



- (1) Reportable: Yes
(2) Of interest to other Judges: Yes/No
(3) Revised

Signature

Date

THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Reportable

Case no: **2025-231674**

In the matter between:

MARGARET GABRIEL WHEATLEY

Applicant

and

**THE COMMISSION FOR CONCILIATION, MEDIATION AND
ARBITRATION (CCMA)**

First Respondent

COMMISSIONER WAYNE PAUL

Second Respondent

WOOLWORTHS (PTY) LTD

Third Respondent

Heard: **9 December 2025**

Delivered: **13 January 2026** (This judgment was handed down electronically by emailing a copy to the parties. The date of delivery of this judgment is deemed to be 13 January 2026).

JUDGMENT

KROON AJ

Introduction

- [1] In an article published in *The Advocate*,¹ Wallis JA referenced Edwin Glasgow KC, who he said had used the term “*Christopher Columbus advocacy*”. He explained that this type of advocacy occurs:

“When you set out, you don’t know where you are going. When you get there, you don’t know where you are. And when you return, you don’t know where you have been.”

- [2] This is a story of a litigant who, unreflectively and with ill-advised haste, left harbour with neither chart nor compass. Having so set sail, the case was destined to founder on the rocks of proper pleading and to run aground on the shoals of the Labour Relations Act.² The aftermath is a legal shipwreck which the Court must adjudicate.
- [3] The suit advanced by the Applicant (Ms Wheatley) has three pillars. First, she seeks an order setting aside a ruling refusing her legal representation. Second, she asks that the Second Respondent (the Commissioner) be disqualified from further participation in her matter. Third, she seeks an order directing the First Respondent (the CCMA) to investigate a matter arising from her case. The CCMA is thereafter to account to the Court. The application is opposed by the Third Respondent (Woolworths) and, uniquely, but understandably so, by the CCMA.

¹ Volume 36, number 3, December 2023, pg 72

² No 66 of 1995 (the LRA)

Events giving rise to the application

- [4] Ms Wheatley says that the Commissioner granted legal representation “on the spot” at the 21 October 2025 sitting of the Arbitration. This was pursuant to a verbal request by her legal representative, Ms Ndlovu, who also represented her in these proceedings. However, a week later, on 28 October 2025, she “unexpectedly” received a ruling issued by the Commissioner denying legal representation (the Ruling). She contends that the Ruling is jarringly inconsistent with the initial decision to grant legal representation. She encountered resistance when she sought to secure a copy of the recording of the proceedings. She believes that the CCMA and the Commissioner harboured ulterior motives for refusing to produce it. Ms Wheatley’s trenchant criticism of the Commissioner is captured in the following paragraph in her founding affidavit:

“3.15 I submits (sic) that foul play occurred after the proceedings, and that the commissioner’s failure to produce the recording was deliberate and intended to conceal the irregular change of (sic) ruling.”

- [5] The answering affidavit of Woolworths is deposed to by Zimasa Mabona (Mr Mabona), an Employee Relations Specialist in the employ of Woolworths, who was present at the 21 October 2025 sitting. Mr Mabona sharply disputes the allegations contained in Ms Wheatley’s affidavit. He denies that the Commissioner granted legal representation on 21 October 2025.³ He states that one of the principal reasons the Commissioner postponed the arbitration was to consider and rule on the application for legal representation.⁴ Mr Mabona further contends that, in relation to the events of 21 October 2025, the affidavit of Ms Wheatley contains other embellishments and untruths.

³ Paras 45, 57, 82, 98.1, 99.1, 101.1 and 102.2 of Mr Mabona’s answering affidavit

⁴ Para 46 of Mr Mabona’s answering affidavit

- [6] The stance of the CCMA, as set out in the answering affidavit deposed to by the Director of the CCMA, Cameron Sello Morajane (Mr Morajane), is unequivocal. It is that Ms Wheatley and, by implication, Ms Ndlovu are attempting to mislead the Court as to what occurred on 21 October 2025. It has proof, so it says, in the form of a recording. It says that it transmitted the recording to Ms Ndlovu on 5 December 2025.
- [7] Whilst Ms Wheatley did reply to the affidavit of Mr Mabona, there is no reply to the affidavit of the CCMA. It may be that, because the matter was heard on 9 December 2025 and the CCMA's answering affidavit was only delivered on 8 December 2025, there was insufficient time to file a reply. That said, when Mr Pillay of the CCMA presented its case, he asserted that it had been confirmed that the recording contradicted Ms Wheatley's version. Ms Ndlovu did not, in her replying submissions, refute that she now has the recording. She did not say whether she had listened to it and, if so, what it revealed. She did not indicate that she wished to reconsider her position in the light of the production of the recording.
- [8] The allegations by Ms Wheatley, as repeated by Ms Ndlovu in the heads of argument drafted on her behalf, are, by their nature, very serious. They may or may not be true. If they are untrue, it is a matter of some gravity. They raise the question whether there has been an attempt to mislead the Court and, consequently, whether there has been an unjustified attack on the integrity of the Commissioner. The more serious the allegation, the greater the need to lay a proper foundation for making it. However, as I made clear at the hearing, it is unnecessary and in my view undesirable, for the Court, by way of an urgent opposed application, to investigate who is telling the truth. Having reflected on the matter, I am of the view that this is a task for the regulatory body of the legal profession, i.e. the Legal Practice Council (the LPC). I deal further with

this aspect at the end of the judgment.

The relief sought

Notice of Motion

[9] The Notice of Motion reads as follows:

- “1. Condoning the Applicant's non-compliance with the rules of this Honourable Court and hearing this matter as one of urgency in terms of the Court Rules.*
- 2. Reviewing and setting aside the ruling of the Second Respondent dated **28 October 2025**, in which the Applicant's legal representation was denied.*
- 3. Declaring that the Second Respondent's conduct in failing to produce the electronic recording of proceedings held on 21 October 2025 constitutes a gross irregularity in terms of section 145(2)(a)(ii) of the Labour Relations Act 66 of 1995 ("the LRA").*
- 4. Ordering that the dispute be remitted to the CCMA for hearing de novo before a different commissioner.*
- 5. Directing the First Respondent to investigate and report on the loss or non-production of the official recording.*
- 6. Granting the Applicant the right to legal representation in the arbitration proceedings.*

7. *Ordering that the Second Respondent be recused from further involvement in this matter.*

8. *Costs against any Respondent opposing this application.”*

[10] In my view, the relief sought is, in every respect, unsustainable from the outset. Prayer one is dealt with below under the heading of urgency.

The application to set aside the Ruling

[11] Ms Wheatley moves for the setting aside of the Ruling without having filed the record of the proceedings which led to it. The two vital components of the record would naturally be the oral application for legal representation and the alleged initial *ex tempore* ruling granting it. The remarkable absence of the record must be assessed against a backdrop where Ms Wheatley’s representative, Ms Ndlovu, knew that the facts would be in dispute. Yet she persisted with the contention that the Court make a decision without the benefit of the record and, as it were, in the dark.⁵ She did so at her peril.⁶

[12] The further relief sought regarding legal representation is unintelligible, Ms Wheatly asks that her dispute be remitted to the CCMA for a hearing *de novo* before a different Commissioner (prayer four). But, if the proceedings are to commence afresh, then the alleged initial ruling in her favour would fall away. She would effectively be seeking relief against

⁵ Ms Ndlovu, in response to concerns raised by the bench, initially vacillated between seeking an indulgence, in her words, to “*re-file the application*” and persisting with the application. She ultimately settled on the latter course. In any event, at the risk of being accused of straining the nautical metaphor introduced in the beginning of the judgment, the ship granting indulgences had long since sailed by the time that the application was heard.

⁶ *SACCAWU & Others v President, Industrial Tribunal & Another* 2001 (2) SA 277 (SCA) at para [7]

herself which would be unprecedented.⁷

- [13] More importantly, irrespective of whether the Ruling is set aside, Ms Weathley, towards the end of her Notice of Motion, requests that the Court nonetheless grant her legal representation (prayer six). The Labour Court does not sit as a court of first instance in respect of applications for legal representation in CCMA proceedings.⁸ It is self-evidently the presiding commissioner who has the competence and authority to do so. She⁹ must exercise her discretion in accordance with the CCMA rules.¹⁰

The application to declare the failure to produce the recording a gross irregularity

- [14] It should not need stating that the remedy available to a party who believes that a record exists but is being withheld, is to bring an application to compel its production. Instead of following this avenue, an inexplicable decision was taken to seek a declaratory order that the failure to produce the record constitutes a “*gross irregularity*”.
- [15] A gross irregularity is a defined ground of review, a determination that a court may make in a review application. The question of whether a gross irregularity exists cannot, *ex post facto*, arise in the course of the administrative process of making the record available once a commissioner is *functus officio*. In any event, the granting of such a

⁷ In *Thusi v Minister of Home Affairs* 2011 (2) SA 561 (KZP) at para [47] Wallis AJ (as he then was), in analysing the relief contained in an order, commented as follows:

“There is a basic misconception underlying this order... This is an order against the Applicant, not the Respondents, and, what is more, one sought by the Applicant. To sue oneself is an oddity. To ask for and obtain relief against oneself is unprecedented...”

⁸ The Labour Court may only substitute such a decision of a CCMA commissioner pursuant to a successful review application.

⁹ The female gender is used for the sake of conciseness. References to the female gender include, where appropriate, the male gender.

¹⁰ Rule 25(1)(c) of the Rules for the Conduct of Proceedings before the Commission for Conciliation, Mediation and Arbitration

prayer would be an exercise in futility. Issuing a stand-alone declarator that conduct amounts to a gross irregularity, unaccompanied by a pronouncement on whether a commissioner's decision should be set aside, would be a *brutum fulmen*¹¹; authoritative in tone, but ineffectual in law.

The application to compel the CCMA to conduct an investigation

- [16] In terms of prayer five, the CCMA is to investigate and report on the loss or non-production of the official recording of the 21 October 2025 sitting. In this regard, the order proposed reads as follows:

“6. The First Respondent (CCMA) is ordered to conduct an internal investigation into the missing and/or unproduced recording of the arbitration proceedings held on 21 October 2025 and to file a written report with this Court within 14 (fourteen) days of this order.

- [17] Thus, Ms Wheatley seeks an order requiring an investigation and a written report on an urgent basis. The CCMA is an independent statutory body created in terms of section 112 of the LRA, an Organ of State with a governing body.¹² It is responsible for its own administration. It is not for the Labour Court to micro-manage the internal governance processes of the CCMA. The Court may, in exceptional circumstances, refer a concern which it harbours about the conduct of a commissioner, or a state of affairs, to the CCMA for investigation.

- [18] Absent proof of delinquency on the part of the CCMA in the performance of its duties in relation to the receipt and investigation of a complaint, a

¹¹ literally empty thunderbolt

¹² Section 116 of the LRA

complaint must first be lodged with it through the correct channels.¹³ As with any administrative body, it should be allowed to manage its own affairs and process any complaint so lodged. Should a complaint be lodged and should Ms Wheatley thereafter be aggrieved by the outcome of her complaint, only then will there be scope for instituting a legal challenge.¹⁴ But, in this matter, the CCMA has not yet been asked by Ms Wheatley to conduct a formal investigation. The prayer is hopelessly premature.

- [19] There is also no explanation why an onerous supervisory order was sought against the CCMA, requiring it to account, within a limited time period, to the Labour Court by way of written report as to the outcome of its investigation. No foundation is laid in the application for the granting of such an order. It is unclear what the Court would be required to do upon receipt of the report. Orders of this nature are ordinarily reserved for situations in which there has been non-compliance with prior court orders or systemic violations of the law.¹⁵

The application that the Commissioner be “recused”

- [20] There is a stand-alone prayer that the Commissioner be “*recused*” from the matter. It is Ms Wheatley’s case that she harbours a reasonable apprehension of “... *Bias and Misconduct*” on the part of the Commissioner. The proposed order is less decorous in tone:

“7. *The Second Respondent, Commissioner Wayne Paul, is removed from any further involvement in the Applicant's dispute under CCMA Case Number KNDB2594-25.*”

¹³ Cf *Mavudzi And Another V Majola And Others* 2022 (6) SA 420 (GJ) at para [39]

¹⁴ Presumably in terms of Section 158(1)(g) read with Section 117 of the LRA

¹⁵ *Public Protector and Others v President of the Republic of South Africa and Others* 2021 (9) BCLR 929 (CC); 2021 (6) SA 37 (CC) at paras [136], [195] and [202]

[21] The relief so sought is extraordinary because it is made in the absence of an approach having first been made to the Commissioner. In the Court's view, Ms Wheatley's attempt to secure the Commissioner's recusal in terms of a first-instance decision by the Labour Court is fatally procedurally irregular. The insurmountable hurdle facing her is that the Labour Court has no jurisdiction to order a commissioner to recuse herself. That would be for it to usurp, contrary to statute, the powers of a commissioner who, at first instance, is the functionary solely responsible for determining the dispute before her in terms of section 138(1) of the LRA. The Court may of course, when considering a review application, adjudicate whether a commissioner's failure to recuse herself is reviewable and in those circumstances, substitute the decision. But that is a different matter.

[22] The fact that the Court has the power to grant an interdict does not mean that it has, so to speak, papal authority to decree the summary recusal or removal of a commissioner. In *Labour Court Manual* by Prinsloo and Van Niekerk,¹⁶ the learned authors explain that jurisdiction cannot be cheerfully assumed outside of the contours of the LRA or other legislation which vests the Labour Court with jurisdiction,¹⁷ emphasising that the power to grant an interdict is not, in itself, jurisdiction conferring:

*"Parties should also be cautious when relying on s 158(1) of the LRA to establish jurisdiction; it describes the LC's powers, as opposed to its jurisdiction. so, for example, the fact that the LC has the power in terms of s 158(1)(a)(ii) to grant an interdict does not mean that an interdict can be sought in respect of any dispute – the applicant must always identify the cause of action by reference to some statutory provision that confers jurisdiction on the court."*¹⁸

¹⁶ 2024, Juta and Company (Pty) Ltd, South Africa, page 7

¹⁷ As to the boundaries of the jurisdiction of the Labour Court, see *Cibane and Another v Premier of Province of Kwazulu-Natal* [2025] 10 BLLR 1004 (LAC); (2025) 46 ILJ 2587 (LAC)

¹⁸ *Merafong City Local Municipality v South African Municipality Workers Union and Another* [2016] ZALAC 12; [2016] 8 BLLR 758 (LAC); (2016) 37 (ILJ) 1857 (LAC) at para [33]

- [23] To place matters in their broader context, commissioners take an oath to administer justice without fear or favour. The first ethical obligation resting on commissioners, in terms of the “*Code of Conduct for Commissioners*”,¹⁹ is to act “...*independently of any outside pressure in the discharge of their statutory functions*”.²⁰ It would be repugnant to the rule of law for one judicial officer, even a Judge of the Labour Court, to dictate to a commissioner how she should exercise her discretion in a recusal application.²¹

Concluding observation

- [24] Ms Wheatley has approached this Court directly, going, behind both the backs of the CCMA and the Commissioner. She did not first apply to the Commissioner for recusal. She did not allow him to address the very serious allegations she has levelled against him in this forum. If she had subsequently felt aggrieved by a decision by the Commissioner's decision not to recuse himself (assuming that that was the decision he made), she could then have approached him for a postponement in order to allow her to launch a legal challenge to his ruling. The Commissioner would, in that event, have had an obligation to exercise a discretion on whether the matter should be postponed pending the outcome of the review application,²² bearing in mind that litigating by way of piecemeal review application is the exception, not the norm.²³ Furthermore, as mentioned, she also did not first lodge a formal complaint with the CCMA and await the outcome of that complaint. The decision to approach the Court directly was unfair and disrespectful to both the Commissioner and the CCMA. It can hardly be said to have been proper.

¹⁹ Government Gazette No. 38230 of 21 November 2014

²⁰ Clause 3.1 of the Code of Conduct for Commissioners

²¹ See also section 142(8)(g) of the LRA which, *inter alia*, contains a prohibition against the improper influence of arbitration proceedings by any person.

²² *Ntombela and Others v United National Transport Union and Others*²² (2019) 40 ILJ 874 (LC) at para [67] and *Southern Sun Hotel Interests (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* [2011] 10 BLLR 1012 (LC) at para [33]

²³ Section 158(1B) of the LRA

Urgency

The case made out by Ms Wheatley for urgency

[25] The alleged urgency of the matter is addressed in two solitary paragraphs in the founding affidavit:

“URGENCY

6.1 *The matter is urgent because the commissioner's contradictory conduct and refusal to produce the recording have effectively halted the Applicant's right to fair process.*

6.2 *(sic) continue to suffer prejudice while the case remains under the authority of the same commissioner who caused the irregularity.*

Analysis

[26] It would have been evident to the author of the Notice of Motion, Ms Ndlovu, that the application would attract opposition. Astoundingly, no provision is made therein for the filing of answering and replying affidavits. In short, Ms Ndlovu abdicated her responsibility to forge her own rules by failing to take the trouble to carefully modify the applicable time periods in a manner commensurate with the alleged exigencies of the case.²⁴

²⁴ *Luna Meubelvervaardigers (Edms) v Makin and Another (t/a Makin's Furniture Manufacturers)* 1977(4) SA 135(W) at pp 137 E-G

[27] Secondly, there was the limited time within which the Respondents were forced into Court. The application was served on Friday, 5 December 2025, to be heard on Tuesday, 9 December 2025, thereby affording the parties an effective two working days to study and peruse the application, obtain authorisation to advise on it and oppose it if necessary, consult on the merits of the allegations made in support of the application and then to draft answering affidavits. In an attempt to justify this unreasonably short period, it was vaguely stated by Ms Ndlovu, not in her founding affidavit, but in an irregular “*certificate of urgency*” (see below), that a set down date was “*imminent*”. No factual foundation was laid for this bald assertion. The assertion is not reconcilable with the CCMA Rules which provide that a minimum of 21 days’ notice must be given of the setting down of an arbitration.²⁵

[28] Thirdly, the application was, *par excellence*, an example of self-induced urgency. The Ruling was issued on 28 October 2025, yet, having threatened to bring the application on 5 November 2025, it was belatedly launched on 5 December 2025. It took over two weeks to serve the signed Court process. As pointed out by Mr Morajane in his answering affidavit, the period taken was a few days shy of the six weeks allowed for the institution of review applications in terms of section 145 of the LRA.

The CCMA

[29] Ms Wheatley’s conduct *vis-à-vis* the CCMA, with respect to urgency, warrants special mention. As an administrative body, the CCMA has its own bureaucracy. As a matter of fairness, it is entitled to an opportunity to investigate claims made against it, to consider them responsibly, and to decide, before becoming embroiled in litigation at public expense,

²⁵ Rule 21

what course it should take.²⁶

- [30] In my view, the sentiments expressed in *In Re several matters on the urgent Court roll*²⁷ find application. Although they are directed at urgent applications brought against State Departments, they apply equally to Organs of State. Wepener J commented as follows:

“[16] *There are also matters brought against departments of state. Experience has taught that such respondents need time to look into the allegations made in order to be able to file affidavits, if they so wish.....*”

[17] *An abuse of the process has developed – in all likelihood in the hope that the respondents will not be able to file opposing affidavits in time – in order to steal a march upon such respondents. This practice must be addressed in order to stop matters being unnecessarily enrolled and clogging the urgent court roll. In these matters sufficient time should be granted to the respondents to file affidavits, and they can rarely do so when the papers are served less than a week before a matter is to be heard. That week includes a weekend when the state machinery normally comes to a standstill. Practitioners would be well advised to be more realistic and to afford state departments a more reasonable time in which to file affidavits.* (Own emphasis)

- [31] The question that cries out for an answer is this: On what conceivable basis could it have been genuinely asserted that an investigation by the CCMA needed to be conducted as a matter of urgency? Why would it be necessary for employees or representatives of the CCMA to scurry

²⁶ Cf *Minister of Agriculture* 2010 (4) SA 109 (SCA) at paragraph [13].

²⁷ 2013 (1) SA 549

around during the annual shutdown to ensure that an investigation report is finalised and filed with the Labour Court, two days before Christmas?²⁸ The application, insofar as it concerned the investigation, was patently an application which could have been heard in the ordinary course.

Order to be granted

[32] The conventional order to make where an application has not been properly enrolled for a want of urgency, is to strike it from the roll. However, if there has been an abuse of the court process, the Court, as part of its inherent jurisdiction, has a discretion to dismiss the proceedings.²⁹ In my view, this matter is of the type that would justify dismissal given the wholesale disregard for the procedural imperatives governing urgent applications and the complete absence of urgency in the relief sought against the CCMA. The application was not only a misuse but an abuse of the Court process. It caused material inconvenience to both the Court and the Respondents which opposed the application. It was the type of application which destroys the utility of the urgent roll.

Non-compliance with the Rules

[33] Further irregularities taint the application. As a point of departure, the Ruling was not attached to the founding affidavit as required by Rule 37(6).³⁰ Ms Ndlovu also filed a “*certificate of urgency*”. There is no provision in the Rules for it.³¹ It can have no legal significance.

²⁸ In terms of Ms Wheatley's draft order, the CCMA had 14 days from the date of the hearing within which to complete the investigation and file the report with the Labour Court.

²⁹ *Vena and Another v Vena and Others* (2461/2008) [2009] ZAECPHC 26; 2010 (2) SA 248 (ECP) at para [7]. *Mortimer v Municipality of Stellenbosch and Another* (18243/2003) [2008] ZAWCHC 306 per Gauntlett AJ on 27 November 2008

³⁰ The Rules Regulating the Conduct of the Proceedings of the Labour Court

³¹ A certificate of urgency is a document which is required in some, but not all, of the divisions of the High Court.

[34] After delivering the application, Ms Ndlovu unilaterally filed further documentation comprising a batch of correspondence. She did so, as it were, in a vacuum because the documentation was not attached to an affidavit and was unmoored from any pleading. The Court uses the word “*filed*” loosely. It would be more accurate to say that the documentation was “*slipped*” into the Court file,³² i.e. the bundle compiled on CaseLines for the hearing of the application. Such documentation falls to be treated as *pro non scripto*. In *Dlwati v King Sabata Dalindyebo FET College*³³ the Court, with reference to Labour Appeal Court authority, warned that it is not permissible to place facts before the Court where the allegations are not under the cover of an affidavit.³⁴

[35] Insistence on compliance with the Rules is not formalism. It is true that the Rules are for the Court and not the other way around. However, that maxim is not a justification for legal practitioners to disregard the Rules to the flagrant extent demonstrated above. Whilst over-technical point-taking is to be discouraged, and the Rules should not be applied in a mechanical and uncompromising manner, the proper administration of justice requires that they be interpreted and applied in a way that gives effect to their underlying purpose: the orderly, expeditious, and cost-effective resolution of disputes. If, as in this case, a party is permitted to indiscriminately file documents *en masse*, the litigation has the potential to degenerate into a shambolic free-for-all.

De bonis propriis costs order

[36] Woolworths requested that Ms Ndlovu pay the costs of the application

³² Cf *Standard Bank of SA Ltd v Sewpersadh and Another* 2005 (4) SA 148 (C) wherein the Court, considering an affidavit which was irregularly “*filed*”, held at para [13] that a litigant is not permitted to “...*simply slip* [an] *affidavit* into the Court file...”.

³³ (2021) 42 ILJ 2427 (LC)

³⁴ At paras [8] and [13]

personally. Ms Ndlovu, understandably, strenuously argued against the making of such an order. The granting of costs *de bonis propriis* is an extraordinary measure.³⁵ In *Multi-Links Telecommunications Ltd v Africa Prepaid Services Nigeria Ltd; Telkom SA Soc Limited and Another v Blue Label Telecoms Limited and Others*,³⁶ the principles relating to costs orders *de bonis propriis* were summarised. The Court emphasised that such orders would not ordinarily be justified solely on the basis of errors of law or non-compliance with the Rules. It is elaborated as follows:

“[34] Costs are ordinarily ordered on the party and party scale. Only in exceptional circumstances and pursuant to a discretion judicially exercise is a party ordered to pay costs on a punitive scale. Even more exceptional is an order that a legal representative should be ordered to pay the costs out of his own pocket ... [T]he obvious policy consideration underlying the court’s reluctance to order costs against legal representatives personally, is that attorneys and counsel are expected to pursue their client’s rights and interests fearlessly and vigorously without undue regard for their personal convenience. In that context they ought not to be intimidated either by their opponent or even, I may add, by the court. Legal practitioners must present their case fearlessly and vigorously, but always within the context of set ethical rules that pertain to them, and which are aimed at preventing practitioners from becoming parties to deception of the court. It is in this context that society and the courts and the professions demand absolute personal integrity and scrupulous honesty of each practitioner ...

[35] It is true that legal representatives sometimes make errors of law, omit to comply fully with the Rules of Court or err in other ways related to the conduct of the proceedings. This is an everyday occurrence. This does not, however, per se ordinarily

³⁵ *Thunder Cats Investments 49 (Pty) Ltd and Others v Fenton and Others* 2009 (4) SA 138 (CPD) at para [30]

³⁶ 2014 (3) SA 265 (GP)

result in the court showing its displeasure by ordering the particular legal practitioner to pay the costs from his own pocket. Such an order is reserved for conduct which substantially and materially deviates from the standard expected of the legal practitioners, such that their clients, the actual parties to the litigation, cannot be expected to bear the costs, or because the court feels compelled to mark its profound displeasure at the conduct of an attorney in any particular context. Examples are, dishonesty, obstruction of the interests of justice, irresponsible and grossly negligent conduct, litigating, in a reckless manner, misleading the court, and gross incompetence and a lack of care.”
(own emphasis)

[37] A Court should thus agonise over whether to grant a personal costs order given its punitive nature. An order of this ilk has significant consequences for the good name of the representative.³⁷ A Court should guard against associating the representative with the merits of a matter.³⁸ A Judge should not assume that a case without merit is being litigated on the advice of the lawyers involved.³⁹ This is for the obvious reason that the representatives are arguing the case, not agreeing with it, and the client has a Constitutional right to have her proverbial day in Court.⁴⁰ There is an entrenched fundamental right to due process of law. However, the right is not unqualified. Where there is an abuse of the process, it may be restricted or even forfeited.⁴¹ The doors of the Court are open to *bona fide* litigants who pursue legitimate claims.⁴²

[38] What is the role of a legal representative in the face of the spectre of an

³⁷ *Choeu v Department of Justice and Constitutional Development Limpopo and Others* [2025] 4 BLLR 419 (LAC) at para [15]

³⁸ *Contra University of South Africa v Socikwa and Others* (2023) 44 ILJ 1878 (LC), overturned on appeal in *Choeu*, where the Court, at para [44], erroneously spoke of “... legal practitioners [who] align themselves with cases...”.

³⁹ *Ridehalgh v Horsefield* [1994] 3 WLR 462 at page 479

⁴⁰ Section 34 of the Constitution

⁴¹ *Nyandeni Local Municipality v MEC for Local Government and Traditional Affairs and Another* (CA68/09) [2009] ZAECHMHC 28; 2010 (4) SA 261 (ECM) (12 November 2009) at paras [106] to [124]

⁴² *Beinash and another v Ernst and Young and Others* 1999 (2) SA 116 (CC) at para [17]

abuse of process of law? It has always been so that a legal representative is not the mere hireling or mouthpiece of her client.⁴³ Those privileged to appear in Courts of law are required to exercise an independent discretion in the conduct and management of a case. They bear a heavy responsibility to focus not only on the client's success, but also on the speedy and efficient administration of justice so that the time of the Court is not wasted. I would venture to suggest that this duty is heightened when prosecuting a case on the urgent roll, which is arguably more vulnerable to abuse. Ideally a mindset, nay an ethic, should take root in the psyche of the legal practitioner, compelling her, when the implacable moments arrive where the narrow interests of the client conflict or do not align with the proper administration of justice, to resist the carnal urge to advance her client's agenda and to choose instead to adhere to the greater and nobler duty to the Court. It is worth noting that, in relation to this ethical question, Counsel at least has, by virtue of the Code of Conduct published in terms of Section 36(1) of the Legal Practice Act 28 of 2014 (the Code), now been afforded protection against interference by clients, inclusive of attorneys, in relation to attempts to influence her professional judgment as to the proper conduct of the litigation.⁴⁴

- [39] Applying the above principles and having carefully considered the facts, in my view a *de bonis propriis* costs order is warranted. In her application, Ms Wheatley makes it plain that the motivation for her application for legal representation in front of the CCMA is that she is, so to speak, not in a good psychological and emotional space and that, because of her mental fragility, she is too overwhelmed to represent

⁴³ See the remarks of De Villiers JP in *Cape Law Society v Vorster* 1949 (3) SA 421 (C) at 425 as referred to with approval by Leach J (as he then was) *Toto v Special Investigating Unit and Others* 2001 (1) SA 673 (E) at 683 C-D.

⁴⁴ CODE OF CONDUCT FOR ALL LEGAL PRACTITIONERS, CANDIDATE LEGAL PRACTITIONERS AND JURISTIC ENTITIES which provides as follows:

“25.3 *Counsel shall upon acceptance of a brief exercise personal judgment over all aspects of the brief and shall not permit any person to dictate how the matter is to be conducted...*” (Own emphasis)

herself. This indicates to the Court that, in her vulnerable state, she would have relied heavily on her representative's advice and guidance. This would be one factor militating against penalising her for the manner in which the litigation was conducted.

[40] When due consideration is given to the cumulative effect of the missteps committed by Ms Ndlovu, the Court is constrained to conclude that the prosecution of the application was accompanied by a marked degree of incompetence, by gross negligence and by recklessness. This is not a case where a legal practitioner was culpable of no more than “*muddled thinking*”.⁴⁵ In making elementary, yet, fundamental errors, it is apparent that Ms Ndlovu did not familiarise herself with the Rules as she was ethically required to do.⁴⁶ There can be no basis in law and fairness why, in such circumstances, the client should be liable for costs when it was the presentation of the case by the legal representative which rendered it fatally defective.

[41] The prayers that the Commissioner be “*recused*” or “*removed*” and that the CCMA be required to account to the Labour Court on short notice by way of the production of an investigation report seem calculated to annoy or embarrass. They are vexatious. In circumventing the CCMA and the Commissioner in the manner done in this matter, the reader can be forgiven for gaining the impression that there was an ulterior motive at play, namely the weaponising of the Court process with a view to gratifying a sense of grievance or settling a score with the CCMA. Courts exist to adjudicate on legitimate causes of action, not to provide a forum to advance personal recriminations.

[42] Tilting the scales further in favour of granting such an order is that most, if not all, of the relief sought, is, in the words of Holmes JA, “*obviously*

⁴⁵ *Ntuli v Smit* 1999 (2) SA 540 (LCC) at 552 F-G

⁴⁶ *Cf S v Sayed and others* 2018 (1) SACR 185 (SCA) at para [19]

unsustainable".⁴⁷ It has been held that frivolous or vexatious litigation constitutes an abuse of Court process.⁴⁸ In the improbable event that Ms Ndlovu was in fact acting on instructions in all respects when it came to the manner in which the case was presented, then, in the Court's view, having due regard to her overarching duty to the Court, she fell short in not declining to advance the case, which she did. The case was hopeless in the sense that it was unarguable.⁴⁹ It was "*dead on arrival*".⁵⁰

- [43] In persisting with an application which brought in its train a hotchpotch of manifestly legally untenable propositions,⁵¹ Ms Ndlovu strayed beyond the bounds of propriety. It is settled law that conducting litigation in this fashion exposes the practitioner to a personal costs order.⁵² No reasonably competent legal representative would have persisted with the application. A bare assertion that the practitioner was acting on instructions does not constitute an answer where those instructions, if followed, would necessarily involve a departure from the practitioner's paramount duty to the Court. As explained in *Engen Petroleum Ltd v Moodley NO and Another*, a legal representative's duty to a client "*...never translates into the embarrassing charade of putting up silly points that are unarguable...*".⁵³ The duties of legal practitioners in this respect have now been formalised in the Code. The Code is not confined to forbidding direct abuse of Court process: It equally condemns a supine

⁴⁷ *African Farms and Townships Ltd v Cape Town Municipality* 1963 (2) SA 555 (A) at 565D-E

⁴⁸ Per Innes CJ in *Western Assurance Co v Caldwell's Trustee* 1918 AD 262 at 271. See also the sentiments expressed by the Constitutional Court in *Beinash* at para [17].

⁴⁹ The Court is not required to express a view on the category of cases which fall within the well-known dictum of Megarry J in *John v Rees and Others; Martin and Another v Davis and Others; Rees and Another v John* [1970] 1 Ch 345; [1969] 2 All ER 274 which contemplates cases where the prospects of success are so remote as to make the outcome appear, in his phrase "open and shut" yet still conceivably capable of salvage. At the risk of oversimplifying matters, it seems that the jurisprudence distinguishes between those matters which appear hopeless, but are nonetheless arguable (likely, even very likely, to fail, but legitimate to advance) and those that are truly hopeless and unarguable (should never have been brought and amount to an abuse of Court process). The dividing line, although real, may not always be easily drawn, particularly when the assessment turns on whether there is credible evidence to support a case.

⁵⁰ *Cf Public Protector of South Africa v Chairperson of the Section 194(1) Committee and Others* [2024] 4 All SA 693 (SCA); 2025 (4) SA 428 (SCA) at para [44]

⁵¹ *Cf Trustees for the time being of Children's Resource Centre Trust and Others v Pioneer Food (Pty) Ltd and Others* 2013 (2) SA 213 (SCA); 2013 (3) BCLR 279 (SCA); [2013] 1 All SA 648 (SCA) at para [35].

⁵² *Webb and Others v Botha* 1980 (3) SA 666 (N) at 672C-673H.

⁵³ [2017] ZAGPJH 78 para [52]

or acquiescent posture that enables a practitioner to facilitate or become a conduit for such abuse.⁵⁴

- [44] There is a further observation to be made. It is uncontroversial that practitioners should not compromise their independence by identifying or aligning themselves with the issues they advance on behalf of their clients. This matter came before the Court on a congested urgent roll characterised by rapid adversarial exchanges. The dust having settled, the Court, in hindsight, has reservations as to whether Ms Ndlovu should have appeared in the first place. She had personal knowledge of material facts which were hotly disputed. Such would probably have affected her professional judgment and her ability to retain her independence and objectivity in relation to her client and the litigation as a whole. Whilst she did not depose on oath, she was a potential witness. On the face of it, there may have been a conflict,⁵⁵ albeit an indirect one, between her role as representative and that of potential witness. She also drew heads of argument in support of the case of Ms Wheatley repeating the correctness of Ms Wheatley's version. If representatives are personally involved in a matter, in the sense that they have direct knowledge of the facts and those facts are in dispute, it tends to undermine the integrity of the proceedings and may give them an appearance of impropriety. However, the Court does not hold Ms Ndlovu culpable for her appearance. She appeared without objection from the Respondents' representatives. The Court also did not raise any concern about it, although, on reflection, it perhaps should have.

Referral to the LPC

⁵⁴ The Code provides that:

"60.1. A legal practitioner shall not abuse or permit abuse of the process of court or tribunal and shall act in a manner that shall promote and advance efficacy of the legal process." (own emphasis)

⁵⁵ Cf *African Banking Corporation of Botswana v Kariba Furniture Manufacturers & Others* 2015 (5) SA 192 (SCA); [2015] 3 All SA 10 (SCA) at para [38]

- [45] At paragraph 110.2 of the answering affidavit of Mr Mabona the following is recorded:

“One final issue which is of importance to note, is that notwithstanding the fact that the Applicant's legal representative was a participant to these proceedings before the CCMA, there is no Confirmatory Affidavit which has ever been annexed to the Founding Affidavit in support of the allegations made by the Applicant. This is concerning to note and the only inference that can be drawn by the Third Respondent is that the Applicant's legal representatives did not wish to depose to an Affidavit which does not set out the correct factual matrix that took place at the CCMA on the date in question.”

- [46] It is thus contended, albeit implicitly, that Ms Ndlovu was arguing a factual position which she knew to be false. In response to paragraph 110.2, Ms Wheatley said “... we (sic) *both in the same room* (sic) *there was nothing to confirm*”.⁵⁶

- [47] The Code provides, *inter alia*, that:

“57.1 A legal practitioner shall take all reasonable steps to avoid, directly or indirectly, misleading a court or a tribunal on any matter of fact or question of law. In particular, a legal practitioner shall not mislead a court or a tribunal in respect of what is in papers before the court or tribunal, including any transcript of evidence.

...

57.9 A legal practitioner shall not rely on any statement made in evidence which he or she knows to be incorrect or false.”

⁵⁶ Para 30 of the replying affidavit

[48] The bone of contention is whether it was Ms Wheatley and Ms Ndlovu (who repeated the allegations of Ms Wheatley in her heads of argument)⁵⁷ or the CCMA and Woolworths, who sought to mislead the Court as to what transpired at the 21 October 2025 sitting. There are further ancillary allegations of misrepresentations regarding the events of 21 October 2025. Reference may be made to paragraph 3.6 of the founding affidavit and the response by Mr Mabona at para 94.1 of his answering affidavit, paragraph 3.7 and the response thereto by Mr Mabona at paragraphs 95.2 and 95.3, paragraph 3.8 and the response thereto by Mr Mabona at paragraph 96.1 and paragraph 3.8.1 and the response thereto by Mr Mabona at paragraph 97.1. The manner in which the litigation was conducted aside,⁵⁸ there is also the controversial assertion in the Certificate of Urgency that the commencement of the arbitration was “*imminent*”. Lastly, there is the allegation that the Commissioner was part of an alleged cover-up.⁵⁹ In *Tshazibane v Montego Pet Nutrition and Others* the Court emphasised the gravity of making unsubstantiated allegations against a Commissioner.⁶⁰ In *De Lacy*⁶¹ the Constitutional Court referred to the regulatory body at the time, for investigation, allegations of bias made by legal practitioners against a panel of the Supreme Court of Appeal judges.

Order

1. The application is dismissed.

⁵⁷ In her heads of argument Ms Ndlovu recorded as follows at page 3:

“9. The commissioner **granted** the request for legal representation **orally and unequivocally.**”

⁵⁸ Para 60.1. of the Code is potentially implicated.

⁵⁹ See para [4] of this judgment.

⁶⁰ (PR 72/21) [2022] ZALCPE 19; (2022) 43 ILJ 2610 (LC); [2022] 12 BLLR 1151 (LC) at para [23]

⁶¹ *De Lacy and Another v South African Post Office* [2011] ZACC17; 2011 (9) BCLR 905 (CC) at para [120]

2. The Applicant's attorneys are to pay, *de bonis propriis*, the costs of the application on Scale C.
3. The Registrar is directed to furnish a copy of this judgment to the Chairperson of the Legal Practice Council and the Director of the KwaZulu-Natal Legal Practice Council.

P N KROON

Acting Judge of the Labour Court of South Africa

Appearances:

For the Applicant: Ms Ndlovu of Connie Ndlovu Inc.

For the First Respondent: Mr Pillay of the CCMA, Durban

For the Third Respondent: Mr Kirby-Hirst of MacGregor Erasmus Attorneys Incorporated