

EMPLOYMENT

The correct approach to Section 138(5)(a) of the LRA: rescission or re-enrolment?

31 May 2023 6 min read

On 27 May 2023, as a direct response to Labour Appeal Court's judgement of *Mohube v Commission for Conciliation, Mediation and Arbitration* (JA18/2022), the CCMA revised its 05 October 2021 Directive. The 2021 Directive introduced new reforms where applicants whose disputes were dismissed in terms of section 138(5)(a) of the LRA could request the re-enrolment of their matters by completing a form and providing good reasons to substantiate their non-appearance at the hearing. The new 2023 Directive reinstates the traditional position where the dismissal of arbitration proceedings owing to the applicant's absence is challenged by rescinding the decision in terms of section 144 of the LRA. A crucial caveat, as directed by the Court in *Mohube* and effected in the 2023 Directive, is that a commissioner may dismiss a matter as a measure of last resort.

Pursuant to the 2021 re-enrolment reforms, a slew of amendments were effected to the CCMA Rules – 30, 31C and 32(2) – which sought to regulate how and when a dismissal may be meted as a result of non-appearance and the consequent process of re-enrolment. The CCMA is working on further revising the new Rules so as to bring them into alignment with *Mohube*. Amidst the swirling tempest of reforms and revised reforms, a question emerges: is this necessary? The answer is no in our view.

A question that should shape the course of the discussion around the interpretation of section 138(5)(a) is: can you dismiss a matter without hearing the facts? If the matter is dismissed without entertaining the substance of the dispute, can such conduct truly be understood to constitute a dismissal? If such conduct is not a dismissal in the true sense, what is it?

We cannot speak of a true dismissal unless the merits of the dispute are ventilated. In fact, the Labour Appeal Court pronounced on the appropriateness of dismissing a matter on account of technical or formalistic issues in *PT Operational Services (Pty) Ltd v RAWU obo Ngwetsana* (2013) 34 ILJ 1138 (LAC). Here, the Commissioner dismissed an application rescinding an earlier arbitration award, without hearing the merits, because it was filed late without a condonation application. The Court held that where "a ruling is of a technical or a formalistic nature" the correct approach is to strike the matter from the roll as opposed to dismissing it. Why? That is because a dismissal is dispositive of the matter. Consequently, the matter is disposed of without determining the substantive claim.

Much like in *PT Operational Services*, when a commissioner dismisses a matter in terms of section 138(5)(a), the commissioner is not dismissing the matter on the merits. So the dismissal is on account of a technical or formalistic issue – the applicant who referred the matter to the CCMA is absent. Clearly the dismissal that is envisaged under section 138(5)(a) is a different kind of dismissal to what we traditionally understand the word to mean. Now, since there is contention on the kind of dismissal that is envisaged under section 138(5)(a), we enter the realm of ambiguity. We must then embark on an interpretative exercise to precisely understand what dismissal means in the context of this provision and the broader framework of the LRA.

The Court in *PT Operational Services* wrestled with what the word "dismissal" meant and came to the conclusion that its usage did not necessarily imply that the substantive claim is disposed of on the merits. Resultantly, the Court emphasised that "[o]ne will still have to enquire, where there is doubt, whether the matter was dismissed on the merits or not". Evidently, there are nuances to the term dismissal. It is not singular in form. What must guide the adjudicator is whether or not the matter is dismissed on the merits? If it is not dismissed on the merits, that dismissal is equivalent to striking the matter off the roll.

The Labour Court in *Solomons v Phokela NO and Others* (JR99/2021) [2021] ZALCJHB 192 agrees with and builds on the precedent espoused in *PT Operational Services* by extending its application to section 138(5)(a). *Solomons* rightly enquired on whether the matter was dismissed on the merits or not, because there was doubt on the nature of the dismissal. Having conducted the enquiry, *Solomons* found that the type of dismissal, in that case, was akin to striking off as it was a dismissal of a technical / formalistic nature.

As we know from recent developments, the Court in *Mohube* disagrees with *Solomons* on the grounds that interpreting “dismissal” to mean “struck-off from the roll” is inconsistent with the plain and unambiguous meaning of the word. The *Mohube* approach disregards the fact that the Constitutional Court in *Cool Ideas 1186 CC v Hubbard and Another* 2014 (4) SA 474 (CC) broadened the statutory interpretative exercise to include a purposive and contextual approach, which is what we respectfully submit *Solomons* did. We also find the language used by the Court in *Mohube* in dismissing the *Solomons* interpretative approach regrettable.

It is most unfortunate that the Court in *Mohube* resorts to the conventional rescission application approach without addressing the judgement of *PT Operational Services*, which upholds the notion that the word dismissal does not have one meaning. In *Mohube*, the Court does not explain why it disagrees with a nuanced understanding of dismissal as established in *PT Operational Services*. The legal fraternity would have benefited from getting insight on the reasons that informed the Labour Appeal Court’s shift in perspective in *Mohube*, especially considering that the Judge President previously concurred with the judgment in *PT Operational Services* in 2012.

The current situation presents us with two conflicting judgments from the Labour Appeal Court. It is important to note that *Mohube* does not overturn *PT Operational Services*. In our view, *Solomons* followed the precedent set by *PT Operational Services*. In addition, the 2021 Directive aligns with *PT Operational Services*. Therefore, there is scope for the CCMA to continue implementing re-enrolment process when arbitration proceedings are dismissed under section 138(5)(a).

We hold the view that the 2021 Directive was spot on and should not have been tinkered with. It is crucial not to favour interpretations that could ultimately burden laypersons and, in some cases, indigent persons, for whom these provisions are intended. Further, re-enrolment is not there for the taking, the applicant is still required to provide good reasons before they are granted another bite at the cherry. In any event, the amended Rules – in particular Rule 31C(2) – permits respondents to oppose requests for re-enrolment. This affords fairness to both parties.



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