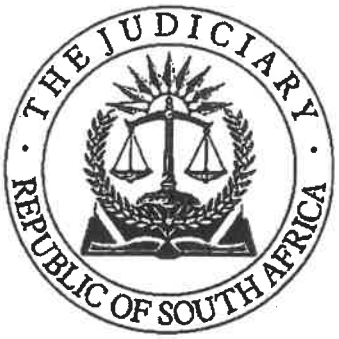

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA 18/2022

In the matter between:

MATOME TUMI MOHUBE	**Appellant**
and	
THE COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
COMMISSIONER BOTHA N.O	**Second Respondent**
COMMISSIONER RICHARD BYRNE N.O.	**Third Respondent**
PASSENGER RAIL AGENCY OF SA (PRASA)	**Fourth Respondent**

Heard: 30 March 2023

Delivered: 18 May 2023

Coram: **Waglay JP, Coppin JA *et* Gqamana AJA**

JUDGMENT

COPPIN JA

Introduction

[1] This is an appeal against the whole order of the Labour Court (Phehane J) in terms of which an application by the appellant to review a rescission ruling of the third respondent (Commissioner Byrne), acting under the auspices of the first respondent (CCMA), was dismissed. Leave to appeal to this Court was granted on the petition of the appellant.

[2] The appellant had unsuccessfully applied to Commissioner Byrne to rescind an order made by the second respondent (Commissioner Botha), also acting under the auspices of the CCMA, in his absence, and in terms of which the appellant's claim for unfair dismissal against the fourth respondent (PRASA) was dismissed.

[3] The central issue in this appeal is thus whether the Labour Court (i.e. the court *a quo*) correctly found that the rescission ruling of Commissioner Byrne fell within the bounds of reasonableness.

Background Facts

[4] The appellant was employed by PRASA as a company secretary from May 2005 until his dismissal by that body in April 2019.

[5] Following the release in August 2015 of the Public Protector's report on PRASA titled "DERAILED", which dealt with allegations of financial and tender irregularities at PRASA, the latter brought charges against the appellant in an internal disciplinary hearing, essentially alleging his involvement in financial/tender irregularities and fraud.

[6] More particularly, it was essentially alleged that he had signed resolutions of the PRASA Board that misrepresented the actual decisions of the Board and in particular, the monetary value of the transactions decided upon. It was alleged, for example, firstly, that he signed a resolution representing (falsely) that the Board had approved the appointment of a company, Siyangena Technologies, for the supply of access gates, security and supporting equipment to various PRASA stations for an amount of approximately R1.95 million, and had

authorised payment to that company of that amount; secondly, that he misrepresented, in a resolution, that the Board awarded a contract to Siyaya Energy for the supply of diesel in an amount of about R856 million, whereas the Board had decided that it was to be for an amount of about R308 million; and thirdly, that he misrepresented in a resolution that the Board awarded a contract to Barutho Gas Supply for the supply of lubricants in an amount of R32 million, whereas the Board had decided that it was to be for an amount of about R2.28 million (the actual amounts were stated in the charges).

[7] At the internal disciplinary hearing, which was chaired by an independent senior advocate, the appellant was found guilty of those charges and dismissed on 26 April 2019.

[8] Aggrieved by the outcome, the appellant referred an unfair dismissal dispute to the CCMA. The matter was eventually set down for a con/arb on 12 June 2019. On that date, the appellant appeared but there was no appearance for PRASA. The commissioner presiding at that stage issued a certificate of outcome (i.e. in respect of the conciliation) certifying that the matter remained unresolved as at 12 June 2019. The certificate also states, *inter alia*, that if the dispute remains unresolved, it may be referred to arbitration. However, in the very ruling of that same commissioner, she states, *inter alia*, that the CCMA is to set the matter down for arbitration.

[9] The CCMA proceeded to set the matter down for arbitration on 9 July 2019. Commissioner Botha presided on that occasion. There was no appearance by or on behalf of the appellant. Commissioner Botha nevertheless issued a ruling on that same day which is titled "Dismissal Ruling" and which reads as follows:

> 'There is no appearance for the applicant... According to the CCMA file the parties were notified of today's hearing by email sent on 13 June 2019. Copies of said documents are to be found in the CCMA file. Ruling: Under the circumstances, I am satisfied that both parties have had adequate notice of that date, time and place of schedule arbitration [sic] and accordingly in terms of section 138(5) of the Labour Relations Act, 1995, I hereby dismiss the case.'

[10] When the appellant became aware of Commissioner Botha's dismissal ruling, he applied for its rescission and for an order that the CCMA set down the unfair dismissal dispute matter for arbitration on an urgent basis.

[11] The appellant's application for rescission was supported by an affidavit in which he explained that there is good cause for a rescission of Commissioner Botha's ruling that was made in his absence. He averred, *inter alia*, that he was not notified of the date of the arbitration and that he was not in wilful default and had a *bona fide* claim against PRASA and that his rescission application was brought in good faith. The detail of his explanation will be considered later in this judgment.

[12] His rescission application was opposed by PRASA. Its attorney, Ms Dawn Norton, deposed to the opposing affidavit. In sum, she alleged that the appellant's claim had been properly dismissed and that he had not made out the case for the rescission of Commissioner Botha's dismissal ruling. The detail of this opposition, insofar as it is relevant, shall also be discussed later.

[13] The appellant filed a replying affidavit deposed to by his attorney, Mr Maropeng Sebola, in which he, *inter alia*, raised various "points *in limine*". The first point was that PRASA's opposing affidavit had been filed late and that it had not applied for condonation for the lateness. The second point was that the opposing affidavit was defective because it was not properly attested. The appellant deposed to a confirmatory affidavit in that regard.

[14] PRASA duly filed an application to condone the late filing of its opposing affidavit, which application was opposed by the appellant. After hearing the parties, Commissioner Byrne issued a written ruling on 28 August 2019 which reads as follows:

> 'This matter concerns a rescission application of a ruling by a Commissioner Botha on 9 July 2019, whereby he dismissed the matter due to the non–appearance by the Applicant party at arbitration. Both parties filed papers and appeared before me on 14 August 2019. I also need to deal with a condonation application by the Respondent for its late response to the rescission application. Condonation for the late filing by the Respondent is granted. It

stated that the Applicant had served its papers on the CEO and not the HR Department or legal representatives. This is a reasonable explanation. The Applicant's attorney states in his affidavit that the applicant never appeared at the CCMA on 9 July 2019 because the CCMA sent the set down notice to his old email address and not his current email address. According to the CCMA file there is no truth in that statement. The CCMA's transmission report shows that the set down notice was sent to the correct address. I obtained the Activity Report on the case off the CCMA system, and it shows that all notices from the beginning was sent to the correct email address. I requested Mr Sebola to send me a copy of the alleged email he was referring to. None was supplied. On the merits of the case, the Applicant states that it is not his signature on the document authorising additional monies to a Contractor. The disciplinary hearing was conducted by professionals and, according to the Respondent, this argument was dealt with. In the circumstances, prospects of success appear weak. Taking into account that there is a factually incorrect reason for the Applicant's non–appearance, and the prospects which appear weak, Rescission is refused.'

[15] This meant that Commissioner Botha's dismissal of the appellant's unfair dismissal claim stood.

[16] In response, the appellant brought an application in the Labour Court to, *inter alia*, review and set aside the rescission ruling of Commissioner Byrne. In the application, the appellant also sought to review and set aside Commissioner Botha's dismissal ruling, which is the very ruling that he sought to rescind. That relief was clearly superfluous in those circumstances.

[17] In any event, the appellant's review application was opposed and the court *a quo*, which was seized with the matter, ultimately decided in favour of PRASA, by dismissing the appellant's application to review Commissioner Byrne's rescission ruling and directing that there was no costs order.

[18] The material part of the judgment was succinct. Having summarised the appellant's grounds of review the judge *a quo*, under the heading "Analysis", states the following before making the formal final order:

'[11] The test to succeed in a review application is trite.

[12] The grounds of review pleaded fail dismally to establish reviewable grounds in terms of section 145(2) of the LRA.

[13] I find no basis to interfere with the rescission ruling.'

[19] In the court *a quo*'s judgment, the appellant's grounds of review are summarised as follows:

'[10] The applicant's ground of review in the main, are couched in the form of an appeal, where the applicant alleges in the main that Commissioner Byrne erred in dismissing the rescission application, as:

10.1 [PRASA] placed its reliance on an incorrect award;

10.2 The applicant did not request that the matter be referred to arbitration;

10.3 In dealing with the merits;

10.4 In finding an incorrect reason for the non-appearance of the applicant at the arbitration proceedings.'

[20] The appellant applied for leave to appeal the court *a quo*'s order, but he was unsuccessful. The true reason why this was so need not detain this Court since the appellant was subsequently granted leave to appeal that order on petition to this court.

[21] The appellant alleges, *inter alia*, that the court *a quo* did not consider certain crucial material facts pertinently stated in the affidavit in support of his application to review Commissioner Byrne's rescission ruling.

[22] It is apparent that the court *a quo*'s summary of the appellant's grounds of review is not accurate and arguably does not take into account important aspects of the appellant's case. The appellant pertinently averred, for example, that Commissioner Byrne's ruling, given all the facts and circumstances placed before him, fell far outside the range of decisions that a reasonable decision-maker in his position, would have arrived at.

[23] Rules 31 and 32 of the Rules for the Conduct of Proceedings before the CCMA[1] provide, *inter alia*, for the rescission of arbitration awards and rulings, but the test for granting such rescission is not spelt-out there.

[24] However, section 144(d) of the Labour Relations Act[2] (LRA) provides that any commissioner who has issued an award or ruling, or any other commissioner may on her own accord or on the application of any affected party, *inter alia*, rescind an arbitration ruling or award "*made in the absence of any party on good cause shown*"[3].

[25] There is no precise definition of the term "good cause"[4], but it is accepted that this entails that the applicant for such relief must show at least the following: (a) an absence of wilfulness; (b) that it has a reasonable explanation for the default; (c) that the application for rescission is *bona fide* and not made with the intention to delay; and that (d) (i.e. as in the case of the appellant here who referred the dispute) that it has a *bona fide* claim against the other party/ies[5]. All these elements must be considered and weighed and, for example, proof of a *bona fide* claim may make up for a weaker explanation.[6]

[26] In this matter, the appellant explains that in the CCMA referral form (form 7.11) the primary email address furnished by the appellant was "tmohube2@icloud.com" and that his alternative email address was "maropengsebola@gmail.com". The latter address was the private email address of his attorney, Mr Sebola, who at the time of the referral was employed at Dyason Attorneys in Pretoria. He left that employment on 10 June 2019.

[27] The appellant further explains that even though he had completed the form, it was served and filed by Mr Sebola on 30 April 2019 using his email address at

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[1] GNR 3318 of 21 April 2023: Rules or the conduct of proceedings before the commission for conciliation, mediation and arbitration (CCMA Rules).
[2] Act 66 of 1995, as amended.
[3] See: Section 144(d) of the LRA. *Shoprite Checkers (Pty) Ltd v CCMA and others* [2007] 10 BLLR 917 (LAC) was decided before the subsection was introduced, but confirms that the test was "good cause". See particularly para 38.
[4] See: *Grant v Plumbers (Pty) Ltd* 1949 (2) SA 470 (O) (*Grant v Plumbers*) at 475.
[5] *Grant v Plumbers* at 476 - 477.
[6] See: *MM Steel Construction CC v Steel Engineering & Allied Workers Union of SA and others* (1994) 15 ILJ 1310 (LAC) at 1311J – 1312A and compare e.g. *Zealand v Milborough* 1991 (4) SA 836 (SE) at 838 and *Carolus and another v SAAMBOU Bank Ltd; Smith v SAAMBOU Bank Ltd* 2002 (6) SA 346 (SE) at 349B-E.

Dyason Attorneys, namely "maropeng@dyason.co.za". The appellant himself never indicated that this was the address at which he would accept service of process in the matter.

[28] According to the appellant, unbeknown to him, on 13 June 2019, the CCMA (allegedly) sent the set down for the arbitration hearing to the private email address of Mr Sebola (i.e. the alternative address as opposed to the appellant's primary address). Mr Sebola testified under oath that he never received it and accordingly never informed the appellant about the set down.

[29] According to the appellant, his absence at the arbitration hearing on 9 July 2019 was not due to any wilful conduct on his part; he simply had no knowledge of the set down. There is no proof that the appellant otherwise had knowledge of such and wilfully did not attend. The attorney, Mr Sebola, was questioned on his alleged receipt of the notice set down. He denied receiving it and even went as far as submitting his personal computer for inspection to prove that he never received the notice. No one from the CCMA was called to prove how the notice was sent and no technical evidence was led about the functionality and reliability of the system. Reliance was merely placed on entries in or the contents of the CCMA file and nothing else. At best, that could only have been *prime facie* proof that the email had been directed to a particular address, but not conclusive proof that it had been received by the intended recipient.[7]

[30] In any event, the CCMA was, in the first and foremost instance, obliged to send the set down to the appellant's personal email address, which he chose as the primary address at which he would receive such notices.[8] This was not done.

[31] Taking into account all the facts and circumstances, the appellant's explanation, that he had no knowledge of the set down date for the arbitration, was unassailable. There could have been no doubt that if he knew of that date he would have attended. There is no reason why he, who referred the dispute in the first place, would not have attended the arbitration where the dispute was to be resolved. When the appellant became aware of Commissioner Botha's

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[7] Compare: *Edgars Consolidated Stores (Pty) Ltd v Kalanda and others* [2007] 7 BLLR 632 (LC).
[8] See: CCMA Rule 5A read with Rule 5.

ruling, he acted promptly to have it rescinded. This is not the conduct of a recalcitrant party who sought to avoid the resolution of the dismissal dispute that he referred to the CCMA.

[32] In addition to finding that the explanation for the default was not reasonable, Commissioner Byrne found that the appellant's prospects of success "appear weak" because the disciplinary enquiry was "conducted by professionals". There seems to have been an assumption that professionals make no mistakes, or commit no wrongs, which is false. A reasonable commissioner would not have made such an assumption.

[33] All that the appellant had to show was that he had a *bona fide* claim. The fact of his dismissal was common cause and the only issue concerns the fairness thereof. Commissioner Byrne failed to engage the facts put up by the appellant in that regard. The appellant contends that he never signed those resolutions or made the alleged misrepresentations he was accused of making or signing and was subsequently dismissed for, and denies that he was ever involved in any fraud or corruption.

[34] The appellant avers that no evidence was led at the enquiry to prove that the signatures on the said resolutions were indeed his and there was nothing substantial to counter that version. He further avers that the chairperson of the enquiry was biased and that too is not dealt with.

[35] A reasonable commissioner in the position of Commissioner Byrne would have found that the appellant's referral was *bona fide*, that his failure to appear was reasonably explained and was not wilful and/or intended to delay the resolution of the dispute which he referred to the CCMA. The court *a quo*'s finding to the contrary is incorrect.

[36] It follows that the appeal must succeed. Taking the law, fairness and all the facts and circumstances into account, it is not appropriate to order one party to pay the costs of the other. Accordingly, there will be no order as to costs.

[37] In the result, the following is ordered:

Order

1. The appeal is upheld;

2. The order of the court *a quo* is set aside and is replaced with the following order:

"1. The rescission ruling of Commissioner Byrne under case number GATW8468-19 and dated 28 August 2019 is hereby reviewed and set aside;

2. It is substituted with the following order:

'1. The ruling of Commissioner Botha under the same case number and of 9 July 2019 is rescinded;

2. The matter is to be set down afresh for arbitration before a different Commissioner.'"

3. There is no costs order.

pp Kmtavaya

P Coppin

WAGLAY JP

[38] I have had the benefit of reading the reasons for the judgment and the order by my brother Coppin JA. I am in agreement with both.

[39] I do however need to address an issue raised in argument by the Appellant. The issue is of some significance. Relying on the judgement of *Solomons v CCMA and others*[9] (*Solomons*), the Appellant argued that:

a) The dismissal of his matter by the CCMA for non-attendance at the arbitration was akin to the matter being struck off the roll.

[9] Unreported judgment JR99/2021 delivered on 4 August 2021.

b) The dismissal without consideration of the merits was inconsistent with section 34 of the Constitution and offends the right to fair labour practice as contemplated in section 23(1) of the Constitution read with section 85(a) of the Labour Relation Act (LRA) - the right not to be unfairly dismissed.

c) The dismissal of his matter by the CCMA was irrational, invalid and ineffective in law.

[40] The facts in the matter of *Solomons* are quite straightforward. Mr Solomons, an Applicant in an unfair dismissal dispute agreed to his erstwhile employer's request to postpone the arbitration hearing allocated by the CCMA because the employer's witness was suffering from COVID-19. The postponement agreement was forwarded to the CCMA. On the date of the arbitration hearing, the commissioner allocated to hear the arbitration refused to postpone the matter because the postponement agreement was not signed by one of the parties. Since neither party was present, the commissioner decided to exercise his discretion in terms of section 138(5) and dismissed the dispute for non-attendance by the Applicant, Mr Solomons.

[41] Mr Solomons applied to rescind the ruling, which the employer did not oppose. The CCMA refused the application. Mr Solomons then took the matter on review to the Labour Court. The Labour Court declared the commissioner's ruling to be irrational, invalid and ineffective and held that the rescission ruling was "*a nullity in law*".

[42] Section 138(5) of the LRA provides that;

> '(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…'

[43] What the *Solomons* judgment held was the dismissal of a dispute in terms of section 138(5)(a) had the effect of the matter being *struck off the roll* because the dispute referred to arbitration had not been resolved as is required by

section 1(d)(iv)[10] of the LRA and offends section 34 of the Constitution[11]. In the circumstances and in terms of *Solomons*, an applicant whose matter is dismissed in terms of section 138(5) (a) need not apply for a rescission of the dismissal ruling but can apply to have the matter re-enrolled upon providing a satisfactory explanation for her/his failure to attend the arbitration hearing.

[44] In my view, such an interpretation of the word "dismissal" is egregious. A Lewis Carrol-type application where a word means what you choose it to mean cannot find application in the interpretation of statutes. While the door to a disputant's right to have his dispute arbitrated or adjudicated should not be easily closed, a balance should be struck to ensure that a respondent in a dispute is not required to wait indefinitely for the matter to reach finality which will be the effect if a dismissal in terms of section 138(5) is interpreted to mean that the matter is "*struck from the roll*". Alternatively, it places an undue burden on the respondent to apply to the CCMA to have the matter dismissed.

[45] While section 138(5) gives the commissioner the power to "dismiss" a dispute referred to the Commission for non-attendance by the applicant, it is not a power that can be exercised mechanically or unconsciously. It requires the commissioner to exercise a discretion to determine whether to dismiss the dispute. The use of the word "may" in this sub-section is instructive of this. Section 138(5) requires the commissioner to apply his mind and consider whether, in the matter before her/him it is appropriate that the dispute be dismissed. To simply adopt the view that *ex-facia* the file, service was properly effected to the party referring the dispute and therefore failure to attend the arbitration should result in a dismissal of the dispute is a failure to exercise a discretion, a failure to consider the matter and a failure to apply your mind to it. While it is not for the commissioner to guess any of the possible reasons for the absence of the applicant, it is appropriate, more especially, where it is the first occasion that the applicant fails to attend the arbitration hearing to order a lesser sanction than that of dismissal. The commissioner always has the option

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[10] Section 1(d)(iv) of the LRA provides that the purpose of the LRA is to promote "the effective resolution of labour disputes".

[11] Section 34 of the Constitution provides: "*[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum*".

to postpone the matter *sine die*, (without a date) and if the referring party has no desire to proceed with his dispute, the matter would simply end there. Alternatively, the commissioner could postpone the matter to a specific date with an instruction to the CCMA's Case Management Officer (CMO) to do more than simply forward a "set-down" notice to the applicant. Perhaps it should order the CMO to telephone (if a number is available) and inform the applicant of the new date with a rider that failure to attend the arbitration may result in his referral being dismissed and note that on the file. The CCMA might even consider adding section 138(5) in all of their notices of set-down, so both parties are aware of the possible consequence of non-attendance at an arbitration hearing.

[46] The commissioner's decision in dismissing the dispute in *Solomons* was a decision taken without any consideration given to the fact that the applicant's absence in that matter was not because of any desire not to proceed with his dispute but because of his compassion to accommodate his opponent whose witness was ill. If the commissioner was uncertain about the agreement being properly concluded, he should have postponed the matter and asked for a properly signed document. To dismiss it was not harsh, it simply made no sense and to compound the problem, the proper next step of applying for rescission was similarly met with a reason-defying refusal of the rescission application. Sadly, though instead of reviewing and setting aside the refusal by the commissioner to rescind the ruling, the Labour Court decided to interpret the word *"dismiss"* as set out in section 138(5) to mean "*struck off the roll*". All this does is create legal confusion and is neither helpful nor correct.

[47] To interpret the word "*dismissal*" in section 138(5) (a) to mean "*struck-off from the roll*" is to give it a meaning that cannot ordinarily be ascribed to that word and to attribute to the word a value or a result that would serve a purpose other than what it is supposed to convey, this is not interpretation.

[48] The consequence of the *Solomons* judgement has the effect that a meaning is ascribed to a word in a statute which departs from the settled understanding of that word, with the result that the word "*dismiss*" is altered to mean something

other than what was intended by the legislature. This is erroneous and as stated by Kellaway:[12]

> 'A statute has no elasticity… it may not be stretched to meet a case for which provision has clearly not been made… if the plain and unambiguous meaning of a provision in an Act is departed from, a court does not construe it, but alters it.'

[49] A decision to dismiss on pure technical non-compliance is a drastic result because it brings the dispute to finality and must therefore not be made lightly. It is a decision, especially in the absence of a proper ventilation of the merits of the dispute, to be made as a last resort. Hence the use of the words "*may dismiss*" in section 138(5)(a). One can never set out all the factors which must be considered before a matter can be dismissed because of the failure of an applicant to attend an arbitration hearing but whatever the commissioner considers in arriving at its decision, the dismissal of a dispute due to non-attendance of the applicant must be based on the understanding that it is a decision of last resort, added to it is the consideration that the respondent is deserving of having finality in the matter. A dismissal consequent on the proper exercise of a discretion violates neither the provisions of the LRA nor Constitutional prescripts as the applicant was given the opportunity to have his/her day in court but has refused to make use of it.

[50] It is to the applicant's credit that it sought to review the commissioner's decision to refuse the rescission application and not to seek a reallocation of the arbitration hearing, which I understand might have been granted by the CCMA. This would then have added to the confusion because the CCMA would then have acted contrary to the clear provisions of the statutes (LRA) which govern its actions.

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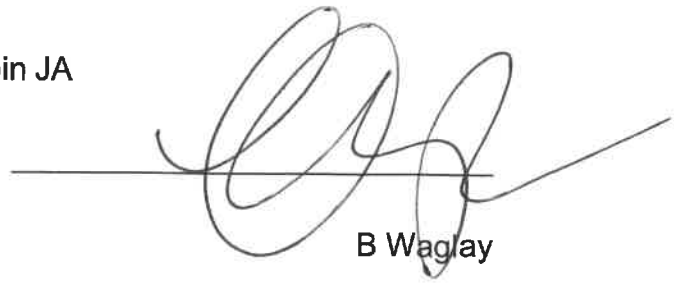
[12] E.A Kellaway, "*Principles of Legal Interpretation*", (LexisNexis, Butterworths), 1995 at p. 140.

[51] In the result, I agree with the order by Coppin JA



B Waglay

Waglay JP and Gqamana AJA concur in the judgment of Coppin JA and Coppin JA and Gqamana AJA concur with the judgment of Waglay JP.

APPEARANCES:

FOR THE APPELLANT:	MD Maluleke with MS Sebola Instructed by Sebola Nchupetsang Sebola Attorneys
FOR THE RESPONDENT:	D Norton of Mkhabela Huntley Attorneys