IN THE LABOUR APPEAL COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JA40/2018

In the matter between:

MURRAY AND ROBERTS (PTY) LTD	**Appellant**
and	
THE COMMISSION FOR CONCILIATION,	
MEDIATION AND ARBITRATION	**First Respondent**
NDUNA, X N.O.	**Second Respondent**
LEGWATI, E N.O.	**Third Respondent**
ASSCIATION OF MINEWORKERS AND	
CONSTRUCTION UNION obo MEMBERS	**Fourth Respondent**

Heard: **14 May 2019**

Delivered:

Coram: Waglay JP, Jappie et Coppin JJA

JUDGMENT

COPPIN JA

[1] This is an appeal against the judgment of the Labour Court (Nkutha-Nkontwana J)[1] reviewing and setting aside, in terms of section 158(1)(g) of the Labour Relations Act[2] ("LRA"): firstly, a settlement agreement concluded between the appellant ("M&R") and the fourth respondent ("AMCU") in conciliation proceedings before the third respondent; and, secondly, a jurisdictional ruling of the second respondent based on the settlement agreement. The second and third respondents were commissioners acting under the auspices of the first respondent ("the CCMA"). The Labour Court granted M&R leave to appeal to this Court.

[2] Central to this matter are efforts made by the trade union, AMCU, to secure organisational rights at one of the workplaces of M&R, including the validity of the settlement agreement and the jurisdictional ruling.

<u>Background facts</u>

[3] M&R is one of others engaged in the construction of the Kusile Power Station for Eskom. Two collective agreements were concluded at Kusile between two employers' organisations, namely, the South African Federation of Civil Engineering Contractors and the Construction Engineering Association of South Africa, on the one side, and a number of trade unions, whose members are employed at Kusile, but excluding AMCU, on the other.

[4] The first collective agreement, namely, the Project Labour Agreement ("PLA") is dated 29 February 2012. It provides, *inter alia*, in clause 3 that it applies to all contractors and their employees and employees of temporary employment services, as well as to trade unions and their members and employees who were not members of a trade union, for the duration of the project. In that regard, it purports to apply to all, but clause 3.3 states that "any other registered trade union which is party to the respective industry bargaining structures may become a party to the agreement by signing this agreement", clearly implying that the PLA only applies to trade unions that are signatories

[1] The Labour Court's judgment is reported as *Association of Mineworkers and Construction Union obo Members v Commission for Conciliation, Mediation and Arbitration and Others* (2018) 39 ILJ 130; [2018] 7 BLLR 656 (LC).
[2] Act 66 of 1995.

to the agreement. This is confirmed by its definition in clause 1.37 of the term "trade union" , where the term is defined as "a trade union or trade unions that are signatories to this agreement".

[5] In its preamble, the PLA provides, for example, in clause 2 that "the [p]arties commit themselves to the promotion of co-operation, industrial peace and harmony on the Project Site and shall endeavour to ensure that fair and proper channels, practices, policies and procedures are followed pro-actively to resolve differences between and amongst all of the parties". The agreement itself purposes, *inter alia*, to regulate matters of remuneration and conditions of employment of employees within the Bargaining Unit, including collective bargaining in respect of those matters (see, for example, clause 5 and clauses 8 to 13).

[6] The second collective agreement, the Final Partnership Agreement ("the PA"), is dated 7 June 2013. In its preamble, it broadly enunciates similar objectives and aims as the PLA, and, *inter-alia*, seeks to commit the partners envisaged in it to principles concerning participation, communication, transparency, et cetera, and to provide for the establishment of partnership forums. It also seeks to regulate collective bargaining and provides, for example, a variety of levels at which collective bargaining agreements may be concluded (clause 10), and, *inter alia*, defines the rights and responsibilities of Eskom, the contractors and trade unions.

[7] Of significance for this matter, in clause 5.39, the PA also defines "trade union" as "a registered, recognised trade union that is a signatory to this agreement". In clause 6.4, it provides, in essence, that any trade union which is registered, either with the MEIBC (Metals Engineering Industries Bargaining Council), or the BCCEI (the Bargaining Council for the Civil Engineering Industry) – and which meets the threshold specified in terms of the policy of trade union recognition under the PA, may become a party to the PA by signing it. Clause 11.3.3 contains the threshold. It provides, in essence, that upon signature of the PA, trade union recognition will be accorded on the basis of a trade union meeting a threshold of 300 members per site and that such recognition will entitle the trade union to a full time shop steward as well

as to participation within the partnership forums and the collective bargaining structures.

[8] It is common cause that AMCU was not a member of any of the bargaining councils mentioned and that it was not a signatory of either the PLA or the PA.

Referrals to the CCMA

[9] It was not an issue that on 26 February 2014, AMCU notified M&R in writing, as contemplated in section 21(1) of the LRA, that it sought to exercise section 12, 13, 14 and 15 organisational rights, which, respectively, relate to a trade union's access to the workplace, the deduction of union subscriptions or levies, the appointment of trade union representatives, and leave for trade union representatives. In the notice, AMCU, amongst other things, proposed a meeting between itself and M&R on 19 or 20 March 2014. M&R was to confirm the meeting date before 7 March 2014. In the notice, M&R's attention was also drawn to sections 21(4) to 21(7) of the LRA.

[10] But for informing AMCU that there were collective agreements that dealt with organisational rights and of the requirements for becoming a party to them, M&R did not meet with AMCU as per the notice, or at all. AMCU then referred an organisational rights dispute in writing to the CCMA on 17 April 2014 ("the first referral"). In the referral form, AMCU states, *inter alia*, that the outcome it requires "is to be granted organisational rights" as it has "the majority of members in the employment of the employer". In the alternative, it wanted the CCMA to grant it a certificate permitting it to strike concerning the matter.

[11] On the day the dispute was scheduled for conciliation before the third respondent, namely 21 May 2014, M&R raised a point at the outset to the effect that for AMCU to become entitled to the organisational rights it sought, it was legally required to become a member of the MEIBC, and in order for it to become such a member it was required to demonstrate to the MEIBC that it had no less than 5000 members in the industry in which that bargaining council operated.

[12] The point was not decided, but, instead, M&R and AMCU on 21 May 2014 entered into a written settlement agreement, on a pre-printed, pro-forma settlement agreement form of the CCMA. AMCU, *inter-alia*, agreed to withdraw the dispute and to submit its audited membership figures to the MEIBC in order for it to become a member of that bargaining council so as to secure organisational rights at Kusile ("the settlement agreement").

[13] On about 20 March 2015, AMCU notified M&R in writing, as is contemplated in section 21(1) of the LRA, that it sought to exercise "section 12, 13, 14, 15 and 16 organisational rights" at M&R's projects in the Witbank/Ogies area ("the second notice'). In the notice, it also informed M&R that it had 556 members at M&R and enclosed a copy of its certificate of registration. M&R was to confirm on or before 27 March 2015 when the parties were to meet, but M&R failed to comply with the second notice and did not meet with AMCU within 30 days of receiving the second notice as required by section 21(3) of the LRA. Consequently, on 20 April 2015 AMCU again referred an organisational rights dispute to the CCMA ("the second referral"). In this referral form AMCU indicated that the result it required was for M&R to grant it organisational rights as it had members employed by M&R.

[14] The dispute in the second referral was set down for conciliation on 18 May 2015 before the second respondent. M&R then raised a preliminary point that the matter was *res judicata*, because the CCMA had made a determination before, and because of the existence of the PLA and PA. The second respondent issued a jurisdictional ruling on 28 May 2015 in which he upheld the preliminary point, having also taken into account the settlement agreement. The second respondent ruled that in those circumstances the CCMA had no jurisdiction to determine the organisational rights dispute referred to it.

Proceedings in the Labour Court

[15] In reaction to that ruling in the CCMA, AMCU brought the application which is the subject of this appeal, namely to, in terms of section 158(1)(g) of the LRA, review and set aside the jurisdictional ruling of the second respondent and the

earlier conciliation proceedings before the third respondent, which culminated in the conclusion of the settlement agreement. AMCU also sought to have the settlement agreement set aside on the grounds of mistake (unilateral, alternatively, common mistake), alternatively, on the grounds of misrepresentation, or irregular conduct on the part of the presiding commissioner that resulted in the conclusion of the settlement agreement.

[16] M&R opposed the application. It alleged, *inter-alia*, that after the third respondent conferred with the parties separately, as he was entitled to do in conciliation proceedings, AMCU conceded the approach suggested in the preliminary point raised by it and the settlement agreement was concluded; that the settlement agreement was in full and final settlement of the dispute between the parties and that it also constituted a defence to AMCU's second referral, rendering the dispute therein *res judicata*. In its answering affidavit, M&R also took issue with the lateness of AMCU's application and denied that there was any basis for reviewing and setting aside the conciliation proceedings before the third respondent, or for setting aside the settlement agreement, or the subsequent jurisdictional ruling of the second respondent.

[17] In argument before the Labour Court, M&R raised yet another preliminary point, one of non- joinder. It submitted, essentially, that AMCU was obliged to join the other trade unions that were parties to the PLA and PA in the review application.

[18] The Labour Court condoned AMCU's delay in bringing the review application. It found that even though the delay was one year and six months, the nature of the application and its merits justified its entertainment. The Labour Court also found that the delay was explained and that the "misapprehension" concerning the status of the settlement agreement persisted and frustrated AMCU's endeavours to re-enrol the matter; and that the jurisdictional ruling was also premised on the settlement agreement.

[19] In respect of the merits - relying on this Court's decision in *South African Correctional Services Union (SACOSWU) v Police and Prisons Civil Rights*

Union and Others (POPCRU)[3] ("*SACOSWU*") – the Labour Court held that the PLA and PA, which are threshold agreements, do not proscribe minority trade unions, like AMCU, from requesting to exercise section 12, 13 or 15 organisational rights; that once AMCU had proven that it was sufficiently representative at the Kusile project – it was "within its right" to request that it be allowed to exercise those rights in terms of section 21; and that it was "inescapable" that M&R's interpretation of section 18 of the LRA was "untenable as it was inconsistent with the constitutional imperatives."

[20] The Labour Court upheld AMCU's argument that its representative at the first referral, one Mr Mazibuko, laboured under a mistake when concluding the settlement agreement and that the mistake was induced by what the third respondent and M&R's representative had stated at the first referral, but also found that even M&R's representative had been labouring under a mistake as to the state of the law at the time. The Labour Court also relied on what this Court held in *Concor Projects (Pty) Ltd t/a Concor Opencast Mining v Commission for Conciliation Mediation and Arbitration and Others*[4] ("*Concor*"). There this Court applied what was held in *Dickenson Motors (Pty) Ltd v Oberholzer*[5] ("*Dickenson Motors*"), namely, 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 formally if necessary, or treated as set aside and as invalid without any process or proceedings to do so". The Labour Court then went on to find that the erroneous construction of section 18 of the LRA influenced the conclusion of the settlement agreement as both parties held the mistaken view that AMCU's eligibility for organisational rights must be preceded by compliance with the thresholds of the PLA and PA, read with the constitution of the MEIBC. The settlement agreement was thus held to have been concluded on the basis of a common mistake. According to the Labour Court, it had been established that AMCU would not have agreed to settle the dispute (i.e. the first referral) if it had known what the true legal position was and that, similarly, M&R would not have adopted the stance it took at the first referral if

---

[3] [2017] 9 BLLR 905 (LAC) paras 36-39.
[4] [2014] 6 BLLR 534 (LAC) paras 40-41.
[5] 1952 (1) SA 443 (A).

it had been appraised of the correct legal position. For those reasons the Labour Court set aside the settlement agreement and, consequently, the jurisdictional ruling following the second referral.

[21] The Labour Court did not specifically rule on the issue of non-joinder. But it is clear from its main judgment and its judgment on the leave to appeal that it was aware of the issue, but that the point was apparently of no consequence to it. The Labour Court, however, granted leave to appeal on three grounds relied upon by M&R, one of them being the non- joinder issue, and the other two grounds being, firstly, whether there was a common mistake or mistake at all and whether AMCU could only attain organisational rights through meeting the threshold requirements of the PLA and PA, and, secondly, whether AMCU had made out a case for the setting aside of the settlement agreement.

The Appeal

Non-joinder

[22] Counsel for M&R argued that the Labour Court erred in finding that the other trade unions, who were parties to the PLA and PA agreements, did not have to be joined in the review application. It submitted that their joinder was "required" for the following reasons: because AMCU makes pertinent reference to the threshold agreements in its application; and because AMCU states that those agreements do not bar it from exercising organisational rights and from competing with the seven trade union parties to the threshold agreements, for membership; and because the threshold agreements served to "shield" the seven trade union parties from minority unions and the removal of this "shield" affected the interests of those trade unions; and lastly, because joinder of a party is essential if the order sought to be made "cannot be implemented without affecting the interests of that party." In support of the latter point, counsel for M&R relied on the decision of this Court in *Minister of Public Service and Administration v Public Servants Association obo*

Makwela[6] ("Makwela") and of the Labour Court in *BHP Billiton Energy Coal SA Ltd v CCMA.*[7]

[23] AMCU's submissions on the point, in brief, were that the notion that threshold agreements could operate as a "shield" to preclude minority unions, was rejected by the Constitutional Court in *SACOSWU*. Further, that the seven trade union parties to the PLA and PA did not have a "direct and substantial interest" in the setting aside of the first referral proceedings, the settlement agreement and the jurisdictional ruling, which was essentially based on the settlement agreement. AMCU's counsel relied on passages from the decision in *Judicial Service Commission and Another v Cape Bar Council and Another*[8] *("Cape Bar Council").*

[24] It is a trite proposition of law that a person must be joined as a party to court proceedings if that person has an interest which is of such a nature that she (or he, or it) may be prejudicially affected by the judgment in the proceedings.[9] The true test for a joinder has also been said to be whether the person has a "direct and substantial interest" in the proceedings.[10] It is generally accepted that "direct and substantial interest" means a legal interest in the subject matter of the proceedings (i.e. litigation) which could be prejudicially affected by the judgment of the court.[11]

[25] In *Cape Bar Council,*[12] the Supreme Court of Appeal reiterated those basic tenents of the law. The joinder of a party is only required if it is a matter of necessity, and not for convenience. The mere fact that the party has an interest in the outcome of litigation does not warrant its joinder, and the interest must be "direct and substantial" in the sense mentioned earlier. Similarly, in *Makwela,* this Court confirmed those principles. This Court specifically held that in court proceedings regarding a claim founded on a

---

[6] (2018) 39 ILJ 376 (LAC) para 15.
[7] (2009) 30 ILJ 2056 (LC).
[8] 2013 (1) SA 170 (SCA) ("Cape Bar Council") para 12.
[9] See*, inter alia, Amalgamated Engineering Union v Minister of Labour* 1949 (3) SA 637 (A).
[10] See, *inter alia*, *United Watch and Daimond Co (Pty) Ltd v Disa Hotels* 1972 (4) SA 409 (C) 415E-F.
[11] See*, inter alia*, *Henri Viljoen (Pty) Ltd v Awerbuch Brothers* 1953 (2) SA 151 (O).
[12] See para 12.

contract, a person that was not a party to the contract and had no rights or obligations in respect of it, did not have to be joined as a party.

[26] The notion that threshold agreements served as a “shield” for the majority trade unions was debunked by the Constitutional Court on appeal in *SACOSWU.*[13] In addition, those entities, whose joinder M&R contended for, were not parties to the settlement agreement, or involved in any of the proceedings relating to the first or second referrals. They have no legal interest as defined in the decisions referred to earlier and they do not stand to suffer any prejudice as contemplated due to the outcome of AMCU’s application which is before us on appeal. The non-joinder point was clearly an afterthought, and even though non-joinder may be raised at any stage of the proceedings,[14] it clearly has no merit in these proceedings. The Labour Court was therefore correct in not ordering the joinder sought by M&R.

<u>The settlement agreement</u>

[27] It is apparent from the pre-printed form itself what the terms of the settlement agreement were. It does not appear as if M&R had to make any compromises. Instead, it appears as if AMCU capitulated – accepting the view that the only way it could acquire the organisational rights sought, was by becoming a member of the MEIBC. As a member, it would have been obliged by the terms of the PLA and PA to subscribe to those agreements. AMCU was at the time clearly ignorant of the law concerning the accessing, or exercise of those rights. The settlement agreement, which was concluded on 21 May 2014, predates the decisions of this Court and the Constitutional Court in *SACOSWU*.

[28] In *SACOSWU* on appeal the majority in the Constitutional Court held that majority trade union parties (and employers) could not, by entering into private threshold agreements contemplated in section 18 of the LRA and which were not laws of general application, limit a trade union’s (and accordingly its

---

[13] Reported as *Police and Prisons Civil Rights Union v South African Correctional Services Workers’ Union and Others* [2018] 11 BLLR 1035; (2018) 39 ILJ 2646; 2019 (1) SA 73 (CC).
[14] See *inter alia, Amalgamated Engineering Union v Minister of Labour* (above).

members') right to engage in collective bargaining.[15] Accordingly, such a private threshold agreement could also not preclude a minority trade union from bargaining with the employer about organisational rights. Section 18 of the LRA does not authorise majority unions and employers from determining which constitutional rights other unions, which were not parties to the threshold agreement, may exercise.[16] Section 20 of the LRA also declares expressly that nothing in part A of Chapter III (being the place in the LRA where section 18 is located) precludes the conclusion of a collective agreement that regulates organisational rights. Thus, not even a threshold agreement concluded between an employer and a majority union, or unions.[17] Although section 23 of the LRA is not located in the position of the LRA referred to in section 20, it also does not preclude a collective agreement between an employer and a minority union regulating organisational rights where there is an existing threshold agreement in place between an employer and a majority trade union regulating those rights.[18]

[29] According to the majority judgment of the Constitutional Court in *SACOSWU*: "when properly construed Chapter III of the LRA reveals that a minority union may access organisational rights in section 12, 13 and 15 in a number of ways. First, it may acquire those rights if it meets the threshold set in the collective agreement between the majority union and the employer. In that event, a minority union does not have to bargain before exercising the rights in question. Second, such a union may bargain and conclude a collective agreement with an employer in terms of which it would be permitted to exercise the relevant rights. Third, a minority union may refer the question whether it should exercise those rights to arbitration in terms of section 21 (8C) of the LRA. If the union meets the conditions stipulated in that section, the arbitrator may grant it organisational rights in the relevant provisions."[19]

[30] AMCU submits that if it had been aware of the true legal position, it would not have entered into the settlement agreement. Essentially, it sought the setting

---

[15] See para 71 of the *SACOSWU* judgment.
[16] See para 93 of the *SACOSWU* judgment.
[17] See paras 96-98 of the *SACOSWU* judgment.
[18] See paras 99-101 of the *SACOSWU* judgment.
[19] See para 102 of the *SACOSWU* judgment.

aside of the settlement agreement on one of three possible bases. The first is that there was a unilateral, alternatively common mistake regarding the legal position; secondly, the mistake made concerning the legal position and which induced the conclusion of the settlement agreement, was as a result of representations made by M&R and the presiding commissioner (the third respondent); thirdly, that the entire proceedings before the said commissioner, including the settlement, were to be set aside because of a material irregularity in the proceedings when the commissioner advised AMCU's lay representative regarding the outcome, thus inducing him to enter into the settlement agreement on behalf of AMCU.

[31] The Labour Court found that the settlement agreement was based on a common mistake regarding the legal position. A common mistake is one where both parties to the contract made the same mistake.[20] In this instance, the Labour Court found, in effect, that M&R and AMCU made the same mistake regarding the legal position concerning the exercise of certain organisational rights. Both were mistaken about the legal position and this mistake underlies the conclusion of the settlement agreement.

[32] It is settled that a compromise or settlement agreement may be set aside on the grounds of fraud or *iustus error.*[21] It may also be set aside for being void or on the ground that it was entered into on the basis of a common, but false assumption.[22] In the case of the latter, there is no lack of consensus, but the contract is regarded as void if the mistake relates to a material, underlying fact.[23] A common mistake has been said to have this effect because it is inferred that the parties intended to contract on the grounds of their common, but false assumption – "that is, they tacitly agreed to contract on the supposition that the fact about which they were mistaken did, in fact, exist."[24]

---

[20] See: *inter alia*, *Gollach & Gomperts (1967) (Pty) Ltd v Universal Mills & Produce Co (Pty) Ltd* 1978 (1) SA 914 (A) ("*Gollach & Gomperts").*
[21] See: inter alia, *Wessels v Badenhorst* 1939 TPD 465 at 469; *Gollach & Gomperts* at 922-923; and the other cases cited in GB Bradfield *Christie's Law of Contract in South Africa* (7ed) 535.
[22] See: *Tauber v Van Abo* 1984 (4) SA 482 (E) 468,469.
[23] See: *Dickenson Motors* (above) and *Gollach & Gomperts* (above).
[24] Joubert (ed) *The Law of South Africa* (First Re-issue) Vol, 5 (Part 1) para 144; *Ornelas v Andrew's Café* 1980 (1) SA 378 (W) 394B-C.

[33] In *Concor Projects,*[25] this Court dealt with a settlement agreement concluded on the basis of a common mistake regarding the law. This Court referred with approval to what was stated in *Dickenson Motors (Pty) Ltd v Oberholzer*[26], namely: "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, formally if necessary or treated as set aside and as invalid without any process or proceedings to do so." This Court then went on to find (confirming the Labour Court's decision) that the agreement there in question was based on a common mistake and that the Labour Court was, accordingly, correct in disregarding that agreement.

[34] The submissions made on behalf of M&R concerning the Labour Court's reliance on this Court's decision in *Concor Projects* were the following: that reliance on a common mistake on its own is not enough and that the parties ought to have made the agreement dependent upon an assumed fact; that in *Concor Projects,* this Court found that the parties' agreement was conditional in that sense, but *Concor Projects* is not authority for the proposition that a settlement agreement may be set aside merely because the parties were under a common misapprehension as to their respective rights; that AMCU never alleged in its affidavits that the parties agreed that the validity of the settlement agreement should depend (or be conditional) upon the correctness of the legal proposition that the threshold agreement means that AMCU is not entitled as of right to organisational rights (according to M&R that would not have achieved any settlement at all, because that was the "determinative issue" at the time, i.e. that was the very matter the parties compromised on); and lastly, if the decision in *Concor Projects* can be read as authority for the proposition that the settlement agreement may be set aside in the circumstances of the matter before us, it would be against the weight of authority, including the decisions in *Van Reenen Steel (Pty) Ltd v Smith NO*[27]

[25] See above.
[26] See above at 450C-E.
[27] 2002 (4) SA 264 (SCA) 269.

(" Van Reenen Steel") and *Van McCulloch v Kelvinator Group Services of SA (Pty) Ltd*[28] ("*McCulloch").*

[35] In my view, these arguments raised by M&R have no merit. Firstly, the parties did not compromise regarding the legal position. AMCU compromised by withdrawing its application and agreeing, in effect, to join the MEIBC. Both sides, including the Commissioner presiding, were under a misapprehension as to the true legal position. The decision of this Court in *Concor Projects* is not inconsistent with what was held in *Van Reenen Steel* or in *McCulloch* concerning the law on common mistake. What was held in *Van Reenen Steel,* and subsequently confirmed in *Transnet v Rubenstein*[29] ("*Rubenstein"),* is that a party cannot vitiate a contract for a common mistake or assumption, unless the contract was based on that common, but mistaken assumption, or the mistake was induced by a misrepresentation.

[36] Others have read *Van Reenen Steel* and *Rubenstein* to mean that for an assumption to have an effect, a litigant is obliged to plead it as a tacit term, or a condition (suspensive or resolutive), because those concepts are well known in the law.[30] I do not agree, with respect. It is not what the court held in either of those matters. But it was held that in order to have legal effect a supposition had to translate into either as a mistake, misrepresentation, a term, or a condition (suspensive or resolutive).[31]

[37] Having taken into account what was held in, *inter alia*, *Van Reenen Steel* and *Rubenstein* regarding common mistake, the view, which I respectfully agree with, is expressed by LTC Harms,[32] who was also the scribe of the court's judgment in *Van Reenen Steel*, that a party who wishes to avoid a contract on the basis of a common mistake – must allege and prove that: "(a) the contract was based on a common assumption; (b) the assumption was incorrect; and (c) the subject-matter of the assumption was vital to the transaction – in other

---

[28] 1998 (4) SA 814 (W) 823G-J.
[29] 2006 91) SA 591 (SCA).
[30] RH Christie *The Law of Contract in South Africa (*5ed) 328*.*
[31] See: *Transnet Ltd v Rubenstein* (above) at 433.
[32] LTC Harms *Amler's Precedents of Pleadings* (8ed) 256.

words, had both parties been aware of the true position the transaction would not have been entered into."

[38] It is clear from the affidavits, which make out, both, the pleadings and constitute the evidence, that even though M&R tried to deny in its response that the parties had erred as far as the legal position was concerned, such denial was patently unconvincing, and that the wrong legal position regarding the nature and effect of the threshold agreements was assumed by both M&R and AMCU (and the presiding commissioner); that the settlement was based on that wrong assumption of the law; and that AMCU would not have entered into the settlement agreement if it knew what the true legal position was. AMCU had therefore made out the case that the settlement agreement was void because of the parties' common mistake.

[39] In any event, if M&R had known what the true legal position was at the time of the first referral (i.e. the position as expounded by the Constitutional Court in *SOCASWU*), but had represented to AMCU's representative that AMCU could only acquire the organisational rights by submitting its audited membership figures to the MEIBC, or by, effectively, becoming a member of the MEIBC, and a party to the PLA and PA, that would have constituted a misrepresentation that induced the settlement agreement, being yet another basis for its vitiation.

[40] Thus, the Labour Court did not err in setting aside the settlement agreement. Since it is really the settlement agreement that formed the basis of and had the effect of *res judicata,*[33] the setting aside of the settlement also justified the setting aside of the jurisdictional ruling of the second respondent.

<u>The Alternative review ground</u>

[41] In its application, AMCU also relied upon yet another ground (beside mistake), which is alluded to earlier, for the setting aside of the settlement agreement. Relying on section 158(1)(g) of the LRA, it sought to review and set aside the entire conciliation process (including the settlement agreement) before the

---

[33] See: *Gollach & Gomperts* (above).

third respondent, on the grounds of the third respondent's partiality, or on the basis of a reasonable perception of bias on his part. The Labour Court did not make findings in that regard, apparently because it decided the matter on the basis of the common mistake. The Labour Court did not grant M&R leave to appeal on that ground and AMCU did not indicate that it was cross-appealing in respect of that ground. Although some argument was advanced by both parties in elaboration of that point, it was not adequately ventilated in the proceedings in the Labour Court, or in this Court. This Court has a discretion, in those circumstances not to entertain and determine it.[34] In any event, in light of the finding by this Court on the issue of common mistake, it is not necessary to consider that ground.

Costs and result

[62] Both parties sought costs orders in their favour should they succeed. There is no reason either on the facts or in law why the costs should not follow the result.

[63] In the result, the following order is made:

The appeal is dismissed with costs.

____

P Coppin

Judge of the Labour Appeal Court

Waglay JP and Jappie JA concur in the judgment of Coppin JA.

[34] *NUMSA obo Sinuko v Powertech Transformers (DPM) and Others* [2014] 2 BLLR 133; (2014) 35 ILJ 954 (LAC) paras 27-43.

APPEARANCES:

FOR THE APPELLANT:	Adv. HA Van der Merwe
	Instructed by Fluxmans Inc.
FOR THE RESPONDENTS:	Adv. FA Boda SC
	Instructed by Larry Dave