.

4 There is no order as to costs.

D. Pretorius

Acting Judge of the Labour Court of South Africa

Appearances:

For the applicant: Advocate P. Kirstein

Instructed by: JW Botes Inc.

For the third respondent: Mr. C.M. Gilpin of Gilpin Attorneys Inc.