

SOUTH AFRICA / JUDGMENT

Primeserv Staff Working Dynamix (Pty) Ltd v Williams NO and Others (JR 2743/2022) [2023] ZALCJHB 256 (13 September 2023) [2023] ZALCJHB 256

COURT

Labour Court Johannesburg

BEFORE

Van Niekerk

CASE / FILE NUMBER

JR 2743/2022

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THE LABOUR COURT OF
SOUTH AFRICA, JOHANNESBURG

Not Reportable

Case No: JR

2743/2022

In the matter between:

PRIMESERV
STAFF WORKING DYNAMIX (PTY) LTD
Applicant
And
WILLIAMS
J N.O.
First
Respondent
COMMISSION
FOR CONCILIATION, MEDIATION AND ARBITRATION
Second
Respondent
NYAMEKO
MARWANQANA
Third
Respondent

Heard:

12 September 2023

Delivered: 13 September 2023
(This judgment was handed down electronically by circulation to the parties' legal representatives, by email, publication on the Labour Court's website and released to SAFLI. The date on which the judgment is delivered is deemed to be 13 September 2023.)

JUDGMENT

VAN NIEKERK, J

[1] The applicant is a temporary employment service, as contemplated by section 198 of the LRA. It seeks to review and set aside a ruling made by the first respondent (the arbitrator) on 25 October 2022. Prior to his dismissal for gross misconduct, the third respondent (the employee) was employed as a truck driver. He was charged with gross misconduct in the form of consuming alcohol, being products belonging to the client. The charge stems from an incident where the employee had been captured on videotape in a section of the

client's warehouse, where the employee was not supposed to be working, and where cleaners later found empty tins of alcohol. The applicant considered the consumption of the clients' product is tantamount to theft and also a breach of its own rules which prohibit the consumption of alcohol by an employee during working hours. In his ruling, the arbitrator refused to rescind an arbitration award dated 16 February 2022 in which, by default, the employee's dismissal by the applicant was found to be substantively unfair and the employee be reinstated with retrospective effect.

[2] The arbitration hearing in respect of an unfair dismissal dispute between the applicant and the employee was scheduled for an arbitration hearing on 16 February 2022. On that date, the arbitrator recorded that the applicant had failed to attend the proceedings and that on a perusal of the file, he was satisfied that the applicant had been notified of the date, time, and venue of the hearing. On that basis, the arbitrator proceeded to hear the matter by default. The arbitrator found in favour of the employee and ordered his reinstatement with retrospective effect.

[3] The applicant then sought to rescind the default award. The applicant's representative submitted in his affidavit in support of the rescission application that he did not feel well on the morning of the hearing, but nonetheless left home at 6h18 but had to turn around to rush to the toilet. The applicant informed the case management officer by email that he would not be able to attend the arbitration proceedings. The representative submitted that his non-attendance at the hearing was not wilful and that the default award should be rescinded. In relation to the applicant's prospects of success, Julie averred that the applicant had a witness who would testify as to the employee's involvement in misconduct, and that video evidence establishing that

the employee was not supposed to be in the area in which he was found would be presented. The arbitrator dismissed the application on the basis that the applicant had been duly notified of the hearing, did not attend in circumstances where no formal application to postpone the proceedings had been filed and where the applicant's non-attendance at the hearing on 16 February 2022 was wilful. Further, the arbitrator held that he had not been convinced of the applicant's prospects of success. In a passage from the award that assumed some significance in these proceedings, the arbitrator stated:

'15. Commissioner M van Rooyen further in a postponement ruling issued on 3 November 2021 questioned the locus standi of Sebastian Julie as it came to her attention that he was the regional secretary of the Shosholozwa Workers Union of South Africa and that he was also appearing in his capacity as a HR manager in the arbitration of Nyameko Marwanqana v Primserv Staff Dynamix (Pty) Ltd.

16. The commissioner ruled that Sebastian Julie is required to present proof of the capacity in which he acts, including a contract of employment, salary advice and proof of registration with the Unemployed Insurance fund. None of the required documentation was received by the CCMA case management from Sebastian Julie as per the ruling.
17. I have further noticed in the rescission ruling submitted to the CCMA on 17 March 2022 a number of ambiguities where Sebastian Julie submits in his affidavit that he is the human resources assistant for the Western Cape and in the same application Basil Smith who is the branch manager cites in his affidavit that Sebastian Julie as the IR administrator of the company. Sebastian Julie's designation comes across as an individual wearing multiple hats in the rescission application, including the ruling issued by Commissioner M van Rooyen.'
- [4] The reference to commissioner Van Rooyen relates to a previous hearing issued on 3 November 2021 in the same matter when the proceedings were postponed on account of Julie's inability to connect to a virtual process. Julie was directed to produce proof of the capacity in which he acted.
- [5] The applicable legal principles are well established. An applicant in a rescission application must establish good cause, in the form of an explanation for the default and secondly, demonstrate that it has a prima facie defence.
- [6] The applicant does not dispute that it received the notice of set down of the arbitration hearing. The applicant contends however that it was not in wilful default, and that it has reasonable prospects of success in the dismissal dispute. The applicant submits that the arbitrator's findings were premised on irrelevant material, particularly in relation to Julie's locus standi. In my view, the issue of Julie's designation of right of representation ought not to have impacted on the arbitrator's

decision-making, or, at the very least, Julie ought to have been afforded an opportunity to respond to these issues. This was an issue entirely divorced from the test that the arbitrator was required to apply, and to the extent that it influenced the arbitrator's

decision (as it clearly did), the arbitrator took into account irrelevant material in making the decision that he did.

- [7] The simple inquiry before the arbitrator ought to have been whether or not he accepted that Julie had taken ill on the morning of 16 February 2022 and was unable to attend the arbitration. What served before the arbitrator an undisputed statement under oath

to explain the circumstances in which Julie had to turn back home on account of sudden illness after setting out to the CCMA on the day in question. To the extent that the arbitrator found that the applicant was in wilful default because no formal application for response had been made, the arbitrator failed to consider that there had been no opportunity to bring a formal application given the circumstances in which Julie fell ill. Julie, at the earliest available opportunity, had contacted the case management officer in an email that amounted, in substance, to a request for a postponement of the matter. The arbitrator gives no explanation as to why he rejected Julie's explanation

- [8] Insofar as the merits of the dismissal dispute are concerned, the applicant contends that the arbitrator failed to consider that it had a witness who could testify to the employee's misconduct, as well as video evidence, and that it had a prima facie defence to the employee's claim.

- [9] The answering affidavit filed by the employee for the present proceedings largely concerns the merits of unfair dismissal claim. These are not directly relevant at this point – what the court is required to do is to assess, on the evidence before it, whether the arbitrator's decision to refuse to rescind the default award is a decision to which a reasonable decision maker

could come on the available evidence. This in turn requires an assessment of the reasons proffered by the applicant for its failure

to appear at the hearing, and whether it has a prima facie defence to the employee's unfair dismissal claim. It is not for the court to determine whether or not the employee was unfairly dismissed; that is a matter for an arbitrator to decide in due course, if the ruling to refuse rescission is set aside. It is enough that the applicant's contentions, if proved at arbitration, will found a sufficient defence to the employee's claim of unfair dismissal.

- [10] In the circumstances, I am satisfied that the arbitrator had regard to irrelevant evidence and failed properly to apply the relevant legal principles. The applicant has established that the arbitrator's ruling is not one to which a reasonable decision maker could have come on the available evidence, and that the ruling ought to be reviewed and set aside. I intend to substitute the ruling for one in which rescission is granted, and to direct the CCMA to enrol the matter for rehearing.

- [11] In relation to the issue of costs, I raised with the applicant's counsel the fact that the employee had been dismissed in Cape Town, the referral was made to the Western Cape office of the CCMA where the ruling under review had been issued, and that the employee

was resident in Langa, Cape Town. The applicant could offer no cogent explanation for the institution of these proceedings in Johannesburg, but for a submission that the court is a single court with national jurisdiction. This submission overlooks the employee's personal circumstances, and the imperatives of access to justice. The employee stated that he had borrowed money to buy a bus ticket to Johannesburg to attend the proceedings. Although there is no technical bar to the institution of the review

proceedings in Johannesburg, to have done so in the present instance poses a limitation on access to justice and indeed, has prejudiced

the employee who has had to incur expenditure that he no doubt can ill afford. On the other hand, the applicant is a corporate entity with the resources available in the Western Cape to pursue any review application in the Cape Town branch of the court. The decision to file the review application in Johannesburg without any compelling reason to do so and without any consideration of the employee's circumstances was ill-considered. While it is correct that the employee's hands are not entirely clean (by reason of his filing the answering affidavit outside of the period within which he was directed to do so), for the purposes of section 162 of the LRA, the requirements of the law and fairness are best satisfied by an order that the applicant meet the disbursements in relation to transport and accommodation that the employee has been obliged to incur.

I make the following order:

1. The ruling issued by the first respondent on 25 October 2022 under case number WECT 3196-21 is reviewed and set aside.
2. The rescission ruling is substituted by the following:
'The arbitration award granted by default on 28 February 2022 is rescinded'.
3. The second respondent is directed to enrol the unfair dismissal dispute between the applicant and the third respondent for hearing at the second respondent's Western Cape office for an arbitration hearing before a commissioner other than the first respondent.
4. The applicant is ordered to pay the disbursements incurred by the third respondent in relation to his transport between Cape Town and Johannesburg, and his accommodation in Johannesburg. In the event of any dispute regarding the quantum of the disbursements

incurred, the taxing master is directed to make a ruling on the basis of written submissions made by the parties.

André van Niekerk

Judge of the Labour Court of South Africa

Appearances:

For the applicant:

Self

For the respondent:

M Lennox, instructed by Beech Veltman Incorporated

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Prepared on 11 October 2026 · Esheria