

RESCISSION

I received a CCMA Ruling/Award against me in my absence as I was not aware of the scheduled case, what should I do?

In such instance you may apply for rescission. However, rescission applications are not always successful and there are only certain instances whereby it will be considered and be successful.

Rescission is an application to have an arbitration award or ruling overturned or annulled. The ruling or award may be rescinded on the commissioner's own accord or, on application by any affected party.

An application for rescission will only be considered if the grounds of such an application is in line with Section 144 of the Labour Relations Act, 1995, being:

- If the award or ruling was erroneously made in the absence of any party,
- If there is an ambiguity or an obvious error, but only to the extent of that ambiguity or error, and
- If the award or ruling was granted as a result of a mistake common to the parties.

In terms of the provisions of the Labour Relations Act, a party should only file a rescission application whereby the party to which the award or ruling was made was absent from the hearing and can show on "good cause" why they were absent or were not in wilful default.

In Shoprite Checkers (Pty) Ltd v Commission for Conciliation Mediation and Arbitration & Others (2007) 28 ILJ 2246 (LAC), the court held that good cause should be read into s144 of the LRA. The decision, in that case, confirmed what had already been decided in Northern Training Trust v Maake & Others (2006) 27 ILJ 828 (LC), where the test for rescission in terms of s144(a) of the LRA was said to be the following:

"The enquiry in an application for rescission on an arbitration award is consequently bipartite. The first leg is one which is concerned with whether or not the notice of set-down was sent, a probability then created that the notice sent was received. The second leg to the enquiry is one which concerns itself with the reasons proffered by the applicant who failed to attend the arbitration proceedings. Such applicant needs to prove that he or she was not wilful in defaulting and that he or she has reasonable prospects of being successful with his or her case, should the award be set aside. However, the applicant need not deal with the merits of the case."

The onus of proof in relation that the applicant of the rescission application was not wilful in defaulting will therefore rest on the applicant to prove.

When it come to the issue of "erroneously made", refers to the content of the award. The party alleging an error in the award must show on good cause;

1. Any clerical or numerical calculation errors in the ruling so as to correct the error.
2. Supplement or exclude any other costs or interest on an award where it contains a clear error or omission.

A rescission application must be made and submitted for rescission of an award or ruling within 14 days of the date on which the applicant became aware of:

- the award,
- or ruling a mistake common to the parties.

It is important to take note that the 14 days' timeframe for a rescission application as stipulated expressly states that it is applicable from the date the applicant became aware of the award or ruling and not 14 days after the issuing of the award or ruling.

However, if the 14 days have lapsed, it is possible to apply for condonation along with the Rescission application. The condonation application will address factors such as the degree / extent of the lateness of the referral, the reason for the lateness, the prospects of success on the merits, prejudice to the other party & other relevant factors.

It is however strongly advised to ensure that you adhere to the 14 days' timeframe of a rescission application, otherwise you need to succeed in both the condonation application and rescission application to have an award or ruling rescinded and this can become a challenging task.

Filing an application for rescission has three requirements within the application process itself which must also comply with the grounds and timeframes of a rescission application as discussed. Failure to comply with these requirements will result in a defective referral, making the referral invalid. A rescission application must:

- be made by means of an application.
- the application must be supported by an affidavit, including relevant proof where applicable.
- a copy of all documents must be sent to the other party and to the CCMA with proof of service.

There are no promulgated forms or applications for rescission that must be used, however the CCMA has put together a standard application form which is available on our website, as well as the CCMA's website.

Once a rescission has been filed, the CCMA must give a ruling on the rescission application within 14 days. Such a ruling will be final and binding. If you are still not satisfied with the ruling, a party may approach the Labour Court for a review application.

In Colyn v Tiger Foods Industries Limited t/a Meadow Feed Mills (Cape) 2003 (6) SA 1(SCA),
Jones AJA with regard to Rule 42 of court stated the position as follows:

[6] It is against this common law background which imparts finality to judgment in the interest of certainty, that Rule 42 was introduced. The Rule caters for mistakes. Rescission or variation does not follow automatically upon proof of a mistake. The Rule gives the Court a discretion to order it, which must be exercised judicially.

From the above case it is clear that rescission is not automatically granted when the proof in relation to the application for rescission has been provided with the application. Therefore, your rescission application must cover at least one of the grounds as per Section 144 of the Labour Relations Act, 1995 and "good cause" must be motivated and shown, and all available proof, where applicable, must accompany your rescission application for it to be considered and possibly be granted.

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