



THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR2534/15

In the matter between:

**ASSOCIATION OF MINEWORKERS AND
CONSTRUCTION UNION OBO**

Applicant

and

**COMMISSION FOR CONCILIATION,
MEDIATION AND ARBITRATION**

First Respondent

NDUNA, X N.O.

Second Respondent

LEKGWATI, E N.O

Third Respondent

MURRAY AND ROBERTS (PTY) LTD

Fourth Respondent

Heard: 24 October 2017

Delivered: 25 January 2018

Summary: Section 158(1)(g) –review application – threshold agreements do not bar minority unions from requesting organisational rights – a settlement agreement concluded on basis on a common mistake in relation to a legal position is reviewable on common law grounds – the nature and merits of the case justify overlooking the delay.

JUDGMENT

Nkutha-Nkontwana J

Introduction

[1] The applicant (AMCU) launched this application in terms of section 158(1)(g) of the Labour Relations Act (the LRA)¹ alternatively in terms of common law for the following orders:

- 1.1. To review and set aside the conciliation proceedings that took place before the third respondent (commissioner Lekgwathi) on 21 May 2014, inclusive of the settlement agreement entered into between AMCU and the fourth respondent (Murray & Roberts) in terms of section 158(1)(g) (conciliation and settlement application).
- 1.2. Alternatively, to review and set aside the settlement agreement entered into between AMCU and Murray & Roberts on 21 May 2014 consequent to the conciliation proceedings before commissioner Lekgwathi in terms of common law on the basis that it was concluded as a result of a mistake, alternatively a misrepresentation (common law application).
- 1.3. To review and set aside the jurisdictional ruling of the second respondent (commissioner Nduna) dated 27 May 2015 in terms of section 158(1)(g), wherein it was found that the conclusion of the settlement agreement rendered the organisational rights dispute between AMCU and Murray & Roberts *res judicata* (jurisdiction ruling application).

[2] The application is only opposed by Murray & Roberts which raised three points *in limine*. Firstly, the delay in launching this application, particularly in

¹ Act 66 of 1995 as amended.

relation to the conciliation and settlement application and common law application, which is about one year and six months. Secondly, the issue on non-joinder. Thirdly, that the issue in relation to the off record discussion between an AMCU representative and commissioner Lekgwathi during the conciliation be referred to oral evidence.

Factual background

[3] Murray & Roberts is a construction company and is one of many contractors and sub-contractors employed by Eskom to build the power station at the Kusile construction site (Kusile Project). A collective agreement known as the Project Labour Agreement (PLA) was concluded in relation to the Kusile Project between two employer organisations viz:

3.1. the South African Federation of Civil Engineering Contractors (SAFCEC); and

3.2. the Construction Engineering Association of South Africa (CEA (SA);
and the following trade unions:

3.3. the National Union of Mineworkers (NUM);

3.4. Building Construction and Allied Workers Union (BCAWU);

3.5. MWU Solidarity (Solidarity);

3.6. UASA – The Union (UASA);

3.7. the National Union of Metalworkers of South African (NUMSA);

3.8. the South African Equity Workers Association (SAEWA);

3.9. The Metal Electrical Workers Union of South Africa (MEWUSA).

[4] In terms of clause 3 of the PLA:

- '3.1 The agreement applies to all the contractors, subcontractors and their employees and employees of temporary employment services (labour brokers [-TES]) contracted to them, and trade unions and their members, as well as to employees who are non-members of a trade union, for the duration of the project.
- 3.2 This agreement does not apply to any employee of a contractor or subcontractor who has been seconded to the project for a period of less than one calendar month.
- 3.3 Any other registered trade union which is a party to the respective party industry bargaining structures may become a party to this agreement by signing this agreement.'

[5] A second collective agreement named the Partnership Agreement (PA) was concluded between contractors and the trade unions at the Medupi and Kusile power stations on 7 June 2013. Clauses 6.1 and 6.4 thereof read as follows:

- '6.1 This agreement applied to Eskom, all Contractors and Employees in the Bargaining Unit and employees contracted to them and Trade unions and their members as well as to Employees who are non-members of the Trade unions, for the duration of the Project.
- 6.4 Any other trade union which is registered with the MEIBC or BCCEI and meets the threshold specified in terms of the policy on trade union recognition under this agreement may become a party to this agreement by signing it.'

[6] While clause 11.3 regulates the trade union rights and responsibilities and pertinently, clauses 11.3.3, 11.3.4 and 11.3.9 read as follows:

- '11.3.3 upon signature of this agreement, trade union recognition will be accorded on the basis of meeting a threshold of three hundred members per site. Recognition at this threshold level will entitle a trade union to a full time shop steward as well as participation within the partnership forums and collective bargaining structures.

11.3.4. within four months after signature, the threshold will increase to five hundred members per site.

11.3.9. should a trade union fall below the threshold necessary for recognition at the project site, the CIRC will notify it in writing that it faces de-recognition should it not within the space of ninety days brings its membership level above the threshold.'

[7] Murray & Robbers is a member of the Metal and Engineering Industry Bargaining Council (the MEIBC) through the CEA (SA). Membership is regulated by clause 4 of the Constitution of the MEIBC which reads as follows:

- '(1) the parties to the Council shall be registered employer's organizations and registered trade unions as set out in annexure A hereto and hereinafter referred to as employers or employer's organizations' and/or 'employees or trade unions' respectively as the case may be, whose members are engaged or employed in the Industry.
- (2) Any employer's organization or trade union registered in terms of Section 96 of the Act and in respect of persons engaged or employed in the Industry, may be admitted to membership of the Council, on such conditions as the Council may determine, and the terms 'the employers' or 'trade unions' shall thereupon be deemed to include any employer's organization or trade union as the case may be, so admitted.

Provided that such trade union shall have not less than 5000 members in the Industry. Membership figures submitted in support of the application to be party to the council must be certified by auditors.

The Council shall advise ant trade union whose membership has fallen below 5000, that unless the situation is corrected within three years of the date of notification, the trade union will forfeit any seats it has on the Council and cease to be a party to the council.

- (3) Any party may withdraw from the Council on giving three months' notice in writing to the Council's Secretary.'

[8] On 26 February 2014, AMCU issued a notice to Murray & Roberts indicating its intention to exercise organisational rights at the Kusile Project in terms of section 21(1) of the LRA. When the 30 days required in terms of section 21(3) of the LRA expired without a response from Murray & Roberts, AMCU referred the dispute to the Commission for Conciliation, Mediation and Arbitration CCMA. The matter was scheduled for conciliation on 21 May 2014 before commissioner Lakgwathi. Murray & Roberts raised a point *in limine* to the effect that AMCU was ineligible to exercise any organisational rights at the Kusile Project without first complying with the requirements of the applicable collective agreements.

[9] The parties concluded a settlement agreement which is recorded on the CCMA template and on the following terms:

'The undersigned parties record the settlement of their dispute in the following terms. By signing this agreement, the parties acknowledge that the agreement was read to them and interpreted (where necessary) and that they understand the content hereof. This agreement is in full and final settlement of the dispute referred to the CCMA...'

1. to 4.

5. WITHDRAWAL OF A DISPUTE

The applicant voluntarily withdraws the referral and abandons the dispute against the respondent in settlement of his/her case at the CCMA with full knowledge that he/she will not be able to proceed with this dispute at a later stage.

6. OTHER

The applicant, Amcu obo Members, agree to submit membership figures to MEIBC certified by Amcu auditors. The applicant further agree[s] to engage Luyanda Manyango, CIRLE, with regards to

PLA ...In the event Luyanda does not co-operate, the applicant may escalate this matter with Sean Isaacs for possible solution. The employer undertakes that there will be no victimization against any of the employees who join Amcu.'

- [10] On or about 20 March 2016, AMCU issued a second notice dated 16 March 2015 to Murray & Roberts. On 20 April 2015, AMCU referred another organisational rights dispute to the CCMA (the second dispute). Commissioner Nduna was appointed to conciliate the dispute. Murray & Roberts raised a point *in limine* to the effect that the matter was *res judicata* in the light of the settlement agreement between the parties. Commissioner Nduna upheld the jurisdictional point and dismissed AMCU's application. AMCU sought to rescind the jurisdictional ruling with no success.
- [11] In these proceedings, AMCU seeks to review and set aside both the settlement agreement and the jurisdictional ruling.

AMCU's submissions

- [12] AMCU argued that it is neither a party to the PLA nor a member of either the MEIBC and accordingly not bound by the PLA based on the following interpretation:
- 12.1. The PLA applies to those unions that are signatories to it and all the employees employed at Kusile Project, having been extended to apply in terms of section 23(1)(d) of the LRA; and
 - 12.2. The PLA does not apply to non-signatory trade unions, and in order for them to 'opt in' and become bound by the PLA, non-signatory trade unions such as AMCU must be party to the MEIBC and signatory to the PLA.
- [13] AMCU has not 'opted in' to be bound by the PLA. The PLA does not contain any provisions that purport to regulate or exclude organisational rights of minority trade unions that are non-parties, it regulates the organisational rights of parties that elect to 'opt in' and become bound by the PLA.

Accordingly, the PLA does not regulate or affect AMCU's organisational rights under the LRA.

- [14] AMCU, as a majority representative trade union in the workplace qualifies for the organisational rights in terms of sections 12, 13, 14, 15 and 16 of the LRA. Alternatively, as a sufficiently representative trade union, it qualifies for the organisational rights in terms of sections 12, 13 and 15 of the LRA.
- [15] AMCU is not bound by the PA as it is only extended to employees who are not members of a trade union and does not deal with organisational rights.
- [16] Commissioner Lekgwathi, seized with the first dispute, instead of ruling on the point *in limine* raised by Murray & Roberts, *mero mutu* raised, on record, prospects of providing advice regarding the procedure to be followed by AMCU with reference to becoming a party to the MEIBC and the PLA. However, during the off record discussion with AMCU's representative, Mr Mazibuko, commissioner Lekgwathi allegedly expressed a view that he agreed with Murray & Roberts' contention and advised that a settlement agreement should be concluded.
- [17] Mr Mazibuko, a lay person and who is not legally trained, erroneously accepted on good faith that commissioner Legwathi and Murray & Roberts' representative were correct in respect of the contention that AMCU was required to be a party to the MEIBC, PLA and PA in order to become entitled to the organisational rights sought to be exercised at the Kusile Project. Accordingly, when Mr Mazibuko was concluding the settlement agreement, he was labouring under a misapprehension based on what commissioner Lekgwathi and the representative of Murray & Roberts had intimated to him.
- [18] Therefore, the settlement agreement was erroneously concluded. Firstly, as a result of unilateral mistake on the part of AMCU, alternatively mutual and/or common mistake between AMCU and Murray & Roberts. Secondly, and alternatively, a material misrepresentation by the representative of Murray & Roberts (echoes by what commissioner Lekgwathi had expressed).

Murray & Roberts' submissions

- [19] AMCU approached the Court to ultimately avoid the settlement agreement which does no more than to put it on level pegging with other trade unions, so far as the exercise of the organisational rights is concerned.
- [20] In terms of section 18 of the LRA, employers and the trade unions are allowed to set thresholds for the exercise of organisational rights by other trade unions. The PLA and PA regulate or exclude organisational rights of minority trade unions and as such AMCU cannot rely on the provisions of the LRA for the exercise of organisational rights.
- [21] A contract should be interpreted to give effect to its purpose. The purpose of the PLA is to provide consistent approach with regard to collective bargaining matters, including the organisational rights of trade unions. That purpose cannot be achieved if AMCU is allowed to 'opt out' of the PLA and PA and follow the provisions of the LRA. That would result in a chaotic situation where a different set of requirements for the exercise of organisational rights would ensue. As a result, trade unions like AMCU with fewer members would enjoy greater organisational rights simply because they choose to 'opt out' of the PLA and PA.
- [22] The threshold provisions of the PLA and PA would be rendered nugatory if a non-party union is allowed to obtain organisational rights solely because they comply with the less onerous requirements of the LRA. A collective agreement must not be interpreted in a manner that renders its provisions superfluous and pointless.
- [23] The only avenue to the exercise of the organisational rights is compliance with the provisions of the collective agreements in line with the guiding principles of the LRA. The LRA aims to avoid the proliferation of trade unions

in one workplace. The primary purpose of section 18 is to promote a system which a single trade union or group of trade unions enjoy exclusive rights or representation within a workplace. Collective agreements must be interpreted in accordance with the purposes of the LRA.

[24] AMCU has not made out a case for setting aside of the settlement agreement on the basis of mistake or misrepresentation. Commissioner Lekgwathi was not a party to the settlement agreement. Misrepresentation by third parties to a contract cannot found a basis for the review of the settlement agreement. Also there was no common mistake as the parties never agreed tacitly or impliedly that the validity of the settlement agreement is subject to the proposition of law put forward by Murray & Roberts was indeed correct.

[25] There could not have been a mistake as the settlement agreements are peculiar in the area of the law contract and the parties voluntarily agree to a compromise.

Delay

[26] Before I deal with the substantive issues raised in the application, I deem it appropriate to deal with the first point *in limine*, the delay in instituting these proceedings.

[27] Section 158(1)(g) empowers this Court, subject to section 145, to review the performance or purported performance of any function provided for in this Act on any grounds that are permissible in law. Unlike in section 145, there is no prescribed time limit for launching a review under section 158(1)(g) and even the Court's Rules prescribe no time limits for bringing review applications. Notwithstanding, it is generally understood that proceedings under section 158(1)(g) must be launched within a reasonable time.

[28] In *Weder v MEC for the Department of Health, Western Cape*,² dealing with the question of what constitutes 'reasonable time', the Court proposed that

² [2013] 1 BLLR 94 (LC) at para 8.

anything more than six weeks should at least trigger an application for condonation simply because the processes in section 158 are closely aligned to the process set out in section 145 of the and Rule 7A.

[29] In *Gqwetha v Transkei Development Corporation Ltd and others*,³ the Supreme Court of Appeal (SCA) in its majority judgment, held that an assessment of a plea of undue delay involves examining, firstly, whether the delay is unreasonable or undue, a factual enquiry upon which a value judgment is made in the light of “all the relevant circumstances”; and if so, secondly, whether the court’s discretion should be exercised to overlook the delay and nevertheless entertain the application.⁴

[30] I do not think that I should spend much time on this issue. The nature of the application and merits justify that the application be entertained. Even though the delay is about one year and six months, it is not atypical in applications of this nature that a respite of about a year be undertaken before the next step could be taken.⁵

[31] Also, the delay is explained and the fact that the misapprehension in relation to the status of the settlement agreement persists and has barred AMCU’s endeavours to re-enrol the matter necessitates the Court’s determination of the merits of this dispute. Commissioner Nduna premised his jurisdictional ruling on the settlement agreement.

[32] In short, the circumstances of this case warrant that condonation for the delay be granted.

Merits

³ [2005] ZASCA 51; 2006 (2) SA 603 (SCA).

⁴ *Supra* at para 24 and 31..

⁵ Section 65(2) states that:

- (a) Despite section 65(1)(c), a person may take part in a strike or a lock-out or in any conduct in contemplation or in furtherance of a strike or lock-out if the issue in dispute is about any matter dealt with in sections 12 to 15. 14.
- (b) If the registered trade union has given notice of the proposed strike in terms of section 64(1) in respect of an issue in dispute referred to in paragraph (a), it may not exercise the right to refer the dispute to arbitration in terms of section 21 for a period of 12 months from the date of the notice.

- [33] Recently the Labour Appeal Court (LAC) in *South African Correctional Services Workers Union (SACOSWU) v Police and Prisons Civil Rights Union (POPCRU) and Others (POPCRU)*,⁶ overturned the judgment of this Court, per Snyman J upon which Murray & Roberts' defence is hinged. In that case POPCRU referred a dispute to the General Public Service Sectoral Bargaining Council (the GPSSBC), claiming that SACOSWU could not be granted organisational rights because that union had not attained the threshold set for membership of any bargaining council and by an agreement concluded between the Department of Correctional Services (the DCS) and majority trade unions, which set thresholds for the acquisition of organisational rights, and requested an order to declare the collective agreement "null and void".
- [34] The Arbitrator, applying the principles in *NUMSA and others v Bader Bop (Pty) Ltd and another (Bader Bop)*,⁷ found that nothing precluded a minority trade union from obtaining organisational rights by negotiating directly with an employer, and ruled that the agreement between the DCS and SACOSWU was valid and binding.
- [35] On review, Snyman J, upholding the review, found that the DCS-SACOSWU agreement was "entirely incompatible" with a threshold agreement concluded between the DCS and POPCRU, which had to take priority, and that SACOSWU could obtain the rights it had been granted only by gaining admission to the department's bargaining council, for which it did not qualify. The DCS-SACOSWU agreement was set aside and the Court declared that SACOSWU was not entitled to any organisational rights until it had satisfied the threshold required for admission to the departmental bargaining council.
- [36] The LAC, referring to *Bader Bop*⁸ and *Association of Mineworkers and Construction Union and others v Chamber of Mines of South Africa and others (Chamber of Mines)*,⁹ with approval, found that:

⁶ [2017] 9 BLLR 905 (LAC).

⁷ [2003] 2 BLLR 103 (CC).

⁸ *Supra* at para 41.

[36] While section 23(1) provides that a collective agreement is binding on the parties to it, a threshold agreed by an employer obliges the employer to confer sections 12, 13 and s15 rights upon a union which had achieved the threshold agreed in the section 18(1) agreement. It does not bar the employer from bargaining collectively with a minority union which seeks to have any organisational rights conferred on it, nor does the existence of a section 18(1) agreement oblige the employer to deprive a minority union of any such organisational rights.

[37] That this is so is starkly highlighted by the issue of representation of members of minority unions in individual disciplinary or grievance proceedings. Since a majoritarian system can only operate fairly where a minority union is allowed to co-exist, including "...to represent members in relation to individual grievances", to deny an employee a choice and impose on him or her representation by a majority union, of which that employee is not a member, is conceivably contrary to and in breach of the employee's constitutional rights to freedom of association and to join a trade union and the right in section 23(1) to fair labour practices.

[38] An employer may determine whether it wants to bargain with a minority union, the extent to which it will do so and whether it will conclude a collective agreement with the minority union. This includes bargaining collectively on the grant of any organisational rights to that union. The LRA does not prohibit the bargaining with a minority union on such matters, nor does the employer breach an existing section 18(1) collective threshold agreement in doing so. This is so, in that, the effect of the section 18(1) threshold which has been agreed to, is to oblige the employer to confer sections 12, 13 and 15 rights upon unions that had achieved that threshold, but not to constrain the employer's entitlement to bargain with those unions that have not.

[39] It is so that the employer's election to bargain with the minority union in such circumstances may have consequence for the relationship

⁹ (2017) 38 ILJ 831 (CC) [also reported at [2017] 7 BLLR 641 (CC) at para 43. This case coincidentally involves AMCU and 'the Constitutional Court recognised majoritarianism as both a premise of and recurrent theme throughout the LRA. Reference was made to *Kem-Lin Fashions CC v Brunton and another* [(2001) 22 ILJ 109 (LAC) [also reported at [2001] 1 BLLR 25 (LAC)].

with the majority union, and that such consequence may play out either in the course of the collective bargaining relationship, or through the exercise of other legal remedies. However, since the threshold agreement does not provide a bar to the conclusion of a section 20 collective agreement with the minority union regarding sections 12, 13 or 15 organisational rights, the existence of the threshold does not distinguish the matter from *Bader Bop*. This is so given the recognition that minority unions are entitled to co-exist, to organise members, to represent members in relation to individual grievances and to seek to challenge majority unions.¹⁰(Emphasis added)

[37] This Court is bound by the above authorities. Coming back to the present case, based on the above authorities, it is clear that the PLA and PA, threshold agreements, do not proscribe minority trade unions like AMCU from requesting to exercise sections 12, 13 or 15 organisational rights. Once AMCU can prove that it is sufficiently representative at the Kusile Project, it is within its right to request to exercise these organisational rights in terms of section 21. It is, therefore, inescapable that the construction Murray & Roberts accorded to section 18 is untenable as it is inconsistent with the Constitutional imperatives.

[38] That takes me to the issue of the settlement agreement. AMCU argued that Mr Mazibuko was labouring under a misapprehension based on what commissioner Lekgwathi and the representative of Murray & Roberts had intimated to him when he was concluding the settlement agreement. Therefore, the settlement agreement was erroneously concluded as a result of unilateral mistake on the part of AMCU, alternatively mutual and/or common mistake between AMCU and Murray & Roberts.

¹⁰ Referring to *Chambers of Mines*, the LAC stated that Constitutional Court 'recognised that while the extension of collective agreements to non-parties under section 23(1)(d) gives enhanced power within a workplace to a majority union for powerful reasons that enhance employees' bargaining power through a single representative bargaining agent, majoritarianism is not "an implement of oppression" and:

"...does not entirely suppress minority unions. Its provisions give ample scope for minority unions to organise within the workforce - and to canvass support to challenge the hegemony of established unions."

[39] Murray & Roberts, conversely, argued that there was no common mistake as the parties never agreed tacitly or impliedly that the validity of the settlement agreement is subject to the proposition of law put forward by Murray & Roberts being indeed correct. There could not have been a mistake as the settlement agreements are peculiar in the area of the law contract and the parties voluntarily agree to a compromise.

[40] It is well accepted that when parties reach an agreement based on a common incorrect assumption of a present or past fact, the contract is void.¹¹ The party wishing to rely on the voidness of the contract must allege and prove that: firstly, the contract was based on a common assumption; secondly, the assumption was incorrect; and thirdly, the subject-matter of the assumption was vital to the transaction, put differently, had both parties been aware of the true position the transaction would not have been entered into.¹²

[41] These tenets were endorsed by the LAC in *Concor Projects (Pty) Ltd t/a Concor Opencast Mining v Commission for Conciliation, Mediation and Arbitration and others*,¹³ another matter involving AMCU. The LAC stated that:

'[40] I am in agreement with the court *a quo* that the inescapable conclusion is that AMCU and the appellant laboured under the wrong impression that the sectoral determination prevented the parties from negotiating at plant level on issues governed by the sectoral determination when it signed the document. In *Dickenson Motors (Pty) Ltd v Oberholzer* it was said that:

"An agreement founded upon a common mistake, which mistake is impliedly treated as a condition which must exist in order to bring the agreement into operation can be set aside,

¹¹ *Osman v Standard Bank National Credit Corp Ltd* [1985] 1 All SA 585 (C), 1985 (2) SA 378 (C) p. 386; *Van Reenen Steel (Pty) Ltd v Smith NO* [2002] ZASCA 12, 2002 (4) SA 264 (SCA); *Transnet Ltd v Rubenstein* [2005] 3 All SA 425 (SCA), 2006 (1) SA 591 (SCA); see also *Amlers Precedents of Pleadings* 8th Edition (Harms) P 257.

¹² *Dickinson Motors (Pty) Ltd v Oberholzer* [1952] 1 All SA 421 (A), 1952 (1) SA 443 (A)

¹³ [2014] 6 BLLR 534 (LAC) at para 40 to 41.

formally if necessary or treated as set aside and as invalid without any process or proceedings to do so."

I agree with the court *a quo* that Mahlomuza would not have withdrawn the dispute had he known that the sectoral determination was no bar against negotiating with the appellant at plant level. I might as well add that the appellant would not have taken the stance that it took had it known what the correct legal position was.

[41] In my view, it would be totally unfair to hold AMCU to an "agreement" that was clearly entered into based on a common mistake and thereby denying it and its members their constitutional right to strike. The court *a quo* was correct in disregarding the "settlement agreement".

[42] Even in the present case, to the extent that the erroneous construction of section 18 influenced the conclusion of the settlement agreement, as both parties held a mistaken view that AMCU's eligibility for organisational rights must be preceded by compliance with the thresholds in terms of the PLA and PA read with the Constitution of the MEIBC, it was indeed concluded on the basis of a common mistake. It is clear that AMCU would not have agreed to settle the dispute on the terms that deprived it of the organisational rights that minority trade unions are entitled to in order to organise and represent their members; to deal with individual grievance and disciplinary matters; and to keep the majority trade unions on their toes.¹⁴ Similarly, Murray & Roberts would not have taken the stance that it took had it been apprised of the correct legal position.

[43] For all the reasons alluded to above, in my view, the settlement agreement entered into between AMCU and Murray & Roberts on 21 May 2014 consequent to the conciliation proceedings facilitated by commissioner Lekgwathi stands to be set aside as it was concluded on the basis of a common mistake.

[44] Correspondingly, commissioner Nduna's jurisdictional ruling dated 27 May 2015 wherein it was found that the conclusion of the settlement agreement

¹⁴ *Supra* n 6 at para 39.

rendered the organisational rights dispute between AMCU and Murray & Roberts *res judicata* must suffer the same fate.

Conclusion

- [45] The delay in instituting these proceedings stands to be condoned.
- [46] The settlement agreement dated 21 May 2014 concluded on the basis of a common mistake stands to be set aside.
- [47] The jurisdictional ruling dated 27 May 2015 that found the settlement agreement to have rendered the organisational rights dispute between AMCU and Murray & Roberts *res judicata* stands to be set aside.
- [48] I note that AMCU did not request that the matter be remitted back to the CCMA. Accordingly, I leave it to the parties, particularly AMCU, to decide the path this matter should follow henceforth. AMCU is, however, not striped of its right to request the CCMA re-enrol the matter with without having to issue a new notice in terms of section 21(1).

Costs

- [49] In my view, it is equitable that each party pays its own costs given the nature of the application and the prospects of a collective bargaining relationship.
- [50] In the premises, I make the following order:

Order

1. The delay in instituting these proceedings is condoned.
2. The settlement agreement under case number MP3038-14 dated 21 May 2014 is set aside.

3. The jurisdictional ruling under case number MP3385-14 dated 27 May 2015 is set aside.

4. There is no order as to costs.

P Nkutha-Nkontwana

Judge of the Labour Court of South Africa

Appearances:

For the applicants: Advocate R Itzkin

Instructed by: Larry Dave Incorporated

For the second respondent: Advocate H van der Merwe

Instructed by: Fluxmans Incorporated