IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Case No: JR2527/22

In the matter between:

PRIMESERV DENVERDRAFT (PTY) LTD Applicant

and

E. WEHNCKE *N.O.* First Respondent

COMMISSION FOR CONCILIATION MEDIATION AND ARBITRATION Second Respondent

STEVEN EARLE WILKINSON Third Respondent

Heard: **21 August 2024**

Delivered: **02 October 2025**

JUDGMENT

KUMALO, AJ

Introduction

[1] In this matter, there are two applications for review before the Court. The first is an application to review a rescission ruling made on 1 November 2022, under case number GAJB22818-21. The second is a review application of an arbitration award made under section 142A of the Labour Relations Act[1] (LRA) by Commissioner Wehncke *N.O.*, which made a settlement agreement concluded by the parties an arbitration award under case number GAJB22818-21.

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[1] Act 66 of 1995.

Background

[2] The applicant, Primeserv Denverdraft (Pty) Ltd (Primeserv) is a Temporary Employment Service providing employment to their clients through various contracts as envisaged in section 198 of the LRA. The third respondent, Steven Earle Wilkinson (the employee), was employed by the applicant in the position of a Technical Illustrator, on a fixed-term contractual basis for a period of 12 months.

[3] The employee was employed on a fixed-term contract and assigned to a client of Primeserv, Babcock International Group (Babcock) for the duration of the said employment contract. On the expiry of the contract, the employee referred a dismissal dispute to the Commission for Conciliation, Mediation and Arbitration (CCMA), alleging that his dismissal was substantively unfair as he had a reasonable expectation of the renewal of his contract due to the consecutive renewals of the same for a period of almost a decade.

[4] At conciliation, the parties entered into a settlement agreement, the salient terms of which read:

> '2.1 The respondent agrees to re-employ the applicant with effect from 13 June 2022
>
> 2.2 The applicant must report for duty on 16 May 2022 at 9:00 am at Illovo.
>
> 2.3 The re-employment will be on the same terms and conditions of employment which governed the employment relationship prior to the dismissal unless specifically set out hereunder.
>
> …
>
> 6 Other
>
> Both parties agree that in the event of the Applicant's fixed term contract (12 months) being terminated prematurely, the respondent shall be provided with a period of 30 days to seek alternative employment on the same or similar terms of conditions for the

> applicant. Should the Respondent be unable to secure such alternative employment, it shall make payment to the applicant insofar as the balance of the agreement is concerned. The applicant will be remunerated for the set grace period, same as the notice period.'

[5] This settlement agreement was later made an arbitration award in terms of section 142A of the LRA, which arbitration award is the subject of the review application and the review application to set aside the rescission ruling.

<u>What is before this Court?</u>

[6] The notice of motion is divided into two parts. Part A of the notice of motion is dependent on the outcome of Part B of the notice of motion, which reads in part as follows:

> '1. The arbitration award dated 17 October 2022, issued by the Commissioner Wehncke N.O. under case number GAJB228-21 is reviewed, corrected and/or set aside.
>
> 2. The document dated 1 November 2022 issued under case number GAJB 22818-21, which represents a rescission ruling, is reviewed, corrected and or set aside …'

[7] There are, therefore, two review applications before this court, the first being a review application against the arbitration award that made the settlement agreement entered into between the parties an arbitration award in terms of section 142A of the LRA. The second review application is against the recission ruling of the CCMA, wherein it held that, in essence, the respondent sought a review of the decision, which is outside the purview of section 144 of the LRA and therefore the recission application was effectively dismissed and referred the applicant to this Court to apply for a review of the said arbitration award.

[8] In light of the above, this judgment will first deal with the review of the rescission ruling, even though the same does not affect the review of the arbitration award itself, as it is not dispositive of the matter.

<u>Review application regarding the rescission ruling</u>

Grounds for review

[9] The applicant submits that the commissioner failed to apply her mind to the rescission application as is borne by the 'ruling', in that the commissioner *'basically refused to entertain the rescission application'*. The applicant further advances the argument that the commissioner failed to appreciate that they fall within the scope of section 144 of the LRA, which is quoted in the ruling, in that they fall at least under subsection (a), which states that:

> '144. Variation and rescission of arbitration awards and rulings. –
>
> Any commissioner who has issued an arbitration award or ruling … may … rescind an arbitration award or ruling —
>
> (*a*) erroneously sought or erroneously made in the absence of any party affected by that award…'

[10] The applicant is quite persistent that the failure by the commissioner to consider their submissions in the section 142A application is grounds for a rescission application in that an award was made in their absence, and therefore the commissioner was incorrect in its decision, effectively dismissing the rescission application.

Legal principles

[11] The Labour Appeal Court in the matter of *Johnson Uniform Solutions v Brown and others*[2] confirmed that in an application for review, there are effectively two standards of review, i.e. reasonableness and correctness, and the facts of the matter will determine which test is applicable. Where the dispute regards the CCMA or Bargaining Council's jurisdiction to adjudicate such a dispute, the test that should be applied is the correctness test.

[12] In the matter of *Department of Health v Jones and another*[3] this Court held that an arbitration award granted in terms of section 142A of the LRA is final

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[2] (DA10/2012) [2014] ZALCJHB 32 (13 February 2014) at paras 33 and 34.

[3] [2009] 3 BLLR 195 (LC)

and binding on the parties as any other arbitration award. The only avenues available to the applicant were either to have the arbitration award rescinded or set aside on review, both of which the applicant herein undertook to do.

[13] In the matter of *Pheme v S*[4] the Court held that when a settlement agreement is made, an arbitration award in terms of section 142A, after considering the requirements relevant to such application, it has then been made with the necessary jurisdictional powers, and the CCMA or Bargaining Council will not have the jurisdiction to rescind the award.

[14] Therefore, a rescission should only be granted if the requirements of section 142A were not met.

[15] In the matter of *CT International Financiers (Pty) Ltd v van Rooyen and others*[5]

> 'All that section 142A(1) requires is that the dispute has been referred to the CCMA or bargaining council. Whether or not it has been timeously referred or is indeed capable of determination is not relevant.'

[16] As set out in *Lekwa Local Municipality v SALGBC and others*[6] The requirements of a section 142A application that a commissioner had to consider are the following:

14.1 The settlement agreement must relate directly or indirectly to the issues arising out of the employment relationship between the parties or to the subject matter of the *lis* between them;

14.2 The settlement agreement must not be objectionable, i.e. its terms must be capable both from a legal and practical point of view of being included in an arbitration award;

14.3 The award must hold some practical and legitimate advantage;

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[4] (A11/2022) ZALMPPHC 1 (16 January 2023)
[5] (C595/18) [2019] ZALCCT 42 (12 December 2019) at para 23.
[6] (2017) 38 ILJ 190 (LC).

14.4 The settlement agreement may not be framed in a manner that affords the person on whom it applies the discretion to comply or disregard it.

Analysis

[17] As stated above, the review test is now trite. The question before this Court is whether the commissioner was correct in his decision to dismiss the rescission application. As correctly argued by the respondent herein, the commissioner was not enjoined to, in an application in terms of section 142A, revisit and enquire into the merits of the settlement agreement.

[18] Looking to the requirements for an application such as this, the commissioner was to enquire into whether there was a valid and binding settlement agreement between the parties, which, on the face of it, there was. Thereafter, the commissioner was to establish whether the settlement agreement was one that disposed of a dispute that was currently pending between the parties, a dispute which was either referred or had the right to be referred. As can be seen in this matter, the settlement agreement was a product of settling a referral that was referred to the CCMA regarding a dispute that arose from the employment relationship between the parties.

[19] Once the same has been established, the commissioner was to consider whether the same protected a legitimate advantage and whether the terms of the same were capable of being incorporated into an arbitration award, as the same was not reliant on the discretion of the party that needed to perform under the same. When looking at the wording of the settlement agreement, the same can be said to be compliant with the wording that would be used in an arbitration award.

[20] In light of the above, any commissioner faced with a rescission application such as this would be correct in their finding that the same falls to be dismissed, and therefore the review application regarding the same falls to be dismissed.

<u>Review application regarding the Section 142A arbitration award</u>

Grounds for review

[21] The applicant argues that the commissioner committed a material irregularity in failing to consider the response of Primeserv to the section 142A application as they were faced with a material 'controversy' which they failed to deal with. Primeserv submits that the commissioner made a material error in fact and law as it placed before the Commissioner its defence as to why the settlement agreement should not be made an arbitration award, which is that same had been complied with. They further submitted that the commissioner approached the application mechanically and did not delve into the merits of the section 142A application before making the settlement agreement an arbitration award.

[22] The applicant further argues that the LRA does not provide for different types of arbitration awards and therefore it can be assumed that a section 142A arbitration award must comply with the provisions of section 138 of the LRA. In relying on this argument, the applicant has premised their grounds of review on the reasonableness of the award and submitted that they were denied a fair hearing in that their submissions were not taken into account in circumstances where the applicant had not abandoned nor waived its right to attend at arbitration.

Legal principles

[23] In the matter of *Pheme v S,*[7] the Court held that when a settlement agreement is made an arbitration award in terms of section 142A, after considerations of the requirements of such application, the award does not morph into one as contemplated in section 138 (7) of the LRA. Further in the matter of *Department of Education v Shilowa*[8] the court held that one must not mix procedures as set out in section 138 of the LRA and conflate it with section 142A:

> 'Put differently, as allowed by the LRA, all the commissioner did was to, in the exercise of his discretion, paint the settlement agreement and adorn it with

[7] (A11/2022) [2023] ZALMPPHC 1 (16 January 2023).
[8] (JR1217/2022) [2023] ZALCMPP 1 (19 July 2023) at para 11.

> arbitration award colours. This arbitration award is not the same as the one contemplated in section 138(7) of the LRA.' (Own emphasis)

[24] As stated above in *Johnson Uniform Solutions* there are effectively two review tests. While a review of an arbitration award attracts the test of reasonableness, an arbitration award made in terms of section 142A is not made through the discretion of the commissioner, and therefore, the review test would be of correctness as opposed to reasonableness.

[25] When determining a review of a section 142A arbitration award, the Court must ask whether the commissioner was correct in making the settlement agreement an arbitration award. In the matter of *Consol Glass (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and others*[9] the Court held that the prerequisites of making a settlement agreement an arbitration award in terms of section 142A are that it should be a settlement agreement that settled a dispute that was referred to the CCMA or Bargaining Council.

[26] As stated above, the requirements that an applicant in a section 142A application has to establish is whether; the settlement agreement settled a dispute that arose from the employment relationship between the parties and has been referred or had the right to refer; the terms of the settlement agreement is not objectionable both legally and practically and the terms of the settlement agreement are not based on the discretion of the parties.

[27] Another hurdle that the applicant faces is that they consented to the settlement agreement being made an arbitration award in terms of section 142A of the LRA. As can be seen from the above, the respondent who bore the onus to show to the commissioner the requirements of a section 142A application has fulfilled the requirements as set out above. The requirements in a section 142A application should not be conflated with the requirements of a section 158(1)(c) application, which has as an element of compliance with the settlement agreement or a dispute on the interpretation of the said settlement agreement. That is a different application with a different enquiry.

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[9] [2012] 1 BLLR 42 (LC).

[28] Even if it could be argued, despite the fact there was an agreement to make the settlement agreement an arbitration award, that the applicant had the right as in section 138 to be present at the ‘arbitration’ (which it did not because it was not actual arbitration proceedings) there was nothing that could have been placed before the commissioner, even had the applicant appeared before him that would warrant the application not being granted. There was no argument from the applicant regarding the actual requirements of a section 142A application, in that they did not raise that the settlement agreement was invalid, the terms of which were objectionable and that it was based on the discretion of the parties. In light of the above, the decision of the commissioner was a correct one. Consequently, the application must also be dismissed.

[29] The applicant must also be ordered to pay the costs of the applications. This is because the applications were clearly stillborn, and from the outset, the applicant, being legally represented, ought to have been aware of the meritless nature of both applications. The requirements of law dictate that labour disputes must be cheaply and expeditiously resolved, and the processes contemplated under section 142A of the LRA seek to achieve that end. Thus, applications such as these defeat that very objective and must be soberly discouraged. Equally, the requirements of fairness dictate that the third respondent ought not be further impoverished by defending a favourable award.

[30] In the premises, the following order is made:

<u>Order</u>

1. The applicant’s application to review and set aside the rescission ruling dated 1 November 2022, under case number GAJB22818-21, is dismissed.

2. The applicant’s application to review and set aside the arbitration award in terms of section 142A of LRA issued by the first respondent is dismissed.

3. The applicant is to pay the costs of the applications.

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M. Kumalo

Acting Judge of the Labour Court of South Africa

APPEARANCES:

For the applicant:	F. Venter, instructed by Beech Veltman Incorporated
For the third respondent:	F. Darby, instructed by Viljoen Attorneys