THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR 2177 / 16

In the matter between:

DANONE SOUTHERN AFRICA (PTY) LTD	**First Applicant**
CAPACITY OUTSOURCING (PTY) LTD	**Second Applicant**
And	
COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION	**First Respondent**
MOHLALA, A N.O.	**Second Respondent**
CASUAL WORKERS ADVICE OFFICE	**Third Respondent**
CHET CHEMICALS (PTY) LTD	**Fourth Respondent**
POVEY MULVENNA PLACEMENTS (PTY) LTD T/A KHAYA EMPLOYMENT SERVICES	**Fifth Respondent**
GREYS WESTERN STAR OUTSOURCING GROUP (PTY) LTD	**Sixth Respondent**
DAWN CARGO (PTY) LTD	**Seventh Respondent**
MOLAETSA WA BOTSHELO TRADING AND PROJECTS CC T/A CRE8WORK	**Eighth Respondent**
MATOME TLOUAMMA AND 291 OTHERS	**Ninth to Further Respondents**

Heard: **20 June 2017**

Delivered: **30 June 2017**

Summary: CCMA *in limine* proceedings – misconduct by arbitrator – test for review – s 145 of LRA 1995 considered

CCMA process – entitlement or bring application and locus standi – representative not competent to bring application – application fatally defective

CCMA *in limine* proceedings – conduct by commissioner in coming to finding – commissioner *mero motu* making own enquiries without knowledge of parties – conduct irregular

CCMA *in limine* proceedings – consolidation of disputes – no proper basis for consolidation – finding of commissioner irregular

Review of ruling – no basis for ruling made – ruling reviewed and set aside – substituted with determination that application be dismissed

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REASONS

SNYMAN, AJ

Introduction

[1] This matter came before me as an unopposed review application on 20 June 2017. After considering the application papers, and hearing argument from Mr Snider for the applicants, I made the following order:

1. The applicants' review application is granted.

2. The ruling of the second respondent, arbitrator A R Mohlala, dated 22 September 2016, under case number GAEK 9832 – 15, is reviewed and set aside.

3. The ruling of the second respondent is substituted with a ruling that he application brought by the third respondent, Casual Workers' Advice Office, is dismissed.

4. There is no order as to costs.

5. Written reasons for this order will be handed down on 30 June 2017.'

This judgment now constitutes the written reasons as contemplated by paragraph 5 of my order referred to above.

[2] As touched on above, the applicants' review application arose from a ruling made by the second respondent, as arbitrator, following an application brought by the third respondent, on behalf of a number of individual employees at different employers, against these employers, which included the applicants. In this application, the third respondent sought to consolidate a number of individual cases brought on behalf of these employees against their respective employers, into one dispute. The third respondent also sought declaratory relief to the effect that the dispute referred against each of these individual employers be declared to have been brought within the requisite time limits, and thus no condonation was necessary. Alternatively, and if the disputes were out of time, the third respondent prayed that condonation be granted. The second respondent delivered his ruling in respect of this application by way of a written ruling dated 22 September 2016, in which the second respondent first consolidated all the individual matters, and then also granted condonation. This ruling led to the applicants' review application, which has been brought in terms of Section 145 as read with Section 158(1)(g) of the Labour Relations Act[1] ('the LRA'). I will now proceed to decide the applicants' review application, by first setting out the relevant factual matrix.

The relevant facts

[3] As stated above, this matter has as its origin an application brought by the third respondent, and filed on 29 April 2016. The third respondent purported to bring this application on behalf of the ninth to further respondents ('the individual respondents'). It must be re-iterated from the outset that the third respondent is not a trade union established and registered under the LRA.

[1] Act 66 of 1995.

[4] A perusal of the application of 29 April 2016 immediately highlights several difficulties with it. It is signed by three unknown signatories. It is unsigned on behalf of the third respondent, although it is reflected as being the representative bringing the application. The individual employees ('individual respondents') that are a party to the application are not identified and listed in the application. There is also no proper proof of service of this application.

[5] The application by the third respondent is supported by an affidavit deposed to by one Ighsaan Schroeder ('Schroeder'), who describes himself as the 'co-ordinator' of the third respondent. According to Schroeder, the third respondent is not representing the individual respondents, but 'assisting' them in their various cases. Schroeder records that the third respondent has an interest in the matter because of its 'purpose', which is to 'assist and advice precarious workers to access their LRA rights' (sic).

[6] In the supporting affidavit, Schroeder simply identified a number of individual cases before the CCMA, and asked that these cases be consolidated. But no case of any kind is made out in the affidavit as to why this should be done. Schroeder then deals with the time limit issue, contending that the application is founded on Section 198D (as read with Section 198A) of the LRA, and that based on his views of the provisions of this Section, the various disputes have been referred to the CCMA in time.

[7] The first applicant (which I will refer to as 'Danone' in this judgment), filed an answering affidavit to this application. This answering affidavit was filed in respect of two of the individual disputes sought to be consolidated by the third respondent, which disputes involved Danone. Danone specifically stated that the dispute described as 'Matlakala and 20 Others' under case number GAEK 9832 – 16 did not exist and explained and justified in the answering affidavit why this was the case.

[8] Danone then dealt with the other dispute it was involved in, being the dispute under case number GAEK 9832 – 15, and relating to 'Nkuna and 53 Others'. Danone explained that there was an earlier dispute in terms of Section 198A of the LRA that was brought on 30 June 2015 under case number GAEK 5095 – 15 that involved a number of employees described as 'Bheki Mdletsane and

66 Others'. This dispute was ultimately settled on 6 October 2015, on the basis that the employees listed in an annexure to the agreement, as well as those employees earning below the BCEA threshold and who did not perform temporary work, shall be deemed to be employees of Danone for the purposes of the LRA.

[9] Danone further explained that on 20 November 2015, the third respondent then referred a dispute in terms of Section 198A to the CCMA under case number GAEK 9832 – 15, which is the dispute of 'Nkuna and 53 Others' referred to above. A list of 54 individual employees accompanied this referral. At conciliation of this dispute on 7 January 2016, 32 (thirty two) of these individual employees party to this referral withdrew from the matter, on the basis that they were members of a trade union, ITU, who would be representing them in their own separate proceedings. This left 21(twenty one) individual employees still party to the dispute. Then, and following this development, Danone raised a point *in limine* to the effect that the dispute was referred to the CCMA out of time, no condonation was applied for, thus the CCMA lacked jurisdiction. The point *in limine* was upheld by commissioner Lance Cilliers, who issued a written ruling that the CCMA lacked jurisdiction to entertain the matter. This disposed of the matter where it came to these remaining 21(twenty one) individual employees.

[10] The 32 (thirty two) individual employees that were members of ITU and that withdrew from the matter on 7 January 2016, pursued their own separate dispute under case number GAJB 24207 – 15. This dispute ultimately proceeded to arbitration on 13 April 2016, but was never arbitrated. Instead, on 13 April 2016, the dispute was settled between the parties, by way of a written settlement agreement. It was *inter alia* agreed in this settlement that the same settlement agreement concluded on 6 October 2015 in respect of the first dispute as set out above, would equally apply to all the employees in this dispute. This therefore disposed of this dispute as well.

[11] The upshot of the case presented by Danone in the answering affidavit was simply that as at 29 April 2016 when the application was brought, there were no live disputes in existence against it, which could form the subject matter of any of the relief sought in the application of the third respondent.

[12] In addition to the above defence on the merits, so to speak, Danone also raised a number of points *in limine*. The first point was that the third respondent had no *locus standi* to bring the application. The second point *in limine* was that the individual employees were not identified or listed in the application, and that the mandate from such individual employees for the third respondent to bring this application remained unproven. The third point *in limine* was that insofar as the third respondent was asking for condonation, it had made out no case for it.

[13] The other points *in limine* raised by Danone in essence related to legal submissions in respect of the provisions of Sections 198A and 198D of the LRA, and are not relevant for the purposes of deciding this review, considering the basis on which I have decided this matter as elaborated on hereunder in this judgment. I will therefore not deal with these issues further.

[14] The other employers cited in the disputes in the third respondent's application also opposed the application. Some of these employers were represented by Kirchmanns Inc attorneys, and they also filed an answering affidavit. In this answering affidavit, which is dated 31 May 2016, the same *in limine* issues as raised by Danone has equally been raised, with an additional point *in limine* added to the effect that the notice of motion in the application was fatally defective for want of compliance with Rule 31 of the CCMA Rules. It was also specifically pointed out that the disputes involving these other employers as well, as cited in the third respondent's application, had already been dismissed by the CCMA for want of jurisdiction, and no live disputes existed. The actual rulings in these various matters were attached to this answering affidavit.

[15] All the employer parties, including Danone, sought a determination from the CCMA that the application brought by the third respondent be dismissed.

[16] Schroeder then filed a replying affidavit on 10 June 2016. Despite all the clear warnings dispensed to the third respondent as contained in the two answering affidavits with which the third respondent had been served, no decisive action was taken by it to remedy any of the clear defects in the application. Also, none of the factual background provided by the employer parties were assailed. In fact, Schroeder glibly states that despite the ruling by

commissioner Cilliers dismissing one of the Danone matters, the third respondent 'assisted' the employees to 're-refer' their dispute to the CCMA, and this was the dispute Danone had said did not exist. But even this version surely does not change the fact that the dispute had actually been disposed of earlier.

[17] Schroeder further said in reply that the third respondent did not represent the individual respondents, and merely assisted them, and that individual respondents had signed the application. This statement is clearly not true, as a simple reading of the application shows that the individual respondents did not sign it. Schroeder stated that he would provide 'proof of mandate' at the hearing of the matter. But this mandate was never provided. Of relevance to this review application, and finally, Schroeder even says that where the CCMA determines that it has no jurisdiction, it has not exercised its 'statutory function' and the dispute can simply be referred to the CCMA all over again.

[18] However, and despite all of the above, the second respondent then proceeded to grant the application brought by the third respondent. Not only did the second respondent consolidate the matters, but he also granted condonation for any late referrals. It is clear from the award that the second respondent had very little or no regard to the pertinent issues raised by the employers. The effect of the ruling of the second respondent also is that disputes already disposed of by the CCMA are in essence resurrected. Hence the review application.

Test for review

[19] In this matter, the traditional review test as articulated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others*[2] does not find application. This is because the review application in the current proceedings concerns, at its core, two considerations, being the jurisdiction of the CCMA and the misconduct of the second respondent as arbitrator.

[2] (2007) 28 ILJ 2405 (CC). See also *Herholdt v Nedbank Ltd and Another* [2013] 11 BLLR 1074 (SCA) at para 25; *Gold Fields Mining South Africa (Pty) Ltd (Kloof Gold Mine) v Commission for Conciliation, Mediation and Arbitration and Others* [2014] 1 BLLR 20 (LAC) at para 14.

[20] Where it comes to the review test in the case of a contention of misconduct on the part of the arbitrator, Navsa AJ in *Sidumo* held that in light of the constitutional requirement (in s 33 (1) of the Constitution) everyone has the right to administrative action that is lawful, reasonable and procedurally fair, and said that:

> 'the reasonableness standard should now suffuse s 145 of the LRA'.

[21] Specifically therefore, the judgment in *Sidumo* does not contemplate that the review grounds as listed in Section 145(2)(a) are obliterated. A review application can still succeed without a review applicant having to show that the outcome arrived at by the arbitrator is unreasonable, where the review grounds are founded on the text of Section 145(2)(a) itself.[3] For example, if an arbitrator commits misconduct in the course of conducting the arbitration, it does not matter whether the outcome arrived at is reasonable, as the misconduct itself vitiates the proceedings, resulting in the award being set aside.[4] Another example is where the arbitrator had no power or jurisdiction to conduct the arbitration, because, once again, this in itself vitiates the proceedings and causes any award made pursuant thereto to be set aside on this basis alone. In *Fidelity Cash Management Service v Commission for Conciliation, Mediation and Arbitration and Others*[5] the Court considered the review test postulated by *Sidumo* and said:

> '…. Nothing said in *Sidumo* means that the grounds of review in s 145 of the Act are obliterated. The Constitutional Court said that they are suffused by reasonableness. Nothing said in *Sidumo* means that the CCMA's arbitration award can no longer be reviewed on the grounds, for example, that the CCMA had no jurisdiction in a matter or any of the other grounds specified in s 145 of the Act. If the CCMA had no jurisdiction in a matter, the question of the reasonableness of its decision would not arise. Also if the CCMA made a decision that exceeds its powers in the sense that it is ultra vires its powers, the reasonableness or otherwise of its decision cannot arise.'

[3] Section 145(2) reads: 'A defect referred to in subsection (1), means- (a) that the commissioner- (i) committed misconduct in relation to the duties of the commissioner as an arbitrator; (ii) committed a gross irregularity in the conduct of the arbitration proceedings; or (iii) exceeded the commissioner's powers'.
[4] *Premier Foods (Pty) Ltd (Nelspruit) v Commission for Conciliation, Mediation and Arbitration and Others* (2017) 38 ILJ 658 (LC) at para 14.
[5] (2008) 29 ILJ 964 (LAC) at para 101.

Similarly, and in *National Commissioner of the SA Police Service v Myers and Others*[6], the Court said the following:

> 'It should be noted, however, that the standard of review as formulated by the Constitutional Court in *Sidumo* does not replace the grounds of review contained in s 145(2) of the LRA. The grounds of review referred to in s 145(2) still remain relevant.'

[22] The nature of the determination where it comes to review grounds as articulated in the text of Section 145(2) was summarized in *Baur Research CC v Commission for Conciliation, Mediation and Arbitration and Others*[7] as follows:

> 'What this means is that where it comes to an arbitrator acting ultra vires his or her powers or committing misconduct that would deprive a party of a fair hearing, the issue of a reasonable outcome is simply not relevant. In such instances, the reviewable defect is found in the actual existence of the statutory prescribed review ground itself and if it exists, the award cannot be sustained, no matter what the outcome may or may not have been. Examples of this are where the arbitrator should have afforded legal representation but did not or where the arbitrator conducted himself or herself during the course of the arbitration in such a manner so as to constitute bias or prevent a party from properly stating its case or depriving a party of a fair hearing. The reason for reasonable outcome not being an issue is that these kinds of defects deprive a party of procedural fairness, which is something different from the concept of process related irregularity. …'

[23] The following *dictum* in *Naraindath v Commission for Conciliation, Mediation and Arbitration and Others*[8] is also relevant, where the Court said:

> '… A failure to conduct arbitration proceedings in a fair manner, where that has the effect that one of the parties does not receive a fair hearing of their case, will almost inevitably mean either that the commissioner has committed misconduct in relation to his or her duties as an arbitrator or that the

[6] (2012) 33 ILJ 1417 (LAC) at para 41.
[7] (2014) 35 ILJ 1528 (LC) at para 18. See also *Chabalala v Metal and Engineering Industries Bargaining Council and Others* (2014) 35 ILJ 1546 (LC) at para 13.
[8] (2000) 21 ILJ 1151 (LC) at para 27.

> commissioner has committed a gross irregularity in the conduct of the arbitration proceedings.'

[24] Next, and when dealing with the issue of review grounds based on a challenge of the jurisdiction of the CCMA, the Court in *SA Rugby Players Association and Others v SA Rugby (Pty) Ltd and Others,*[9] articulated the review enquiry as follows:

> 'The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was a dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then, the CCMA had no jurisdiction to entertain the dispute in terms of s 191 of the Act.
>
> The CCMA is a creature of statute and is not a court of law. As a general rule, it cannot decide its own jurisdiction. It can only make a ruling for convenience. Whether it has jurisdiction or not in a particular matter is a matter to be decided by the Labour Court…'

[25] I have had the opportunity to deal with this kind of review test, in *Trio Glass t/a The Glass Group v Molapo NO and Others*[10], and said:

> 'The Labour Court thus, in what can be labelled a 'jurisdictional' review of CCMA proceedings, is in fact entitled, if not obliged, to determine the issue of jurisdiction of its own accord. In doing so, the Labour Court is not limited only to the accepted test of review, but can in fact determine the issue de novo in order to decide whether the determination by the commissioner is right or wrong.'

[26] Against the above principles and test, the conduct and ruling of the second respondent, as complained of by the applicants, must be considered.

Analysis

[9] (2008) 29 *ILJ* 2218 (LAC) at paras 39 – 40.
[10] (2013) 34 *ILJ* 2662 (LC) at para 22.

[27] I must state from the outset that I have a number of difficulties with the conduct of the second respondent in this case, and in particular the manner in which he dealt with the application by the third respondent.

[28] The first of these difficulties concern the manner in which the second respondent dealt with the dispute of 'Matlakala and 20 Others' under case number GAEK 9832 – 16, which Danone had said did not exist. After perusing what is contained in the affidavits and hearing the parties' arguments before him, the second respondent, then, and clearly behind the back of the parties, goes off on his own mission of trying to find out what happened to this dispute. He digs up CCMA files, peruses these files, and draws conclusions, all without anyone even being aware that he is doing this. He accepts that no dispute of 'Matlakala and 20 Others' under case number GAEK 9832 – 16, exists, but then finds that this dispute actually replaced the dispute under case number GAEK 9832 – 15, which according to the second respondent occurred because of the 32 individual employees in that matter having withdrawn. He arrives at this conclusion without alerting Danone as to his investigation, and affording it an opportunity to answer what he had discovered. This conduct of the second respondent flies in the face of the principle of *audi alteram partem*. In *AA Ball (Pty) Ltd v Kolisi and Another*[11] the Court said:

> 'As stated above it is my view that the arbitrator committed a gross irregularity by finding the existence of a procedural defect in proceedings which were otherwise fair, without the matter being raised by either of the parties and did so after the proceedings had been concluded. I am also of the view that the commissioner also exceeded his/her powers in addition to committing a gross irregularity by disregarding the fundamental principle of audi alteram partem …'

[29] The aforesaid dictum in *AA Ball* was applied in *Afrisix (Pty) Ltd t/a Afri Services v Wabile NO and Others*[12] as follows:

[11] [1998] 6 BLLR 560 (LC) at 562F-G.
[12] (2014) 35 ILJ 668 (LC) at para 23. See also *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman No and Others* (2013) 34 ILJ 2347 (LC) at para 68; *Rambar Construction (Pty) Ltd t/a Rixi Taxi v Commission for Conciliation, Mediation & Arbitration & others* (2012) 33 *ILJ* 1911 (LC) at para 42.

> 'I agree with Ms *Groenewald*, who appeared for applicant, that in basing his finding on an issue applicant did not raise during the arbitration proceedings first respondent's conduct constituted a gross irregularity and he also committed gross misconduct. Moreover, first respondent did not raise this point as a concern and invite the parties to address him on it. For this reason, applicant did not lead evidence on this point, for it was not made aware that first respondent would make a finding on this issue. In this regard, first respondent failed to observe the audi alteram partem rule. …'

[30] The conduct of the second respondent I have set out above, where it comes to his findings in respect of the dispute relating to 'Matlakala and 20 Others', is clearly misconduct in respect of the conducting of the arbitration proceedings, and violates the principle of *audi alteram partem*. As such, it must be reviewable.

[31] In any event, this reasoning of the second respondent where it comes to the case of 'Matlakala and 20 Others' is complete nonsense, and entirely irrational. The dispute under case number GAEK 9832 – 15 from which the 32 ITU members withdrew actually proceeded further where it came to the remaining 21 employees, and this dispute was disposed of by commissioner Cilliers on 7 January 2016. How the dispute of 'Matlakala and 20 Others' could then replace that dispute, is beyond comprehension. And further, the second respondent never addresses the concern of Danone that this alleged referral was not even served on it. Accordingly, and despite the principle of *audi alteram partem* being flouted, even the conclusion that the second respondent comes to in this regard, on his own, is entirely unsustainable, and consequently also reviewable on this basis.

[32] The undeniable evidence before the second respondent was that all the disputes involving the employees of the applicants had been finally disposed of by the time the third respondent brought the application on 29 April 2016. There was no longer any live dispute in existence between the parties, and the disputes were *res judicata*. The application should have been dismissed on this basis alone. The second respondent failed in his duties as arbitrator and misdirected himself in not doing so. Worse still, the second respondent

seemed not to have considered this critical issue at all. In *MEC Department of Education, KwaZulu-Natal v Khumalo and Another*[13], the Court said:

> 'Res judicata literally means "a matter already judged"; the doctrine is that the matter cannot be judged again. This is a presumption founded on public policy requiring litigation not to be endless, to be in good faith and to prevent the same claim being demanded more than once.'

[33] What the third respondent was in effect trying to do with its application, was to circumvent the consequences of *res judicata*, considering that all of the disputes forming the subject matter of the application having been earlier disposed of by the CCMA. In other words, it was clearly a stratagem designed to revive that which had been dealt with and disposed of, but now under the guise of consolidation and condonation. In *National Union of Metalworkers of SA v Intervalve (Pty) Ltd and Others*[14] the Court dealt with the very same kind of stratagem, but in that case the trade union sought to use a joinder application to achieve this objective. Writing for the majority, Zondo J (as he then was), held:[15]

> 'The answer is that the union realised that the first referral did not include any dismissal dispute between Intervalve and its former employees or between BHR and its former employees and this meant that the Labour Court would not have jurisdiction to adjudicate those dismissal disputes. It was after the bargaining council had refused condonation that the union thought of using the joinder strategy to try and bring the dismissal disputes involving Intervalve and its former employees and BHR and its former employees through the back door into the trial proceedings relating to the dismissal dispute between Steinmüller and its former employees. This was a ploy by the union to circumvent the decision of the bargaining council refusing it condonation in respect of the dismissal disputes involving Intervalve and BHR.'

The comparison to the matter *in casu* is immediately apparent.

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[13] (2010) 31 ILJ 2657 (LC) at para 32. See also *Dumisani and Another v Mintroad Sawmills (Pty) Ltd (*2000) 21 ILJ 125 (LAC) at para 6.
[14] (2015) 36 ILJ 363 (CC).
[15] Id at para 137.

[34] It is clear from the replying affidavit that the third respondent has further tried to defeat being thwarted by the application of the *res judicata* principle, by saying that the CCMA had dealt with the earlier matters on the basis of jurisdiction, that this meant that the CCMA had not decided the actual substance or merits of the cases, and it was thus competent to refer those cases to the CCMA again. A similar kind of argument was dealt with in *Bouwer v City of Johannesburg and Another*[16]. Zondo JP (as he then was), writing for the majority, held that:[17]

> '… In motion proceedings the affidavits filed by the parties do not only serve as pleadings but they also contain the evidence that the parties place before the court to enable the court to decide the matter. The court decides the matter by either granting or dismissing the applicant's application. …'

The learned Judge concluded:[18]

> 'If I were to extract a principle from my approach to this matter, it would be this: if in motion proceedings the parties have placed before the court such evidence as they have chosen to place before it and the matter has been argued and, thereafter, the court issues an order that the application is dismissed and the basis of that decision is that the applicant failed to prove its case, the judgment or order of the court is a judgment or order on the merits of the case and it is final and any attempt to institute proceedings later to effectively seek the same relief on the same cause of action would properly be met by the special plea of *res judicata*.'

The judgment in *Bouwer* in effect disposes of the argument of the third respondent referred to above.

[35] In any event, it is entirely undesirable that a litigant brings one claim after another based on in essence the same *lis* between the same parties, simply by rotating different possible causes of action and processes to justify the same ultimate relief. This principle is often also expressed as the 'once and for all rule', and is nothing else but a manifestation of the *exceptio res judicata*. In

[16] [2009] JOL 23913 (LAC).
[17] Id at para 23.
[18] Id at para 41.

Evins v Shield Insurance Co Ltd[19], the Court described the 'once and for all rule' as follows:

> '…. it is a well-entrenched rule. Its purpose is to prevent a multiplicity of actions and to ensure that there is an end to litigation.'

[36] Therefore, and what the second respondent was actually confronted with when the application came before him, was relief sought in respect of disputes that were no longer live and had been disposed of. On this basis alone, the second respondent, had he properly and rationally discharged his duties, should have dismissed the application. This issue was after all specifically pleaded by Danone. On this basis as well, the second respondent's ruling is unsustainable, and falls to be reviewed and set aside.

[37] Turning next to the defective nature of the application before him, the same kind of criticism about the conduct of the second respondent again arises. The second respondent paid scant attention to all the issues raised concerning the defective application, the lack of *locus standi* of the third respondent, the identification of the individual respondents that were party to the proceedings, and the lack of mandate of the third respondent. The second respondent does touch on the issue of *locus standi*, and accepts that the third respondent did not represent the individual respondents in the application and had no *locus standi* to do so. Once he had made this finding, it was incumbent on the second respondent to have dismissed the application, for the reasons I will now elaborate on.

[38] The second respondent seems to accept that Rule 25[20] of the CCMA Rules (as read with Rule 35[21]) gives him the discretion to allow anyone to represent

[19] 1980 (2) SA 814 (A) at 835C-E. See also *Janse van Rensburg NO and Others v Steenkamp and Another; Janse van Rensburg and Others v Myburgh and Others* [2009] 1 All SA 539 (SCA) at para 27; *Truter and Another v Deysel* [2006] JOL 16961 (SCA) at para 22; *Symington and Others v Pretoria-Oos Privaat Hospitaal Bedryfs (Pty) Ltd* [2005] 4 All SA 403 (SCA) at para 26; *Sgt Pepper's Knitwear and Another v SA Clothing and Textile Workers Union and Others* (2012) 33 ILJ 2178 (LC) at para 28.

[20] The relevant part of the Rule provides: '(1)(a) In conciliation proceedings a party to the dispute may appear in person or be represented only by- … (ii) any office bearer, official or member of that party's registered trade union or registered employer's organisation … (b) Subject to paragraph (c), in any arbitration proceedings a party to the dispute may appear in person or be represented only by- (i) a legal practitioner; or (ii) an individual entitled to represent the party at conciliation proceedings in terms of subrule (1)(a) …' (emphasis added).

a party before the CCMA. Although the second respondent does not say so directly, one can only assume that he makes this reference to justify the third respondent bringing, and then moving, the application at the CCMA. This reasoning of course is patently wrong. Rule 25 is prescriptive as to who may represent parties before the CCMA. These provisions cannot be condoned under Rule 35. A party either qualifies to represent another party under Rule 25 or does not. There are no exceptions. The third respondent does not qualify. That should be the end of the debate.

[39] Representation in the context of Rule 25 does not just include appearing at the CCMA. It includes all facets of representation, which would include the bringing of legal process such as the filing of applications. A defect in this regard renders the proceedings so brought, to be nothing else but an irregular step. In *Vac Air Technology (Pty) Ltd v Metal and Engineering Industries Bargaining Council and Others*[22] the Court said:

> '…. papers before the Labour Court signed by a person who does not fall within the permitted category are null and void, and proceedings relating thereto are also null and void.'

The Court concluded:[23]

> 'A labour consultant is not permitted to represent parties in terms of the Act. It follows that any affidavits he deposed to or any correspondence he wrote, in the capacity of a labour consultant representing a party, are null and void. The proceedings are also null and void.'

[40] Whilst the judgment in *Vac Air* dealt with the Labour Court Rules, I can see no reason why these same considerations should not equally apply to the CCMA Rules. I find support for my views in this regard in the following *dictum* from the judgment in *Nduli v SA Commercial Catering and Allied Workers Union*[24]:

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[21] Rule 35(1) provides that: 'The Commission or a commissioner may condone any failure to comply with any provision of these Rules, on good cause shown'.
[22] (2006) 27 ILJ 1733 (LC) at para 14.
[23] Id at para 16.
[24] (2001) 22 ILJ 198 (LC) at para 16. See also *Davidson and Others v Wingprop (Pty) Ltd* (2010) 31 ILJ 605 (LC).

> 'In the present matter and during the course of these proceedings it has come to light that Sibiya who represented applicant at the arbitration proceedings had no right of appearance at the arbitration. …. Although none of the parties, including the applicant, was aware thereof should this court simply disregard such a fact? I believe not. While I am prepared to accept that her representation could not have affected the outcome, the fact is that the arbitration proceedings were tainted by an irregularity. Even if I find that the irregularity did not prejudice the respondent and that if I do not make the award an order of court applicant would be severely prejudiced I do not consider prejudice to be a relevant factor.

I must emphasize that it is clear from this *dictum* in *Nduli* that it does not matter if an opponent is prejudiced by the irregularity or not. The mere existence of such an irregularity renders the proceedings defective, and by necessary consequence, the application *in casu* defective.

[41] The defective nature of the application is further compounded by the fact that none of the individual respondents have been cited in, or identified in, the application filed by the third respondent. They have not deposed to any confirmatory affidavits. The consequence of this is that they cannot be considered to properly party to the proceedings. In *Librapac CC v Moletsane NO and Others*[25] the Court said:

> 'The new Act 66 of 1995, has a number of provisions which indicate that greater clarity in respect of the parties is now required. There is good reason for this. A dispute comprises not only a set of averments and submissions relating to issues. It comprises also the persons who are parties to the dispute. Those who seek to be part of the dispute resolution possibilities contained in the Act, must identify themselves and declare their participation.
>
> There are compelling practical considerations underlying this. Where, for instance, applicants are described merely as "union A and X others", who are not otherwise properly identified as parties in the action, serious problems of locus standi emerge in the event of some individuals resigning from the union in the course of pre-litigation periods or, by way of further example, in the event of the union in its own right electing not to conduct the litigation to

[25] (1998) 19 *ILJ* 1159 (LC) at para 43 – 44.

> conclusion. That holds the potential of prejudice for the individuals concerned. It also contains potential prejudice for a respondent party, who may seek counter-relief against individuals or, ultimately, relief by way of costs against them …'

[42] The Court in *Candy and Others v Coca Cola Fortune (Pty) Ltd*[26] applied the aforesaid *dictum* in *Librapac*, and held as follows:

> 'I will next turn to the issue of the individual applicants actually being parties to these proceedings. I again refer to what I have set out above to the effect that entire citation of the applicants is 'Candy and 95 others' and that is it. There is neither a list of individual applicants nor any form of identification or description of even who these individuals are. The point is how would the respondent even know who to deal with and whether these individuals were even its employees? In my view, it was essential for the individual applicants to be properly cited and described in this matter, especially as there was no trade union involved. This entails that the individual applicants must each be properly identified by name and be listed as individual applicants, either in the statement of claim or as an annexure thereto. Any individual applicant not so listed simply cannot be considered to be properly a party to the proceedings.'

Similarly *in casu*, in the absence of any of the individual respondents being identified in the application as being a party to the application, these individual respondents simply cannot be considered to be participants or parties in the third respondent's application. Without the individual respondents as parties *per se*, and because the third respondent cannot rely on Section 200 of the LRA as it is not a registered trade union[27], the third respondent's application is simply not competent, and as such, fatally defective. By failing to appreciate this, the second respondent committed a gross and reviewable irregularity.

[43] Despite Danone specifically calling for it, and Schroeder stating he would provide it, no mandate was shown in terms of which the individuals who brought the application had been authorized by any of the individual respondents to do so on their behalf. This renders the application to be an

[26] (2015) 36 ILJ 677 (LC) at para 31. A similar approach was followed in *Chemical Energy Paper Printing Wood and Allied Workers Union and Others v Express Payroll CC* (2011) 32 *ILJ* 2959 (LC) at paras 29 – 30 and 36.
[27] See *Candy* (*supra*) at para 35.

entirely irregular step, which cannot, as it stands, be sustained. It cannot assist the third respondent to simply say it was not the representative of the individual respondents, considering that it was the third respondent that filed the application, deposed to the founding affidavit (without any supporting affidavits from the individual respondents), and then deposed to a replying affidavit. In *Candy*[28] the Court said:

> '… The point is that Advocate *Phale* had ample opportunity, at any time before this matter was argued, to provide proof of authority. …'

The Court concluded:[29]

> 'In the matter now before me, there are several difficulties. Firstly, and as I have said, there are no powers of attorney. I repeatedly asked Advocate *Phale* where the powers of attorney were, and despite initially conceding that there was no proof of authority, he then changed his submission to the effect that the letter of B W Mtsweni of 14 March 2014 also properly served as proof of authority to act, which contention I have already touched on above. In addition to what I have already said in this regard, I further conclude that there is simply no merit in the suggestion that the letter of 14 March 2014 constitutes proof of authority because it does not even identify who these individual clients are that were supposed to have given authority. The simple line in the letter of 'Kindly assist our abovementioned clients in the matter' can by no stretch of the imagination be considered to constitute proof of a client authorising an attorney to bring a case on behalf of the client. In my view, and especially considering that the matter concerned a large number of individual applicants, a legitimate proof of authority to act had to entail the provision of a proper power of attorney or confirmatory affidavit by each applicant wishing to be a part of the proceedings, authorising B W Mtsweni Attorneys to bring the Labour Court case on their behalf and declaring themselves as party to the case. …
>
> In the absence of powers of attorney or any alternative form of proof of authority as contemplated by rule 7(1), the end result has to be that Advocate *Phale* has failed to establish the authority to act. That being the case, he has been unable to show that either he or B W Mtsweni Attorneys had the right to

[28] (*supra*) at para 17.
[29] Id at paras 19 – 20.

bring the current proceedings on behalf of the individual applicants to the Labour Court and therefore, by necessary consequence, to serve and file the statement of claim. As such, the statement of claim in itself has to be an irregular step.'

[44] Finally, the third respondent has made out no case for consolidation in the application. It simply baldly said it should happen. Danone specifically complained in its opposition to the application that no such case had been made out. The second respondent, however, without considering any of the principles applicable to deciding whether or not to grant consolidation, simply consolidates all the disputes. In *Piner v SA Breweries Ltd*[30] Waglay J (as he then was) said:

'… For the court to grant consolidation of separate actions, it need not simply consider whether the balance of convenience may favour such consolidation, but go further and be satisfied that consolidation will in no way prejudice the party or parties sought to be joined. See in this respect *New Zealand Insurance Co Ltd v Stone* 1963 (3) SA 63 (C) at 63H. The prejudice must, however, be substantial; and in determining whether or not the prejudice is substantial, one of the issues that the court is required to consider is whether the relief sought in each of the separate actions which are sought to be consolidated, depends on the determination of substantially the same questions of law and fact or not.'

[45] In *Twani and Others v Premier of the Province EC and Others*[31] the Court held:

'It follows that a consolidation of actions will not be ordered if such would be prejudicial or potentially prejudicial to any of the parties (see *Nel v Silicon Smelters* (*Edms*) *Bpk* 1981 (4) SA 792(A) at 801D). … The onus rests on the applicants to satisfy the court that the consolidation of the actions is favoured by the balance of convenience and that no party effected thereby will suffer prejudice (see *New Zealand Insurance Co Ltd vs Stone and others* 1963 (3) SA 63(C) at 69B–C) …'

[30] (2002) 23 ILJ 1446 (LC) at para 4. See also *SA Commercial Catering and Allied Workers Union and Others v Southern Sun Hotel Interests (Pty) Ltd* (2017) 38 ILJ 463 (LC) at para 2.
[31] [2005] JOL 14256 (Tk) at page 6.

[46] Bearing in mind the above principles, the third respondent thus needed to make out a case in the application that it would be convenient to consolidate all the individual disputes into one matter. In this context, convenience does not just mean convenience to the third respondent or what the third respondent considers appropriate. More is needed. There must be a balance drawn where it comes to the convenience of all the parties involved, including the Court. And then the third respondents also had to address the issue of prejudice, in that it had to show that consolidation would not substantially prejudice any of the parties. The third respondent made out no such case, and as a result, there was no basis upon which the second respondent could have consolidated the disputes. The second respondent completely misdirected himself, and simply granted consolidation for the asking. This is grossly irregular.

[47] It has been said that the issue of convenience in the context of consolidation includes a consideration as to whether the facts and the substantive legal issues are the same.[32] Similarly, it has been held that consolidation would not be competent if there is an issue of the adjudicating body lacking the requisite jurisdiction, where it comes to one of the disputes that is sought to be part of the consolidation.[33] In *Twani*[34] the Court held that the 'unknowns' in the cases that are sought to be consolidated were simply too great and this was incompatible with the requirement of convenience. All of these considerations equally work against consolidation *in casu*. There is no evidence of similar facts and similar substantive legal issues in the various disputes. I also believe that there are many unknowns that could result from the consolidation. The various prior *in limine* rulings of the CCMA is evidence of this. I am also convinced that the applicants could be materially prejudiced by consolidation, in that its case could be contaminated by possible shortcomings in the cases of the other employers, especially considering the complexity of the legal issues involved. Finally, there are undeniable problems with jurisdiction. Therefore, and on the basis of the requirements of convenience and prejudice, there is no basis for consolidation, in any event.

[32] See *Radebe and Others v Coronet Equities (Pty) Ltd* (2001) 22 ILJ 1677 (LC) at para 13.
[33] See *Motaung v Department of Education and Others* [2016] JOL 35739 (LC) at para 9.
[34] (*supra*) at page 9.

[48] In the end, the Labour Court has a duty to supervise this kind of conduct by CCMA commissioners. In *ZA One (Pty) Ltd t/a Naartjie Clothing v Goldman No and Others*[35] the Court said:

> '… In my view, … the arbitration proceedings must be lawful, reasonable and procedurally fair, and that the Labour Court, in exercising its powers in terms of s 145 of the LRA, is duty bound to supervise the CCMA and the exercise of its arbitration functions, so as to ensure that this happens and this is indeed the case.'

[49] In terms of this supervisory duty of the Labour Court over the arbitration functions of the CCMA, it is important that irregular practices or conduct of CCMA commissioners be highlighted and dealt with, not only to ensure that the parties receive a fair hearing and a fair and proper determination of the issues brought to the CCMA to decide, but also so that the CCMA can adopt policy measures to remedy or discourage same.[36] As said in *Sasol Infrachem v Sefafe and Others*[37]:

> '… The hearing must not only be fair, but must also be seen to be fair. Anything less than that would not suffice. The remedy employed must cure the irregularity; it must restore the right. …'

[50] In summary, the manner in which the second respondent dealt with the dispute of 'Matlakala and 20 Others' deprived the applicant of a lawful, reasonable and procedurally fair hearing of the issue it raised in this regard. The situation was exacerbated by the manner in which the second respondent virtually completely failed to address any of the objections raised by the applicants where it came to the defective nature of the application, the fact that the disputes had actually been disposed of, and the complete failure of the third respondent to make out a case for consolidation. This all constitutes misconduct by the second respondent as arbitrator as contemplated by

[35] (2013) 34 ILJ 2347 (LC) at para 37. The judgment was referred to with approval in *Satani v Department of Education, Western Cape and Others* (2016) 37 ILJ 2298 (LAC) at paras 21 – 22. See also *Deutsch v Pinto and Another* (1997) 18 ILJ 1008 (LC) at 1011 and 1018; *Van Rooy v Nedcor Bank Ltd* (1998) 19 ILJ 1258 (LC) at para 17.
[36] *Premier Foods* (*supra*) at para 42.
[37] (2015) 36 ILJ 655 (LAC) at para 54.

Section 145(2)(a)(i) of the LRA. The effect of this is that the ruling itself is vitiated and falls to be set aside.

[51] Based on my findings as set out above, I do not consider it necessary to consider any of the other review grounds as raised by the applicants, and in particular whether a case for condonation has even been made out by the third respondent, and whether its views where it comes to the application of Section 198A and 198D are indeed correct. The second respondent's ruling is vitiated and rendered reviewable for all the above reasons, without any of these considerations having to be dealt with.

[52] The final question to determine is what to do next, with the ruling of the second respondent having been reviewed and set aside. The simple reality is that no case for consolidation was made out in the third respondent's founding affidavit. Also, there are simply no live disputes left which could serve as the basis for the application. The only proper option left in this instance would be to finally dismiss the third respondent's application. In terms of Section 145(4) of the LRA, I shall oblige and substitute the ruling of the second respondent, with a ruling that the third respondent's application be dismissed.

[53] This matter was unopposed, and accordingly no issue of costs arises.

[54] It is for all the reasons, supra, I made the order that I did on 20 June 2017 as set out in paragraph 1 of this judgment.

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S Snyman

Acting Judge of the Labour Court

Appearances:

For the Applicants:	Adv A Snider
Instructed by:	Webber Wentzel
For the Respondents:	No appearance