



THE LABOUR COURT OF SOUTH AFRICA, CAPE TOWN

Not Reportable
Case no: C106/2023

In the matter between:

DR MULLER SMIT INC

Applicant

and

CCMA

First Respondent

LAMEESAH JOOMA N.O.

Second Respondent

YOLANI LOUBSER

Third Respondent

Heard: 27 August 2026

Delivered: 28 August 2026

JUDGMENT

JACOBS AJ

Introduction

- [1] This is an opposed review application.
- [2] The Applicant seeks an order:
- 2.1 Reviewing and setting aside the rescission ruling dated 24 January 2023, issued by the Second Respondent under case number WECT6086-22;
 - 2.2 Substituting the rescission ruling with an order that:
 - 2.2.1 The Second Respondent's arbitration award dated 23 November 2022 is rescinded; and
 - 2.2.2 The matter is referred back to the First Respondent to appoint an arbitrator, other than the Second Respondent, to arbitrate the Third Respondent's dispute under CCMA case number WECT6068-22.
 - 2.3 *In the alternative:*
 - 2.3.1 The Second Respondent's arbitration award dated 23 November 2022, and issued under case number WECT6068-22, is reviewed and set aside in terms of section 145 of the LRA;
 - 2.3.2 Remitting the matter to the First Respondent and directing that the First Respondent enrol the matter for arbitration before an arbitrator other than the Second Respondent.
 - 2.4 That those Respondents who oppose this application be ordered to pay the costs of this application; and
 - 2.5 Further and/or alternative relief as the court deems fit.

Historical context

- [3] The Third Respondent was employed by the Applicant on 1 February 2019.
- [4] On 6 March 2022 the Applicant confronted the Third Respondent by WhatsApp with serious concerns relating to her conduct. Mr De Lange, an attorney acting for the Applicant, subsequently contacted the Third Respondent and advised her that the Applicant hopes to dispose of issues amicably, and that he was asked to facilitate discussions in this regard.
- [5] The Third Respondent was suspended with pay on 6 March 2022.

- [6] On 14 March 2022, Mr De Lange again contacted the Third Respondent to pursue facilitation. She advised that she had been booked off from 14 to 18 March 2022 for issues relating to her pregnancy.
- [7] On 5 April 2022, Mr De Lange again inquired from the Third Respondent whether she was available. He was referred to the Third Respondent's attorney, and on 7 April 2022 Mr De Lange advised the Third Respondent that he had left a message for the attorney.
- [8] On 8 May 2022 the Third Respondent referred a dispute in term of sec 73A BCEA to address the non-payment of her salary for March and April 2022.
- [9] The Third Respondent's maternity leave commenced on 25 May 2022.
- [10] During June 2022, some communication was exchanged between Mr De Lange, the Third Respondent and her attorney regarding issues such as UIF and an IRP5 certificate.
- [11] The dispute referred in May 2022, was enrolled for con-arb by the CCMA, and the Applicant objected to arbitration proceeding immediately after conciliation. On 19 July 2022 a conciliation meeting took place. The Third Respondent and Mr De Lange, on behalf of the Applicant, attended.
- [12] The certificate of outcome issued after the conciliation process indicated that the matter related to an unfair labour practice.
- [13] On 21 September 2022, the dispute before the CCMA was set down for arbitration on 9 November 2022.
- [14] The Third Respondent's maternity leave ended on 25 September 2022.
- [15] On 26 September 2022 Mr De Lange advised the Third Respondent's attorney that the Applicant would proceed with a disciplinary hearing.
- [16] On 9 November 2022, the Applicant failed to attend arbitration proceedings, but Mr De Lange attended as his representative to apply for postponement. No written application was brought. Mr De Lange explained that until the previous day, the Applicant was not aware that he had to appear at the CCMA in person

because Mr De Lange attended the previous process on his behalf. Because of this misunderstanding, the Applicant had diarised a number of medical procedures and consultations which could not be cancelled on short notice.

- [17] The Second Respondent (the Commissioner) declined the Applicant's request for postponement and continued with the arbitration hearing in the absence of the Applicant.
- [18] On 23 November 2022, the Commissioner rendered a default award in which she found that the Applicant's conduct amounted to an unfair labour practice and a violation of the Third Respondent's right to submit a maternity benefits application.
- [19] The Applicant was ordered to pay statutory remuneration to the Third Respondent in the amount of R190 927.71. This amount included basic salary and a calculated average monthly commission component for the 9-month period from March to November 2022.
- [20] On 7 December 2022 Mr De Lange, on behalf of the Applicant, submitted a rescission application supported by unsigned affidavits. In correspondence accompanying the application, Mr De Lange advised that the affidavits were not signed due to logistical problems and that the signed versions would be submitted soon. Copies of the affidavits, signed and commissioned on 7 December 2022, were delivered at 07:22 on 8 December 2022. Mr De Lange explained that he could not forward the signed affidavits on 7 December due to unexpected loadshedding.
- [21] In the Applicant's affidavit it was pointed out that commission calculations as reflected and used in the default award, were incorrect. It was also pointed out that the period from March to November 2022 included 4 months of unpaid maternity leave.
- [22] The rescission application was opposed by the Third Respondent on 12 August 2022. In her answering affidavit the Third Respondent pointed out that the rescission application was one day late.

- [23] On 15 December 2022, a replying affidavit by Mr De Lange and a supporting affidavit by the Applicant were filed, explaining the brief delay. In paragraph 12 of Mr De Lange's affidavit condonation was sought. On the same day a notice to attend a disciplinary hearing was also served on the Third Respondent.
- [24] On 20 December 2022 the disciplinary hearing took place, and on 21 December 2022 the Third Respondent was dismissed.
- [25] On 24 December 2022 the Commissioner considered the rescission application on the papers and dismissed the application. In her ruling the Commissioner found that no formal application for the late filing of the rescission application was brought and that there was merely an explanation for the delay.
- [26] The Commissioner lambasted the Applicant for leaving the application until the 11th hour and opined that they should have taken the matter more seriously and ought to have attended to the application long before the deadline. The Commissioner also insisted that loadshedding cannot be used as a convenient excuse. She concluded that despite the delay being negligible, condonation was not granted and she dismissed the rescission application.

The parties' submissions

- [27] In this application the Applicant seeks to review and set aside both the arbitration award of 23 November 2022 and the rescission ruling of 24 January 2023. It was also submitted on behalf of the Applicant that the Commissioner failed to recognise that an application for postponement may be brought orally in pressing circumstances and that the Commissioner was empowered to consider such an application by virtue of the provisions of CCMA Rule 31(10).
- [28] The Applicant argued that good cause was shown for not complying with the rules applicable to postponement applications and that the Commissioner acted unreasonably by not weighing all relevant considerations.
- [29] The Applicant submitted that the rescission ruling issued by the Commissioner is reviewable because the Commissioner did not consider all factors relevant to such an application. It was submitted that the Commissioner failed to give

any consideration to the Applicant's prospects of success and the fact that the Applicant had presented a prima facie defence. Calculation of commission amounts included in the amount awarded, was incorrect. It was not considered that the Third Respondent may not have earned any commission during the applicable period, and the award did not account for the four months of unpaid maternity leave that fell within the period for which the Applicant was ordered to pay outstanding remuneration to the Third Respondent.

[30] The Applicant further argued that the arbitration award was also reviewable due to the Commissioner's failure to hear evidence and to carefully scrutinise the quantum of the Third Respondent's claim for remuneration due to her.

[31] The Third Respondent opposed the application on the grounds that the failure to attend the arbitration hearing was grossly negligent and that good cause for the failure to attend could not be shown.

[32] The Third Respondent also submitted that the arbitration award falls well within the band of reasonableness that serves as measure and is therefore not reviewable.

[33] For the Third Respondent it was further submitted that the rescission application was brought out of time, that condonation was not sought and that good cause was once again not shown.

The rescission application and condonation

[34] The rescission ruling will be dealt with first. If the rescission ruling is reviewed and set aside, the main dispute will automatically require reconsideration by a different arbitrator, as is provided for in the first prayer in the notice of motion.

[35] The rescission ruling was not made after a consideration of the explanation for default or a determination whether good cause was shown. The rescission application was dismissed because the Commissioner did not grant the Applicant's application for condonation.

[36] In her ruling, the Commissioner indicated that there was no formal application for condonation. This is not correct. When the Third Respondent, in her answer

submitted that condonation was required, the Applicant addressed condonation briefly in the replying affidavit, explaining the brief delay and seeking condonation therefor. The prospects of success were addressed in detail in the rescission application, and the delay of less than a day was also dealt with. A specific plea for condonation to be granted was included. There was in fact a condonation application before the Commissioner. This is also confirmed by her ruling that:

“The Respondent’s application for condonation of the late submission of the rescission application is not granted.”

- [37] The test on review of a rescission ruling, requires an evaluation of the reasonableness of the ruling – the well-known Sidumo-test.¹
- [38] The determination of a condonation application also involves the exercise of a wide judicial discretion,² and a decision can only be arrived at after a consideration of all relevant considerations.³
- [39] The Commissioner failed to consider any other factor besides the lateness of less than a day. The requirements for the proper consideration of a condonation application are trite.⁴ A failure by the Commissioner to consider any other factor but the lateness, which she in any event regarded as negligible, is unreasonable.

¹ *Sidumo & Another v Rustenburg Platinum Mines Ltd & Others* (2007) 28 ILJ 2405 (CC); *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 964 (LAC).

² *Nature's Choice Products (Pty) Ltd v Food & Allied Workers Union & others* (2014) 35 ILJ 1512 (LAC) at [11].

³ *Motloi v South African Local Government Association* (JA3/04) [2005] ZALAC 12; [2006] 3 BLLR 264 (LAC); (2006) 27 ILJ 982 (LAC) (9 December 2005); *Bosch v Seynhaeve NO* (159/2023) [2024] ZALCCT 25 (27 June 2024)

⁴ See eg: *Melane v Santam Insurance Co. Limited* 1962 (4) SA 531 (A); *Aspen Holdings Pty Ltd and Another v Phelane and Another* (JA 71/23) [2025] ZALAC 4; [2025] 4 BLLR 409 (LAC); *Moodley v Umzinto North Town Board* [1997] ZASCA 95; 1998 (2) SA 188 SCA; *Potgietersrus Platinum Limited v CCMA* (1999) 20 ILJ 2679 (LC).

- [40] As result of the Commissioner's dismissal of the condonation application, her rescission ruling did not deal with the merits of the rescission application at all. The rescission ruling stands to be reviewed and set aside for the unreasonable ruling relating to condonation and the failure to deal with the merits of the rescission application.
- [41] There is sufficient material before this court to substitute the rescission ruling.
- [42] The rescission application was brought less than 12 hours late and some diligence was shown by the Applicant in attempts to submit the papers in time. The unsigned papers were submitted and the signed copies, signed and commissioned on 7 December, were filed before 08:00 on 8 December 2022.
- [43] Although there is no right to a postponement in CCMA processes, the discretion whether or not to grant a postponement must be exercised with reference to the questions whether the applicant shows good cause for the postponement to be granted, whether it is in the interests of justice that the postponement be granted, and a consideration of all further relevant factors.⁵
- [44] Although the failure of the Applicant to attend the arbitration hearing may be criticised, the Applicant did not completely disregard the process. Mr De Lange was sent to request a postponement based on the misunderstanding that arose between the Applicant and Mr De Lange.
- [45] On the day of the arbitration hearing, the Commissioner did not consider Mr De Lange's submissions as a proper application for postponement. She ruled that the application was "defective, unsupported and not considered." This was a misdirection. CCMA Rules 31(10) and 35(1) & (2), read with sec 138(1) & (2) LRA empowers a commissioner to consider an application, even if the strict prescripts of CCMA Rule 31 were not adhered to.
- [46] In determining a rescission application, all relevant factors must be taken into account in determining whether the applicant can show good cause. The

⁵ *National Police Services Union and Others v Minister of Safety and Security and Others* 2001 (8) BCLR 775 (CC). Also see: *Mobile Telephone Networks (Proprietary) Limited v Commission for Conciliation Mediation and Arbitration and Others* (JA21/25) [2025] ZALAC 59; [2026] 2 BLLR 114 (LAC); (2026) 47 ILJ 1081 (LAC) (24 November 2025).

applicant must give a reasonable explanation for his default, and he must show that he has a bona fide defence to the plaintiff's claim.⁶

- [47] These two essential elements (the explanation for default and a bona fide defence) cannot be assessed mechanistically and in isolation. While the absence of one of them could be fatal, they are to be weighed together in determining whether it should be fair and just to grant the indulgence.⁷
- [48] The enquiry into a possible defence to the employee's claim was not considered at all, despite there being some obvious merit to the Applicant's case.
- [49] A consideration of the merits of the matter raises an obvious question concerning the quantum of the award. This goes to the heart of the inquiry into good cause relevant to both the request for postponement, and the rescission application.
- [50] The Commissioner did not award compensation but ordered payment of statutory monies owing for a period of 9 months. "Statutory monies" implies payment that the employee is legally entitled to. This in turn implies that the amount involved, must be determined accurately, accounting for all relevant entitlements and deductions.
- [51] The amount of statutory remuneration the Commissioner ordered the Applicant to pay, amounts to R190 927.71. This includes an average monthly commission component. The legal entitlement to commission and the correct calculation thereof remains to be determined.
- [52] A further glaring concern regarding the calculation of outstanding remuneration to be paid in terms of the award, is the failure to consider and account for the period of unpaid maternity leave.
- [53] The Applicant therefore has disclosed a bona fide defence to the plaintiff's claim, which shows sufficient good cause.

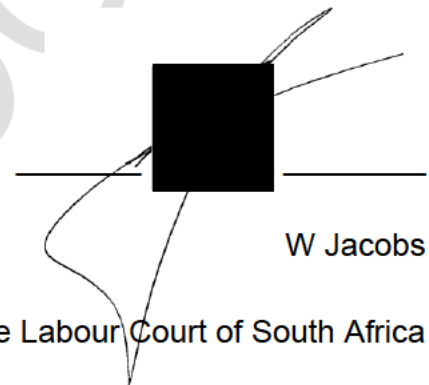
⁶ *Northern Province Local Government v CCMA and others* (2001) 22 ILJ 1173 (LC).

⁷ See eg: *Shoprite Checkers v Commission for Conciliation Mediation and Arbitration* (2005) 26 ILJ 828 (LC); *Total Facilities management Company (Pty) Ltd (T. F. M C) v Commission for Conciliation, Mediation and Arbitration and Others* [2007] ZALC 53; [2008] 1 BLLR 73 (LC).

[54] In the result, the following order is made:

Order

1. The rescission ruling dated 24 January 2023, issued by the Second Respondent under case number WECT6086-22 is reviewed and set aside;
2. The rescission ruling is substituted with an order that:
 - 2.1 The delay in filing the rescission application is condoned;
 - 2.2 The arbitration award dated 23 November 2022 is rescinded; and
 - 2.2 The matter is referred back to the First Respondent to appoint an arbitrator, other than the Second Respondent, to arbitrate the Third Respondent's dispute under CCMA case number WECT6068-22.
3. There is no order of cost.



W Jacobs
Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: - A de Lange of De Lange Attorneys

For the Third Respondent: - E Geldenhuys of Macgregor Erasmus Attorneys

LABOUR COURT