

There are ways around an arbitration award

By Ivan Israelstam

The Labour Relations Act (LRA) does not allow any party to appeal against an arbitration award.

However, such awards can be overturned by other means.

In fact, there are two ways of going about setting aside an arbitration award: by Labour Court review or by rescission application.

On one hand, according to the the Labour Court Review, the party that is unhappy with the award asks for the Labour Court to set the award aside on the grounds that the arbitrator, in making the award, "misconducted himself/herself".

The review application should by no means be viewed as an appeal against the award decision but rather as a claim that the arbitrator:

- Committed misconduct in relation to his/her arbitration duties;
- Committed a gross irregularity in the conduct of the arbitration proceedings;
- Exceeded his/her powers; or Made the award improperly.

The above criteria refers to misconduct and irregularities, including, but not limited to:

- Taking into account evidence that was not put before the arbitrator;
- Refusing to allow valid and relevant evidence to be brought;
- Ignoring statutory requirements or legal principles;
- Unduly assisting one or other party with his/her case;
- Delivering a biased award;
- Taking a bribe; and
- Failure to apply his/her mind to the facts in evidence.

The rescission application, on the other hand, is normally made to the same arbitrator who made the original arbitration award.

It stipulates that a party may, within 14 days of becoming aware of the arbitration award, apply to the arbitrator to rescind (cancel) the award.

This can be done on the grounds that the award:

- Was erroneously sought or made in the absence of any party affected by it;

- Contained an ambiguity (ie. could mean two different things) or an obvious error or omission; or
- Was granted as a result of a mistake common to the parties.

The grounds for rescission are very narrow and such applications are most commonly brought when one party has not attended the arbitration hearing and the award has been made in that party's absence.

For example, if the employer fails to attend the arbitration hearing, the arbitrator might, on the employee's evidence, decide that the dismissal was unfair.

On the other hand, the rescission application stipulates that, if the employee fails to attend the arbitration hearing, the arbitrator may decide to dismiss the case and close the file.

However, where the party who has failed to attend the hearing has an excuse for his/her absence he/she may apply to the arbitrator.

He/she may rescind the award so as to allow a new arbitration hearing to be set down.

Typical reasons for rescission applications being granted include:

- The rescission application is made within the 14-day deadline; and
- Valid proof is submitted of illness or of failure of CCMA or bargaining council to serve the notice of set down on the party concerned.