THE LABOUR COURT OF SOUTH AFRICA
(HELD AT JOHANNESBURG)

CASE NO. JR 1644/06

In the matter between:

CEMENTATION MINING	**Applicant**
And	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**1ST Respondent**
DINTLE FREDERICK MATSHABA	**2ND Respondent**
PETRUS SIKHOSANA	**3rd Respondent**
INTELLECTUAL DEMOCRATIC WORKERS UNION	**4TH Respondent**

JUDGMENT

VAN NIEKERK J

Introduction

[1] This is an application to review and set aside a ruling made by the second respondent (the commissioner) dated 26 October 2007, in terms of which he dismissed the applicant's application for rescission.

[2] The applicant states in its founding affidavit that it is more correctly described as "Murray and Roberts Cementation (Pty) Ltd", and, to the extent that it is necessary, the citation of the application is varied accordingly. After being called upon to show cause why it should not be joined as a respondent, and in view of its consent thereto, the Intellectual

Democratic Workers Union was joined as a respondent to these proceedings.

The facts

[3] After his dismissal for misconduct on 7 January 2005, the third respondent referred a dispute to the CCMA. The dispute was referred in due course to arbitration. On 30 September 2005, Commissioner Dunn issued a default arbitration award, in circumstances where the applicant was not present at the proceedings. In her award, Commissioner Dunn found that the third respondent had failed to make out a case, and she dismissed the third respondent's claim.

[4] After filing an unsuccessful application to rescind the default award, the third respondent filed an application in July 2006 under case no JR 1644/06 to review and set aside the award. The applicant did not oppose the proceedings on the basis, it says, that since the third respondent (the applicant in the application for review) had not requested the Court to determine the merits of his claim, it assumed that should the award be reviewed and set aside, the matter would be referred back to the CCMA for rehearing.

[5] On 13 February 2007, this Court reviewed and set aside Commissioner Dunn's award, and substituted her award with the following order:

> *"The dismissal of the Applicant is declared to be both procedurally and substantively unfair and the Applicant is to be reinstated back to his employment with the Third Respondent with effect from 7 January 2005 with full emoluments."*

[6] The applicant then applied to have the substituted order rescinded, on account of the fact that it had not been in attendance at the arbitration proceedings before Commissioner Dunn. An application for leave to appeal against the judgment of this Court was filed, but later abandoned. The rescission application was served on 27 May 2007. On 9 November 2007, the Commissioner handed down his ruling in the application for rescission.

[7] In his ruling, the commissioner recorded the background to the rescission application, that the third respondent had had his case dismissed on account of his failure to attend at the arbitration hearing and that he had failed, when requested to do so on 30 July 2007, to respond to correspondence addressed to him regarding the date on which he became aware of the default award. On this basis, the commissioner dismissed the application.

[8] When the ruling was brought to the applicant's attention, the applicant appreciated that the commissioner had misconstrued the application. First, the commissioner noted that the application was directed at rescinding a default award made by commissioner Dunn, whereas the application was in truth directed at the substituted order of this Court. Further, it was the third respondent (and not the applicant) who had been unsuccessful in the initial arbitration proceedings; it was the applicant and not the third respondent who had sought rescission and it was the third respondent (and not the applicant) who had never been in default. The applicant then sought to have the rescission ruling itself rescinded, on account of the fact that the commissioner had failed to address the application initiated by the applicant. The present review was then initiated, with the view to finally disposing of the matter.

The law

[9] In *Fidelity Cash Management Services v CCMA & others* [2008] 3 BLLR 197 (LAC), the Labour Appeal Court affirmed that the Constitutional Court's judgment in *Sidumo*[1] did not obliterate the grounds of review in s 145 of the Act – what it held was that they were "suffused by reasonableness". Thus, for example, when an arbitrator misconceives his or her function or fails to apply his or her mind to the issues, the aggrieved party is denied a fair hearing and the outcome of the proceedings, in the form of a ruling or award, stands to be reviewed and set aside. In other words, while the *Sidumo* judgment concerned result-based reasonableness, an error in process alone (as opposed to outcome) may result in a CCMA award or ruling being unreasonable (see *CUSA v Tao Ying Metal Industries & others* (2008) 29 *ILJ* 246 (CC).

Analysis

[10] The record in the present matter indicates that the commissioner failed to address the application initiated by the applicant and that in doing so, he failed to apply his mind to the issues. The heading to the award reflects "Petrus" as the applicant and "Cementation Mining" as the respondent. After setting out a perfunctory background, the commissioner concludes:

> *"The Commission notified the applicant in a letter dated the 30 July 2007 that the date when the applicant became aware of the default award must be furnished. The applicant was given fourteen (14) days to provide the date. The applicant has failed to heed the request or directive.*
>
> *The application is therefore defective and does not meet the requirements of the rules.*

[1] *Sidumo & another v Rustenburg Platinum Mines & others* [2007] 12 BLLR 1097 (CC)

RULING.

The applicant's rescission application is not granted and therefore dismissed."

Plainly, the commissioner considered the third respondent to be the applicant in the application for rescission, and approached the application on that basis. The commissioner's failures were not limited to a confusion of the labels of "applicant" and "respondent" – what would have amounted to no more than a typographical error. The record and the terms of the award make it abundantly clear that the commissioner's confusion was more far-reaching and deep-seated – for example, the commissioner records in paragraph 2 of the award that:

"The arbitration hearing obtained on the 22 September 2005 at the CCMA Offices 20 Anderson Street Johannesburg and the applicant failed to attend and consequently his case was dismissed. The applicant brought a rescission application."

(The commissioner then went on to deal with the matter as reflected in the quote from the award in the preceding paragraph of this judgment.) This summary of the facts is wholly incorrect - the third respondent was present at the arbitration proceedings (his case was dismissed despite him being present). While he had filed an application for rescission (in December 2005), that was not the application before the commissioner. What was before the commissioner was the application for rescission filed by the applicant in these proceedings on 21 May 2007. The best that can be said for the commissioner is that he confused the application before him with the application for rescission that the third respondent had brought in December 2005.

[11] The following is apparent from the affidavit that was before the commissioner: the applicant in these proceedings had failed to attend the arbitration hearing in September 2005 because it was unaware of the notice of set down; the applicant was not in willful default; the applicant had attended the arbitration proceedings in a directly related matter[2] and convened before another commissioner; the applicant was not in default in relation to any directive addressed to it; and the issue of prospects of success was properly addressed. In these circumstances, in my view, the applicant had satisfied the requirements for the granting of the rescission application. Had the commissioner applied his mind to the application, he would have granted it.

[12] The applicant seeks for the Court to finally determine the matter, as opposed to remitting it to the CCMA for a fresh hearing. The LAC and this Court have held that they should correct a decision rather than refer it back to the CCMA for a hearing *de novo* in the following circumstances: (i) where the end result is a foregone conclusion and it would merely be a waste of time to order the CCMA to reconsider the matter; (ii) where a further delay would cause unjustified prejudice to the parties; (iii) where the CCMA has exhibited such bias or incompetence that it would be unfair to require the applicant to submit to the same jurisdiction again; or (iv) where the Court is in as good a position as the CCMA to make the decision itself.[3] In this matter, the factors listed under (i), (ii) and (iv) are present. In these circumstances, it is appropriate to grant a substituted order in terms of which the applicant's rescission application is granted.

Representation and Costs

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[2] This matter concerned one Mohoase, who was dismissed with the third respondent.

[3] See: *Department of Justice v CCMA & others* (2004) 25 ILJ 248 (LAC) at 304, para 48; *Rustenburg Platinum Mines Ltd v CCMA & others* (2007) 28 ILJ 417 (LC) at para 12.

[13] The LRA restricts the right of appearance in this Court. This is not done so as to protect vested interests or to restrict access to justice. All of those persons who enjoy the right of appearance are accountable to professional bodies, or to the leadership and members of the unions or employers' organisations that they represent. In other words, litigants who are aggrieved by the conduct of their representatives have a right of recourse to structures that are designed to ensure accountability. Regrettably, this Court continues to witness a daily parade of representatives claiming to be officials representing trade unions and employers' organisations, or various other self-styled advice bureaux. Many of them hide behind certificates of registration when in reality, they are persons who are operating businesses for their own benefit in a market that is wholly unregulated, and in which they are entirely unaccountable for their advice and their actions. The right of access to justice demands that litigants enjoy access to legal advice and to representation in this Court. The LRA gives effect to this right by affording the right of appearance in this Court to a broader range of representatives than is the case in other Courts of equivalent status. Regrettably, as I have noted, this concession has been abused, and continues to be abused. The primary guardian of the public interest in this regard is the Registrar of Labour Relations, who is afforded powers under the Act to deregister those unions and employer organisations that are not genuine, or that fail to meet the reporting and accounting requirements that apply to registered bodies. As the underwriter of the guarantee of accountability to the members of unions and employer organisations, the Registrar is burdened with a responsibility that is central to the integrity of the systems of collective bargaining and dispute resolution, and which should not be shirked.

[14] In the present matter, JM Motsumi, an attorney of Oberholzer, appears throughout as the third respondent's attorney of record. JM Motsumi Attorneys are reflected as the third respondent's attorneys in the Form

7.11 referral dated 1 February 2005, and on all of the pleadings before the CCMA and before this Court. All of the formal notices filed in this application, including the Notice of Intention to Oppose, the service sheet filed with the third respondent's answering affidavit and the third respondent's heads of argument, are filed by JM Motsumi Attorneys. Correspondence between the parties' representatives was conducted, form the third respondent's side, on the letterhead of JM Motsumi Attorneys. All of these documents and letters are signed by a Mr. Nimrod Mzinyati. When this matter was called, Mzinyati appeared on behalf of the third respondent. When the basis of his right to appear was questioned, Mzinyati advised the Court that he was a union official, representing "Ubuntu". When he was asked whether that organisation was a registered trade union, he replied that it was. The matter proceeded on the basis of this assurance, but Mzinyati was directed to file a certificate of registration and proof of his status as an official by no later than 23 October 2009.

[15] On 23 October 2009, Mzinyati filed a letter, signed by the general secretary of an organisation styled as the Intellectual Democratic Workers Union, certifying that a Mr Nimrod Mzinyati was an official of that union. The Intellectual Democratic Workers Union had previously played no role whatsoever in these proceedings, nor had Mzinyati disclosed, when the matter was pertinently raised with him at the hearing of this application, that he or the third respondent were in any way affiliated to the Intellectual Democratic Workers Union.

[16] The Court's own investigation subsequently revealed that the Ubuntu Labour Organisation of South Africa had been refused registration on 22 January 2002. It concerns me that Mzinyati appears to have lied when he assured the Court that the union was registered. It also concerns me that Mzinyati, who acknowledged in this Court that he is not an attorney, signed all of the pleadings and correspondence in this matter on behalf of JM Motsumi attorneys and thus, on the face of it, held himself out to be an

attorney, instructed by the third respondent. If he did this with the knowledge of Motsumi (it is difficult to conceive that he did so without Motsumi being aware of his actions), Motsumi has permitted a person who is not an attorney to hold himself out to be one, and to conduct himself as such from an attorney's offices. Whether Motsumi is guilty of professional misconduct is a matter for the Law Society to investigate and determine, and I intend to refer this matter to the Law Society for that purpose.

[17] Similarly, I am far from satisfied that the Intellectual Democratic Workers Union is a genuine trade union. After the challenge to Mzinyati's status as an official of the Ubuntu Labour Organisation of South Africa, far from providing the proof of registration of that organisation as he undertook to do, it seems that within 48 hours Mzinyati found the convenient shelter of the Intellectual Democratic Workers Union from which to pursue his activities. The third respondent was never a member of the Intellectual Democratic Workers Union at the time of his dismissal, or at the time that this application was filed or argued. Mzinyati conceded as much when questioned on this issue. The irresistible conclusion is that the third respondent's membership of the union (if he is a member at all) coincided with Mzinyati's almost overnight appointment as one of its officials. For these reasons, I intend to direct the Industrial Registrar to conduct an investigation into whether the Intellectual Democratic Workers Union is a genuine trade union.

[18] In these circumstances, and in the absence particularly of any existing collective bargaining relationship that might be prejudiced by a costs order or any other compelling reason to depart from the general rule that costs should follow the result, the third and fourth respondents ought to be responsible for the applicant's costs.

I accordingly make the following order:

1. The ruling made by the second respondent dated 26 October 2007 is reviewed and set aside;

2. The ruling is substituted by the following;

   "The arbitration award (as substituted by the Labour Court under case number JR 1644/06) is rescinded.";

3. The third respondent and the Intellectual Democratic Workers Union, jointly and severally, the one paying the other to be absolved, are to pay the costs of these proceedings;

4. The Registrar is directed to forward a copy of this judgment to the Law Society of the Northern Provinces to investigate whether Mr JM Motsumi is guilty of professional misconduct by permitting a person who is not an attorney to sign pleadings and correspondence on his behalf and thereby to hold himself out as an attorney;

5. The Registrar is directed to forward a copy of this judgment to the Registrar of Labour Relations to investigate whether the Intellectual Democratic Workers Union is a genuine trade union.

ANDRE VAN NIEKERK

JUDGE OF THE LABOUR COURT

Date of hearing: 21 October 2009
Date of judgment: 13 November 2009

Appearances:

For the applicant: Adv R B Wade
Instructed by: Van Zyl's Incorporated

For the respondent: Mr. N Mzinyati (union official)