



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Not Reportable
Case no: JR626/24

In the matter between:

JUSTICE FLOYD CHILOANE

Applicant

and

SAKHILE KHULEKANI GUMEDE N.O

First Respondent

**COMMISSION FOR CONCILIATION MEDIATION
AND ARBITRATION**

Second Respondent

GLENCORE OPERATIONS SA (PTY) LTD

Third Respondent

Heard: 12 August 2025

Delivered: 11 November 2025

Summary: An application to review and set aside a ruling refusing to re-enrol a matter previously withdrawn. Matter to be re-enrolled as it was not settled.

JUDGMENT

GANDIDZE, J

Introduction

[1] The application by Mr Chiloane, in terms of section 145 or 158(1)(g) of the Labour Relations Act¹ (LRA), is aimed at reviewing and setting aside a '*Re-enrolment Ruling*' (the Ruling) issued by the commissioner in case number GAJB18629-223, under the auspices of the Commission for Conciliation, Mediation, and Arbitration (CCMA). The ruling of 12 March 2024 refused to grant Chiloane's application to re-enrol a dismissal dispute against Glencore Operations Pty Ltd (Glencore), which Chiloane had withdrawn on 7 February 2024. Chiloane seeks an order directing the CCMA to re-enrol the dispute for arbitration, or, alternatively, remitting the matter to a different commissioner for determination.

[2] Glencore opposed the application.

Condonation for the late filing of the answering affidavit

[3] Glencore applied for condonation for filing its answering affidavit late.

[4] The Notice in terms of the then-applicable Rule 7A(8)² was served on Glencore's attorneys on 8 May 2024, and the answering affidavit was filed on 10 June 2024. According to my calculations, that is 23 days late, but the parties submitted that it was either eight or ten days late.

[5] Be that as it may, I understand the explanation for the delay provided in the answering affidavit to be as follows. A Notice of Objection in terms of clause 11.4.2 of the now since repealed Practice Manual of the Labour Court³ was served on Glencore's attorneys on 24 May 2024, before any answering affidavit had been filed. Upon receipt of the Notice of Objection, Glencore's attorneys⁴ are said to have forwarded it to Glencore's current attorneys of record,⁵ and there was miscommunication between Glencore's attorneys and their current attorneys of record regarding whether an answering affidavit had

¹ Act 66 of 1995, as amended.

² GN 1665 of 1996: Rules for the Conduct of Proceedings of the Labour Court (repealed effective 17 July 2024).

³ Practice Manual of the Labour Court of South Africa, 2013 (repealed, effective 17 July 2024).

⁴ Elize Alberts and David Woodhouse.

⁵ Pinsent Mansons.

already been drafted and filed. It appears the confusion arose from the Notice of Objection being filed when no answering affidavit had been filed. After engagements, Glencore's current attorneys of record prepared an answering affidavit, which was filed on 10 June 2024.

- [6] The 23-day delay is almost twice the time prescribed for filing an answering affidavit. However, a Notice of Objection was filed before an answering affidavit was filed. If condonation is necessary, it is in the interests of justice⁶ to grant it so the application is determined having regard to the submissions of both parties. Condonation is granted.

Background information

- [7] Chiloane was employed by Glencore as a fleet management system superintendent. He was dismissed on 30 June 2023 for absenteeism and/or abscondment. Chiloane claims that he was granted permission to be absent by Mr Havenga, that the employer knew his whereabouts, and that during his absence, his wife contacted Glencore to inform them of his whereabouts. Following his dismissal, he referred an alleged unfair dismissal dispute to the CCMA on 18 August 2023. The dispute was unsuccessfully conciliated on 3 October 2023.
- [8] Subsequently, the matter was scheduled for arbitration on 7 February 2024. On that day, Chiloane was represented by a Candidate Attorney from Nkosi Moloi Attorneys,⁷ appointed by Standard Bank Legal Protection Cover, of which Chiloane is a policyholder. What transpired on the day is captured in two documents.
- [9] First is the '*Outcome report*' signed by the commissioner, which notes that the dispute has been conciliated, the applicant '*abandoned pursuit of the matter*', and the case was '*withdrawn*'. The second document is a '*Notice of Withdrawal*', recording that Chiloane hereby withdraws his application to the CCMA against Glencore. The reason for withdrawal is cited as '*Other - The*

⁶ See: *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC) at para 20.

⁷ This is evident from Chiloane's affidavit in support of the re-enrolment application, although not specifically pleaded in Chiloane's affidavits in the review application.

employer has undertaken to give the applicant a neutral reference'. The form also states that *'I confirm that I signed this Notice of Withdrawal of my own free will. I understand that there will be no further process in this matter and that I am not able to re-refer or re-open this case'*. Chiloane, the commissioner, and another commissioner signed this form.

- [10] Almost a month later, now represented by Mashifane Moswane Attorneys, his current attorneys of record, on 5 March 2024, Chiloane filed a *'Request for re-enrollment'* of the same dispute withdrawn on 7 February 2024.
- [11] The application was supported by a founding affidavit from Chiloane, in which he stated that he withdrew the dispute following advice from his then legal representative. This legal representative told him he had no chance of succeeding at the CCMA and advised him to pursue a contractual claim in the High Court instead. Chiloane also claimed that the same legal representative said she would not act for him if he continued with the claim. He explained that the legal representative did not follow his instructions, was professionally negligent in advising him to withdraw the dispute at the CCMA, and that he had reported her to the Legal Practice Council and to Standard Bank Legal Protection Cover. He admitted he was not forced into signing the withdrawal form but alleged that the commissioner failed to explain the implications and consequences of withdrawing the dispute. He expressed his desire to pursue his claim at the CCMA.
- [12] Glencore did not oppose the application.
- [13] The same commissioner who handled the matter on 5 March 2024 decided the re-enrolment application and found that:
- 13.1 She could not comment on the advice Chiloane received from his legal representatives, but the wrong legal advice given is not a valid reason to re-enrol the matter, and Chiloane must bear the implications of following the advice of a legal representative of his choice.
 - 13.2 Chiloane withdrew the dispute after Glencore agreed to provide him with a neutral reference, not so that the matter could be referred to the

High Court. Therefore, Chiloane did not provide a valid reason for the re-enrolment.

13.3 Chiloane signed the withdrawal form after the commissioner explained the implications, and Chiloane understood the implications.

13.4 Chiloane intended to withdraw the matter because he was present and signed the withdrawal form.

13.5 To re-enrol the dispute would be to condone the mischief whereby a party withdraws disputes for whatever reason and later seeks to re-enrol the same dispute, negating the principle of finality.

13.6 It was not in the interests of justice to re-enrol the matter.

[14] Case management was directed to close the file.

Grounds of review

[15] Firstly, it is submitted that the commissioner failed to adequately apply her mind to the facts and circumstances of the case.

[16] Secondly, by deciding the matter on the papers and not calling for an oral hearing, the commissioner is said to have deprived Chiloane of the right to a fair hearing.

[17] Third, the commissioner incorrectly concluded that the CCMA lacked jurisdiction to re-enrol the matter which had been withdrawn, in circumstances where a withdrawal is akin to an order of absolution from the instance, which does not prevent re-enrolment of the dispute.

Analysis of the grounds of review

Failure to apply mind to the facts

- [18] The submission was that, in refusing the re-enrolment application, the commissioner ignored section 191(5) of the LRA, which states that the CCMA must arbitrate a dispute at the request of the employee party if it has been referred to conciliation and 30 days have passed, or a certificate (of non-resolution) has been issued. The submission further was that, based on the facts of this case, both requirements were met and, therefore, the CCMA was obliged to arbitrate the dispute.
- [19] The submission overlooks that the matter was scheduled for arbitration on 7 February 2024, when Chiloane withdrew the case. The real issue is whether a case that was set down for arbitration and then withdrawn on the same date can be re-enrolled. This is the third ground of review discussed below.

The right to an oral hearing

- [20] It is undisputed that the re-enrolment application was decided on the papers, without an oral hearing.
- [21] Chiloane submitted that the commissioner committed a gross irregularity by considering the application solely based on the papers, without inviting the parties to make oral submissions or providing them with notice. He further submitted that there is no CCMA Rule explicitly allowing the disposal of applications on paper, and that the correct interpretation of the Rule is that the parties' agreement was necessary for the matter to be decided in this way. As I understand it, the additional submission was that, in the absence of an answering affidavit and '*faced with a dispute of facts on the papers*', the commissioner should have directed that the matter be set down for oral argument.
- [22] Glencore relies on the Rules for the Conduct of Proceedings before the Commission for Conciliation, Mediation and Arbitration⁸ (CCMA Rules) for its submission that a commissioner exercises discretion whether to hear an

⁸ Government Gazette No R3318, 21 April 2023.

application on the papers or to call for an oral hearing, and that the agreement of the parties need not be obtained.

- [23] First, Rule 31(8) provides that applications may be set down for a hearing or determined on the papers. Then Rule 31(10) provides that, despite Rule 31 (dealing with applications), a commissioner may determine an application in any manner he/she deems fit, provided that the commissioner informs the parties of how the process will be conducted and gives the parties an opportunity to be heard. Finally, Rule 31C(3) states that a commissioner may decide the application to re-enrol a dispute based on the submissions received from the parties.
- [24] Glencore also refers to the decisions of this Court in *TGWU v National Bargaining Council for the Road Freight Industry & Another*⁹, and *Mpheroane v Makhubela NO and Others*¹⁰, which established that there is no automatic right to an oral hearing when the CCMA considers applications.
- [25] Rule 31C(3) concerns applications to reinstate a matter removed from the roll, which is a different issue from the matter that was before the commissioner. Therefore, the rule did not apply to the matter.
- [26] Rule 31(8) clearly grants a commissioner the discretion to decide whether to resolve an application on the papers. Nothing more is required from the commissioner.
- [27] However, CCMA Rule 31(10), while granting a commissioner the discretion to decide whether to determine an application on the papers or to hear oral submissions, includes the proviso that the parties must be informed of how the process will be conducted and be given an opportunity to be heard. It appears that, once the commissioner has exercised their discretion to decide the matter on the papers or to hear oral submissions, under this Rule, the parties should be informed of the process to be followed. It does not appear

⁹ [2002] 9 BLLR 906 (LC) at para 11.

¹⁰ (JR 1997/2020) [2023] ZALCJHB (11 August 2023) at paras 32-37.

that the parties were notified that the application would be decided on the papers.

- [28] On my reading of CCMA Rule 31, Chiloane had no right to make oral submissions but was entitled to be notified that the matter would be decided on the papers. However, the failure to inform him that the application would be decided on the papers did not prejudice him, considering that only his affidavit was before the commissioner, as Glencore did not file opposing papers.
- [29] In any case, section 138 of the LRA requires a commissioner to resolve a dispute fairly and quickly, with minimal legal formalities, and, where there is any conflict between the LRA and the CCMA Rules, the LRA takes precedence.
- [30] Chiloane's argument that the commissioner needed to obtain the parties' agreement before making a decision based on the papers was not supported by reference to the CCMA rule relied upon.¹¹
- [31] Only Chiloane's affidavit was before the commissioner; therefore, there were no '*disputes of fact on the papers*' justifying oral submissions, as argued on behalf of Chiloane.
- [32] If Chiloane believed that oral argument was essential, he could have stated this in his affidavit or sent relevant correspondence to the CCMA. He did not do either.
- [33] There is no merit in this ground of review, which Chiloane contends is his main complaint against the ruling.

A withdrawn matter can be re-enrolled

- [34] For the contention that a matter which had been withdrawn can be re-enrolled, reliance was placed on the case authorities of *Ncaphayi v*

¹¹ The heads of argument submitted on behalf of Chiloane refer to Rule 24 of the CCMA Guidelines on Misconduct Arbitrations, which deals with preliminary points in arbitration proceedings. It is unclear what relevance that Rule had to the application for re-enrolment.

*Commission for Conciliation, Mediation & Arbitration and Others*¹² (Ncaphayi), *Shibogde v Minister of Safety and Security and Others* (Shibogde),¹³ *Kgobokoe v Commission for Conciliation, Mediation and Arbitration and Others*¹⁴, and *SA Municipal Workers Union and Others v Commission for Conciliation, Mediation and Arbitration and Others & Another*¹⁵ (SAMWU).

[35] In their heads of argument, both parties submitted that the commissioner found that the CCMA lacked jurisdiction to arbitrate the matter. However, during oral argument, Mr Allsop pointed out that the commissioner did not make such a finding. He submitted that the commissioner had exercised a discretion not to re-enrol the matter, and that the scope to interfere with such discretionary exercise was limited to cases where a commissioner commits a misdirection or irregularity, or acted capriciously, or upon the wrong principle, or in bad faith or unfairly, or where, in exercising the discretion, the commissioner reached a decision that a reasonable decision maker could not reach. The submission further was that if the commissioner exercised such discretion judiciously and fairly, after taking into consideration all relevant facts, this court will not interfere with it. Reliance was placed on the decision of *Cowley v Anglo Platinum and Others*¹⁶.

[36] Glencore's further submission was that the CCMA could not re-enrol the matter because there was no live dispute between the parties since the matter had been settled; therefore, the CCMA lacked jurisdiction to arbitrate it. For that submission, reliance was placed on the decision of this Court in *Robor Tube (Pty) Ltd v Metal & Engineering Industries Bargaining Council & Others*¹⁷ (Robor Tube).

[37] Mr Allsop was correct in his submission that the commissioner did not find that the CCMA lacked jurisdiction to determine the matter. However, I accept

¹² (2011) 32 ILJ 402 (LC).

¹³ (JR 3307/09) [2012] ZALCJHB 64 (11 July 2012).

¹⁴ (2012) 33 ILJ 235 (LC).

¹⁵ (2014) 35 ILJ 2011 (LC).

¹⁶ [2016] JOL 35884 (LC) at para 21.

¹⁷ (2018) 39 ILJ 2332 (LC).

that some court decisions have regarded a refusal to re-enrol a matter as a jurisdictional finding.¹⁸

[38] Mr Allsop also correctly submitted that the commissioner exercised a discretion not to re-enrol the matter, and that the applicable review test is whether the commissioner exercised his discretion judiciously and whether the decision is one that no reasonable decision-maker could reach.

[39] From the cases cited by the parties referenced above, the general principle is that a case withdrawn before the merits are decided may be re-enrolled. It does not matter that the withdrawal was based on legal advice.¹⁹ Nor does it matter that an employee signed an undertaking affirming that the withdrawal was of their own free will, that such employee understood there would be no further process in the matter, and that such employee would not be able to re-refer or re-open the case. The same applies to the commissioner's explanation to Chiloane about the consequences of withdrawing a dispute. None of these factors prevents an employee from seeking the re-enrolment of a withdrawn matter. This legal position makes it unnecessary to consider Mr Serogole's submission that, in deciding the application, the commissioner failed to have regard to social justice.

[40] It was also unnecessary for Chiloane to apply to set aside the Notice of Withdrawal, as submitted by Glencore. That issue was explicitly addressed by the Court in *Ncapayi*,²⁰ which found that when a matter is withdrawn, it is a unilateral decision by the employee, and not a decision by the commissioner, which can be set aside on review.

[41] However, when a matter is withdrawn because it has been settled, it is well established that the dispute has been resolved and cannot be reinitiated unless the settlement agreement is set aside. Therefore, the question to be determined is whether Chiloane settled his dispute with Glencore.

¹⁸ *Ncapayi supra*. In *SA Municipal Workers Union and Others v Commission for Conciliation, Mediation and Arbitration and Another* (2014) 35 ILJ 2011 (LC), the commissioner had made a finding that the CCMA lacked jurisdiction to determine a withdrawn dispute.

¹⁹ See: *Robor Tube*.

²⁰ *Ncapayi* *ibid* at para 26.

- [42] The commissioner did not explicitly find that the matter was settled, but noted that it was withdrawn in response to Glencore's proposal to give Chiloane a neutral reference. However, was the matter truly settled?
- [43] Above, I have referred to the documents signed by Chiloane. The Notice of Withdrawal records the reason for dismissal as '*Other- the employer has undertaken to give the applicant a neutral reference*'. The same form provided the option to select the reason for the withdrawal as '*I have settled with my former employer*'. That box could have been ticked, but was not.
- [44] No transcript was presented to the Court concerning the proceedings of 7 February 2024. Such a transcript could have clarified the discussions regarding Glencore's proposal to provide Chiloane with a neutral reference.
- [45] Despite the absence of the transcript, I am of the view that the matter was not settled. The neutral reference provided to Chiloane was not before the Court. A neutral reference can be no different to a certificate of service, which Chiloane was entitled to in terms of the Basic Conditions of Employment Act.²¹ Therefore, Chiloane did not compromise his claim in exchange for a neutral reference.
- [46] The commissioner expressed concern that re-enrolling the dispute could encourage parties to withdraw disputes for arbitrary reasons and then seek to re-enrol the same matter later.
- [47] If a matter is withdrawn but not settled, it can be re-enrolled. An employee who seeks to re-enrol a matter must be directed to file a fresh referral, and if the referral is made late, to apply for condonation. Whether the dispute will be arbitrated on its merits depends on whether condonation is granted. This is the approach to be followed in terms of the decisions of *Shibogde*²² and *SAMWU*.²³

²¹ Act 75 of 1997.

²² *Shibogde* at para 23.

²³ *SAMWU* at para 15.

[48] In this instance, the CCMA did not approach the matter in that manner but instead determined whether a withdrawn dispute could be re-enrolled. It is well established that a withdrawal notice can be withdrawn. Therefore, in exercising her discretion whether or not to grant the re-enrolment application, the commissioner committed a misdirection or an irregularity and relied on the wrong principle that a matter that is voluntarily withdrawn cannot be reinstated. In *National Union of Metalworkers of SA v Assign Services & Others*,²⁴ the Labour Appeal Court stated that a material error of law will lead to both an incorrect and unreasonable award.

[49] This ground of review succeeds, and the ruling falls to be reviewed and set aside.

Costs

[50] In accordance with the requirements of law and fairness, each party shall bear its own costs.

[51] In the premise, the following order is made:

Order

1. The re-enrolment ruling issued by the Commission for Conciliation, Mediation, and Arbitration in case number GAJB18629/23 dated 12 March 2024 is reviewed and set aside.
2. The Commission for Conciliation, Mediation, and Arbitration is ordered to enrol the matter for arbitration before a commissioner other than Commissioner Sakhile Khulekani Gumede.
3. There is no order as to costs.

T Gandidze

Judge of the Labour Court of South Africa

²⁴ (2017) 38 ILJ 1978 (LAC) at para 32.

LABOUR COURT

Appearances

For the Applicant: Advocate Phokgedi Serogole

Instructed by: Mashifanemoswane Attorneys

For the Respondent: Mr Allsop of Pinset Masons South Africa Inc

LABOUR COURT