REPUBLIC OF SOUTH AFRICA

IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

JUDGMENT

Reportable

Case no: JA 67/12

In the matter between:

PROFESSIONAL TRANSPORT

WORKERS UNION **Appellant**

and

PAUL MALEMA **First Respondent**

COMMISSION FOR CONCILIATION,

MEDIATION AND ARBITRATION **Second Respondent**

GERALDINE DUNN N.O. **Third Respondent**

Heard: **21 February 2014**

Delivered: **07 October 2014**

Summary: Review of a rescission ruling. Commissioner refusing to grant rescission of arbitration award- commissioner not considering good cause- Good cause an independent ground for rescission in addition to grounds in section 144 of the LRA. Rescission ruling reviewable. Labour Court correct in setting aside ruling. Labour Court not remitting matter for arbitration but considering it. Labour Court only considering explanation for the delay- Labour Court incorrect in not considering merit of the matter. Appeal upheld- rescission ruling set aside.

CORAM: Tlaletsi DJP, Ndlovu JA *et* Coppin AJA

JUDGMENT

TLALETSI DJP

Introduction

[1] The appellant is appealing against a judgment of the Labour Court (Molahlehi J) in a review application brought in that court against a ruling made by the third respondent (the Commissioner), in which she dismissed with costs an application for rescission of an award granted in default against the appellant. The commissioner was acting under the auspices of the second respondent (the CCMA). The appellant is in this Court with leave of the court pursuant to a petition to this Court, after his application for leave to appeal was dismissed by the Labour Court with no order as to costs.

Factual background

[2] The first respondent (the respondent) held the position of General Secretary of the appellant, a trade union registered in terms of the Labour Relations Act (LRA).[1] He was also employed by the appellant. The appellant removed the respondent from the position of General Secretary on the ground of allegations that he failed to ensure that the appellant, as a trade union, complied with the provisions of the LRA. He, however, continued his relationship with the appellant as an employee.

[3] It is common cause that the respondent was subjected to a disciplinary process on allegations of misconduct. The charges against him were:

a. A Refusal to obey reasonable instructions, in that he refused to report for work on 28 April 2009.

b. Absence without authority for 18 days.

[1] Act 66 of 1995.

c. Threatening two office bearers in front of other union officials.

d. Fraudulent misrepresentation on Union documents.

A practising attorney was appointed to be the chairperson of the internal disciplinary inquiry. The respondent was found guilty of all these charges and the chairperson of the disciplinary inquiry recommended that he be dismissed from his employment. The appellant accepted the recommendation of the chairperson and the respondent was accordingly dismissed.

[4] Aggrieved by his dismissal, the respondent referred a dispute of unfair dismissal to the CCMA. The dispute could not be resolved at conciliation and a certificate to that effect was issued by the CCMA. The respondent referred the matter to arbitration and the matter was set down for 26 and 29 March 2010. It suffices at this stage to mention that there was no appearance by either the appellant or its legal representative. The arbitration nevertheless proceeded in their absence. The respondent was called to present his case. He testified that his dismissal was unfair as he was found guilty wrongly. He disputed his guilt against the charges and mentioned that he was not given an opportunity to present his case. He arrived late at the inquiry and the chairperson failed to postpone the inquiry as required by the appellant's disciplinary code. His evidence was accepted as is and his dismissal was found to have been both procedurally and substantively unfair. The commissioner made an award in the following terms:

> 'The [appellant] is ordered to reinstate [the respondent] on the 1st May 2010, with retrospective effect.
>
> The back pay in the amount of 11 months x R12 000.00 = R132 000.00 should be paid to [the respondent] within 30 days from the date of service of the award.
>
> No order as to costs is hereby made.'

[5] Aggrieved by the award, the appellant brought an application for rescission of the award on the basis that it was erroneously granted in its absence. It was contended on behalf of the appellant that it was not in wilful default as it had

applied for postponement of the arbitration proceedings. The written application for the postponement of the arbitration proceedings had been prepared by the appellant's attorney and served on both the respondent and the CCMA. The application for rescission was dismissed with costs in terms of a ruling issued by the commissioner on 21 June 2010. It is this award which is the subject of the appeal.

[6] Before dealing with the merits of the appeal, there are two matters that need to be considered first. The appellant has served and filed an application for its failure to file its Notice of Appeal within the prescribed period of 15 days. The Notice of Appeal is out of time by six days. The application is vigorously opposed by the respondent. The reason for the delay is that the appellant's attorney, after receiving an order granting the appellant leave to appeal, was preoccupied with obtaining instructions and making sure that the record for the appeal was prepared and delivered in accordance with the order of this Court granting leave to appeal. As a result of the attorney's preoccupation, he simply overlooked the fact that a Notice of Appeal had to be filed. It was submitted that the delay was due to a mistake by an attorney, for which he apologises.

[7] In opposing the application, the respondent concedes that he is unable to dispute the reasons advanced by the appellant for the delay. He, however, contends that the reason advanced is an indication that the appellant and its attorney lacked seriousness in prosecuting the appeal. He contends further that there was no need for the attorney to obtain instructions on appeal since they had already applied for leave to appeal and had also petitioned this Court for leave to appeal after its application was refused by the Labour Court. He further contends that the appellant does not have good prospects of success on the merits of the appeal. For these reasons, he submitted, condonation for the late filing of the Notice of Appeal should be refused and that the appeal, consequently, be dismissed.

[8] In my view, the respondent's criticism of the appellant's and its attorneys' conduct is understandable. However, the delay, in the circumstances of this case, is not excessive and the explanation therefor appears to be *bona fide*.

What remains to be considered is, whether the appellant has reasonable prospects of success on the merits of the appeal.

[9] The second application for condonation relates to the appellant's failure to serve and file a Power of Attorney giving its attorneys the authority and mandate to institute and prosecute the appeal in accordance with Rule 6(1). The Power of Attorney was filed 17 days out of time. The reason advanced by the appellant's attorney for the delay is, simply, that they overlooked the fact that the Power of Attorney had to be filed, because their attention and concentration was devoted to ensuring that the Notice of appeal, as well as the application for its late filing had to be done in order to ensure that the appeal was prosecuted. It was submitted that the failure to file the power of attorney was, therefore a *bona fide* mistake by the attorney, for which he apologises.

[10] This application is also opposed by the respondent. Although the respondent concedes that he does not have knowledge of the facts surrounding the failure to file the Power of Attorney by the appellant's attorney, he contends that the attorney was grossly negligent and inept in handling the matter. He reiterates that the appellant does not have good prospects of success and that he would be prejudiced should condonation be granted, because the matter would be unnecessarily prolonged. He prays that condonation for the late filing of the Power of Attorney should be refused. It would appear that the appellant's attorney devoted his attention to one aspect at a time and in the process, overlooked compliance with other rules of this Court in preparation of the appeal. The explanation seems to be that there was a mistake on the part of the attorney and much cannot be said, or done about it. However, there has been compliance after 17 days, which, in my view, is not excessive. It cannot be disputed that the attorney did not sit back and do nothing about the matter. He was busy during this period, preparing the matter to be heard on appeal. Again, the prospects of success on the merits will play an important role, in deciding the issue of condonation.

The Application for Rescission

[11] What follows are the undisputed facts pertaining to failure by the appellant's attorney to attend the arbitration hearing which was set down for 26 and 29 March 2010. The appellant's attorney had a prearranged trip to Zambia. He was to fly out to Victoria Falls on 26 March 2010 and was scheduled to return to Johannesburg on 29 March 2010. Acting in terms of Rule 23 of the Rules for the Conduct of Proceedings in the CCMA, the attorney prepared an application for postponement of the arbitration proceedings. The application was served on the respondent and filed with the CCMA per telefax 16 days prior to the scheduled date of the arbitration. The telefax number used for service on the respondent's attorneys was the same as that reflected in the filing sheet of the replying affidavit.

[12] According to the appellant's attorney, he telephoned the CCMA offices on numerous occasions on 23, 24 and 25 March 2010 to ascertain the status of the application for postponement and on all these occasions he was informed that the "*CCMA system*" was down and, as a result, they could not inform him of the status of the application. He was further informed that it was not possible to check the files manually to ascertain the status of the application. He thereafter assumed that the matter had been postponed since his reason for requiring the postponement was sound and further that the application was not opposed by the respondent.

[13] The respondent opposed the application for rescission. In his opposition, the respondent denied receipt of the application for postponement. This is surprising, because the application was sent to the same fax number provided by the respondent for acceptance of service of documents. The respondent contended further that even if such application was made to the CCMA, the application itself could not excuse the appellant from attending the arbitration, unless there was a directive from the CCMA excusing him from attending. He further contended that the appellant did not have any prospects of success on the merits.

[14] In reply, the appellant contended that the respondent's averment that he did not receive the application for postponement was without merit, because it

sent the application for postponement to the same telefax number, that he used to serve the application for rescission of the default award, in the case of the latter the respondent acknowledged receipt.

[15] In refusing the application for rescission the commissioner reasoned thus:

> 'The applicant has submitted that the Commissioner erroneously proceeded in the absence of the [appellant] and granted the default award.
>
> As I understand the application before me, the [appellant] assumed that the application for postponement of the two-day arbitration was granted, without having any substance for such a view. This has severely prejudiced the applicant for rescission as there was no such postponement granted. The CCMA had arranged for a Commissioner to hear the matter which was set down as early as the 28th January 2010 over two days, 26th and 29th March 2010.
>
> The [appellant] is therefore unable to show that firstly the arbitrator committed any error by proceeding with the arbitration. Secondly, the [appellant] was also unable to show as submitted in the founding affidavit that the respondent was aware of the application and agreement to same. There was no compliance by the [appellant] with Rule 23 in terms of which the [appellant] had sought the application.
>
> The [appellant] addressed the prospects of success in the dismissal dispute by merely stating that the dismissal was substantively and procedurally fair. The respondent's opposing arguments addressed the substantive and procedural aspects of the dismissal. It is the duty of the [appellant] to show that it has excellent merits in the dismissal dispute but the [appellant] has failed to do so.
>
> I have considered that the [appellant] failed to show any error on the part of the arbitrator and that the [appellant's] failure to attend the arbitration to argue for the postponement on behalf of Mr Kevin Allardyce and merely assumed that its reasons were adequate and accepted by the CCMA. The [appellant] has failed to show good prospects of success. The [appellant] had on an earlier occasion applied for postponement in adherence with the same rule.

> In the absence of compliance with CCMA Rule 23 dealing with postponement, I find that the application for rescission is refused as there was no error in granting the default award. The [appellant] ignored the very rule in terms of which the application was made.'

The Review application

[16] The appellant sought to review the rescission ruling by the commissioner on the ground that the decision reached is not one that a reasonable decision-maker could reach. Reference was made to instances where the commissioner made incorrect findings. The first was the finding that the appellant could not show that the respondent was aware of the application for rescission when, in actual fact, the appellant submitted proof that he served the application on the respondent; Secondly, that the commissioner failed to deal with the application for postponement itself; Thirdly, that the commissioner concluded that the appellant had no prospects of success in the dismissal dispute, which was incorrect, as the ruling of the Chairperson was annexed to the replying affidavit, which should have alerted the commissioner that the respondent faced serious allegations of gross misconduct and that the trust relationship had been damaged; Fourthly, that the commissioner held that the application for rescission was frivolous without setting out any basis for this conclusion.

[17] The Labour Court made several observations in its judgment. Those that I find most relevant in the determination of this appeal, given the grounds upon which the judgment of the Labour Court below is challenged, are the following:

17.1 That it is generally accepted that unlike in the courts of law, postponements in arbitration proceedings are not readily granted because of the need for speedy resolution of disputes as required by the LRA. A strict approach is generally adopted in the postponement of arbitration hearings. [2]

[2] The court referred with approval what the court said in *Nestle SA (Pty) Ltd v CCMA and Others* (2008) JOL 21846(LC) at para 25.

17.2 In considering whether a postponement should be granted, the commissioner had a discretion which should have been judicially exercised.

17.3 The [appellant] in *casu* was aware of the date of hearing and did not seem to seek an indulgence from the commissioner, but instructed him to postpone the matter.

17.4 The reasons for seeking the postponement "are set out scantily in the founding affidavit by the candidate attorney."

17.5 There are no reasons given why the attorney had to leave on the days mentioned, or why he could not postpone the Livingstone trip.

17.6 The [appellant] has also not provided an explanation for not attending the hearing.

The Labour Court held, based on the above analysis, that there was no basis to interfere with the exercise of the discretion of the commissioner in refusing to rescind the arbitration award, which had been granted against the appellant by default.

[18] The Labour Court went on to find that from the reading of the arbitration award, the commissioner appears to have focused his mind only on the issue of "*erroneously granted*" and not on "*good cause*" and that that constituted an irregularity, caused by the failure to apply his mind to an important principle of law, resulting in the appellant not being given a fair hearing. For that reason, the Labour Court held, the award stood to be reviewed. Having found that the award was reviewable, the Labour Court , nevertheless, found it unnecessary to remit the matter to the CCMA for consideration afresh, because doing so, according to the Labour Court below, would be against the speedy resolution of disputes principle and further, that there is sufficient material before the court to substitute the decision of the commissioner.

[19] The Labour Court, accordingly, proceeded to consider whether the appellant had showed good cause in its rescission application and reasoned thus:

> 'It should be apparent from the earlier discussion that the inevitable and reasonable conclusion to draw is that the [appellant] has failed to show good cause. In other words the [appellant] has failed to provide a satisfactory and reasonable explanation for its non-attendance at the arbitration hearing on the date which had been set down by the first respondent. It needs to be pointed out that the contention of the [appellant] that attempts should have been made to contact the [appellant] to attend the arbitration proceedings has in the circumstances of this case no merit and the consequences thereof on the facts of this case would have dire consequences for the CCMA.
>
> Accordingly, the applicant's review application stands to fail. In the circumstances of this case, I see no reason why costs should not follow the results.'

The Appeal

[20] In this Court, it was contended on behalf of the appellant that the Labour Court failed to appreciate that "*good cause*" constitutes, in this context, an independent ground on which to grant rescission of a CCMA award; that the court *a quo* misunderstood the correct legal position when it held that "*good cause*" was a concept infused into each of the provisions of sec 144 (a), (b) and (c) of the LRA and that when a party sought to show that an award had been "*erroneously sought or erroneously made*" in terms of sec 144(a), the party had to show, in addition, that there was good cause to rescind, and that the Labour Court erred in failing to consider the appellant's prospects of success.

[21] It was submitted on behalf of the respondent that the Labour Court was correct in finding that there was no basis to interfere with the commissioner's discretion in refusing to grant the application for rescission; that the Labour Court balanced the interests of justice and correctly came to the conclusion that there was sufficient material before it to consider the issue of good cause and, consequently, arrived at the inevitable and reasonable decision that the appellant failed to show good cause and, therefore, the review application must fail. It was submitted that the appeal should be dismissed with costs.

[22] The central issue for determination in this appeal is firstly, whether sec 144 of the LRA was properly interpreted and applied in the determination of the application for rescission of the award of the commissioner, by both the commissioner and the Labour Court. Finally, whether on the facts and circumstances of this case, rescission of the award ought to have been allowed, or refused.

[23] Section 144 of the LRA dealing with rescission of arbitration awards by the CCMA commissioners provides thus:

> '144. Variation and rescission of arbitration awards and rulings
>
> 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;
>
> (b) in which there is an ambiguity, or an obvious error or omission, but only to the extent of that ambiguity, error or omission; or
>
> (c) granted as a result of a mistake common to the parties to the proceedings.'

[24] In *Shoprite Checkers (Pty) Ltd v CCMA and Others,*[3] this Court had the following to say in interpreting sec 144 of the LRA:

> '[33] As there are circumstances which can be envisaged, such as in the present case, and which fall outside the circumstances referred to section 144 of the Act, in such cases, both logic and common sense would dictate that a defaulting party should, as a matter of justice and fairness be afforded relief. It follows, that if one was to hold that section 144 of the Act does not allow for the rescission of an arbitration award in circumstances where good cause is shown and that an applicant who seeks rescission of an arbitration award was compelled to bring the application within the limited circumstances allowed by

[3] [2007] 10 BLLR 917 (LAC) at paras 33 and 38. .

the wording of the section it could lead to unfairness and injustice. In my view, this would be inconsistent with the spirit and the primary object of the Act referred to above. Furthermore, I am of the view that to interpret section 144 of the LRA 66 of 1995 so as to include "good cause" as a ground for rescission is to give the Act an interpretation that is in line with the right provided for in section 34 of the Constitution of the Republic of South Africa, 1996 because, if section 144 of the LRA 66 of 1995 is not interpreted in that way, a party who can show good cause for his default would be denied an opportunity to exercise his right provided for in section 34 of the Constitution of the Republic of South Africa, 1996, despite the fact that he may not have been at fault for his default. That could be a grave injustice.

[38] When the matter came before the Labour Court, Pillay J adopted the approach that good cause is not a requirement in an application for the rescission of a decision of the CCMA and a commissioner was obliged not to take it into account. As already shown above, I take a different view. Section 144 must be interpreted so as to also include good cause as a ground for the rescission of a default arbitration award. Accordingly, a commissioner may rescind an arbitration award under section 144 where a party shows good cause for its default. In my view, this approach of interpreting the Act is in line with the approach adopted by this Court in the *Queenstown* case, *supra*, referred to above, particularly at paragraphs [17]–[24] thereof. It, therefore, follows that the decision of the Labour Court is to be set aside.' [own emphasis]

[25] There is no doubt that what this Court did in *Shoprite* was, *inter alia*, to introduce "*good cause*" as an independent ground for rescission in addition to the grounds set out in sec 144 of the LRA. The Labour Court was therefore correct in its finding that the commissioner, in so far as she did not regard good cause as a requirement for consideration in the determination of the rescission application brought by the appellant, failed to apply her mind to an important principle of law, which is an irregularity in terms of sec 145 of the LRA. This finding answers the first question in so far as it relates to the commissioner. The award is therefore reviewable as the Labour Court found. However, the matter does not end there. One has to consider whether the Labour Court erred, or misdirected itself in considering whether the appellant

had shown good cause for it to be granted rescission of the award, granted in its absence. Put differently, since the Labour Court stepped into the shoes of the commissioner and considered whether the appellant had made out a case on the material that was placed before the commissioner, we have to consider whether the Labour Court misdirected itself in finding that the appellant had in any case not make out a case for good cause to be decided in its favour.

[26] The test for good cause in rescission applications, primarily, involves a consideration of two factors, namely, the explanation for the default (whether the explanation is reasonable and *bona fide*) and whether the applicant had a *prima facie* defence. In *MM Steel Construction CC v Steel Engineering & Allied Workers Union of SA and Others*,[4] it was held that while the absence of one of the two essential elements would usually be fatal, they are not to be considered mechanically and in isolation, but they are to be weighed together with other relevant factors in determining whether it should be fair and just to grant the indulgence.

[27] It is common cause that at the arbitration held on 31 March 2010, the commissioner was satisfied that the appellant had been served with the notice of the date of the arbitration. There was, however, no appearance on behalf of the appellant. The commissioner in these circumstances held that *"[i]n the absence of any reasons, I continued and heard the [respondent's] version*". The commissioner was, however, not aware that a written application for a postponement had been served and filed on behalf of the appellant. The written application for a postponement was not in the file that was presented to the commissioner. She was also not aware that the appellant's attorney had made several inquiries at the CCMA to establish the outcome of the application for a postponement and that he was advised that the system was down and that it was not possible to check manually. There was therefore no application for a postponement for consideration before the commissioner even though it had been served and filed. These factors should have, in my view, played an important role when an application for rescission was considered by the commissioner.

[4] (1994) 15 ILJ 1310 (LAC) at 1311J-1312A.

[28] The Labour Court was correct in finding that the commissioner focussed her mind only on the issue of "*erroneously granted*", and did not consider whether "good cause" had been shown for the application for rescission to be granted. In doing so, the commissioner committed an irregularity, by failing to apply her mind to an important principle of law.

[29] In consideration of good cause, the Labour Court limited its inquiry to the reason for non-attendance at the arbitration proceedings and held that the appellant had failed to provide a satisfactory and reasonable explanation for its non-attendance and as such failed to show good cause. The appellant's explanation for non-attendance at the arbitration is, simply, that the attorney was under a *bona fide* but mistaken belief that the arbitration had been postponed as a result of the application for a postponement in terms of Rule 23 of the CCMA Rules. The belief that the application had been granted was based on the fact that the attorney did not receive any opposition to its application for a postponement, although it was properly served on the respondent's attorneys. Furthermore, the attorney had on a previous occasion made a similar application and was granted a postponement. The appellant and its attorney therefore, acted under the genuine belief that since the application was unopposed, it was sufficient to have the matter removed from the roll and accordingly dispensed with the need for any appearance on the scheduled day, as happened on a previous occasion. It is perhaps because of this genuine belief on the part of the attorney that the appellant was not advised to arrange for someone to attend the arbitration.

[30] It is clear from the explanation given by the appellant that the blame for non-attendance should be attributed to its attorney. I am, however, not convinced that the attorney in the circumstances of this case adopted the attitude of not asking for an indulgence, but instructing the commissioner to grant the postponement and that the postponement was there for the taking and deliberately stayed away from the arbitration. His explanation that he had on a previous occasion followed the same procedure and was granted the postponement was not disputed. The attorney's explanation on the facts of this case is in my view *bona fide* and reasonable. Even if the attorney was somehow negligent, I am not of the view that the appellant should be

penalised for its attorney's negligence.[5] There is no evidence that the appellant was aware of the circumstances relating to its attorney and that it was supposed to arrange for an appearance in the absence of its attorney. The entire process was driven by the attorney and it was the attorney, and not the appellant, who was not available to attend the arbitration. It was submitted on behalf of the respondent that failure by the appellant's attorney to attend the arbitration was wilful. I agree that if literally interpreted failure to attend was indeed wilful. However, it should not be seen as wanton disregard for the rules or as disrespect for the CCMA. The failure is excusable, because of the circumstances under which it occurred.

[31] The Labour Court did not consider the second element of good cause, namely, whether the appellant had reasonable prospects on the merits of the dispute. To this end, the Labour Court erred as it did not apply the test for good cause as set out by this Court in *MM Steel Construction Co* decision referred to above.

[32] Much was said about the fact that the appellant had not set out in detail in its founding affidavit in the rescission application why it contended that it had good prospects of success. The respondent, in his answering affidavit, disputed that the appellant had good prospects of success and pleaded his innocence in respect of the charges against him. He accused the chairperson of the inquiry of procedural unfairness, in that he failed to make rulings on several points *in limine which* he took against the appellant. In reply, the appellant attached copies of detailed rulings made by the chairperson on the point *in limine* and in respect of the disciplinary inquiry against the respondent.

[33] It is clear from the detailed ruling by the chairperson that he considered the circumstances relating to the respondent's non-attendance at the disciplinary inquiry and came to a conclusion that he needed to proceed with the inquiry in his absence. He considered the evidence presented on behalf of the appellant on the charges of misconduct and found the employee guilty. He further found

[5] *Saloojee and Another v Minister of Community Development* 1965 (2) SA 135 (A) at 141B-H; *Waverley Blankets Ltd v Ndima and Others*; *Waverley Blankets Ltd v Sithukuza and Others* (1999) 20 ILJ 2564 (LAC) para 10; *Superb Meat Supply CC v Maritz* (2004) 25 ILJ 96 (LAC) para 16 and *Queenstown Fuel Distributors CC v Labuschagne NO and Others* (2000) 21 ILJ 166 (LAC) 174 E-F.

the misconduct charges to be so serious that the employment relationship was irreparably damaged and that dismissal would be the only appropriate sanction for each of the charges. I am therefore of the view that the appellant has shown that the respondent was dismissed pursuant to a disciplinary process and as such there are good prospects of success. The question whether the conclusion by the chairperson that the dismissal was fair is an issue that can be properly and fairly be determined at an arbitration hearing where the versions of both parties are to be considered.

[34] It is in my view clear from the conduct of the appellant that it wanted to pursue its dispute with the respondent to finality. It is also in the interest of all the parties that the matter be decided fairly. I am satisfied that on the material on record the appellant has shown good cause for rescission of the arbitration award granted by default. The applications for condonation for the late filing of the Power of Attorney as well as the Notice of Appeal should be granted. It would be in accordance with the requirements of the law and fairness that each party pay its costs.

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

a) The applications for the condonation for the late filing of the Power of Attorney as well as the Notice of Appeal are granted.

b) The appeal succeeds and the order of the Labour Court is set aside and replaced with the following order:

1) The arbitration award is reviewed and set aside.

2) The application for rescission is granted.

3) Each party is to pay its costs.

c) Each party is to pay its costs of the appeal.

_____

Tlaletsi DJP

Ndlovu JA *et* Coppin AJA concur in the judgment of Tlaletsi DJP.

APPEARANCES:

FOR THE APPELLANT:	Mr C E Watt-Pringle SC
	Instructed by Allardyce & Partners
FOR THE RESPONDENT:	Mr S M Matime
	Instructed by T G Mohoje Attorneys