



REPUBLIC OF SOUTH AFRICA

Reportable
Of interest to other judges

THE LABOUR COURT OF SOUTH AFRICA
(HELD AT, JOHANNESBURG)

Case no: J 656/2011

In the matter between:

AHI EMPLOYERS' ORGANISATION obo MEMBERS

Applicant

and

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

Respondent

Case no: JR 2518/10

In the matter between:

AHI EMPLOYERS' ORGANISATION

obo MEMBERS

First Applicant

PAL WESSELS

Second Applicant

AA CELLIERS

Third Applicant

and

COMMISSION FOR CONCILIATION MEDIATION

AND ARBITRATION

First Respondent

COMMISSIONER PAULUS MOTAKE (N.O.)

Second Respondent

NUDPW obo MEMBERS

Third Respondent

Heard: 3 June and 4 August 2011

Delivered: 1 February 2012

Summary: (review of CCMA guidelines on representation – ultra vires)

JUDGMENT

LAGRANGE, J

Introduction

- 1] The first matter under case number J656/2011 is a somewhat unusual review application. The applicant is a registered employers' organisation, which is seeking to ensure that its members may be represented in proceedings of the CCMA, by another member of the Association even if that other member is a juristic entity and even if it receives a fee from the member it represents. In striving to achieve this aim, it is attempting in these proceedings to set aside certain circulars issued by the CCMA to commissioners concerning the way in which they should evaluate whether or not an employer's representative has satisfied the requirements of rule 25 (1) (a) (2) and rule 25 (1) (b) (3) of the CCMA rules.
- 2] Initially this matter came before me on 3 June 2011 as a semi-urgent application to set aside one circular. On that occasion I agreed that the matter could proceed on that basis but that there was not sufficient urgency to justify the determination of final relief without the benefit of full oral argument supported by written heads from both parties. No interim relief was sought at the time by the applicant. The parties agreed amongst themselves on further steps to be taken on the further conduct of the matter. When the matter came before me again on 4 August 2011, the applicant had amended its notice of motion to include an application to set aside a second directive issued on 10 June 2011 ('the second circular'), which replaced the first circular dated 28 March 2011 ('the first circular').
- 3] The publication of the second circular had been anticipated at the earlier proceedings on 3 June 2011, at which the CCMA had argued that there was no need to proceed with the original application to set

aside the first circular, in view of the anticipated release of the second circular which would replace the first.

- 4] The parties also requested that the first matter be heard jointly with another review application under case number JR 2518/09 concerning an individual instance in which a CCMA arbitrator had refused to allow one of the applicant's members to represent the other in an unfair dismissal hearing on the basis that the representative did not qualify to appear in that capacity in those proceedings. Following the arbitrator's refusal to admit the employer's representative, the employer and the representative left the arbitration which proceeded on a default basis. The AHI took up the cudgels on behalf of its members and together with the aggrieved members launched an application to review and set aside the arbitration award.
- 5] In his award that the arbitrator set out reasons for his ruling against the employer's representative appearing in the proceedings. He noted that this was not the first time he had made a ruling against the particular representative, a Mr A Celliers. He had refused to allow Cilliers to represent parties in the CCMA because in his view Cilliers was not "a genuine co-member as he claimed". The arbitrator continued, "I ruled that if he were representing parties as a co-member he would not be doing it on such High frequency as he did, for instance, every day or every week or every month." The arbitrator inferred from the frequency of Cilliers's attendance as a representative that it was his business to represent co-members and that he was paid to do so. He reasoned that Cilliers could not make a living if he was not paid for his frequent attendances. The arbitrator accepted the right of a member of an employers' organisation or union to represent a co-member but insisted that Cilliers was not performing that representative function as a genuine co-member but more as an official of AHI or some other kind of employers'

organisation. The Commissioner said that he relied on the provisions of rule 25 which required him to investigate a person who wanted to represent a party if the Commissioner "suspected" that such a person was not qualified to represent a party at the CCMA. He concluded that Cilliers was appearing as a Labour consultant and not a genuine member of AHI.

- 6] The applicants sought to set aside the arbitrator's ruling on a number of grounds including gross irregularity, a failure of the arbitrator to apply his mind to the relevant facts and arguments before him, unreasonableness and acting beyond his powers. The principal ground of review is that the arbitrator acted beyond his powers in excluding Cilliers on the basis that he was not a genuine co-member of the AHI, whereas the CCMA rule provides that any member of an employer's organisation may represent another in such proceedings.
- 7] Although the arbitrator's ruling predated the publication of both of the circulars, for reasons that will become apparent when the circulars are considered there is a considerable overlap in certain respects between the substance of the review of the circulars and the way the commissioner exercised his judgment in this matter.

The Circulars and Rule 25 of the CCMA rules

- 8] Since the introduction of section 115 (2 A) of the Labour Relations Act 66 of 1995 ('the LRA') in 2002, the CCMA has had the power to make rules, amongst other things, to regulate the practice and procedure of dispute resolution through conciliation or arbitration (section 115 (2 A) (a)), and to regulate "the right of any person or category of persons to represent any party in any conciliation and arbitration proceedings;..." (Section 115 (2 A) (k)). In terms of section

115(2A) (g) the CCMA is also empowered to “publish guidelines in relation to any matter dealt with in this Act.”

- 9] A commissioner is also required to pay heed to guidelines issued by the commission in terms of s 138(6), which states:

“The commissioner must take into account any *code of good practice* that has been issued by *NEDLAC* or guidelines published by the Commission in accordance with the provisions of *this Act* that is relevant to a matter being considered in the arbitration proceedings.”

(emphasis added)

- 10] Prior to this, the right to representation was dealt with in the LRA itself. Section 138 (4) of the LRA, before it was deleted by s 27 (k) of Act 12 of 2002, read: “In any arbitration proceedings, a party to the dispute may appear in person or be represented only by a legal practitioner or a co-employee or by a, member office-bearer or official of that party's trade union or *employers' organisation* and, if the party is a juristic person, by a director or an employee.”

Rule 25 of the CCMA rules

- 11] The right to representation found its expression in rule 25 of the CCMA rules¹, the current version of which reads:

¹ Rules for the Conduct of Proceedings before the CCMA as published in GN R 1448 in GG25515 of 10 October 2003 and amended by GN R 1512 in GG25607 of 17 October 2003; GN R 1748 in GG25797 of 5 December 2003; GN R 530 in GG26279 30 April 2004; GN and R 531 and R 532 in GG26279 of 30 April 2004; GN R 380 in GG27490 of 22 April 2005, and GN R 97 in GG 29587 of 9 February 2007.

“25 Representation before the commission

(1)(a) In conciliation proceedings a party to the dispute may appear in person or be represented only by-

(1) a *director* or *employee* of that party and if a close corporation also a member thereof; or

(2) any member, *office bearer* or *official* of that party's registered *trade union* or registered employer's organisation.

(b) In any arbitration proceedings, a party to the *dispute* may appear in person or be represented only by:

(1) a *legal practitioner*;

(2) a *director* or *employee* of that party and if a close corporation also a member thereof; or

(3) any member, *office bearer* or *official* of that party's registered *trade union* or registered employer's organisation.

(c) If the *dispute* being arbitrated is about the fairness of a dismissal and a party has alleged that the reason for the *dismissal* relates to the employee's conduct or capacity, the parties, despite subrule (1)(b) are not entitled to be represented by a *legal practitioner* in the proceedings unless-

(1) the commissioner and all the other parties consent;

(2) the commissioner concludes that it is unreasonable to expect a party to deal with the *dispute* without legal representation, after considering-

(a) the nature of the questions of law raised by the *dispute*;

(b) the complexity of the *dispute*;

(c) the public interest; and

(d) the comparative ability of the opposing parties or their representatives to deal with the *dispute*.

(2) If the party to the dispute objects to the representation of another party to the dispute or the commissioner suspects that the representative of a party does not qualify in terms of this rule, the commissioner must determine the issue.

(3) The commissioner may call upon the representative to establish why the representative should be permitted to appear in terms of this Rule.

(4) A representative must tender any documents requested by the commissioner in terms of subrule (3), including constitutions, payslips, contracts of employment, documents and forms, recognition agreements and proof of membership of a trade union or employers' organisation."

The Circular of 28 March 2011

12] The first circular was in the form of a standard letter, apparently sent out by the CCMA in response to complaints about the exclusion by commissioners of would-be representatives of parties from proceedings. In order to understand the context in which the circulars were issued it is useful to quote the first part of the circular letter in full:

"TO WHOM IT MAY CONCERN,

There has been an alarming escalation of complaints relating to the *locus standi* of representatives during processes. The complaints have

ranged from allegations that commissioners allow representatives that have no legal right to represent parties to allegations of commissioners being in cahoots with representatives to commissioners furthering the aims of the illegitimate trade unions and employer organisations. In this regard commissioners have also raised concerns that their colleagues are not enforcing the rules and that they are in effect been compromised when they enforce such as the representatives often cite instances where other commissioners have allowed them the right to represent.

In an attempt to mitigate the adverse effect of such conduct on our users, whether perceived or real, this office will in future and with immediate effect require that all commissioners comply with the rules and insist that any and all representatives provide proof of legitimacy to represent parties regardless of whether or not the issue is challenged or raised. The aforementioned documents are to be placed in the relevant case file and the CCMA's National internal audit department will immediately commence random file checks to monitor compliance. The JHB management will be responsible for enforcing this directive in the region and will be engaging those commissioners that fail to comply on an individual basis.

We will be implementing a few measures to alert our users of this requirement and this will include the display of notices in and around the entrance foyer as well as the hearing room floors. These notices will specifically detail that all commissioners will in future require copies of the registration certificate of an employers' organisation or trade union together with copies of proof that the representative in a personal capacity is a member of the employers' organisation or an employee of the employers' organisation or trade union. This requirement is not new and dialogue with the registrar of Labour relations in the Department of labour has already commenced to verify the legitimacy of these documents as well is to conduct an audit of questionable employer organisations and trade unions.

In this regard you are reminded of the following CCMA rule as well as the accompanying practice and procedure.

CCMA practice and procedure

The commissioner making a determination regarding the status of a representative must require the person who is seeking to represent a party on the basis that he/she is a member, official or office bearer of a trade union or an employers' organisation, to establish each of the following –

- that the representative is a member, official or office bearer of the trade union or employer's organisation. An official letter on the letterhead of the trade union or employers' organisation confirming that is all, in the case of a member, a current membership card should generally be accepted as sufficient proof unless it is challenged;
- that the trade union or employers' organisation is currently (i.e. at the time the process is taking place, registered as such. A certificate of registration issued by the registrar of labour relations should generally be regarded as sufficient proof;
- that the party who the representative is seeking to represent, is entitled to be a member of the trade union or employers' organisation and is in fact such member. In this regard the relevant clauses of the relevant constitution and the current membership card should generally be regarded as sufficient proof.

Only a natural person may represent an employer party on the basis that they are fellow members of an employers' organisation. Only employers may be members of an employers' organisation and therefore, provided that they meet all the other requirements, it is only possible for sole proprietors who are themselves employers, to qualify to

represent other employers on the basis of fellow membership of an employers' organisation. Directors of companies, members of close corporations and employees of companies and close corporations are not employers and are therefore not entitled to be members of employers' organisations. Such persons may not be allowed to represent employer parties to the dispute on the basis that they are fellow members of an employers' organisation. The fact that the company will close corporation of which they are directors, members or employees, belongs to an employer organisation, does not qualify them to represent other members of the employers' organisation..."

(*sic* – emphasis added)

The remainder of the circular then reproduced rule 25 in its entirety.

The Second Circular

- 13] The amending circular came to light when the CCMA filed its answering affidavit in the review application. In its answering affidavit the CCMA stressed that its concern about admitting certain representatives was not simply because they represented an employer who was a juristic person, but rather that this type of representation was the subject of widespread abuse to facilitate representation of employers by labour consultants in CCMA processes. The CCMA referred to the case of ***NEHAWU obo Damoyi and Willow Park Primary* [2008] 29 ILJ 796 (CCMA)** as an example of the type of situation it was seeking to prevent.

- 14] Nevertheless, the CCMA conceded that it is theoretically possible that an employer might ask for the assistance of a fellow member of an employers' organisation and that assistance may be offered "on grounds of solidarity and legitimate common interests shared by employers that lead them to form an employers' organisation".
- 15] Consequently, the CCMA decided to amend the circular "to accommodate such a possibility without permitting disguised Labour consultancy arrangements." As mentioned above, the CCMA contends that this revision removes any justification for AHI proceeding with its application to set aside the first circular. The pertinent portion of the second circular is reproduced below with revisions underlined:

"TO WHOM IT MAY CONCERN,

1. There has been an alarming escalation of complaints relating to the *locus standi* of representatives during processes. The complaints have ranged from allegations that commissioners allow representatives that have no legal right to represent parties to allegations of commissioners being in cahoots with representatives to commissioners furthering the aims of the illegitimate trade unions and employer organisations. In this regard commissioners have also raised concerns that their colleagues are not enforcing the rules and that they are in effect been compromised when they enforce such as the representatives often cite instances where other commissioners have allowed them the right to represent.

2. This circular is issued as a guideline to users and Commissioners in an

attempt to mitigate the adverse effect of inconsistent decisions on our users, and to generate consistency in decision-making on questions of representation.

This office will in future and with immediate effect require that all commissioners comply with the rules and insist that any and all representatives provide proof of legitimacy to represent parties regardless of whether or not the issue is challenged or raised. The aforementioned documents are to be placed in the relevant case file and the CCMA's National internal audit department will immediately commence random file checks to monitor compliance. The JHB management will be responsible for enforcing this directive in the region and will be engaging those commissioners that fail to comply on an individual basis.

3. We will be implementing a few measures to alert our users of this requirement and this will include the display of notices in and around the entrance foyer as well as the hearing room floors. These notices will specifically detail that all commissioners will in future require copies of the registration certificate of an employers' organisation or trade union together with copies of proof that the representative in a personal capacity is a member of the employers' organisation or an employee of the employers' organisation or trade union. This requirement is not new and dialogue with the registrar of Labour relations in the Department of labour has already commenced to verify the legitimacy of these documents as well is to conduct an audit of questionable employer organisations and trade unions that conduct their affairs in breach of the requirements of the LRA, guidelines of the registrar, and conditions under which they are registered.

4. In this regard you are reminded of the following CCMA rule as well as the accompanying practice and procedure.

5. CCMA practice and procedure

5.1 The commissioner making a determination regarding the status of a

representative must require the person who is seeking to represent a party on the basis that he/she is a member, official or office bearer of a trade union or an employers' organisation, to establish each of the following –

- that the representative is a member, official or office bearer of the trade union or employer's organisation. An official letter on the letterhead of the trade union or employers' organisation confirming that is all, in the case of a member, a current membership card should generally be accepted as sufficient proof unless it is challenged;
- that the trade union or employers' organisation is currently (i.e. at the time the process is taking place, registered as such. A certificate of registration issued by the registrar of labour relations should generally be regarded as sufficient proof;
- that the party who the representative is seeking to represent, is entitled to be a member of the trade union or employers' organisation and is in fact such member. In this regard the relevant clauses of the relevant constitution and the current membership card should generally be regarded as sufficient proof.

5.2 Where a person seeks to represent an employer party on the grounds that he/she is a director, member or employee of a different employer that is a member of the same employers' organisation, the commissioner should require that that person to establish each of the following –

- That the party who the representative is seeking to represent is entitled to be a member of the relevant employers' organisation, is in fact such a member, and that the employers' organisation is currently registered.
- That the representative is a director, member or employee of another employer that is entitled to be a member of the same employers' organisation and is in fact such a member.
- That the representative is duly authorised by his/her employer to act on behalf of his/her employer to represent the party in proceedings before the CCMA in its capacity as a fellow member of the employers' organisation.

- That the agreement by the other employer to represent the party is a bona fide assertion of a common interest between members of the employers' organisation, and is not a disguised Labour consultancy arrangement. If the party is required to pay the representative or his/her employer for their services in representing the party, this will ordinarily be a strong indication that the arrangement is not bona fide in this sense, and that it is in fact a disguised Labour consultancy arrangement. (The same principle applies to representation of one trade union member by another.)"

(sic).

16] A clear intention of the revisions contained in the second circular was to remove the AHI's objection to the provision in the first circular which sought to exclude representation by one employers' organisation member on behalf of another unless the representative was a sole proprietor. Further, by expressly referring to the circular as a 'guideline to users and Commissioners', it appears that the CCMA sought to disabuse readers of the circular of any impression they might gain that the circular prescribed how commissioners should determine whether representation should be allowed or not, in circumstances where the member seeking to represent another member was not a natural person. Thirdly, it seeks to introduce an additional criterion a commissioner should consider before permitting representation by another member of an employers' organisation namely, whether or not the representative party is simply representing the employer as part of a commercial arrangement rather than doing so out of a selfless sense of solidarity or shared interests as an employer. This approach suggests that membership of the same employers' organisation alone is insufficient to allow that representative to appear in that capacity in CCMA proceedings.

Evaluation of the grounds of review

- 17] The AHI contends that the CCMA does not have the power to instruct commissioners, which it claims the circulars do. It also submits that the content of the circular is simply incompatible with some of the provisions of rule 25.
- 18] The AHI correctly notes that when the CCMA rules were first published in 2003, the rules on representation in conciliation and arbitration proceedings replicated the former provisions of sections 135 (4) and 138 (4) of the LRA. Initially, the new rules excluded members of trade unions and employers' organisations as potential representatives in CCMA proceedings. However, in 2004 members of both types of organisation were once again accorded recognition as representatives in conciliation and arbitration proceedings, when the CCMA amended the rules.
- 19] Consequently, the AHI argues that the inclusion of members of an employers' organisation in the class of potential representatives was a conscious policy choice on the part of the CCMA when it made the amendments, and it cannot undermine the application of that rule by means of a circular requiring commissioners to interpret the rule more restrictively.
- 20] In relation to the first circular, the AHI pointed out that since a member of an employers' organisation might itself be a corporate entity it could only perform a representative function through the agency of a natural person. Therefore, it stood to reason that one employer member of the organisation should be permitted representation by another member, through the agency of a natural

person authorised by that other member to perform its representative role, where the other member is a juristic entity,. No similar difficulty presents itself in the case of trade union members as representatives, because they will always be natural persons.

21] The AHI's attack on the initial circular rested primarily on this argument. By removing the prohibitions against representation by a properly authorised person acting on behalf of a juristic member in the second circular, the AHI maintains that the CCMA effectively conceded that such a restriction was unjustifiable and unreasonable. But once this particular hurdle is removed, can the revised circular, now characterised as a guideline, still be attacked on the basis that the CCMA is acting beyond its powers in doing so?

22] Essential differences between the first and second circulars are that the CCMA described the second circular as a guideline and also stipulated that a Commissioner ought to probe any agreement in terms of which one employer represents another as members of the same employers' organisation in order to determine if that agreement is not simply a mechanism for a Labour consultant to represent an employer for a fee.

The second circular's status as a 'guideline'.

23] Aside from giving the revised circular a non-prescriptive description, does it imply that commissioners are free to determine, in

accordance with the provisions of Rule 25(2), whether to refuse or permit the employer representative to appear? If one considers the last portion of the wording of paragraph 2, which remains the same as in the first circular, one is left with an unavoidable impression that even though the circular is referred to as a guideline, strict compliance by commissioners is expected. The paragraph contains two injunctions. Firstly, at least as far as commissioners falling within the remit of the CCMA's Gauteng office are concerned, they are expected to insist that anyone claiming the right to appear as a representative must provide evidence of the basis on which they claim such rights of appearance.

- 24] As mentioned, section 115(2A)(k) of the LRA empowers the CCMA to promulgate rules governing who may appear as a representative in such proceedings. In giving effect to such rules, in principle it would not interfere with a commissioner's power to decide if the representative is qualified to appear or not, by requiring a Commissioner to require evidence to substantiate that entitlement. Indeed, Rules 25(3) and (4) deal with the requirement of substantiation if an enquiry is triggered under Rule 25(2). Rule 25(2) itself does not oblige a commissioner to insist on such substantiation as a matter of course, but only if the other party objects to the representative's right to appear, or if the commissioner suspects the persons does not qualify to appear as a representative. The prescripts of the circular would trigger the investigation in the absence of either of these conditions being met.

- 25] A common theme in the various strands of the applicant's argument is that the circulars in question do not properly qualify as guidelines published in terms of the Act. In relation to both circulars, the applicant says that by requiring that commissioners must invariably

demand evidence to substantiate the right of appearance, the CCMA has imposed a requirement which the rules do not contain. In effect, the injunction in the circular imposes an obligation that the proof of a representative's status must always be investigated, even if neither of the pre-conditions for such an enquiry under Rule 25(2) are met.

- 26] Moreover, both circulars make it clear that the requirement will be 'enforced', at least in the case of CCMA proceedings falling under the authority of the Johannesburg regional office, and that commissioners who fail to comply with the 'directive' can expect an 'engagement' with management on their non-compliance. Labelling the circular a 'guideline' on the one hand, but in the same paragraph referring to it as a 'directive' which commissioners are required to comply with, is clearly contradictory. The language of the circular is more in keeping with an instruction than a guideline which a commissioner must simply consider. As such, it is difficult to construe either circular as anything but peremptory in intent.
- 27] The effect of the requirement in the circular would render the existing trigger mechanisms for an investigation into a representative's status contained in Rule 25(2) redundant. The power to issue guidelines, cannot extend to the imposition of peremptory procedures which are at odds with the rules.
- 28] The applicant further contends that *any* guidelines dealing with an issue contained in the rules are *per se* invalid. According to this argument, because the LRA itself does not regulate the right of any person or category of persons to represent any party in conciliation and arbitration proceedings;...", the representation of parties in

CCMA proceedings is not “a matter dealt with in the Act” within the meaning of s 115(2A)(g). Accordingly, so the argument goes, any guidelines issued by the CCMA on the question of representation would concern a matter not dealt with in the Act and therefore the pre-requisite set out in that section for exercising the power to issue a guideline would not be met.

- 29] However, the LRA does deal with the issue of representation in CCMA proceedings by empowering the CCMA to regulate the issue under s 115 (2A) (k). It seems unduly narrow to interpret the phrase ‘a matter dealt with in the Act’ as only referring to matters dealt with exhaustively in the statute itself. By assigning the CCMA the power to regulate the representation of parties, the LRA does deal with the matter of representation. Also, the fact that rules are promulgated does not logically, nor as a matter of principle, preclude the publication of guidelines on their application.² However the guidelines cannot supplant the rules.

Probing the bona fide nature of the arrangement between the member and the representative

- 30] Currently, the CCMA rules on representation of parties in arbitration and conciliation proceedings are silent on the question of whether a potential representative should be excluded because the representative party receives a fee for the representative service rendered to the member. The requirement of Rule 25(2) is that, in

² In this regards, the observations of Cachalia, AJA in **MEC for Agriculture, Conservation, Environment and Land Affairs v Sasol Oil (Pty) Ltd and another 2006 (5) SA 483 (SCA)**, at 491 are apposite:

“[19] The adoption of policy guidelines by state organs to assist decision-makers in the exercise of their discretionary powers has long been accepted as legally permissible and eminently sensible. This is particularly so where the decision is a complex one, requiring the B balancing of a range of competing interests or considerations, as well as specific expertise on the part of a decision-maker.”

the case of representation of one employer's organisation member by another member, the representative party must be a genuine member of the same employers' organisation. The second circular introduces a further requirement that the member performing the representative function may not do so for a fee, which goes beyond the requirement of mere membership in the rules.

- 31] Whether such an enquiry ought to be included in the rules is another matter. The difficulties relating to this part of the second circular are twofold. Firstly, the new paragraph 5.2 also forms part of the guideline which the CCMA vows to 'enforce' and expects commissioners to comply with. Secondly, the paragraph itself directs commissioners to embark on an enquiry into the *bona fide* nature of the arrangement between a party to proceedings and the representative, irrespective of whether the issue is raised or not in the proceedings. A routine enquiry of this nature is not provided for under Rule 25. Read in the context of the circular as a whole, paragraph 5.2 of the second circular tries to impose another mandatory enquiry into an aspect of representation which is not addressed by the rules.
- 32] I am aware that there have been challenges raised to representatives entitlement to appear in CCMA proceedings on the basis that the employer's organisation to which they claim to belong does not constitute a proper employer's organisation in terms of the LRA because it does not serve the purpose of "*regulating relations between employers and employees or trade unions*" which is a characteristic of an employer's organisation as defined in section 213 of the LRA. However, there is nothing in the LRA or the rules regulation representation that stipulates that a representative who is a member of an employer's organisation must be acting for another

member in accordance with an agreement asserting their common interests as members of the employer's organisation. If however, the principal function of the employer's organisation was simply to facilitate representation of employer's in the CCMA, the right of representation might be affected by the characteristics required of an employer's organisation in terms of the LRA.

33] I am satisfied in the circumstances, that to the extent that the circulars contain provisions which are cast in peremptory rather than directory language they go beyond what is permissible in a guideline. Further, to the extent that they seek to hold commissioners to account if they do not conduct certain enquiries as a matter of course, even though the rules do not enjoin them to do so automatically, the guidelines contained in the two circulars do not constitute guidelines which the CCMA is entitled to publish under section 115(2A) (g) of the LRA. The circulars effectively would rob a commissioner of any independent exercise of their judgment in deciding whether or not to conduct such an enquiry in terms of Rule 25(2).

34] Secondly, in requiring a commissioner to determine issues which go beyond the question of the representative's membership of an employers' organisation or trade union, the circulars introduce an additional criterion which should properly be addressed under the CCMA's power to make rules regulating who may appear in a representative capacity. The CCMA's power to issue guidelines cannot regulate the right of representation. Accordingly, the additional criterion in paragraph 5.2 of the second circular is *ultra vires* the CCMA's power to issue guidelines.

35] However, I am reluctant to grant an open-ended licence to AHI

members to appear on behalf of others irrespective of whether or not they are being remunerated by the represented member or not, because it is conceivable that other issues connected with the remuneration of such representatives might give rise to different queries about the right of AHI members to function in this fashion as the cases mentioned below illustrate.

The review of the arbitration award in JR 2518/10

- 36] As previously mentioned, the award was issued when the circulars in question had not been issued. However, it is clear that in deciding to exclude the AHI member as a representative, he embarked on the very enquiry that the CCMA would like all commissioner's to undertake in terms of its second circular. His conclusion was that the representative was not a bona fide member of AHI but was appearing as a labour consultant.
- 37] In considering the review application, the question now concerns whether the commissioner committed a reviewable error or irregularity in embarking on that enquiry, or to put it differently, was he entitled to enquire into the nature of the relationship between the two AHI members to try to determine if there was another reason why one member was prepared to represent the other? There are a number of cases in which claims have been made that the ostensible relationship between a party and their representative belies the true relationship and the parties are engaged in a subterfuge to avoid complying with the legal requirement for representation. The line between those cases in which the court has deemed such an enquiry appropriate and those in which it has been held that such an enquiry cannot be justified is sometimes difficult to discern. Both

parties referred to some of the better known authorities.

38] Following the applicant's argument, it insists that the arbitrator's enquiry should have gone no further than determining if the representative was a member of the AHI or not. Once his membership status and that of the party he was representing was established, that was where the enquiry should have ended. In ***Vidar Rubber Products (Pty) Ltd v CCMA & others* [1998] 6 BLLR 634 (LC)** Tip AJ held that a labour consultant who purported to be an official of an employer's organisation registered for the sole purpose of representing employers in CCMA proceedings was not entitled to do so. The learned judge held in that matter that the Commissioner was entitled to enquire into whether the employers' organisation was registered for a *bona fide* purpose. Importantly, the court held that the absence of the phrase *bona fide* qualifying the status of potential representatives in section 138(4) of the LRA, did not mean that, representation could not be refused even though the representative was not an official of a *bona fide* employers' organisation.³

39] It is important to note that in *Vidar Rubber* the representative, a labour consultant, had previously sought to appear as an employee of the employer party engaged on a retainer basis. The arbitrator disagreed and refused to admit the consultant as a representative. When the arbitration resumed the same individual appeared as the chairperson of a yet to be registered employer's organisation with 22 members in other provinces and claiming to have represented other employers in CCMA proceedings. The arbitrator found the employer's organisation was 'a sham' and a device to gain access to arbitration proceedings. The court dismissed the review application to set aside the arbitrator's rulings on the basis that it was clear the

³ At 638, [18]

true purpose for the creation of the employers' organisation was to represent employers in the CCMA and that the arbitrator was correct in finding that the organisation did not satisfy the primary object of an employer's organisation which was to regulate relations between employers and employees and trade unions.⁴

40] In the case of ***Van Wyk and Taylor v Dando and Van Wyk Print (Pty) Ltd*** [1997] 7 BLLR 906 (LC) a similarly crude attempt by a consultant to obtain rights of appearance in court was thwarted by the court which found that the union had acted *ultra vires* in admitting the consultant as a member when he did not qualify in terms of its constitution. By contrast, in the case of ***Smollan (Transvaal) (Pty) Ltd v Lebea NO and others*** (1998) 19 ILJ 1252 (LC), Revelas J set aside an award in which a commissioner refused admission of a labour consultant who had been appointed a director of the employer company because nothing in the LRA prohibited a consultant being appointed as a director and in the absence of fraud nothing prevented parties from arranging their affairs in such a way as to bring them within the ambit of the law. Revelas J also considered *Vidar Rubber* and *Van Wyk's* cases, but found them distinguishable on the facts.

41] In this instance, it was not the bona fides of AHI as an employer's organisation that was under scrutiny but the *bona fide* nature of the representative's membership of AHI. However, there was nothing before the arbitrator to support a conclusion that the representative, Cilliers, did not qualify to be a member of AHI in terms of its constitution. Unlike in the case of an employer's organisation, there is no statutory purpose which an individual member of a trade union

⁴ At 639,[23]-[27]

or employer's organisation needs to fulfil in order to qualify for membership of the organisation. I cannot see any reason for distinguishing this case from that of *Smollan*, even if Cilliers's motives for belonging to AHI might have been to represent employers in CCMA proceedings.

- 42] Accordingly, the ruling on representation in this case should be set aside

Concluding remarks

- 43] I appreciate that the CCMA is experiencing great frustration in its efforts to keep professionals out of CCMA proceedings, but if the existing rules on representation create avenues by which this might occur lawfully that is a consequence of the way those rules are framed. It cannot be remedied by issuing guidelines instead of amending the rules.

Costs

- 44] In respect of the first hearing of the application to review the circulars, I have previously expressed my view that even though a degree of urgency was justified, the timetable chosen by the applicant necessitated a delay in order to provide time for the matter to be fully ventilated. In the circumstances, the applicant should pay the wasted costs of the CCMA's preparation and representation on the first day when the matter was postponed.
- 45] As to the applicant's costs for the remainder of the proceedings including the drafting of the original application, these should be

borne by the CCMA as the applicant has been substantially successful.

- 46] In respect of the review of the arbitration award, there seems no reason why costs should not follow the result.

Order

- 47] In the result, the following order is made:

47.1 In the second matter, namely the review of the arbitrator's ruling on representation in case number JR 2518/10,

47.1.1 The arbitrator's ruling on representation of 10 September 2010 refusing the third applicant permission to represent the second applicant in the arbitration proceedings is reviewed and set aside, as is the default award issued under case number FS 2733/10 on the same date

47.1.2 The first respondent must set the unfair dismissal claims down for a hearing before another commissioner other than the second respondent at which hearing the third applicant may represent the second applicant.

47.1.3 The respondents must pay the costs of the application, the one paying the others to be absolved.

47.2 In respect of the review of the CCMA circulars under case number J 656/2011,

47.2.1 The circular issued to commissioners and recorded in

the Respondent's email to the Applicant of 28 March 2011 (annexure "C" to the founding affidavit) is declared *ultra vires*, invalid and of no force or effect.

47.2.2 Any member of the Applicant who is a party to proceedings before the CCMA may not be refused representation by another member of the applicant on the sole basis that such other member is a juristic (and not a natural) person.

47.2.3 A member of the applicant is entitled to appoint a director, member or employee in the case of a company, close corporation or any form of juristic person respectively through which it may represent a fellow member of the applicant.

47.2.4 The following portions of the circular issued by the respondent in June 2011, which is annexed to the respondent's supplementary affidavit as annexure "D" are *ultra vires* and of no force and effect:

47.2.4.1 "This office will in future and with immediate effect require that all commissioners comply with the rules and insist that any and all representatives provide proof of legitimacy to represent parties regardless of whether or not the issue is challenged or raised. The aforementioned documents are to be placed in the relevant case file and the CCMA's National internal audit department will immediately commence random file checks to monitor compliance. The JHB management will be responsible for enforcing this directive in the region and will be engaging those commissioners that fail to comply on an individual basis."

47.2.4.2“These notices will specifically detail that all commissioners will in future require copies of the registration certificate of an employers’ organisation or trade union together with copies of proof that the representative in a personal capacity is a member of the employers’ organisation or an employee of the employers’ organisation or trade union. This requirement is not new and...”

47.2.4.3Paragraphs 5.1 and 5.2 thereof.

47.2.5 The applicant shall pay the respondent’s wasted costs of preparation and representation for the hearing of this matter on 3 June 2011, and

47.2.6 The respondent shall pay the applicant’s costs of the application, excluding the costs of preparation and representation for the hearing on 3 June 2011, but including the drafting of the founding papers.



ROBERT LAGRANGE
Judge of the Labour Court of South Africa

APPEARANCES

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