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DATE: 10 January 2011

No. Of Pages to follow: 14

MATTER: P 477/2009 Building Industry BC v CCMA

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IN THE LABOUR COURT OF SOUTH AFRICA

HELD AT PORT ELIZABETH

CASE NO P 477/2009

In the matter between:

BUILDING INDUSTRY BARGAINING COUNCIL (SOUTHERN AND EASTERN CAPE) — **Applicant**

and

COMMISSION FOR CONCILIATION, MEDIATION AND ARBITRATION — **Respondent**

JUDGMENT

VAN NIEKERK J

Introduction

[1] The applicant is a bargaining council, established in terms of s 27 of the Labour Relations Act (LRA), with a registered scope that extends to the construction sector in the Southern and Eastern Cape. In 2009, the applicant applied to the respondent (the CCMA) to be accredited to perform conciliation and arbitration functions in respect of all employers and employees who fall within its registered scope. On 21 May 2009, the CCMA decided to accredit the applicant, but limited that accreditation to the conciliation of disputes between parties to the council, for a period of one year. In this application, brought under s 158 (1) (g)[1] of the LRA, the applicant seeks to have the CCMA's decision reviewed and set aside.

[1] Section 158 (1) (g) empowers this court, subject to s 145, to review the performance or purported performance of any function provided for in the LRA on any grounds permissible in law.

Background

[2] The material facts are not in dispute. In 1999, the applicant was accredited to by the CCMA to perform conciliation and arbitration functions in respect of disputes between parties to the council as well as non-parties, i.e. those employers and employees who fall within the applicant's registered scope but are not members respectively of any employers' organisation or trade union that is a party to the applicant. The applicant continued to be accredited by the CCMA on the same terms, on application and on an annual basis, until 31 May 2008. In 2008, the applicant applied for accreditation on the same terms for the period 1 June 2008 to 31 May 2009. On 31 May 2008, the CCMA accredited the applicant to conciliate and arbitrate disputes, for the period 1 June 2008 to 31 May 2009, but restricted the accreditation to disputes between parties to the council (described in the papers as 'party-party disputes').

[3] In April 2009, applicant sought accreditation from the CCMA to conciliate and arbitrate disputes in respect of both parties and non-parties to the council. As recorded in the introduction, on 21 May 2009, the CCMA decided to accredit the applicant to conciliate party-party disputes only. This decision is the subject of these proceedings.

[4] On 27 May 2009, the applicant sought reasons for the CCMA's decision to limit its accreditation. These were eventually furnished on 19 July 2009, by email. The salient part of the email reads as follows:

> *As a result of the poor quality of awards in general and the fact that there is no Collective Agreement in place, it was resolved that your Council only be accredited for party-party conciliations.*
> *The period of accreditation is one year (1 June 2009 until 31 May 2010).*

[5] The matter of the 'collective agreement' referred to in the email assumed some significance in these proceedings, and is to be understood in the following

context. In May 2008, the CCMA advised the applicant that to be accredited to resolve non-party disputes, a collective agreement (or some other suitable mechanism) would be required so that rules and procedures relevant to dispute resolution could be extended to non-parties. The CCMA's position was based on an opinion previously provided to it by Prof Paul Benjamin. In his opinion, Benjamin noted that s 51 (9) of the LRA empowers bargaining councils to establish procedures to resolve disputes by way of a collective agreement. Collective agreements concluded under the auspices of a bargaining council ordinarily bind only parties to the council. Since the Minister is entitled in terms of s 32 to extend collective agreements concluded by bargaining councils to non-parties that are in the council's registered scope, Benjamin expressed the view that effective dispute resolution (a requirement established by s 127 (4)(b)), could be achieved if a bargaining council were to conclude a collective agreement establishing dispute resolution procedures and have the Minister extend the agreement to non-parties. The opinion concludes:

> *In our view, it is highly likely that, in the absence of a collective agreement contemplated in section 51(9) establishing dispute resolution procedures, a bargaining council would not be able to establish that it could resolve non-party disputes effectively. As a result, it would not be able to gain accreditation for this category of disputes and the CCMA would have to assume this responsibility in terms of section 147 (8). (We point out that this is not a categorical statement and there remains the possibility that, despite not having such an agreement, a Council could demonstrate that it could perform these functions effectively. This would have to be evaluated in each case).*

[6] There were a number of further developments after May 2010, when the period of the limited accreditation under review expired. On 25 October 2010, the applicant was advised of the terms of its accreditation for the new period of 1 November 2010 to 30 October 2011. In terms of this most recent accreditation, the applicant has been accredited for conciliation and arbitrations for disputes between parties, on condition that the arbitrations are conducted by part-time commissioners of the CCMA and that quality control of settlement agreements and awards be conducted by a part-time senior commissioner of the CCMA. This decision is not the subject of the present litigation, but is assumes some significance in relation to the

preliminary point raised by the CCMA to the effect that the dispute that is the subject of these proceedings is not justiciable on account of it having become moot.

Mootness

[7] The CCMA contends that the issue in dispute has become moot, since the accreditation that is the subject of these proceedings expired on 31 May 2010, and given the accreditation on new terms for the period that expires in October 2011. In these circumstances, the CCMA submits that the application ought to be dismissed.

[8] The principles relating to mootness are well-established. In *National Coalition for Gay and Lesbian Equality & others v Minister of Home Affairs & others* 2000 (1) BCLR 39 (CC), the Constitutional Court said the following:

> *A case is moot and therefore not justiciable if it no longer presents an existing or live controversy which should exist if the Court is to avoid giving advisory opinions on abstract propositions of law.*

In *Independent Electoral Commission v Langeberg Municipality* 2001 (9) BCLR 883 (CC), the same court held that where there was no live controversy between the parties and in the absence of any suggestion that any order the court might make would have any impact on the parties, the disputes between the parties were moot, especially since future cases would inevitably present different factual matrixes, no purpose would be served in resolving them. Similarly, in *Radio Pretoria v Chairman of the Independent Communications Authority of South Africa & another* 2005 (3) BCLR 231 (CC), the court held that the refusal to grant the applicant a licence in respect of the period April 1999 to April 2000 (the subject matter of the review in that instance) was moot in circumstances where the respondent had refused to grant a further licence (in September 2003) and where that decision was not a feature of the review.

[9] The question then is whether there is any practical purpose served by adjudicating a dispute about the terms of the applicant's accreditation in respect of a period that lapsed in May 2010. It seems to me that there are at least two reasons

for doing so. The first relates to the CCMA's requirement that the applicant conclude a collective agreement capable of binding non-parties, as a prerequisite to accreditation in respect of disputes involving those non-parties. To the extent that the applicant's accreditation was limited on this basis both in respect of the period that expired in May 2010 and that due to expire in October 2011, the case presents a live controversy and the court is not being asked to give an opinion in the abstract. Secondly, it is not inconceivable (indeed it is more than likely) that the basis on which the decision that is the subject of these proceedings was taken is likely to serve as a basis for future, similar decisions, where the same or similar facts will present themselves. Thirdly, the parties acknowledge that the issue that presents itself is one that affects other bargaining councils, and that is of general interest to the industrial relations community. I intend therefore to consider the merits of the applicant's claim.

The nature of the review application

[10] As I recorded in the introduction to this judgment, the applicant brings this claim in terms of s 158(1) (g). The applicant contends that in making a decision that deprived the council of the accreditation it sought, the CCMA failed to comply with its own policy, was materially influenced by an error of law, took irrelevant considerations into account and disregarded relevant material facts and acted capriciously or arbitrarily, with the result that the decision was not rationally connected to the purpose for which it was taken, and that it was accordingly unreasonable. This formulation of the applicant's claim requires some analysis, if only to discern the extent to which this court is entitled to intervene in the decision under review.

[11] In its notice of motion, the applicant characterises the CCMA's decision as an 'administrative decision'. However, in the applicant's heads of argument and in the submissions made during argument, the principle of legality was relied upon as the sole basis of the applicant's attack; the argument being, as I understand it, that the CCMA's decision failed to meet the threshold established by the principle of legality, and is thus reviewable. The heads of argument refer to *Pharmaceutical Manufacturers Association of South Africa & another: In re Ex parte President of the*

Republic of South Africa & others 2000 (2) SA 675 (CC) where the court said, at paragraph [90] of the judgment:

> *It is a requirement of the rule of law that the exercise of public power by the executive and other functionaries should not be arbitrary. Decisions must be rationally related to the purpose for which the power was given, otherwise they are in effect arbitrary and inconsistent with this requirement. It follows that in order to pass constitutional scrutiny the exercise of public power by the Executive and other functionaries must, at least, comply with this requirement. If it does not, it falls short of the standards demanded by our constitution for such action.*

The heads then move to the proposition that against this background, the court is required to ask whether the CCMA's decision is one that a reasonable decision maker would reach. In this regard, the applicant refers to *Sidumo & another v Rustenburg Platinum Mines Ltd & others* [2007] 12 BLLR 1097 (CC) as authority, it would seem, for the contention that the Promotion of Administrative Justice Act (the PAJA) does not apply to decisions made by the CCMA, and for the introduction of a constitutional requirement of reasonableness. The conclusion drawn is that the CCMA's decision is assailable since it is one that was clearly unreasonable.

[12] This curious formulation prompted me to enquire from Mr van Zyl, who appeared for the applicant, why the application had been framed as a legality review, rather than a review in terms of the PAJA, since on the applicant's version, the CCMA's decision to limit its accreditation constituted administrative action. Mr van Zyl's response was that s 158 (1) (g) of the LRA contemplated a review on the basis of the principle of legality.

[13] In my view, there is no merit in adopting the restrictive interpretation of s 158 (1) (g) for which the applicant contends. Section158 (1) (g) is patently not limited to what is known as a legality review - the section empowers this court to review the performance of any function under the LRA 'on such grounds as are permissible in law'. This includes not only a review of the exercise of any public power under the LRA on the basis of the principle of legality but also, in appropriate circumstances,

the review of administrative action under the PAJA and possibly a common law review. In other words, s 158(1) (g) establishes what might be termed a 'jurisdictional footprint' for the review of the performance of functions under the LRA – the basis for review is dependent on the nature of the decision taken. Section 7 of the PAJA, read with the definition of 'court' in s 1, certainly contemplates this that court is empowered to entertain proceedings for judicial review.

[14] But the conceptual confusion in the applicant's argument extends beyond its limited interpretation of s 158 (1) (g). To the extent that the applicant considers the *Sidumo* judgment to preclude any review under the PAJA, it should be recalled that the majority of the court in that matter held that while a CCMA arbitration constituted administrative action, the review provisions of the PAJA did not apply for reasons related to the statutory system of dispute resolution and in particular, what was referred to as the '*specialised legislative regulation of administrative action such as s 145 of the LRA*..." (at paragraph 91). In other words, *Sidumo* was concerned only with the function of compulsory arbitration by the CCMA, and the PAJA was found not to apply because of s 145. It does not follow, as the applicant appears to assume, that because a CCMA commissioner who conducts an arbitration hearing performs an administrative function that is not regulated by the PAJA,[2] that the PAJA does not apply to all decisions taken by the CCMA or its various functionaries. Where there is no specialised legislative regulation such as that established by s145 it seems to me that ordinarily, any decision made by the CCMA that falls within the scope of the PAJA ought to be reviewed in terms of that Act. For the purposes of s1 of the PAJA, the CCMA is an organ of state, and its decision to limit the accreditation of the applicant is clearly a decision made in the exercise of a public power or the performance of a public function in terms of the LRA. More particularly, section 127 of the LRA confers a power on the CCMA that is not dissimilar to that enjoyed by a licensing authority. It must consider any application for accreditation and decide whether the applicant meets the criteria established by s 127 (4). In doing so, the CCMA necessarily exercises a discretion that may adversely affect the rights of an applicant for accreditation and that has a direct external effect not only on an

[2] See the *Sidumo* judgment at paragraphs [96] to [104].

applicant bargaining council, but also the parties to that council and those non - parties who fall within its registered scope.

[15] In short: a decision made by the CCMA under s 127, whether it is to grant or refuse accreditation or to extend accreditation on terms more limited than those sought by an applicant council, is not a decision that is infused with any of the considerations that caused the majority in *Sidumo* to find that while the making of a CCMA arbitration award is administrative action, the PAJA did not apply. There is no reason therefore why the PAJA ought not to have been the applicant's first resort - it is the statute that gives effect to the rights under s 33 of the Constitution, and which represents a codification of those rights (see *Bato Star* (*supra*) at para 25).

[16] Having failed to present a claim under the PAJA, and having persisted solely with a legality review, is the applicant's inversion of the constitutional logic of requiring reliance on the more specific, constitutionally mandated norm as opposed to the general fatal to its claim? This would appear to be the case. In *Minister of Health v New Clicks South Africa (Pty) Ltd* 2006 (2) SA 311 (CC), the Constitutional Court said, (per Chaskalson CJ):

> *PAJA is the national legislation that was passed to give effect to the rights contained in section 33. It was clearly intended to be, and in substance is, a codification of these rights.*[3] *It was required to cover the field and purports to do so.*
>
> *A litigant cannot avoid the provisions of PAJA by going behind it, and seeking to rely on section 33(1) of the Constitution or the common law. That would defeat the purpose of the Constitution in requiring the rights contained in section 33 to be given effect by means of national legislation.*

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[3] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others* 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) at para 25.

Professor Hoexter sums up the relationship between PAJA, the Constitution and the common law, as follows:

> *"The principle of legality clearly provides a much-needed safety net when the PAJA does not apply. However, the Act cannot simply be circumvented by resorting directly to the constitutional rights in s 33. This follows logically from the fact that the PAJA gives effect to the constitutional rights. (The PAJA itself can of course be measured against the constitutional rights, but that is not the same thing.) Nor is it possible to sidestep the Act by resorting to the common law. This, too, is logical, since statutes inevitably displace the common law. The common law may be used to inform the meaning of the constitutional rights and of the Act, but it cannot be regarded as an alternative to the Act." (footnotes and emphasis omitted)*

I agree.

In other words, when it applies, parties should not be permitted to bypass the PAJA by seeking to review a decision on the basis of the principle of legality. For this reason, this application stands to be dismissed.

[17] To the extent that the applicant has elected to frame its claim as a legality review, and to the extent that the claim is justiciable on this basis, it should be recalled that contrary to Mr van Zyl's expansive attack on the CCMA's decision, a legality review is limited in the first instance (as the applicant's reliance on *Pharmaceutical Manufacturers Association* illustrates) to the threshold requirement of rationality, extending to procedural fairness (see *Masetlha v President of the Republic of South Africa* 2008 (1) SA 566 (CC), and possibly to the giving of reasons (see *Wessels v Minister of Justice and Constitutional Development & others* [2009] ZAGPPHC 81 (2 June 2009), but not to reasonableness itself. (See Prof. Cora Hoexter 'The Rule of Law and the Principle of Legality in Administrative Law Today' (2010) (forthcoming)). *Pharmaceutical Manufacturers Association* makes it clear that as long as the purpose sought to be achieved by the exercise of public power is within the authority of the functionary, and as long as the decision under review is

rational, the court is not entitled to interfere with the decision simply because it disagrees with it or because it considers that the power was exercised inappropriately.

[18] In so far as the rationality requirement is concerned, a brief overview of the system of accreditation is appropriate. The LRA places the CCMA at the hub of the statutory dispute resolution process. Although certain disputes are always required to be referred to the CCMA (see s 127 (2)), the Act recognises that bargaining councils and private agencies have roles to play in the resolution of labour disputes. Integral to the extension of statutory dispute resolution powers beyond the CCMA is the system of accreditation. In broad terms, a bargaining council, statutory council and any private agency may apply to the CCMA to be accredited to resolve disputes through conciliation, and to arbitrate unresolved disputes, if the Act requires those disputes to be determined by arbitration. Accredited councils and agencies may apply to the CCMA in terms of s 132 for subsidies to perform dispute resolution functions for which they have been accredited.

[19] The resolution of disputes is a central function of a bargaining council. In respect of parties to a council, the LRA does not prescribe how a council's dispute resolution functions should be carried out or the procedure to be followed. These are matters left to the parties, to be regulated in accordance with the council's constitution. In the case of non-parties, the situation is different. Section 51 (3) provides that a party to a dispute that is not party to the council may refer a dispute to the council for conciliation and if conciliation fails, for arbitration if the Act requires the dispute to be arbitrated and any party to the dispute has requested arbitration. The council may also arbitrate a dispute if all parties to the dispute agree to arbitration under the auspices of the council. If one or more parties to a dispute fall outside of the council's registered scope, the dispute must be referred to the CCMA. To perform these functions, the council must apply to the CCMA's governing body in terms of s 127 for accreditation.

[20] Section 127 of the LRA establishes the criteria for accreditation. These are whether:

- The services provided by the applicant meet the CCMA's standards.

- The applicant is able to conduct its activities effectively.
- The persons to perform the functions will be competent to do so.
- The persons appointed by the applicant to perform the functions for which accreditation is sought will do so independently.
- The applicant has a code of conduct.
- The applicant uses acceptable disciplinary procedures to enforce the code of conduct.
- The applicant promotes a service that is broadly representative of South African society.

(In the present matter, only the first three of these criteria are of any relevance.) Councils may apply for amendment to their accreditation (s 129), and the CCMA may withdraw accreditation (s 130). Any application to renew accreditation must be dealt with in terms of s 127.

[21] The CCMA's policy on accreditation, adopted on 9 December 2008, establishes seven criteria which not surprisingly, mirrors s 127. The applicant's primary complaint is the CCMA's attitude that in the absence of a collective agreement, it was not entitled to grant accreditation to a bargaining council (and the applicant in particular) to perform conciliation and arbitration functions in respect of non-parties. To the extent that the applicant contends that the conclusion of a collective agreement is not a criterion for accreditation, it should be recalled that the criterion at issue is efficiency – the CCMA's case being that effective dispute resolution was not possible in the absence of a bargaining council's ability to exercise authority over a non-party. In this context, there is no material difference, contrary to what Mr van Zyl submitted, between 'efficiency' and effectiveness. The CCMA took the view that effective dispute resolution required a mechanism through which a bargaining council could bind non-parties to a disputes procedure, the most obvious mechanism being a collective agreement. The existence of a collective agreement is the most obvious vehicle through which to bind non-parties to a disputes procedure. I fail to appreciate how the CCMA's insistence on a collective agreement to bind non-parties can in these circumstances be said to be irrational- the applicant has proffered no other alternative mechanism to bind non-parties or

otherwise to act against a recalcitrant non-party who simply refuses to be bound by the proceedings. While the applicant might consider, as it appears to do, that its adoption of the CCMA rules provides an adequate mechanism for the resolution of disputes under its auspices and while it may adopt the view, as it appears to have done, that numerous non-party employers and employees are happy to participate in its structures, the fact of the matter remains that the applicant is a statutory body whose powers are limited by the Act and by agreements concluded the parties to it. The applicant may not exercise powers over those who by eschewing membership of the council elect not to be bound by its constitution and agreements, unless, of course, the council is sufficiently representative of the sector for which it is registered and the Minister has extended any collective agreement in terms of s 32 of the Act. Whatever the applicant's views may be of its own efficiency and the level of satisfaction with the services it has provided in the past, the fact remains that in the absence of a collective agreement regulating dispute resolution procedures extended to non-parties, it is ultimately unable to exercise any authority over non-parties, and its functioning as an effective dispute resolution agent is and remains compromised to that extent. I fail to appreciate how, in these circumstances, it can be said that the CCMA's decision was not rationally related to the objectives sought to be achieved by s 127, or that it was unreasoned or lacked any ostensible logic or comprehensible justification.

[22] There is an additional, policy-related reason why the criterion applied by the CCMA should be upheld. The CCMA is the statutory authority that is ultimately accountable for the standard of dispute resolution in South African industrial relations either through its own agency or through those bodies that it accredits. The CCMA is governed by the social partners, and decisions on accreditation are accordingly the result of tripartite reflection and consensus. This court should be slow to second-guess decisions on the terms of any accreditation of a bargaining council or private agency, not only because this reflects the proper application of this court's review jurisdiction but because decisions that reflect a consensus reached by the social partners will typically reflect a rational relationship between the exercise of the power and the objectives of the accreditation processes.

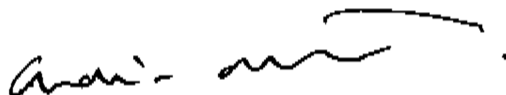
[23] In so far as procedural fairness is concerned, the applicant contends that it was not afforded the opportunity to make oral representations in respect of its application for accreditation, and that the CCMA failed to convey the outcome of its assessment with the applicant This may be so, but the record indicates that the applicant was furnished with a summary of areas of concern that needed to be addressed before the CCMA made a final decision to grant the applicant limited accreditation. This invitation must be seen in a context in which the applicant was advised as early as 2007 that unless it had a collective agreement in place binding on non-parties, it would not be accredited for arbitrations. In March 2009, the CCMA offered to assist the applicant to ensure that a collective agreement was entered into. The applicant was requested to provide the CCMA with a date for a meeting to discuss the issue. The applicant failed to take up this offer.

[24] In so far as reasons for the CCMA's decision are concerned, these were requested on 27 May 2009 and furnished on 19 July 2009. The CCMA was tardy in responding to the applicant's request for reasons (although it did so within the 90-day period provided for in section 5(2) of the PAJA) , there is no suggestion that it failed or refused to furnish reasons for its decision, or that its reasons were inadequate.

[25] Finally, there is no reason why costs should not follow the result. This may be a novel case, but there was no suggestion that it was a test case or that there was any other compelling reason why the CCMA should be denied its costs

I accordingly make the following order:

1. The application is dismissed, with costs.



ANDRE VAN NIEKERK
JUDGE OF THE LABOUR COURT

Date of application: 18 November 2010
Date of judgment: 10 January 2011

Appearances:

For the applicant: Adv B van Zyl, instructed by Dion van der Merwe

For the respondent: Mr C Todd, Bowman Gilfillan Inc.