



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not reportable

Case No: JR148/24

In the matter between:

BONGANI NGUBENI

Applicant

and

**COMMISSION FOR CONCILIATION, MEDIATION
AND ARBITRATION**

First Respondent

COMMISSIONER N S NGWANE N.O.

Second Respondent

PASSENGER RAIL AGENCY OF SOUTH AFRICA

Third Respondent

Heard: 19 August 2025

Delivered: 06 November 2025

Summary: Opposed review application challenging a rescission ruling. The Applicant failed to satisfy the second requirement of the test for rescission, namely, demonstrating good prospects of success. The commissioner exercised his discretion reasonably. The Applicant failed to establish that the ruling was unreasonable. Review dismissed with no

order as to costs.

JUDGMENT

COOK, AJ

Introduction

- [1] This matter concerns an opposed application to review and set aside the rescission ruling issued by the Second Respondent (the commissioner) under case number GAJB21797-23 under the auspices of the First Respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA).
- [2] The Third Respondent, Passenger Rail Agency of South Africa (PRASA) seeks that the review application be dismissed with costs.

Background

- [3] SATAWU, on the Applicant's behalf, referred an unfair dismissal dispute to the CCMA on 22 September 2023. The matter was not resolved through conciliation and was set down for arbitration on 8 December 2023 at 09h00.
- [4] The Applicant failed to appear timeously, and Commissioner N Raffee issued a dismissal ruling on 8 December 2023.¹
- [5] SATAWU, on behalf of the Applicant, launched an application for rescission of the dismissal ruling on 8 December 2023. In terms of the written statement in support of rescission, it was recorded:

¹ Page 29 of the CCMA record.

“On our way to the CCMA we had a tyre burst that led to a delay towards the CCMA for our case scheduled for 09:00 a.m. and would like to be given an alternative date to represent the member in arbitration as applied.”²

[6] PRASA opposed the rescission application and filed an answering affidavit and made the following submissions:

- “9. Based on the Applicant’s version, firstly the Applicant during the internal hearing and conciliation, he was represented by the reputable labour union and well conversant representative.
10. Secondly, the Applicant or representative should have phoned the line manager or the employee relations manager to inform CCMA that they are having challenges.”³

The rescission ruling

[7] The rescission application was determined on the papers. The commissioner issued a rescission ruling on 22 December 2023.⁴

[8] In the rescission ruling, the commissioner recorded that, regarding the explanation for the non-appearance, the employee representative and the employee were on their way to the CCMA, but a tyre burst caused a delay. Further, the commissioner recorded PRASA’s opposition on the basis that the representative failed to inform anyone that they were experiencing challenges on the day on their way to the CCMA⁵.

[9] Regarding the prospects of success, the commissioner noted that the representatives did not make submissions on them⁶.

² Page 31 of the CCMA record.

³ Page 36 of the CCMA bundle.

⁴ Page 39 of the CCMA bundle.

⁵ Paragraphs 7 and 8 of the rescission ruling.

⁶ paragraph 8 of the rescission ruling.

- [10] In the ruling, the commissioner referred to *Shoprite Checkers (Pty) Ltd v CCMA and Others*⁷ (*Shoprite*), stating that:

“The court held that the test of good cause in the application for rescission was the consideration of two factors, namely the explanation for the default and whether the applicant (employee) has a prima facie defence. A commissioner in considering the prospects of success does not have to pronounce on the merits of the case. All that the commissioner needs to do is to investigate whether on the averments made by the party that filed the application, there is a chance of succeeding when the main case is heard.”⁸

- [11] The commissioner found:

“11. It was the employee’s representative’s submission that he and the employee had a tyre burst on their way to the CCMA on the day of the proceedings, it was however the employer’s opposing submissions that the employee and/or his representative failed to notify either the CCMA or the employee’s relations manager of their non-appearance at the CCMA on the day. There was nothing submitted in support of their allegation. The representative failed to make submissions on the prospects of success. The application was in essence bare. I therefore find that the employee was in wilful default of the CCMA and that he failed to show a prima facie case against the employer. The ruling was not erroneously made in the absence of the employer and no good cause was shown to grant rescission, accordingly, rescission is not granted.”

- [12] The commissioner did not grant the rescission and dismissed the application against the employer.

The review

⁷ [2007] 10 BLLR 917 (LAC).

⁸ paragraph 10 of the rescission ruling.

[13] In the founding affidavit, the Applicant states:

“The circumstances surrounding my absence were attributable to a burst tyre encountered on my way to the CCMA. Unfortunately, the crucial detail was not considered prior to the dismissal of the arbitration. I reached the CCMA at 9:32 a.m., slightly later than the scheduled 9 a.m. start, falling within the customary grace period. Upon reaching the Second Respondent, we were informed that the Third Respondent had been released due to our delayed arrival. To clarify our delay, my union representative and I presented photographic evidence to the CCMA. A copy of the photograph is hereto attached and marked Annexure “B”.⁹

[14] The Applicant further states:

“It is submitted that my prospects have not altered since the initial referral of my matter, and thus the reasons were not enunciated in the rescission application.”¹⁰

[15] The Applicant then avers:

“The Second Respondent only addressed one facet for the good cause test, neglecting to evaluate or make any decision regarding the Applicant’s prospects of success in the main dispute. The failure to assess the Applicant’s overall prospects in the main dispute raises concerns about comprehensiveness and the fairness of the evaluation process.”¹¹

[16] The deponent reiterates that his intention was never to default wilfully.¹² In its answering affidavit, PRASA submitted that:

“Neither the CCMA nor the above Honourable Court have been made aware of the circumstance surrounding the dismissal of the Applicant. This was one of the main reasons why the rescission application of the

⁹ Paragraph 14, founding affidavit, page 6 of the indexed pleadings.

¹⁰ Paragraph 16, page 6 of the indexed pleadings.

¹¹ Paragraph 17 of the founding affidavit, page 7 of the indexed pleadings.

¹² Paragraph 19, founding affidavit, page 7 of the indexed pleadings.

Applicant failed, as he failed to bring to the CCMA's confidence the prospects of success of his referral to the CCMA, this was a fatal flaw of the rescission application."¹³

[17] PRASA further submits:

"The Applicant's rescission application was not merely dismissed based on the Applicant not notifying the parties of his delay. It was this together with the fact that the rescission application fails to address the issue of prospects of success, which is required to be discussed in a rescission application."¹⁴

Relevant law

[18] Section 138(5)(a) of the Labour Relations Act¹⁵ (LRA) reads:

"(5) If a party to the dispute fails to appear in person or to be represented at the arbitration proceedings, and that party-

(a) had referred the dispute to the Commission, the commissioner may dismiss the matter;"

(b)

[19] Section 144 of the LRA reads:

"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;

¹³ Paragraph 13, answering affidavit, page 26 of the indexed pleadings.

¹⁴ Paragraph 18, page 27 of the indexed pleadings.

¹⁵ Act 66 of 1995.

- (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission;
- (c) granted as a result of a mistake common to the parties to the proceedings; or
- (d) made in the absence of any party, on good cause shown.”

[20] In *Shoprite*¹⁶, the Labour Appeal Court held:

“[35] The test for good cause in an application for rescission normally involves the consideration of at least two factors. Firstly, the explanation for the default and secondly whether the applicant has a prima facie defence. In *Northern Province Local Government Association v CCMA and Other* [2001] 5 BLLR 539 (LC) at 545 at para 16 it was stated:

“An application for the rescission of a default judgment must show good cause and prove that he at no time denounced his defence, and that he has a serious intention of proceeding with the case. In order to show good cause an applicant must give a reasonable explanation for his default, his explanation must be made bona fide and he must show that he has a bone fide defence to the plaintiff’s claims.”

[36] In *MM Steel Construction CC v Steel Engineering and Allied Workers Union of SA and Others*¹⁷, Nugent J had this to say:-

“These two essential elements ought nevertheless not to be assessed mechanistically and in isolation. While the absence of one of them would usually be fatal, where they are present they are to be weighed together with relevant factors in determining whether it should be fair and just to grant the indulgence.”

¹⁶ (Id fn 7) at para 35.

¹⁷ (1994) 15 ILJ 1310 (LAC) at 1311 I – 132a.

[21] The Constitutional Court in *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others*¹⁸, defined good cause:

“[71] As an alternative to rule 42, Mr Zuma pleads rescission on the basis of the common law, in terms of which an applicant is required to prove that there is “sufficient” or “good cause” to warrant rescission. “Good cause” depends on whether the common law requirements for rescission are met, which requirements were espoused by the erstwhile Appellate Division in Chetty, and affirmed in numerous subsequent cases, including by this Court, in Fick. In that matter, this Court expressed the common law requirements thus—

‘the requirements for rescission of a default judgment are twofold. First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind.”

Thus, the existing common law test is simple: both requirements must be met. Mr Zuma must establish that he had a reasonable and satisfactory explanation for his failure to oppose these proceedings, and that he has a bona fide case that carries some prospects of success.”

and

“[73] Secondly, even if Mr Zuma was at the helm of a meritorious application bearing some prospects, which he had managed to

¹⁸ 2021 (11) BCLR 1263 (CC) at para 71.

steer clear of the perilous dangers of the doctrine of *functus officio*, one cannot ignore the simple common law rule that both the requirements must be met:

“for obvious reasons a party showing no prospect of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation of his default. And ordered judicial process would be negated if, on the other hand, a party who could offer no explanation of his default other than his disdain of the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits.”

[22] In *Production Institute of South Africa (Pty) Ltd v CCMA and others*¹⁹, the Court held:

“The discretion that a commissioner exercises in considering a rescission application is very wide and is the same as that of judicial officers in civil cases. See *Martin v Commission of Conciliation Mediation and Arbitration* (2008) 29 ILJ 2254 (LC). However, in exercising the power to either grant or refuse the rescission application, the commissioner has to make sure that in doing so he or she applies his or her mind to the factors relevant to such a determination. Failure to consider or apply one’s mind to any of the relevant factors by the commissioner in his or her consideration of the rescission application could make such a decision unreasonable or defective as envisage in s145 of the LRA. As stated in *Martin’s* case, the Labour Appeal Court upheld the appeal largely because the commissioner in that case had taken into account only one aspect of the applicable test.”

And

“... What an applicant needs to do is to provide a basis that shows that

¹⁹ (2011) 32 ILJ 1712 (LC) at para 6.

he or she has a good chance of succeeding when the matter is considered on its merits. It is however not good enough for the applicant to make a broad and sweeping statement that he or she has good prospects of success. An averment that there are prospects of success or bona fide defence must be substantiated and backed by facts”.

Analysis

[23] The Applicant, despite being represented by a trade union, wholly failed to address the issue of prospects of success in the rescission application.

[24] Similarly, the Applicant, now legally represented, has also failed to adequately address the prospects of success in the present review application.

[25] The only possible reference could be gleaned from the 7.11 referral form and not in the rescission application:

25.1 “Summarise the facts of the dispute: “The employee was dismissed against the employer’s policy.”²⁰

25.2 For procedural fairness: “Appeal rejected”

25.3 And for substantive issues: “No reason for dismissal.”

[26] Consequently, even if the Applicant could rely on these broad and sweeping statements (which were not made in the rescission application), they would not have been sufficient as they were not substantiated and backed by any supporting facts.

[27] In the circumstances, there was no evidence before the commissioner, and there is likewise nothing before this Court, upon which to assess the Applicant's prospects of success.

²⁰ Page 6 of the CCMA record

- [28] Accordingly, the Applicant failed to satisfy the second essential requirement of the test for rescission. As the authorities make clear, an applicant must satisfy both requirements. The Applicant failed to do so. As a result, the Applicant failed to establish good cause to rescind the dismissal ruling.
- [29] Although the Court is sympathetic to the Applicant's explanation for his default, this is a review application. The Court is not at liberty to interfere with the ruling based on what the Court may or may not have ruled in the circumstances.
- [30] The review test is a stringent and conservative test of reasonableness. The Court can only interfere with the ruling if the result is untenable.²¹ The commissioner did not misconceive the nature of the enquiry, nor did he arrive at an unreasonable result.²² The Commissioner exercised his discretion reasonably.
- [31] At best, the Applicant provided a reasonable explanation for his default. However, he failed entirely to meet the second, distinct requirement of establishing a *prima facie* case on the merits.
- [32] In conclusion, the commissioner's decision in the rescission ruling is not one a reasonable decision-maker could not have reached under the circumstances.²³

Costs

- [33] The Court has a wide discretion to order costs.
- [34] In labour matters, costs do not necessarily follow the result. An order of costs is determined by considering whether it would be fair to award such

²¹ *Makuleni v Standard Bank of South Africa Ltd and others* (2023) 44 ILJ 1005 (LAC).

²² *Herholdt v Nedbank Ltd* (2013) 34 ILJ 2795 (SCA).

²³ *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others* (2007) 12 BLLR 1097 (CC).

costs in accordance with law and fairness.

[35] Although the review application was ill-conceived and lacked merit, the Applicant has already been denied an opportunity to ventilate his dispute. In these circumstances, fairness dictates that he should not be further burdened with a costs order.

[36] In the premises, the Court makes the following order:

Order

1. The review application is dismissed.
2. There is no order as to costs.

A.L. Cook

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant : S Naidoo of Sudeshnee Naidoo Attorneys

For the Respondent : C Crafford of Crafford Attorneys